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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

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AMERICAN BOARD OF INTERNAL
MEDICINE,

Plaintiff,

v.

RAJENDER K. ARORA, ARORA BOARD
REVIEW, ANISE KACHADOURIAN and
JOHN DOES 1-50,

Defendants.

(FILED UNDER SEAL)

CIVIL ACTION NO. 09-5707

FILED

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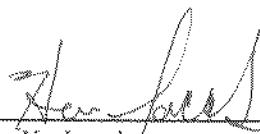
MICHAEL E. KUNZ, Clerk
Dep. Clerk

**PLAINTIFF'S MOTION FOR TEMPORARY RESTRAINING ORDER, SEIZURE AND
IMPOUNDMENT ORDER, ORDER SETTING BOND, ORDER TO FILE DOCUMENTS
UNDER SEAL, AND ORDER SETTING PRELIMINARY INJUNCTION HEARING**

Pursuant to Federal Rule of Civil Procedure 65, Plaintiff American Board of Internal Medicine ("ABIM"), by its undersigned counsel, respectfully moves the Court for the issuance of a temporary restraining order, seizure and impoundment order, order setting bond, order to file documents under seal, and order setting a preliminary injunction hearing, arising from the willful copyright infringement of ABIM's secure copyrighted examination for Board Certification in Internal Medicine by Defendants Rajender K. Arora, Arora Board Review and Anise Kachadourian. The grounds for this Motion are set forth in the accompanying Memorandum of Law.

December 2, 2009

Respectfully submitted,



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NICHAE KUNZ, Clerk
By _____ Dep. Clerk

**PLAINTIFF'S MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR
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ORDER SETTING BOND, ORDER TO FILE DOCUMENTS UNDER SEAL, AND
ORDER SETTING PRELIMINARY INJUNCTION HEARING**

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Plaintiff American Board of Internal Medicine (“ABIM”) submits this memorandum of law and the accompanying declarations of Rebecca Baranowski, Christine K. Cassel, M.D., and A. Benjamin Mannes in support of its motion for temporary restraining order, seizure and impoundment order, order to file documents under seal and order setting preliminary injunction hearing arising from the willful copyright infringement of ABIM’s secure copyrighted examination for Board Certification in Internal Medicine by Defendants Arora Board Review, Dr. Rajender K. Arora (“Arora”) and Dr. Anise Kachadourian (“Kachadourian”).

I. **PRELIMINARY STATEMENT**

Defendant Arora, proprietor of the Arora Board Review course, stole, copied and distributed to his course attendees hundreds of actual examination questions from ABIM’s copyrighted and confidential Certifying Examination in Internal Medicine (“Examination”). ABIM’s Examination is the final requirement a physician must satisfy to achieve the highest standard in internal medicine – Board Certification. Arora obtained access to ABIM’s secure and confidential Examination items in two ways. First, by coaxing course attendees to divulge the contents of the Examination to him during the Examination lunch break and following the Examination. Second, by personally taking and failing the Examination, together with Defendant Kachadourian, seventeen times. The depth and brashness of Arora’s calculated infringement of ABIM’s copyrights is startling. As Arora explained to his most recent review class:

I don’t do anything which is not on the examination. I don’t make these questions; they have been taken from people who took the exam. Hopefully, you will send us questions next year. As soon as you finish the exam, you send me the questions, and I will put it for next year. That’s how we do it. We have to help each other.

(Declaration of Rebecca Baranowski (“Baranowski decl.”) ¶ 23, Exh. A.)

ABIM's compelling need for an ex parte seizure order in this case is underscored by the nature of Defendants' nefarious scheme. Arora Board Review is a family-run business operated out of Arora's personal residence and through a website controlled by Arora's son, an information technology expert who is presently subject to a permanent injunction arising from intellectual property infringement on the Internet. Arora uses his course to mobilize presently unidentified physicians to steal Examination questions in knowing violation of the copyright notice and confidentiality agreement to which every Examination candidate must agree. If Defendants are provided notice of this action, Defendants' computer files and other records, including those identifying Examination candidates who engaged in willful copyright infringement, will likely be destroyed, effectively preventing ABIM from seeking redress against these John Doe Defendants. An ex parte seizure order is the only relief that will enable ABIM to prosecute this action and to determine the full extent to which Defendants have subverted the Board Certification process.

II. STATEMENT OF FACTS

ABIM and Board Certification

ABIM, established in 1936, is a not-for-profit corporation that enhances the quality of medical care by certifying internists and subspecialists who demonstrate the clinical judgment, skills and attitudes essential for the delivery of excellent patient care. (Declaration of Dr. Christine Cassel ("Cassel decl.") ¶¶ 1-2, Exh. B.) Board Certification by ABIM is an internationally recognized marker designating that a physician has achieved the highest standards for internal medicine. (Id. ¶ 3.) A physician becomes Board Certified in Internal Medicine by completing post-graduate training in internal medicine, meeting other clinical and experiential requirements and finally, by passing the Examination. (Id. ¶ 7.) After becoming Board Certified in Internal Medicine, a physician may then seek Board Certification in one or more

subspecialties. (Id. ¶ 8.) Board Certification in any of the subspecialties requires additional training and clinical requirements, as well as passing a Certification Examination for the subspecialty. (Id.) Becoming Board Certified is an important goal for many physicians because it greatly enhances their opportunities for employment and advancement in the medical profession. (Id. ¶ 6.)

The Board Certification Examination

The Examination is a secure, computer-based examination administered at testing centers nationwide and abroad during the month of August. (Id. ¶ 7.) Similar to the Multistate Bar Examination, the Examination is administered in one day over approximately ten hours. The questions on the Examination are not disclosed to anyone except those taking the Examination and those involved in creating and administering the Examination. (Declaration of A. Benjamin Mannes (“Mannes decl.”) ¶ 4, Exh. C.)

ABIM repeatedly notifies candidates for Board Certification that the Examination is a copyrighted work owned by ABIM and may not be reproduced. (Id. ¶ 5.) All candidates for Board Certification are required to enter into a confidentiality agreement with ABIM at the time of their Examination and Board Candidates are reminded of their obligation not to copy or disclose Examination items both immediately before and after taking the Examination. (Id.)

ABIM develops its Examination questions through a rigorous and costly process. It uses a “stepwise” procedure to create new questions. First, the Test Committee¹ (“Committee”), comprised of physicians who are leaders in their fields of medicine and medical education, defines a general examination blueprint of areas within internal medicine to be tested.

¹ All Test Committee members sign an agreement with ABIM confirming that ABIM is the copyright owner of all works created by or contributed to by the member. (Baranowski decl. ¶ 4.)

(Baranowski decl. ¶ 5.) The Committee identifies cognitive tasks, such as diagnosis or treatment, and cognitive abilities, such as clinical judgment, to be tested for each area. (Id.) The work of writing new questions and evaluating draft questions is performed by Committee members at in-person meetings during which the questions are read aloud, one by one. (Id.) The Committee then decides by consensus opinion to either: (1) accept the questions for further consideration, (2) revise them at the meeting, (3) assign them to individual test Committee members for extensive revision or (4) reject them. (Id.) Once a question is accepted, it is pre-tested (used in Examinations but not scored) to ensure that it has appropriate measurement characteristics. (Id., ¶¶ 5-6.) ABIM strives to create or replace three hundred new questions each year. (Id., ¶ 7.) For every five hundred questions created by the Committee, only three hundred ultimately become scored questions on the Examination. (Id.) Some Examination items are reused and appear on multiple Examinations, especially those that demonstrate repeatedly, through statistical analysis, to be an excellent assessment of the specific subject matter. (Cassel decl. ¶ 17.)

ABIM has obtained Certificates of Copyright for its secure Examinations from the United States Copyright Office in accordance with the procedures for secure tests pursuant to 37 C.F.R. § 202.20. Copies of the relevant Certificates of Copyright and/or proof of registration are attached to the accompanying Declaration of Rebecca Baranowski as Exhibit 1.

Arora Board Review

Arora Board Review (“ABR”) is a private business based at the residence of Dr. Rajender K. Arora² (“Arora”), that sells test-preparation courses and materials solely for the ABIM Board Certification Examinations. (Mannes decl. ¶ 6.) ABR appears to be a sole proprietorship operated by Arora with the assistance of several of his family members, including his son, Pavan Arora, the “Technical Director” for ABR. (Id. ¶ 6.) Pavan Arora has fifteen years of software development and technology management experience, and is presently subject to a permanent injunction arising from intellectual property infringement on the Internet. (LinkedIn Profile for Pavan Arora, Exh. 1 to Mannes decl.; Consent Order in YourDictionary.com, Inc. v. Pavan Arora, No. 4:04-CV-1896 (M.D. Pa. 2004), Exh. 2 to Mannes decl.)

Arora offers five different Examination test-prep products: (1) Unusual Board Review – a board review course (\$1095); (2) Crash Course – a three day weekend cram session for certification (\$695); (3) Recertification Course (\$1495); (4) Newsletter (\$295/12 issues); and (5) Flashcards (\$100). (Mannes decl. ¶ 8.) Arora’s Board Certification review courses are offered in the late Spring and Summer, shortly before the ABIM Examination. Over 400 Board Certification candidates attended Arora’s most recent review courses held at a rented auditorium and his home. (Baranowski decl. ¶¶ 17, 21.)

² Defendant Arora began his career by taking and failing the Examination seven times. (Mannes decl. ¶ 11.) After finally passing the Examination, he took an additional ten ABIM examinations in two subspecialties (again failing these repeatedly), in addition to taking an Internal Medicine recertification Examination that was not required. (Id. ¶¶ 11-12.)

Defendants' Theft, Copying and Dissemination of ABIM's Examination

ABR advertises and offers its test-prep products on the Internet to doctors throughout the world who are studying to pass the Examination at the website www.aroraboardreview.com ("ABR Website").³ (Baranowski decl. ¶ 12.) To market ABR's services to potential customers, Arora placed a "practice" examination on the ABR Website consisting of sixty questions simulating one module of the ABIM Examination. (*Id.*) ABR's practice examination was timed and the questions appeared one by one on the screen just as they do for the ABIM Examination. (*Id.*)

After conducting an in-depth analysis of the sixty "practice" questions, ABIM concluded that at least fifty-five ABR questions were substantially similar to ABIM Examination items. (*Id.* ¶¶ 13-14.) A detailed, color-coded question comparison analysis of ten ABR practice questions and their ABIM Examination item counterparts is attached as Exhibit 2 to the Declaration of Rebecca Baranowski.

As seen in the attached analysis, Defendants copied every facet of the ABIM Examination items, including purely creative non-substantive elements and incorrect answers. (Baranowski decl. ¶ 15.) For example, in one question focused on HIV infection in young women from Africa, ABR's practice question – like the copyrighted ABIM question -- recited that *the patient had emigrated from Uganda sixteen months ago, presented with weight loss, night sweats and enlarged lymph nodes*, and offered the incorrect answer "blood cultures." (*Id.*) A different ABR question, testing the origin of hepatitis, recited that the male patient *worked in a hospital, had the hepatitis B vaccine seven years ago, and ten days ago returned from a vacation in Belize where he had sex with a prostitute.* (*Id.*) The copyrighted ABIM Examination item

³ Pavan Arora is the technical contact for ABR's Website. (Mannes decl. ¶ 6.)

contained these identical facts, except that the hepatitis B vaccine took place eight years ago. The ABR question also contained *four of the five identical answers choices* as the ABIM Examination item. (Id.)

Having seen the magnitude and exactitude of ABR's copying, ABIM investigated further to determine how ABR obtained ABIM's secure and copyrighted Examination content. ABIM sent Rebecca Baranowski, one of the most knowledgeable employees about the contents of ABIM's Examination item bank, to ABR's next review course, the Unusual Board Review. (Id. ¶ 16.) Approximately 350 Board Certification candidates attended this six-day class in May 2009, held in a lecture hall at CUNY Graduate Center in New York City. (Id. ¶ 17.) The course consisted of a question and answer format with Defendant Arora and an unnamed assistant (subsequently identified by ABIM as Dr. Anise Kachadourian), taking turns reading practice questions aloud from the daily handout and going over the answer choices with the audience. (Id. ¶ 18.)

The written outlines for the course contained hundreds of practice questions, many of which were substantially similar to ABIM Examination items. (Id. ¶ 19.) Ms. Baranowski also captured the statements made by Arora and his staff during the review course using a digital audio recorder. (Id. ¶ 17.) In a nutshell, Arora repeatedly boasted that his practice questions were really ABIM Examination items obtained from previous Board Certification candidates and implored his attendees to email questions to him immediately following the ABIM Examination:

When people send me the questions, there is a good part and a bad part. The good part is that you know exactly now what they're asking, all right? . . . I can only give you what I am given, and this is the way it is.

The moral of the story is – send me questions. . . . Email me right after the exam.

(Id.) Arora even explained how Board Certification candidates meet Arora in his white Mercedes during the Examination lunch break (where Arora provides lunch) and divulge the copyrighted and confidential Examination items to Arora by speaking into his recording device.

(Id. ¶ 20.)

ABIM continued its investigation into Arora and ABR by having Ms. Baranowski attend and audio record the ABR Crash Course, given immediately before the ABIM Examination in August 2009. Approximately seventy-five physicians attended this three-day review course at Arora's personal residence in Livingston, New Jersey. (Id. ¶ 21.) The written materials for this course were essentially a condensed version of the written outline from the Unusual Board Review course with one notable exception – the directive on the last page of the outline:

Last year's candidates have helped you
You must help the next year's candidates.
(Through Arora Board Review)
Call/write/email soon after the examination (973) 994-3203
boardreview@comcast.net

(Crash Course Outline p. 142, Exh. 3 to Baranowski decl.)

The Crash Course followed the same format as the Unusual Board Review, with Arora and his still unnamed assistant (Kachadourian), taking turns reading practice questions aloud from the written outline and going over the answers with the audience. (Id. ¶¶ 22-23.) Like the prior course, Arora repeatedly declared that he created his materials by copying actual ABIM Examination items and asked course participants to send questions to him after the ABIM Examination:

That's another board question – everything we do here is, has been on the Board really. Which one you get I don't know. This is it, this is all – their database, basically is this.

"I'm showing you the right axilla. In the exam question, they have left axilla. That's the truth. They told me, I wrote it down. I hope you will send me the questions like that, so I can then add to it. That's how we collect – this is all collected material.

(Id., ¶ 23.)

Also, like the prior course, Arora frequently used non-substantive original and creative expression of ABIM's Examination items to cue the correct Examination answer for course participants:

You see glare in the exam question, the answer is cataracts. That was for the first time asked last year. There is no other question with glare, really.

The moment you read the sentence, 'awakened by an alarm clock,' the answer to the question is 'family history of sudden death.' Answer is family history of sudden death. In other words, awakened by alarm clock equals family history of sudden death."

(Id., ¶ 24.) Used in this manner, ABIM's secure copyrighted Examination items are useless to measure the skill and judgment of a physician who is seeking Board Certification.

ABIM analyzed the voluminous written course outlines provided by Arora to ABR review course participants. ABIM concluded that the ABR materials contained at least 100 questions that were substantially similar to copyrighted ABIM Examination items. (Id., ¶ 26.) ABIM further concluded that Defendants, through their written course materials and teaching methods, had compromised approximately 900 of ABIM's secure and confidential Examination items, requiring ABIM to permanently remove these questions from its Examination item bank.

(Id.)

ABIM continued its investigation into Defendants' illegal conduct by identifying Arora's previously unnamed assistant, Defendant Kachadourian. (Mannes decl. ¶ 17.) ABIM learned that Kachadourian had previously taken and failed the Examination nine times and was again scheduled to take the Examination in August 2009. (Id., ¶¶ 17-18.) Also, Kachadourian

had requested and received American with Disabilities Act accommodation for the Examination, which provided Kachadourian with double the normal time to take the Examination in a private examination room. (Id., ¶ 17.) As permitted by ABIM's agreement with Board Certification candidates, ABIM conducted surveillance of Defendant Kachadourian's conduct at the testing center, including audio and video surveillance. (Id., ¶¶ 18-21.)

ABIM's surveillance of Defendant Kachadourian showed that she repeatedly left the test center building during unscheduled breaks to access her vehicle in the parking lot, where she reviewed printed material, frantically wrote what appeared to be examination questions on notepads, made telephone calls and typed into her cell phone/PDA device. (Id., ¶ 23.) All of this conduct violates ABIM's rules and policies governing the Examination. (Id., ¶ 22.) Defendant Kachadourian, despite being an assistant for the ABR review course, failed the August 2009 Examination for the tenth time. (Id., ¶ 23.)

ABIM seeks to find and hold responsible those Board Certification candidates who knowingly infringed ABIM's copyright in its Examination and who knowingly violated their contractual obligation to keep ABIM's secure Examination items a secret by providing ABIM Examination items to the Defendants. ABIM is also rebuilding its Examination item bank, an arduous, multi-year process, because of the staggering quantity of Examination items copied and compromised by Defendants. Because every new Examination item must be pretested to confirm that it is an accurate measure of internal medicine competence, ABIM cannot ultimately repopulate the Examination item bank until all Defendants, including the Doe Defendants, are enjoined from copying, distributing and displaying ABIM's copyrighted Examinations.

III. ARGUMENT

ABIM readily meets this Circuit's test for the issuance of ex parte injunctive relief, which requires ABIM to show: (1) immediate and irreparable loss will occur if Defendants obtain notice of this action; (2) a reasonable likelihood of success on the merits; (3) ABIM will likely suffer irreparable harm if an injunction is denied; (4) a balance of the hardships weighs in ABIM's favor; and (5) the public interest is served by granting injunctive relief. Fed. R. Civ. P. 65(b); Video Pipeline, Inc. v. Buena Vista Home Entm't, Inc., 342 F.3d 191, 196 (3d Cir. 2003); Apple Computer, Inc. v. Franklin Computer Corp., 714 F.2d 1240, 1246 (3d Cir. 1983).

A. **The Court Should Grant ABIM's Request for an Ex Parte Seizure and Temporary Restraining Order**

ABIM's need for ex parte relief is compelling because there is a real and immediate danger that Defendants, upon receiving notice of this action, will hide or destroy the evidence that ABIM needs to prosecute Defendants and the presently unknown infringers who, together with Defendants, copied and distributed ABIM's secure copyrighted Examination items.

Under Rule 65(b) of the Federal Rules of Civil Procedure, a court may issue an order for ex parte relief if the movant demonstrates that "immediate and irreparable injury, loss, or damage will result to the movant before the adverse party can be heard in opposition," and if the movant's attorney certifies in writing the reasons why notice should not be required. Fed. R. Civ. P. 65(b). As the court explained in In re Vuitton et Fils, providing notice to an accused infringer often frustrates the purpose of the litigation:

If notice is required, that notice all too often appears to serve only to render fruitless further prosecution of the action. This is precisely contrary to the normal and intended role of 'notice'....

In re Vuitton et Fils S.A., 606 F.2d 1, 5 (2d Cir. 1979). A grant of ex parte seizure or impoundment mitigates the concern that the defendant or someone like the defendant “would be likely to hide or destroy the evidence of his infringing activity” upon receiving notice of the action. See Century Home Entm’t, Inc. v. Laser Beat, Inc., 859 F. Supp. 636, 639 (S.D.N.Y. 1994) (holding that “it is the norm in this District that where a danger of destruction or hiding of the evidence exists to grant ex parte orders of seizure.”).

In copyright infringement cases, particularly where the copyrighted subject matter is a secure examination, federal courts have frequently granted ex parte seizure and orders to protect important evidence from destruction or concealment by defendants.⁴ See, e.g., Fed’n of State Boards of Physical Therapy v. Hare Krishna Educ. Consultants, No. H-08-0059 (S.D. Tex. 2008) (granting ex parte order directing Marshals to seize and impound infringing practice tests in the field of physical therapy as well as hard copy and electronic information relating to the defendant’s copyright infringement) (attached hereto as Exh. D); Nat’l Ass’n of Boards of Pharmacy v. Boards of Regents of the Univ. System of Georgia, No. 3:07-CV-084, 2008 WL 1805439, at *1 (M.D. Ga. Apr. 18, 2008) (granting ex parte impoundment order in copyright infringement suit involving copyrighted pharmacy board examination questions) (attached hereto as Exh. E); see also Columbia Pictures Indus. v. Jasso, 927 F. Supp. 1075 (N.D. Ill. 1996) (finding seizure order warranted because strong possibility existed that defendants would attempt to destroy, remove or hide infringing products and the equipment used to produce them). Courts have generally required plaintiffs to meet the standard for a preliminary injunction in order for an

⁴ Rule 65(f) renders Rule 65 applicable to copyright impoundment proceedings, which are governed by Section 503 of the Copyright Act, 17 U.S.C. § 101 et seq. Fed. R. Civ. P. 65(f).

impoundment order to issue under Section 503 of the Copyright Act. See Columbia Pictures Indus., 927 F. Supp. 1075.

Giving notice to the Defendants, proprietors of a test-prep course for Board Certification in Internal Medicine, very likely will lead to the destruction or concealment of evidence that ABIM needs to fully prosecute this case. Defendants systematically and willfully stole, copied, and distributed secure copyrighted Examination questions designed and used to evaluate the skill and judgment of physicians who have reached the final phase of ABIM's rigorous, medical Board Certification process. Defendants mobilized presently unidentified course attendees to provide Defendants with copyrighted Examination questions in knowing violation of copyright law and the confidentiality agreement to which every Examination candidate must agree. If Defendants are provided notice of this action, Defendants' computer files and other records, including those identifying Examination candidates who engaged in willful copyright infringement, may very likely be destroyed, effectively preventing ABIM from seeking redress against these Doe Defendants. An ex parte seizure order is necessary to enable ABIM to fully prosecute this action and determine the extent to which Defendants have subverted the Board Certification process through their unlawful copyright infringement.

There is also a danger that, unless an ex parte temporary restraining order is issued, Defendants will continue to copy and disseminate the pre-test items that ABIM included as part of its August 2009 Examination. (See Cassel decl. ¶ 19.) Defendants should not be permitted to continue collecting and copying any of ABIM's copyrighted Examination items from the August 2009 Examination, especially the pre-test items that ABIM intends to use to begin repopulating its Examination item bank. Likewise, Defendants should not be permitted to continue preparing infringing course materials that incorporate ABIM Examination items. If

Defendants are permitted to continue engaging in their unlawful infringing conduct, the value of ABIM's most recently developed Examination items will be destroyed, causing further irreparable injury to ABIM. Additionally, Defendants must be enjoined from destroying or altering any of the electronically stored information on any personal computers that will remain in Defendant's possession following the seizure of the electronically stored information residing on their computers.

Defendants have both the motivation and the ability to transfer or destroy critical evidence, especially evidence stored electronically. Defendants face substantial civil and criminal penalties for copyright infringement. The presently unidentified ABR course attendees who assisted Dr. Arora (many of whom are likely Board Certified physicians) face, in addition to substantial penalties for copyright infringement, potential sanctions by ABIM, including the revocation or denial of Board Certification, and the reporting of their conduct to state medical licensing boards. Course attendees who assisted Dr. Arora will be motivated to erase any evidence of their unlawful conduct because of the potential damage to their careers.

Defendants also possess the unfettered ability to destroy evidence because ABR is a true "mom and pop" operation. ABR is headquartered from Defendant Arora's personal residence, and evidence critical to the prosecution of this case is likely stored there. With notice of this action, there is a high risk that evidence would vanish overnight. Further, a significant portion of the infringing conduct in this case has been carried out electronically. The ABR Website previously displayed, copied and distributed at least fifty-five ABIM copyrighted Examination items. Dr. Arora's email account contains an unknown but likely substantial quantity of emails from ABR course attendees who unlawfully copied copyrighted Examination items into those emails at Dr. Arora's behest. (See Baranowski decl. ¶¶ 19, 25.) Defendant

Arora's son, Pavan Arora, is an information technology expert who serves as "Technical Director" at ABR, and who videotaped the ABR course sessions. (Mannes decl. ¶ 6.) As an information technology expert, Pavan Arora would be especially knowledgeable of the processes used to hide or destroy electronic information. Moreover, Pavan Arora is no stranger to infringement litigation. He is presently subject to a permanent injunction arising from intellectual property infringement on the Internet. (*Id.*)

ABIM is seeking a narrowly tailored seizure order permitting it to obtain infringing copies of its copyrighted Examination and all related Examination materials; the business records relevant to the creation, reproduction and distribution of such materials; and the methods used to create those materials. As in other cases involving copyright infringement of secure tests, the danger of loss here is real and immediate and *ex parte* relief is necessary to protect ABIM's ability to seek effective relief against Defendants and the presently unidentified infringers.

B. ABIM Has a Strong Likelihood of Success On the Merits

To prevail on its claim for copyright infringement, ABIM must show that: (1) it owns a valid copyright interest in the work in question; and (2) copying by the defendant without authorization. See *Dam Things From Denmark v. Russ Berrie & Co.*, 290 F.3d 548, 561 (3d Cir. 2002) (citations omitted); *Educational Testing Service v. Katzman*, 793 F.2d 533, 538 (3d Cir. 1986); *Ass'n of Am. Med. Colleges v. Mikaelian*, 571 F. Supp. 144, 149 (E.D. Pa. 1983). ABIM is likely to succeed on the merits of its claim for copyright infringement because it owns valid, registered copyrights in its Examination questions and Defendants copied such questions without authorization.

1. **ABIM Owns Valid Copyrights in its Examination Items**

ABIM's ownership of all right, title and interest in and to the ABIM Examination items is indisputable. The Examination items are original and were created by ABIM through a lengthy and costly process that involves organizing a physician-led test committee, drafting questions and selecting questions by committee consensus, editing questions and pictorial materials, and then pre-testing questions for measurement characteristics. (Baranowski decl. ¶ 5.) ABIM has registered its copyrights in the Examination with the United States Copyright Office pursuant to a regulation allowing for "secure test" registration. (Certificates of Registration, Exh. 1 to Baranowski decl.) ABIM's copyright registrations are prima facie evidence of the validity of ABIM's copyrights. See, e.g., Educ. Testing Service, 793 F.2d at 538; see also 17 U.S.C. § 410(c) ("in any judicial proceedings the certificate of a registration made before or within five years after first publication of the work shall constitute prima facie evidence of the validity of the copyright and of the facts stated in the certificate."). Because ABIM owns valid copyrights in the ABIM Examination items, it has proven the first element of its copyright claim.

2. **Defendants Copied the ABIM Examination Items**

There are two ways to prove "copying" for the purposes of copyright infringement: (1) a plaintiff may present direct evidence of copying, which is rare; or (2) a plaintiff may prove that the defendant had access to the copyrighted work and that a substantial similarity exists between the copyrighted work and the accused work. Whelan Assoc., Inc. v. Jaslow Dental Lab, Inc., 797 F.2d 1222, 1231 (3d Cir. 1986). ABIM, which has ample evidence of direct copying and ample evidence of access and substantial similarity, easily satisfies both tests.

(a) Defendant Arora Has Admitted Copying ABIM's Examination Items

A defendant's admission of copying subjects the defendant to liability for copyright infringement, provided illegal appropriation is shown and the copyright owner has not consented to the defendant's use of the protected material. Major League Baseball Promotion v. Colour-Tex, 729 F. Supp. 1035 (D.N.J. 1990) (stating that "[i]f a defendant admits to using copyrighted material, that alone would make the defendant liable for copyright infringement, absent the owner's authorization."), citing Fitzgerald Publ'g Co. v. Baylor Publ'g Co., 807 F.2d 1110, 1113 (2d Cir. 1986). Courts in this Circuit have explained that, in the rare instance where the defendant admits copying, indirect proof of copying is not required. See Jarvis v. A&M Records, 827 F. Supp. 282, 289 (D.N.J. 1983). This is one of those rare cases.

Defendant Arora boasted to his course attendees many times during the ABR review courses that ABR practice questions are, in actuality, ABIM Examination items that Arora obtained from other Board Candidates. (Baranowski decl. ¶¶ 19-20, 23.) Arora, therefore, admitted not only his unlawful copying but precisely the illegal and unauthorized means by which he obtained ABIM's secure copyrighted Examination items. Given Arora's repeated, public admissions and the absence of authorization, ABIM has established a valid claim for copyright infringement with direct evidence of Defendants' unlawful copying.

(b) Defendants Had Repeated Access to ABIM's Secure Copyrighted Examination Items and There Is a Substantial Similarity Between ABIM's Examination Items and Defendants' ABR Review Materials

Even if Defendant Arora had not admitted copying the protected Examination items, ABIM easily establishes the element of copying, since Defendants had repeated to access ABIM's copyrighted work, and there is a "substantial similarity" between the ABIM Examination and the ABR review materials. See Whelan Assoc., 797 F.2d at 1231; Ass'n of

Am. Med. Colleges v. Mikaelian, 571 F. Supp. 144, 149 (E.D. Pa. 1983) (noting that “access exists when a defendant has had a reasonable opportunity to view the copyrighted work.”).

First, Defendants Arora and Kachadourian had ample opportunity to access to ABIM’s Examination items—between them, they have taken the Examination a total of seventeen times. (Mannes decl. ¶¶ 11, 17.) Additionally, as explained above, Defendants implore ABR review course attendees to violate the ABIM copyright notice and the confidentiality agreement all Board Candidates enter into with ABIM, and provide ABR with as much of ABIM’s copyrighted Examination as possible. During the two-day ABR Crash Course, Defendant Arora asked his course attendees many times to send ABIM’s Examination items to Defendant Arora after the Examination. (Baranowski decl. ¶ 23.) Dr. Arora even included this brazen request to the course attendees, in writing, at the end of the Crash Course outline:

Last year’s candidates have helped you
You must help the next year’s candidates.
(Through Arora Board Review)
Call/write/email soon after the examination (973) 994-3203
boardreview@comcast.net

(Id. ¶ 25.) Defendants’ access to the copyrighted ABIM Examination cannot be debated.

Second, ABIM can readily demonstrate that there is a substantial similarity between ABR test-prep questions and ABIM’s Examination items. In other cases involving confidential examination questions, this Circuit has applied the reasonable person standard for determining whether there is a substantial similarity between the protected work and the defendant’s work:

The test is whether the accused work is so similar to the plaintiff’s work that an ordinary reasonable person would conclude that the defendant unlawfully appropriated the plaintiff’s protectable expression by taking material of substance and value.

Educ. Testing Service, 793 F.2d at 541. In National Conference of Bar Examiners v. Multistate Legal Studies, a case involving a test-prep company's copying of Multistate Bar Examination items, the court compared the plaintiff's and defendant's question-and-answer pairings to assess substantial similarity. Nat'l Conference of Bar Examiners v. Multistate Legal Studies, Inc., 458 F. Supp. 2d 252, 258 (E.D. Pa. 2006). In one side-by-side comparison, both plaintiff's and defendant's questions involved the same creative elements—a waiter who overhears fraudulent insider information not intended for his ears, invests his money based on that information and loses it, and then sues the person who made the statements. Id. The court found that even with some original language and factual embellishments added by defendant, the defendant's question “clearly copied” plaintiff's questions. Id. The court aptly noted, “Teaching the legal principles tested on the MBE is permissible. Doing so using the same fact patterns, prompts, and answer-choice combinations found in MBE questions is not.” Id. at 259.

In the present case, a side-by-side comparison of ABIM's copyrighted Examination items and Defendants' questions and answers reveals similarities so striking that they could have been achieved only by copying. See Educ. Testing Service, 793 F.2d at 541 (finding at least some of defendant's review questions “so strikingly similar to those prepared by [plaintiff] as to lead to no other conclusion than that they were copied.”). Here, there are at least 100 ABR practice questions that are substantially similar to copyrighted ABIM Examination items.

The following example is illustrative of the degree of copying engaged in by Defendants. ABIM's Examination item #13417 reads as follows:

A 14-year-old boy noted swelling of the right forearm and hand 15 minutes after shop class. Medical history includes abdominal discomfort that has occurred three or four times in the past several years; pain was severe enough to prompt visits to the emergency

department, where evaluations were negative. He also has mild asthma. The patient's father died at age 30 of unknown causes.

Vital signs are normal. A photograph of the forearms is shown. Radiographs of the right arm and hand are normal except for soft tissue swelling.

Which of the following findings is most consistent with the patient's current presentation?

- (A) Positive skin test for sensitivity to house dust, pollen, and animal dander
- (B) Leukocyte count of 8700/cu mm with 10% basophils
- (C) Erythrocyte sedimentation rate of 88 mm/hr and antinuclear antibodies positive at a titer of 1:160
- (D) Serum complement C2 and C4 levels reduced by 80%
- (E) Elevated serum IgE level

(Question Comparison Analysis at p. 5, Exh. 2 to Baronowski decl.)

ABIM's question is about hereditary angioedema, a somewhat uncommon immunologic problem. The question features a 14-year-old male whose father died of unknown causes; the boy develops symptoms—swelling of his right arm—after shop class, and has a history of emergency room visits. Each of the characteristics underlined for emphasis are non-substantive creative elements that are not particular to hereditary angioedema. Yet, ABR's Test Question #19 reads:

A photograph of a white **14 year-old boy** is shown with swelling of the **right forearm** that developed after attending a **class on wood chopping**. There is no itching, however, he gave history of many trips to the ER during the last year for an inconclusively diagnosed [sic] abdominal pain. His **father** died of unknown cause [sic]. What is your next test?

- (A) Late complement
- (B) IgE level
- (C) IgA level
- (D) C2 and C4 levels

(Id.)(emphasis added).

The correct answer choice is (E) for the ABIM question (“Elevated serum IgE level”), and (B) for the ABR question (“IgE level”). Both questions offer an incorrect answer choice relating to C2 and C4 levels.

Here, the evidence of copying “practically leaps from the page.” See Nat’l Conference of Bar Examiners, 458 F. Supp. 2d at 257. The ABR practice question copies multiple non-substantive creative elements from the ABIM copyrighted Examination item, including the precise age of the boy, the part of his body where the swelling occurs, the fact that his father has died of an unknown cause, and the fact that the boy has just left a similar “shop” type class. This is just one of many such copied examples. (See Question Comparison Analysis, Exh. 2 to Baranowski decl.) As evidenced by the ABR course materials, Defendants clearly have appropriated “material of substance and value.” See Educ. Testing Service, 793 F.2d at 541. An ordinary reasonable person would conclude that Defendants’ questions are substantially similar to ABIM’s Examination items.

Having established its registered copyrights in the Examination items, along with admissions of copying, and, in the alternative, access and substantial similarity, ABIM has shown that it is highly likely to prevail on the merits of its copyright infringement claim. Thus, ABIM readily meets the first required element for injunctive relief.

C. ABIM is Suffering and Will Continue to Suffer Irreparable Harm if an Injunction is Not Issued

First, irreparable harm is presumed in this case because ABIM’s prima facie showing of copyright infringement by Defendants creates a presumption of irreparable harm. See, e.g., F.A. Davis Co. v. Wolters Kluwer Health, Inc., 413 F. Supp. 2d 507, 516 (E.D. Pa. 2005), citing Apple Computer, Inc. v. Franklin Computer Corp., 714 F.2d 1240, 1254 (3d Cir. 1983). The presumption of irreparable harm is sufficient for the issuance of an injunction. See

id. (issuing preliminary injunction based on plaintiff's prima facie showing of copyright infringement and resulting presumption of harm).

Second, the independent evidence of irreparable injury to ABIM is overwhelming. Defendants' test-prep business model, built on copyright infringement, theft and conspiracy, has destroyed the value of approximately 100 of ABIM's secure copyrighted Examination items and has interfered with the Board Certification process. The Examination cannot serve its intended purpose if Board Candidates, such as those who have attended the ABR review course, correctly answer questions designed to assess the medical knowledge and judgment of a physician not by correctly diagnosing the clinical findings of the hypothetical patient but by equating ABIM's original fact patterns with what they simply are told by Defendants are the corresponding correct answer choices. (Cassel decl. ¶ 16.) The Examination items copied by Defendants, along with nearly 900 others compromised by Defendants, make up a significant portion of ABIM's item bank. ABIM must retire those items and cannot reuse them for future Examinations, as would have been its regular practice. (Id. ¶ 17.) The Examination items' value to ABIM—built up through ABIM's significant expenditure of time, money, and expertise—has been destroyed. Monetary damages alone will not compensate ABIM for this harm.

In cases such as this, involving compromised secure test items, courts have repeatedly recognized that infringement severely disrupts and inconveniences a plaintiff's secure test program, causing irreparable harm to the testing organization:

In this case, there was 'adequate evidence of the expenditure of significant time, effort, and money directed to the production of copyrighted material.' . . . Moreover, there was ample evidence of the effort ETS must undertake when secure questions have been misappropriated, and the inconvenience caused thereby to support the finding of irreparable harm.

Educ. Testing Service, 793 F.2d at 544, citing Apple Computer, 714 F.2d at 1254; see also Nat'l Conf. of Bar Examiners v. Saccuzzo, Civ. A. No. 03-CV-0737, 2003 WL 21467772, at *11 (S.D. Cal., June 10, 2003) (finding irreparable harm because defendant's copying and dissemination of NCBE's secure test questions "renders the material worthless to NCBE"); Ass'n of Am. Med. Colls. v. Mikaelian, 571 F.Supp 144, 154 (E.D. Pa. 1983) ("Obviously, continued use of copyrighted test questions by Multiprep could make worthless AAMC's stock of MCAT questions. These questions are the result of years of painstaking research and testing. Monetary damages could not compensate AAMC for this damage.").

ABIM's irreparable injury in this case is more compelling than the plaintiffs' in the cases cited above because not only have Defendants destroyed the value of the compromised Examination items, their continued copyright infringement will further deplete ABIM's pool of validated scored questions and prevent ABIM from effectively pre-testing the new Examination items needed to repopulate ABIM's Examination item bank. (See Cassel decl. ¶¶ 17, 23.) This, too, is irreparable injury meriting the issuance of an injunction.

Finally, Defendants' infringing conduct potentially undermines the public's trust in the Board Certification designation. ABIM has invested substantial resources to ensure that the public and the medical profession recognize and can rely on its Board Certified designation as a marker of excellence that demonstrates the highest level of clinical judgment, skills and attitudes essential for the delivery of first-rate patient care. (See id. ¶ 21.) To the extent a physician becomes Board Certified as a result of Defendants' unlawful conduct and not because certification is merited by the actual skills of the candidate, ABIM's Board Certified designation is substantially and irreparably diminished in the eyes of the patient and medical communities. (Id.) Quantifying damages for the potential diminution and harm to ABIM's reputation would be

extremely difficult, and thus an injunction is warranted. Educ. Testing Service, 793 F.2d at 544 (finding irreparable harm based on, inter alia, the potential diminution of reputation and integrity of a secure test resulting from defendant's copyright infringement).

D. A Balance of Hardships Weighs Strongly in Favor of ABIM

ABIM has shown that the injury it would suffer as a result of the continued infringement of ABIM's copyrighted Examination items is significant, imminent and irreparable. ABIM has also demonstrated Defendants' propensity for unscrupulous conduct, and thus, if the relief requested herein is not granted, there exists a high likelihood that Defendants will hide or destroy evidence critical to ABIM's prosecution of this case, further injuring ABIM. In short, ABIM will suffer grave hardship if the requested injunctive relief is not issued.

In contrast, Defendants, who have openly admitted copying ABIM's secure copyrighted Examination items and openly encouraged Board Certification candidates to follow in their footsteps of willful infringement, will suffer no legally recognized hardship if an injunction issues. Ordering Defendants to cease their illegal, infringing activities is not a hardship as a matter of law because otherwise, "a knowing infringer would be permitted to construct its business around its infringement, a result we cannot condone." Apple Computer, Inc., 714 F.2d at 1255. Further, any monetary loss in the form of lost profits could be remedied through damages, in the highly unlikely event that Defendants are able to prove their innocence.

E. The Public Interest is Served By Granting the Preliminary Injunction

Issuance of an injunction will serve the public interest in two ways. First, as a matter of law, the public interest is served by protecting the exclusive rights of copyright ownership. Broadcast Music, Inc. v. Spring Mount Area Bavarian Resort, Ltd., 555 F. Supp. 2d 537, 544 (E.D. Pa. 2008) ("An injunction which enforces federal copyright laws, and protects the rights

and responsibilities defined by them, is by definition in the public interest.”) As the Third Circuit stated in Apple Computer v. Franklin Computer:

Since Congress has elected to grant certain exclusive rights to the owner of a copyright in a protected work, it is virtually axiomatic that the public interest can only be served by upholding copyright protections and, correspondingly, preventing the misappropriation of the skills, creative energies, and resources which are invested in the protected work.

Apple Computer, 714 F.2d 1240, 1255 (3d Cir. 1983).

Second, maintaining the integrity of ABIM’s Board Certification process and the Examination itself serves the public interest. Patients, hospitals and other medical care providers rely on Board Certification by ABIM as an internationally recognized marker designating that a physician has achieved the highest standards for internal medicine. (Cassel decl. ¶ 6.) By precluding Defendants from unlawfully copying and interfering with the secure copyrighted Examination, an injunction preserves and protects the Board Certification designation, thus serving the interest of the public, which relies on that designation.

IV. THE COURT SHOULD TEMPORARILY SEAL THE FILE

It is critical that the Court temporarily seal the file to ensure that Defendants do not learn of the seizure order before authorized officials can effect the order. In In re Vuitton et Fils, the court stated: “In these situations, giving the defendant notice of the application for an injunction could result in an inability to provide any relief at all.” In re Vuitton et Fils S.A., 606 F.2d 1, 4 (2d Cir. 1979). ABIM anticipates that seizure will be effected and Defendants will be served with all applicable documents and orders within approximately ten days, at which time the seal can be lifted. Thus, any restriction to public access to the file will be minimal, and is far outweighed by the recognized need for seizure to proceed without notice to ensure evidence is preserved.

V. CONCLUSION

For all the foregoing reasons, ABIM respectfully requests that the Court issue a seizure and impoundment order, a temporary restraining order, set a hearing date for a preliminary injunction, and order the file sealed until the seizure is effected.

Respectfully submitted,

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