

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

**American Board of Internal Medicine
(ABIM),**

Plaintiff,

vs.

Jaime A. “Jimmy” Salas Rushford. M.D.,

Defendant

CASE No. 14-cv-06428-KSH-CLW

Hon. Cathy L. Waldor

Return date: June 3, 2016

MEMORANDUM OF LAW

in support of

Motion to Compel Discovery from
Plaintiff, to find an admission against
interest proven and for Attorney’s Fees

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IN THE UNITED STATES DISTRICT COURT
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To the Honorable Court:

COMES NOW Defendant, Counterclaim Plaintiff and Third-Party Plaintiff, Jaime A. “Jimmy” Salas Rushford, M.D. (“Dr. Salas” or “Defendant”), through his undersigned counsel, and, in compliance the Court’s Order of April 18 (D.E. 92), most respectfully states, requests and prays:

1. Background

Plaintiff, the American Board of Internal Medicine (“ABIM”), is an unelected, self-appointed, bogus "non-profit," vampire corporation; the largest of an umbrella cartel known as the American Board of Medical Specialties (ABMS) that latches itself onto the neck of every medical doctor in the United States, without any independent verification of results, accuracy or quality, demanding thousands of dollars from each physician throughout their careers for nothing in return, save the *de facto* right to practice their State-licensed profession, in all but the least desirable or exceptionally rare medical jobs in America. Accordingly, it has submitted Dr. Salas Rushford to grievous injury, including a fraudulent internal appeals process and public disparagement.

ABIM alleges here that it is the registered owner of the copyrights pertaining to a total of 50 separate secure tests, as defined by 37 C.F.R. §202.20(b)(4), which were independently registered as works-for-hire between 1986 and 2009. (Complaint ¶29 [Dkt. 1]). ABIM bases its copyright infringement case (regarding all 50 works) against Dr. Salas Rushford, an internist, on certain attachments, mostly forwarded, to his e-mail communications as a student with Dr. Rajender K. Arora (Dr. Arora), the instructor of the well-known, state continuing medical education (CME) credit-granting, Arora Board Review course (ABR), prior to his turn taking ABIM’s Examination for Certification of August 2009.

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On and since October 14, 2015, Dr. Salas Rushford submitted to ABIM (1) his First Set of Interrogatories, (2) his First Request to Plaintiff for Production of Documents and Things, and (3) his First Set of Requests for Admission.

To this date, ABIM (2) has yet to make a substantive, responsive and non-redacted production of documents, including those specifically requested that originate out of ABIM's allegations from their own Complaint as well that it has failed to produce any Electronically Stored Information ("ESI"), and (3) has yet to provide responsive answers to the request for admissions where a considerable amount of responses were blanket, non-compliant, non-specified or justified objections. On April 22, just days after it learned that the Court had allowed the filing of this Motion, ABIM submitted a very partial answer to some of the interrogatories in Defendant's six-month-old first set, plagued with so many blanket and non-specific objections and refusals to answer that we are forced to address many of them here one by one.

The answers, documents and admissions reasonably sought and requested of ABIM go to the core of the allegations made in its Complaint, as well as to the claims that Defendant has presented in his counterclaims and third party complaint.

However, despite ABIM seeking statutory damages for alleged copyright infringement of its examination, Plaintiff, for example, continues to refuse to produce in discovery the "work" allegedly infringed (the unredacted complete examinations), the settlement agreement between ABIM and the instructor of the course (which might preclude ABIM's claims against the student Dr. Salas Rushford because that case gave rise to this one), ABIM's alleged work-for-hire agreements, and other documents that are directly or indirectly referenced by ABIM's own Complaint or that pertain to issues it must prove to sustain its allegations, as discussed in detail below.

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2. ABIM Bears the Burden of Proof

“Importantly, ‘the party resisting discovery [here ABIM] has the burden of clarifying and explaining its objections to provide support therefor.’” *E.E.O.C. v. Princeton Healthcare System*, No. 10-4126-JAP (D.N.J. May 31, 2011). ABIM has not properly explained the vast majority of its objections to discovery requests.

3. Applied general standard

Unless the Court limits discovery, Rule 26 of the Federal Rules of Civil Procedure¹ permits a party to “obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense...” See Fed. R. Civ. P. 26(b)(1). The information, admissions, things or documentation sought do not have to be admissible at trial as long as they are “proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties’ relative access to relevant information, the parties’ resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit.” *Id.* While all the proportionality criteria are intertwined, the “importance of the [particular] discovery” request is best discussed specifically, along with relevancy, as to each request or category of requests. However, the other proportionality considerations, are overarching in this case and we address them generally below and ask the Court to consider all of them restated as to each particular request or interrogatory individually.

a. Amount in controversy

The Complaint is silent as to the amount of damages claimed, stating only that the amount for compensatory damages would be “proven at trial” and that the statutory damages should be the

¹ The text of the Rules was different when all the discovery requests were served and when they were supposed to be complied with. Our argument holds true regardless of the version chosen.

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“applicable” amount.² The calculation of the potential maximum of that “applicable amount” is unclear. While the Complaint alleges infringement acts in the plural [D.E. 1, ¶¶ 53, 55] and cites 50 infringed copyrighted works [¶ 29], Plaintiff keeps insisting to the Court, when it suits it, that it is “a straightforward, single-count Complaint for copyright infringement.” (D.E. 91, p. 1) Plaintiff has also insisted that the alleged infringements were not innocent but very much willful. (D.E. 91, p. 17) Since the Copyright Act allows the imposition of up to \$150,000 in statutory damages for every work infringed (17 U.S.C. §§ 504(c)(1) - 504(c)(2)), at this time the potential award requested by Plaintiff reaches the staggering (in context) amount of \$7.5 Million plus attorneys’ fees which it has also requested. (See Exhibit B, Plaintiff’s Initial Disclosures, p. 3) On the other hand, Dr. Salas Rushford has filed a Counterclaim and Third Party Complaint claiming that Plaintiff is jointly and severally liable for an amount no smaller than \$16.5 Million (D.E. 33, ¶¶75-76), a sum which is surely larger at this point. Dr. Salas Rushford is also requesting attorneys’ fees, both as a Defendant and as a Counterclaim and Third Party Complaint Plaintiff. Therefore, **the amount in controversy is certainly over \$24 Million.**

b. Importance of the Issues at Stake in the Litigation

As a reason for including the criteria of the importance of the issues at stake in the litigation, the Advisory Committee notes to the 2015 amendments to Fed. R. Civ. P. 26(b)(1) stress that,

The 1983 Committee Note recognized ‘the significance of the substantive issues, as measured in **philosophic, social, or institutional terms**. Thus the rule recognizes that many cases in public policy spheres, such as employment practices, **free speech**, and other matters, may have importance far beyond the monetary amount involved.’ Many other substantive areas also may involve litigation that seeks relatively small amounts of money, or no money at all, but that seeks to vindicate vitally important personal or public values.

² Plaintiff ABIM has represented to us that it will only pursue statutory damages while it has yet to amend its Complaint to that effect.

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2015 Advisory Committee Note (emphasis added). Those issues are of vibrant importance in this case.

First, the parties are litigating the potential **unconstitutionality**, on free speech and due process grounds, among others, of the United States Register of Copyrights' regulatory scheme which gives basis to Plaintiff's alleged copyrights. (D.E. 76-1, pp. 24-25; D.E. 87, pp. 17-20; D.E. 91, pp. 9-19) Second, but no less important, Dr. Salas Rushford's Counterclaims stress that **his very livelihood** is at stake. They go to the heart of any physician's ability to practice medicine in the United States, to define what it means to be a specialist in the United States, and how a corrupt, unelected and self-appointed private cartel, of which Plaintiff is the largest member (and which the Third Party Defendants control), has illegally taken over this **vitaly important public health regulatory issue** by spuriously and facetiously alleging membership is voluntary but convincing institutional actors that it is essential, and then demanding fees from physicians with no scientific basis and imposing its capricious beliefs by openly denying even basic due process, to the detriment of Defendant, the medical profession and the public at large. (D.E. 1, ¶¶ 7-8, D.E. 33 ¶¶ 26-27) Any of these issues alone are enough to raise this case to the level of public interest, and all of them combined serve to underscore that what is at stake here are basic issues of liberty, the right to earn a living and the most essential pursuit of happiness.

c. Parties' Relative Access to the Relevant Information

This one is very simple. We have not requested from ABIM anything to which we already have access. In fact, ABIM is the only party with access to everything we have asked of it. And, in most cases ABIM is the only entity (including non-parties) with access to what we have requested, or has not identified anyone else who may have access. (See Exhibit B, at p. 3) ABIM counsel's letter of March 17, 2016 is telling. It admits that "**ABIM has additional documents**

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that it is withholding because the parties have not yet agreed to the entry of an appropriate protective order.” See Attached Exhibit A, Letter dated March 17, 2016, from Tyler Marandola, Esq. to Andrew L. Schlafly, Esq., ¶ 2 (emphasis added).

The exception is ABIM's Settlement Agreement with Dr. Arora in the action captioned *American Board of Internal Medicine v. Arora, et al.*, No. 2:09-05707 (E.D. Pa. 2009) (“PA Case”) (Doc. Request ¶ 33; Complaint ¶ 49), of which there are only two known copies in existence, ABIM's and Dr. Arora's (who is not a party here), and ABIM is fighting us tooth and nail over getting Dr. Arora's. (D.E. 79)

d. Parties' Resources

To say that ABIM has more resources than Dr. Salas Rushford is an understatement of gargantuan proportions.

ABIM's tortious actions and actions in breach of contract against Dr. Salas Rushford and pursuing his defense of ABIM's frivolous Complaint over 1600 miles away from his home and office, have pushed Dr. Salas Rushford to the brink of bankruptcy. Dr. Salas Rushford's gross income for 2015, reflected in his recently filed tax return, was \$69,725, which after expenses turned into a net loss of \$1,875 (with an additional carryover in losses for next year). Contrast that with 2012, the year halfway through which ABIM and Ms. Langdon publicly announced that they were recommending his board certification be revoked, where Dr. Salas Rushford's taxes reflected a gross income of \$126,874 and a net taxable income of \$64,194. (See Attached Exhibit K Declaration of Dr. Salas Rushford in Support)

Comparatively, ABIM is fabulously wealthy. It had gross receipts of \$58 Million in FY

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2014³ and \$57.7 Million in FY 2015,⁴ basically all of it from fees it demands from physicians. ABIM annually spends over a million dollars on legal fees alone,⁵ and a whopping \$4.5 Million exclusively on board meetings and the ABIM President's office.⁶ This does not include the extra \$8 Million it admits to spending on administration,⁷ and \$600,000 on advertising.⁸ ABIM even unloaded on its Foundation an annual expense of \$45,000⁹ for fees related to the \$2.45 Million luxury condominium¹⁰ with chauffeurs¹¹ that ABIM maintains for use of its board members. By its own website's admission, none of those \$14 Million in annual expenses are truly related to ABIM's Exam Development or Administration, or to Self-Assessment (presumably Maintenance of Certification or MOC), or to Physician Support,¹² or to substantive Program Oversight, or even

³ The last year for which ABIM's IRS Form 990 is available. See <http://www.abim.org/about/revenue-expenes.aspx> (retrieved April 28, 2016), and see <http://www.abim.org/~media/ABIM%20Public/Files/pdf/revenue-expenses/abim-990-form.pdf> (retrieved April 28, 2016) (hereinafter ABIM 2014 Form 990).

⁴ According to ABIM's website and published consolidated financial statements. See <http://www.abim.org/~media/ABIM%20Public/Files/pdf/revenue-expenses/revenue-expenses.pdf> (retrieved April 28, 2016), and see <http://www.abim.org/~media/ABIM%20Public/Files/pdf/revenue-expenses/abim-abimfoundation-consolidated-financial-report.pdf> (retrieved April 28, 2016), at page 21 (hereinafter the FY15 ABIM Consolidated Financial Statements).

⁵ See FY15 ABIM Consolidated Financial Statements, p. 24; and see ABIM 2014 Form 990, p. 8 (showing a slightly smaller amount for that year which went to the law firm representing ABIM in this action).

⁶ See <http://www.abim.org/about/revenue-expenses.aspx> (retrieved April 28, 2016).

⁷ Id. (subtracting the legal fees from the 14% Administration expenses).

⁸ Id. (ABIM calls this "promoting awareness of Certification and MOC to external stakeholders")

⁹ See FY15 ABIM Consolidated Financial Statements, p. 24

¹⁰ See FY15 ABIM Consolidated Financial Statements, p. 16

¹¹ See Wes Fisher, "A physician investigates the American Board of Internal Medicine" (KevinMD Jan 7, 2015) available at <http://www.kevinmd.com/blog/2015/01/physician-investigates-american-board-internal-medicine.html> (retrieved April 28, 2016).

¹² These expenses on ABIM's "Call Center, physician communications, Academic Affairs and Web" seem nothing more than another \$9 Million in administrative expenses ABIM uses to maintain its stranglehold on the practice of internal medicine. After discovery is complete, we will hopefully have a clearer picture.

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to Research.¹³

Nothing we have requested of ABIM should put an appreciable dent in those resources, but the cost of arguing here over every little request does tax Dr. Salas Rushford's resources greatly. The Plaintiff in any litigation should, at a minimum, expect discovery to be requested about any and all claims it makes in its complaint, however complicated or burdensome those may result.

e. Whether the burden or expense outweighs its likely benefit

ABIM has not explained the burden or expense of any of the requests where it claims this objection. Since ABIM bears the burden of proof, this element of the proportionality analysis should be deemed waived because ABIM's silence doesn't permit us to argue the weighing of the benefits against the unspecified burdens or expenses.

4. Plaintiff's Waiver of Objections and Arguments

a. Waiver of new objections

We proceed on the understanding that, given the Court's order that we will not be allowed to reply to ABIM's Opposition to this Motion, it is too late in the day for ABIM to raise or expand objections to our requests that it has not raised up to now. They are necessarily waived. ABIM's argument should be limited to arguing the applicability and sufficiency of the objections it has timely raised and, of course, to explaining any arguments it has against ours.

b. Waiver by lateness/untimeliness

Barring stipulation or Court order, "[t]he responding party must serve its answers and any objections within 30 days after being served with the interrogatories." Fed. R. Civ. P. 33(b)(2). Defendant served his First Interrogatories on Plaintiff on October 14, 2015. (See Exhibit C, letter dated October 23, 2015 from Roberto Rivera Soto, Esq. to Marco A. Gonzalez, Esq.) Plaintiff

¹³ See <http://www.abim.org/about/revenue-expenses.aspx>.

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responded by letter on October 23, 2015 stating as its **only objection** that the interrogatories exceeded “the limit of not more than 25 interrogatories set forth in Fed. R. Civ. P. 33(a)(1).” *Id.* Plaintiff also requested “direction as to which 25 interrogatories -- including discrete subparts -- require a response...” *Id.* We responded by letter dated October 30, 2015 stating that we believed the interrogatories complied with Rule 33 but also providing the requested guidance “[i]n the interest of preventing any further delay with compliance to at least part of our discovery request.” (See Exhibit D, letter dated October 30, 2015 from Marco A. Gonzalez, Esq. to Roberto Rivera Soto, Esq.) Using the guidance we provided, ABIM replied to Defendant's First Interrogatories on April 22, 2016, about six (6) months later, and several days after learning that the Court would allow us to file this Motion, in part to require ABIM's compliance with them. (See Exhibit F, Plaintiff's Supplemental Objections and Responses to Defendant's First Set of Interrogatories, Answers No. 3, 4, 8, 9, 12, 16, 18, 19, 20, 22, 23 and 25.) This demonstrates that ABIM was more than capable of responding (and objecting to each question specifically) within the time allotted by the Rules (back in November) and simply chose not to.

The plain text of the Rule 33(b)(4) states that, “[a]ny ground not stated in a timely objection is waived unless the court, for good cause, excuses the failure.” Courts apply that rule regularly in granting motions to compel. *See Conrad v. Northumberland County*, No. 4:09-CV-01326 (M.D. Pa. November 23, 2010); *Shomide v. ILC Dover, Inc.*, 521 F. Supp. 2d 324, 331 (D. De. 2007). Plaintiff did not state any good cause in the document itself or on the cover letter accompanying it. Counsel for Plaintiff merely stated that the document was sent “[a]s a further follow-up to our meet and confer.” (See Exhibit E, letter dated April 22, 2016 from Roberto Rivera Soto, Esq. to Andrew Schlafly, Esq.) But even if that's the excuse, it is not good cause, because that meeting occurred on March 3, 2016, 50 days before Plaintiff sent its Supplemental Objections and

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Responses.

In any case, contrary to Rule 33(b)(3), **Plaintiff's Supplemental Objections and Answers are not under oath**,¹⁴ so they are not valid. See *U.S. v. \$39,557.00, More or Less, in U.S. Currency*, 683 F.Supp.2d 335, 340-41 (D.N.J. 2010); *Anderson v. Thermo Fisher Scientific*, No. 11-3394-FSH, note 1 (D.N.J. June 20, 2013); *Unzicker v. A.W. Chesterton Company*, No. 11-cv-66288, Pt. II(A) (E.D. Pa. May 31, 2012) (citing *Bracey v. Grenoble*, 494 F.2d 566, 570-72 (3rd Cir. 1974)). The fact that the answering agent is ABIM's attorney does not excuse ABIM from the verification requirement. See *Wilson v. Volkswagen of America, Inc.*, 561 F. 2d 494, 508 (4th Cir. 1977) (holding that corporation's attorney may sign and verify interrogatory). So, other than showing that Plaintiff could have answered in time (back in November) had it chosen to, the document entitled Plaintiff's Supplemental Objections and Answers is worthless as a tool of evidence and nearly worthless as a tool of discovery.¹⁵ *Sempier v. Johnson & Higgins*, 45 F. 3d 724, 736 (3rd Cir. 1995) ("interrogatories must be answered under oath and thus may be evidentiary").

c. Waiver by boilerplate

As the Court explained in *E.E.O.C.*,

'[T]he party resisting production of discovery bears the burden of establishing lack of relevancy or undue burden', 'must demonstrate to the Court that the requested documents either do not come within the broad scope of relevance as defined in FED. R. CIV. P. 26(b)(1) or else that they are of such marginal relevance that the potential harm occasioned by discovery would outweigh the ordinary presumption in favor of broad disclosure', and 'must do more than argue that to compile and produce [documents] would be burdensome.'

¹⁴ This is the reason why we will not send a Deficiency letter regarding them because the document is not a true response.

¹⁵ We will succinctly address below the objections raised by Plaintiff in the document because, since we cannot predict the Court's ruling regarding our lateness argument, we do not want the Court to think that we agree with them.

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E.E.O.C., No. 10-4126-JAP (referring to the old text of Rule 26(b)(1)) (emphasis added).

In a very recent case in the Southern District of California where, as here, the responding party had “provided a catalogue of boilerplate objections, including noting that [the] request [was] vague, ambiguous, overbroad, duplicative, and seeks irrelevant information, but [had] failed to provide any explanation for its objections,” the Court struck all the objections so made. *Herrera v. AllianceONE*, No. 14-CV-1844-BTM-WVG (S.D. Ca. March 28, 2016). The Court emphasized that “[w]here the responding party provides a boilerplate or generalized objection, the ‘objections are inadequate and tantamount to not making any objection at all.’” *Id.* (citing *Ritacca v. Abbott Laboratories*, 203 F.R.D. 332, 335 n.4 (N.D.Ill. 2001) (“As courts have repeatedly pointed out, blanket objections are patently improper, ... [and] we treat [the] general objections as if they were never made.”)).

We faced the same type of boilerplate objection when, as recounted above, ABIM responded to Defendant's First Set of Interrogatories on October 23, 2015 stating as its only objection that the interrogatories exceeded “the limit of not more than 25 interrogatories set forth in Fed. R. Civ. P. 33(a)(1),” without giving any explanation as to why even though they were numbered 1 through 25. (See Exhibit C) Plaintiff simply stated, that “in the absence of direction as to which 25 interrogatories -- including discrete subparts – require a response, [Plaintiff was] unable to respond to the interrogatories as a whole.” *Id.* We complained about the lack of specificity in the objection in our letter dated October 30, 2015, and stated that we believed the interrogatories complied with Rule 33—an argument citing to *Carpenter v. Donegan*, Civ. No. 1:11-CV-043-NAM-RFT (N.D.N.Y. March 15, 2012), that in the interest of space we adopt fully here—but that “[i]n the interest of preventing any further delay with compliance to at least part of our discovery request, we provide the additional instruction that Plaintiff answer Defendant's

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Interrogatories in this order of preference: 1, 21, 24, 2, 5, 15, 10, 11, 6, 7, 9, 8, 12, 18, 13, 17, 19, 22, 4, 3, 14, 16, 25, 23, and 20.” (See Exhibit D)

Those directions were so clear that ABIM followed them to the letter in its untimely and unsworn Supplemental Objections and Responses of April 22, 2016. (See Exhibit F) But, in them, Plaintiff also attempted to provide the basis for its original 25-question objection in the footnotes. Even though we continue to believe that our original interrogatories contained only 25 questions, we request that the Court find the original objection to be waived boilerplate (and of course that it hold that the added explanations to it six months later, after the Court allowed this Motion, be waived along with the original).

So as not to complicate the Court's docket, the arguments made in our Letter requesting leave to file this Motion (D.E. 81 and all its attachments) are fully adopted herein. In them Dr. Salas Rushford demonstrates that ABIM's oft-repeated objections, that the requests are “vague”, “overly broad” or “unduly burdensome” and that they “seek information that is irrelevant and not calculated to lead to the discovery of admissible evidence” are entirely unfounded boilerplate. The Court can appreciate that, in our deficiency letters, we painstakingly gave very particular responses to each objection ABIM has presented at the time.

Most of the objections that ABIM presents are so unreasonable as to show contempt for both the Court and opposing counsel's time and intelligence; and not the garden variety contempt that arises when a person doesn't comply with any court order, we mean the sort of patronizingly real contempt that displays an utter disdain for the truth, consequences or propriety of what is stated and forces both opposing counsel and the Court to painstakingly respond to every unsubstantiated utterance Plaintiff has thrown at the wall to see if it sticks.

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ABIM has objected to practically the entire Request for Production of Documents and to Defendant's Interrogatories. Many of the objections appear to be made in a perfunctory manner, without considering what information the request actually seeks. These include conclusory objections that the request is "overly broad" or "unduly burdensome" and that it "seeks information not reasonably calculated to lead to the discovery of admissible evidence." In this case, such objections are mere boilerplate recitations, completely unfounded in light of the governing standards. As to objections specific to each request, moreover, ABIM has not satisfied its burden of proof and complete responses should be compelled.

At this time, even knowing that we requested leave to file this Motion over a month ago, ABIM did not opportunely file a request for protective order and, considering that the Court has warned it will not permit replies to this Motion (D.E. 92), ABIM has waived the opportunity to request one. It otherwise chose to unreasonably delay discovery while letting the time allotted for a protective order pass it by.

d. Waiver by responding conditionally

"Conditional responses and/or the purported reservation of rights by a responding party are improper and ultimately have the effect of waiving the objections to the discovery requests." *Herrera v. AllianceONE*, No. 14-CV-1844-BTM-WVG (S.D. Ca. March 28, 2016). "The responses are confusing and misleading because, for example, when a party responds to an interrogatory that is 'subject to' and 'without waiving its objections,' the propounder of the interrogatory is 'left guessing as to whether the responding party has fully or only partially responded to the interrogatory.'" *Id.* (quoting *Estridge v. Target Corp.*, 2012 WL 527051 at *1-2 (S.D. FL 2012)); see also *Consumer Elecs. Assn. v. Compras And Buys Magazine, Inc.*, 2008 WL 4327253 at *3 (S.D. FL 2008) ("subject to" and "without waiving objections" "preserve . . .

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nothing and serve . . . only to waste the time and resources of both the Parties and the Court. Further, such practice leaves the requesting Party uncertain as to whether the question has actually been fully answered or whether only a portion of the question has been answered.”)

For example, ABIM's General Objection #4 to the Interrogatories and Answers Nos. 1, 2, 6, 10, 11, 14, 15, 17, and 21 are all of the same nature described in *Herrera*. Its response to No. 11 illustrates the problem. ABIM states in the Complaint that several people author or create each exam question. (¶¶ 23-24, 26) Yet, in its response to No. 11 it lists at most two names for a question, none for one, one for many and single last names for several. This information is facially incomplete and borderline useless.

e. Waiver of privilege by lack of required specificity

“When a party withholds information otherwise discoverable by claiming that the information is privileged or subject to protection as trial-preparation material, the party must... describe the nature of the documents, communications, or tangible things not produced or disclosed—and do so in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the claim.” Fed. R. Civ. P. 26(b)(5)(A). ABIM has not done so as to any of its privilege claims. “To withhold materials without such notice is contrary to the rule, subjects the party to sanctions under Rule 37(b)(2), and may be viewed as a waiver of the privilege or protection.” Advisory Committee Notes to the 1993 Amendments.

i. Attorney-Client Privilege

A party claiming attorney client privilege “bears the burden of establishing every element of attorney-client privilege, including that the communication was made in confidence and the privilege has not been waived.” *Transweb v. 3M Innovative Properties*, No. 10-4413-FSH-PS (D.N.J. July 13, 2012). The “protection of the privilege extends only to communications and not

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to facts.” *Rhone-Poulenc Rorer Inc. v. Home Indem. Co.*, 32 F.3d 851, 862 (3d Cir. 1994). None of the claims of attorney-client privilege asserted by ABIM in any document included the required descriptions that would allow us to assess ABIM's claim of attorney-client privilege as to each one (privilege log).

ii. Work Product Doctrine

The same rule applies to the work-product doctrine. And, as above, none of the claims of work product doctrine asserted by ABIM in any document included the required descriptions that would allow us to assess ABIM's claim of work product doctrine as to each one (privilege log).

f. Waiver of privilege by putting the issue in contention

Interrogatories Nos. 2 and 5 ask ABIM to “explain in detail all steps ABIM took to identify the owner of the padrinojr@yahoo.com account,” and to “explain every single step [that the persons that took part in the process regarding Dr. Salas Rushford that gave rise to the letter to Dr. Salas Rushford signed by Ms. Lynn Langdon and dated May 8, 2012] took and the evidence they used to reach each and every one of their statements and conclusions in that letter.”

ABIM's unsworn and untimely Supplemental Objections and Responses to the First Interrogatory, “specifically objects [to both interrogatories because they call] for information protected by the attorney-client privilege or work product doctrine.” Exhibit F. ABIM asserts as a basis on both that “[i]nvestigative steps taken by or at the advice of counsel are subject to the attorney-client privilege and work product doctrine.” *Id.*

Even if we concede for purposes of this argument that those investigations were in fact taken on the advice of counsel, it has long been held that “there is an ‘implied waiver of the attorney-client and/or attorney work product privilege where a client affirmatively places otherwise privileged information at issue in the case.” *Avaya v. Telecom Labs.*, No. 06-2490

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(D.N.J. January 19, 2016); see also *Glenmede Trust Co. v. Thompson*, 56 F. 3d 476, 486-87 (3rd Cir. 1995); and see *Livingstone v. North Belle Vernon Borough*, 91 F. 3d 515, 536-37 (3rd Cir. 1996).

As to Interrogatory No. 2, ABIM has claimed that the discovery rule and/or fraudulent concealment tolled the statute of limitations in this case, allowing it to file around two years after the limitations period expired counted from either the moment of the alleged injuries or the moment ABIM came into possession of the emails sent from the *padrinojr@yahoo.com* account. (D.E. 87) In support of those contentions, the Complaint itself states that "ABIM diligently investigated the identity of the person who corresponded with Dr. Arora using the e-mail address *padrinojr@yahoo.com* but was unable to concretely match the e-mail address to Dr. Salas until January 2012." (D.E. 1, ¶ 50) By putting its investigatory diligence into contention, ABIM has waived any claim of attorney-client privilege or work product doctrine regarding its investigation into the *padrinojr@yahoo.com* account.

Furthermore, as to Interrogatory No. 5, paragraphs 17-22 and 50 of the Complaint track the language of the May 8, 2012 letter. And, the details of ABIM's investigation into the issues raised by Ms. Langdon in the letter could serve to further illustrate how early ABIM was put on inquiry notice regarding its copyright infringement claims. In fact work-product protection only applies to trial-preparation materials. Fed. R. Civ. P. 26(b)(3); Fed. R. Ev. 502(g)(2); *U.S. v. Textron Inc.*, 577 F.3d 21, 29-31 (1st Cir. 2009) ("It is not enough to trigger work product protection that the subject matter of a document relates to a subject that might conceivably be litigated.... Nor is it enough that the materials were prepared by lawyers or represent legal thinking.") ABIM's claim of work-product protection for this investigation shows, for example, that the statute of limitations for its claim may have begun to run much earlier than it has

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represented to the court. See for example, *Sanford v. Allstate Indemnity*, No. 05-cv-00728-EWN-BNB (D. Co. Nov 9, 2006) (“retention of counsel was sufficient to trigger accrual”). And, since the only way to assert the privilege is to assert that the investigation was done in preparation for trial, it has huge implications for ABIM's defenses against the Counterclaim which we discuss below. Finally, ABIM's Motion to Dismiss the Counterclaims goes into detail regarding the letter and the consequences its findings provoked, it even attaches the letter, submitting it into evidence on the docket (D.E. 34-1, pp. 4-7 and exhibits A-D)

g. Waiver of privilege by using as both a sword and a shield

Turning again to ABIM's objection to Interrogatory No. 5 (described in the previous section), ABIM has also waived any claim to attorney-client privilege and the work-product doctrine by using the investigation described in the May 8, 2012 as both a sword and a shield by injuring Defendant based on it and now expecting it to be privileged.

“[L]itigants must not manipulate the work product doctrine for their own benefit by attempting to selectively disclose their attorney's work product.” *Harding v. Dana Transport, Inc.*, 914 F. Supp. 1084, 1098 (D.N.J. 1996) (citing *In re Subpoenas Duces Tecum*, 738 F.2d 1367, 1371 (D.C. Cir. 1984)). A party “must not be permitted to ‘use [a privileged document] as both a sword and a shield.’” *Id.*, at 1096.

5. ABIM cannot refuse to produce counterclaim discovery pending the resolution of its Motion to Dismiss

Back in April of last year, when we were facing ABIM's parallel litigation, we asked the Court to stay discovery pending the resolution of the parallel case or at least of our Motion to Dismiss for Lack of Personal Jurisdiction. (D.E. 18-1, p. 9-11) ABIM opposed that request. (D.E. 21, p. 9, note 4) Oral Argument was heard as to the stay of discovery and the Court ruled against us preliminarily in the April 6, 2015 Scheduling Conference (D.E. 23-1, pp. 7-14), and confirmed

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on final resolution of the motion in ABIM's favor, specifically taking into account that discovery was already occurring. (D.E. 26, p.12)

Now, in several places, ABIM has openly refused to provide discovery on Defendant's Counterclaims because its own Motion to Dismiss is pending. (For example, see Exhibit F, p. 3 item 8, and objections to ints. 15 and 21.) ABIM is estopped from making that objection. Furthermore, raising it at this point is tantamount to contempt of Court.

6. ABIM cannot refuse discovery because we disagree as to confidentiality

In the letter accompanying the production of documents of March 17, 2016, ABIM counsel stated that "ABIM has additional documents that it is withholding because the parties have not yet agreed to the entry of an appropriate protective order." (See Exhibit A) However, nowhere in the rules is it stated that Defendant must agree to such an order and in this case it is in Defendant's best interests not to agree. But, regardless of Defendant's posture, the fact remains that no rule allows a party to unilaterally withhold discovery, without asserting any particularized privilege or objection, because it simply doesn't like the fact that the public might see the discovered documents. The proper procedure would be to apply to the Court for protective order if it thinks it warranted by law (we do not). But ABIM has not done so, and for the reasons stated above, we believe that ship has sailed, and that argument has also been waived.

7. ABIM's assertion against interest of fraudulent intent and of trying to hide it through counsel, is enough to deny the use of the work product doctrine and compel ABIM to produce the documents and fully answer the interrogatories relating to its investigation against Defendant that gave rise to the May 8, 2012 letter.

As we discussed above, ABIM's assertion that the work-product doctrine applies to its investigation about Defendant that gave rise to the May 8, 2012 letter implies that ABIM believes all the requirements of that rule to be satisfied. In particular, ABIM is also unavoidably asserting that the investigation, which necessarily ended over two (2) years before the Complaint was filed,

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was done in preparation for trial. *See U.S. v. Textron*, 577 F.3d, at 29-31; Fed. R. Civ. P. 26(b)(3); Fed. R. Ev. 502(g)(2). Regardless of the content ABIM pretends to shield,¹⁶ that implicit assertion, is an assertion against interest under Fed. R. Ev. 801(d)(2) in terms of ABIM and the Third-Party Defendants' liability to Dr. Salas Rushford as per the Counterclaims and Third-Party Complaint. It telegraphs the reasons for ABIM's bad-faith persecution of Defendant in its kangaroo-court so-called "internal appeals process." It was a sham; ABIM and the Third-Party Defendants never had any good faith intention of reviewing his case fairly; there was no way Dr. Salas Rushford could have succeeded in ABIM's internal appeal. ABIM's true bad-faith intention was to make sure it weakened Dr. Salas Rushford economically, emotionally and reputationally for over two years before bringing him to court. ABIM also wanted the benefit of improperly compelling Defendant to provide it everything it wanted as discovery for this case without having to provide anything in return, hence its insistence that Dr. Salas Rushford only had the right to present arguments and documents in his defense but not to confront ABIM's evidence against him, and why Drs. Coleman, Von Feldt and O'Grady kept insisting that he testify before a court reporter in their sham trial.¹⁷ But even worse, it shows that ABIM was willing to destroy Dr. Salas Rushford's life and career in order to get the precedent it hadn't been able to get in the previous cases it had filed on the subject. It shows why ABIM sued Dr. Salas Rushford the day after Dr. Coleman signed ABIM's so-called final determination against Dr. Salas Rushford. (D.E. 34-1, ex. D, p. 6) It could get no more discovery for this case without filing it. This is also why ABIM now keeps delaying

¹⁶ ABIM hasn't provided the required log.

¹⁷ This is another reason why Defendant will never agree to the so-called "appropriate protective order" which ABIM uses as an improper excuse in its letters to deny discovery (never requesting it directly of the Court) and which would cover all discovery (that ABIM refuses to even identify). That completely inequitable order would only protect ABIM, because it already got all the discovery it needed from us, and now it wants to shield itself from the public's right to open trials.

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discovery even though it is the Plaintiff. Any delays in discovery only benefit it because it already got everything but a deposition from Defendant, and that one is pending.

We request that the Court take note of this admission now because ABIM would have surely attempted to spin it or retract it once it realized what it had done. This is the sort of admission of fraudulent intent that usually only happens in movies or TV. Rarely will any litigator get a smoking-gun admission of fraudulent intent of this sort, which is why the standard of proof doesn't even nearly require one. In attempting to protect itself and the Third Party Defendants from the consequences that the revelation of their machinations might entail, ABIM (through their joint counsel acting as agent) overplayed its hand and laid bare its intent and theirs.

In situations such as these, courts routinely disallow the assertion of the work product doctrine. See *U.S. v. Philip Morris USA, Inc.*, 449 F. Supp. 2d 1, 832-39, 928-29, 931-32 (D. D.C. 2006) (discussing how overbroad misuse of the attorney-client privilege and work product doctrines helped tobacco companies deceive the public for decades about the toxic effects of tobacco);¹⁸ and see *In re Grand Jury Proceedings*, 492 F.3d 976, 980-81 (8th Cir. 2007) (discussing the crime/fraud exception). Like the giant tobacco companies before it, ABIM wants to hide its corrupt, decidedly biased and profiteering nature from the medical profession and patients at large, by routing its dirty secrets and routine witch-hunts through complicit lawyers and then asserting privilege or having their lawyers assert it. It is public knowledge that ABIM investigated at least 134 other doctors under almost identical circumstances and never sued them.

¹⁸ Coincidentally (or not), a former ABIM Chair was part of that tobacco conspiracy. See Kurt Eichenwald, "To the Barricades! The Doctors' Revolt Against ABIM Is Succeeding" (Newsweek, Sep. 15, 2015) available at <http://www.newsweek.com/abim-american-board-internal-medicine-doctors-revolt-372723>

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See Katherine Hobson, "Medical Board Says MDs Cheated" (Wall Street Journal, June 9, 2010).¹⁹

Surely ABIM couldn't claim work-product over those investigations. The only thing different about their investigation into Dr. Salas Rushford is that they have admitted their fraudulent intent.

8. ABIM must show both good cause and harmlessness to allow it to add three potential witnesses it has known about for years and failed to timely disclose

Rule 26(e) requires ABIM to supplement its initial disclosures in a timely manner from the moment it learns they must be corrected. The First Circuit has explained that Rule 26(e) does not require "that a court order must be in effect and then violated, as a prerequisite for the imposition of sanctions.... The rule itself furnishes fair warning." *Thibeault v. Square D. Co.*, 960 F.2d 239, 245 (1st Cir. 1992).

In answer to Interrogatory No. 21, ABIM attempts to add three names to its potential witness list that it certainly had known about for many years and failed to disclose in its initial disclosures or any supplements to them. Namely, it identifies Jeremy W. Dugosh, Ph.D. stating that he has "knowledge relating to ABIM's efforts to identify examination items copied by Defendant;" and Drs. Geraldine Luna and Coromoto Angela Palermo stating that they have "knowledge relating to Defendant's communications with Arora Board Review using the email address padrinojr@yahoo.com."

Considering that ABIM asserted its statute of limitations argument based precisely on the topics those three individuals have knowledge about, it stands to reason that ABIM was aware of them and knew it had to rely on them to establish its tolling defense years before it filed the Complaint. Why didn't it disclose them in its initial disclosures as required by Fed. R. Civ. P. 26(a)(1)(A)(i)? Why didn't it supplement its initial disclosures and instead decided to hide behind

¹⁹

Available at <http://www.wsj.com/articles/SB10001424052748704256604575294712195930970>

at

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its frivolous boilerplate objection to the first interrogatories? At a minimum, ABIM should have listed the information required in these cases by Fed. R. Civ. P. 37(c)(1).

The Seventh Circuit has ruled that “the sanction of exclusion is automatic and mandatory unless the sanctioned party can show that its violation of Rule 26(a) was either justified or harmless.” *David v. Caterpillar, Inc.*, 324 F. 3d 851, 857 (7th Cir. 2003). Here, it is neither. Defendant has already deposed Dr. Arora at great expense, and Defendant has lost an entire year it could have used to investigate these people. Further dilation of the New Jersey trial process due to Plaintiff's utter disregard for the rules is ruinous to Defendant. The Court should exclude the listed people as potential witnesses for Plaintiff.

Plaintiff's conduct regarding this issue is precisely why none of the interrogatory questions are premature. If ABIM doesn't know an answer it has a duty to supplement, even though it seems to be unaware of it.

9. Good Cause Exists to Compel ABIM to Completely Answer the First Interrogatories, to Provide Specific Truthful Responses to the Request for Admissions, and to Produce the Documents Requested in the First Request.

The requests that are the subject of this Motion are, on their face, directed to issues at the heart of this case, reasonable in scope and clearly proper discovery. ABIM's failure to respond reflects a cavalier, if not obstinate, approach to discovery obligations that should not be tolerated.

As the Court will see below and at D.E. 81 and its attachments, Defendant's discovery requests seek specific information regarding the facts that are at issue here, including ABIM's allegations of ownership of the questions whose copyright were purportedly infringed,²⁰ documents created, kept and/or maintained in the ordinary course of ABIM's business,²¹

²⁰ See, inter alia, paragraphs 23-30 of the Complaint. D.E. 1.

²¹ Id., at paragraphs 14-22.

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documents related to Defendant and ABIM, and all documents related to Dr. Arora and the ABR, including and not limited to the PA Case, and their settlement agreement.²²

ABIM's repeated and unsubstantiated objection of irrelevance is without merit and must be rejected as to each of the requests where it is asserted. As defined in *In Re Gerber Probiotic Sales Practices Litig.*, 306 F.R.D. 527 (D.N.J. 2015):

The purpose of discovery is to uncover facts about the claims and defenses set forth in the pleadings and thus the boundaries of relevance under Rule 26 depend upon the context of each action.... [C]ourts construe Rule 26 'broadly to encompass any matter that bears on, or that reasonably could lead to other matters that could bear on, any issue that is or may be in the case.'

In Re Gerber Probiotic Sales Practices Litig., 306 F.R.D., at 528 (citing among others, *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 351 (1978). "Relevancy is determined 'in light of the allegations of the complaint, not as to evidentiary admissibility.'" *Carchietta v. Russo*, No. 11-cv-7587-SRC-CLW, 2014 U.S. Dist. LEXIS 62344, at *8 (D.N.J. May 6, 2014) (quoting *Hickman v. Taylor*, 329 U.S. 495, 507 (1947)); see also *Donovan v. Prestamos Presto Puerto Rico, Inc.*, 91 F.R.D. 222, 224 (D.P.R. 1981) ("Discovery will be permitted unless it is clear that the information sought can have no possible bearing upon the subject matter of the action.").

ABIM also has objected to almost all of Defendant's discovery requests as "unduly burdensome." However, all of Defendant's requests have more than a reasonable relation to the subject matter of this case and therefore cannot be burdensome on the grounds that they are irrelevant. See *Mitsui & Co. (U.S.A.) Inc. v. Puerto Rico Water Resources Authority*, 79 F.R.D. 72, 82 (D.P.R. 1978).

Finally, ABIM has objected to almost all of Defendant's requests as "overly broad" but it has provided no specifics or other explanation to support any of the individual objections and,

²² Id., at paragraphs 31-50, and D.E.s 75, 78, 79 & 84.

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therefore, they must be rejected also. See *Burns v. Imagine Films Entertainment, Inc.*, 164 F.R.D. 589, 593 (W.D.N.Y. 1996) (objections to interrogatories like "overbroad, vague and unduly burdensome" are merely conclusory and do not meet the objecting party's burden under Rule 33(a)). In addition, as argued above, all of Defendant's requests are well within the standards for discovery and therefore ABIM should have provided some other explanation for why they are "overly broad" in order for any opportune objections to be sustained.

a. As to the Interrogatories

For the myriad reasons stated above, we do not need to address Plaintiff's objections to our Interrogatories here. We believe them to be self-evidently relevant and important to the issues raised in the case. See Exhibit F, which includes each of Defendant's First Set of Interrogatories.

b. As to the Request for Production of Documents ("RFP")

Over all, the Request for Production of Documents by Defendant can be divided into five (5) general topics which sometimes overlap:

- a. All documents and things which ABIM relied on in the Complaint, in the initial disclosures and what it can anticipate to use in trial on the merits. RFP 1-4, 54-57, 76.
- b. All documents and things pertaining to the ownership and copyrightability of the material allegedly infringed, the material itself as well as other documents ABIM may have created in the course of its business related to this case. RFP 5-16, 41-43, 53-57, 64-67, 71-74.
- c. All documents and things pertaining to Defendant's Counterclaims and Third Party Complaint. RFP 17-20, 34-40, 51-54.
- d. All documents and things pertaining to Dr. Arora and/or ABR and/or Dr. Salas. RFP 27-33, 45-49, 52, 59-63.

(See Exhibit G, Defendant's First Request for Production of Documents.) It is important to highlight that all of the documents requested have been in ABIM's possession for many years. Others are kept, maintained and/or are created in the ordinary course of ABIM's business.

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ABIM did produce some heavily redacted examination excerpts, and some 2016 exam committee-member agreements, and very few prior ones, despite the facts at issue occurring in 2009 and fifty exams (and therefore exam committees) being pleaded in the Complaint.

As an example Defendant requested documents that are expressly mentioned in the Complaint, such as: (a). Unedited and non-redacted copies of the works that were allegedly infringed – the exams themselves. (Request ¶¶ 4, 5, 8, 15; Complaint ¶¶ 29, 52-54.) Proving copyright infringement requires comparing the originals to the allegedly infringing works. Further, Dr. Salas Rushford's defense of "fair use" requires viewing the allegedly infringing works in context. ABIM produced redacted copies of its examinations containing questions defendant allegedly infringed,²³ but ABIM's heavy redaction interferes with Dr. Salas's right to develop his defense of fair use and to investigate ABIM's claims. (b) The "work for hire" arrangements in developing the questions at issue. (Request ¶ 6; Complaint ¶ 28.) ABIM asserts ownership of the test questions and Dr. Salas has a right to discovery on this in order to challenge ABIM's allegation of ownership. (c) The settlement agreement between ABIM, ARB and Dr. Arora (Request ¶ 33; Complaint ¶ 49). The date and contents of this settlement agreement are relevant, among other reasons, to prove that ABIM's lawsuit against Dr. Salas is barred by the applicable statute of limitations, among other potential defenses of preclusion. This matter is already subject of a motion to compel addressed to a third party. (D.E. 75, 78, 79 & 84.)

In addition, ABIM is withholding the following documents that are relevant to disprove allegations made in the Complaint: (a) Transcripts and/or any recording or notes or documents obtained from anyone who attended Dr. Arora's test preparation course taken by Dr. Salas.

²³ It did not link the questions it discovered to the allegedly infringing material in any way. We are left to guess where specifically it thinks the emailed documents infringe upon the questions. The questions ABIM has sent also do not contain any indicia of authenticity.

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(Request ¶ 61; Complaint ¶¶ 1, 34.) These documents would tend to disprove ABIM's allegations that Dr. Salas obtained questions from any source other than the test preparation course (id. ¶¶ 38, 40, 42, 44), and would also show that ABIM's lawsuit against Dr. Salas is barred by the applicable statute of limitations. (b) Documents containing demographic information about performance on the exams at issue. (Request ¶ 17; Complaint ¶¶ 7-9.) These documents would tend to disprove ABIM's repeated allegations in its Complaint that its exams are a fair and unbiased measure of the "highest quality" in physicians. (Id. ¶ 9) These documents are also relevant to Dr. Salas's Counterclaims. In its letter dated March 16, ABIM's counsel continued to refuse to produce these documents.

Finally, ABIM continues to withhold documents requested that are reasonably intended to produce evidence in support of his answers to the Complaint, and for his affirmative defenses, counterclaims and third-party complaint, such as: (a) documents pertaining to ABIM's investigations, complaints to authorities, or actions taken to ascertain whether or not Arora and any other test preparation companies had obtained actual ABIM Examination content and were disclosing it to candidates; (b) all documents referenced in the Complaint for all relevant times; and (c) all insurance policies for the type of risks included in the Counterclaim. ABIM should not be permitted to withhold these documents from Dr. Salas for so many months on a simple whim.

ABIM is delaying discovery in this action by continuing to withhold all the requested documents. Dr. Salas requests that the Court order ABIM to produce them immediately.

c. As to the Request for Admissions ("RFA")

Defendant presented to ABIM 141 Requests for Admission. See Exhibit H, Defendant's First Set of Requests for Admissions. Of those, without any explanation ABIM summarily dispatched about 113 by simply declaring that they were irrelevant and would not lead to

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discoverable evidence. Another eight (8) were denied without providing any facts or legal basis for such denial. Seven (7) were denied for purportedly contain a legal conclusion, another eight (8) were denied allegedly for lack of information by ABIM. (See Exhibit I, ABIM's Response to Defendant's Request for Admissions.) We reallege the arguments in the Deficiency letter we sent in response as if they were set forth here. (D.E. 81-1) As may be derived from that letter the objections presented by ABIM are unfounded and unprecedented.

A good example would be ABIM's insufficient responses and baseless objections to requests 32-46 and 95-96. The requested admissions are directed to Defendant's stated affirmative defense of acquiescence and to the proper construction of the extent of the authorization given by ABIM (the copyright holder) to all test takers and to those studying for its Test as to the use of its copyrighted material. It also goes to the proper interpretation and to the interpretation that reasonably could be expected from Defendant at all material times, as to the contractual intent of the contract of adhesion between ABIM and Defendant. It therefore has bearing on any claim of vicarious or contributory copyright infringement. The accreditation, with Defendants prior knowledge, of the ABR course by an organization whose policies ABIM indirectly or directly publicly controls, renders the alleged use of ABIM copyrighted material in the ABR course into an authorized and therefore non infringing use. Implied authorization is one of Defendants' stated affirmative defenses. Furthermore accreditation and Continuing Medical Education ("CME") credit mean that the ABR course and communication between Defendant and Dr. Arora qualify under the educational fair use exception to copyright infringement. Therefore, it was then informed to ABIM that its objection of lack of relevancy was baseless and Defendant requested that it admit or deny this request in accordance with Fed. R. Civ. P. 36. Nevertheless, ABIM ignored such requests.

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As to the RFAs 57-68 Dr. Salas objected to ABIM's answers for being non-responsive. Defendant has raised the defense of lack of personal jurisdiction, so evidence of Defendant's life and activities outside of the State of New Jersey is relevant to that defense. Furthermore the issues of Defendant's professional history go to the defense of innocent infringement and to the credibility of Plaintiffs claim against Defendant regarding Dr. Salas assertive defense of time barring. In addition this information is pertinent to Defendants' counterclaims against Plaintiff. If the case is that ABIM does not know the answers, then it should have stated that as opposed to just avoiding to respond. However, much of the information requested should be easily verifiable for ABIM.

The examples cited above pertained to some of the RFAs where ABIM simply ignored Defendant's request. An excellent illustration of ABIM contemptuous denial behavior pertains to the request (no. 103) asking it to "admit that the seizure of ABR material pursuant to the court in the case of *ABIM v. Arora*, No. 2:09-05707 (E.D.Pa.), was executed on December 7, 2009." ABIM denied this and we had to send a Deficiency stating that we got the information from a press release on its own website! We added that considering the importance of this requested admission to the issue of the statute of limitations, we could move the Court to order ABIM to pay reasonable expenses in obtaining and proving the mentioned press release, and to this day ABIM has not supplemented its response.

10. Good cause exists to grant attorneys' fees

Defendant is entitled to attorney fees for all the costs related to the filing of the herein discovery motion pursuant to Fed. R. Civ. P. 37(a)(5). When calculating attorney's fees the Court should consider the reasonableness of the requested fees, the minimum amount of attorney fees needed to deter future litigation abuse, the sanctioned party's ability to pay attorney fees, and the

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severity of the sanctionable conduct. *Poole v. Textron*, 192 F.R.D. 494, 508 (D. Md. 2000); see also *Cherrington Asia v. A&L Underground*, 263 F.R.D. 653, 662 (D. Kan. 2010). Further see *Younes v. 7-Eleven*, No. 13-3500-RMB-JS, Pt. 2 (D.N.J. Dec 11, 2015) (describing the type of work that can be included and other criteria and potential sanctions).

The facts here support an award of attorney fees to Defendant for all work related to the filing of this discovery motion. Dr. Salas reached out to ABIM by correspondence on repeated occasions as the record clearly shows, since at least October 30, 2015, and which included a meet-and-confer with ABIM's counsel about four (4) months later, on March 3, 2016. Still ABIM obstinately delays and refuses. The bad faith nature of ABIM's conduct is laid bare in our arguments above.

Accordingly, ABIM should be sanctioned by granting Defendant attorneys' fees in an amount no less than \$21,900 (See Certification of Counsel at Exhibit J) (we will supplement it as appropriate), for its unreasonable and uncompromising litigation behavior to date and to dissuade it from engaging in such misguided tactics throughout the remaining of this litigation.

11. Prayer for Relief

For the reasons stated above, Defendant respectfully requests that the Court order ABIM to fully comply with his discovery requests. Defendant also requests attorneys' fees; the exclusion of the listed potential witnesses and the ruling that, since ABIM has admitted that its investigation into Defendant was in preparation for trial, it has admitted its bad faith and fraud regarding the internal appeals process. Defendant further requests all other relief consistent with this motion.

Dated: May 2, 2016.

Respectfully submitted,

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