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VIA TELECOPIER AND VIA CM/ECF

March 28, 2016

The Honorable Cathy L. Waldor
United States Magistrate Judge
M.L. King, Jr. Fed. Bldg. & Cthse.
50 Walnut Street - Room 4040
Newark, New Jersey 07102

Re: **AM. BD. OF INTERNAL MED. V. JAIME SALAS RUSHFORD, M.D.**
Civil Action No. 2:14-cv-06428-KSH-CLW

Dear Magistrate Judge Waldor:

This firm represents plaintiff/counterclaim defendant, the American Board of Internal Medicine, and third-party defendants, Richard Baron, M.D., Christine K. Cassel, M.D., Lynn O. Langdon, Eric S. Holmboe, M.D., David L. Coleman, M.D., Joan M. Feldt, M.D., and Naomi P. O'Grady, M.D. (collectively, "ABIM"), in the above-referenced case. Kindly accept this letter as a response to the March 23, 2016 letter ("Letter") seeking leave to file a motion to compel discovery submitted by defendant/counterclaim plaintiff/third-party plaintiff Jaime A. Salas Rushford, M.D. ("defendant"). [D.E. No. 81.]

At the outset, please accept my apologies for the delay in submitting this response; defendant submitted his Letter last Wednesday, March 23, 2016, when I was away on vacation, and today is my first day back in the office.

There is no need to rehash here the lengthy and tortured history of ABIM's efforts to resolve the many alleged "deficiencies" in its responses to defendant's discovery requests. As is evident by defendant's choice of exhibits attached to his Letter, defendant alone has written more than sixty-four pages on the subject. Conveniently, defendant omitted any of ABIM's responses to defendant's letters. More to the point, defendant failed to disclose that ABIM has produced (a) 2,400 pages of documents (and would have produced more but for defendant's continuing refusal to agree to the entry of a protective order); (b) responses and detailed objections to defendant's 141 requests for admission; and (c) objections to defendant's improperly voluminous interrogatories.

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In short, a motion to compel ABIM's production of the eight categories of documents identified in the Letter is not warranted for three reasons: (i) ABIM already has produced some of documents; (ii) ABIM already agreed to produce others; and (iii) defendant has not shown, and cannot show, how any of the remaining documents are relevant to ABIM's copyright claim or defendant's counterclaims. A review of the categories that defendant seeks and that constitute that remainder makes the point succinctly:


1. ABIM's Copyrighted Works. ABIM already has produced the examination questions that it alleges defendant infringed. Defendant's claim that he is entitled to the entire exams to support a fanciful fair use defense has no substantive merit. ABIM does not allege that defendant had access to the full exam when he obtained, copied, and disseminated hundreds of ABIM questions. Indeed, defendant acknowledges as much in the Letter. ("ABIM does not allege that Dr. Salas copied and disclosed any questions *that he saw on an ABIM examination.*" Letter, at 2 (emphasis supplied)). Rather, ABIM alleges that defendant had access to derivative works before he took the exam. Defendant already has all of the documents relevant to that claim and his defenses.
2. Work for Hire Agreements. ABIM has produced all the work for hire agreements that exist in respect of the copyrighted questions that ABIM alleges defendant infringed.
3. Arora Settlement Agreement. ABIM's confidential settlement agreement with Dr. Arora is the subject of defendant's motion to compel production addressed to Dr. Arora [D.E. No. 75], which both Dr. Arora and ABIM have opposed [D.E. Nos. 78 & 79].
4. Transcripts or Notes from the Arora Course Defendant Attended. ABIM voluntarily will produce the recordings of the Arora course that are in its possession.
5. Demographic Examination Performance Data. Simply put, "[d]emographic information about performance on the exams at issue" (Letter, at 4) has no conceivable bearing on ABIM's copyright claim or on defendant's counterclaims; defendant does not -- because he cannot -- provide any reason to conclude otherwise.
6. Documents Concerning ABIM's Investigation of Arora Board Review or Other Test Prep Companies. Likewise, these documents have no conceivable bearing on ABIM's copyright claim or defendant's counterclaims; defendant does not -- because he cannot -- provide any reason to conclude otherwise.
7. ABIM Policies Referenced in ABIM's Complaint "for Various Years." These documents have no relevance to ABIM's copyright claim and, only to the extent they applied to defendants, potentially may be relevant to defendant's counterclaims. That said, ABIM already has produced the policies applicable to defendant.
8. ABIM's Applicable Insurance Policies. ABIM will produce copies of the policies providing coverage for defendant's counterclaims.

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In the end, defendant's request for leave to file a discovery motion is nothing more than an extension of defendant's scorched earth defense tactics that bear no relation to the controversy before the Court and that certainly are not proportional to the needs of this case. For the reasons advanced here, ABIM respectfully submits that defendant should be denied leave to file a motion to compel additional discovery.

Respectfully yours,

BALLARD SPAHR LLP

By: 
Roberto A. Rivera-Soto

cc: Andrew L. Schlafly, Esq. (*VIA ELECTRONIC MAIL AND VIA CM/ECF*)