

1 IN THE UNITED STATES DISTRICT COURT  
 2 FOR THE DISTRICT OF NEW JERSEY  
 3 CIVIL NO. 14-6428  
 4 AMERICAN BOARD OF INTERNAL MEDICINE :  
 5 Plaintiff, :  
 6 -vs- :  
 7 DR. JAIME A. SALAS RUSHFORD, :  
 8 :  
 9 : MOTIONS  
 10 Defendant :  
 11 ----- :  
 12 Newark, New Jersey  
 13 January 11, 2017 10:30 a.m.  
 14 B E F O R E:

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 37

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38 Pursuant to Section 753 Title 28 United States Code,  
 39 the following transcript is certified to be an accurate  
 40 record as taken stenographically in the above-entitled  
 41 proceedings.

42 s\ RALPH F. FLORIO  
 43 Official Court Reporter

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1 MS. GARCIA: All rise.

2 THE COURT: Good morning everybody.

3 MR. SCHLAFLY: Good morning, your Honor.

4 MR. RIVERA-SOTO: Good morning, Judge.

5 THE COURT: Everybody may be seated. Thank you.

6 All right. We're here in the matter of American  
7 Board of International Medicine v Dr. Salas Rushford. Whose  
8 here today?

9 May I have counsel appearances please.

10 MR. RIVERA-SOTO: Good morning, your Honor, may it  
11 please the Court. On behalf of the plaintiff American Board  
12 of Internal Medicine, Roberto A. Rivera-Soto and Hara Jacobs  
13 from the law firm of Ballard Spahr.

14 THE COURT: Welcome counsel and good morning.

15 MR. SCHLAFLY: Good morning, your Honor. May it  
16 please the Court. Andrew Schlafly, on behalf of the defendant  
17 Salas Rushford, who is here and who flew in for this  
18 proceeding from Puerto Rico. And co-counsel Guillermo  
19 Mena-Irizarry and Jaime Salas-Soler they are local counsel  
20 and also flew in from Puerto Rico.

21 MR. MENA-IRIZARRY: Good morning.

22 MR. SALAS-SOLER: Good morning, Judge.

23 THE COURT: How was your flight? When did you get  
24 into town?

25 MR. MENA-IRIZARRY: Last night, your Honor.

1 THE COURT: Last night. And did you have any  
2 delays?

3 MR. MENA-IRIZARRY: No, no, it was pretty smooth.

4 THE COURT: And did you come into Newark?

5 MR. MENA-IRIZARRY: No, JFK.

6 THE COURT: We don't even inquire about JFK.

7 Okay. All right.

8 I've recognized that this motion is for judgment on  
9 the pleadings and the movant is Dr. Salas Rushford. But I'm  
10 a big believer in context, and I have some questions,  
11 basically just about the underlying factual assumptions in  
12 the complaint.

13 So if counsel would indulge me. And whomever is  
14 carrying the ball by way of argument for the plaintiffs, if  
15 you would come up to the podium. I just want to march  
16 through that. Thank you, Mr. Rivera-Soto.

17 I would just want to march through the questions  
18 that I have. So really it's just a matter of looking at the  
19 complaint, which led to my questions.

20 MR. RIVERA-SOTO: Sure.

21 THE COURT: Just for context. The exam process.  
22 At some point somebody makes an argument and says, think of  
23 the SATs. And I think that's a good point in that we're all  
24 familiar with LSATs and SATs and so on. But this process,  
25 which seems to me to be somewhat different. In that there

1 were so many different days in which the exam is offered.  
2 The window of time as it is described by one of the litigants  
3 was August-- a ten day administration of the test in 2009.  
4 But I wanted to have a little bigger picture. That's just  
5 Puerto Rico. This is given all of over the country for the  
6 ten days of August in 2009? Could you just kind of fill me  
7 in on the process I'd appreciate the information.

8 MR. RIVERA-SOTO: The process itself, your Honor,  
9 is that the American Board of Internal Medicine has certain  
10 periods of time during the year when the examinations are  
11 given for board certification. It's not just on one day, as  
12 the SATs or LSAT exams are. But like the SAT or LSAT exams  
13 they're given several times during the year. And each one of  
14 those sittings, I guess the best way to put it, is there's a  
15 window of time-- usually ten days, in which the exam is made  
16 available for an applicant to take the examination.

17 THE COURT: Now, is the applicant sitting at home  
18 on his or her computer? Or do they go to a central point?

19 MR. RIVERA-SOTO: I'm not sure, your Honor, let me  
20 just check.

21 THE COURT: Sure.

22 MR. RIVERA-SOTO: Perhaps it's better if Ms. Jacobs  
23 responds to those technical questions.

24 THE COURT: Okay. Thank you.

25 MS. JACOBS: Good morning, your Honor.

1           Your Honor, your initial question with respect to  
2 the certifying examination in internal medicine. The  
3 certifying examination, ABIM gives examinations throughout  
4 the year. But focusing on this specific examination, which  
5 is a certifying examination in internal medicine. That's  
6 given every August. There's approximately a ten day window.  
7 The ten day window applies nationwide. And my understanding  
8 is that the reason for that is you couldn't have every single  
9 internal medicine physician sitting because of the hours--

10           THE COURT: For ten hours.

11           MS. JACOBS: Who will be practicing medicine and  
12 have all of the coverage that you need to cover that day.

13           THE COURT: Right.

14           MS. JACOBS: So it is a window of ten days.

15           THE COURT: Right.

16           MS. JACOBS: And it's approximately ten days and  
17 it's nationwide. And then I believe your Honor's next  
18 question was about the specific process for creating the  
19 questions.

20           THE COURT: Yes. That's pretty well-detailed in the  
21 complaint.

22           Just getting back to the administration of the exam  
23 and the sittings.

24           MS. JACOBS: Yes.

25           THE COURT: I remember when I was teaching law

1 after a long period of time of not teaching anything, except  
2 myself, I was surprised at the difference in the process  
3 now. People stay at home or they don't stay at home, or a  
4 professor elects it and so on.

5 So tell me about how the exams actually are taken  
6 by the applicant.

7 MS. JACOBS: Sure, your Honor. This is a very  
8 secured exam. Every single examinee goes to a testing  
9 center.

10 THE COURT: Okay.

11 MS. JACOBS: And there is a company named Pearson.  
12 And Pearson has a nationwide network of testing centers  
13 throughout the United States.

14 So the candidate goes to a testing center, has to  
15 check in with identification. They can't have anything on  
16 their person. They have to put all of their, you know,  
17 anything they have with them, a phone or valuables-- you  
18 can't have any paper with you. And, I mean, even today their  
19 restrictions that are quite restrictive. You have to check  
20 that into a locker. And then you go and sit, you know,  
21 basically in a cubical with a computer and take the exam.  
22 You cannot have, you know, you cannot have anything with  
23 you. You cannot access materials at any time during the  
24 exam, if you do it's a security violation and, I mean, it's  
25 reported and there are proctors on site who administer the

1 exam, and who explain the rules to, you know, folks who are  
2 taking the exam.

3 THE COURT: Okay. Thank you. So it's not as if at  
4 any time within the ten day window I could decide to take the  
5 exam so long as I got it in by the end of the tenth day. I  
6 have to show up, take the exam and go home-- is that it?

7 MS. JACOBS: Right. In fact, in advance basically  
8 an examinee signs up for a seat at a specific testing  
9 center. And then in that way ABIM is able to communicate  
10 with Pearson, who works with it to administer the exam, to  
11 make sure that the exam is delivered on the right computer  
12 for the right person. It's very specific. And there are  
13 deadlines in which to sign up, you know, to get your seat at  
14 a specific testing center. I mean, that's not something you  
15 do two days before the exam.

16 THE COURT: Okay, great. Thank you very much.

17 MR. SCHLAFLY: Your Honor, can I respond to those  
18 things? I don't want to interrupt your train of thoughts--  
19 or may I respond at the end or whatever you prefer?

20 THE COURT: Why don't you hold your thoughts until  
21 the end.

22 MR. SCHLAFLY: Okay.

23 THE COURT: Stay up there, counsel, just in case I  
24 have something else.

25 How long has ABIM, we're talking 2009-- that's

1 eight years ago. I assume that this particular testing  
2 process is pretty embedded historically in the way the exam  
3 is administered-- yes?

4 MS. JACOBS: Yes, your Honor. Before it was on a  
5 computer, yes, there was a paper and pencil exam. But I  
6 would say to you that the security measures were very  
7 similar.

8 THE COURT: Okay. And has ABIM in the past, given  
9 its security concerns and ramped up measures to ensure  
10 security, has it conducted investigations, raids, litigation  
11 against other crash courses or schools such as ABR?

12 MS. JACOBS: Yes, your Honor.

13 THE COURT: And was that pretty much an ongoing  
14 function of its security concerns?

15 MS. JACOBS: Yes, your Honor. That is definitely  
16 an ongoing concern. And there have been quite a number of  
17 investigations and, you know, also federal court litigation.

18 THE COURT: Okay. Now, when ABIM learned about  
19 this particular event, I gathered that happened within just a  
20 couple of months after the August 2009 exam or testing, no?

21 MS. JACOBS: No, your Honor, it did not.

22 THE COURT: I thought it was a long time. But then  
23 somebody said it was within a few months they were aware of  
24 something having gone wrong. And there's no need for the  
25 complaint to lay it out, but I'm trying to get context.

1           How did ABIM learn-- ABIM learn about ABR and about  
2 something having happened visa via the August 2009 Puerto  
3 Rico test?

4           MS. JACOBS: So ABIM learned initially from seeing  
5 questions on the Arora Board Review website, at some point in  
6 2009, that appeared to be actual ABIM examination questions.

7           At that point ABIM undertook an investigation of  
8 the Arora Board Review, we are now in 2009, and that  
9 investigation included sending someone to the course who  
10 recorded-- made an audio recording at the course and obtained  
11 the course materials. That was also, you know, I want to say  
12 in or about May or so of 2009. There were a lot of  
13 materials, ABIM carefully analyzed those materials as well as  
14 the recordings. And then what ABIM was able to determine  
15 from that was the Arora Board Review had ABIM questions, and  
16 the Arora Board Review-- believed that the Arora Board Review  
17 was getting them by specifically asking people who went to  
18 the course. When you're done with the course, after taking  
19 the ABIM exam send me those questions-- of the exam. The  
20 test the Arora Board Review-- Dr. Arora would say to the  
21 students in the course, after the exam, send me questions--  
22 email me-- call me.

23           So based on that information, ABIM went to court in  
24 December of 2009 in the Eastern District of Pennsylvania and  
25 obtained an exparte seizure order and ultimately a

1 preliminary injunction. ABIM went with counsel and the  
2 marshals to the site of the Arora Board Review, which was Dr.  
3 Arora's home and seized very substantial amounts of  
4 materials-- over 30 boxes of documents. There were numerous  
5 computer hard-drives. And after obtaining the material--  
6 that was in January 2010, ABIM then reviewed all of that  
7 material. And I mean, your Honor, it was a lot of material.

8           After reviewing that material, ABIM concretely  
9 identified over 140 physicians, who it believed engaged in  
10 improper conduct by, for example, sending questions to Dr.  
11 Arora after the exam. Or writing to Dr. Arora just before  
12 their exam saying, hey, have gotten any questions from this  
13 year's exam? And ABIM sanctioned approximately 140  
14 physicians. It also sued five of-- well, say were the most  
15 egregious offenders.

16           At that point in time ABIM had identified--  
17 identified-- ABIM had evidence-- had documents that had been  
18 sent to Dr. Arora, but it could not identify who had sent  
19 those documents, there were a number of different ones. And  
20 Dr. Salas Rushford was-- it turned out to be one of those set  
21 of documents as he was ultimately the person who was sending  
22 material to Dr. Arora under the email address  
23 padrinojr@yahoo.com. And padrinojr@yahoo.com was one of the  
24 addresses that ABIM was not able to link to a physician, and  
25 ABIM ultimately was able to link that email address to Dr.

1 Salas in January of 2012, when a physician-- one of the 140  
2 physicians who had been sanctioned advised and informed ABIM  
3 that she was a physician who was on the phone with Dr. Salas  
4 after she took her ABIM exam, and was able to identify the  
5 handwritten notes that are attached to exhibits B and C of  
6 the complaint. And she advised ABIM of that in January 2012.

7 THE COURT: Okay. I understand better. I may have  
8 one other question. In the settlement with ABR, was that the  
9 settlement that is referred to, was that the litigation in  
10 EDPA? The preliminary injunction?

11 MS. JACOBS: Yes, your Honor.

12 THE COURT: And did that involve the other named  
13 individuals you said that there were five egregious folks?

14 MS. JACOBS: No, your Honor. The five egregious  
15 offenders were not sued I would say until six months later.  
16 I want to say June. When ABIM sued the Arora Board Review it  
17 had no idea to the extent anybody else was involved. It was  
18 not until ABIM brought the action against Dr. Arora and got  
19 all of the materials that ABIM determined, you know, there  
20 were more than 140 other physicians involved. And so ABIM at  
21 that point settled with Dr. Arora, and then suits against the  
22 five other physicians were five independent suits.

23 THE COURT: Okay.

24 MS. JACOBS: Yes. And I just can't remember off  
25 the top of my head whether Dr. Arora's suit was dismissed

1 pursuant to the settlement before the subsequent actions were  
2 filed. I just don't recall.

3 THE COURT: And were the subsequent actions all  
4 copyright infringement actions?

5 MS. JACOBS: They were copyright infringement  
6 actions. And to extent they involved physicians who sent  
7 questions to Dr. Arora after their exam, they also included a  
8 claim for breach of contract base on the violating the pledge  
9 of honesty-- which every candidate takes when taking the  
10 exam.

11 THE COURT: Okay, that's helpful. Thank you.

12 Paragraphs 44, 45, 46, I think they have technical  
13 stuff and perhaps you could help me out. Bottom of page 12  
14 of the complaint. This is with respect to the involvement of  
15 Dr. Salas and Dr. Arora. It says three days after-- we are  
16 still in the August 2009 window. Dr. Salas sent an email to  
17 Dr. Arora with the subject line "164 question the one  
18 repeated in every exam."

19 The body of Dr. Salas' email entitled "ABIM 2009  
20 learning point". And contained a list of specific testing  
21 points and ABIM examination questions that Dr. Salas had  
22 received by email from a residency colleague earlier that  
23 day.

24 I just want a little clarification of what specific  
25 testing points mean and the 2009 learning points mean. It

1 seems to connect with the phrase in paragraph 45, "Dr. Arora,  
2 who immediately understood the substance of what Dr. Salas  
3 had sent to him."

4           So what are we talking about here? What is this  
5 testing point substance, you know, kind of thing? It  
6 probably goes back to what the complaint explains by way of  
7 how the exams are written, but if you could just advise me a  
8 little bit.

9           MS. JACOBS: Sure, your Honor. With respect to Dr.  
10 Salas's email which was titled "ABIM 2009 Learning Points."  
11 We believe what that is-- is here are questions that appear  
12 on the August 2009 ABIM exam, and that is what the content of  
13 the email is. And then with respect to the subject line 164  
14 questions, the one repeated in every exam. ABIM does review  
15 questions and has an item bank of questions. And it does  
16 reuse questions. And one of the key reasons why you reuse  
17 questions is that the questions are designed to measure the  
18 performance of a physician who has, you know, the knowledge  
19 and the skills and judgment to be board certified from one  
20 who is not. And there is an entire science that goes into  
21 creating examinations-- the folks who do that are called  
22 psychometricians.

23           THE COURT: What are they called?

24           MS. JACOBS: Psychometricians.

25           THE COURT: P-S-Y-C-H-O-- a new word. Like

1 psychopath or something?

2 MS. JACOBS: I'm not going to go with the  
3 psychopath. It's P-S-Y-C-H-O-M-E-T-R-I-C-I-A-N.

4 THE COURT: Something to aspire to. Think about  
5 it. You might stop the practice of law. I have my law  
6 clerks here. And the law is an increasingly endangered  
7 profession. I don't imagine there are that many  
8 psychometricians-- that's wonderful.

9 MS. JACOBS: They are not easy to find from what I  
10 understand.

11 THE COURT: And do they do exam questions for every  
12 discipline or for just medicine?

13 MS. JACOBS: No, a psychometrician is someone that  
14 is-- someone who has an incredible education in statistics in  
15 part. And they do-- psychometricians can measure performance  
16 of an exam question in almost any discipline.

17 THE COURT: Wow, that's wonderful.

18 MR. RIVERA-SOTO: If I may interrupt for just a  
19 moment, your Honor. In my prior life, I know for a fact that  
20 psychometrician appeared for our examination questions.

21 THE COURT: I was going to get to that-- that's  
22 great. But it does not sound to me-- which I never am at,  
23 Tony cocktail parties swishing around in a beautiful gown and  
24 I yell out how many psychometricians will I find in this  
25 room-- it's not likely that I'll meet a lot of them. May be

1 at a football game-- that's possible. I could see them being  
2 gamers. Okay. Back to reality. But I do love that.

3 Go ahead.

4 MS. JACOBS: So ABIM does reuse questions-- they  
5 have an item bank of questions. And questions in terms of  
6 they are measured in-- psychometricians know how to do this,  
7 measure how effective questions are. And when they find that  
8 questions aren't effective they throw them out, or they be  
9 come dated and they do update them. But tried and true  
10 questions that are good performers, they do keep for a period  
11 of time and they do get reused in different years.

12 So the reference to 164 question, the one repeated  
13 in every exam, is questions that have been on prior ABIM  
14 exams that clearly believed to be used with some frequency.

15 THE COURT: Okay. And then the last thing which  
16 was Dr. Arora immediately understood the substance. You're  
17 saying that this whole repeated question and the content  
18 generally would be known.

19 MS. JACOBS: Yes. He knew that and he even told  
20 Dr. Salas, hey, look when you come back from the exam with  
21 particular the ones that were there in your exams to see what  
22 percentage of these are in the candidates' portion. He  
23 knows, Dr. Arora knows he's getting actual ABIM exam  
24 questions.

25 THE COURT: Okay. Then paragraph 46 says, "Dr.

1 Salas continued sending to Dr. Arora ABIM examinations that  
2 he collected." How?

3 MS. JACOBS: There is a typo. That should be ABIM  
4 examination questions.

5 THE COURT: Okay, that's fine. That's all I wanted  
6 to know-- okay. I have a short question and then I'm not  
7 sure if I want to holdback the other question, because I  
8 think it will come up naturally in argument.

9 Can we agree, without taking it anywhere, but just  
10 begin with the assumption that from the factual narrative in  
11 the complaint, that what Dr. Salas did and what Arora did  
12 with what Dr. Salas did, would have been impossible without  
13 the participation of others? Whether it was phone  
14 conversations that he had with others, information that he  
15 got from others, or the notes that he took during  
16 conversations with others. But you needed those others?  
17 Wherever that takes us. Can you-- we assume that that's a  
18 fact?

19 MS. JACOBS: Yes, your Honor.

20 THE COURT: Okay. And then this is a copyright  
21 lawsuit. You indicated that the other folks, arguably the  
22 other others-- or some of the others who supplied information  
23 to Dr. Salas, but who were actually taking the exam questions  
24 that they took and disclosing them. They were available-- I  
25 mean, their actions fit a contract claim, but that was not

1 asserted here, is that because of the breakout of the conduct  
2 of Dr. Salas, Dr. Arora, and these other folks?

3 MS. JACOBS: Your Honor, a breach of contract claim  
4 was not asserted here because Dr. Salas sent the questions to  
5 Dr. Arora before he took the ABIM exam and before he signed  
6 the pledge of honesty.

7 THE COURT: Okay. That's what I thought. My other  
8 question is and so nobody is wasting time saying what else  
9 would she ask is just. Simply is how do we breakout exactly  
10 what was going on in what's described beginning paragraph 35  
11 as the "August 2009 exam window in Puerto Rico," you really  
12 touched on that pretty much in terms of what Dr. Salas was  
13 doing, what Dr. Arora was doing and so on. And the reason  
14 that I was kind of probing is that in the opposition brief  
15 ABIM takes the position, hey, the version of what we said in  
16 the complaint uses the premise by the defendant is not what  
17 we were complaining about. We were not saying that he copied  
18 exam questions. We were saying that he took notes. In  
19 essence that the direct infringement that we alleged has to  
20 do with his using information provided by others, but that  
21 still fits within the legal claim, am I right about that?

22 MS. JACOBS: That's correct. That is correct, your  
23 Honor. What our opposition brief points out is that there is  
24 no allegation here that Dr. Salas sent any questions from--  
25 from his ABIM exam that he took. The allegations and the

1 copyright claim is based on ABIM exam question information  
2 that he obtained from other people who had already taken  
3 their August 2009 ABIM exam before him.

4 THE COURT: Okay, got it. Thank you very, very  
5 much. We can get more traditional at this point and let the  
6 movant make the argument, and then I'll hear from you. And  
7 then we could go on from there. Thank you very much, I  
8 appreciate that. All right.

9 Who will be handling the movant's argument, Mr.  
10 Schlafly?

11 MR. SCHLAFLY: Yes, your Honor. I would like to  
12 just rebut some of the questions opposing counsel said before  
13 we get into the argument finished in our minds.

14 THE COURT: Sure.

15 MR. SCHLAFLY: First of all there is much in the  
16 complaint that is irrelevant to the defendant. And I think  
17 that's causing confusion, and I think it's improper also to  
18 put in things in the complaint that are irrelevant to the  
19 defendant.

20 For example, opposing counsel was quoting from  
21 paragraph 45, where Dr. Arora said, "when you come back from  
22 exam send me some questions." But the defendant never did  
23 that. And opposing counsel admits that. The defendant never  
24 did that. The defendant never disclosed any questions from  
25 the exam he took. So why is this in here? It just creates

1 confusion. This is not a lawsuit against Dr. Arora. I  
2 understand that if they sued Dr. Arora they could complain  
3 about this. This is a lawsuit against Dr. Salas and he never  
4 disclosed any questions from the exam-- none.

5 Now, what they're complaining about is that that he  
6 took this Arora Board Review course, where questions were  
7 floating around in the course from the instructor, from other  
8 people who taken the course, and questions were floating  
9 around. And then Dr. Salas, not knowing if there were on the  
10 exam or not communicated questions to the instructor. That's  
11 the only person that Dr. Salas communicated with in this  
12 case.

13 THE COURT: Let me just stop you for one minute. I  
14 didn't ask a very basic question and it really should be a  
15 part of the record.

16 Board certification exam is not a continuing  
17 medical education prove-up it's a one time special; is that  
18 correct?

19 MR. SCHLAFLY: Well, that's a good question, your  
20 Honor, and let me address that. It's a business what they  
21 do. And they do require recertification. They make money  
22 from that. And I want to just clarify, because opposing  
23 counsel used the term sanction. That ABIM, their client  
24 sanctioned physicians. No, that's incorrect. There's  
25 nothing official about ABIM. It's a purely private

1 business. It has no authority from universities-- using the  
2 comparisons of LSAT and SAT. Those exams are used to get  
3 into universities and law schools. They are administered  
4 under the oversight of schools. And they do things like  
5 there's transparency. They will publish their exam questions  
6 periodically, so schools and the public could look at them  
7 and say, hey, what are you testing here. ABIM doesn't do  
8 that. They have no transparency. They don't publish their  
9 exam questions periodically so people can be scrutinizing  
10 them. They don't have the official authority from medical  
11 schools. Sanction is not a proper term. They're not a  
12 governmental entity. They are a purely private business. It  
13 has nothing to do with the ability to be licensed by a  
14 governmental entity. They are a purely private business that  
15 administers these exams and maximizing the bottom lines, so  
16 that do require recertification and so on.

17           Back in 2009, which is the time frame that matters  
18 here, it was customary for physicians to attend these board  
19 review courses and still is. The board review course that my  
20 client attended was approved for CME credit, continuing  
21 medical education credit fully approved. The person that  
22 taught the course is board certified twice by the ABIM. So  
23 it was a completely reputable board review course. And this  
24 is how things were done in 2009. And questions-- wording--  
25 some of the questions were used in these courses, they were

1 traded amongst students and so on that was a common  
2 practice. And they admit that pretty much by saying that 150  
3 people were doing this so on. And they said that they sued  
4 five or six other people. What they didn't say was that they  
5 lost everyone of those cases except for one. All of those  
6 cases that they brought against other physicians over this--  
7 they lost everyone except for one.

8           They settled with Arora. The real bad actor here  
9 that they complained about, they settled with him and they  
10 posted-- we never got the terms of the settlement in this  
11 case, which has been a sticky point because the magistrate  
12 judge never allowed us to see the terms of that settlement.  
13 We tried repeatedly. But they posted a Press release about  
14 him and he didn't even pay much money. He was the one that  
15 profited from this. My client didn't profit from anything  
16 from this. He was just taking a course to pass an exam. He  
17 was doing what was just customary. He didn't repeat any  
18 questions from the exam. They said he forwarded information  
19 that he received from someone else who had taken the course  
20 to the instructor. That's what they're complaining about.

21           If we take a course, I mean it's understood that we  
22 communicate with the instructor. We want to know what-- how  
23 to do well on the exam. He had no way of knowing if what he  
24 forwarded to the instructor was wording from the exam. The  
25 only claim for this case is copyright. So was the wording

1 the same. My client had no way of knowing whether it was  
2 exact wording.

3 THE COURT: Well let me jump into that issue. This  
4 is an attack on the pleadings. And for what you're informing  
5 me about is again context that puts some color and life into  
6 the case. And perhaps begs the question well show me. And  
7 when we say show me, we're talking about stuff that is of  
8 necessity not in the pleadings-- doesn't have to be in the  
9 pleadings.

10 MR. SCHLAFLY: Right. Right.

11 THE COURT: Aren't you really kind of saying, hey,  
12 we've got a really gorgeous copyright defense here. And  
13 aren't you prematurely ramming it down my throat by way of  
14 the judgment on the pleadings motion?

15 MR. SCHLAFLY: That's an excellent point, your  
16 Honor.

17 So the reason we're here today-- the reason we're  
18 asking for a judgment on the pleadings is because of the  
19 statute of limitations. That's the reason. I'll get into  
20 that argument now.

21 THE COURT: And then let me just say, just in terms  
22 of a briefing. Because this is a case that really has a lot  
23 of neat, legal and cerebral content. I was watching the  
24 President's farewell address yesterday and thinking about  
25 prep for today, which I did yesterday and then again early

1 this morning, saying, Oh, my God this is the same combination  
2 of lofty soaring stuff and practical stuff. So with the lofty  
3 soaring and practical, and I commend everybody for the nice  
4 combination in all of your papers; when you finish up and  
5 devote out of the 20 plus pages, I will yell at you for your  
6 brief here at some point. So pages 25 and 26 of the brief  
7 says, in summary, and you leave out the statute of  
8 limitations argument. I didn't know how serious you were  
9 because you said in summary bomb, boom. And I'm going I  
10 thought they were yelling about the statute of limitations.

11 MR. SCHLAFLY: Right. We're here on statute of  
12 limitations and I apologize about that wording.

13 THE COURT: On the statute of Limitation.

14 MR. SCHLAFLY: Yes.

15 THE COURT: Because that's what I do want to hear  
16 about.

17 MR. SCHLAFLY: And that's the whole case and is the  
18 winning argument really in two words and the two words-- it's  
19 beyond statute. The copyright statute says you have three  
20 years to bring a copyright claim. That's the only claim that  
21 they brought as you pointed out. That's all. There's no  
22 breach of contract. Because he didn't breach any contract.  
23 This is copyright. It's from three years from the date that  
24 it accrues. The case law is clear, that the date of accrual  
25 is when the alleged infringement occurred which was in August

1 2009. They sued in October of 2014, five years later.

2 THE COURT: Okay. Now, we're heading into the  
3 tolling versus the injury accrual.

4 MR. SCHLAFLY: Yes.

5 THE COURT: Versus all of this stuff. We are not  
6 in a classroom. We are not teaching a copyright course,  
7 although all of you could go in and really do a bang up job.  
8 And you can get all of my colleagues in the room in the  
9 District of New Jersey in Newark. I think we are the most  
10 fractious bunch and you could have us all fighting about it.  
11 But would we agree that diligence-- however much diligence is  
12 shot through whatever theory. Whether it's equitable tolling  
13 or the discovery rule in the most human aspect of remedial  
14 law-- whatever you want-- diligence is.

15 MR. SCHLAFLY: Right.

16 THE COURT: Now what bothers me is that I only get  
17 from the plaintiff, you not love hearing this but I have a  
18 question for you that comes after. I have from the  
19 plaintiff, we only found out about this from 2014 and did  
20 what we had to do. I have no facts. I have nothing. I have  
21 zero. All right. And that's what you're saying. I have got  
22 this skating-- and we're on the other side of it  
23 (indicating).

24 MR. SCHLAFLY: Right. Right.

25 THE COURT: However, aren't you really asking for

1 summary? I mean fairness. Again, the big issue is, we're  
2 talking about having a knock down dragged out on the statute  
3 of limitations issue. And we-- let me finish. And we're  
4 talking about a pleading that skates. And we're talking  
5 about a response here on a judgment on the pleadings that  
6 also skates.

7           We also know that for at least a year you folks  
8 have been bedeviling each other and Magistrate Judge Waldor  
9 in discovery efforts. So my question is, why isn't this a  
10 summary judgment motion saying, this is all they have. You  
11 were talking about skating, Judge, all they do is skate,  
12 their ain't nothing here. And the fact that somebody came  
13 forward and said, Oh, yeah, I have this conversation when  
14 they could have found out about it either through the same  
15 kind of seizure efforts that they made with respect to  
16 Arora's records or asking-- or now we found out that there  
17 are other lawsuits of other individuals who might have been  
18 able to give them information. Isn't that stuff that, even  
19 when you make the argument that could have, should have--  
20 isn't that better against a summary judgment motion? Where  
21 at least I have the sense, I saw everything that they had to  
22 say and there ain't nothing there.

23           If you look at an older case, but it's a good  
24 example of how the Third Circuit feels about this issue.  
25 Without the fancy stuff about equitable tolling and this,

1 that and the other thing, which you needed the quality and  
2 nature of the motion for which, you know, is kind of by the  
3 by here-- if we just take a big view of this.

4           Judge Orlofsky threw out a case on statute of  
5 limitations grounds and said why. And the Third Circuit  
6 affirmed him saying, what the discovery rule is. And then  
7 talking about the complaint, he alleges that he was subject  
8 to an illegal search and seizure. Assuming that this is true  
9 he had knowledge. And then he had Rolex counter by arguing  
10 that he did not know the names of his assailants-- so on and  
11 so forth. There you have a much easier template of facts.  
12 And there you have an assault on the pleadings. But I would  
13 argue that the nature of these facts is complicated enough  
14 and you're at a point in the litigation enough, where you're  
15 dealing with the substance. And it would be a lot friendlier  
16 to the Court, if I had whatever they plan to pull out of  
17 their pockets-- if there's anything.

18           And I will tell plaintiff that I'm going to want a  
19 preview. If I say, I'm denying the motion because I consider  
20 that doing it on the pleadings isn't where I want to do it, I  
21 want to do it on the facts. I want to know here today what  
22 I'm going to hear by way of facts as opposed to, we spent \$1  
23 million more on coming back here again.

24           Everybody clear what my procedural issues are?

25           MR. SCHLAFLY: I understand what you're saying,

1 your Honor.

2 THE COURT: And maybe you know because you've been  
3 engaged in the discovery.

4 MR. SCHLAFLY: It's clear on the pleadings though  
5 that they're beyond the statute. And all we have to do is  
6 look at paragraph 50, where they admit that they seized all  
7 of the evidence in December of 2009.

8 THE COURT: Right.

9 MR. SCHLAFLY: They had all of the evidence in  
10 December of 2009.

11 THE COURT: Well, they're saying that the Padrino  
12 Moniker was such that they couldn't figure it out.

13 MR. SCHLAFLY: But that's insufficient under the  
14 case law about copyright. They have to plead diligence with  
15 some facts. Because that's conclusory-- diligence. You were  
16 a teacher, your Honor. A student does poorly on an exam and  
17 comes to see you afterwards, and the student says, well, I  
18 was diligent studying for the exam. That's not enough. I  
19 mean, how are you diligent? What did you do?

20 THE COURT: Well, then you're in agreement with me  
21 that at least that however much you want to talk about the  
22 discovery rule and whether we enlarge the time or go right  
23 back to when the copyright infringement occurred, we're still  
24 talking diligence. And that is at its most basic level?

25 MR. SCHLAFLY: Yes.

1 THE COURT: The issue is you have to plead it.

2 MR. SCHLAFLY: At a minimum. They also have to  
3 plead fraudulent concealment with particularity.

4 Now, they say that he was using a nickname in an  
5 email address Padrino Jr., half the emails that we send to  
6 someone-- half the emails have someone's nickname. That's  
7 not concealment. That's a matter of law on the pleadings.  
8 That's not pleading fraudulent concealment to say that  
9 someone used their nickname in an email. It just isn't. And  
10 that's a matter of law.

11 THE COURT: Well, I think you also make the  
12 argument who where they concealing from. And it is pretty  
13 obvious to me that Arora knew who was he was talking to was a  
14 doctor, because he said you will do fine on the exam.

15 MR. SCHLAFLY: Right. Right.

16 THE COURT: So not only a doctor but a student of  
17 his.

18 MR. SCHLAFLY: Yes, yes. And then in paragraph 50  
19 it says, ABIM spent months analyzing the documents. Okay.  
20 They spent months. Okay. December 2009, months will carry  
21 us to March of 2010 and/or let's say July of 2010, or let's  
22 say even slower September 2010. They still didn't sue until  
23 four years later. They're still beyond the statute.

24 THE COURT: Well, I think we learned today that  
25 they found out through I guess one of the individual lawsuits

1 that somebody popped up and said that she recalled a  
2 conversation and tied it to Dr. Salas Rushford, correct?

3 MR. SCHLAFLY: That's what they say. Now, they  
4 didn't plead that. They didn't plead that with  
5 particularity. But, moreover, that individual that they're  
6 talking about, they settled with her way early and they  
7 entered into an agreement with her way back-- prior to three  
8 years. Beyond the statute. Where she would cooperate and  
9 give them all of the information.

10 So there's a diligence question. They had her  
11 cooperating with ABIM way earlier than that, promising to  
12 tell them who is Padrino Jr. all they ask her is who were you  
13 talking to? So it's not enough for them to stand up and say,  
14 we didn't learn about this until January 2012, that's not the  
15 test. That's not the test. When were you able to learn  
16 about it. And it's clear from paragraph 50 that they were  
17 able to learn about it way before January 2012. If they were  
18 able to get away with this and say, well, we didn't hear  
19 about it until 2012 and so we didn't sue until 2014; the  
20 statute wouldn't have any teeth at all. Anybody could say  
21 that.

22 Notice that they say that they found out in January  
23 2012. They were still within the three year statute then.  
24 They didn't sue until more than two and a half years after  
25 that. Is that diligence? The facts right there in paragraph

1 50 prove as a matter of law that they're beyond the statute.

2 THE COURT: Then why did you torture everybody by  
3 not bringing this to the Court's attention, given the fact  
4 that this is preserved in amber at the time that the  
5 complaint was filed in paragraph 50 hit the docket?

6 MR. SCHLAFLY: Well, your Honor, for two reasons.  
7 Good question. Two reasons.

8 First of all, we did file this motion for a hearing  
9 today-- we did file it a long time ago. Number two,  
10 initially--

11 THE COURT: I think in April 2015, right?

12 MR. MENA-IRIZARRY: March.

13 THE COURT: March. I think I came out in 2015,  
14 with the you're here and you're mine decision, right?

15 MR. SCHLAFLY: Well, that was the other reason.  
16 Because the feeling of the prior attorney to me, both the  
17 counsel here, was that we'd get out of this courtroom on  
18 jurisdictional grounds. And his advice was to just go on  
19 jurisdiction-- it's a slam dunk here. That was his feeling.  
20 He was wrong obviously and here we are.

21 THE COURT: I'm thinking of Homeland's plot. If  
22 anybody watches Homeland you will know what I'm talking about  
23 this year.

24 Go ahead.

25 MR. SCHLAFLY: So that's why it was not done

1 initially.

2 THE COURT: Right.

3 So you're saying that I kept you here in 2015, you  
4 started up the motor, you began your discovery and in March  
5 of 2016 you filed this motion?

6 MR. SCHLAFLY: Yes. And I will say, discovery has  
7 not produced any evidence of, you know, there's nothing in  
8 discovery that will change that paragraph 50. There's  
9 nothing. We deposed-- the witness they say told them in  
10 2016.

11 THE COURT: Let me ask you a dumb question.  
12 Supposing Mr. Rivera-Soto or counsel-- I am so sorry, Ms.  
13 Jacobs.

14 MR. RIVERA-SOTO: Ms. Jacobs.

15 THE COURT: Ms. Jacobs, jumps up and says, they got  
16 me, they got me, I want to amend the complaint. I will give  
17 you paragraph 50 A, B, C. We'll show you a diligence that  
18 will shock the nation. What do we do then?

19 MR. SCHLAFLY: I mean it is just not there. They  
20 didn't do it. We are really passed that point. They thought  
21 that they could skate-- in your words, your Honor, it's a  
22 slickly written complaint. I mean, this is-- I am very  
23 impressed by this complaint. All the irrelevant allegations  
24 in here are--

25 THE COURT: I thought it kind of read pretty well.

1 MR. SCHLAFLY: It does lay it out.

2 MR. RIVERA-SOTO: Thank you, your Honor.

3 MR. SCHLAFLY: It reads breach in contract they  
4 have in here about his pledge of honesty. He did but he  
5 didn't violate it. I mean, this is a master piece.

6 THE COURT: Well, it is kind of-- I think there was  
7 a sense of a jury in the wings. Maybe me. Maybe.

8 MR. SCHLAFLY: Maybe. And we'll have to deal with  
9 that. And they will claim that he signed this pledge of  
10 honesty. The jury will think, well, he must have violated  
11 it. Why would you be telling me that. No, he didn't violate  
12 it. So why is that there? They did put everything they could  
13 into this and said that they were diligent. That's all they  
14 got. They weren't diligent. You know how they were not  
15 diligent, because they were still well within the statute  
16 when they knew. They were still eight months within statute  
17 and they didn't sue.

18 Now, as an attorney-- your Honor, we're attorneys,  
19 right. We hear about something, well, what's the first thing  
20 we check is what's the statute of limitation on this thing,  
21 right. Eight months within statute when they heard about it  
22 and they let that thing run through. No. No. No attorney  
23 does that. No attorney does that knowingly.

24 Instead what obviously happened and we're the Iqbal  
25 standards-- we're under plausibility now-- in terms of

1 judging the pleadings. That's the new standard what's  
2 plausible. And what's plausible is that they decided not to  
3 sue. They have no case here.

4 THE COURT: I'm sorry?

5 MR. SCHLAFLY: They decided not to sue. Not to go  
6 after him. They didn't have a case against him. He was not  
7 someone who gave out questions after the exam. He's not  
8 someone who even knew what the wording was on the exam. He  
9 had no way of knowing it. This was all before he took the  
10 exam. They decided not to go after him. And then in October  
11 2014 they changed their mind. And they say, you know what,  
12 we are going after him. We are going after this guy. And  
13 then they made up a story. They say, well, we have a statute  
14 of limitations problem. We're five years after the statute.  
15 And they made up a little story put it in here saying-- we'll  
16 get around that. We will get around it and we will say that  
17 you we were diligent. And they'll say, we didn't learn until  
18 some period of time within the three years. Conveniently  
19 pick-- they don't want to pick it right after three years  
20 that's too obvious. So they pick something two years and  
21 nine months earlier. Then we learned about it. And, oh  
22 yeah, used a nickname email address, we'll say he used  
23 fraudulent concealment. That's a nonstarter. That's a  
24 matter of law. It is not fraudulent and concealment. He used  
25 a nickname on an account. We would have millions of people

1 doing fraudulent concealment everyday if they used a nickname  
2 for their email account.

3 THE COURT: Well, to me it doesn't match the people  
4 involved. Whose concealing what and from whom and Arora knew  
5 exactly who he was talking to?

6 MR. SCHLAFLY: Right, yes. So these are legal  
7 questions. It's a matter of law on the pleadings. And so we  
8 urge you, your Honor, to grant our 12(c) motion.

9 THE COURT: The operative January-- January 2012  
10 event was the lady saying, I had the conversation and  
11 identify Padrino?

12 MR. SCHLAFLY: Yes. But they had an agreement with  
13 that same woman well prior for her to give-- answer any  
14 questions that they wanted.

15 THE COURT: Well, instead of somebody getting up  
16 three o'clock in the morning and going, ah, hah, I've got to  
17 tell them and getting on the phone, let's give her a little  
18 context there. That happened in January of 2012-- is that  
19 it?

20 MR. SCHLAFLY: Well, that's what they alleged. I  
21 think that it was quickly invented. I think they just made  
22 this up to fit within statute. In other words, this woman is  
23 supposed to give them information, ABIM could agree with her  
24 back in 2011-- in July of 2011 that she would give them--  
25 answer any questions that they asked her.

1           THE COURT: Let me-- again, kind of coming back to  
2 my context inquiry.

3           I indicated that I was going to hold back and kind  
4 of infer from the arguments that are made, that we have  
5 either an agreement or disagreement in how to break out what  
6 the activities were in the August 2009 period. But how do  
7 you believe the complaint pleads them that, in fact, your  
8 client did what any anybody interested in getting the exam  
9 would do. He applied for it. He got a seat and a day. Ms.  
10 Jacobs was helpful about that.

11          MR. SCHLAFLY: Yes, right.

12          THE COURT: And he took the course in May before  
13 the exam, right?

14          MR. SCHLAFLY: Well, he was still communicating  
15 with the instructor in August.

16          THE COURT: I understand. But I'm talking about  
17 when he first came across Dr. Arora's exam and course.

18          MR. SCHLAFLY: In May of 2009.

19          THE COURT: In May of 2009 he took the course. And  
20 prior to that there are no events that we care about, right?

21          MR. SCHLAFLY: That's right.

22          THE COURT: So in May he takes the course. And  
23 then he has an ongoing involvement with Dr. Arora, including  
24 the days before August 10th, the five or six exam taking days  
25 in that cycle.

1 MR. SCHLAFLY: Yes.

2 THE COURT: When-- when what? Just tell me what  
3 happened? According to the complaint, we're talking about  
4 the complaint here, right?

5 MR. SCHLAFLY: Yes, according to the complaint,  
6 another individual had taken Arora's class was in Puerto  
7 Rico, who took the exam, allegedly communicated with Dr.  
8 Salas about things that were on the exam. Dr. Salas Rushford  
9 then allegedly forwarded those things to Dr. Arora. Because  
10 Dr. Salas Rushford wanted to past the exam.

11 THE COURT: So a question that I could ask Ms.  
12 Jacobs or Mr. Soto-Rivera would be, doesn't this kind of  
13 thing go on all of the time. Doesn't a test taker on day-one  
14 call test taker 2, 3, 4, 5 and 10 say, they ask about liver  
15 or whatever and--

16 MR. SCHLAFLY: Yes.

17 THE COURT: And doesn't that--

18 MR. SCHLAFLY: It goes on all of the time.

19 THE COURT: Isn't that the problem with not being  
20 able to lockup every doctor in America for ten hours?

21 MR. SCHLAFLY: That's right. And the most  
22 importantly, it was certainly going on all of the time in  
23 2009.

24 This whole thing that they raided Dr. Arora's home  
25 to get his computers that was extraordinary. That was

1 extraordinary. And speaking of that that reminds me, to  
2 break the three years statute of limitations-- that's in the  
3 law if you look at the Code it says three years. And Supreme  
4 Court says three years. This date set. You are not supposed  
5 to break it. And the Supreme Court has never condoned  
6 breaking that three years-- never. But if you're breaking it  
7 there has to be extraordinary circumstances for breaking  
8 three the years. Extraordinary circumstances. And there are  
9 no extraordinary circumstances here. They are not here.

10 THE COURT: Go back to my question then. So he's  
11 communicating with X, right, and X says, this that and the  
12 other thing is on the exam. And then Dr. Salas undertakes to  
13 communicate this to Dr. Arora?

14 MR. SCHLAFLY: Right.

15 THE COURT: What is Dr. Arora doing at this time?  
16 Is he going to communicate to other people that took his  
17 course? I don't know if we care.

18 MR. SCHLAFLY: That's what ABIM will say, but  
19 that's not defendant's concern. He's just trying to pass the  
20 exam. He's trying to give the answers so that he could pass  
21 the exam.

22 THE COURT: Okay.

23 MR. SCHLAFLY: I mean, we're attorneys-- would any  
24 of us think that that's a copyright violation? I mean, we  
25 have taken courses and you've taught courses, your Honor. If

1 a student came to you and said I have a question about the  
2 rule against perpetuities and here are the facts, what's the  
3 answer? Would you think, Oh, wait a minute, that's a  
4 copyright violation you know you can't--

5 THE COURT: I might allege that because I would  
6 have no answer for him. I'm not sure if that was allowed, if  
7 that was a copyright violation. Probably wouldn't have been  
8 smart enough to do that also. So go ahead.

9 MR. SCHLAFLY: So it's a contrived case. You will  
10 never see another copyright like this. There is no precedent  
11 for what they're doing. There is no precedent in the past  
12 for what they're doing. And it is way beyond statute.

13 THE COURT: There is some precedent for-- I think  
14 successful lawsuits against folks disseminating questions.  
15 How are the facts different?

16 MR. SCHLAFLY: After they take the exam. If  
17 someone took the exam and then goes out and then starts  
18 posing on the internet, here's the question and the wording  
19 is the same wording, okay, that's a copyright issue. We all  
20 agree that Dr. Salas Rushford did not do that. He didn't  
21 communicate with anything after the exam.

22 So even the questions of sort of sitting and  
23 different exams and stuff is not really relevant.

24 THE COURT: What about the argument that you make  
25 about that there cannot be direct infringement because, in

1 fact, Dr. Salas had not taken the exam at that point.

2 MR. SCHLAFLY: Right.

3 THE COURT: I think your adversary is saying that  
4 there is plenty of case law that says there can be an  
5 appropriate allegation of direct infringement through  
6 intermediaries?

7 MR. SCHLAFLY: I could address that, but Mr.  
8 Mena-Irizarry came up from Puerto Rico-- he's my expert with  
9 this, if I could use this opportunity to let him speak?

10 THE COURT: Okay. Thank you.

11 MR. MENA-IRIZARRY: Thank you. Good morning, your  
12 Honor. Regarding that. I think you have to look very  
13 closely at what that third party access is. You know. One  
14 of the cases that they cite is the case in which they're  
15 saying, Oh, this person published a book, that book had the  
16 material that this other person owned the copyright of, and  
17 the defendant copied from this middle of the book that had  
18 this material, right. The defendant was actually looking at  
19 the original material was republished and recopied.

20 THE COURT: Okay.

21 MR. MENA-IRIZARRY: Here, we're talking about  
22 literally a phone conversation. This is not like the person  
23 they're talking about photocopied or somehow took pictures of  
24 the test and then gave these pictures to him so that he could  
25 then create replicas of the material. No. This is a person

1 who, according to the complaint, I am just going by the  
2 complaint-- according to them. Went and took a test and then  
3 called a colleague of hers. They don't even say that Dr.  
4 Rushford forwarded-- knew that she had taken this test-- this  
5 person. But let's go by what he knew. And then said, you  
6 know, this came on the test and this came on the test and  
7 this came on the test and this came on the test. That's not  
8 access. And that's not access for several reasons.

9           First, this is a test about scientific knowledge.  
10 Right. And scientific knowledge is inherently not  
11 copyrighted. You have to copyright expression, right. So  
12 what they're saying is that in order for that to be access  
13 that she quoted verbatim from the test. That's to me very  
14 much of a stretch. It's very unlikely that she quoted  
15 verbatim from the test. She may be said what they asked  
16 about. But what they asked about is just topics of internal  
17 medicine. And what the alternative answers in these multiple  
18 choice questions were, were probably what you would expect  
19 them to be which are differential diagnosis, right. So the  
20 things could be confused, right, because if not the test  
21 would have no point. If the answers were just, you know, off  
22 the wall alternatives then the right answer would be  
23 evident.

24           So you're going to have-- the answer choices that  
25 are going to be potentially applicable depending upon what

1 the case study or whatever the facts of the questions are.  
2 Right. So, you know, for them to say that this phone  
3 conversation constitutes access, we're talking about someone  
4 that must have an identic memory-- a photographic memory.

5 THE COURT: Well, there are people like that.

6 MR. MENA-IRIZARRY: Yes, there are. But they don't  
7 claim that she is.

8 THE COURT: They don't give us a content of any bar  
9 exam course.

10 MR. MENA-IRIZARRY: Right. They don't claim that  
11 she is and I don't think she is-- that would be extraordinary  
12 for her to be. I remember taking the bar exam. They're  
13 claiming here hundreds of questions, hundreds, and I think  
14 it's highly unlikely-- I certainly could not have told you  
15 hundreds of questions of the bar exam from the day that I  
16 came out of the bar exam. I don't think anyone could. I  
17 think it's completely unbelievable, let alone implausible.  
18 It is unbelievable that somebody could produce out of their  
19 head hundreds of questions in one conversation.

20 THE COURT: Well, counsel, I think that the  
21 complaint goes to some pains talking about how the questions  
22 are creative and recycled. We learned about our  
23 psychometricians and so on. And that Dr. Arora is somebody  
24 intimately aware of the substance of these exams. New right  
25 away that he was on to some good stuff from what was being

1 conveyed. So that has at least the-- a plausible allegation  
2 that that there was some copying however it is transmitted.  
3 It's coming out of the exam to him to Arora-- in terms of the  
4 art of it.

5 MR. MENA-IRIZARRY: With all due respect you are  
6 confusing two emails.

7 THE COURT: Okay.

8 MR. MENA-IRIZARRY: That email in which Dr. Arora  
9 is saying that, they claim that he is saying that is Exhibit  
10 E to the complaint. And Exhibit E is a response to Exhibit  
11 B.

12 Now Exhibit B, which is the one that has all of the  
13 attached PDFs. Which is a very thick, yes. Exhibit V, which  
14 is this one, right, if you would look at it you will notice  
15 that it does not have any handwritten notes.

16 So what Dr. Arora is responding to as recognizing  
17 the substance of what it is-- what they say it is, is an  
18 email that they themselves alleged in the complaint, that he  
19 got in that morning from somebody, and he just forward it on  
20 that same date to Dr. Arora. This one has a-- it's very  
21 peculiar because they're not claiming any access as to this  
22 one (indicating).

23 THE COURT: Okay.

24 MR. MENA-IRIZARRY: There's no third party.

25 THE COURT: So this is a push through document and

1 not related to the phone conversation?

2 MR. MENA-IRIZARRY: Right. Yes.

3 THE COURT: Okay.

4 MR. MENA-IRIZARRY: So the phone conversation  
5 emails which are Exhibits B and C, I don't think we have the  
6 answers from Dr. Arora on these. I mean, just looking at  
7 them, you will see they are not even formative questions.  
8 Sadly we don't have these here. But if you look what they  
9 allege to be their questions, you know, they are longish  
10 paragraphs with some alternatives (indicating).

11 MR. MENA-IRIZARRY: And what you see in these  
12 handwritten notes, just by looking at them you know that  
13 these are not in the format in questions in their test, the  
14 questions look in the medical sense very similar to bar  
15 questions. Long set of facts and then, you know, some  
16 alternatives. This is a bunch of, you know, when you see  
17 this, this is what it is or whatever, which is what you would  
18 expect to find in a review for any student reviewing for this  
19 sort of exam. I mean, you're likely to find this sort of a--  
20 I mean, if the reviews is of every student studying for the  
21 exam-- not the contain the contents in the exam-- then the  
22 reviews are worthless. Why they are even reviewing this.

23 THE COURT: Okay. I get that. And I understand  
24 what you're talking about. When we say review we're talking  
25 about review. Review of what? Review of exams. So we have

1 to get into the exams. But here's my-- I kind of make this  
2 point with Mr. Schlafly. There's a lot of factual stuff that  
3 we have to muck around with in order to give life to that  
4 argument. And a lot of factual assumptions like whether or  
5 not she had a photographic memory or whatever that have to  
6 underlined a real solid decision by the Court.

7           It begs a question of whether there's any other way  
8 to prevent what is clearly going on in-- and I would be  
9 shocked if it wasn't going on, and that is the sharing of the  
10 content with one another by medical professionals taking this  
11 exam. I mean, I can't believe that any rational human being  
12 would say, I want to take it, I want to sit on the first day  
13 of the exam. I really want to do it on the first day. I  
14 want to be that first slew of people. I would imagine that  
15 that's all the people who were too dumb to sign up fast. But  
16 my point being that this is endemic. Or this is built in and  
17 it is baked into the process, if you are trying to administer  
18 an exam over a period of ten-- count them ten days. That's a  
19 long period of time.

20           MR. MENA-IRIZARRY: Right. And the period is longer  
21 and his date was not the last date. He was just in the  
22 middle of the pack.

23           THE COURT: Yes.

24           MR. MENA-IRIZARRY: That date tells you that this  
25 is not someone who was conspiring to get everybody's

1 questions and then take the exam on the last date. He just  
2 had just a middle of the pack day.

3 THE COURT: Right. But, I mean, if you had brother  
4 or son taking the exam, you probably would be saying you  
5 might want to take it in the middle and a wink or nod. Maybe  
6 I have a bad view of human nature. But I do believe that  
7 part of the security concerns can never be satisfied by the  
8 virtue of taking the same exam. I mean, if they wanted to  
9 give ten different exams I suppose.

10 MR. MENA-IRIZARRY: Well they are. The exams are  
11 as far as we know the exams are not the same.

12 THE COURT: They are not the same?

13 MR. MENA-IRIZARRY: No. The window of-- it has  
14 several days in which they give exams. And the exam given on  
15 the first day is not the same as on the second day. They  
16 just take questions from the same pool, but they have  
17 thousands of questions and the exam has three hundred and  
18 some questions.

19 THE COURT: So it could be an elimination. In  
20 other words, really it is a fraction is what you're saying.  
21 You kind of want to know what was on the prior exams, but  
22 that's not a sure fire guarantee that it is going to be on  
23 your exam.

24 MR. MENA-IRIZARRY: Exactly.

25 THE COURT: And that gives a little bit more live

1 to the recurring question because that's likely to be on the  
2 exam.

3 MR. MEANA-IRIZARRY: I suppose.

4 THE COURT: Because if people taking one, two, three  
5 and 4, they all say that they have X question then it is  
6 likely on day five that question will appear?

7 MR. MENA-IRIZARRY: Yes. But let me go further than  
8 that. I'm going to say, this is true of any discipline. Any  
9 professor of any discipline can probably tell you two or  
10 three or four-- maybe ten questions that are likely to come  
11 up in any test of that discipline. Because they're the  
12 classic questions. And there's evening a book called the  
13 M-Case App. Which is published by the American College of  
14 Physicians. An ancient foundation that was one of the  
15 founders that helped to found ABIM. And they published this  
16 multi-volume set of study material for the test. And if you  
17 go into the multi-volume set you will find page after page  
18 after page of what they call classic board scenarios. Which  
19 is nothing more than the questions that are always asked.  
20 Because everybody knows they are asked. Because they must be  
21 asked. Because if weren't asked then the test would be  
22 something about something else and not about internal  
23 medicine. Because this is the, you know, the bread and  
24 butter of the practice of internal medicine. This book has  
25 literally page after page. Every page you pass has a little

1 colored block that says in green letters, if I recall  
2 correctly, classic board scenario. And it gives you board  
3 scenario. Maybe the names are changed or details or  
4 whatever. But these are all classics. And when you speak of  
5 a particular condition, you're going to have this classic  
6 scenario of the condition. Because those are the symptoms of  
7 the condition. I mean, if you go into Mayo Clinic website  
8 and look up a condition, the Mayo clinic is not infringing on  
9 ABIM's copyrights, just by describing the same thing.  
10 Because the disease-- that's the picture it paints.

11 THE COURT: Okay. I want to take a break. My  
12 question to counsel is it would be a logical time to take a  
13 break to turn things over to the opposition. Is there any  
14 other point that you wanted to make on the question that was  
15 pending when I brought you up?

16 MR. MENA-IRIZARRY: Yes. When I brought up the  
17 issue of access. I think it's important to recall that each  
18 email is a separate claim. They say that that they have only  
19 one count, and that is the count is you know something from  
20 criminal. But according to the Supreme Court in Pettrella  
21 (ph), each infringement is a separate claim, right. And each  
22 infringement then must be pleaded-- all the elements of the  
23 infringements have to be pleaded-- for a separate claim.  
24 What I just told you for this one, which is the largest one,  
25 there is no pleading of access whatsoever (indicating).

1 THE COURT: Okay.

2 MR. MENA-IRIZARRY: And there is certainly no  
3 pleading of direct copying. So in order to prove copying  
4 they have to plead access and substantial similarity. And if  
5 they don't plead access then they have not pleaded a full  
6 infringement action. After Exhibit D and as to certainly  
7 Exhibit F, which they also do not say-- if you look at their  
8 opposition paper here, when they can take all of their  
9 complaint and put it down in four bullets. They only-- three  
10 of the bullets are about access as to the emails in Exhibits  
11 B and C which have handwritten notes. But the other bullet  
12 just tries to lump in everything else and there's no access  
13 pleaded as to any of that.

14 So all of the emails mentioned except for the ones  
15 in paragraphs 36 and 38, which are B and C, all the other  
16 ones mentioned from paragraphs 41 to 46-- they have no  
17 allegation of access as to any of them.

18 THE COURT: Okay.

19 MR. MENA-IRIZARRY: So that's something that I  
20 think the Court should take into account, because it can  
21 really get a lot out of this.

22 THE COURT: Whether we consider an in In Limine  
23 point of view or an actual striking. Okay.

24 MR. MENA-IRIZARRY: Yes.

25 THE COURT: I see Mr. Schlafly sneaking up

1 (indicating).

2 MR. SCHLAFLY: Yes, this is quick.

3 Your Honor, we seem to be on the same page with  
4 respect to the lack of fraudulent concealment. And the Third  
5 Circuit has said very explicitly, we agree of course that  
6 fraud and thus fraudulent concealment must be pleaded with  
7 particularity. That's in Burns v DeBolt Transfer (ph)--  
8 Third Circuit. There's no fraudulent concealment pleaded in  
9 the complaint.

10 THE COURT: How does it work its way in? Is it  
11 being used as a supporting circumstance for the copyright  
12 infringement claim?

13 MR. SCHLAFLY: Yes. In order to get around the  
14 statute-- the three year bar. The statute says three years.  
15 No exceptions. In order to get around that, a plaintiff has  
16 to plead with particularity fraudulent concealment by the  
17 defendant, in order to justify suing outside of the three  
18 years.

19 THE COURT: Now that's going back into the argument  
20 with respect to whether or not we've got equitable tolling or  
21 accruing?

22 MR. SCHLAFLY: Either way. With particularity  
23 fraudulent concealment, they haven't done it and they cannot  
24 do it.

25 Thank you, your Honor.

1           THE COURT: Let's take a break everybody.  
2           Ten minutes. And then I'll hear from the  
3 opposition.

4           MR. RIVERA-SOTO: Thank you, your Honor.  
5           (RECESS TAKEN).

6           THE COURT: Back on the record. I'm going to be  
7 asking about the diligence issue. I'm going to be asking  
8 about the access issue and whether or not any of the claims  
9 or inherent claims of copyright infringement in the one count  
10 with respect to the large cache of PDFs-- there were nine of  
11 them. And finally, exactly what is gained by the copyright  
12 suit, either by way of statutory damages or actual damages,  
13 so I have a sense of why we're here.

14           MR. RIVERA-SOTO: If I may, your Honor-- to be of  
15 assistance to the Court. What I would like to do, if I may,  
16 just a very quick response to what we've heard up until now  
17 and I intend to be very brief. I would answer the first and  
18 third questions and then defer to Ms. Jacobs to answer the  
19 second.

20           THE COURT: Okay. That's fine.

21           MR. RIVERA-SOTO: Thank you, your Honor.

22           THE COURT: Thank you.

23           MR. RIVERA-SOTO: May it please the Court.

24           As your Honor knows I am a big fan of returning to  
25 first principles. And I think we need to do that here.

1           What is before the Court is a motion for judgment  
2 on the pleadings. It's not a motion for summary judgment.  
3 It is not a motion that allows admission of proofs that are  
4 outside of the pleadings. Instead what the Court must  
5 consider is whether the pleadings, taking all of the  
6 allegations as true and giving the plaintiff the full benefit  
7 of any reasonable inferences therefrom, suffices under the  
8 circumstances.

9           The fact of the matter is, is that this motion for  
10 judgment under the pleadings really comes down to the statute  
11 of limitations question. They assert that the case is  
12 time-barred. We say that it is not. But what is important  
13 is what does the complaint say.

14           The complaint says that we did not learn about Dr.  
15 Salas's identity as someone who engaged in copyright  
16 infringement until January of 2012. I could give your Honor  
17 chapter and verse as to how that occurred, but that would be  
18 outside of the pleadings. But, in fact, what happened is  
19 that as a result of the investigation a lawsuit was filed  
20 against Dr. Arora and the Arora Board Review, that case was  
21 settled and it included an agreement of cooperation on the  
22 part-- I'm sorry, it did not include an agreement of  
23 cooperation in respect to Dr. Arora. 140 plus doctors had  
24 disciplinary actions brought against them at ABIM to revoke  
25 and suspend their certifications. Of those five ended up

1 getting sued. Everybody else took their medicine-- to use a  
2 phrase. Of those five, contrary to what Mr. Schlafly told  
3 this Court, of those five, four settled with ABIM. One went  
4 to trial. She lost. The case was tried in the Eastern  
5 District of Pennsylvania. Ms. Jacobs tried it. The jury  
6 returned a verdict in ABIM's favor, and she was required to  
7 pay appropriate damages and counsel fees. So when counsel  
8 stands here and says to your Honor, five lawsuits were filed  
9 and they lost four of them that is just simply mistaken. And  
10 counsel knows better.

11           Now, we heard some argument about ABIM being a  
12 purely a private organization. That's not at issue in this  
13 case. But ABIM is like the folks who do the Good  
14 Housekeeping seal of approval. People voluntarily submit to  
15 be judged by ABIM. Just like people submit their products to  
16 Good Housekeeping. And the result is what the result is.  
17 But the ultimate reason is so that the consumer has some  
18 guarantee of quality. That the consumer is not misled.  
19 That's the ultimate reason. Both in the Good Housekeeping  
20 seal of approval as well as in a ABIM certification. These  
21 doctors don't take this examination because they feel like  
22 it. They take the examination so that they can tell the  
23 world that they are board certified in this discipline.

24           And it goes further. Because as your Honor knows,  
25 in New Jersey if you sue a doctor you have to produce as an

1 expert-- a doctor of equal qualifications as your expert  
2 against that doctor. But if that doctor is board certified,  
3 the defendant, then by statute the only person who can appear  
4 as an expert against that board certified physician is an  
5 equally board certified physician.

6           So there are benefits and burdens that are carried  
7 with board certification. And let me repeat. It's a  
8 voluntary process. Nobody put a gun to his head and told him  
9 you have to show up and take this exam. He voluntarily  
10 choose to and now he complains about the process.

11           Now, once he was identified disciplinary  
12 proceedings were brought against him. And I'm not straying  
13 from the pleadings because that's his counterclaim in third  
14 party complaint. Where he alleges that this was, I think  
15 actually used the phrase a kangaroo court. I'm happy to put  
16 that before a jury any day of the week.

17           So unlike all these other claims that they're  
18 making, nobody forced Dr. Salas Rushford to engage in this  
19 process. But what was expected of him was that he not  
20 cheat. And that's what he did. There is a reason, as was  
21 explored earlier, that this exam is not given on one day and  
22 one day alone. We can't have all of these physicians out of  
23 pocket for that period of time during a given day. So it's  
24 done over a period of several days. But a couple of things  
25 are done to preserve the integrity of the process. One of

1 which your Honor heard about. And that is the exam on day-one  
2 is not exactly the same as the exam on day-2 or 3, 4 and 5.  
3 They're different. There's a core number of questions that  
4 may be repeated. But the exam as a whole is a whole  
5 different exam. But what wasn't explored is that everyone  
6 who takes the exam signs a pledge of honesty-- that says I  
7 wouldn't disclose the contents of this exam.

8 THE COURT: Now, are you saying that that extends  
9 to Dr. Salas as well as to the people that did disclose this  
10 to him?

11 MR. RIVERA-SOTO: No, your Honor. What I'm saying  
12 is that when he received the information from Dr. Lumina--  
13 that's who he received it from. That's who he had a  
14 telephone conversation with.

15 THE COURT: What's the name?

16 MR. RIVERA-SOTO: Dr. Lumina (ph). Geraldine  
17 Lumina (ph). When he received that information from Dr.  
18 Lumina, Dr. Lumina was under the obligation to not disclose  
19 it.

20 THE COURT: Right. She was the one disclosing it.

21 MR. RIVERA-SOTO: So what he received was bad  
22 goods. Just like a thief can never take title to property--  
23 stolen property remains stolen. That's how he acquired it.

24 THE COURT: Right. And we have a criminal statute  
25 against the receipt of stolen property. Do we have a civil

1 statute against the receipt of stolen exam results?

2 MR. RIVERA-SOTO: We have a Copyright Act that  
3 says, you can't use it if it belongs to somebody else. And  
4 the cause of action couldn't be simpler. It's two elements.  
5 Actual copyright and copying. And it's a strict liability  
6 statute. There's no mens rea involved in it. And we proven  
7 to a far-the-well that these things were registered. The  
8 registrations are attached as Exhibit A to the complaint.  
9 And it's clearly that he copied them. It's clear that he  
10 copied them. He got them through a third-party, but he  
11 copied them.

12 So for all intent and purposes on a motion for a  
13 judgment on the pleadings this case is over. We move on to  
14 the next stage. If they insist that there remains an issue  
15 on the statute of limitations-- the proper way to bring that  
16 up is in a motion for summary judgment, where the Court can  
17 consider facts that are outside of the pleadings that have  
18 been brought to the Court. And at that point your Honor will  
19 hear the full story. Your Honor will hear everything that  
20 ABIM did in trying to identify who this Padrino Jr. was.  
21 How, in fact, Dr. Lumina would not talk to us until after her  
22 settlement agreement was signed. And her lawyer had  
23 previously said she doesn't know who Padrino Jr. is.

24 THE COURT: Why weren't those facts pleaded?  
25 Again, your adversaries are holding your feet to the fire

1 under Igbal. And to say we were diligent, no matter how we  
2 torture that that is a conclusory statement. I'm going back  
3 to paragraph 50. Why wasn't there 50-- 1, 2, 3, 4 different  
4 than the 1, 2, 3, 4 that's in there that said, we could not  
5 ascertain who this person was or even that it was this person  
6 that it was operating under-- until she finally agreed to be  
7 debriefed and that was just blah, blah, blah?

8 MR. RIVERA-SOTO: If that issue is relevant then it  
9 is properly raised at summary judgment-- not on a motion for  
10 judgment on the pleadings. Let us remember that Igbal was  
11 not a judgment on the pleadings case.

12 THE COURT: No, I understand what you're saying,  
13 but that's the same standard-- isn't it. This is a motion to  
14 dismiss or a motion for a judgment on the pleadings, we could  
15 get super duper technical-- but it really is the same  
16 standard and aren't they entitled to say, hey, maybe we could  
17 bring a motion to dismiss, but we're doing it now under this  
18 different-- because we want to capture more stuff.

19 So again we come back to the plausibility. There  
20 is a real problem with the plausibility under Igbal of  
21 saying, we exercised due diligence and we couldn't have found  
22 out any sooner than we did.

23 MR. RIVERA-SOTO: Well, it's important what is in  
24 fact in the complaint and that is in paragraph 50. Where it  
25 says in the last sentence of that paragraph. "ABIM diligently

1 investigated the identity of the person who corresponded with  
2 Dr. Arora, using the email address padrinojr@yahoo.com, but  
3 was unable to concretely match the email address to Dr. Salas  
4 until January 2012."

5 THE COURT: So if I said by way of background to  
6 that statement what would ABIM saying? It was Geraldine  
7 Lumina (ph) who talked to him, she wouldn't tell us who he  
8 was until we finished up our negotiations with her. Ms.  
9 Jacobs wanted to come in.

10 MR. RIVERA-SOTO: That's more of a factual point  
11 that I think that Ms. Jacobs could address better.

12 THE COURT: Yes. So just for an exercise. Assume  
13 that I said that I want 50-- I want subparagraphs to  
14 paragraph 50, A, B, C, D. Who is this person? Who is this  
15 investigation? Why couldn't you concretely match the email  
16 address with Dr. Salas Rushford?

17 MS. JACOBS: Sure. Your Honor, the first thing  
18 that ABIM did was-- it had that email address, it ran through  
19 its own system. Which our physicians who are certified in--  
20 or are board certified by ABIM. Or who have applied to take  
21 the exam.

22 THE COURT: So that was done in the early months or  
23 some months after?

24 MS. JACOBS: Yes, early.

25 THE COURT: Early December 2009?

1           MS. JACOBS: No. That would have been-- so the  
2 seizure was in-- the seizure was in December 2009. There  
3 were thousands of emails. Thousands to go through. And so  
4 it was done at some point in the winter or early spring of  
5 2010.

6           THE COURT: Okay.

7           MS. JACOBS: ABIM searched its records. It had no  
8 record of anyone with an email address with  
9 padrinojr@yahoo.com. ABIM also did public searches, using  
10 several data bases, it could not find a person to connect to  
11 that email address. We also-- ABIM also searched Dr. Arora's  
12 records. Dr. Arora kept copious and detailed records of  
13 every physician who had ever taken his course. And those  
14 records included name, email address-- mailing address. And  
15 we put that through his system and looked through scores of  
16 his documents and that email address did not match any  
17 physician in his data base. And my recollection is, I mean,  
18 he had thousands of physicians in his data base, he had been  
19 teaching that course for some time-- ABIM.

20           THE COURT: Just back up a little bit, Ms. Jacobs,  
21 so I'm following correctly.

22           When did ABIM zero in on the Padrino Jr. emails as  
23 particularly the target because of their content?

24           MS. JACOBS: It was at some point in-- I would say  
25 in the spring of 2010.

1 THE COURT: 2010. Okay.

2 MS. JACOBS: Yes.

3 THE COURT: Yes.

4 MS. JACOBS: It took couple of months to actually  
5 just reading the documents that were seized from Dr. Arora.

6 THE COURT: So this comes to the surface and then  
7 you start trying to match to known physicians and you come up  
8 with nothing?

9 MS. JACOBS: That's correct. ABIM, also as part of  
10 a separate investigation effort, went down to Puerto Rico and  
11 interviewed physicians in Puerto Rico. In course of those  
12 interviews, ABIM did ask physicians whether any of them  
13 recognized the email address padrinojr@yahoo.com and no one  
14 did. There was one email that was sent from the  
15 padrinojr@yahoo.com email address. That was-- they were all  
16 sent to Dr. Arora, and there was one email that copied  
17 someone else, okay, in addition. And it copied someone with  
18 the email address of Palermo (ph). ABIM researched the  
19 Palermo email address identified that person, ABIM went to  
20 that person who was Dr. Como Palermo (ph). And that's Dr.  
21 Palermo who identified the Padrino Jr. email address. She  
22 said she couldn't and she didn't. And she claimed she didn't  
23 know who sent her that email. And at Dr. Palermo, who was  
24 sanctioned for sending questions to Dr. Arora, one of the 140  
25 physicians she had-- there is that three step appeal process

1 which I believe is spelled out in-- may be not spelled out in  
2 these papers, but are spelled out in other papers. ABIM had  
3 a three step appeal process for when it disciplined a  
4 physician.

5           At her board appeal hearing, the head of the  
6 internal medicine program, where as it turns out Dr. Salas  
7 was in that program the internal medicine program, and Dr.  
8 Palermo was in that program. The head of that internal  
9 medicine program said that she had performed the search of  
10 the email data base for their program for Padrino Jr. and  
11 could not find who-- could not find any-- any match to  
12 anybody in the program for that email address.

13           Subsequently, ABIM reached an agreement with a  
14 physician Dr. Lumina. At that time ABIM did not know that  
15 she was necessarily for sure she was a potential link to  
16 padrinojr@yahoo.com email address. So she signed a  
17 settlement with an agreement to cooperate with ABIM. And she  
18 initially-- her lawyer initially advised ABIM that they could  
19 not identify who was the owner who was linked to the  
20 padrinojr@yahoo.com email address.

21           Later in January of 2012, after connecting  
22 potentially a few dots and reaching out again to her counsel,  
23 and when I say connecting a few dots, it was further  
24 researched into documents that had similar questions in  
25 them. Her counsel sent her counsel-- sent her counsel the

1 handwritten notes-- the handwritten notes. And the counsel  
2 at that point in January of 2012 Dr. Lumina identified the  
3 handwritten notes. And said that the handwritten notes were  
4 handwritten notes of Dr. Salas and she knew that because she  
5 had a telephone conversation with him the day that he took  
6 his exam. And that he had taken notes during that telephone  
7 conversation. That during that telephone conversation,  
8 basically told him what she could remember from her exam and  
9 what were the questions which she had difficulty with. He  
10 wrote down as much as he could remember, which was of course  
11 why these notes don't look like a perfect exam question--  
12 it's brain dumping. And he sent letter the notes. He sent  
13 Dr. Lumina the notes, which was how he concretely identified  
14 the handwritten notes. And with the handwritten notes  
15 concretely identified in January of 2012 that is how ABIM  
16 matched the Padrino Jr. email address to Dr. Salas.

17 THE COURT: So why didn't they question other  
18 doctors' issue raised in the reply and-- yes, in the reply  
19 brief is, we did ask other people and we didn't have any  
20 answers.

21 MS. JACOBS: Absolutely did. And I think there was  
22 a reference to Dr. Arora. Dr. Arora was deposed in this  
23 case. And for example he said he didn't know who-- whose  
24 email address Padrino Jr. address was at his deposition.

25 THE COURT: As far as trying to get the identity of

1 the account holder from Yahoo.com; how do you respond to  
2 that?

3 MS. JACOBS: Your Honor, I do not recall, I mean,  
4 standing here I do not recall the efforts in those-- I do not  
5 recall the efforts in those regards. I know that ABIM was  
6 working diligently through investigation as opposed to  
7 litigation at that point, in trying to identify who was the  
8 registrant of the Padrino Jr. email.

9 THE COURT: Okay. All right, I appreciate that.  
10 While I have you up there. Let's talk about this access  
11 issue which has been raised.

12 MS. JACOBS: Yes, your Honor.

13 THE COURT: And whether or not there isn't some  
14 meat on those bones in so far as you can't-- the argument is  
15 you can't put a copyright copying theory around what is  
16 essentially a transmission of these PDFs.

17 MS. JACOBS: Yes, I will grab my copy of the  
18 complaint.

19 So, your Honor, there's a couple of different  
20 points here. I mean, first of all copying is-- copyright  
21 infringement, elements are about ownership of valid copyright  
22 and copying. You can prove copying in two different ways.  
23 Access plus substantial similarity-- that's (A). That's the  
24 most common. (B), is where you have direct evidence of  
25 copying. Direct evidence is rare. We have it in this case.

1 Starting-- going back with what is referred to as Exhibit D.  
2 First of all, Dr. Salas did-- in the copyright act is the  
3 copyright owner a number of exclusive rights. Including the  
4 right to copy, make a derivative work and distribute. Okay.

5           Dr. Salas, when he sent this email to Dr. Arora, he  
6 both copied the contents of the email and he distributed it.  
7 So he falls squarely within the Copyright Act. If you want  
8 to talk about access and substantial similarity, or whether  
9 you want to talk about direct evidence, my view is that there  
10 is even in Exhibit D there's direct evidence of copying.  
11 Because if you look at page 12-- if you look at page 12 in  
12 Exhibit E, one of the questions says, at this moment, after a  
13 whole question number 49 about a 35 year old male  
14 patient. "At this moment I was burned out. However, I think  
15 he is having anxiety performance just because he's not  
16 depressed and having problems with erectile dysfunction, my  
17 answer was A but I am not sure." That person is saying-- this  
18 is a question from their exam. I copied this question from  
19 my ABIM exam. That's direct evidence.

20           This document also has in more than one place but  
21 I'll refer to page 31 of Exhibit D. It says, brainstorm  
22 2007, questions repeated on board 2008. And then it gives a  
23 laundry list of numbers. It's saying, okay, these were the  
24 questions. These questions and numbers were in this ABIM  
25 exam in 2008.

1           Your Honor, that's direct evidence of copying. And  
2 so all of the exhibits in this document, whether the ABIM  
3 questions in them were transmitted to Dr. Salas by a  
4 telephone call, from someone who sat for the exam and told  
5 him everything she could remember-- and there weren't just  
6 one call there were several that she testified at her  
7 deposition about that. Whether he got the information from a  
8 telephone call from someone who sat through the exam. And  
9 then he wrote down as much as he could-- that's copyright  
10 infringement. The access to the copyrighted work is through  
11 someone that saw it. He wrote it down. He copied it. He  
12 distributed it. Or whether someone else who had taken the  
13 ABIM exam has printed up the document about questions that  
14 were on the ABIM exam, gave it to Dr. Salas, and he through  
15 his computer copies and distributed it and sends it to Dr.  
16 Arora. That's textbook copying copyright infringement in  
17 either scenario.

18           When you think about it in that context.

19           THE COURT: Let me just ask you a basic question.  
20 If all he did was say, hear is some other stuff that I got  
21 from other people and punched forward; would that still be  
22 copying?

23           MS. JACOBS: Absolutely.

24           THE COURT: Okay.

25           MS. JACOBS: That's absolutely copyright

1 infringement. And when you think about this case the context  
2 of Dr. Arora, in the context of Dr. Arora who is, you know,  
3 the individual that-- among the individuals ABIM sued in  
4 connection with the test prep course. ABIM didn't sue Dr.  
5 Arora, because he went and took the exam and wrote down all  
6 he could remember and then shared it with students. How did  
7 Dr. Arora get the information for which ABIM got a TRO and a  
8 preliminary injunction. " Dr. Arora got it because other  
9 students went and sat for the exam-- just like Dr. Lumina,  
10 called him on the phone. Or sent him emails with the  
11 questions. And then he put it in the material. And he gave  
12 it to other people. There's no difference.

13 THE COURT: Let me ask you a question. On the  
14 issue of fraudulent concealment. I'm asking you rather than  
15 Mr. Rivera-Soto because we're really talking about the proofs  
16 in this case.

17 MS. JACOBS: Yes, your Honor.

18 THE COURT: I'm not in love with fraudulent  
19 concealment, as you could tell from the questions that I was  
20 asking you, because it just doesn't seem to fit the facts  
21 here. It looks more like an attempt to be evasive on the  
22 part of Dr. Rushford. As an example and a circumstantial  
23 example of what was going on here. Which is that he was  
24 being sneaky and didn't want to be caught. He was cheating  
25 and he knew that he was involved with cheaters etc. it is

1 part of the disclosing bad-- or receipt of stolen property  
2 syndrome that's going on here and we're trying to put a legal  
3 theory around it.

4 Do you believe that-- and we're talking about the  
5 statute of limitations issue when I talk about this.

6 Do you believe that you have enough of a story to  
7 tell and that the language of the complaint gives enough  
8 notice and substance to the story you have to tell as to why  
9 it took five years to file this lawsuit, that the fact that  
10 he used different emails is really not important to the  
11 statute of limitations argument? Or do you think you need it  
12 as another nail in the coffin that really gets it down?

13 MS. JACOBS: Your Honor, the fact that he  
14 registered with Dr. Arora, using his regular J. Salas MD  
15 email address, and had other communications with Dr. Arora  
16 back when he took the course back in May-- perfectly  
17 appropriate communications about the course and other  
18 things. And that he used his real email address and that he  
19 signed his name on those emails, and then when it came time  
20 to sending questions from 2009 internal medicine exam, he  
21 stopped doing that. He used a different email address. That  
22 his residency program couldn't find or identify. None of  
23 these other people could find or identify. And he didn't  
24 sign his name to the emails-- I think that's a very important  
25 part of this.

1           THE COURT:  Fraudulent concealment?  Who is he  
2 concealing his identity from?

3           MS. JACOBS:  He is concealing his identity from  
4 anyone who would obtain those communications in the future.

5           THE COURT:  Does he have a duty to those anyone?

6           MS. JACOBS:  I'm sorry.

7           THE COURT:  Does he have a duty to those anyone?  
8 I mean, what is he gaining by concealing his-- we talk about  
9 the cover-up in the criminal sphere.  There's circumstantial  
10 evidence by use of cover-up by a different name.  Now you're  
11 talking about a civil cause of action, and you don't have a  
12 statute forbidding receipt of, you know, disclosed exam  
13 questions to use.  You believe that your client has been  
14 wronged.  But you have to take the law as it sits and you  
15 have taken copyright law.

16           The fraudulent concealment only comes up in the  
17 context of the defendant's argument that you have got to have  
18 a heightened standard here.  But I have a real issue as to  
19 whether or not you could even use it, or I could see an  
20 argument being made at any trial that as in an In Limine  
21 motion that they would want any effort on your part to argue  
22 that it shows cover-up and, if they lost that one that's  
23 about all you would be using it.  He knew what he was doing  
24 was wrong, ladies and gentlemen, look, he changed his emails.

25           MS. JACOBS:  Actually, your Honor, I think him not

1 using his identifiable name when he signed the emails in his  
2 regular email address, J Salas MD, I think that it shows a  
3 number of things. One. First of all for copyright  
4 infringement it goes to the willfulness.

5 THE COURT: It goes to what?

6 MS. JACOBS: It goes to willfulness, your Honor.  
7 Which ABIM is seeking statutory damages. There are enhanced  
8 statutory damages for willfulness. So it goes to willfulness  
9 on that for sure. And it also goes to-- to the extent that  
10 he's claiming, you know, these are-- these are notes from--  
11 these aren't notes from a conversation I had with someone who  
12 just took the exam. These are notes from my-- from when I  
13 sat in the Arora Board Review course that I was sending to  
14 Dr. Arora. To the extent that he's making that claim, we're  
15 absolutely entitled to show that, no, you were trying to  
16 conceal your identity. And concealing his identity from ABIM  
17 could be important because he doesn't want to be disciplined  
18 and lose his board certification from ABIM, which is exactly  
19 what happened for engaging in cheating.

20 THE COURT: Okay. You moved into the damages, but  
21 I think Mr. Rivera-Soto was going to handle that one. Was  
22 there anything else? I think that I had gotten everything  
23 that I think I needed to get from you, Ms. Jacobs, thank you,  
24 you have been very helpful.

25 MR. RIVERA-SOTO: I think you have gotten a little

1 bit more and I'm perfectly happy with that.

2 THE COURT: Okay.

3 MR. RIVERA-SOTO: Your Honor, the only thing--

4 THE COURT: You have to give me a primer on what  
5 damages you're looking for.

6 MR. RIVERA-SOTO: We're looking for statutory  
7 damages.

8 THE COURT: Okay. And how would you quantify those  
9 statutory damages?

10 MR. RIVERA-SOTO: One per each violation.

11 THE COURT: And you're not persuaded that your  
12 adversaries have whittled down the number of violations?

13 MR. RIVERA-SOTO: They could try. But that's for  
14 trial and that's not for now.

15 THE COURT: And attorneys' fees?

16 MR. RIVERA-SOTO: And counsel fees, yes, which are  
17 provided under the statute. As Ms. Jacobs noted, we may well  
18 be asking for willfulness and answers in this case.

19 THE COURT: Is there any argument that, in fact, in  
20 your settlement with these other folks, Dr. Salas is entitled  
21 to an offset because of the nature of what you were able to  
22 get by way of your other settlement?

23 MR. RIVERA-SOTO: There copyright violations are  
24 theirs, his are his. So the answer is no.

25 The fact that somebody else committed copyright

1 infringement does not relieve him of his obligation for what  
2 he has done.

3 THE COURT: Okay.

4 MR. RIVERA-SOTO: And, your Honor, to go back  
5 almost to the very beginning. Counsel stood here and argued  
6 to the Court that in this complaint, and I wave it a little  
7 bit because this is actually two-sided copying-- it would be  
8 twice the size.

9 THE COURT: And it is very wise to do that because  
10 any time you bring a wheel barrel into a judge and all that  
11 is the complaint you know you have a very unhappy jurist.  
12 It's a good idea.

13 MR. RIVERA-SOTO: Which is why I make the complaint  
14 so readable.

15 THE COURT: Fair enough.

16 MR. RIVERA-SOTO: But in any event, what we heard  
17 was argument that there's all this irrelevancy in this  
18 complaint. Okay. There's a time and place for that. It's  
19 called a motion to strike. And in this case, I just want to  
20 get this right. Where the docket is now at entry 147,  
21 there's no motion to strike in this case. Just like there  
22 hasn't been a motion for summary judgment. I will note for  
23 the Court, that just like they filed a Rule 12(c) motion in  
24 respect of our complaint, we also filed a Rule 12 motion in  
25 respect of their counterclaim and third-party complaint that,

1 at the Court's suggestion we withdrew. Because the Court let  
2 us know that the Court thought it was more appropriate for  
3 summary judgment. I think the same is true in respect of  
4 this motion.

5           There is something that doesn't quite fit here.  
6 And I think it speaks volumes about the defendant and what he  
7 was doing.

8           THE COURT: I'm sorry?

9           MR. RIVERA-SOTO: It speaks volumes about the  
10 defendant and what he was doing. His counsel has stood here  
11 and said, he only wanted to pass the exam. I understand  
12 that. I understand that. That's a natural reaction. But if  
13 he only wanted to pass the exam, why is he sending questions  
14 to Dr. Arora that he got from Dr. Lumina before he even took  
15 the exam? You could look at the email it doesn't say, here  
16 are these questions, can you give me the answers to them  
17 before I go into the exam? It doesn't say that. All it says  
18 is, here are these questions from this exam. And you look at  
19 every single email attached to the complaint, nowhere does it  
20 request any assistance in taking the exam. All they do is  
21 say, here are more questions. If his purpose in doing so was  
22 to aid him in passing the exam then ask for the help.

23           THE COURT: Well couldn't the purpose to be to aid  
24 Dr. Arora in supporting and educating his colleagues who were  
25 in the same boat that he was taking a board certified exam,

1 and supporting the purpose of the review course that was  
2 given, which reviews arguably the medicine but also the  
3 testing process?

4 MR. RIVERA-SOTO: But by that point the ship had  
5 sailed. The course was taken in May and the exam was in  
6 August. So anybody taking that exam that ship had sailed.  
7 And at no point does he say, and here are the emails from Dr.  
8 Arora to all of the people who took his course with these  
9 questions and the proper answers to help them in taking the  
10 exam. They haven't closed that loop. And the reason they  
11 haven't done so is because that's not their claim.

12 Their claim is that the handwritten notes that Dr.  
13 Lumina testified at deposition, whereas the information she  
14 provided to Dr. Salas during several telephone conversations,  
15 after she had taken the exam but he had not. Their argument,  
16 the defendants' argument is, those are his class notes.  
17 Those are the notes that he took back in May. That's  
18 interesting. But what he can't answer is, if they are your  
19 own class notes what are you doing sending them to your  
20 instructor 4 or 5 months later? What's the point?

21 THE COURT: Okay.

22 MR. RIVERA-SOTO: So in the end these emails all  
23 speak for themselves. Their writings. And at no point does  
24 he ask for any help.

25 Your Honor, we respectfully submit that the proper

1 resolution of this matter is that this motion would be  
2 denied. If the defendant thinks that he's got a viable  
3 statute of limitations defense, then the way to do that is in  
4 summary judgment motion, where he could bring in all of the  
5 facts that he wants that are outside of the four corners of  
6 the pleadings-- we'll be happy to respond to it and your  
7 Honor will have a full record on which to make that  
8 determination. But right now, the record before the Court,  
9 is limited to the pleadings. And the pleadings say, that we  
10 found out about it in February of 2012. The complaint was  
11 filed in October of 2014. The discovery rule which rules in  
12 this circuit had at last count in eight other circuits, and  
13 was cited with approval by the Supreme Court of the United  
14 States in *Petrillo v MGM* (ph), says that it is the discovery  
15 rules that applies. And one doesn't have to go into the  
16 whole esoterics of whether it tolls the statute of  
17 limitations or changes the accrual date or anything like  
18 that.

19           The simple fact of the matter is that what it does  
20 in its net result is that the application of the discovery  
21 rule says, we start counting from that date. Statute of  
22 limitations stays the same which is three years, but we start  
23 counting from that date. Regardless of when the cause of  
24 action may have accrued. Because as a factual matter, you  
25 need more than just the fact of injury in order to trigger a

1 statute of limitations. You need to know who injured here.  
2 And we did not know that until January of 2012. At that  
3 point, I respectfully submit, that's when the cause of action  
4 accrued and that is therefore the start date regardless of  
5 the discovery rule. Because you need to know not just the  
6 fact of injury, but also the cause of the injury. You can't  
7 just sue somebody out there. You have to know who you're  
8 suing. Otherwise all you would have is John Doe complaints  
9 filed everywhere, solely for the purpose of preserving  
10 unnecessarily a statute of limitation when the discovery rule  
11 applies. And there is no question that the discovery a rule  
12 applies here. That cannot be a question in dispute. And, in  
13 fact, interestingly the defendant tries to segregate that  
14 issue out by saying, well, in 2009, the Third Circuit decided  
15 that the discovery rule applied. But in that same case, when  
16 it came back to the Third Circuit in 2011 they talked about  
17 it being orbiter dicta. Okay. But the 2011 decision had  
18 nothing to do with the accrual or discovery dates. It had to  
19 do with when prejudgment interest should start to run. And  
20 interestingly enough they said, although in 2009 they said,  
21 the discovery rule is what triggers the statute of  
22 limitations. In respect of prejudgment interests, they said  
23 it goes back to the earliest date. Because the purpose is to  
24 make the plaintiff hole.

25 I would suggest that the Third Circuit's comment by

1 now chief Judge Smith, that it was over dicta is itself dicta  
2 and need not be followed here.

3           What is relevant is the 2009 decision, in the  
4 Whally (ph) case that says specifically the discovery rule  
5 applies.

6           Thank you, your Honor.

7           THE COURT: Thank you very much. A brief  
8 response. Just highlights.

9           MR. SCHLAFLY: Thank you, your Honor.

10           Your Honor, opposing counsel repeatedly misstated  
11 the standard. He repeatedly said that he didn't learn of the  
12 copyright infringement until January of 2012. If you notice  
13 then at one point he said, we didn't learn of it-- he didn't  
14 learn of it until February of 2012. That's not the test. If  
15 that's the test the statute of limitations doesn't mean  
16 anything. And he urges us to go back to first principles.  
17 Well, he never cited the statute. The first principles is  
18 it's three years for when the infringement occurred. And the  
19 Supreme Court has emphasized that. And the Supreme Court has  
20 never blessed going around that three year limit. Three  
21 years, from when infringement occurred.

22           And opposing counsel to this date doesn't get it,  
23 it's not when you learned it. That's not when it accrues.  
24 It's when you could have learned of it. When you could have  
25 learned of it. And they could have learned of it at the end

1 of 2009, when they had all of the evidence. They could have  
2 easily gone to Yahoo.com and gotten the information. They  
3 know how to use legal process to seize the computers of  
4 Arora. They know how to use legal process. And they  
5 certainly knew how to use legal process to go to Yahoo.com  
6 and say, who this is person using this nickname. They didn't  
7 do it. You asked counsel, Ms. Jacobs, she didn't have an  
8 answer for why they didn't do it. They have a duty to do  
9 that. If they don't want to do that that's fine, but don't  
10 then sue somebody beyond the statute.

11           They could have sued as John Doe. Mr. Rivera-Soto  
12 started to go down that road and may be he made a mistake,  
13 yeah, you sue as John Doe. Get discovery. You find out who  
14 it is. They knew about the infringement. They knew about  
15 the infringement. They just said they didn't know the  
16 identity. They could've sued ABIM v John Doe. We then enter  
17 into discovery and find out who that John Doe is. Not that  
18 complicated. They know how to do that. He admitted he knows  
19 how to do it. He said, well, we didn't do that because we  
20 don't want John Doe lawsuits all over the place. That's just  
21 not plausible. That's not the reason they didn't do it.  
22 They're fired up. They spent a ton of money on this case.  
23 They didn't do that because they chose not to do it. And in  
24 fact after they learned who Padrino Jr. was, they still chose  
25 not to sue him. They learned before the three years expired.

1           THE COURT: Well, I think that your adversary is  
2 saying the three years started up again at that point?

3           MR. SCHLAFLY: Well, that's their-- that's their  
4 contrived argument they are making now, but no attorney would  
5 do that. No attorney who learns of the infringement within  
6 the three years would blow passed that three year statute and  
7 take a chance. Nobody would do that.

8           THE COURT: Well the issue is legally can they do  
9 that, right?

10          MR. SCHLAFLY: And answer is no. They can't play  
11 with the statute of limitations like that. Because if they  
12 could play with it like that and say the time doesn't start  
13 until we learned about it. The statute doesn't mean anything  
14 at all. There's no case law that supports what they say that  
15 it starts when they learned of it. When they could have  
16 known it is. And could have known at end of 2009. They  
17 could have known-- gotten it from Yahoo.com and there is no  
18 answer for that. They could have sued John Doe and they  
19 admit that. They said that they didn't do that because they  
20 didn't want John Doe lawsuits all over the place. It's just  
21 not plausible. It's not proper pleadings.

22          This is on the pleadings-- we admit that. But  
23 there it is in paragraph 50 and they set those dates there.  
24 And they admit that they had all of the information in  
25 December of 2009. They said that they spent March or April

1 of 2010 and then there's no explanation why they couldn't  
2 have learned it at least by 2010. There's no explanation at  
3 all. They have to plead that. We need notice of that. This  
4 is what the case law says. Otherwise everybody could just  
5 violate the statute.

6           Now, you know, we get a lot of this, you know, he  
7 has to take his medicine. Or these accusations of the  
8 doctor. It is irrelevant to copyright-- everybody knows  
9 that. I guess I have to move to-- you could say that I have  
10 move to strike. I would suggest striking much of his  
11 argument. Because it is all irrelevant making these  
12 accusations about him. I'm submitting a letter on the  
13 record, from Pennsylvania Medical Society that harshly  
14 criticized ABIM. After we filed our motions in June to 2016.  
15 This was the medical community. Pennsylvania Medical Society.

16           THE COURT: No, leave that out now and do it later.

17           MR. SCHLAFLY: Okay. That's fine.

18           Co-counsel has given me some cases from the Supreme  
19 Court U.S. v Qui Fun Wong (ph), that says that tolling  
20 requires an extraordinary circumstance, that prevents  
21 plaintiff from meeting the filing deadline. They admit they  
22 had the information to meet the filing deadline. They had  
23 it, and they had in January-- they admit that. The three  
24 years didn't run until August of that year. It requires  
25 extraordinary circumstance to justify is going around the

1 statute that says three years. And we urge your Honor on the  
2 argument about access, co-counsel, direct access-- direct  
3 infringement does require direct access.

4 Go ahead.

5 MR. MENA-IRIZARRY: Your Honor, good afternoon  
6 again. Just very shortly.

7 Counsel for plaintiff, Ms. Jacobs, stated that and  
8 gave an example from the content of the email and said that  
9 that was evidence of direct access.

10 Now, Third Circuit law regarding what is required  
11 to prove copying, as they have many times stated, comes from  
12 the Third Circuit's adoption of *Orange Spine v Porter*. A  
13 case from the Second Circuit 1946, 154 F.2d 464. I'm going  
14 to read from page 468 of that case. And it says this. "As to  
15 the first copying, the evidence may consist of A, the  
16 defendant's admission that he copied. Or B, circumstantial  
17 evidence, usually evidence of access from which a trier of  
18 the facts may reasonably infer copying. Of course, if there  
19 are no similarities no amount of evidence of access will  
20 suffice to prove copying. If there is evidence of access and  
21 similarities exist then the trier of fact must determine  
22 whether the similarities are sufficient to prove copying."

23 That first prong, that's the first possibility of  
24 the defendant's admission that he copied-- has been taken by  
25 the case law and turned into what is called direct evidence.

1 So it extends to more than just the defendant's admission, it  
2 can also be, for example, a witness's testimony Oh, I witness  
3 saw the defendant copying. But it cannot-- it cannot be  
4 derived from the content of the document alleged. It is  
5 evidence that is not part of the infringement. You know,  
6 it's not the infringed document. It is somebody saying, I  
7 saw the defendant copying. It is the defendant saying, yes,  
8 I copied. If the defendant is raising a fair use defense.  
9 Yeah, I copied, but it's for fair use. Right. Then you don't  
10 need evidence of similarity or anything because you have a  
11 defendant saying I did copyright. Right. But saying, that  
12 because a document says, by whoever wrote it said, at this  
13 point I was tired or whatever. That's not the defendant  
14 saying this. This is whoever wrote the PDF saying it. If  
15 that's going to be used as maybe an evidence of access by  
16 whoever wrote it-- you know, it's used against whoever wrote  
17 it.

18 THE COURT: Okay. I am not discounting any of  
19 these arguments. I think I am hung up on how they sparkle  
20 the contents of a factfinders inquiry as opposed to where I  
21 am at. Which is looking at the face of the complaint.

22 So I'm going to cut you short on those grounds.  
23 Okay.

24 MR. MENA-IRIZARRY: Okay.

25 THE COURT: One more point?

1           MR. RIVERA-SOTO: I am suggesting that he might say  
2 thank you and sit down.

3           THE COURT: No, that's because you are his  
4 adversary. And you would be as sitting in on that side  
5 saying get in the last point.

6           MR. MENA-IRIZARRY: The last point is that they  
7 never pleaded.

8           THE COURT: I understand that. Thank you.

9           MR. MENA-IRIZARRY: Thank you.

10          THE COURT: Counsel. I am-- I will let Ralph close  
11 down the record. I will direct that counsel order the  
12 transcript so that I have it available to me, because that's  
13 the price you pay for being good on your feet. There's more  
14 than just a lot of paper to consider.

15          And then, since we have Dr. Salas here with us, I  
16 want to seize the opportunity to talk to the lawyers, because  
17 when we have a real person here, I think that the Court  
18 should extend itself, especially when coming far way, to sort  
19 of doing a little chatting about where the case might resolve  
20 if it can resolve etc., it's a golden opportunity and I do  
21 not want to waste it.

22          We don't have ABIM people here, but this is clearly  
23 a client where you could call on the end of the phone. If we  
24 can't get anything done I at least want to be told that, we  
25 can't, and then I'll let you go.

1           The issue is whether or not I let you grab lunch  
2 before or after.

3           At this time I will close down the record now.

4           (WHEREUPON THE MATTER CONCLUDED).

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