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

American Board of Internal Medicine, Plaintiff, vs. **Jaime A. ("Jimmy") Salas Rushford, M.D.,** Defendant, Counterclaim Plaintiff, and Third-Party Plaintiff, vs. **Richard Baron, M.D., et al.**, Third-Party Defendants.	Civil Action **2:14-cv-06428-KSH-CLW** Return Date: April 4, 2016 Hon. Cathy L. Waldor **ORAL ARGUMENT REQUESTED**

DEFENDANT JAIME A. SALAS RUSHFORD'S MEMORANDUM OF LAW IN SUPPORT OF HIS MOTION TO COMPEL PRODUCTION OF DOCUMENTS PURSUANT TO THE RULE 45 SUBPOENA

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Defendant Jaime A. Salas Rushford ("Dr. Salas") respectfully submits this memorandum of law in support of his motion to compel production by nonparty Rajender K. Arora, M.D., 2168 Milburn Ave., #205, Maplewood, NJ 07040 ("Arora") as requested in a Subpoena Duces Tecum issued by Defendant Salas pursuant to Rule 45 of the Federal Rules of Civil Procedure dated October 16, 2015 (the "Subpoena").

Dr. Arora has withheld material on the grounds that the documents requested are part of certain confidential settlement agreement reached with Plaintiff in this case, American Board of Internal Medicine ("ABIM") in the Civil Case No. 2:09-cv-05707-JCJ in the United States District Court for the Eastern District of Pennsylvania. Nevertheless, despite any claim to the contrary by Arora, or ABIM for that matter, confidential settlement agreements are subject to discovery as it has been well established that those agreements, albeit confidential between the parties involved, are not afforded any sort of privilege under pertinent Rules. Therefore, this Court should grant Defendant Salas's motion to compel production of the documents requested by the Subpoena and other remedy.

STATEMENT OF FACTS

This case was initiated by ABIM against Salas whereby the former claims that the latter incurred copyright infringement of materials and, more particularly of examination questions, when Salas attended Arora's Arora Board Review ("ABR") in preparation for the internal medicine Board Examination to be given in August 2009. Furthermore, that after the board review, that was held in New York City during the month of May 2009, that Salas exchanged various e-mails with Arora and others which allegedly contained material that infringed ABIM's copyrighted property. ABIM further alleges that Salas also attended a "crash course review" during the month of July given at the home of Arora in New Jersey.

Plaintiff further alleges that after discovering test questions on ABR's website that ABIM believed were copied from its exams, it subsequently obtained an ex parte seizure order in the action captioned American Board of Internal Medicine v. Arora, et. al., No. 2:09-cv-05707 (E.D. Pa. 2009) (hereinafter "PA Case"). Admittedly, ABIM settled its claims against Arora and ABR. See, *in general*, D.E. 1, ¶¶ 32-49. The settlement of that case, in a confidential settlement agreement, was informed to the Court of the PA Case which eventually issued its judgment accordingly. The confidential settlement agreement is not part of the docket before the Eastern District of Pennsylvania and has been kept private by the two (2) parties involved in that case.

In the meantime, and as part of the discovery in this case, and after filing his Answer to Complaint, Affirmative Defenses, Counterclaims and Third-Party Complaint, Dr. Salas has initiated discovery which included serving a subpoena duces tecum, requesting the production of anything and everything that Arora had in his possession, custody or control related to the PA Case. This, obviously, includes any agreement that may have been executed by Arora and/or ABIM pursuant to, as is affirmatively alleged by Plaintiff in their Complaint, where it forever prohibits Arora and ABR from offering live test-prep course like the one Dr. Salas took on May 2009. See D.E. 1 at ¶ 49. We are certain that that settlement contains much more information that impacts this case as well.

Thus, and pursuant to Rule 45 of the Federal Rules of Civil Procedure, Defendant Dr. Salas served a Subpoena Duces Tecum on Arora dated October 16, 2015.[1] The Subpoena was served on Arora because as the Complaint in this case reveals, he is intrinsically related to this case. It is for that reason that the Subpoena requested the production of certain documents, including:

[1] A copy of the Subpoena is annexed as Exhibit A to the Declaration of Antonio Valiente, Esq., which accompanies this present motion ("Valiente Declaration").

> "All documents that relate to any and all allegations or claims in the lawsuit entitled, American Board of Internal Medicine v. Rajender K. Arora, No. 2:09-cv-05707-JCJ, in the United States District Court for the Eastern District of Pennsylvania, **including, but not limited** to, those contained in pleadings, motions, discovery, orders, settlement communications, correspondence, certifications, statements, declarations, and affidavits." See Attachment 1 of Exhibit A (Our emphasis).

Arora has improperly withheld the requested documents and counsel for Arora admittedly instructed, despite the clear instructions in the subpoena, not to bring or produce the settlement agreement when his deposition finally took place on January 21, 2016. See Exhibit B, portion of Deposition Transcript of Arora, at p. 108, L. 23 – p. 115, L. 9. Also, p. 121, L. 23 – p. 123, L. 15.

Defendant Dr. Salas attempted in good faith to obtain discovery of the documents requested by the Subpoena.[2] Yet Arora continues to withhold the documents, thereby necessitating this motion to compel by Defendant Dr. Salas for the production of the documents.

ARGUMENT

POINT I

ARORA HAS FAILED TO MEET ITS BURDEN OF PROVING THAT THE REQUESTED DOCUMENTS ARE PROTECTED FROM DISCLOSURE

The Federal Rules of Civil Procedure allow for broad discovery "regarding any nonprivileged matter that is relevant to any party's claim or defense …." FED. R. CIV. P. 26(b)(1). Rule 45 authorizes the same broad discovery from a nonparty that may be attained from a party. Discovery of documents from a nonparty may be achieved under Rule 45. *See* FED. R. CIV. P. 34(c) ("As provided in Rule 45, a nonparty may be compelled to produce documents and tangible things or to permit an inspection.").

The subpoena duces tecum served upon Arora included a list of documents that, if at all in his possession, are deemed relevant and pertinent for Dr. Salas allegations and averments made in

[2] The Valiente Declaration describes in detail the efforts to obtain production of the documents.

the various pleadings of this case and would tend to offer the opportunity to discovery pertinent evidence. But, as it pertains to the PA Case, affirmatively alleged and referred to by Plaintiff extensively throughout their Complaint, the settlement agreement it executed with Arora is specifically relevant for its content will assuredly lead to the discovery of additional pertinent evidence related to the allegations made by Dr. Salas in his answer to the Complaint here, and his counterclaims and third-party Complaint here. One needs only but a cursory review of the allegation made by ABIM in the Complaint against Arora in the PA Case to be convinced of its relevance in this case.

For example, ABIM alleged against Arora in the PA Case that while promoting the ABR course, Arora provided about 55 questions that were substantially similar to ABIM Examination items". See PA Case Complaint at ¶42. Also, during ABR's review of May 2009, ABIM alleges that many of the hundreds of practice questions were substantially similar to ABIM Examination items. *Id*. at ¶45. Later, ABIM again alleges that ABR and Arora disclosed the secret contents of about 900 of its secured and confidential examination items that needed to be removed from ABIM's examination items bank. *Id.* at ¶55. Additionally there are repeated allegations by ABIM of exchange of correspondence between Arora and Defendant in this case. See D.E. 1, ¶¶43-46, among other pertinent allegations not needed to be included here.

Arora has no basis for withholding this and any other document requested in the subpoena that is not subject or beneficiary of a privilege that is under his custody or control. In fact, as part of the discussion involving the request for a copy of the settlement agreement between ABIM and Arora, during Arora's deposition, there is no mention or claim by Arora, or ABIM for that matter, that said document need not be produced or cannot be produced because it is shielded by a privilege. Rather, vague and meritless allegations referring to the injunction of the PA Case were

made by Arora alone. Additionally, and assuming *arguendo* that the settlement agreement contains what was the subject of the injunction in the PA Case, then that makes it much more so discoverable as there would be no confidential, much less privileged, matter and discovery of it to this party would cause them no harm.

That said, a party or nonparty asserting a privilege bears the burden to demonstrate that a privilege applies. *See Holmes v. Pension Plan of Bethlehem Steel Corp.*, 213 F.3d 124 (3d Cir. 2000); *Conoco, Inc. v. United States Dep't of Justice*, 687 F.2d 724, 730 (3d Cir. 1982). Arora has utterly failed to satisfy its burden for withholding documents based on privilege, or for any other reason, for that matter.

To the extent Arora is withholding documents based on attorney-work/product doctrine, those documents fail to qualify for the privilege under applicable precedents. *See Louisiana Mun. Police Employees Ret. Sys. v. Sealed Air Corp.*, 253 F.R.D. 300, 306 (D.N.J. 2008); *In re Gabapentin Patent Litigation*, 214 F.R.D. 178, 183 (D.N.J. 2003). The requested documents were created in the ordinary course of business and are not protected by the work/product doctrine. *See United States v. Rockwell Int'l*, 897 F.2d 1255, 1266 (3d Cir. 1990).

None of the justifications for a privilege exists here to allow Arora to withhold the requested documents. *See In re Cendant Corp. Sec. Litig.*, 343 F.3d 658, 661-62 (3d Cir. 2003); *Westinghouse Elec. Corp. v. Republic of the Philippines*, 951 F.2d 1414, 1428 (3d Cir. 1991); *see also Hickman v. Taylor*, 329 U.S. 495, 510-11 (1946).

It is well established in the Third Circuit that there is no "settlement" privilege even when a District Court had ordered a confidential agreement to be sealed. See *Bank of Am. v. Hotel Rittenhouse Assoc.*, 800 F.2d 339 (3d Cir. 1986), *cert. denied*, 107 S, Ct. 921 (1987). On the other hand, even when a different Circuit has recognized that a heightened analysis needs to be

undertaken as to settlement discussion, that analysis does not include the executed settlement agreements. At the same time, many courts have declined to recognize any privilege at all to anything pertaining settlement agreements, discussions and/or communications. See e.g., *In re General Motors Corp. Engine Interchange Litigation*, 594 F.2d 1106, (7th Cir. 1979) (declining to adopt a settlement privilege); *Spilker v. Medtronic, Inc.*, 2014 BL 265426, 2014 WL 4760292, at *3 (E.D.N.C. Sept. 24, 2014) (No. 4:13-CV-76-H) (applying the standard of relevance to determine whether a settlement agreement is producible in discovery, noting that the Fourth Circuit has declined to recognize a federal settlement privilege); *In re Urethane Antitrust Litig.*, 2009 BL 151690, 2009 WL 2058759, at *3-4 (D. Kan. July 15, 2009) (No. 04-MD-1616-JWL) (declining to follow Goodyear and adopt a settlement privilege); *Bd. of Trustees of Leland Stanford Junior Univ. v. Tyco Int'l Ltd.*, 253 F.R.D. 521, 522 (C.D. Cal. 2008) (granting a motion to compel a prior settlement agreement, as well as the underlying negotiation and drafting documents, noting that ''there is no federal privilege preventing the discovery of settlement agreements and related documents''); *Matsushita Electric Indus. Co. v. Mediatek, Inc.*, 2007 BL 250970, 2007 WL 963975 (N.D. Cal. Mar. 30, 2007) (No. C–05–3148) (holding that Federal Rules of Evidence 501 and 408 do not create a federal settlement privilege); *In re Subpoena Issued to Commodity Futures Trading Commission*, 370 F. Supp. 2d 201, 208-213 (D.D.C. 2005) (refusing to recognize a settlement privilege under federal law that would protect the documents from third-party discovery); *ResQNet.com, Inc. v. Lansa, Inc.*, 594 F.3d 860 (Fed. Cir. 2010).

Arora has simply failed to justify its withholding of documents in response to the Subpoena, and this Court should grant Defendant Dr. Salas's motion to compel production of all the documents requested by the Subpoena including, but not limited, to the settlement agreement of the PA Case.

POINT II

UNDER FED. R. CIV. P. 37(A)(5) DEFENDANT DR. SALAS IS ENTITLED TO HIS COSTS AND ATTORNEYS' FEES IN MAKING THE PRESENT MOTION

Rule 37(a)(5)(A) of the Federal Rules of Civil Procedure states:

> If the motion [to compel the production of document] is granted . . . the court ***must***, after giving an opportunity to be heard, require the party or deponent whose conduct necessitated the motion, the party advising that conduct, or both to pay the movant's expenses incurred in making the motion, including the attorney's fees. But the court must not order this payment if:
>
> (i) the movant filed the motion before attempting in good faith to obtain the disclosure or discovery without court action;
>
> (ii) the opposing party's nondisclosure, response, or objection was substantially justified; or
>
> (iii) other circumstances make an award of expenses unjust.

Arora's withholding of the documents requested in the Subpoena was entirely unsupported and unjustified, as explained above. Despite the repeated effort by Defendant Dr. Salas's counsel to obtain from Arora production of the requested documents, with copies of those requests sent to opposing counsel for ABIM, Arora continued to withhold them and refuses to produce them without even as much as producing a privilege log or any type of log at all.

Defendant Dr. Salas respectfully submits that it is entitled, under the foregoing Rule 37(a)(5)(A), to an Order by this Court compelling Arora to reimburse Defendant Salas for his costs and attorneys' fees in connection with this motion to compel production of documents pursuant to the Subpoena.

CONCLUSION

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

Dated: March 10, 2016

Respectfully submitted,

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