

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW JERSEY

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.;
CHRISTINE K. CASSEL, M.D.;
LYNN O. LANGDON;
ERIC S. HOLMBOE, M.D.;
DAVID L. COLEMAN, M.D.;
JOAN M. VON FELDT, M.D.;
NAOMI P. O'GRADY, M.D.;
COMPANIES A, B & C;
JOHN DOE & RICHARD ROE;
PEARSON EDUCATION INC.;

CIVIL NO.
14-CV-06428-KSH-CLW

COPYRIGHT INFRINGEMENT;
BREACH OF CONTRACTS;
TORTS;
INJUNCTIVE RELIEF;

TRIAL BY JURY REQUESTED

**ANSWER TO THE COMPLAINT, COUNTERCLAIMS &
THIRD-PARTY COMPLAINT**

To the Honorable Court:

COMES NOW Defendant, Counterclaim Plaintiff and Third-Party Plaintiff, Jaime A. "Jimmy" Salas Rushford, M.D. (Dr. Salas Rushford), through his undersigned counsel and most respectfully states, requests and prays:

ANSWER TO THE COMPLAINT

SECTION ON NATURE OF ACTION

1. The first paragraph of the Complaint is introductory and does not require an answer. But

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in general, save for the facts that ABR offered Internal Medicine Board review courses, that Dr. Salas Rushford attended the ABR course in May 2009 and that he registered for the course using the email address jsalasmd@yahoo.com, it is denied.

SECTION ON PARTIES

2. Paragraph No. 2 of the Complaint is admitted.
3. Paragraph No. 3 of the Complaint is admitted.

SECTION ON JURISDICTION AND VENUE

4. Paragraph No. 4 of the Complaint is admitted.
5. Paragraph No. 5 of the Complaint is denied.
6. Paragraph No. 6 of the Complaint is denied.

SECTION ON FACTS COMMON TO ALL COUNTS

Subsection on the American Board of Internal Medicine

7. . Defendant admits that ABIM is a corporation that was established in 1936. Defendant has no knowledge sufficient to form a belief regarding ABIM's tax qualifications and questions the truthfulness of its non-for-profit nature. Defendant has no knowledge sufficient to form a belief regarding what the term 'independent' implies in the context of paragraph No. 7. Defendant admits that ABIM may have once been dedicated to the advancement of excellence in the field of internal medicine and its subspecialties, but that is no longer the case. The remainder of Paragraph No. 7 of the Complaint is denied as written.
8. Inasmuch as Paragraph No. 8 of the Complaint purports to establish as fact the opinion of patients, hospitals and medical care providers at large, Defendant has no knowledge sufficient to form a belief as to the truth of the allegations asserted. The remainder of

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Paragraph No. 8 of the Complaint is denied as written.

9. Defendant has no knowledge sufficient to form a belief regarding the “trust” or other specific significance that ABIM Board Certification implies for the persons cited. The remainder of Paragraph No. 9 of the Complaint is denied as written.

10. Paragraph No. 10 of the Complaint is admitted.

11. Paragraph No. 11 of the Complaint is admitted.

12. Paragraph No. 12 of the Complaint is admitted, except that Defendant has no knowledge sufficient to form a belief regarding the phrase “other requirements” and the term “secure” because they are vague and/or conclusory as written. The remainder of this paragraph is denied.

13. Paragraph No. 13 of the Complaint is admitted.

Subsection on the ABIM Certification Examination in Internal Medicine

14. Paragraph No. 14 of the Complaint is admitted, except that Defendant has no knowledge sufficient to form a belief regarding the actual ‘security’ of the test. The remainder of this paragraph is denied.

15. Paragraph No. 15 of the Complaint is admitted, except that Defendant specifically alleges that date selection by candidates is not absolute and is limited by factors which include the dates selected by other candidates. The remainder of this paragraph is denied.

16. Paragraph No. 16 of the Complaint is denied because the term copyrighted is conclusory, and Defendant has no knowledge sufficient to form a belief regarding the extent of the copyright protection of the questions because he does not have access to them. It is further denied because of the vagueness of the quoted term “secure” and because Defendant has no knowledge sufficient to form a belief as to the truth of the remainder of

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the allegations in this paragraph.

17. Paragraph No. 17 of the Complaint is denied.

18. Defendant admits that some ABIM documents state that the Examination is copyrighted.

Defendant lacks knowledge sufficient to form a belief as to the truth of the remainder of the allegations in Paragraph No. 18 of the Complaint.

19. Defendant has no knowledge sufficient to form a belief regarding the content of ABIM's Pledge of Honesty or if and when he may have signed it. The remainder of Paragraph No. 19 of the Complaint is denied as written.

20. Paragraph No. 20 of the Complaint is denied.

21. Defendant has no knowledge sufficient to form a belief as to the truth of the allegations in this paragraph.

22. Paragraph No. 22 of the Complaint is denied.

Subsection on the Development of the Certification Examination in Internal Medicine

23. Paragraph No. 23 of the Complaint is denied because Defendant has no knowledge sufficient to form a belief regarding how ABIM develops its Examination. Defendant further has no knowledge sufficient to form a belief regarding ABIM's contracts with third parties.

24. Paragraph No. 24 of the Complaint is denied because Defendant has no knowledge sufficient to form a belief regarding how ABIM develops its Examination.

25. Paragraph No. 25 of the Complaint is denied because Defendant has no knowledge sufficient to form a belief regarding how ABIM specifically manages its questions.

26. Paragraph No. 26 of the Complaint is denied because Defendant has no knowledge sufficient to form a belief regarding how ABIM specifically manages its questions.

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27. Paragraph No. 27 of the Complaint is denied because Defendant has no knowledge sufficient to form a belief regarding how ABIM develops its Examination or specifically manages its questions.

Subsection on ABIM's Copyrights in the Examination

28. Paragraph No. 28 of the Complaint is denied as conclusory and because Defendant has no knowledge sufficient to form a belief regarding how ABIM develops its Examination. Defendant further has no knowledge sufficient to form a belief regarding ABIM's contracts with third parties.

29. Paragraph No. 29 of the Complaint is denied because Defendant has no knowledge sufficient to form a belief regarding what ABIM has included in its filings with the Register of Copyrights or what actual specific content is covered by the listed Certificates of Registration. The remainder of the allegations in this paragraph is denied.

30. Paragraph No. 30 of the Complaint is denied as written because the Defendant has no knowledge sufficient to form a belief regarding what agreements, contracts or authorizations ABIM may have or may have had with third-parties and because ABIM authorized Defendant to make at least some use of the questions.

Subsection on Dr. Salas Rushford's Allegedly Unlawful Conduct

31. Paragraph No. 31 of the Complaint is admitted only as to the dates. The remainder of the allegations in this paragraph is denied.

32. Paragraph No. 32 of the Complaint is admitted except that the term "business address" is denied as vague. Defendant has no knowledge sufficient to form a belief regarding the nature of the address in terms of whether it was a third-party processing center for applications or payments or if it was an actual office of ABR.

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33. Defendant admits that jsalasmd@yahoo.com was not his only or exclusive e-mail address (in fact it only became one of his e-mail addresses after he became an M.D.). The remainder of paragraph No. 33 of the Complaint is denied.
34. Defendant admits that the course was held in the City University of New York (CUNY) in Manhattan, New York and that jsalasmd@yahoo.com was not his only or exclusive e-mail address (in fact it only became one of his e-mail addresses after he became an M.D.). The remainder of the allegations in this paragraph is denied.
35. Paragraph No. 35 of the Complaint is denied as written.
36. Paragraph No. 36 of the Complaint is denied.
37. Paragraph No. 37 of the Complaint is denied.
38. Paragraph No. 38 of the Complaint is denied.
39. Paragraph No. 39 of the Complaint is denied.
40. Defendant admits having conversations with Dr. Arora on multiple occasions to discuss his course. Defendant denies the remainder of the allegations in this paragraph.
41. Defendant has no knowledge sufficient to form a belief regarding whether any of the content bears any similarity to any of Plaintiff's copyrighted content. Defendant denies the remainder of the allegations in this paragraph.
42. Paragraph No. 42 of the Complaint is denied.
43. Paragraph No. 43 of the Complaint is denied.
44. Defendant admits that he sent emails to Dr. Arora. Defendant denies that he was the author or had knowledge of whether any email content was protected intellectual property. The remainder of the allegations in this paragraph is denied.
45. Paragraph No. 45 of the Complaint is admitted as to the content of Dr. Arora's reply but

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not as to what Dr. Arora understood because Defendant has no knowledge sufficient to form a belief regarding what went through Dr. Arora's mind. The remainder of the allegations in this paragraph is denied.

46. Defendant admits that the last communication he sent to Dr. Arora was the day before he took the exam. The remainder of Paragraph No. 46 of the Complaint is denied.

47. Paragraph No. 47 of the Complaint is admitted only as to the date Defendant took the examination. The remainder of the allegations in this paragraph is denied.

48. Paragraph No. 48 of the Complaint is admitted.

49. Paragraph No. 49 of the Complaint is admitted only as to the existence of the civil action cited. Defendant has no knowledge sufficient to form a belief regarding what ABIM discovered and where and when. Defendant has no knowledge sufficient to form a belief regarding the cited seizure order. Defendant has no knowledge sufficient to form a belief regarding the settlement between ABIM and ABR. The remainder of the allegations in this paragraph is denied.

50. Paragraph No. 50 of the Complaint is denied.

SECTION ON COUNT I: COPYRIGHT INFRINGEMENT

51. Defendant restates and repeats his responses to the allegations set forth in the preceding paragraphs of the Complaint as if set forth herein at length.

52. Paragraph No. 52 of the Complaint is denied.

53. Paragraph No. 53 of the Complaint is denied.

54. Paragraph No. 54 of the Complaint is denied.

55. Paragraph No. 55 of the Complaint is denied.

DEFENDANT'S AFFIRMATIVE DEFENSES

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The defendant affirmatively raises the following defenses which he will amend pending discovery or as justice requires:

1. All affirmative defenses alleged in the preceding paragraphs are incorporated and re-alleged here as though fully set forth herein.
2. All causes of action in the Complaint are time-barred by the Statute of Limitations of the Copyright Act.
3. Lack of diligence by plaintiff.
4. All causes of action in the Complaint are barred by *res judicata*, collateral estoppel and/or failure to timely include the Defendant in a previous action regarding the same causes of action.
5. Lack of valid copyright:
 - a. Lack of originality in the author/Merger.
 - b. Lack of copyrightability of the subject matter.
 - c. Plaintiff did not guarantee the security of its test and therefore its works are no longer covered by the secured test regulations.
 - d. Contributory negligence.
 - e. Lack of a transfer of rights between the author and the plaintiff.
6. Authorization
 - a. Acquiescence.
 - b. Laches.
 - c. Invalid contractual novation.
 - d. Contributory negligence.
 - e. Lack of good faith in performance of contract.

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- f. Implied license or authorization.
7. Lack of unauthorized copying of protected aspects of the work.
 - a. Lack of access.
 - b. Lack of volition.
 - c. Lack of actual copying.
 - d. Lack of intent if the claim is vicarious or contributory.
 - e. Fair use.
 - f. Non substantial similarity.
8. Estoppel.
9. Injury by fellow servant.
10. Non-particular/insufficient allegation of fraud.
11. The 'secure test' regulatory scheme, contained mainly in 37 C.F.R. §§ 202.20(b)(4) and 202.20(c)(2)(vi), violates the Copyright Act, 17 U.S.C. § 702, because, among other reasons to be developed later, it *de facto* disallows fair use in violation of 17 U.S.C. § 107, and it attempts to grant protection to a procedure, system or process in violation of 17 U.S.C. §102(b).
12. The 'secure test' regulatory scheme and/or the Copyright Act that authorizes it is/are unconstitutional because, they *de facto* disallow fair use in violation of the very purpose of copyrights as explained in *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 575 (1994), because, being a strict liability offense, they deny due process guarantees of fair warning and thereby create a chilling effect on protected speech, and/or because they attempt to use the delegation of power in the Copyright Clause of the Constitution to protect trade secrets beyond the limits of the Commerce

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Clause.

PRAYER FOR RELIEF REGARDING THE ANSWER

FOR THE AFOREMENTIONED REASONS, Defendant, Jaime Antonio “Jimmy” Salas Rushford, M.D., prays that the Court dismiss all causes of action in the Complaint and order Plaintiff to pay reasonable costs and attorneys’ fees and any other relief he may be granted pursuant to law or equity.

COUNTERCLAIMS AND THIRD-PARTY COMPLAINT

NATURE OF ACTION

Defendant, Dr. Jaime A. “Jimmy” Salas Rushford, brings this action under the Civil Code of Puerto Rico, against Plaintiff, The American Board of Internal Medicine (ABIM) for breach of its contractual duties to him stemming from the contract under which he gained and maintained Board Certification; by intentionally and baselessly misleading Dr. Salas Rushford’s patients and potential patients, employers and insurers about the quality of Dr. Salas Rushford’s medical care; by not warning him about its investigation against Dr. Arora; by subjecting him to a kangaroo-court appeals process for over two years, denying him access to potentially exonerating evidence; by sending him threatening letters replete with unsubstantiated accusations through the mail; and by systematically deceiving the governments, patients, hospitals, insurers and medical practitioners of the jurisdictions in which he is licensed to practice medicine about the value of an ABIM certification. All of these actions caused Dr. Salas Rushford severe loss of income and emotional and moral damages for which he seeks reparations, specific performance and injunctive relief. For any of the above actions which fall outside of contract law, they are pleaded in the alternative, under the general torts statute of the Civil Code.

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Dr. Salas Rushford further brings this action under the Lanham Act, 15 U.S.C. § 1125(a), and, alternatively, under the general torts statute of the Civil Code of Puerto Rico against the named individual physician Third-Party Defendants, for the damages they conspired to cause and actually caused him individually and in conjunction by utilizing their positions of power in ABIM to cause ABIM to commit all the actions summarized above and in many occasions doing so personally each of them as its agents, benefitting themselves in the process, most particularly through their knowingly false and baseless public accusations against him all of which actions caused him severe loss of income, emotional distress and moral damages for which he seeks reparations. Dr. Salas Rushford further brings this action under the general torts statute of the Civil Code of Puerto Rico against Ms. Lynn Langdon for the same tortious conspiratorial conduct described above.

Additionally, Dr. Salas Rushford brings this action under the Copyright Act and/or under the Civil Code of Puerto Rico against Pearson Education Inc. for breach of its contractual duty to him, as a third party beneficiary, to be responsible for the integrity and security of the ABIM certification process, a duty which, if Plaintiff's allegations are true, it evidently shirked for years, becoming a vicarious infringer, and predictably culminating in a perfect storm of strict liability for Defendant and others, the negligence for which it is liable to Defendant in as much as Defendant may be liable to Plaintiff.

Finally, Dr. Salas Rushford brings this action under the Copyright Act against the unnamed physicians, Doctors 1-2800, who contributed in any way to the creation or distribution of the documents that Plaintiff alleges against Defendant as being in violation of its copyrights, or to the creation or distribution of any documents from which those may have been derived, for which they are liable to Defendant for at least partially what Defendant

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may be liable to Plaintiff

For any of the above actions for which Federal or Puerto Rico law is inapplicable, it should be interpreted as brought under the corresponding state statute of the jurisdiction where the particular damages occurred, or as a last option, under the law of the forum state.

JURISDICTIONAL ALLEGATIONS

1. This Court has subject matter Federal Question jurisdiction for the actions under the Lanham and Copyright Acts under 28 U.S.C. §§ 1331 and 1338. It has Supplemental Jurisdiction over the rest of the claims which are all intimately related to the actions under one of the other Acts under 28 U.S.C. § 1367.
2. Alternatively, for claims under state law, this Court has subject matter jurisdiction pursuant to the Diversity of Citizenship statute, 28 U.S.C. § 1332, since there is complete diversity of citizenship between the parties and the amount in controversy exceeds the sum of \$75,000.00 exclusive of interests and costs.
3. This Court has personal jurisdiction over ABIM, an Iowa Corporation with Principal Place of Business in Pennsylvania, because it subjected itself to personal jurisdiction in New Jersey by suing Defendant here.
4. This Court, on information and belief has General and Specific Personal Jurisdiction over Third-Party Defendant, Pearson Education Inc., which does extensive business in New Jersey with, on information and belief, branches in several locations throughout the state which do work directly related to the claims against it. We file this action here under duress, preferring to file it in the U.S. District Court of Puerto Rico, to avoid the possibility of having it barred by *res judicata* as an unfiled compulsory counterclaim, and because the other known Third-Party Defendants have represented to the U.S. Dis-

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trict Court of Puerto Rico that this is the proper venue for this action against them.

5. Venue is, again, wholly improper in this District because it has little to no connection with the causes of action alleged, but, because the Court assumed personal jurisdiction over Defendant over our objections, we file this action here under duress to avoid the possibility of having it barred by *res judicata* as an unfiled compulsory counterclaim.

THE PARTIES

6. Defendant, Counterclaim Plaintiff and Third-Party Plaintiff, Dr. Salas Rushford, is a physician with a specialty in Internal Medicine and is a resident of San Juan, Puerto Rico. He is licensed to practice medicine in Puerto Rico as well as in the states of New York, Florida and North Carolina.
7. Plaintiff, American Board of Internal Medicine (ABIM), is an Iowa non-profit corporation with its principal place of business in at 510 Walnut Street, Suite 1700, Philadelphia, Pennsylvania 19106-3699. It is the main and largest medical specialty board certification entity in the country, including the Commonwealth of Puerto Rico. In 2013 ABIM earned \$55,500,000.00 by certifying physicians in Internal Medicine and its twenty sub-specialties, Adolescent Medicine, Adult Congenital Heart Disease, Advance Heart Failure & Transplant Cardiology, Cardiovascular Disease, Clinical Cardiac Electrophysiology, Critical Care Medicine, Endocrinology, Diabetes & Metabolism, Gastroenterology, Geriatric Medicine, Hematology, Hospice & Palliative Medicine, Infectious Disease, Interventional Cardiology, Medical Oncology, Nephrology, Pulmonary Disease, Rheumatology, Sleep Medicine, Sports Medicine, and Transplant Hepatology. ABIM is the only Board that certifies physicians in any of the aforementioned specialties.

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8. Third-Party Defendant, Richard J. Baron, M.D. (Dr. Baron), is the current President and Chief Executive Officer (CEO) of ABIM and, on information and belief, resides in the State of Pennsylvania.
9. Third-Party Defendant, Christine K. Cassel, M.D., (Dr. Cassel), is the former President and Chief Executive Officer (CEO) of ABIM and, on information and belief, resides in the District of Columbia.
10. Third-Party Defendant, Lynn O. Langdon, M.S. (Langdon), is the former Senior Vice President and Chief Operating Officer (COO) of ABIM and current Advisor to Dr. Baron, and, on information and belief, resides in the State of Pennsylvania.
11. Third-Party Defendant, Eric S. Holmboe, M.D. (Dr. Holmboe), is the former Senior Vice President and Chief Medical Officer of ABIM and resides in the State of Illinois.
12. Third-Party Defendant, David L. Coleman, M.D. (Dr. Coleman), is the chairman of the Appeals Board-Designated Panel of ABIM and resides in the State of Massachusetts.
13. Third-Party Defendant, Joan M. Von Feldt, M.D. (Dr. Von Feldt), is a member of the Appeals Board-Designated Panel of ABIM and resides in the State of Delaware.
14. Third-Party Defendant, Naomi P. O'Grady, M.D. (Dr. O'Grady), is a member of the Appeals Board-Designated Panel of ABIM and resides in the state of Maryland.
15. Third-Party Defendants, Companies A, B and C, are insurance companies which at the time the facts of this case took place had in full force and effect insurance policies in favor of Plaintiff, ABIM and Third-Party defendants, under whose terms and conditions they are jointly and severally liable with their insured to Defendant, Third-Party Plaintiff, Dr. Salas Rushford, for the facts and damages alleged herein.
16. Third-Party Defendants, John Doe and Richard Roe are unknown Third-Party defend-

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ants who committed tortious and/or negligent acts or omissions that caused and/or contributed to cause Dr. Salas Rushford's damages.

17. Pearson Education Inc. is the company whose employees and agents Plaintiff alleges, in paragraph 18 of the Complaint, are "responsible for the integrity and security of the certification process." It is, on information and belief, a New York Corporation with principal place of business in New York. Dr. Salas Rushford brings this action under the Copyright Act and/or under the Civil Code of Puerto Rico against it for breach of its contractual duty to him, as a third party beneficiary, to be responsible for the integrity and security of the ABIM certification process, a duty which, if Plaintiff's allegations are true regarding how the questions forwarded by Dr. Salas Rushford were collected, it evidently shirked for years, becoming a vicarious infringer, and predictably culminating in a perfect storm of strict liability for Dr. Salas Rushford and others, the negligence for which it is liable to Defendant in as much as Defendant may be liable to Plaintiff.

18. Third-Party Defendants, Doctors 1-2800, are unknown physicians who contributed in any way to the creation or distribution of the documents that Plaintiff alleges against Defendant as being in violation of its copyrights, or to the creation or distribution of any documents from which those may have been derived. They are also, independently, any physicians who had knowledge of the alleged infringement in any way prior to Defendant and failed to warn Defendant and/or ABIM of the violation. They include, but are not limited to, any physicians against which ABIM has taken any sort of action regarding its test copyrights or test integrity if at all related to the infringements or copyrights at issue in this action, including sending letters, contacting in any way, investigating in any way, making a note on their records in any way, reprimanding in any way

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or acting legally against in any way. They also include, but are not limited to, any person who violated ABIM's Pledge of Honesty prior to Defendant taking the test. Dr. Salas Rushford brings this action under the Copyright Act against them because they are liable to Defendant for at least partially what Defendant may be liable to Plaintiff.

19. 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. Von Feldt, M.D., and Naomi P. O'Grady, M.D. will be collectively referred to as the ABIM Individuals as has been their custom when addressing the Court in the parallel case.

THE FACTS

Dr. Salas Rushford's trek to achieve Board Certification

20. Dr. Salas Rushford was born in San Juan, Puerto Rico and graduated with high honors from Colegio San Ignacio de Loyola high school in San Juan in 1997. He was admitted that same year to the prestigious "Grupo de los Cien" (Group of the Hundred) of the Department of Natural Sciences of the University of Puerto Rico ("UPR"), Rio Piedras Campus. He obtained his bachelor's degree in Natural Sciences with high honors from the UPR on December 1999.

21. He then enrolled at the UPR School of Medicine and obtained his Doctorate of Medicine, also with honors, from that institution in 2004.

22. He did his internship at the General Surgery Program at St. Vincent's Manhattan Hospital in New York, New York from 2004 to 2006. He received excellent evaluations for his work in St. Vincent's. He had to change his residency program because St. Vincent's filed for bankruptcy and closed the program.

23. He then started his residency in Internal Medicine at Cabrini Medical Center in New

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York, New York from July 2006 to February 2008 when he returned to Puerto Rico because Cabrini Medical Center also declared bankruptcy and had to close its training and clinical programs. He received excellent evaluations for his work at Cabrini.

24. Dr. Salas Rushford then enrolled at the San Juan City Hospital located in San Juan, Puerto Rico on February 2008 where he completed his residency in Internal Medicine in April 2009.

25. Practicing physicians are required to be licensed by the state in which they practice. These state licensing agencies (“state medical boards”) are subject to the substantive and procedural “due process” and “equal protection” clauses in all actions, including disciplinary proceedings. Being sanctioned or disciplined by one of these state agencies is devastating to a physician’s practice, reputation, and economic livelihood. It bars physicians from obtaining required medical privileges, as well as malpractice insurance. Thus, a “doctor’s medical license” is considered a “valuable property right” of the physician, which cannot be sanctioned or removed by mere arbitrary or capricious action of the state agency.

26. Board Certification is immensely important in a physician’s ability to obtain privileges and attain progress in his/her profession. Unlike state medical boards, medical “Certification Boards” are private organizations, which claim to not be subject to any governmental rules or regulations, and are not subject to governmental control or oversight. These Certification Boards act as gatekeepers with *de facto* absolute power to control the right to practice in specific medical fields.

27. Board Certifications issued by these private medical Certification Boards are a requisite for most positions in the medical profession. Although Board Certification is not es-

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essential for the practice of medicine, it has become a practical necessity. For example, these Board Certifications are necessary in order to obtain privileges at most hospitals, as well as employment in HMO's, clinics, and the like. Thus, being sanctioned or disciplined by a private medical Certification Board and/or loss of Board Certification is as devastating to a physician's practice, reputation, and economic livelihood as being sanctioned or disciplined by a state medical board. That is, sanction, suspension or revocation of a Board Certification irreparably damages a physician's reputation and the ability to practice medicine or to obtain malpractice insurance.

28. For this reason, many jurisdictions, find a property interest in these privately granted rights, especially when such rights affect the recipients standing in the community and/or his/her professional reputation and/or trade or business. Board Certification, therefore, constitutes the creation of a "vested right" which impacts the professional reputation and economic opportunities of those, who hold this right, including Dr. Salas Rushford. A doctor upon whom a Board Certificate has already been conferred enjoys broader protections than a mere applicant for Certification.

29. Therefore, private Certification Boards' actions must comport with the legal principle of "fair play, contractual due process and substantial justice" and be both substantively rational and procedurally fair. For a procedure to be fair, it must include adequate notice and a real and genuine opportunity to be heard by an impartial and unbiased person or panel prior to the Certification Board revoking or suspending its Board Certification. On the other hand, procedures are deemed "arbitrary" when they are substantively unreasonable, internally irregular, or procedurally unfair, and all are based on false allegations and are created or improvised along the way, constitute egregious breaches of contract

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and the duty of good faith.

30. In December of 2008, Dr. Salas Rushford, while a resident of the Commonwealth of Puerto Rico and using a computer in Puerto Rico, registered online to take the ABIM Board Exam to be held in Puerto Rico. He paid with a credit card registered with a billing address of San Juan, Puerto Rico from funds located in San Juan, Puerto Rico. He was authorized to take the ABIM Board Exam which would be held on August 20, 2009. From that point on, the relationship between ABIM and Dr. Salas Rushford was governed by a contract, upon information and belief, ABIM's October 2008 Policies and Procedures for Certification (herein after, the Original P&P's), which was the first contract between ABIM and Dr. Salas Rushford. For the past three years Plaintiff ABIM and Third-Party Defendants have repeatedly denied a copy of this document to Dr. Salas Rushford. He learned of his existence because it was mentioned in a past version of ABIM's website.
31. Dr. Salas Rushford followed the advice he received from colleagues and professors from Puerto Rico and New York and enrolled in a six-day ABIM Certification Exam review course offered by Arora Board Review ("Arora Course") which, according to its widely disseminated advertising literature, relied principally on discussion of board-type questions.
32. The Arora Course had been offered yearly for 20 years and was presented by renowned ABIM-certified internist, gastroenterologist, and geriatrist Dr. Rajender K. Arora ("Dr. Arora"), a fellow of the American College of Physicians and of the American College of Gastroenterology.
33. Another selling point of the Arora Course was that it was approved by the Accreditation

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Council for Continuing Medical Education (hereinafter, ACCME) for “42 AMA/PRA™ (American Medical Association/ Physicians’ Recognition Award) Category 1 CME (Continuing Medical Education) Credits”. ABIM is the largest of 24 member certifying boards of the American Board of Medical Specialties (ABMS). In turn, ABMS is a founding member of ACCME. ABIM’s policies have great influence in the Arora Course’s eligibility for ACCME credit eligibility.

34. The Arora Course was held at the City University of New York in May 2009. As part of its education program, the San Juan Hospital, a non-profit educational government institution, reimbursed Dr. Salas Rushford for part of that expense. The course was attended by approximately 350 other physicians from around the United States. A great many of these physicians were Diplomates (referring to a doctor certified as a specialist by a Board) and others were Candidates for Board Examination. Dr. Salas Rushford was a candidate.

35. Because of all the above reasons, Dr. Salas Rushford’s impression was that the Arora course was a legitimate, above-board, reputable course that had all the trappings of authority, legality and propriety: it was held at a public university, it was taught by a celebrated physician, it was eligible for educational credits, it was well-recommended, and its existence was widely known and advertised.

36. During this ACCME-approved course, Dr. Arora asked participants to inform him of how well his review course helped them pass the test *after* taking of the ABIM Board Exam. This practice had been going on publicly for many years and was commonly known and never prohibited by ABIM, residency programs or the AMA. On the contrary, it was a highly recommended review course. Despite not knowing anything about

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ABIM's claims at the time, Dr. Salas Rushford never discussed the exam with Dr. Arora after he took it.

37. During the Arora Course, Dr. Arora stated that he welcomed students to discuss issues with him at any time, and, for said purposes, made one contact e-mail address and one phone number available to all attendees.

38. While preparing for the ABIM Board Exam, as was customary and accepted, and in some cases required, Dr. Salas Rushford participated with several study groups. Some of the physicians in those groups were former Arora Course enrollees that exchanged study material by e-mail derived from a multitude of sources, including other study groups, medical school professors, teaching hospital academic directors, the Medical Knowledge Self-Assessment Program ("MKSAP") and websites that claimed their board-like questions and study materials were prepared by actual ABIM exam writers and were readily available for purchase on the internet.

39. Dr. Salas Rushford took and passed the ABIM Board Exam in a Pearson Testing Center in the Commonwealth of Puerto Rico on August 20, 2009.

40. Dr. Salas Rushford has never been involved in any disciplinary proceeding or medical misconduct proceedings in any state or the Commonwealth of Puerto Rico. Dr. Salas Rushford is a skilled, accomplished, published, recognized physician in his community. He has been honored by the Senate and House of Representatives of the Commonwealth of Puerto Rico, and is well regarded by both his patients and peers. He has been active in community service and was a first responder to the Haiti earthquake crisis. He was an ABIM Board Certified practicing physician, in good standing, in the Commonwealth of Puerto Rico and the states of New York, Florida and North Carolina, up until the joint

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and arbitrary and malicious actions by ABIM and the ABIM Individuals.

ABIM and the ABIM Individuals' illicit conduct

41. ABIM was established in 1936 through the American College of Physicians (“ACP”) and the American Medical Association (“AMA”), both private organizations. On information and belief, Third Party Defendant Dr. Cassel was the President and CEO of the ACP before becoming President and CEO of ABIM. ACP has Continuing Medical Education (“CME”) programs for physicians, including Internal Medicine. ACP publishes study material for ABIM Candidates taking the ABIM examinations, including the MKSAP, now in its 15th edition; postgraduate board review courses; and Re-Certification courses. The MKSAP contains hundreds of questions that are indistinguishable from actual Board exam questions by anyone who does not have access to the test.
42. Unbeknownst to Dr. Salas Rushford (or/and apparently, other ABIM Candidates), ABIM examination questions are maintained in an “item bank” for “re-use”. Thus, exact questions are, apparently, reused a number of times. This was nowhere stated or publicized on ABIM’s website or in any literature. On information and belief, this practice is engaged in by Defendant ABIM “to save money”. ABIM candidates who take the test are not allowed to see the tests after they are scored and have no way of knowing which questions they missed. Likewise, on information and belief, ABIM cannot reproduce the questions on a particular ABIM Candidate’s test.
43. ABIM had knowledge of potential problems with the Arora Course before Dr. Salas Rushford took it and never warned him or any other physician of the potential issues with such a popular, reputable course. All of Dr. Arora’s offerings of ABR were done

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publicly, not clandestinely, much of it on the internet and/or ABR website. On information and belief, ABIM had knowledge of the practice of Dr. Arora and ABR prior to Dr. Salas Rushford's registration for the Examination in December 2008.

44. ABIM sent a spy to the Arora Course which Dr. Salas Rushford attended. Even though, according to ABIM, that spy received one thousand (1,000) questions substantially similar to ABIM copyrighted questions during the course, ABIM never warned Dr. Salas Rushford or the other course attendees of its issues with the course. ABIM's copyrighted questions are secret and only ABIM or its agents were in a position to gauge whether a document published by a third party was in fact substantially similar to ABIM's copyrighted secured tests.

45. On information and belief, ABIM, Dr. Cassel, Ms. Langdon, and Dr. Holmboe did not remove the allegedly offending questions from the test before Sr. Salas Rushford took it, even though they had a large replacement question-bank available to them and had over two months to do so before the test date. ABIM has stated that they removed them but not the date.

46. Even after having supposedly gathered substantial evidence against Dr. Arora, ABIM never warned Dr. Salas Rushford or any other physician about Dr. Arora's alleged conduct and waited over six months to take any public action. Its intent was clearly to persecute innocent third-parties, including sending reprimand letters to approximately 2,700 physicians, fining hundreds, and pursuing capricious legal action against over a dozen, rather than to act in good faith. It has acted with unclean hands throughout the entire process. All of those physicians are included here as part of Doctors 1-2800.

47. On May 8th, 2012 without prior notice or warning, almost three (3) years after Dr. Salas

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Rushford had successfully passed the ABIM Board Exam, ABIM sent a letter, signed by Ms. Lynn Langdon, then COO of ABIM, alleging misconduct, violation of policies and recommending full and indefinite revocation of his Board Certification. The basis for these unsubstantiated accusations was in essence guilt by association, because Dr. Salas Rushford had participated in the Arora Course. Specifically, the letter alleged that Plaintiff disguised and concealed his identity because he used a nickname “Jimmy” and more than one e-mail address when he communicated with Dr. Arora; that he hoarded and collected hundreds of ABIM examination questions in violation of a so-called Pledge of Honesty that he had not even seen, signed or agreed to at the time the violations were alleged to have occurred; and that his conduct was, in their conclusion, unethical and unprofessional. Dr. Salas Rushford was stunned, appalled, concerned, and upset because ABIM also stated it was going to notify the government medical licensing board in every jurisdiction in which he was licensed and that said revocation would be instituted within 10 days.

48. In her certified original letter, Ms. Langdon, on behalf of ABIM, asserted that when Dr. Salas Rushford registered for the Examination, he had “agreed” to a contract, to wit, the “Policies and Procedures for Certification” (“P&P’s”), which he allegedly breached. The letter claimed to quote from the P&P’s. However, at the time Dr. Salas Rushford registered for the ABIM Board Exam, the text that the letter quoted was not part of the P&P’s. The version of the P&P’s in existence at the time Dr. Salas Rushford registered for the Examination was, in all material issues, a qualitatively different document. Its publication date was October 2008, while ABIM’s letter had been quoting from the August 2009 P&P’s which ABIM published after Dr. Salas Rushford sat for the Board

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Exam. Both the Original October 2008 P&P's and the August 2009 P&P's stated that the P&P's in effect *at the time of registration* for the exam (in this case December 2008) would govern the contract between the candidate and ABIM. However, those facts did not deter ABIM and the ABIM Individuals from their course to destroy Dr. Salas Rushford's reputation and livelihood. It simply went ahead with a "revocation process" that provided none of the minimum requirements of contractual due process or good faith. Instead, the ABIM Individuals' determinations, on behalf of ABIM, grew even more capricious, arbitrary, malicious and unreasonable.

49. The letter also claimed that Dr. Salas Rushford had breached ABIM's Pledge of Honesty even though ABIM knew that he had not because their own data showed no conduct whatsoever after the date of the Pledge. In sum, the allegations in ABIM's Confidential Letter of May 8th, 2012, leading to ABIM and Ms. Langdon's actions of recommending indefinite revocation were false; a fact that was known or should have been known to both at the time they sanctioned Dr. Salas Rushford.

50. Upon sending the letter, without notice to Dr. Salas Rushford and without giving him an opportunity to respond or appeal in advance, Ms. Langdon caused ABIM's public website to display Dr. Salas Rushford Board Certification status as "Revocation Recommended", directing that innuendo-laden change to patients, potential patients, colleagues, potential employers, insurers and hospitals in the states where he is licensed to practice medicine. The website never detailed what were the factual allegations which gave rise to the recommendation to revoke. A viewer could not know the alleged cause.

51. Even though Dr. Salas Rushford immediately denied wrongdoing, Ms. Langdon refused to change his public certification status, in contravention of her and ABIM's,

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self-imposed “confidentiality” duty as set forth on the face of her Confidential Letter. ABIM breached its own policy with regard to changing status of a physician without prior notification. Ms. Langdon promoted the publication with full knowledge of the emotional and economic harm that it would cause Dr. Salas Rushford, and the groundlessness of the acts imputed. This action to assert revocation was done by Ms. Langdon with the knowledge that Dr. Salas Rushford had not been afforded any notice of ABIM’s actions or any opportunity to respond or refute the charges which were, on their face, false.

52. Dr. Salas Rushford submitted to ABIM’s internal procedures of appeal. This process, in which Ms. Langdon, Dr. Holmboe, Dr. Coleman, Dr. Von Feldt and Dr. O’Grady, personally participated, and which all the ABIM Individuals personally controlled on behalf of ABIM, turned out to constitute a tour de force in bad faith dealing and reputational damages against Dr. Salas Rushford. ABIM and Ms. Langdon demurred and failed to respond, but eventually they and, on information and belief, Dr. Cassel, Dr. Holmboe, Dr. Coleman and Dr. Von Feldt created an improvised a “process” that was not in the Policies and Procedures applicable to Dr. Salas Rushford. Dr. Salas Rushford repeatedly requested copies of the Original P&P’s applicable to him but ABIM refused to provide them. The so-called appeal process lasted well over two years. The last stage was a hearing held on July 24, 2014, before a panel of three physicians designated by ABIM.
53. At the hearing, and during the protracted “process”, ABIM failed to cite a specific Rule, Policy or Resolution violated by Dr. Salas Rushford. ABIM and the ABIM Individuals failed constantly to respond to Dr. Salas Rushford’s request to specifically address the charges, to provide the applicable Policies and Procedures and to provide a copy of the

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Pledge of Honesty he allegedly violated. ABIM, in total disregard of contractual good faith and due process, failed time after time, to provide the evidence to substantiate the allegations it and the ABIM Individuals deemed credible and proven.

54. ABIM and the ABIM Individuals personally denied Dr. Salas Rushford the most crucial evidence, that which might prove his innocence and which ABIM and the ABIM Individuals exclusively control: the original test questions which he supposedly hoarded and forwarded, so that he might compare them to those he received from colleagues and from the Arora Course believing them to be independently created reviews. In fact, they never even mounted a case against him, instead presuming all accusations to be true.

55. In spite of all this, the Hearing Panel (composed of Drs. Coleman, Von Feldt and O'Grady), on behalf of ABIM, sent a letter on October 16, 2014, signed by Dr. Coleman, concluding that Dr. Salas Rushford's conduct had been unprofessional and unethical; his board certification was retroactively suspended for seven (7) years effective December 7th, 2012. Said final resolution contained the following statement: "this constitutes the final decision of ABIM on this matter."

56. The very next day, ABIM viciously filed the Complaint in this case contradicting the Hearing Panel's final determination.

57. Since the above-mentioned Decision notified on October 16, 2014, the status of Dr. Salas Rushford shown in the ABIM website is "Not Certified". Immediately below said status, it is stated "INITIAL CERTIFICATION Internal Medicine: 2009". Therefore, it is obvious for the public that his certification was suspended. He has also been blocked from the Maintenance of Certification (hereinafter, MOC) process.

58. ABIM and the ABIM Individuals, jointly and severally, under color of ABIM authority,

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whether acting outside their actual authority or not, engaged in an ongoing campaign of appalling conduct intended to destroy the personal and professional life of Dr. Salas Rushford and have successfully caused him professional and emotional harm.

59. ABIM's actions have caused and will continue to cause Dr. Salas Rushford to sustain irreparable damage, loss of income and injury for which there is no adequate remedy in law.

FIRST CLAIM FOR RELIEF

60. All prior allegations are incorporated by reference in this cause of action as if they had been expressed herein.

61. The damages suffered by Dr. Salas Rushford were caused by the malicious breach of contract of ABIM.

SECOND CLAIM FOR RELIEF

Commercial disparagement under the Lanham Act

62. All prior allegations are incorporated by reference in this cause of action as if they had been expressed herein.

63. The physician members among the ABIM Individuals are Dr. Salas Rushford's competitors.

64. Their actions in baselessly disparaging his professional services using ABIM's website are in violation of the Lanham Act. 15 U.S.C. § 1125(a).

THIRD CLAIM FOR RELIEF

Article 1802, et seq. of the Civil Code (general torts)

65. All prior allegations are incorporated by reference in this cause of action as if they had been expressed herein.

66. The damages suffered by Dr. Salas Rushford were also caused by the tortious, negligent,

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wrongful, arbitrary, malicious and incompetent investigation conducted the ABIM Individuals which concluded incorrectly that Dr. Salas Rushford had supposedly committed misconduct and breached the Policies and Procedures for Certification and the Pledge of Honesty and Defendant and Third-Party Plaintiff, Dr. Salas Rushford, incorporates and re-alleges each and every allegation contained in the preceding paragraphs.

FOURTH CLAIM FOR RELIEF

Article 1802, et seq. of the Civil Code (general torts)

67. All prior allegations are incorporated by reference in this cause of action as if they had been expressed herein.

68. Dr. Salas Rushford is a well-respected physician in the Commonwealth of Puerto Rico and ABIM and the ABIM Individuals acted maliciously and/or negligently, with knowledge that the information disseminated was false and/or with total disregard of its veracity, thus causing damages to Plaintiff. The published information has been verified, read and learned by hospitals, patients, physicians and others, thus, causing harm to Plaintiff's personal and professional reputation.

FIFTH CLAIM FOR RELIEF

Copyright Act

69. All prior allegations are incorporated by reference in this cause of action as if they had been expressed herein.

70. Doctors 1-2800 are liable to Defendant for at least partially what Defendant may be liable to Plaintiff, if they in any way caused an infringement of Plaintiff's copyrights which led to the one alleged against him here.

71. Pearson Education Inc. is liable to Dr. Salas Rushford for enabling the infringement of those Doctors, the negligence for which it is liable to Defendant in as much as Defendant

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may be liable to Plaintiff.

SIXTH CLAIM FOR RELIEF

General Contracts

72. All prior allegations are incorporated by reference in this cause of action as if they had been expressed herein.

73. Pearson Education Inc. is liable to Dr. Salas Rushford for breach of its contractual duty to him, as a third party beneficiary, to be responsible for the integrity and security of the ABIM certification process, the negligence for which it is liable to Defendant in as much as Defendant may be liable to Plaintiff.

DAMAGES

74. All prior allegations are incorporated by reference to this cause of action.

75. As a result of the Counterclaim and Third-Party Defendants' malicious breach of contract and negligent, wrongful, arbitrary and malicious acts and/or omissions, Dr. Salas Rushford has suffered, continuous to suffer and will suffer irreparable damages to his professional and personal reputation, injuries and profound mental anguish and anxiety. These damages are valued at no less than \$15,000,000.00, for which the defendants are jointly and severally liable.

76. As a result of the Counterclaim and Third-Party Defendants' breach of contract and negligent, wrongful, arbitrary and malicious acts and/or omissions, Dr. Salas Rushford has suffered, a loss of income in a sum greater than \$1,500,000.00, for which the defendants are jointly and severally liable.

JURY DEMAND

77. Plaintiff demands a trial by jury in all issues so triable.

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PRAYER FOR RELIEF

WHEREFORE, Defendant, Counterclaim Plaintiff and Third-Party Plaintiff, Jaime Antonio “Jimmy” Salas Rushford, M.D., prays for judgment and relief against ABIM and Third-Party Defendants, jointly and severally, as follows:

- A. For dismissal of all causes of action in the Complaint.
- B. For temporary, preliminary and permanent injunctive relief enjoining ABIM and the ABIM Individuals and their officers, agents, servants, employees, successors, and assigns, and those persons in active concert, participation or privities with them, or any of them from disparaging Jaime Antonio Salas Rushford, M.D. in any manner, either writing (including on the Internet), orally, or otherwise;
- C. Entry of preliminary and permanent injunction requiring that ABIM and the ABIM Individuals immediately restore Dr. Salas Rushford Certification status as “Certified” on ABIM’s website, as well as its records and to this permit Dr. Salas Rushford to participate in MOC, Maintenance of Certification Process in a way that is not more prejudicial to him than if this entire situation had never happened and to withdraw/eliminate/clarify all defamatory and disparaging statements made by ABIM.
- D. That Dr. Salas Rushford be awarded costs, attorney’s fees and pre-judgment and post-judgment interests.
- E. That judgment be entered against defendants for all damages sustained by Dr. Salas Rushford and enumerated in this Complaint which shall be proved at trial and exceed the amount of \$75,000.
- F. That Dr. Salas Rushford be awarded such other and further relief, both general and

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special, at law and equity, as the Court may deem just and proper.

RESPECTFULLY SUBMITTED,

In Newark, New Jersey, this 22nd day of September,

2015.

Attorneys for Dr. Salas Rushford,

/s/ Marco A. Gonzalez, Jr.

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