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

American Board of Internal Medicine, *Plaintiff,* **v.** **Jaime A. ("Jimmy") Salas Rushford, M.D.,** *Defendant, Counterclaim Plaintiff & Third Party Plaintiff,* **v.** **Richard Baron, M.D.; et al.;** *Third-Party Defendants.*	**CIVIL NO. 14-CV-06428-KSH-CI** Copyright Infringement; Breach of Contract; Torts; False Designation; Injunctive Relief Jury Trial Requested

DEFENDANT JAIME A. SALAS RUSHFORD'S BRIEF IN REPLY TO ABIM AND THE ABIM INDIVIDUALS' OPPOSITION TO MOTION FOR PARTIAL RECONSIDERATION OF ORDER (D.E. 64)

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To The Honorable Court:

COMES NOW Defendant, Jaime A. "Jimmy" Salas Rushford, M.D. ("Dr. Salas Rushford"), through his undersigned local counsel, and respectfully presents his reply to an opposition filed by Plaintiff American Board of Internal Medicine (ABIM), 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. (ABIM Individuals) (for ease of reference ABIM and the ABIM Individuals will be collectively referred to herein as "ABIM") (See D.E. 69).

I. INTRODUCTION

The Complaint in this case, initiated by ABIM, presents a single count of copyright infringement (D.E. 1, at p. 14) encompassing an indeterminate number of separate claims. Defendant presented his answer to complaint, affirmative defenses, counterclaims and third-party complaint (D.E. 33) on September 22, 2015.

On November 25, Defendant filed three (3) requests for *pro hac vice* admissions for attorneys Dora L. Monserrate-Penagaricano, Jaime Salas-Soler and Antonio Valiente (D.E.'s 47-49), to add to his team of lawyers which already included local counsel and Guillermo Mena-Irizarry, also *pro hac vice*. Previously, and since October 2015, Defendant had submitted discovery requests to ABIM for information and documentation and other tangible objects that have been in possession and control of Plaintiff for the better part of the last six (6) years that, at least to this date, still are incompletely responded to, despite over 120 days having passed since submitted. Furthermore, some of what has been requested of ABIM as part of discovery not only is subjacent and essential to their own allegations in this case, but often relates to documents and things affirmatively used by Plaintiff in other cases against other defendants.

In the meantime, and while substantive discovery issues remain pending, ABIM has opted to concentrate its efforts and resources on procedural or non-substantive issues to prevent the participation of the *pro hac vice* attorneys in proceedings and meetings where local counsel need not be present, in accordance to the District of New Jersey's L.Civ.R. 101.1(c). See D.E.'s 53, 55, and 64. That is, Plaintiff here, the filer and initiator of this case, opts to stall the pre-trial proceedings and necessary discovery of this case by instead choosing to engage in unnecessary discussions about which of Defendant's attorneys they deem proper to have telephone conferences with, which attorney they deem proper to have court and non-court mandated meet and confers, and even to which emails it replies or to whom it addresses them. That is not, we humbly believe, what the Rules of Civil Procedure and its local counterparts and additions, are intended for.

Those tactics are but one distressing example of a plaintiff who incredibly wishes to delay and further delay the substantive resolution of its own "simple" one-count case. This because despite there being nothing in a rule or jurisprudence that requires the imposition of additional conditions to the *pro hac vice* attorneys, ABIM now interprets the Court's order to go beyond the regular course of business without any reason given.

This interpretation impacts the understanding that discovery issues would not be delayed, but rather would be worked out, even in the case of any unavailability of local counsel, and forces Defendant to withdraw any consent given by his then local counsel.

We, therefore, move on to address certain particular aspects of ABIM's Opposition (D.E. 69).

II. ARGUMENT

The record of the hearing held before this Honorable Court on January 22, 2016 is very telling even to any who may have not been present. It counters ABIM's repeated but unfounded

assertion that then-local counsel had ample opportunity to consider the text of any proposed order by Plaintiff and that the same was discussed by all attorneys present, even when Mr. Valiente and Mr. Salas-Soler had yet to be conditionally admitted. To that effect, and with the transcript of the hearing, where it is revealed that this topic was discussed as follows in its pertinent portion:

> THE COURT: So let's start this way. I'll give you a little bit of time on your opposition to the pro hac because my inclination is to admit. I'd like you to make a record, if you want to. But certainly with the strictures that you address in your briefing, which are also local rule restrictions, which thus far, I think, have been followed. Mr. Gonzalez, you're aware of that which I speak?
>
> MR. GONZALEZ: Yes, Your Honor.
>
> THE COURT: So proceed, if you'd like to argue.
>
> MR. RIVERA-SOTO: Well, Your Honor, we actually submitted to the Court two forms of order. We're happy with either of them. And so if Your Honor is saying that Your Honor is inclined to enter the one with the conditions, then I don't need to take up the Court's time.
>
> THE COURT: Okay. Perfect.
>
> MR. RIVERA-SOTO: And I would note for the record, Your Honor.
>
> THE COURT: Yes, sir.
>
> MR. RIVERA-SOTO: That Mr. Valiente and Mr. Salas-Soler are in the courtroom.
>
> THE COURT: Okay. So we will sign off on that order and admit the pro hacs. Mr. Gonzalez, I didn't mean to not permit you to speak. I'm sorry.
>
> MR. GONZALEZ: No, Your Honor, I just want to make sure that I know which order that we're talking about out of the two. Could I have a moment to look at that?
>
> MR. RIVERA-SOTO: Sure, it was the one -

(Pause in proceedings)

MR. GONZALEZ: It's the one consistent with the local rules?

THE COURT: Actually, I do not have it out here with me.

MR. RIVERA-SOTO: It's the one docketed at 53-2, Your Honor.

(Pause in proceedings)

MR. GONZALEZ: Okay. May I have just a moment with Mr. Rivera-Soto, Your Honor, regarding this order?

THE COURT: Sure. Yes. Absolutely.

(Pause in proceedings)

THE COURT: The only part -- I'll let you speak before I ruin anything that you may have agreed to.

MR. RIVERA-SOTO: Your Honor, Mr. Gonzalez and I had a chance to go over it. He had a concern about what would happen if he was unavailable. I told him we'll work with that. That's not a problem.

THE COURT: Okay.

MR. RIVERA-SOTO: And with that representation, I think we're -- this almost becomes a consent order.

THE COURT: Okay. Good. Go ahead. No problem.

MR. GONZALEZ: What -- I'm sorry, Your Honor, let me -- allow me.

(Pause in proceedings)

THE COURT: Mr. Gonzalez.

MR. GONZALEZ: Yes, Your Honor, the order that Mr. Rivera-Soto showed to me is acceptable.

THE COURT: Okay. We will sign that today. *See*, January 22, 2016 Hearing Transcript at page 4:10 – 6:16. (Emphasis added.)

This unopposed transcript of the hearing demonstrates the following. First, the intent of both then-local counsel and of the Court that any order be consistent with the local rules. Hr'g Tr. 4:10-4:25, 5:15-16. Second, the moment that ABIM's lead counsel and Defendant's then-local counsel briefly discussed by themselves, said proposed order was considered. *Id.*, at 5:21-24. Third, and most importantly again, ABIM's very own statement that Defendant's then-local counsel had a concern about what would happen if he was unavailable and he was told that "we'll work with that. That's not a problem." *Id.*, at 6:3-5 (emphasis added).

One can only wonder how ABIM can now conveniently interpret the words "we'll work with that" as having meant that, if local counsel is not available, everything has to be rescheduled instead of following through with agreed upon dates when, necessarily a party has incurred in expenses that are more proportionally burdensome than to the other. That is what the record demonstrates and that is why Defendant approached ABIM with sufficient time as the conditions in this occasion permitted. But, again one can only wonder, if sufficient time would not have been available. Needless to say, and as the record clearly demonstrates despite Defendant's repeated pleas to the contrary, that nothing was worked out and a problem certainly occurred with ABIM simply not desiring to conduct the agreed-upon meet-and-confer of February 2.

Thus, if "we'll work with that" and "that's not a problem" simply meant that things would be postponed even when Defendant is or was capable, able and interested, then Defendant is compelled to necessarily and formally withdraw any consent given to the order for the conditional *pro hac vices* as established in D.E. 64 and request it be amended as proposed at D.E. 65.5, as what

was informed by ABIM to Defendant's counsel and the Court was not an accurate representation or, at the very least, completely misunderstood.

That, by itself, provides ground for reconsideration as established by *L.Civ.R. 7.1(i)*, whereby ABIM incurred in the manifest error of facts presented to the Court under which it relied to issue the Order found at D.E. 64. But of utmost importance, and in consideration of what would be and has been ABIM's behavior throughout the pendency of this case, is to prevent the occurrence of what would be a manifest injustice. *Harsco Corp. Zlotincki*, 779 F.2d 906, 909 (3d Cir. 1985), *cert. denied*, 476 U.S. 1171, 106 S. Ct. 2895 (1986); *Veer v. Maibec, Inc.*, 2013 WL 1694835, at *1 (D.N.J. Apr. 18, 2013) (citing *N. River Ins. Co. v. CIGNA Reinsurance Co.*, 52 F.3d 1194, 1218 (3d Cir. 1995)).

First, Defendant has unequivocally designated and identified his lead counsel for this case, see D.E. 65.2, who is an attorney that fully complies with the requirements for *pro hac vice* admissions and will appear wherever it is required by rules or law along with and accompanied by local counsel. Second, there is no evidence, from ABIM, nor any exist, that any of the *pro hac vice* attorneys has incurred in any sort of action that could be interpreted as improper or "become a source of delay and non-cooperation on defendant's part." See D.E. 69 at page 2. The Court itself stated as much in its opening remarks on the issue underlined above. This includes the pleas to maintain the February 2 meet-and-confer that was agreed to on January 22. Quite, again, to the contrary. It is Defendant who has been pursuing discovery requests, meet-and-confers, and others, while ABIM attempts to further delay and be non-cooperative in the discovery requests.

Third, the *pro hac vice* restrictions as interpreted by ABIM are of such degree that negate and render useless the *pro hac vice* admissions unless amended as respectfully requested. If the restrictions are maintained, it would be tantamount of having a duly admitted attorney do nothing

more than the equivalent to a supporting staff member, akin to paralegal, law clerk or other personnel. That is clearly not the intent of the rule permitting the admissions of qualified *pro hac vice* attorneys.

Fourth, so as not to forget as it needs to be addressed for the record to correct the erroneous representations made by ABIM. Mr. Guillermo Mena, previously admitted *pro hac vice* counsel without the restrictions was, at all times here pertinent, a resident of the Commonwealth of Puerto Rico. After conclusion of the hearing of January 22 and due to other personal and professional reasons, he did not return to Puerto Rico immediately but headed to Washington, DC. Although his professional engagement in the nation's capital ended much earlier than February 2, it remained much more cost efficient for him to stay in the Washington, DC area and then travel by land to Philadelphia, PA, than to have air-traveled back home to Puerto Rico and then again air-travel to Philadelphia for the scheduled February 2 meet-and-confer. Thus, remaining in the "mainland" to be able to attend the meet-and-confer also created expenses, albeit somewhat less than what two (2) or more short notice air travels would have entailed. But that is not what ABIM represents when it mischaracterizes and alleges that Mr. Mena would be "in the area" and needs to be corrected for the benefit of the record.

Finally, it must be highlighted how this non-substantive issue caused by ABIM continues to derail the core proceedings of this case unnecessarily. To wit, conducting discovery in this case; conducting meet-and-confers to solve discovery issues in this case; and conducting depositions. As things currently stand, even the exchange of emails between ABIM's lead counsel and Defendant's designated lead counsel (D.E. 65.2), cannot take place freely in a way that can assist in advancing proceedings in this case. These facts, thus, necessitate the reconsideration or clarification of the Order with the conditional *pro hac vice* admissions.

III. CONCLUSION

For the reasons set forth above and at D.E. 65, Defendant Dr. Jaime A. "Jimmy" Salas Rushford hereby respectfully requests that this Honorable Court clarify or reconsider in part its Order entered at D.E. 64 so that *pro hac vice* counsels can properly defend and assist Defendant in this proceedings as requested in D.E. 65.

Dated: February 29, 2016

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CERTIFICATE OF SERVICE

I, Andrew L. Schlafly, counsel for Defendant, Counterclaim Plaintiff, and Third-Party Plaintiff Jaime Salas Rushford, M.D., do certify that on February 29, 2016, I electronically filed the foregoing Defendant Jaime A. Salas Rushford's Brief in Reply to ABIM and the ABIM Individuals' Opposition to Motion for Partial Reconsideration of Order (D.E. 64) using the Electronic Case Filing system, which I understand to have caused electronic service on all the parties.

/s/ Andrew L. Schlafly
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