UNITED STATES DISTRICT COURT

DISTRICT OF MASSACHUSETTS CIVIL ACTION NO: 1:15-cv-13297-NMG

BHARANIDHARAN PADMANABHAN MD PhD)
(Dr. Bharani))
- PLAINTIFF) JURY TRIAL DEMANDED
)
vs.)
)
MAURA HEALEY)
STEVEN HOFFMAN)
CHRIS CECCHINI)
ADELE AUDET)
JAMES PAIKOS)
LORETTA KISH COOKE)
JOHN DOES)
JANE DOES)
- DEFENDANTS)

PLAINTIFF'S OPPOSITION TO THE NAMED DEFENDANTS' 12(b)(6) MOTION TO DISMISS

1 In his *pro se* Objection and Motion for Sanctions, Plaintiff Dr. Bharani had shown that the Motion to Dismiss filed by the six Named Defendants was untimely per Fed. R. Civ. P. 6(4)(A) and LR 5.4, was filed without conferring in good faith with pro se Plaintiff (who was and is in communication with AAG LaGrassa) and without filing the required ***mandatory*** Certificate of Compliance with Local Rule 7.1. (Document 28)

2 Defendants' Counsel AAG Mark Sutliff felt free to email Plaintiff 6 minutes *after* filing their Motion to Dismiss but claimed in a filed Notice that he did not confer with Plaintiff prior to filing the Motion "because Plaintiff Bharanidharan Padmanabhan believed he was "precluded from communicating directly with [me]"" which still does not explain why Counsel Mark Sutliff felt free to email Plaintiff after filing the Motion but not

before. Counsel Mark Sutliff filed his Notice eight (8) full days after filing the Motion to Dismiss without the mandatory Certificate of Compliance. (Document 31) (Exhibit 1)

3 Pursuant to D. Mass. L. R. 1.3, Defendants' Motion to Dismiss must be denied and Defendants precluded from filing any further Motions to Dismiss.

4 Without waiving Plaintiff's Objection to the untimeliness of Named Defendants' Motion to Dismiss and to it being filed without any attempt made to confer with Plaintiff whatsoever and filed without the mandatory Certificate of Compliance, herewith is Plaintiff's formal Opposition, now based on the merits of the arguments presented within Defendants' noncompliant Motion to Dismiss.

SPECIFIC REFUTATION OF DEFENDANTS' MISREPRESENTATIONS

(Defendants' misrepresentations are in **Bold** and within quotation marks)

MISREPRESENTATIONS 1

"Plaintiff's Complaint attempts to twist this belief through conclusory and speculative allegations[...]." Motion to Dismiss (MTD), Pg. 1 **"Plaintiff's case rests solely on his belief that the Defendants accessed the PMP database and that said access exceeded that which is authorized. However, Plaintiff relies almost entirely on conclusory and speculative allegations in an attempt to twist this belief into claims for violation of the CFAA and the SCA."** MTD Pg. 6 **"Plaintiff fails to allege specific facts to show that any of the Defendants accessed the PMP database." MTD, Pg. 8 "Allegations such as these are the sort of speculative "the defendant-unlawfully-harmed me" accusations that are insufficient to overcome a motion to dismiss. Ashcroft, 556 U.S. at 678." MTD Pg. 1**

5 Plaintiff asserts in his Complaint he can prove that there was no way on earth the Defendants procured that list of Plaintiff's patients from any other source other than the PMP database. This is not in the realm of "belief."

6 In evaluating a Motion to Dismiss the Court must give all possible credence to the Plaintiff whose claims must be taken as true. Rodi v. Southern New England School of Law, 389 F.3d 5, 9 (1st Cir., 2004); Sbt Holdings, LLC v. Town of Westminster, 547 F.3d 28, 36 (2008); Rucker v. Lee Holding Co., 471 F.3d 6, 8 (1st Cir., 2006). The purpose of a 12(b)(6) Motion to dismiss is to determine whether the facts as stated in the Complaint satisfy the prima facie standard of establishing a cause of action.

7 The list of patients presented by Defendants includes a person whose sole connection to Plaintiff involves one single prescription. Plaintiff did not bill Medicaid or any commercial insurance for this patient or send a primary care physician a note that could have been retransmitted to the AGO. The only way on earth that patient's name could have appeared on this list is via the PMP prescription database. Plaintiff was reluctant to reveal this information in the Complaint itself out of fear that Defendant Attorney General Maura Healey and her staff would immediately take steps to intimidate and tamper with the patient-witness.

8 Defendants have been unable to assert that at the time they accessed the PMP Database they were in compliance with 105 CMR 700.012. Using a Motion to Dismiss as a substitute for Answering the Complaint does not relieve Defendants of the need to prove they were in actual compliance with 105 CMR 700.012 at the time of their access. This burden is on the Defendants.

9 Massachusetts Regulation 105 CMR 700.012 regulates and governs "lawfully authorized investigative activity" involving access to the PMP database. It is the "Terms of Use" for the PMP database in terms of the CFAA.

10 It is not enough for Defendants to merely claim that they were engaged in "lawfully authorized investigative activity." By statute the PMP database does not provide 'free for all' 'no questions asked' 'no paper trail' access to law enforcement.

11 Defendants needed to prove that they were in official contemporaneous compliance with 105 CMR 700.012 before and at the very time they accessed the PMP database to procure the list of 16 of the Plaintiff's patients.

12 Defendants needed to have attached with their Motion to dismiss, a copy of the application form or affidavit they were required to sign under oath to affirm that they were indeed engaged in a bona fide ongoing drug-related investigation, along with contemporaneous government documentation, computer printouts and logs with serial numbers showing that Defendants did not suddenly forge a document out of thin air after the CFAA lawsuit was filed.

13 Their inability to do so, especially in a Motion to dismiss, and after conceding (MTD, page 18) that Plaintiff is correct to demand that any access be strictly "drug related," is damning and fatal. This more than meets the standard for review at this stage to deny Defendants' Motion to dismiss and begin legal discovery. Defendants have not met their burden to rebut that they did not access the 16 patients' confidential information and procure the list from the PMP.

MISREPRESENTATIONS 2

"Plaintiff believes that requesting "immediate access" and "complete page-by-page" medical records is a violation of precedent set by the Massachusetts Supreme Judicial Court." MTD, Pg. 4

14 It is not Plaintiff's personal "belief" but a statement of law. The Defendants do not discuss at all the SJC precedent set by *Kobrin*. This is fatal to Defendants' Motion to Dismiss.

MISREPRESENTATIONS 3

"Plaintiff cannot simply thrust a jumble of allegations upon the Court, but must specify which particular Defendant committed each alleged wrong. See e.g., *Bagheri v. Galligan*" MTD, Pg. 9 **"As an initial matter, Plaintiff does not even allege any specific conduct by any of the named Defendants with respect to his claim that the PMP database was accessed." MTD, Pg. 10**

15 The case law relied on by Defendants to support their claim is erroneous because the court made it's finding in *Bagheri* after discovery had taken place.

16 Furthermore, Defendants violated a clear Rule of the **1st Circuit** (Rule 32.1) specifically pertaining to their citation of *Bagheri v. Galligan*. Defendants did NOT file a copy of the unpublished opinion and did NOT note in their Motion that it was unpublished just as they did NOT include a Certificate of Compliance with D. Mass. L.R. 7.1 along with their Motion.

17 Defendants impermissibly suggest that the only way any plaintiff can possibly pursue a civil action is by providing actual, indisputable proof of the allegations. As a matter of law, a plaintiff is *not* required to provide actual and direct proof of asserted allegations.

Bell Atlantic v. Twombly, 550 U.S., 556. The reason why such a requirement does not exist is because in *most* circumstances it is unrealistic and impractical to expect that a plaintiff would have the means to access such evidence prior to commencing suit; which is the very purpose of the procedures for discovery. As a matter of law, there is no requirement that Plaintiff must specify which particular person directly obtained information from the PMP. Ashcroft v. Iqbal, supra at 663.

MISREPRESENTATIONS 4

"...it is impossible for Plaintiff to satisfy the requirement that he allege the Defendants acted with such a degree of culpability." MTD, Pg. 9 "Accordingly..... conduct that is intentional or knowing requires dismissal...." MTD, Pg. 9 "Any access to the PMP database did not exceed permissible legal authority" "However, Plaintiff's allegation that Medicaid Fraud investigation was for violation of the Social Security Act and thus not "drug related" is misplaced." MTD, Pg. 17

18 Plaintiff has already satisfied the requirement to show that Defendants did indeed unlawfully access the PMP database without authorization and in excess of authorization in violation of the CFAA and they have not met their burden to prove their access was lawful.

19 Defendants did so knowing that it was the Plaintiff himself who reported **Medicaid Fraud** *to* the **Medicaid Fraud Division** (personally to Defendant Steven Hoffman) and to the Attorney General back in 2013.

20 It is beyond dispute that Defendant Adele Audet as Assistant Director was the designated liaison between the PMP database and law enforcement, including the Attorney General's

Office and the Board of Registration in Medicine, and the rules require that law enforcement must file written applications attesting that they seek access to the PMP for an ongoing bona fide drug-related investigation.

21 Plaintiff awaits the start of legal discovery to identify further individuals (till now still John Does and Jane Does) who facilitated the unlawful access by Defendants in violation of the CFAA.

22 Even without the benefit of discovery and based solely on the rules, Plaintiff has shown that Defendants accessed the PMP database in violation of 105 CMR700.012 as there was no "drug-related" investigation.

23 Defendants now counter that they were indeed engaged in a "drug-related" investigation but provide no evidence in support. We are expected to believe them simply because they so. Instead Defendants now claim Plaintiff misunderstood the plain language of the Demand letter. The Demand letter states that **fraud** and **violations by Medicaid providers or patients** is being investigated.

24 Plaintiff is undoubtedly NOT a Medicaid provider and so Defendant Maura Healey's **Medicaid Fraud Division** at the Office of the Attorney General has ZERO jurisdiction over Plaintiff's actual medical practice.

25 Plaintiff has not credentialed with Medicare or Medicaid, has not signed a Provider Contract with Medicare or Medicaid, has not billed either entitlement program since going solo five (5) years ago and has seen all his patients entirely for free.

26 Ergo, accessing the PMP database for Plaintiff's patients while claiming in writing a **Medicaid Fraud investigation by the Medicaid Fraud Division** was itself a CMR

and CFAA violation.

27 Alternatively AGO should declare, even more fancifully now that they have been caught in a flat-out lie by Plaintiff, that the actual target of their investigation was Plaintiff's 16 patients and the AGO's demand for "immediate access" to "complete page-by-page" medical records, in conscious and flagrant violation of the SJC in *Kobrin*, was aimed at the patients and not the Plaintiff.

28 As stated in the Complaint, the 16 patients share no common attribute other than receiving their care, entirely for free, from the Plaintiff. It is impossible to claim any other database search term, any drug or class of drug, that brings these 16 individuals together. Defendants, who have all grouped together and chosen to be represented by the same Counsel, conspired to target Plaintiff's patients exclusively because they were Plaintiff's patients and did so in violation of 105 CMR 700.012 and CFAA.

29 Defendants' claim that Plaintiff attempts to "misconstrue the nature of the investigation as being something other than 'drug related' in order to shoehorn the facts" is an egregious factual misrepresentation of the plain language of the Demand letter.

30 Defendants' sudden claim that their alleged investigation was about **nothing else** than "drug related" is as stunning as it is false.

31 Because there was no legitimate ongoing "drug related" investigation and there could not have been one given the lack of jurisdiction, because Defendants have proved unable to provide a contemporaneous bona fide sworn document filed prior to seeking access to the PMP database and because Defendants have suddenly switched their claims between the Demand letter and their Motion to Dismiss, their outrageous claim that "it is clear that

any such access is authorized by law" is wholly and consciously false. Their Motion to dismiss must be denied.

32 In the midst of a known 'oxycodone, heroin and fentanyl' epidemic publicly associated by Federal agencies with massive importation of illegally manufactured oxycodone, heroin and fentanyl by the Mexican Sinaloa drug cartel, the **Medicaid Fraud Division** of the Massachusetts Office of the Attorney General has claimed in writing to the US District Court in a Motion to dismiss that it was expending manpower and money on a **Medicaid Fraud investigation**, now suddenly declared "drug related" after a CFAA complaint was filed, of a physician who personally reported **Medicaid Fraud** *to* **the Medicaid Fraud Division** and who has cared for a total of fifty (50) patients entirely for free for the past five (5) years.

MISREPRESENTATIONS 5

"Computers that host the PMP database are not protected computers." MTD, Pg. 11

33 Defendants put forth a deliberate factual misrepresentation of the law and court rulings. Per CFAA, 18 U.S. Code § 1030 (e), the term "protected computer" means a computer -

> **(A)** *exclusively for the use of a financial institution* ***or the United States Government****, or, in the case of* ***a computer not exclusively for such use****, used by or for a financial institution* ***or the United States Government and the conduct constituting the offense affects that use by or for*** *the financial institution* ***or the Government***; or **(B)** ***which is used in or affecting interstate or foreign commerce or communication, including a computer located outside the United States that is used in a manner that affects interstate or foreign commerce or communication of the United States***;
> (emphasis added)

34 It is a deliberate egregious fraud on this court for Defendants to claim a protected computer must be "exclusively for the use of a financial institution or the Federal Government." The statute plainly states that "exclusive" use is not required and includes foreign computers that merely affect interstate commerce.

35 Defendants also deliberate misrepresent the clear language in Plaintiff's Complaint given Plaintiff took pains to repeatedly lay out that the PMP database is federally funded in order to promote interstate commerce. Defendants knowingly neglect to mention this fact when they selectively quote that Plaintiff "acknowledges that the PMP database is managed by..... a state agency...". Defendants deliberately left out that Plaintiff also acknowledges the Federal funding.

36 Defendants commit a fraud on the court with their desperate misrepresentation that the PMP database is a creature purely of state government with no involvement of the Federal government.

MISREPRESENTATIONS 6

"Therefore, the computers hosting the PMP database are neither exclusively for the use of a financial institution or the federal government nor are they used in or affecting interstate commerce." MTD, Pg. 11

37 Defendants commit a massive conscious fraud on this Court by again using the word "exclusively" and concealing the plain language of the statute. The statute does not require "exclusive" use by or for the Government, just use.

38 Plaintiff's Complaint unequivocally lays out that the Federal government funds the PMP database expressly to promote interstate commerce.

39 It is a definite fraud on this court for Defendants to then claim that the PMP database, funded by Federal dollars expressly to promote interstate commerce, is not a protected computer and is not used by the Government and is not engaged in interstate commerce.

40 The statement by the Defendants that "exclusive" use is statutorily required, is an egregious, conscious, outrageous factual misrepresentation that should result in severe sanctions for both Defendants and their Counsel Mark Sutliff.

41 Furthermore, the nation's foremost expert on the CFAA disagrees with the Defendants' stance, with his review available to Defendants well prior to them filing their Motion to dismiss.

"This excursion into Commerce Clause doctrine explains just how broad the current version of "protected computer"has become, and by extension, just how far the CFAA reaches. Because the definition now applies to both computers in the United States and abroad that are used in or affecting interstate commerce or communication, every computer around the world that can be regulated under the Commerce Clause is a "protected computer" covered by 18 U.S.C. § 1030. This does not merely cover computers connected to the Internet that are actually "used" in interstate commerce. Instead, it applies to all computers, period, so long as the federal government has the power to regulate them." "Perhaps the only identifiable exclusion from the scope of protected computers is a "portable hand held calculator, or other similar device," exempted from the definition of "computer." Everything else with a microchip or that permits digital storage is, arguably, covered." - Prof. Orin Kerr, Fred C. Stevenson Research Professor of Law, The George Washington University
http://www.minnesotalawreview.org/wp-content/uploads/2012/03/Kerr_MLR.pdf,
https://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/08/25/does-the-federal-computer-hacking-law-apply-to-a-laptop-not-connected-to-the-internet/

42 As Defendants are totally in error to claim **exclusive use** by a financial institution or the federal government, their Motion to dismiss must fail.

MISREPRESENTATIONS 7

"As a result, Plaintiff has failed to allege that the information allegedly came from a

protected computer and his claim for violation of the CFAA must be dismissed. See *Pine Environmental Services, LLC v. Carson*" MTD, Pg. 11

43 Defendants deliberately rely on a totally unrelated case for their citation. *Pine v. Carson* was between 2 private parties, did not involve a computer database that actually belongs to the government and funded by the Federal government (as the PMP database is) and was strictly about whether a laptop that was offline from the internet could be engaged in interstate commerce. Even Defendants do not claim that the PMP database is offline from the Internet.

44 The PMP database is an online database that is available online via registered password access to physicians and pharmacists 24 hours a day and is also accessible to law enforcement for **strictly drug-related** investigations if they apply in writing to the DCP Liaison for law enforcement (Defendant Adele Audet at the time of the events in question) and affirm that they seek access only for a bona fide ongoing drug-related investigation.

MISREPRESENTATIONS 8

"The CFAA does not apply to lawfully authorized investigative activity" MTD, Pg. 12

45 105 CMR 700.012 regulates and governs "lawfully authorized investigative activity." It is the "Terms of Service" for the PMP database in terms of the CFAA.

46 It is not enough for Defendants to merely claim that they were engaged in "lawfully authorized investigative activity." By statute the PMP database does not provide 'free for all' 'no questions asked' 'no paper trail' access to law enforcement.

47 Defendants needed to prove that they were in official contemporaneous compliance with

105 CMR 700.012 before and at the very time they accessed the PMP database to procure the list of 16 of the Plaintiff's patients.

48 Defendants needed to have attached with their Motion to dismiss, a copy of the application form or affidavit they were required to sign under oath to affirm that they were indeed engaged in a bona fide ongoing drug-related investigation along with contemporaneous government documentation and computer printouts and logs with serial numbers showing that Defendants did not suddenly forge a document out of thin air after the CFAA lawsuit was filed.

49 As of this minute Defendants have not offered this Court evidence to prove they were engaged in a bona fide "drug related" investigation, given their Demand letter states unequivocally over 3 pages that it was a **Medicaid Fraud investigation by the Medicaid Fraud Division.**

50 Plaintiff quoted in his Complaint the actual language from DCP that shows the written requirements that law enforcement needs to meet before accessing the highly private confidential prescription data of the people of this Commonwealth. It remains alarming that this document has not been produced and Defendants have refused to mention it even once in their 20-page Motion.

MISREPRESENTATIONS 9

"The definitions of damage and loss make it clear that the intent is for said damage and loss to be directly related to the costs incurred by an owner of a computer associated with repairing or restoring the computer, a loss of access to or use of the computer, or uncovering the extent of unauthorized access to the computer." See *Shirakov v Dunlap* (sic),

Grubb & Weaver. MTD, Pg. 13

51 The decision in *Shirokov* relied on *Wilson v Moreau*, an unpublished case from 2006, almost a lifetime ago in terms of CFAA case law evolution. And *Shirokov* definitely did not say what the Defendants claim it did. In *Shirokov* the Court held that "loss" must be "directly attributable to the defendants' alleged access of his computer".

52 Despite Defendants' claim, it is not at all clear that Defendants' stated definition is the only existing standard for defining an incurred "loss".

53 The detailed ruling in *Animators at Law, Inc., v. Capital Legal Solutions, LLC*, No. 1: 10cv1341 (E.D. Va., May 10, 2011) directly pertains to the more current case law on damages from violations of the CFAA. It remains interesting that Defendants have taken pains to not draw the Court's attention to the much-discussed and popularly celebrated findings in *Animators*.

54 The plain language of the statute itself reads -

18 U.S. Code § 1030 (e)(11): **the term "loss" means any reasonable cost to any victim, including the cost of responding to an offense,** conducting a damage assessment, and restoring the data, program, system, or information to its condition prior to the offense, and any revenue lost, cost incurred, or other consequential damages incurred because of interruption of service; (emphasis added)

55 Nowhere in the plain language of the statute **(any reasonable cost to any victim)** does it **exclude** costs not directly related to a specific computer. The statute and the intent of Congress in plain language **include** direct computer costs to any reasonable cost to any victim.

56 Had Congress intended to **exclude** all costs not directly related to damage to a specific computer, Congress would have written that into the statute at any one of the five times Congress has amended this statute. Each time Congress has amended the statute it has only expanded the reach and inclusiveness of the statute and made clear it's intent to recompense "any victim."

57 Defendants are plainly incorrect in claiming Plaintiff has "misconstrued" the definition of "loss" "to try and claim that the costs he incurred after forming a belief,..." Based on the plain language of the statute and recent case law, Defendants' Motion must fail.

MISREPRESENTATIONS 10

"This is easily distinguished from Plaintiff's claim of loss that amounts to the time he took to meet with his patients." MTD, Pg. 14

58 Defendants' claim that case law is "easily distinguished from Plaintiff's claim of loss that amounts to the time he took to meet with his patients" is clearly in error. The Court in *Animators* clearly held that "CFAA does not require losses to be paid for in cash. Indeed, a holding that CFAA losses must be reduced to a cash exchange would conflict with the principle that a CFAA plaintiff may recover damages for its own employees' time spent responding to CFAA violations."

59 Defendants are further in error given that Plaintiff has documented downstream damages from the Defendants' violation of CFAA all of which were proximally caused by Defendants' misconduct. Case law supports this claim. See *United States v. Auernheimer*, 2:11-cr-00470-SDW-1 (D.N.J. 2011) where the federal government

claimed mailing costs to notify customers of a security breach as "loss" under the CFAA.

60 Therefore on this argument too Defendants' Motion must fail.

MISREPRESENTATIONS 11

"Information contained in the PMP database is not "Electronic Communication" in "Electronic Storage"" MTD, Pg. 14

61 Plaintiff in his complaint relies on the plain language of the law as explicitly written by Congress: 18 U.S. Code § 2711, § 2510 (12): "electronic communication" means any transfer of signs, signals, writing, images, sounds, data, or intelligence of any nature transmitted in whole or in part by a wire, radio, electromagnetic, photoelectronic or photooptical system that affects interstate or foreign commerce [.]

62 Defendants write that the First Circuit has held that "the term 'electronic communication' **includes** transient electronic storage that is intrinsic to the communication process for such communications." *U.S. v. Councilman*, 418 F. 3d 67, 79 (1st Cir. 2005) (emphasis added) While this expands the definition of 'electronic communication' the term **includes** does not and cannot override the plain language and intent expressed in the statute.

MISREPRESENTATIONS 12

"While the statute can be read broadly to extend its applicability to other forms of electronic communication, it can in no means be read to extend to data stored in the PMP database." MTD, Pg. 15

63 In addition to electronic prescription information, the Stored Communications Act has been applied to 'stored communications' in other cases, such as *Robbins v. Lower Merion School District* (E.D. PA, Civil Action No. 2:10-cv-00665-JD) where the 'stored

communications' were stored digital photographs and plaintiffs successfully prevailed in Federal court. Therefore it is at least a matter for a finder of fact after discovery and a trial. Defendants' Motion to dismiss on this ground must fail at this stage.

MISREPRESENTATIONS 13

"There is no intended recipient." MTD, Pg. 16

64 Defendants' statement is plainly false as the entire reason the tax payers fund this database via **both state and Federal taxes** is to help keep the public safe, a goal Defendants do not recognize.

65 The intended recipients are physicians who use the database to prevent 'doctor shopping' and DPH which uses the database to track trends. Law enforcement officials are also recipients once they, pursuant to the "Terms of Use" for the PMP Database (namely 105 CMR 700.012 and the requirement for a written application), have affirmed that they need the data for an ongoing bona fide "drug related" investigation.

66 There most certainly are intended recipients for this stored comm unication with clear rules defining access to this stored communication.

MISREPRESENTATIONS 14

"Plaintiff is Not a "Person Aggrieved"" MTD, Pg. 16

67 As shown earlier, the statute plainly envisages as victim any person who was affected by the violation of the CFAA. Plaintiff has already set forth in his Complaint numerous ways he was aggrieved by Defendants' violation of the CFAA.

MISREPRESENTATIONS 15

"Conspiracy and Equitable Relief must also be dismissed" MTD, Pg.19

68 Defendants assert that all other causes of actions presented in Plaintiff Dr. Bharani's Complaint fail based solely on the premise that Plaintiff purportedly fails to state a cause of action of the underlying and primary violation of the CFAA.

69 Plaintiff has demonstrated fatal flaws in Defendants' varying and contradictory arguments as well as deliberate factual misrepresentations and outright frauds on the Court (such as claiming exclusive use) that at a minimum call for proper discovery and a finding of fact.

70 Defendants have been unable to prove they had authorized access to the PMP database. Plaintiff on the other hand has provided a clear basis in law as to why Defendants' access was unauthorized and in excess of authorization and a violation of the CFAA, the SCA and CMR.

71 Laws and Regulations exist to be obeyed and are as binding on public officials as the general public. In fact public officials must be held to a higher standard.

72 It is intemperate to dismiss Plaintiff's Complaints given there is more than a plausible chance of success at trial. Defendants' Motion to Dismiss should be denied entirely.

Summary

73 Defendants at the same time deny they conspired to access the online PMP database, deny that the database is a "protected computer", deny that there was no "drug related" investigation, suddenly deny that they were investigating **Medicaid Fraud** and violations of the Social Security Act, refuse to provide sworn proof that they affirmed the existence of a bona fide "drug related" investigation ***prior*** to accessing the PMP database and at the same time claim their access to the PMP database was authorized by law.

74 In addition to fatal flaws in their arguments along with numerous factual misrepresentations, Defendants also filed their Motion to Dismiss without even attempting to confer with Plaintiff, not even as a quick bad faith email one minute prior to filing their Motion, and also filed their Motion after the deadline to file had expired.

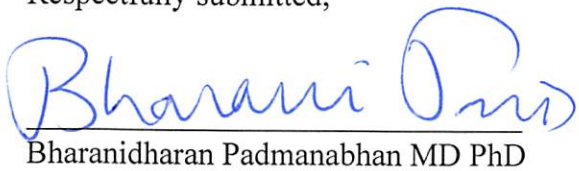
Wherefore, for all of the reasons put forth above and as Plaintiff Dr. Bharani's Complaint satisfies all the elements pertinent to violations of the CFAA and SCA, Plaintiff Dr Bharani respectfully requests that Defendants' Motion to Dismiss be denied.

Defendants' Motion to dismiss should be denied based alone on A.A.G. Mark Sutliff's knowing and willful violation of L.R. 7.1(a)(2) by failing to file the required Certificate of efforts to confer.

Request for Oral Hearing

Pursuant to Local Rule 7.1(d) of the U.S. District Court for the District of Massachusetts, Plaintiff Dr. Bharani requests an oral argument in the belief it may be of assistance to the Court.

Respectfully submitted,



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