

UNITED STATES DISTRICT COURT  
DISTRICT OF NEW JERSEY

AMERICAN BOARD OF INTERNAL .  
MEDICINE, .  
 .  
Plaintiff, . Case No. 14-cv-06428  
 .  
vs. . Newark, New Jersey  
 . June 3, 2016  
JAMIE SALAS RUSHFORD, M.D., .  
 .  
Defendant. .

TRANSCRIPT OF HEARING  
BEFORE THE HONORABLE CATHY L. WALDOR  
UNITED STATES MAGISTRATE JUDGE

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1 (Commencement of proceedings at 2:50 P.M.)

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3 THE COURT: We are on the record in Civil Action  
4 14-6428. It's 2:50 on 06/3/16.

5 May I have appearances for American Board of  
6 Internal Medicine.

7 MR. RIVERA-SOTO: Good afternoon, Your Honor, on  
8 behalf of the American Board of Internal Medicine as well as  
9 the third-party defendants that we're referring to as the  
10 ABIM individuals, Roberto Rivera-Soto and Hara Jacobs of the  
11 law firm of Ballard Spahr LLP.

12 THE COURT: Thank you. And may I have appearances  
13 for Dr. Salas Rushford?

14 MR. SCHLAFLY: Yes, Your Honor, Andrew Schlafly,  
15 local counsel for Dr. Salas Rushford.

16 MR. MENA: And good afternoon, Your Honor,  
17 Guillermo Mena, pro hac vice counsel for Dr. Salas Rushford.

18 MR. SALAS RUSHFORD: Your Honor, I am Jamie Salas  
19 Rushford.

20 THE COURT: Oh, okay.

21 MR. SALAS-SOLER: Your Honor, I am Jaime  
22 Salas-Soler, pro hac vice for my son.

23 THE COURT: All righty. Thank you.

24 So let me just go back on the docket, because this  
25 case needs a script.

1 MR. RIVERA-SOTO: Your Honor, if I may be of help  
2 to Your Honor, we have three motions that are before the  
3 Court.

4 THE COURT: Yes.

5 MR. RIVERA-SOTO: The first one is Docket Entry 75,  
6 which is defendant's motion to compel production.

7 THE COURT: Yes 75 --

8 MR. RIVERA-SOTO: The Arora settlement agreement.

9 THE COURT: 78 -- 75, 78, 79, 84.

10 MR. RIVERA-SOTO: And 84. Those are all on that  
11 one.

12 THE COURT: Right.

13 MR. RIVERA-SOTO: And then we have defendant's  
14 motion to compel discovery and other relief. Those are  
15 Docket Entry Numbers 95 and 96.

16 THE COURT: Got it.

17 MR. RIVERA-SOTO: And then we have defendant's  
18 second motion for a protective order regarding the  
19 defendant's deposition, and those are 97 and 98.

20 THE COURT: Okay. Thank you.

21 You saw, I think, our order on the docket with  
22 respect to the pro hac. We put an order on yesterday. And  
23 Mr. Schlafly, I -- if you read the order, it waives costs for  
24 refileing of pro hac, which I think is appropriate to cure the  
25 docket. So if you don't mind doing that.

1 MR. SCHLAFLY: Yes, Your Honor.

2 THE COURT: At that point, Mr. Rivera-Soto, if you  
3 have objections, you can refile your motion. And it wouldn't  
4 necessarily be reconsideration; it may be a primary motion at  
5 that point.

6 MR. RIVERA-SOTO: Well, it would be or opposition  
7 to their motion for a pro hac vice.

8 THE COURT: For pro hac. Exactly.

9 Okay. Thank you.

10 What I'd like to do is also address and have a  
11 discussion with you regarding the two pending motions to  
12 dismiss -- excuse me -- I have a terrible cold. But let's go  
13 to that after we deal with some of these motions, the first  
14 one being the motion to compel the confidential settlement  
15 agreement. I have read all of the submissions, so you know.  
16 I do not quite understand the request at this point. It's  
17 not very clear to the Court why that's necessary for your  
18 case.

19 So taking you right to where I need you to be.

20 MR. SCHLAFLY: Yes, Your Honor. Dr. Salas Rushford  
21 was a student on a course. He was just a student. And  
22 that's a little hard to maybe appreciate. He's being sued  
23 based on his conduct as a student in a course. He was trying  
24 to prepare for an exam. And he went over questions in  
25 preparation for an exam, which is a board certification exam

1 | offered by the ABIM. That's all he was trying to do was pass  
2 | exam.

3 |           In preparation for that, he had some communications  
4 | with the instructor. He had some communications with other  
5 | people who had taken the exam, while all he was doing was  
6 | trying to pass the exam. He didn't make any money off of it.  
7 | He wasn't selling the course.

8 |           And there's no precedent anywhere, that I'm aware  
9 | of, of a student being sued for a copyright violation in  
10 | connection with his studies in preparation for an exam.

11 |           He didn't -- after he took the exam, he didn't give  
12 | questions to anyone. He was merely preparing for the exam.

13 |           And that's what this case is about. That's their  
14 | claim against Dr. Salas Rushford.

15 |           ABIM settled with the instructor, who was making  
16 | millions of dollars off the prep course. And -- prep  
17 | courses. I'm not saying the instructor did anything wrong  
18 | either. But regardless, it's the instructor who would be  
19 | committing any copyright violation, and ABIM sued and settled  
20 | with the instructor.

21 |           We're entitled to see that settlement. That is one  
22 | of the things we're asking for. That may release the student  
23 | from these claims, depending on how that settlement was  
24 | crafted. The representations in that settlement that may be  
25 | of use to the student. The settlement will -- will reflect

1 | what ABIM knew at the time, and there's a huge statute of  
2 | limitations barrier to their claim against the student.  
3 | They've sued the student here more than three years after the  
4 | conduct that's being alleged, and a copyright has a  
5 | three-year statute of limitations. And they're trying to get  
6 | around that statute of limitations by saying they didn't know  
7 | certain things, but they had a settlement that will prove  
8 | what they did know and what they didn't know.

9 |           So we're entitled in discovery to see a copy of  
10 | their settlement with the instructor of the course who took  
11 | the -- of this entire case. They allege the complaint -- the  
12 | settlement in their complaint. They expressly mention it  
13 | right in their complaint. And that's the starting point for  
14 | what's relevant to a case is what they say in their  
15 | complaint.

16 |           They have a whole bunch of other things in their  
17 | complaint, if we simply asked for those documents that they  
18 | allege in their complaint, and they've refused to turn it  
19 | over for months and months and months, refused to talk.  
20 | They've refused turn over copies of the exams. That's  
21 | relevant to our fair use defense. They've refused to turn  
22 | over their work-for-hire agreements, even though --

23 |           THE COURT: Didn't -- aren't there certain portions  
24 | of the exams that you've been given?

25 |           MR. SCHLAFELY: They -- what they produced are these

1 | ridiculous, redacted portions of the exam that literally have  
2 | single words -- which is Bates-stamped ABIM 01691, is single  
3 | snippets from words one year ago about patterns. And I can  
4 | approach and show this to Your Honor, if you'd like. It's  
5 | just ridiculous.

6 |           We have a fair use defense. If -- if there are a  
7 | few words that Dr. Salas Rushford that he heard from somebody  
8 | and then repeated to someone else in the course, if those few  
9 | words show up on the exam, that's not a copyright violation.

10 |           Fair use looks at proportionality. They look at  
11 | whether the alleged infringement is a substantial part of the  
12 | work. And there's some debate about this, whether one  
13 | question would be substantial in an exam of a hundred  
14 | questions -- you know, they'll debate that. But we're  
15 | entitled to it in discovery. I mean, we're entitled to  
16 | argument. We're entitled to look at it and see whether  
17 | anything that had to do with Dr. Salas Rushford was really  
18 | substantial. You look at what they produced, it's these  
19 | ridiculous snippets that's basically worthless. And, yeah, I  
20 | can approach, if you look. Maybe you could see it from  
21 | there. But the -- literally slice of the exam, we can only  
22 | see one word per line.

23 |           And they allege the exams in their complaint. They  
24 | have to turn over in discovery what they allege in their  
25 | complaint.

1           And numerous other things. The -- well, here. As  
2 to the settlement agreement, they -- they made public  
3 statements about the settlement agreement. And they made  
4 representations to the public about what was in the  
5 settlement agreement, yet they won't turn it over to us in  
6 discovery.

7           Some other things. Interrogatories that they gave  
8 to us. First of all, they refused to answer the  
9 interrogatories. I mean --

10           MR. RIVERA-SOTO: Your Honor, with all due to  
11 respect, I thought we were only talking about the settlement  
12 agreement.

13           THE COURT: Yeah, let's -- just because I'm a  
14 little slow.

15           MR. SCHLAFLY: Okay, sure.

16           THE COURT: Just let's do the settlement agreement.

17           MR. SCHLAFLY: Fine, Your Honor.

18           THE COURT: And -- and we can move on to the other  
19 areas, because I know we have --

20           MR. SCHLAFLY: Yes.

21           THE COURT: -- other areas. Is that -- is that --  
22 have you articulated your argument on the settlement  
23 agreement?

24           MR. SCHLAFLY: Yes.

25           THE COURT: Who will be arguing?

1 MR. RIVERA-SOTO: I will -- I will address the  
2 issue of the settlement agreement, Your Honor.

3 THE COURT: Thank you.

4 MR. RIVERA-SOTO: Let's make sure that we  
5 understand what this case really is about.

6 Dr. Salas is not being sued because he was a  
7 student. That's not what this case is about. What this case  
8 is about is the fact that Dr. Salas procured copyrighted  
9 questions from third parties and then disseminated them. The  
10 emails are as painfully clear as they could be. He got them.  
11 He wrote them down. And that he sent them to Dr. Arora.

12 That, he knows he should not have done. That's  
13 what this case is about. It's not about him being a student  
14 taking a cram course for a board certification. This had  
15 nothing to do with him attending the classes.

16 It had everything to do with him trying to secure  
17 for himself an unfair advantage by talking to one of his  
18 colleagues who had already taken the exam and getting the  
19 exam questions from that person and then taking those same  
20 questions, which he wrote down and sending them to the course  
21 instructor and owner, and saying, here, by the way, here's a  
22 hundred questions I've gotten.

23 That's what this case is about. No matter how they  
24 try to twist it, that's what this case is about.

25 And to stand here and say, well, we're entitled to

1 the settlement with Dr. Arora who was the fellow who ran the  
2 course -- in fact, the course had his name, it was the Arora  
3 Board Review -- and say whatever settlement was entered into  
4 is relevant to us is built on a foundation of smoke.

5 That settlement was never made part of the public  
6 record. Provides by its own terms it's confidential. What  
7 appears in the public record, unlike the authorities they  
8 cite is simply an order saying the case is dismissed.

9 THE COURT: So there's no settlement agreement on  
10 the docket.

11 MR. RIVERA-SOTO: There's no settlement agreement  
12 on the docket.

13 And the one case that they cite is one where the  
14 settlement agreement was put on the docket. And that deals  
15 then with a different set of concerns, which has to do with  
16 what's in the public record once you put it on the docket.

17 That never happened here.

18 Here was a private agreement made between private  
19 parties who agreed that it would be confidential. They've  
20 made no showing whatsoever of any particularized need for  
21 that settlement agreement, and so they cannot stand here in  
22 court and allege, my goodness, we're entitled to it, because  
23 it may have some marginal relationship with this case.

24 Well, it's certainly not relevant to this case,  
25 because whatever Mr. Arora agreed by terms of agreement with

1 ABIM has nothing to do with Dr. Salas's behavior. And even  
2 if it did, they still have to overcome the need to show  
3 exceptional circumstances because of the private nature of  
4 the agreement.

5 Neither of those is present. The motion should be  
6 denied.

7 THE COURT: Thank you.

8 MR. RIVERA-SOTO: Your Honor, and just one point  
9 that I intended to make.

10 THE COURT: Certainly.

11 MR. RIVERA-SOTO: If they have the view that they  
12 have here today, why didn't they sue Dr. Arora? Which, by  
13 the way, they haven't done.

14 MR. SCHLAFLY: No, this is --

15 THE COURT: Response?

16 MR. SCHLAFLY: This is discovery. I mean, we're  
17 entitled to discover information that might lead to  
18 admissible evidence.

19 THE COURT: Proportionate to the many circumstances  
20 in the case.

21 MR. SCHLAFLY: Well, it's irrelevant whether they  
22 entered that settlement agreement onto a docket, example.  
23 That's not relevant to the test for discovery. This -- this  
24 settlement agreement, the representation -- they made  
25 representations settlement. He doesn't deny it. ABIM made

1 representations about the very issue that is here, that --  
2 whether there was copyright infringement on the ABIM exam.  
3 The emails that he talks about were emails sent by the  
4 student, Dr. Salas Rushford, to the instructor, Dr. Arora.  
5 Dr. Arora settled. That that settlement agreement has  
6 representations by ABIM, by Dr. Arora about the same subject  
7 matter, copyright infringement that they're pursuing against  
8 Dr. Salas Rushford here.

9           The reason they're upset that Dr. Salas Rushford  
10 allegedly sent some questions to Dr. Arora is because  
11 Dr. Arora would then use them in his course. That's the  
12 reason they're upset. Otherwise, they'd have no reason to  
13 even be upset about that. They're upset because they allege  
14 that Dr. Arora would take the question from Dr. Salas  
15 Rushford that he heard somewhere else, and then Dr. Arora  
16 would teach it in his course.

17           Well, they settled with Dr. Arora. There are all  
18 sorts of representations that go back and forth in that  
19 settlement that would be useful for us in this litigation,  
20 could lead to admissible information. And, in fact,  
21 Dr. Salas Rushford may be able to argue that he's released by  
22 that settlement, because every settlement, as we know, has  
23 releases. And it releases the parties and it releases  
24 parties' --

25           THE COURT: But certainly, if he was specifically

1 released, he would have knowledge of that.

2 MR. SCHLAFLY: Well, it could be within the --

3 (Simultaneous conversation)

4 THE COURT: -- you couldn't have a secret release.

5 I mean --

6 MR. SCHLAFLY: No, no, but it would be a --

7 Dr. Arora would have a release and release his successors,  
8 assigneds, people in privity. I mean, you know how releases  
9 are written where it releases people who are -- who are in  
10 connection with the person being released. And Dr. Salas has  
11 no way of knowing that unless he can get discovery of the  
12 settlement agreement.

13 And my adversary didn't mention the statute of  
14 limitations issue, but that is huge too. And we've got a  
15 motion pending on that, which maybe we'll get to later today,  
16 where they sued beyond three years, and they can only do that  
17 if he overcome huge hurdles.

18 THE COURT: So you think that the doctor's name  
19 might be in the settlement agreement? Is that what -- what  
20 would go to the statute of limitations, a recognition that  
21 they had knowledge prior to their date of discovery, so to  
22 speak?

23 MR. SCHLAFLY: Yes, a recognition that they  
24 received some question from students, that Dr. Arora received  
25 some questions from students. And that ABIM knew that. And

1 they knew that at the time of the settlement.

2 THE COURT: Okay.

3 MR. SCHLAFLY: And they knew that at the time of  
4 the settlement, this case is over on the statute of  
5 limitations, Your Honor.

6 MR. RIVERA-SOTO: Your Honor.

7 THE COURT: Yes, sir.

8 MR. RIVERA-SOTO: It's extraordinary how lawyers  
9 can talk about documents they've never seen and assert to the  
10 Court representations about the contents of documents they've  
11 never seen.

12 Let us assume that Mr. Schlafly is right. Let us  
13 assume, for a moment, that the Arora settlement agreement  
14 talks about students providing him information. Can they say  
15 to this Court that one of those, quote, students were  
16 Dr. Salas? They can't, because it's not true.

17 And the complaint in this case points out very  
18 clearly when we identified who Dr. Salas was. Because  
19 Dr. Salas in his email to Dr. Arora wasn't kind enough to use  
20 his Dr. Salas email address. No, he used one that he calls  
21 himself, Padrino Junior, which means godfather junior.

22 Who's that? It took time to find out who that was.  
23 As we've alleged in this complaint, we did not find out who  
24 that was until sometime in 2012. And we sued in 2014.  
25 That's within the three-year statute of limitations.

1           THE COURT: Let's move on to the other compel  
2 motion, if you will. Now, I have letters on the docket; as I  
3 look at them, Docket 81 and 82, which sort of lists  
4 discovery, alleged discovery deficiencies and specifically  
5 are answered and responded to.

6           I understand that the compel is filed, but it's  
7 kind of a very general motion with respect to the alleged  
8 deficiencies.

9           So perhaps we should use 81 and 82 as our guide.  
10 Is that correct or not, Mr. Schlafly?

11          MR. SCHLAFLY: Perhaps, Mr. Mena could address  
12 that.

13          THE COURT: Is that a better way to guide me  
14 through the compel?

15          MR. MENA: Yes, Your Honor, there's also the  
16 relevance issues as to each particular request.

17          THE COURT: Yes.

18          MR. MENA: 81 -- the attachments to the original  
19 letter, the letter that you are referring, are a better way,  
20 because they address each particular issue in turn.

21           The motion itself goes more to addressing the  
22 proportionality issues --

23          THE COURT: Yes.

24          MR. MENA: -- regarding -- so those may be  
25 overarching and applied to all of them, so that's why we took

1 | them in the motion.

2 |           THE COURT: Okay.

3 |           MR. MENA: But, you know, we didn't want to  
4 | overburden the Court by addressing each particular request.

5 |           THE COURT: You did. You all overburdened the  
6 | Court. Just so you know.

7 |           MR. MENA: We're -- we're didn't want to. We're  
8 | sorry we did.

9 |           THE COURT: But it is my pleasure.

10 |           MR. MENA: Thank you.

11 |           THE COURT: So I thought that these would be a  
12 | better guide. I'm glad that you agree.

13 |           So what I'd like to do --

14 |           MR. RIVERA-SOTO: Your Honor will forgive me --

15 |           THE COURT: Yes, sir.

16 |           MR. RIVERA-SOTO: -- but I don't know to what  
17 | Your Honor refers to when you talk about 81 and 82.

18 |           THE COURT: Okay. I'm sorry. There are two  
19 | preliminary letters warning me about the coming motion to  
20 | compel and the opposition. One is from Mr. Schlafly dated  
21 | March 23d. Therein on page 3 begins a list. And your letter  
22 | of March 28th, because grass never grows under your feet,  
23 | five days later --

24 |           MR. RIVERA-SOTO: I try not to, Your Honor.

25 |           THE COURT: -- address your opposition.

1           The compel and the opposition to the compel are  
2 sort of outlines of the current state of the law. So if you  
3 don't have them, I'm happy to make copies for you.

4           MR. RIVERA-SOTO: I don't, Your Honor, I'm sorry.

5           THE COURT: Okay. We will do that.

6           Do you need copies?

7           MR. SCHLAFELY: Yes, please, Your Honor.

8           THE COURT: All right. We'll make -- you got it?  
9 81 and 82. Spit out a number of copies. If you don't mind.  
10 Thanks, Dan.

11           MR. MENA: Your Honor, in particular, I think that  
12 the best way to go through this particularly with documents  
13 81/2, is -- I don't know if the Court is going to photocopy  
14 all the attachments, but 81/2 goes in very -- in great detail  
15 as to each deficiency. And particularly the production of  
16 documents, which is the -- the -- you know, the longest and  
17 most particularized problem here.

18           THE COURT: My frustration is with my computer, not  
19 with you. It seems to keep knocking me off ECF.

20           So Exhibit A to 81.

21           MR. MENA: 81/2 was the number.

22           THE COURT: Oh, I see, okay. Let me move it to  
23 that.

24           Okay. So Question Number 1, where this is  
25 production of documents. Right?

1 MR. MENA: Right, production of documents, yes.

2 THE COURT: True and exact copies of any documents  
3 or things referred to, relied upon, consulted or used in any  
4 way to create your complaint.

5 Was there a privilege log in this case?

6 UNIDENTIFIED SPEAKERS: No, Your Honor.

7 THE COURT: Okay. Because it looks like we might  
8 be going there.

9 MR. RIVERA-SOTO: It looks like.

10 THE COURT: ABIM objects calling for documents  
11 protected by attorney-client or work product doc- --  
12 doctrine, subject to and without waiving, produce any  
13 nonprivileged docs.

14 So your deficiency is -- so, ABIM, did you produce  
15 nonprivileged documents pertaining to allegations in your  
16 complaint?

17 MR. RIVERA-SOTO: I believe we did, Your Honor. I  
18 believe we did.

19 I should point out, Your Honor.

20 THE COURT: Sure.

21 MR. RIVERA-SOTO: That when we had our  
22 meet-and-confer, no questions were ever raised about Request  
23 For Production Number 1.

24 THE COURT: Okay.

25 MR. RIVERA-SOTO: In fact, the first request for

1 production about which a question was raised was Number 55.

2 THE COURT: All right.

3 MR. SCHLAFLY: Your Honor, I'd like to correct  
4 that. I was at meet-and-confer, and I complained repeatedly  
5 about how ABIM had not produced documents that were  
6 referenced explicitly in the complaint.

7 We didn't go in number by number with all the  
8 different requests we did. I just said generally, you have  
9 not produced documents that you referenced in your complaint.  
10 And they still haven't.

11 THE COURT: Okay. But what they're saying is they  
12 have only withheld privileged documents. Is there a  
13 particular document the -- the problem I'm having with these  
14 motions is that I really don't know what you want.

15 So is there a particular area I should be  
16 addressing with respect to documents referenced in the  
17 complaint, as you say or that --

18 MR. SCHLAFLY: Well, yeah, Your Honor, if we just  
19 got the documents they referenced in the complaint, it would  
20 be a huge step forward. And none of those documents are  
21 privileged.

22 THE COURT: Well, I -- I don't know what documents  
23 you're talking about.

24 MR. SCHLAFLY: Well, okay. The Arora settlement,  
25 the exams, the work-for-hire agreements.

1 THE COURT: Okay. So that's really --

2 (Simultaneous conversation)

3 MR. SCHLAFLY: Those are all referenced --

4 (Simultaneous conversation)

5 THE COURT: -- what our focus is in these  
6 deficiencies?

7 MR. SCHLAFLY: Well, that's -- they're referenced  
8 right in the complaint, and those are -- are probably our top  
9 three priorities.

10 (Simultaneous conversation)

11 MR. SCHLAFLY: And they've never produced them.

12 MR. RIVERA-SOTO: Excuse me, but except for the  
13 Arora settlement agreement, those have all been produced.

14 THE COURT: Well, but now we can get to -- or  
15 funnel to the redacted, say, exams, for example.

16 MR. RIVERA-SOTO: In respect --

17 THE COURT: So let's just -- I think this is going  
18 to be a rather disorganized discussion.

19 MR. RIVERA-SOTO: The redacted exams, we have  
20 provided them copies of all of the questions that were on the  
21 exam that Dr. Salas took.

22 THE COURT: Oh, right. So -- so --

23 MR. RIVERA-SOTO: Everything else has been --

24 (Simultaneous conversation)

25 MR. SCHLAFLY: No, that's not true.

1 THE COURT: So what was not provided --

2 MR. SCHLAFLY: That is not true.

3 THE COURT: Okay. Well, let -- let's --

4 (Simultaneous conversation)

5 MR. RIVERA-SOTO: I can't deal with "that is not  
6 true" without any factual basis.

7 THE COURT: But let's figure out what -- what small  
8 area we're talking about.

9 So now, it's on the floor that any exam --

10 MR. RIVERA-SOTO: I'm sorry --

11 THE COURT: Yes.

12 MR. RIVERA-SOTO: I'm sorry, Your Honor, I want to  
13 make sure that I'm perfectly clear --

14 THE COURT: Okay.

15 MR. RIVERA-SOTO: -- in what I said. We have  
16 provided them copies of every question that we claim he  
17 infringed on, that was on the exam.

18 THE COURT: I see.

19 MR. SCHLAFLY: And that's very different. Now,  
20 it's stated very differently.

21 THE COURT: Okay. Well -- so any -- any claim in  
22 the complaint of infringement was backed up by the question  
23 that you have alleged was infringed upon.

24 MR. RIVERA-SOTO: Correct, Your Honor.

25 THE COURT: So now what is it you want with respect

1 to the other questions?

2 MR. MENA: Now, I -- there are two things,  
3 Your Honor.

4 THE COURT: Go ahead.

5 MR. MENA: First and these are two different  
6 requests, so I'm going to address each -- each one in turn.

7 One request was for the -- the questions that  
8 appeared on Dr. Salas Rushford's test that they claim he  
9 infringed upon. So basically the questions that were on his  
10 test that he knew about prior to the test. Right? And that  
11 request goes to how material, you know -- even if it turns  
12 out that he actually did this, as they claim -- and  
13 obviously, we're not saying he did -- how material this was  
14 to his grade on the test. Right? Because if you didn't have  
15 the vast majority of them or any of them, or if, in fact,  
16 those questions don't really appear on the test, then, you  
17 know, it's a different -- different matter in terms of -- at  
18 least of our counterclaims, certainly, as to -- as to whether  
19 or not they treated him fairly in their -- in their decision  
20 to revoke his board certification. Right?

21 So -- and that part -- and counsel is right  
22 regarding that. He said, well, at least they pur- -- they  
23 gave us what they purport were the answers to that question.

24 Now, what they gave was -- and I don't know if  
25 Your Honor can see it, but basically, there's screenshots,

1 and you can see the whole screen, it has been blacked out and  
2 says "redacted" on top, they show the whole screen except  
3 for -- you know, this is all -- supposedly all the questions  
4 that were on his test, that's what -- that's what counsel has  
5 said. We don't have a certification this is the case or  
6 anything or the sort.

7 And in some of the -- some of the screens have a  
8 question or two on them or each screen has a question, but  
9 basically most -- I would say over 90 percent of the screens  
10 are -- don't have any questions on them. You see? And  
11 even -- even of great concern is that they say this was his  
12 test, but there is nothing in these pages that leads us to  
13 believe this was his actual test. There's -- his name is not  
14 on these pages.

15 THE COURT: So if you have a certification that  
16 that was your client's test, that should suffice?

17 MR. MENA: It -- if we have a certification that  
18 this was, in fact -- and for that particular request I was  
19 talking about -- if we have a certification that this was, in  
20 fact, his -- his -- his test, we can see in terms of his  
21 particular test, what the -- the difference was between the  
22 questions they say he had and the questions he did not, in  
23 terms of the number of question. Right?

24 THE COURT: So what I -- what I'm -- now I'm a  
25 little lost, because I thought that what you had were

1 | questions that were allegedly infringed upon.

2 |           MR. MENA: Yes, that's at a different -- that's an  
3 | entirely different request.

4 |           THE COURT: That's a different request. Okay. I  
5 | knew this was going to get out of hand. For me. It is not  
6 | out of hand for you but --

7 |           MR. MENA: That's fine.

8 |           THE COURT: So now what you -- what you also have  
9 | in discovery is the questions that were on the doctor's test.

10 |           MR. MENA: Of course.

11 |           THE COURT: You have all those questions? Or you  
12 | don't know if you have all those questions?

13 |           MR. MENA: I don't know. I know -- what I have is,  
14 | you know, a number of pages, maybe -- I don't know,  
15 | eyeballing it, 250 pages in which -- which are screenshot of  
16 | some sort of something --

17 |           THE COURT: Are those the -- the Doctor's tests?  
18 | Mr. Rivera-Soto?

19 |           MR. RIVERA-SOTO: I'm sorry. Your Honor --

20 |           THE COURT: Did I lose you?

21 |           MR. RIVERA-SOTO: I -- I think I'm in the same  
22 | state of fog as Your Honor's in. And maybe it's because --

23 |           THE COURT: I live in this state.

24 |           MR. RIVERA-SOTO: I -- well, I may charge you rent  
25 | for being --

1 THE COURT: So what -- is it that that package is,  
2 then? Do you know?

3 MR. RIVERA-SOTO: That package is the questions  
4 that we claim he infringed on.

5 THE COURT: So that's not the entire exam.

6 MR. RIVERA-SOTO: Whether -- whether they appeared  
7 on his test or not.

8 THE COURT: Or any tests somewhere else.

9 MR. RIVERA-SOTO: These -- because this is a  
10 copyright infringement case.

11 THE COURT: Right. That's what we provided them.

12 MR. MENA: With -- you know, begging Your Honor's  
13 pardon and counsel's pardon --

14 MR. RIVERA-SOTO: And we also provided counsel with  
15 a copy of his test. Dr. Salas's test.

16 THE COURT: So that's what you're referring to.

17 MR. RIVERA-SOTO: -- redacted -- I don't know what  
18 he's referring to over there. They're waving a lot of  
19 papers.

20 THE COURT: I think that's what you're referring to  
21 is the -- the copy of Dr. Salas Rushford's test.

22 MR. MENA: We -- I -- my first, what we were  
23 talking about is -- and I distinctly separated the two  
24 requests, the first one we were talking about is the  
25 questions that they claim he infringed upon, otherwise the

1 | questions that they say he had before he took the test, that  
2 | were actually on his test.

3 |           THE COURT: Okay. So all you want -- or not all  
4 | you want, but what you want is a certification that those are  
5 | the questions that appeared on Dr. Salas Rushford's  
6 | certification test.

7 |           MR. MENA: Right. With -- with -- I mean, I -- we  
8 | want the whole -- the whole thing because I think it's  
9 | important to --

10 |           THE COURT: What do you mean the whole thing?  
11 | You --

12 |           (Simultaneous conversation)

13 |           THE COURT: -- well, you want to know what's  
14 | missing, is what you're saying.

15 |           MR. MENA: No, I want to know -- I want to know --  
16 | I want to be able to compare the number of questions, you  
17 | know, that he actually -- they say he actually infringed upon  
18 | to the -- to the -- to the total -- the whole --

19 |           (Simultaneous conversation)

20 |           THE COURT: Why do you want to do that?

21 |           MR. MENA: Because it goes to materiality as to,  
22 | you know, whether or not it -- it affected his passing rate  
23 | or not in the test.

24 |           THE COURT: What difference does that make?

25 |           MR. MENA: Well, it makes a difference in terms of

1 | copyright infringement, but it does -- it could make a  
2 | difference in terms of the --

3 |           THE COURT: Counterclaim?

4 |           MR. MENA: -- counterclaims.

5 |           THE COURT: How so?

6 |           MR. MENA: Because they are -- they were claiming  
7 | in the first letter that he had hundreds of copyright -- of  
8 | questions before he took the test.

9 |           THE COURT: Right.

10 |           MR. MENA: But they never showed us at any point in  
11 | their three-stage appeal process, internal appeal process,  
12 | they never showed us either this or any other questions that  
13 | were on the test, so we could compare them to the emails they  
14 | say he sent. Right? Even if what we are -- we are always  
15 | proceeded on the -- on the assumption that they -- that he  
16 | actually sent the emails, and that's not, you know, really a  
17 | question.

18 |           But we -- we had to -- we wanted to compare, you  
19 | know, what -- what they say he did to -- in terms of what --  
20 | what the content was of the test to what -- to what the  
21 | emails he sent actually contained. You know, both copyright  
22 | infringement and any other allegation that somebody, you  
23 | know, had questions prior to the test and at -- based on a  
24 | document produced or sent by that person, require a  
25 | comparison of whatever that person sent and the test. I

1 mean, it's impossible to -- to say that something is part of  
2 a test without actually seeing the test. You know? It's --  
3 it's mind-boggling that -- that we went through an entire two  
4 and a half years of an internal appeals process, and we  
5 never -- and we repeatedly asked for, and we were never given  
6 even access to the test to see if, in fact, the content of  
7 those emails, those hundreds of questions they claim were, in  
8 fact, on the test.

9 THE COURT: Okay. I understand.

10 So what they have is a copy of all of the questions  
11 on the defendant's test?

12 MR. RIVERA-SOTO: They have all the questions on  
13 defendant's test that we claim were infringed.

14 THE COURT: But they don't have all of the  
15 questions.

16 MR. RIVERA-SOTO: Correct. They --

17 THE COURT: How many questions do they -- how many  
18 questions do you claim were infringed, out of curiosity?

19 MR. RIVERA-SOTO: I don't recall off the top of my  
20 head, Your Honor. I'm sorry.

21 THE COURT: Okay.

22 MR. RIVERA-SOTO: But the fact of the matter is is  
23 that questions are repeated year after year. They're reused.

24 THE COURT: Right.

25 MR. RIVERA-SOTO: And that is why we can't have --

1 THE COURT: I understand.

2 MR. RIVERA-SOTO: -- floating out there. The --  
3 and let's remember what this case is about. This is -- our  
4 case is about copyright infringement. Their claim is that  
5 somehow they -- what ABIM did to him was horrible.

6 Well, the fact of the matter is, Your Honor, that  
7 his certification was suspended not because they were  
8 questions that he infringed on that then appeared on his  
9 exam. It was the act of infringement that caused his  
10 certification to be suspended.

11 So what's on his exam, what's not on his exam is  
12 largely irrelevant to this case.

13 What is relevant is those questions on which he  
14 infringed and those questions on which he infringed that  
15 were, in fact, on his exam.

16 And I would submit to the court that if there's  
17 only one question on his exam that he infringed on, that's  
18 all anybody needs. And there's more than one, Your Honor.

19 MR. MENA: Your Honor, I would -- I would -- to  
20 that last statement, I would reply that that is factually  
21 false. Copyright infringement is a -- is a strict liability  
22 claim to violate a contract with intent. So it -- let's  
23 say -- let's say for the sake of argument that, in fact, he  
24 actually, you know, put forth one question, just one  
25 question, out of the entirety of the universe of ABIM

1 | questions, you know, it would -- it would -- it would call --  
2 | it would be calling into question whether or not that  
3 | question actually -- actually somebody got it from the test  
4 | or it was, you know -- it -- somebody studying just came up  
5 | with a question that is very similar, because let's --  
6 | let's -- let's go back to what this is. This is a test about  
7 | internal medicine. This is a very narrow field of knowledge.  
8 | This is not a very broad test about vocabulary or some sort  
9 | of, you know, wide-ranging issue. This is a very  
10 | particularized test for which ABIM comes out with a list of  
11 | topics that will be on the test. They publish a list of the  
12 | topics that will be on the test.

13 |           So, you know, if people are studying for that test,  
14 | it would be reasonable to expect them to actually come up  
15 | practice questions that look like, somehow, the questions  
16 | that will be asked on the test, because -- those reviews are  
17 | completely useless. You know, if people actually study --  
18 | when anyone studies for a test, they will study from material  
19 | that looks like or, you know, it's similar to what will  
20 | actually come on the test, because if not, why are you  
21 | studying for it -- with it? You know?

22 |           So -- so if there had been one question out of the  
23 | thousands of questions they have for the test, thousands of  
24 | questions, if there had been one question, that was just one,  
25 | that was, you know, similar to one of -- one of the thousands

1 of questions, you know, that could at least come up -- that  
2 could be created spontaneously by someone, it's not that it  
3 wouldn't -- it would certainly not -- infringement, it  
4 would -- we would certainly not be here.

5 And -- and we -- he probably would not even have  
6 been reprimanded all for one point -- and so -- so --

7 (Simultaneous conversation)

8 THE COURT: Right. Depending. But I do agree you  
9 only have to have that one alleged infringement.

10 But I see what you're saying. I understand what  
11 you're saying. So there's almost a proportional review that  
12 you want to --

13 MR. MENA: Of course.

14 THE COURT: -- make?

15 Is there a confidentiality agreement in this case?

16 (Simultaneous conversation)

17 MR. RIVERA-SOTO: No, Your Honor, we've asked for  
18 one pursuant to --

19 THE COURT: Okay.

20 MR. RIVERA-SOTO: -- what appears in the local  
21 rules, and we've gotten no response.

22 THE COURT: Okay.

23 MR. MENA: No, the -- the local rules,  
24 Your Honor --

25 THE COURT: I'll take care of it. Don't worry

1 about it.

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

3 THE COURT: What's your next area?

4 MR. RIVERA-SOTO: Your Honor, may I just -- I think  
5 we need --

6 THE COURT: In response.

7 MR. RIVERA-SOTO: I think we need to take a step  
8 back because I think, as we put in our papers, in response to  
9 this motion, both the Court and ABIM are at a disadvantage,  
10 because as Your Honor noted plaintiff -- the defendant's  
11 motion doesn't say this is deficient for that reason. This  
12 is deficient for that other reason. This is deficient for  
13 that third reason.

14 We don't have.

15 What we have is somebody who stands before this  
16 Court that says we've made more than 300 discovery requests,  
17 and the answers are all bad.

18 THE COURT: Uh, yeah --

19 MR. RIVERA-SOTO: That's just not manageable,  
20 Your Honor. It's just not manageable.

21 THE COURT: Well, I didn't want to go item by item,  
22 but I -- I have done this in other cases. I -- we may even  
23 have to come back. But I do want to go now item by item,  
24 because I think that's the only way to motor this case.

25 MR. MENA: Yes, I agree, Your Honor.

1 THE COURT: We're all stuck in the mud, and we're  
2 going to start moving.

3 And that's the other issue that I need to address,  
4 because Judge Hayden -- when a case starts with the number  
5 14, Judge Hayden gets very testy. And this is a 14 case.  
6 And it seems not to be moving.

7 So this is the way I'm going to move it. If we  
8 have to come here once a month and review discovery disputes,  
9 we're going to have to do it.

10 MR. MENA: As a complete novice to what number 14  
11 may mean, will you --

12 THE COURT: The year that it was filed.

13 MR. MENA: Oh, okay. Okay.

14 THE COURT: I'm sorry. The year -- she has a  
15 two-year rule. We, in fact, have a birthday calendar for  
16 each case.

17 MR. MENA: Okay.

18 THE COURT: So this case is going to hit that  
19 birthday calendar very quickly. And you may be okay with me,  
20 but you won't be okay with Judge Hayden.

21 So.

22 MR. SCHLAFLY: Of course.

23 THE COURT: Judge Hayden is very particular about  
24 aging cases.

25 So I'm also here to propel this case.

1 MR. RIVERA-SOTO: Right.

2 THE COURT: And this is the only way I know how to  
3 manage it at this point, because quite frankly, it's very  
4 contentious. It will continue to get contentious. That's  
5 way some cases are.

6 So --

7 MR. MENA: I would like, Your Honor, if you'll  
8 permit me to correct opposing counsel very --

9 THE COURT: Let's not get too caught in the weeds  
10 here. You might be ahead on this one.

11 MR. MENA: Okay. I'm just -- I'm just saying that  
12 we actually in our motion, we actually referred to the  
13 documents that had -- you know, the --

14 (Simultaneous conversation)

15 THE COURT: Don't worry about it. We're going to  
16 go through as many as we can today, and then if we have to  
17 come back, we're going to come back.

18 MR. MENA: Okay.

19 THE COURT: But I am moving this case.

20 MR. MENA: Thank you, Your Honor.

21 THE COURT: So what your next area is -- talk to me  
22 about the work-for-hire agreements.

23 MR. MENA: Right. The work-for-hire agreements,  
24 Your Honor, the copyright law states that the actual author,  
25 the person, natural person, the human being who does that --

1 | that authors any sort of document is the author for purposes  
2 | of the copyright law.

3 |           That -- there's an exception, a particularized  
4 | exception that comes -- that is cited specifically in the  
5 | law, which comes into play when -- when the person authoring  
6 | the document or the movie or what it is, the art work,  
7 | whatever it is that is -- copyright is being claimed on, is  
8 | doing as part of his or her employment. So in that case --  
9 | in that sense, when somebody is the employee, then that --  
10 | the author slash owner for purposes of the copyright law is  
11 | the employer of the person authoring the work.

12 |           Now, there is a -- a third way in which this could  
13 | happen apart from actually just assignment of copyright,  
14 | right, which is work-for-hire agreement. Now, this happens  
15 | when a -- a person authoring on behalf of another is not a --  
16 | an employee. It is -- he is a private contractor or he or  
17 | she is just a volunteer, you know, doing so --

18 |           THE COURT: Right.

19 |           MR. MENA: -- on behalf of question, and in that --  
20 | in those cases, there is -- before maybe after, but certainly  
21 | it should be before, the work is done, a work-for-hire  
22 | agreement, which is a contract, a work-for-hire agreement  
23 | should be executed. Right? And every person authoring the  
24 | document should have executed the work-for-hire agreement,  
25 | because if this -- if that did not happen, then the -- the

1 | company that, you know, the nonnatural person that is  
2 | claiming to be the owner of the copyrighted work in terms of  
3 | the copyright rights, is not the owner.

4 |           So the first -- the first requirement to bring  
5 | forth a copyright claim is to actually be the owner of the  
6 | copyright.

7 |           In order for a -- for a corporation that can never  
8 | author anything, of course, because it's not a human being,  
9 | for a corporation to be the owner, the document, the work at  
10 | issue must have been authored either by its employee in the  
11 | scope of their employment or by a third party that was done  
12 | as a work for hire for the corporation.

13 |           So we need the work-for-hire agreements to know if,  
14 | in fact, ABIM is the owner of the copyrighted examinations.

15 |           And I know -- I realize that this is a finer point  
16 | of law, but it is a very specific requirement of the law. In  
17 | order to be able to bring a copyright claim, you have to be  
18 | the owner of the copyright. You cannot bring a copyright  
19 | claim for a third party.

20 |           So -- so ABIM must be as to each of the 50  
21 | different works that they are claiming -- this is the -- this  
22 | is really important -- if you look at the complaint, they  
23 | list 50 different copyrighted works for 50 different numbers.  
24 | And for each number, we would need the work-for-hire  
25 | agreements from the people who actually authored that

1 particular number, that particular work that was copyrighted  
2 before the copyright office. Right?

3           So -- so it doesn't -- it doesn't -- if it -- if  
4 it's the 2006 copy -- work-for-hire agreements don't cover  
5 the 1986 test, because tests here are alleged from 1986 until  
6 2009, different works, so 50 different works.

7           So he -- and they claim in the complaint that part  
8 of the value of their tests is achieved because each question  
9 or each -- each test that was copyrighted is created by a  
10 committee. Right? And the committee looks at all the  
11 questions, proposed questions, and then they tell the people  
12 maybe you should amend or, you know, change the question here  
13 or there, change the -- the alternatives, somehow. You know,  
14 the committee does the drafting and -- of the test.

15           So we would expect -- we would expect to receive  
16 several, at least, you know, work-for-hire agreements for  
17 each test as to the members of the drafting committee for  
18 that particular year. We don't exactly know how it is that  
19 ABIM, you know, internally does that. We don't know if  
20 people serve for more than one year. We -- this is not  
21 public information. So we -- I mean, we can't ask --  
22 specifically for what -- you know, you know, exactly, how many  
23 prior agreements we're talking -- we don't know how many  
24 people are on the committee. So I -- I don't know if it's 10  
25 or if it's three.

1           What you certainly know is it's more than one.

2           THE COURT: Are you suggesting ABIM might not be  
3 the real party in interest here?

4           MR. MENA: Yes.

5           MR. RIVERA-SOTO: Your Honor, perhaps it's best if  
6 Ms. Jacobs responds to Your Honor.

7           THE COURT: Sure.

8           MS. JACOBS: Good afternoon, Your Honor.

9           THE COURT: Good afternoon.

10          MS. JACOBS: First, with respect to  
11 work-made-for-hire agreements, okay, ABIM has -- let me step  
12 back for a second.

13          ABIM has produced all of the work-made-for-hire  
14 agreements, okay, with the individuals who created the  
15 questions that are at issue in this case. We have produced  
16 the work-made-for-hire agreements. There are contracts with  
17 ABIM.

18          There are -- the questions are a work made for  
19 hire. There are contracts. We have produced them.

20          There are no others, to the best of my knowledge.  
21 That's it.

22          Number two, I believe in an interrogatory response,  
23 we matched up -- there was matching of either questions or  
24 persons on committees to the work-made-for-hire agreements.  
25 I apologize I don't have those interrogatory responses in

1 front of me in this second. But I -- you know, I do remember  
2 that.

3 So they have -- they have the agreements. Okay.  
4 The agreements are by -- go with a person. So a person sits  
5 on the test committee. A person can sit on a test committee  
6 for a number of years and can have -- you know, and can have  
7 consecutive -- you know, can -- could be on a test committee  
8 for, you know, three or six years, can be longer than that.  
9 So we have produced those -- we have produced the documents.  
10 And we have produced interrogatory responses relating to  
11 that.

12 And we identified the authors of all of the  
13 questions at issue in this case. I think that's answer --  
14 Interrogatory Answer Number 11 matches up the author with an  
15 ABIM document production number, which is a specific question  
16 that we have alleged that has been infringed. So they have  
17 the question. They have the author. They have the  
18 work-made-for-hire agreement.

19 MR. RIVERA-SOTO: Your Honor, if it's of aid, that  
20 list appears at pages 14 through 17 of Docket Entry 95-7.  
21 And that's our supplemental responses to interrogatories.

22 THE COURT: So I don't und- -- I don't understand  
23 what you're missing.

24 MR. MENA: Well, I -- I'll enlighten the Court.  
25 I'll try to.

1 First of all, you -- if Your Honor looks at the  
2 list that they are referring to, first, that is the  
3 interrogatory we have claimed is not an actual response  
4 because it was unsworn. So it is -- it is in terms of  
5 evidentiary use worthless. We can't -- we can't produce to  
6 the Court, because --

7 THE COURT: All right. Well, they -- they can fix  
8 that.

9 MR. MENA: Yes.

10 THE COURT: They can have that certified.

11 MR. MENA: Okay.

12 As for the answer itself.

13 THE COURT: Go ahead, I'm listening.

14 MR. MENA: Let's -- if you look at the table,  
15 you'll see question Number 1, which is Number ABIM 00054, it  
16 is authored by Johannson.

17 I don't know who Johannson is. You know --

18 THE COURT: Is that a last name? Or is it Joe  
19 Hanson?

20 MR. MENA: No, no, a last name, Johannson. Just  
21 Johannson. Plain Johannson.

22 THE COURT: Just Johannson.

23 MR. RIVERA-SOTO: That's all we had, Your Honor.

24 And if, Your Honor, I know that your clerk is  
25 trying to pull it up for you, but I'd be happy to hand this

1 up to Your Honor if you want to take a look at it.

2 THE COURT: I think it's got it. It just keeps  
3 cutting out.

4 My computer does not like this case.

5 MR. MENA: So -- so Number 3, ABIM 00056 is  
6 authored by Aeedson.

7 THE COURT: Who?

8 MR. MENA: Aeedson, A-e-e-d-s-o-n, Aeedson.

9 THE COURT: Thank you.

10 MR. MENA: Now, you just heard counsel say that's  
11 all they have. Now, that seems rather weird, because if they  
12 have work-for-hire agreements from these people, then maybe  
13 they should have on the agreement the full name of the  
14 person. Right?

15 MR. RIVERA-SOTO: You know, Your Honor, if that's  
16 what their complaint was, why didn't they send me a letter  
17 and say, can you give us the full names --

18 THE COURT: We're beyond that.

19 (Simultaneous conversation)

20 MR. RIVERA-SOTO: -- for Johannson is Aeedson?

21 THE COURT: Mr. Rivera-Soto, we are doing  
22 everything in court. We're beyond -- there are two cases  
23 that I have been forbidden to meet and confer. This is  
24 number two.

25 So we're just going to have to resolve everything

1 here. I'm throwing away the meet-and-confer requirement,  
2 because you sit and you meet and confer and it gets worse.  
3 Right?

4 MR. RIVERA-SOTO: We made a significant -- a  
5 significant --

6 THE COURT: Good, then you're going to resolve the  
7 protective order.

8 MR. RIVERA-SOTO: -- production afterwards. Okay.

9 THE COURT: Okay.

10 MR. MENA: So -- so, as you go forward, you'll  
11 see -- you'll see that the issue with the --

12 THE COURT: Thanks, Dan.

13 MR. MENA: -- one -- just one last thing, which  
14 caused him to question again what I was saying, if they say  
15 that's all they have, then how is it that they have a --

16 THE COURT: They're going to provide whatever names  
17 and identification information they have on the work-for-hire  
18 agreements.

19 MR. MENA: On the -- on the -- on the question  
20 authors, which is the --

21 THE COURT: Oh, I'm sorry, on the question authors.  
22 And you're going to certify whatever interrogatories remain  
23 uncertified.

24 MR. MENA: And, Your Honor, again, the -- if I may,  
25 I direct the Court to the same table we have been discussing,

1 and -- and refer to what we have discussed before as to the  
2 committee. And counsel for plaintiff, Ms. Jacobs also stated  
3 that they are made by a committee.

4 But there's -- now she states that the -- each  
5 question has one particular author. Sometimes it's two  
6 authors in the -- in the list, but just one or two.

7 Now, that is not what they have been representing  
8 to courts before, or -- and it is certainly not what they  
9 represented in their complaint. They said that the value of  
10 the questions relies on the fact that they are made by a  
11 committee, they are drafted by a committee, they go through  
12 several stages of correction and also sorts of -- the  
13 complaint goes into a lot of detail as to how this works.

14 So how can one question have one author? In fact,  
15 that crosses the --

16 MS. JACOBS: Your Honor, the questions do have what  
17 are the primary authors, because as you can imagine, let's  
18 say we're talking about it's the internal medicine exam, and  
19 there is an exam committee for the internal medicine exam,  
20 and there are a number of physicians who sit on that  
21 committee, and there are many different subset disciplines in  
22 internal medicine. Okay. And so an expert in one  
23 discipline, maybe it's endocrinology, gets and goes and  
24 writes, say -- I'm giving a hypothetical example, that person  
25 is assigned 10 questions. Go write 10 questions in

1 | endocrinology on these topics. That person writes the  
2 | questions, comes to the committee, and the committee reviews  
3 | them. You can understand there's primary author, maybe one  
4 | or two for the question. Okay. They do go through a  
5 | committee process.

6 |           ABIM labels the author or authors of that question,  
7 | you know, the underlying people who directed it, and then it  
8 | goes to a committee. Okay. ABIM's filings in this case and  
9 | in other cases are entirely consistent and entirely accurate  
10 | with respect to how ABIM's exam questions are drafted.

11 |           MR. MENA: Well, Your Honor, we would like -- that  
12 | is an issue of law as to who are -- for purposes of the  
13 | copyright law, who are the authorities.

14 |           The copyright law does not speak about primary  
15 | authors and secondary authors. It speaks about authors.  
16 | Just plain authors. You either are an author or you are not  
17 | an author. This issue of primary versus secondary or  
18 | whatever it is, the secondary people are, they -- that's not  
19 | what -- how copyright works.

20 |           The copyright law talks about the author. And it's  
21 | everyone. And -- well, excuse me, but I didn't want to take  
22 | their word for it that this person in particular is the  
23 | particular author of this particular question, because that's  
24 | really convenient. You know, that that -- that it turns out  
25 | that work-for-hire agreements they have produced correspond

1 as that -- if they admitted, if this is, in fact, is the  
2 case, correspond to the people listed on the -- on the  
3 list -- on the table we've been discussing, because one would  
4 expect copyright -- work-for-hire agreements from every  
5 single member of the committee, right, not just from the  
6 people they now claim without any sort of proof -- I mean, if  
7 Your Honor will look at one of the questions that they have  
8 produced -- and I was getting to that before, and we moved  
9 on, but I want to get to that again. One of the questions  
10 they have produced that we've been referring to the first  
11 one, ABIM 00054, doesn't list an author on the question.

12 THE COURT: Okay.

13 MR. MENA: It's not there. So how do I know, how  
14 does the Court know, how does the jury know that that, in  
15 fact, is the actual author?

16 The only people that -- since the questions don't  
17 seem to list an author.

18 (Simultaneous conversation)

19 THE COURT: How -- can we -- this?

20 MR. MENA: -- then we're going to presume that  
21 everybody on the -- on the committee is on author.

22 THE COURT: Okay. Can we fix this? Or is it fixed  
23 already?

24 MS. JACOBS: I mean, in terms of --

25 THE COURT: He wants to know the author of the

1 question.

2 MS. JACOBS: And we have -- we gave that in  
3 Interrogatory Response Number 11, we said ABIM identifies the  
4 following authors as persons who contributed original content  
5 to each examination question. And --

6 THE COURT: Is it broken down?

7 MS. JACOBS: It's broken down by question,  
8 Your Honor.

9 THE COURT: Okay. So I'm not -- then I'm missing  
10 the point.

11 MR. MENA: Well, the problem is, Your Honor, if  
12 you -- if you go into that document -- I don't know if  
13 Your Honor has it in front of you, but Answer Number 10, the  
14 prior answer is also a list of the questions they -- they  
15 purport to have given to us and their date of first use on  
16 the test.

17 Now, they didn't tell us exactly which of the  
18 copyrighted works at issue in the case they were first  
19 registered in, which is what's important.

20 Then they give us the date of first use, and we  
21 will assume, for the sake of argument, that they were created  
22 on the -- just prior copyrighted work that was filed into the  
23 copyright office, because the date of first use, the date it  
24 first appeared on a test. Right.

25 THE COURT: Right.

1 MR. MENA: So if you look at these, they have very  
2 different dates. And it shows, then, that the authors should  
3 be very different. Each one for each particular work, like  
4 we've been saying, each work has the authors.

5 Now, this is very important, because we -- the way  
6 they copyrighted these works were not copyrighted questions,  
7 question by questions. They were copyrighted in a bunch.

8 So they told the copyright office that the work for  
9 hire was done by a committee that they -- that they convened,  
10 right?

11 THE COURT: Mm-hmm.

12 MR. MENA: And the authors were all these people.  
13 The copyright office was not told, I would assume, that this  
14 question was authored by this question -- this person and  
15 this question was authored by this --

16 THE COURT: I don't know. I --

17 MR. MENA: I don't know either, but if you see --  
18 if you look at the -- if you look at the -- if you look at  
19 one of their -- the certificate of registration that -- that  
20 actually were on some of the -- I actually -- I actually  
21 attached or were attached to the complaint, you see that, for  
22 example -- I'll give you just an example. The title of the  
23 work is hematology module 051, 052, 053 -- cardiology modules  
24 12 -- 121, 122, 123, internal medicine module 001, and it  
25 goes on.

1           And that's just one of the copyrighted works  
2 that's -- that's Registration Number TX 7116588. And there,  
3 the author is listed as American Board of Internal Medicine,  
4 right? And so -- so just by looking at the -- at the  
5 registration, it says -- it's basically -- shows a work for  
6 hire, because it's being created either by an employee or  
7 by -- or by the work-for-hire agreements. And it is not  
8 separated into those specialty areas that counsel has named.  
9 She said -- she said, oh, each particular area has one  
10 particular author.

11           But that is not what they went to the copyright  
12 office and registered.

13           THE COURT: No, I don't think that's what she said.  
14           Ms. Jacobs?

15           MS. JACOBS: No, Your Honor, A -- on all the  
16 copyright registrations, okay, ABIM is listed as the author  
17 by virtue of the work-made-for-hire doctrine.

18           THE COURT: Right.

19           MS. JACOBS: Okay? That's accurate.

20           THE COURT: Yes.

21           MS. JACOBS: I actually don't quite understand what  
22 further information counsel is looking for. We have produced  
23 the copyright registrations. We have produced the questions  
24 that we allege that Dr. Salas infringed. We have identified  
25 by question the --

1 THE COURT: The authors.

2 MS. JACOBS: -- the specific author or authors of  
3 those questions, and we have produced the work-made-for-hire  
4 agreements for those authors.

5 And in addition, counsel was referring to  
6 Interrogatory Response Number 10, and what Interrogatory  
7 Response Number 10 does is it lists every question that we  
8 allege that ABIM alleges that Dr. Salas infringed and  
9 identifies the first time it appeared on an ABIM exam,  
10 because as you've heard, questions are reused, okay, and the  
11 dates, and you see it's the date --

12 THE COURT: The day of use.

13 MS. JACOBS: Right. It's -- so it's the ABIM exam  
14 that the question first appeared on. And we have provided  
15 them that information as well, though I actually don't think  
16 it bears on this case, but we gave it to them.

17 THE COURT: So what is it -- because I'm missing --  
18 I -- what coordination are you looking for?

19 MR. MENA: Well, this is the thing. One of --  
20 some -- the -- the Document 001 shows a production in  
21 December to Document 0052 are maybe -- yeah, 52 are the  
22 work-for-hire agreements in 2007 internal medicine exam write  
23 committee.

24 THE COURT: Right.

25 MR. MENA: They -- all -- all the committee.

1           We would like that for every year. If they can  
2 produce it for 2007, we want it for every year, because for  
3 2007, we agree that probably the author was here. But I  
4 don't think -- and -- and if you look at other -- they have  
5 other agreements they have produced later, some of -- I mean,  
6 these are signed -- even though this is 2007, they are  
7 dated -- the agreements were executed in 2011. So -- so --  
8 and some of the agreements they have produced, I don't have  
9 them here in front of me, but some of the agreements they  
10 have produced were executed in 2016. Some of the agreements  
11 were executed in 2016, just -- I mean, this year, none of the  
12 copyrighted work at issue here is older or younger than 2009.  
13 So some of the agreements they have produced were from  
14 2000- -- this year, were executed this year.

15           THE COURT: Yes.

16           MR. MENA: That leads me to believe that they don't  
17 have work-for-hire agreements for a lot of these people.

18           And -- because if they have to sign them in 2016,  
19 it's because they didn't have them before. So -- so I think  
20 that they are -- they found some people that were -- were one  
21 or two members of a particular committee or a particular  
22 year, got them to sign it, and now they purport that those  
23 people that they could actually find were the -- got actual  
24 authors of the questions. But they don't give us the entire  
25 committee on this theory that, oh, the primary author is what

1 matters. We know the law. Nothing in the copyright says  
2 that the -- that only the primary author matters. Everybody  
3 who authored something matters. So on -- and they've been  
4 saying repeatedly that this is authored by a committee, this  
5 is --

6 THE COURT: No, no, no, no, no, no. That's --  
7 that's not what I'm hearing. And I don't think the record  
8 reflects that. And I -- I don't want to put any words in  
9 plaintiff's mouth. But I thought I understood the process,  
10 not unlike the process for lawyer certification, that there  
11 are authors of questions, maybe one, maybe two, I don't know,  
12 maybe three, and then they're reviewed by a larger committee.

13 MR. MENA: Perhaps.

14 (Simultaneous conversation)

15 THE COURT: Am I misstating the process?

16 MR. RIVERA-SOTO: Your Honor has it exactly right.  
17 Having been involved in the business of lawyer licensing,  
18 that is exactly how process works. People are assigned  
19 questions. They come back with the questions. And then the  
20 board of bar examiners makes the determination as to which  
21 questions will go in. They might tweak them a little bit.  
22 But they make the decision as to what goes in. But --

23 THE COURT: So the author is the author.

24 MR. RIVERA-SOTO: The author is the author.

25 MR. MENA: The tweaker is also the author. And

1 that's the problem.

2 THE COURT: How -- how do we -- how is that  
3 possible?

4 MR. MENA: Because everybody -- the final work is  
5 the final work. It's -- first of all, I don't know, since  
6 none of this, they've never stated, right, that which  
7 particular questions were authored by which particular  
8 people. Neither publicly or anything of the sort. They --  
9 they --

10 THE COURT: But Ms. Jacobs said she gave you the  
11 authors --

12 MR. MENA: Look, she gave -- she gave us --  
13 (Simultaneous conversation)

14 THE COURT: -- of the questions.  
15 (Simultaneous conversation)

16 MR. MENA: Well, she list --  
17 (Simultaneous conversation)

18 MR. MENA: She gave us -- she gave us -- she gave  
19 us --

20 (Simultaneous conversation)

21 THE COURT: -- and the questions.

22 MR. MENA: She listed them, but the questions  
23 themselves don't list an author.

24 You see, let me -- let me go back.

25 In order to -- in theory, in order to prove that

1 | you are the owner of a copyright, you just have to produce  
2 | the title of the work. Right?

3 | THE COURT: Yes.

4 | MR. MENA: Along with the author of the work.  
5 | Right?

6 | THE COURT: Yes.

7 | MR. MENA: And normally, you would -- if it's a  
8 | book, any of the books Your Honor has in the -- on bench, you  
9 | would see clearly, this is the work, because the content of  
10 | the work should not be at issue. The book has a title and an  
11 | author, and anybody with a copy of the book could be able to  
12 | ascertain what the content of the book is. Right?

13 | And then --

14 | (Simultaneous conversation)

15 | THE COURT: What about the editor?

16 | MR. MENA: There -- there could be an editor.

17 | THE COURT: Would that be an author?

18 | MR. MENA: No, the editor would not be an author.

19 | That -- the -- but, again, here the problem is different.  
20 | These questions have an author that is American Board of  
21 | Internal Medicine. Right? Which means that some people  
22 | authored the questions.

23 | They have -- they do not publicly reveal -- and now  
24 | they want us to take their word for who, in fact, authored  
25 | the questions.

1 THE COURT: Well, how else are you going to find  
2 out where --

3 MR. MENA: Well, this is why we want the entire  
4 committee, because I just don't believe that those are the  
5 authors. I believe that this is very convenient for them to  
6 have found the work-for-hire agreements with these people  
7 when, in fact, a lot of the work-for-hire agreements were  
8 executed in 2016, which leads me to believe that for years,  
9 they never executed work-for-hire agreements.

10 THE COURT: Well, why are they work for hire in  
11 2016? Are those for going-forward questions?

12 MS. JACOBS: No, Your Honor, there are -- there are  
13 all your work-for-hire agreements as well, and these  
14 work-for-hire agreements conform with later ones that were  
15 put in place.

16 Counsel's concern -- so the later work-for-hire  
17 agreements conform, you know, the practice over time is -- is  
18 the answer.

19 To the extent that counsel is questioning whether  
20 the individuals listed in Interrogatory Number 11 are really  
21 the authors, okay, of these questions, I have a couple of  
22 different solutions, Your Honor.

23 THE COURT: Certify. Is it certified?

24 MS. JACOBS: One is that will be certified.

25 Number two is that I believe that in the ABIM

1 computer system, there may be a field where you print out --  
2 you print out these questions. There may be a field for  
3 author, and I can confirm that with the client. And if there  
4 is, they can reprint out the questions that we previously  
5 produced with an author field. And I can ask them whether  
6 that's possible.

7 The third thing is they're going to take a  
8 deposition.

9 THE COURT: Right. So they're going to -- inquire  
10 as to whether or not they can produce this field or list from  
11 their computer system.

12 MR. MENA: No, we're going to take a deposition,  
13 and even if I take a deposition, I mean who -- who actually  
14 has personal knowledge as to who the -- who the -- I don't --  
15 are they --

16 (Simultaneous conversation)

17 MR. MENA: Is the deponent in the deposition going  
18 to say, oh, the computer system says this?

19 I mean, I don't know --

20 THE COURT: I don't know.

21 MR. MENA: -- if the computer system has been  
22 tampered with. I don't --

23 (Simultaneous conversation)

24 MS. JACOBS: What are you saying?

25 (Simultaneous conversation)

1 MR. MENA: No, that's what your side -- this is  
2 what your side is for. You know?

3 THE COURT: All right. All right. Listen, we --  
4 listen. I appreciate the fact that you are -- you want to  
5 put them in the jury room? Thank you.

6 I appreciate the fact that you are suspicious. I  
7 appreciate it.

8 But for the purposes of discovery, it's not going  
9 to be endless. There are other ways to test credibility,  
10 such as deposition, such as cross-examination, but it's not  
11 going to be an ad infinitum search for testing credibility.  
12 If Ms. Jacobs is willing to produce a computer -- if it is  
13 available, a computer printout to see if it matches up with  
14 the information you have, it's -- you're searching and  
15 searching and searching, and this search has got to end. And  
16 I'm the one who's going to put an end to it.

17 MR. MENA: I agree, Your Honor, and if she's going  
18 to produce that, we would like to --

19 THE COURT: She's going to produce a computer  
20 printout. And if you think somebody tampered with the  
21 computer, I mean, we take -- I can't go to the hundredth  
22 degree of doubt with you. I can't do that.

23 MR. MENA: I understand. But -- for -- and -- for  
24 a computer printout to be admissible, there are certain --  
25 there are certain requirements that --

1 (Simultaneous conversation)

2 THE COURT: You'll -- you'll be able to have a  
3 custodian, I'm sure, listed on that, to make it admissible.  
4 If, in fact, it gets to be admissible. I don't know that.

5 MR. MENA: Right, of course, of course.

6 THE COURT: We're way ahead of ourselves.

7 MR. SCHLAFLY: Of course, of course, of course.

8 THE COURT: So they're going to search for a  
9 computer program that matches up author and question. Is  
10 that the specific --

11 MR. MENA: Yes, we want -- we want to know who  
12 the -- who the author of the question was so then we can  
13 ascertain whether or not, in fact, we have all the  
14 work-for-hire agreements or we don't.

15 THE COURT: But heed my -- heed my advice to you,  
16 Judge Hayden does not want to play anymore.

17 MR. MENA: I under- --

18 THE COURT: She wants this case to trial. And  
19 that's why I'm here. We're going to trial. And there's your  
20 jury. We're going to trial. And --

21 MALE SPEAKER: We'll take it.

22 THE COURT: And we're going to move the case.

23 So I want you to sort of really get focused as to  
24 the major issues here, to move this on.

25 And especially for your client. It's time to wrap

1 | this up.

2 | MR. MENA: So we agree.

3 | THE COURT: Let me quickly -- I'm going to take a  
4 | 5-minute away from you and deal with the Rule 16 there. But  
5 | let me suggest that you discuss this protective order,  
6 | because the way I see it, it addresses depositions, times and  
7 | places, and I know I've forbidden you from meeting and  
8 | conferring, but you're on my playground right now. Can you  
9 | meet and confer in the courtroom and try and resolve the  
10 | protective order -- because as I see it, that's just a  
11 | deposition schedule.

12 | MR. MENA: Yes, of course. And I -- Your Honor,  
13 | it's two things. It was -- it was -- it was a request -- a  
14 | notice of deposition that included a request for production  
15 | of documents.

16 | THE COURT: Right.

17 | MR. MENA: And the request, the time for the  
18 | request was 14 days.

19 | THE COURT: Okay.

20 | MR. MENA: So we -- we objected based on that.  
21 | And today, I think, would be Day Number 30.

22 | THE COURT: Can we just work this out? This is --  
23 | this is --

24 | MR. MENA: Yes, of course, of course.

25 | THE COURT: -- lawyer stuff.

1 MR. RIVERA-SOTO: I'm sorry, Your Honor, but is  
2 Your Honor referring to the motion for a protective order?

3 THE COURT: Yes.

4 MR. RIVERA-SOTO: Okay. I think the record should  
5 be clear that deposition was originally scheduled for the  
6 last day of the discovery period.

7 THE COURT:

8 MR. RIVERA-SOTO: And we were told that the world  
9 would come to an end if Dr. Salas had to come here on  
10 Tuesday. I'd like, with no small bit of irony, to point out,  
11 Dr. Salas is here today. How could he get here today when he  
12 wouldn't be here on Tuesday?

13 THE COURT: Well, we going to get the dep done.  
14 Let's not get into this. We're going to get the dep done.  
15 You're going to sit and schedule -- I don't care if you do it  
16 tomorrow. You're going to sit and schedule it, because  
17 extending discovery -- let me you, sometimes I extend  
18 discovery, and Judge Hayden later that night, goes into the  
19 docket and backs the date down. So there's no guarantee that  
20 extensions are going to be permanent for you, and that is the  
21 truth.

22 The other thing I want to touch upon -- and this is  
23 food for thought after discussing with Judge Hayden about  
24 this case and getting it to trial, that there are motions to  
25 dismiss on the docket that through our discussion, we do not

1 feel mutually that they are ripe as motions to dismiss.

2 I suggest to you, especially your motion with  
3 respect to contract issues, that those motions -- I suggest  
4 to you and that you think about this while I'm gone -- be  
5 better filed as summary judgment motions, as final motions  
6 and dispositive motions in the case.

7 Now, I'm going to leave you with that food for  
8 thought. You don't have to answer me.

9 MR. RIVERA-SOTO: Your Honor, just wanted to point  
10 out that in respect of Dr. Salas's deposition, I just want  
11 some dates as to when he will show up.

12 THE COURT: You're going to get them right now.

13 MR. RIVERA-SOTO: I want to know when he's going to  
14 show up, and I want to know when I'm going to get my  
15 documents.

16 THE COURT: You're going to get -- you're going to  
17 get --

18 MR. RIVERA-SOTO: That's all.

19 THE COURT: -- dates and documents right now.  
20 You're going to talk about that. And if you don't agree,  
21 I'll impose dates. I'm happy to do that.

22 MR. RIVERA-SOTO: Thank you, Your Honor.

23 THE COURT: So give me 10 minutes to take care of  
24 this other conference that I do realize is on.

25 (Recess: 4:05 P.M. to 4:19 P.M.)

1 MS. JACOBS: We agree to take Dr. Salas's  
2 deposition at our office in Cherry Hill.

3 THE COURT: Okay.

4 MS. JACOBS: On Tuesday, June 29th.

5 However, they would like to take Mr. Mannes's  
6 deposition -- he's from ABIM.

7 THE COURT: Right.

8 MS. JACOBS: Either the day before or the day  
9 after.

10 THE COURT: Right.

11 MS. JACOBS: I'm not able to contact him -- Tuesday  
12 the 28th.

13 And I'm not able to contact him this second.

14 MR. SCHLAFLY: Well, Your Honor, we can't make two  
15 trips. I mean, it's just too much of a burden.

16 MS. JACOBS: The case --

17 MR. SCHLAFLY: -- litigation -- we're willing to  
18 work with them and produce Dr. Salas Rushford, but it has to  
19 be back to back with Mr. Mannes so it's one trip and it  
20 doesn't get unreasonably expensive.

21 THE COURT: Can't we just make it one trip? Is  
22 there a way to do that?

23 MS. JACOBS: Your Honor, I will do everything I  
24 can --

25 THE COURT: You will try to do that.

1 MS. JACOBS: I will try to do that, but I --

2 THE COURT: I will take that representation.

3 MS. JACOBS: I can't -- I can't --

4 THE COURT: If it's a problem, you'll call me, and  
5 we'll figure it out.

6 MR. SCHLAFLY: And then we could just move  
7 Dr. Salas Rushford's back to back with a day when Mr. Mannes  
8 is available.

9 THE COURT: Okay. Okay.

10 MR. RIVERA-SOTO: Your Honor, will we need to  
11 reissue our notice of deposition?

12 THE COURT: No, we'll go on the record and put on  
13 the record the depositions are going to occur back to back,  
14 so Dr. Salas Rushford doesn't have to make two trips. And  
15 you will organize them either on the date that you had for  
16 the doctor and the day before for the ABIM witness, or on two  
17 other consecutive days when the other witness may be  
18 available.

19 MR. RIVERA-SOTO: Just -- just to make sure that  
20 we're clear, Your Honor.

21 THE COURT: Go ahead.

22 MR. RIVERA-SOTO: They have not yet noticed  
23 Mr. Mannes's deposition. We have issued a notice --

24 THE COURT: Did you -- could you notice it?

25 MR. SCHLAFLY: Of course, Your Honor, of course.

1 MR. RIVERA-SOTO: -- they've issued a notice --

2 THE COURT: I understand.

3 MR. RIVERA-SOTO: -- for the 31st.

4 THE COURT: Okay.

5 MR. RIVERA-SOTO: My question is, does that notice  
6 still require him to come in on the 28th of June? Or do we  
7 have to reissue it?

8 THE COURT: No, I don't think you'll have to  
9 reissue.

10 MR. RIVERA-SOTO: Okay. That the documents that  
11 were requested as part of that?

12 THE WITNESS: Yes.

13 MR. RIVERA-SOTO: What can we expect those?

14 MR. MENA: We --

15 MR. SCHLAFLY: We produced many of the responsive  
16 documents. We've made some objections, and then asked for  
17 tax returns back 10 years. We gave them a bunch of tax  
18 returns, which is unusual, so we're willing to respond to the  
19 reasonable requests in a timely manner. We have. We have  
20 produced -- documents.

21 MR. RIVERA-SOTO: Well, in a timely manner, I just  
22 wanted to know when that is. That is all I want to know.

23 THE COURT: Because they need the documents before  
24 the deposition.

25 MR. SCHLAFLY: Yeah, and --

1 THE COURT: So are you going to be mindful of that?

2 MR. SCHLAFLY: Of course. Of course.

3 THE COURT: And if not, I'm going to get a letter,  
4 and I'm going to get you on the phone, and we're going to  
5 have another discussion.

6 MR. SCHLAFLY: Yeah, no we'll do it in a timely  
7 manner.

8 THE COURT: The idea is to move the case.

9 MR. SCHLAFLY: Yeah, so, Your Honor, we'd like it  
10 just to be one deposition for the record too. I mean, we  
11 have these counterclaims, and we don't want them to get a  
12 second chance at deposing.

13 THE COURT: Well, if all the documents are  
14 produced, there'll be no need to have a second deposition.  
15 If the documents are not produced, then everybody's always  
16 subject to a second deposition.

17 MR. SCHLAFLY: Yes, Your Honor.

18 THE COURT: That's the way of the world. What else  
19 do we have to resolve today that is of urgent moment?

20 MR. MENA: Okay, well, we --

21 THE COURT: Let me -- let me just say this to you.  
22 I think what we've resolved is the work-for-hire area.

23 I will tell you that I will not permit the  
24 settlement agreement to be disclosed. I am not convinced  
25 it's necessary at this point.

1 I have to balance proportionality with respect to  
2 what I consider to be confidentiality and topically what's  
3 involved in the settlement privilege, even though we're not  
4 settlement privilege jurisdiction, I have high regard for the  
5 confidentiality of the settlement agreement.

6 That's not to say that is with prejudice forever.  
7 But I am not satisfied that you have shown me there's enough  
8 smoke for there to be fire in that settlement agreement. And  
9 I know that you're going to say, well, that's a Catch-22  
10 because we don't have the settlement agreement, we don't know  
11 what's in it. But at this time, I'm certainly not convinced.  
12 If throughout depositions, there arises another occasion for  
13 you to -- to raise this issue again, I will consider it.  
14 That's my ruling with respect to that.

15 With respect to the tests, I'm going to ask that  
16 all test questions be turned over for attorney's eyes only.

17 MR. RIVERA-SOTO: When you say all test questions,  
18 what do --

19 THE COURT: That the doctor took on his test.

20 MR. RIVERA-SOTO: The questions on his test.

21 THE COURT: Yes.

22 MR. RIVERA-SOTO: Not just the questions we  
23 claim --

24 THE COURT: No.

25 MR. RIVERA-SOTO: -- that he infringed.

1 THE COURT: Well, you already turned those over.

2 MR. RIVERA-SOTO: Right.

3 THE COURT: Yeah, I'm asking -- I'm ordering that  
4 you turn over all tests for attorney's eyes only.

5 MR. RIVERA-SOTO: Well, Your Honor, that brings us  
6 to the next problem, which is we don't have a discovery  
7 confidentiality order in this case.

8 THE COURT: But I have ordered attorney's eyes  
9 only.

10 MR. RIVERA-SOTO: I understand that.

11 What I'd like Your Honor to also direct is that  
12 we've made the offer let's enter into a standard --

13 THE COURT: Can we just -- why don't you want to  
14 enter into that?

15 MR. MENA: No, because the standard order covers  
16 all the discovery, and then --

17 THE COURT: Yes.

18 MR. MENA: There's a presumpt- -- one --

19 THE COURT: But you mark some things as  
20 confidential --

21 MR. MENA: Well --

22 THE COURT: Listen to me. If you don't agree, you  
23 bring it to me on a document-by-document basis.

24 MR. MENA: Well, I think -- I think the only thing  
25 that is -- that is conceivably of -- worthy of protection in

1 | that sense here are the -- are the questions that are still  
2 | live on the test, and we are perfectly willing to have those  
3 | be for attorney's eyes only.

4 |           THE COURT: But what about the rest of discovery?  
5 | Why shouldn't there be markings of --

6 |           MR. MENA: Because --

7 |           THE COURT: -- markings of confidentiality --

8 |           (Simultaneous conversation)

9 |           MR. MENA: Because there's nothing --

10 |           (Simultaneous conversation)

11 |           THE COURT: -- especially when there's protectable  
12 | interests?

13 |           MR. MENA: Because there's no -- nothing else  
14 | confidential and nothing else that anybody has alleged to be  
15 | confidential in this -- in this matter. And the public --  
16 | and we have a right to have public discovery. There's --  
17 | there's --

18 |           THE COURT: I don't disagree with you --

19 |           (Simultaneous conversation)

20 |           MR. MENA: -- ample case law --

21 |           (Simultaneous conversation)

22 |           THE COURT: -- I am very mindful of the public  
23 | awareness and access to courts and filings. Very aware. I'm  
24 | one of the hyper-aware judges with respect to that and  
25 | requests for confidentiality and sealing.

1           But in the future, are you saying that there are  
2 documents you believe that will be marked confidential?

3           MR. RIVERA-SOTO: Well, if we have a  
4 confidentially -- a confidentiality order along the terms of  
5 what the appendix local rules provide, we'll be fine, because  
6 then at that point, it is incumbent upon us and in respect of  
7 them, it's incumbent upon them to designate what part of  
8 whatever is supposed to be subject to that order.

9           I'm okay with that, Your Honor. I think that's the  
10 way --

11           THE COURT: They don't want to enter into a  
12 confidentiality, so my next step is this. If there is a  
13 document that you believe to be confidential, you will notify  
14 chambers, and I will make a determination.

15           MR. RIVERA-SOTO: And what do we do in depositions  
16 when somebody goes into an area that we believe to be  
17 confidential?

18           THE COURT: Well --

19           MR. RIVERA-SOTO: Normal people say, we designate  
20 this portion of the deposition confidential.

21           THE COURT: And -- and -- confidential, and then  
22 you can bring it to me. Do the same thing.

23           MR. RIVERA-SOTO: Okay.

24           THE COURT: You know what? Same process. We're  
25 operating under a confidentiality without an agreement,

1 | because if they want to earmark it as confidential for me to  
2 | later decide, they can do that.

3 | MR. MENA: That's fine, that's fine.

4 | THE COURT: So in effect, we have an unwritten  
5 | confidentiality agreement that the Court will supervise.

6 | MR. MENA: Right, but the presumption is that  
7 | documents are not confidential unless --

8 | THE COURT: I think that's a presumption in the  
9 | confidentiality agreement as well.

10 | MR. MENA: Oh, yes, but --

11 | THE COURT: Okay.

12 | MR. MENA: -- I think imports different meaning.

13 | MR. RIVERA-SOTO: Your Honor, with all due respect,  
14 | Your Honor can enter the confidentiality agreement --

15 | THE COURT: Yes, I know. I have essentially  
16 | without having a written one.

17 | MR. RIVERA-SOTO: Okay.

18 | MR. SCHLAFLY: Well, just for clarification,  
19 | Your Honor.

20 | THE COURT: Yes, Mr. Schlafly.

21 | MR. SCHLAFLY: Everything they produced so far is  
22 | not confidential.

23 | THE COURT: I understand.

24 | MR. SCHLAFLY: And the only thing we can vision  
25 | that would be produced in the future that might be

1 confidential are live exam questions.

2 ABIM has hurt the reputation of Dr. Salas Rushford.  
3 I mean, they post on their website disparaging things about  
4 him. We can't have our hands tied and be --

5 THE COURT: Okay.

6 MR. SCHLAFLY: -- because things are not -- okay.  
7 Thank you.

8 MR. RIVERA-SOTO: Your Honor, the only thing posted  
9 on our website is that his certification was suspended. And  
10 it's suspended for a period of seven years.

11 Now, if we want to talk about posting on the  
12 website, we'll be happy to talk about that. But I --

13 (Simultaneous conversation)

14 THE COURT: Somehow, I don't think I want to go  
15 into this --

16 (Simultaneous conversation)

17 MR. RIVERA-SOTO: But I think that's a fight that  
18 they're going to mark -- they're going to lose.

19 THE COURT: I don't want to go into this.

20 MR. RIVERA-SOTO: I didn't think Your Honor did,  
21 but that's a fight they're going to lose.

22 THE COURT: No, not on a Friday at 4:30. But I'm  
23 sure I will hear about it in the future.

24 What else is of moment that I can address that will  
25 keep forward motion in the case? Because, as I said, we will

1 have -- and the doctor can appear by telephone for  
2 conferences, if he's otherwise hung up, sometimes.

3 MR. MENA: Okay.

4 THE COURT: You know, I don't require that parties  
5 be here necessarily unless it's for a settlement --

6 MR. MENA: Right.

7 THE COURT: -- conference, and I don't think we're  
8 going to have one in this case.

9 MR. RIVERA-SOTO: Your Honor, can we have a  
10 hard-and-fast discovery deadline?

11 THE COURT: We're going to have a hard-and-fast  
12 discovery deadline.

13 Did you think about the motions to dismiss?

14 MR. RIVERA-SOTO: And my response --

15 THE COURT: My strong suggestion.

16 MR. RIVERA-SOTO: And my response would be, if we  
17 have a hard-and-fast discovery deadline that has also a date  
18 on it by which dispositive motions must be filed, we'll be  
19 happy to withdraw our motion to dismiss the counterclaims.  
20 Without prejudice.

21 THE COURT: Absolutely without prejudice, to be  
22 refiled as summary judgment motions.

23 And so you know, that is the preferred way -- I  
24 mean, I can order that, but I would like the parties to  
25 participate in trying to manage the case the way the judge

1 and I -- Judge Hayden and I manage cases. And that's let's  
2 get all the discovery done by a hard-and-fast line. Then we  
3 can deal with all of the motions at once. At this point,  
4 motions to dismiss aren't going to change the expense, aren't  
5 going to change the discovery, and quite frankly, aren't  
6 going to tailor the case. That's why I'm suggesting that the  
7 parties withdraw and refile.

8 MR. MENA: Okay, we'll -- we'll -- I mean, we'll  
9 take it into --

10 (Simultaneous conversation)

11 THE COURT: Please take it under serious  
12 consideration.

13 MR. MENA: Yes. And our motion to dismiss was  
14 based on two issues, and I don't know --

15 THE COURT: They need exploration. The statute of  
16 limitations issue is not -- is not a yes or no. It's --  
17 there are issues of material fact. That's what I'm --

18 MR. MENA: Okay.

19 THE COURT: -- suggesting to you. I'm not saying  
20 it's a bad motion. I'm saying it's a little early.

21 MR. MENA: Okay.

22 THE COURT: And Judge Hayden and I both operate on  
23 let's have all the discovery on the table, and then we're  
24 educated in deciding motions.

25 MR. MENA: Okay.

1 THE COURT: Rather than saying your motion is  
2 denied, you need discovery.

3 Are you hearing me?

4 MR. MENA: Yes.

5 So that brings us, Your Honor, getting back to  
6 the --

7 THE COURT: We're going to do dates.

8 MR. RIVERA-SOTO: Is the answer to yes or no?

9 THE COURT: He says he's going to take it under  
10 advisement.

11 MR. RIVERA-SOTO: Oh, okay.

12 MR. MENA: So that brings us, Your Honor, to if we  
13 can get back to the specific requests that we were discussing  
14 earlier.

15 THE COURT: Yes, we can do some more of them.

16 MR. MENA: Two exactly, let's see -- let's say, for  
17 example, Request 44 and 45, and we will go back to some  
18 others, but 44 and 45, for example, are documents, both of  
19 them showing --

20 (Pause in proceedings)

21 MR. MENA: -- they're on page 8.

22 THE COURT: Go ahead.

23 MR. MENA: Yes?

24 THE COURT: Continue.

25 MR. MENA: Okay. 44 and 45, which ABIM say are not

1 relevant, both of them, and one of them says produce -- exact  
2 property of documents concerning how ABIM learned of  
3 Dr. Arora's use and disclosure of -- examinations on or  
4 before August 20th, 2009, and produce two exact copies of  
5 documents pertaining or related to your investigations,  
6 inquiries, so-and-so, to ascertain whether or not Mr. Arora  
7 or ABR or any other textbook company have obtained actual  
8 ABIM questions.

9           Now, those two requests which they say are  
10 irrelevant, may be in another copyright case could be  
11 irrelevant when there was no -- not an issue of time-barring  
12 before the Court. But now, in a copyright case like this,  
13 they are -- they're fair warning is definitely an issue.

14           So how they learned, what they learned and when  
15 they learned it is really important. And they say it's --  
16 irrelevant, so I think that's something that we really want  
17 to -- to have access to.

18           THE COURT: Okay. Let's stop there. Just one at a  
19 time so I can --

20           MR. MENA: Okay. Okay.

21           THE COURT: How you learned and when you learned.

22           MS. JACOBS: Your Honor, how ABIM learned and when  
23 it learned of what precisely?

24           THE COURT: I suppose -- do you mean when they  
25 identified the email address with your client?

1 MR. MENA: No, no, no, we are talking about  
2 Dr. Arora, because he was --

3 THE COURT: Oh.

4 MR. MENA: Because, again --

5 THE COURT: How they learned that Dr. Arora what?

6 MR. MENA: Was -- was, in fact -- had, in fact,  
7 test questions in their -- in his -- in his exam -- in his --

8 THE COURT: Why is that relevant? Go back.

9 MR. MENA: Well, two things. First, it's relevant  
10 because it may go to fair warning in terms of statute of  
11 limitations, because if they are claiming against  
12 Dr. Arora -- against Dr. Salas Rushford something that was  
13 occurring publicly in Dr. Arora's course before, and they say  
14 you're not -- I mean, the -- the complaint goes into some  
15 detail as to what Dr. Arora was asking students to do, and --  
16 you know, it goes into a lot of detail that does not pertain  
17 particularly to Dr. Salas Rushford. Right?

18 So they -- they put it into contention, how they  
19 learned of this.

20 THE COURT: So you want them to tell you when  
21 Doctor --

22 MR. MENA: When they learned -- when they --

23 THE COURT: When they learned that Dr. Arora had  
24 test questions?

25 MR. MENA: Yes, and every -- and the -- and the --

1 and the documents about the investigations that they made to  
2 ascertain that if, in fact, those were test questions.

3 Those -- I mean, one of -- one of the things they  
4 say is that they -- somebody saw it on the -- website, one of  
5 the questions. Right?

6 THE COURT: Yeah.

7 MR. MENA: So we want to know what question this  
8 was that -- website is no longer public, but presumably, they  
9 have a copy of it, because they brought a, you know, an  
10 action against him so that presumably they have the copy of  
11 what they saw --

12 THE COURT: How does that go to statute of  
13 limitations?

14 MR. MENA: Because --

15 THE COURT: What does it matter what Arora knew?

16 MR. MENA: Because this whole situation is -- we --  
17 we believe, could go to whether fair warning as a -- whether  
18 warning -- or actual warning or actual knowledge about  
19 Dr. Arora needs to fair warning about his students.

20 THE COURT: But what if it did? Then they had to  
21 identify the particular students after that.

22 MR. MENA: Well, but according to -- that depends,  
23 because according to -- according to their complaint, it  
24 all -- Dr. Arora's gave defendant a number of questions  
25 within the course, right?

1 THE COURT: Right.

2 MR. MENA: So -- and defendant, one of the things  
3 we had raised, the possibility -- or actually another  
4 possibility, we have stated in so many words, that the  
5 handwritten notes where they're claiming copyright  
6 infringement, were, in fact, his class notes from the Arora  
7 course.

8 THE COURT: I'm still not following. If they  
9 didn't learn the identity of your client until a period  
10 afterward where they had to -- I think there were two  
11 nonnamed email addresses, they had to discover the owner of  
12 those email addresses, what does that have to do with the  
13 statute of limitations and your client?

14 MR. MENA: Because there's a -- there's -- when the  
15 discovery -- they have -- say that the discovery rule  
16 applies. The discovery rule is a way to extend the statute  
17 of limitations.

18 THE COURT: I -- I know that.

19 MR. MENA: And the discovery rule requires certain  
20 things for it to be usable. And one of them is that you have  
21 fair warning within the allotted time.

22 THE COURT: I understand that. But I -- what I am  
23 not understanding -- do you have a response to this?

24 MR. MENA: And -- and there's another issue about  
25 the statute of limitations that I wanted to raise.

1 THE COURT: Okay.

2 MR. MENA: And the other issue is, again, as to our  
3 counterclaims --

4 THE COURT: Right.

5 MR. MENA: -- we state that ABIM should have  
6 warned -- once ABIM knew, perhaps --

7 THE COURT: Should have warned who?

8 MR. MENA: Every person who was going to take their  
9 test, and they knew who these people were, because they --  
10 they applied to take test on or about November or December of  
11 the year before they take the test. And the Arora course  
12 took place on May of the year they took the test. So the  
13 test is on August. The Arora course was in May, and the  
14 application for the test was on the prior November or  
15 December.

16 THE COURT: Uh-huh.

17 MR. MENA: We say, if you knew that this was  
18 happening in the Arora course before Dr. Salas Rushford and  
19 everybody else took the Arora course, why didn't you warn  
20 them?

21 THE COURT: What's the obligation to warn? Where  
22 is --

23 MR. MENA: Because they have -- they have a duty of  
24 good faith to their contractual partners.

25 THE COURT: But -- so this is pursuant to your

1 | contract claim.

2 | MR. MENA: Yes.

3 | THE COURT: Do you want to respond?

4 | MR. RIVERA-SOTO: Honestly? No, I don't.

5 | THE COURT: I'm not -- I don't think this is  
6 | relevant. So, no.

7 | What question is that? 45?

8 | MR. RIVERA-SOTO: 44 and 45.

9 | THE COURT: I'm reining this case in. I don't know  
10 | how many times I'm going to say it. We're -- don't lose  
11 | sight of the forest through the trees or the trees in the  
12 | forest.

13 | MR. MENA: Okay.

14 | THE COURT: Very often, lawyers tend to dilute  
15 | their -- their main points by going too far afield and  
16 | confusing the trier of fact.

17 | MR. MENA: Okay. 47 refers to documents relating  
18 | to when ABIM learned that Dr. Salas Rushford attended the  
19 | Arora course. And it goes to, again, the issue -- that one  
20 | is in statute of limitations because there, I think again,  
21 | the issue of fair warning for statute of limitations is  
22 | important.

23 | Maybe if Your Honor says that it is not relevant  
24 | when they learned about Dr. Arora, I think when they learned  
25 | that Dr. Salas Rushford took the Arora course, then that may

1 put them on fair warning in terms of the statute of  
2 limitations, because if they say, as they say in the  
3 complaint, that Dr. Arora gave them, gave everybody who took  
4 the test hundreds of thousands of questions that were on the  
5 test, and we are saying that the handwritten documents that  
6 are attached to the complaint were his notes from the course.

7 THE COURT: Right.

8 MR. MENA: Where Dr. Arora was doing this, clearly,  
9 I mean, the notes are going to reflect what was not -- on the  
10 course. Right? So it would certainly as to at least notes  
11 taken during the course, it would certainly put them on  
12 warning that people are certainly copying, right, the  
13 questions that Dr. Arora is giving people out, you know,  
14 on -- as a matter of -- of teaching the course.

15 Now, the people might not be knowing, they may not  
16 know they are, in fact --

17 THE COURT: Yeah, that's a stretch.

18 MR. MENA: Well, the people taking the notes don't  
19 know that they're questions. But by the time they realize  
20 that Dr. Salas Rushford took the course, which we believe to  
21 have been at least when they took -- they seized the  
22 documents from Dr. Arora, that certainly puts them on fair  
23 notice against all the -- all -- remember, Your Honor, that  
24 they -- they seized -- let me -- let me draw a time line  
25 here. They seized the documents -- the alleged infringement

1 | occurred in August 2009. They seized the document from  
2 | Dr. Arora in December 2009.

3 | THE COURT: Yes.

4 | MR. MENA: They settled with Dr. Arora in June  
5 | 2010.

6 | THE COURT: Yes.

7 | MR. MENA: And they claim to have not been able to  
8 | identify Dr. Salas Rushford until January 2012.

9 | THE COURT: Right.

10 | MR. MENA: That's over a year and a half later  
11 | after -- now, we have -- and we have -- we have Dr. Arora on  
12 | deposition saying that they never asked him who the owner of  
13 | the Padrino Junior Yahoo.com account was. So -- and, again,  
14 | as to -- to your position that you have stated that the  
15 | statute of limitations issue was not ripe because we need  
16 | documentation, we want all the documentation that we could  
17 | conceivably need in order to prove that they should have  
18 | known, at least when they had the seizure order, enough to  
19 | put them on notice to start the limitations clock running.

20 | So -- I mean --

21 | THE COURT: That is way a stretch.

22 | MR. MENA: Well --

23 | THE COURT: Again, I think you're -- you're really  
24 | getting very far afield here.

25 | I appreciate your aggression in trying to secure

1 | the most documents that you can and testing credibility of  
2 | your adversary and your adversary's client.

3 |           But I really implore you to concentrate on the  
4 | strengths of your case here rather than getting too carried  
5 | away with side issues. I speak to you an ex-trial attorney,  
6 | not just as a litigant. I don't -- I think you're off in  
7 | relevance, as I said, three or four times removed. Again, if  
8 | you go through depositions and there's something that leads  
9 | you to believe there's a solid link between your request for  
10 | this information and the statute of limitations, but -- but  
11 | you're asking me to bridge too many gaps, and I'm not going  
12 | to do that. I'm not going to let you go off into areas that  
13 | I don't find to be relevant. And, again, that's without  
14 | ruling on admissibility.

15 |           But I will tell you that when you try this case,  
16 | which I believe will go to trial, it will be pursuant to a  
17 | final pretrial order that is so tight, that none of this,  
18 | none of this will have any place in the trial. That trial  
19 | will be limited exactly to the pleadings that are left in the  
20 | case. And I can assure you that Judge Hayden will cut the  
21 | final pretrial in half from what I permit you to do.

22 |           So please focus. And I'm not -- I don't mean to --  
23 | to -- you're a terrific lawyer. He's a good lawyer. He's a  
24 | very good lawyer, the best of lawyers.

25 |           But I know from my experience of trying cases

1 before Judge Hayden myself and managing her cases for a  
2 number of years that this information is just too far removed  
3 for her to permit -- forget relevance, be anywhere near  
4 admissible, unless you've got a fire, and you're just too far  
5 removed on this.

6 Yes, Mr. Schlafly.

7 MR. SCHLAFLY: Your Honor, if I could jump in.

8 THE COURT: Schlafly, I -- yes.

9 MR. SCHLAFLY: I respectfully suggest it's the  
10 pleadings --

11 THE COURT: You don't have to say respectfully,  
12 because I know what that really means.

13 MR. SCHLAFLY: May I suggest it's the pleadings  
14 that determine relevance. And when we go to trial --

15 THE COURT: Yes.

16 MR. SCHLAFLY: -- we're stuck with their pleadings.

17 THE COURT: Yes, or whatever is left of their  
18 pleadings.

19 MR. SCHLAFLY: Well, whatever's left, I mean, they  
20 will sit, stand, in front of a jury, and they will make the  
21 same assertions that they made in these pleadings, and we're  
22 being denied the documents that we refer to --

23 THE COURT: Well, no, you're --

24 MR. SCHLAFLY: -- in their pleadings.

25 THE COURT: The statute of limitations motions will

1 | be decided not by a jury, but by the trial judge in a summary  
2 | judgment motion. So the documents that are relevant to the  
3 | statute of limitations are not for the trier of fact.

4 | MR. SCHLAFLY: Yes, Your Honor.

5 | Paragraph 50, they say ABIM spent months analyzing  
6 | the documents and information obtained from ABR. That's the  
7 | Arora thing.

8 | We are being denied access to those documents.

9 | THE COURT: To what documents? What's 50?

10 | MR. SCHLAFLY: The documents that ABIM says it  
11 | spent months analyzing documents it obtained from Arora Board  
12 | Review. It's paragraph 50 I'm reading from.

13 | THE COURT: Got it.

14 | MR. SCHLAFLY: It alleges here. Beginning in  
15 | December of 2009, ABIM spent months analyzing the documents  
16 | and information obtained from ABR.

17 | And the discovery, we're being denied access to  
18 | that.

19 | THE COURT: There's no investigation documents that  
20 | were turned over?

21 | MR. RIVERA-SOTO: No.

22 | MS. JACOBS: That's not true, Your Honor, we did  
23 | turn over the notes that were taken by the person from ABIM  
24 | who attended the ABR course.

25 | MR. MENA: Well, that -- that was --

1 MS. JACOBS: Can I finish, please?

2 With respect to the allegation in that paragraph of  
3 the complaint, Your Honor, the -- there was a substantial  
4 volume of documents that were obtained from Arora Board  
5 Review. Okay? 98 percent of it has nothing to do with  
6 Dr. Salas, because there were all of these other physicians  
7 who sent questions to Dr. Arora, who actually used their real  
8 names and their real email addresses, so they were much  
9 easier to locate. And none of those documents have anything  
10 to do with Dr. Salas. They're not relevant to this case,  
11 including documents relating to an exam, for example, the  
12 gastroentero examination that he didn't take.

13 MR. SCHLAFLY: Your Honor, we don't have to take  
14 their word for that.

15 THE COURT: Well, I think --

16 MR. SCHLAFLY: They've alleged it.

17 THE COURT: I think, though, let me understand  
18 this, I believe what you want is how they got your client's  
19 identification?

20 MR. SCHLAFLY: And how they failed to get his  
21 identification. His name is going to be all over those  
22 documents. And, yet, they claim they couldn't find them.

23 MR. RIVERA-SOTO: Your Honor, perhaps it -- the  
24 clarification lies in the last sentence of paragraph 50 in  
25 the complaint, that counsel did not read, and it states and I

1 quote, ABIM diligently investigated the identity of the  
2 person who corresponded with Dr. Arora using the email  
3 address padrinojunior@Yahoo.com, but was unable to concretely  
4 match the email address to Dr. Salas until January 2012.

5 THE COURT: So you want to know how they  
6 identified --

7 MR. SCHLAFLY: And allegedly failed to identify  
8 him. We don't have to take their word for that.

9 MR. MENA: They're hooligans.

10 MR. SCHLAFLY: -- Dr. Salas's name is all over that  
11 stuff.

12 THE COURT: What kind of documents would exist in  
13 your search for the identity of "Padrino Junior" at Yahoo?

14 MR. SCHLAFLY: Your Honor, a document with that  
15 email address signed by Dr. Jamie Salas Rushford may be in  
16 that box. And we don't have to take their word for it.

17 But they couldn't link it. They couldn't link the  
18 email address to -- we don't have to believe them. We get  
19 those -- that box of documents, because I'll bet you, we can  
20 go in there and find -- you could link that email address to  
21 Dr. Salas Rushford right there in the box of documents.

22 MS. JACOBS: I'm not sure I follow that, but every  
23 email in ABIM's possession that was sent from the email  
24 address Padrino Junior has been produced the in this case,  
25 Your Honor.

1 MR. RIVERA-SOTO: And more to the point,  
2 Your Honor, they propounded an interrogatory that said,  
3 explain in detail all steps ABIM took to identify the owner  
4 of the padrinojunior@yahoo.com account, state the date and  
5 time of each action or step, identify the specific means and  
6 location of all actions or steps involved, and the specific  
7 rebuttal of each action or step. Identify all persons  
8 involved in any way in each action or step -- are you okay?  
9 Are you still with me? I don't want to lose you. Regardless  
10 of whether they did so on behalf of ABIM or of any third  
11 party.

12 There is an answer to that interrogatory that goes  
13 for a page and a half.

14 THE COURT: Describing the steps that you took?

15 MR. RIVERA-SOTO: Yes, Your Honor. And it is -- it  
16 is at the Document Number 95-7 at pages 5 and 6.

17 MR. MENA: And the answer, Your Honor, the first  
18 thing it talks about is that on December 8th, 2009, ABIM  
19 executed an *ex parte* seizure order against the Arora Board  
20 Review. Although ABIM did not know it at the time, among the  
21 tens of thousands of pages of documents recovered from the  
22 Arora Board of Review, were the emails sent. So they, in  
23 their own answer, they are referring to those documents.

24 MR. RIVERA-SOTO: Your Honor, they need to stop not  
25 reading complete sentences. Okay? Because email sent to

1 | Dr. Arora by defendant containing infringing conduct and  
2 | using the padrinojunior@yahoo.com email address. That's the  
3 | rest of that answer that counsel managed to not --

4 |           MR. MENA: No, I -- I know what it says. And she  
5 | has it in front of her.

6 |           What I'm saying is that you are referring to those  
7 | documents repeatedly. And we want to see them.

8 |           MR. RIVERA-SOTO: To which I ask why.

9 |           THE COURT: What are these documents.

10 |           MR. RIVERA-SOTO: What point? What's the point?

11 |           THE COURT: What are the documents that -- that  
12 | they're requesting. Tell me what --

13 |           MS. JACOBS: Well, Your Honor, if they're asking  
14 | for the tens of thousands of pages of documents that we  
15 | seized from Dr. Arora, they are referring to all of the  
16 | communications between Dr. Arora and many other physicians,  
17 | not Dr. Salas, in which other physicians sent questions to  
18 | Dr. Arora, all kinds of back-and-forth.

19 |           THE COURT: Are there emails from Arora to  
20 | Dr. Salas Rushford?

21 |           MS. JACOBS: They have been produced. We have  
22 | produced all communications.

23 |           THE COURT: So what are you missing?

24 |           MS. JACOBS: What we -- Your Honor, to be clear,  
25 | what we are not turning over are communications between

1 Dr. Arora and anyone other than Dr. Salas.

2 MR. SCHLAFLY: No, they haven't turned over any of  
3 those documents except she says they turned over the emails.

4 THE COURT: Right.

5 MR. SCHLAFLY: But if a student list, list of  
6 students in the class, for example.

7 THE COURT: Why would that be relevant?

8 MR. SCHLAFLY: It would list Dr. Salas Rushford as  
9 a student in the class, may have some identifying  
10 information, may have his email address next to his  
11 registration.

12 THE COURT: Is there anything with his name on it  
13 that has not been produced?

14 MS. JACOBS: I don't believe so, but I will confirm  
15 it.

16 THE COURT: I want you to check.

17 MS. JACOBS: Yes.

18 THE COURT: And I want you to, a la privilege log,  
19 list for me, so I can review the documents *in camera*.

20 So you'll provide them for me within -- can you do  
21 it in two weeks?

22 MS. JACOBS: Yes, Your Honor.

23 THE COURT: If any exist. If not, you'll certify  
24 that no other documents exist with defendant's name on it.  
25 Between Arora and defendant. That -- that's the, I think,

1 the school of documents we're talking about.

2 MR. RIVERA-SOTO: Well, that's not what they're  
3 asking for, Your Honor. I think what we're -- we have  
4 produced communications between Dr. Arora and Dr. Salas those  
5 have all been produced.

6 THE COURT: That's what I understand.

7 MR. RIVERA-SOTO: What they're asking for is more  
8 than that. They're asking for any documents seized from  
9 Dr. Arora that has the name Jaime Salas Rushford on it.

10 THE COURT: Okay. You'll produce them to me *in*  
11 *camera*.

12 MS. JACOBS: So that would include, for example,  
13 if -- if -- if there was a spreadsheet of every person who's,  
14 you know, ever taken his course. It would include every  
15 person -- it would include every person.

16 MR. MENA: Yes, actually -- we actually asked for a  
17 list of all the -- for example, all the ABIM persons, that is  
18 people who have been in the board of directors of ABIM or  
19 whatnot, that took the Arora course, again to ascertain  
20 again -- and this is not for a copyright issue, this is for  
21 the -- for the contractual issue, to ascertain when ABIM knew  
22 that the -- the content of the Arora course is what they  
23 purported to be.

24 We're not -- we're not granting that the content is  
25 what they say it is. What we --

1 THE COURT: What does that have to do with -- how  
2 does that go to your contract claim?

3 MR. MENA: Again, they have a duty of good faith.  
4 If they know that this guy is doing this publicly in a  
5 course -- in a course, Your Honor, that is accredited for  
6 continuing medical education by the accreditation council on  
7 continuing medical education on -- and that --

8 THE COURT: So you're saying good faith and fair  
9 dealing, if they knew something bad was going on, they should  
10 have told everybody. That's your premise.

11 MR. MENA: Of course, yes.

12 THE COURT: So you want to contact all of these  
13 people to ask them if they knew that -- or participated in --

14 MR. MENA: No, they obviously knew what they --  
15 what they -- and everybody who was in the course and knew  
16 what was going on in the course, that the situation is --  
17 that's not the -- that's not what I -- what I want to do with  
18 that information.

19 What I want to do with the information is ascertain  
20 whether any person who was sitting or was ever sitting on the  
21 ABIM board of directors --

22 THE COURT: Right.

23 MR. MENA: -- took the course or, you know -- or an  
24 officer of ABIM took the course and should know what was --  
25 because all these people are board-certified, and they

1 studied somehow for a board certification test.

2 THE COURT: Right.

3 MR. MENA: And Dr. Arora was offering this course  
4 for 20 years publicly.

5 THE COURT: Yes.

6 MR. MENA: So I mean, I think there's a good -- and  
7 at least 500 people took it every year, so there's a good  
8 likelihood that at least one person ever sat on the ABIM  
9 board of directors or was an officer or, you know, sat on any  
10 board for ABIM, took this -- took this Arora course and knew  
11 what was going on, and they were thinking was anything, you  
12 know, untowards, and -- and there was -- it was not part of  
13 the questions on the test, we -- we -- I mean, Dr. Arora may  
14 have settled the case with them, but we are not of the  
15 opinion that Dr. Arora gave anyone questions from the test.  
16 And that is an issue that we may raise -- in fact, we have --  
17 we have, in fact, talked about, because the -- the questions  
18 we have from Dr. Arora in the -- in the read list that he  
19 actually gave out that we have -- that we have given to the  
20 other side, does not look at all like the questions they have  
21 produced to us.

22 THE COURT: Mr. Schlafly's -- let me interrupt you.

23 Mr. Schlafly's point is what I will consider, and  
24 that is I want provided to me in chambers, if they exist,  
25 anything that has the doctor's name on it for my review as to

1 | relevance, and if you claim privilege, you know, put a "P" on  
2 | it or mark it as privileged within two weeks.

3 | MR. MENA: Can that include --

4 | THE COURT: As far as a list of everybody that took  
5 | the course over a period of 20 years or even 5 years or one  
6 | year, I'm not -- I'm inclined not to give that. I think that  
7 | Mr. Schlafly has a little more focused attack.

8 | MR. MENA: Can we -- can we include in that list,  
9 | Your Honor, at least the mentioning of the email address as  
10 | well? Not only the name, but the email address.

11 | MS. JACOBS: We've given them every document that  
12 | contains the "Padrino Junior" email address.

13 | THE COURT: Is that certified? It's certified. Is  
14 | that --

15 | MR. RIVERA-SOTO: It was in a production,  
16 | Your Honor. We'll be happy to certify it.

17 | THE COURT: Okay.

18 | MR. MENA: It's not certified.

19 | MR. RIVERA-SOTO: If -- if that's necessary, we'd  
20 | be happy --

21 | THE COURT: Send them the certification.

22 | MR. RIVERA-SOTO: Your Honor, we've made a  
23 | representation on the record here --

24 | THE COURT: I agree that that's the tantamount to a  
25 | certification. That's correct. You've got him on the

1 record.

2 MR. MENA: Okay. That's fine.

3 MS. JACOBS: Your Honor, I submit --

4 MR. MENA: I --

5 (Simultaneous conversation) --

6 THE COURT: I'm sorry --

7 (Simultaneous conversation)

8 THE COURT: I'm ending this session because it is  
9 now 4:58 and I can barely talk. So for personal reasons, so  
10 I live for our next session.

11 MS. JACOBS: Your Honor, I just want to clarify,  
12 because I want to make sure a hundred percent that I'm giving  
13 Your Honor exactly what you've asked for.

14 THE COURT: Yes.

15 MS. JACOBS: My understanding is I'm going back  
16 through all the documents that we seized from Dr. Arora. In  
17 the documents we seized from Dr. Arora, I am going to tell  
18 Your Honor whether there is anything in -- in the documents  
19 we seized from Dr. Arora that has Dr. Salas's name on it that  
20 has not been produced to the other side, and if the answer is  
21 "yes" to that, I am giving Your Honor a list of those  
22 documents. Is that correct, Your Honor?

23 THE COURT: That -- well, I want to see the  
24 documents.

25 MS. JACOBS: Right, I'll give you --

1 THE COURT: But -- yes.

2 MS. JACOBS: -- of course, Your Honor.

3 THE COURT: And the list will say whether or not  
4 you're claiming privilege, and I can determine relevance.  
5 And of course, if I -- I'll have to have *ex parte*  
6 conversation, Mr. Schlafly, with respect to documents, if I  
7 don't understand them or need more information on relevance.  
8 That's as far as I'm going.

9 MR. MENA: Okay. Two things, Your Honor. That's  
10 fine.

11 Two things, Your Honor. As the discussion we were  
12 just having regarding what they -- what they say that they  
13 have produced in the production of documents, the problem  
14 is -- and you may sympathize with -- that when they -- when  
15 they answer, when they produce documents, they don't tell us  
16 exactly what production request they are -- they pertain to.  
17 So --

18 THE COURT: Okay. Can you do that in the future?

19 MS. JACOBS: Yes, Your Honor.

20 THE COURT: Put the number of -- that's a good  
21 point. Put the number of production request, whatever it is  
22 on the production, because that does remind --

23 MR. RIVERA-SOTO: And I assume that that is a  
24 reciprocal responsibility.

25 THE COURT: Absolutely.

1 MR. MENA: Of course.

2 THE COURT: That should happen in every course.

3 MR. RIVERA-SOTO: Don't say "of course." You  
4 haven't done it yet.

5 MR. MENA: The other thing, Your Honor, and last  
6 thing --

7 THE COURT: It's got to be the last thing, because  
8 I may not live. I may need the doctor's help.

9 MR. MENA: As to the -- as to the ABIM's request,  
10 the protective order -- the -- that the request that  
11 Dr. Salas Rushford be directed to test- -- to be deposed and  
12 all the other requests on that motion, that motion is now  
13 mooted. Right? Because we have -- we have settled on a  
14 date, and that is --

15 THE COURT: The protective order is mooted.

16 MR. MENA: Okay. The -- and its request is mooted.

17 THE COURT: So now there are more -- I didn't even  
18 ask you, do you have anything you want from them? I don't  
19 want to hear it today.

20 MR. RIVERA-SOTO: We have a request for fees under  
21 the motion for a protective order.

22 THE COURT: I know that. I know that. That -- is  
23 probably going to be denied.

24 MR. MENA: One -- and --

25 THE COURT: And I have a reason for that, but

1 again, I ask the parties to renew those applications after  
2 dispositive motions.

3 MR. RIVERA-SOTO: Okay.

4 THE COURT: Because I think that -- I have my  
5 reasons.

6 MR. RIVERA-SOTO: I understand.

7 MR. MENA: Your Honor, that reminds me that the  
8 document that Counsel Jacobs was referring to, that we have  
9 the -- that we provided the notes of the person from ABIM  
10 that went to the Arora course.

11 THE COURT: Yes.

12 MR. MENA: They provided that yesterday evening.  
13 They sent an email with 200-and-some pages yesterday evening.

14 THE COURT: Okay.

15 MR. MENA: Now, today, I learned right now what  
16 they are. The -- and I was reminded of that because the rule  
17 regarding motions to compel says that if documents that were  
18 the object of the motion are produced after the motion is  
19 submitted, then the Court must grant attorney's fees as to  
20 the cost of the motion. Including attorney's fees and all  
21 other costs of the -- of relating to the motion.

22 THE COURT: Okay. Have a seat. We're doing dates.

23 I appreciate your comments, but I will not consider  
24 awarding attorney's fees for either side on any application  
25 until after dispositive motions have been filed. Those

1 motions can be renewed.

2 MR. SCHLAFLY: Your Honor, just a real quick copy,  
3 the documents they produced late yesterday was just documents  
4 in like a Dropbox situation with no representation of what  
5 they were. And we're sort of trying to figure out what the  
6 documents relate to. It looks like one of the documents is a  
7 transcript of the --

8 THE COURT: Are they in response to your production  
9 requests?

10 MR. SCHLAFLY: They are. They appear to be. But  
11 there's no representation --

12 (Simultaneous conversation)

13 THE COURT: Okay. So you're going to have to send  
14 them the list of numbers --

15 MR. SCHLAFLY: -- about what they are.

16 THE COURT: -- that relate to the -- are they  
17 Bated?

18 MR. RIVERA-SOTO: Yes, Your Honor.

19 THE COURT: Okay. So designate the Bates to the  
20 request.

21 MS. JACOBS: Yes, Your Honor.

22 THE COURT: So they're going to give you the Bate  
23 number --

24 MR. SCHLAFLY: Yes, thank you, Your Honor.

25 (Simultaneous conversation)

1 THE COURT: -- to the request so you can figure  
2 that out.

3 MR. MENA: Thank you, Your Honor, it's going to be  
4 very helpful.

5 THE COURT: That's an old -- that's an old criminal  
6 defense attorney trick. Just dump documents. Hope they  
7 don't find the bad ones.

8 So now, we're going to do fact -- except Dan wants  
9 to talk to me off the record.

10 (Pause in proceedings)

11 THE COURT: We're going to do fact end, fact end,  
12 that means all depositions. This will be without extension,  
13 according to Judge Hayden. I will then discuss with Judge  
14 Hayden a summary judgment plan. Then I will either get you  
15 on the phone or docket it, and you can call me up and yell at  
16 me.

17 MR. MENA: Okay.

18 THE COURT: So we'll see what happens. But Judge  
19 Hayden wants to orchestrate the filing of SJs in the case.  
20 And since she's got to decide them, we'll let her do that.

21 So I'm taking bids for fact end. Let's go off the  
22 record. We're going to go off the record, folks. Okay?

23 MR. SCHLAFLY: Your Honor, may I --

24 (Conclusion of proceedings at 5:04 P.M.)

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Certification

I, SARA L. KERN, Transcriptionist, do hereby certify that the 101 pages contained herein constitute a full, true, and accurate transcript from the official electronic recording of the proceedings had in the above-entitled matter; that research was performed on the spelling of proper names and utilizing the information provided, but that in many cases the spellings were educated guesses; that the transcript was prepared by me or under my direction and was done to the best of my skill and ability.

I further certify that I am in no way related to any of the parties hereto nor am I in any way interested in the outcome hereof.

s/ **Sara L. Kern**

15th of June, 2016

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Signature of Approved Transcriber

\_\_\_\_\_  
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