No. 16-1159

# United States Court of Appeals
# For the First Circuit

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BHARANIDHARAN PADMANABHAN MD PhD
Plaintiff - Appellant

v.

MAURA HEALEY, STEVEN HOFFMAN, CHRIS CECCHINI, JAMES PAIKOS, LORETTA KISH COOKE, ADELE AUDET
Defendants - Appellees

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On Appeal from U.S. District Court for the District of Massachusetts
HON. NATHANIEL GORTON, U.S. DISTRICT JUDGE
Civil Case No. 15-CV-13297-NMG

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## Plaintiff-Appellant's Opening Brief

Bharanidharan Padmanabhan MD PhD
*pro se*
30 Gardner Road #6A
Brookline MA 02445
617 5666047
scleroplex@gmail.com

JOHN DOES, JANE DOES

Defendants

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**Oral argument pursuant to Rule 34 (a)(1)**

Plaintiff-Appellant requests oral argument in order to assist the Court clarify any matters possibly left wanting in this *pro se* brief.

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## Jurisdictional statement

The district court's memorandum and order of dismissal was entered on February 2nd, 2016:

> "**Judge Nathaniel M. Gorton: ORDER entered. MEMORANDUM AND ORDER, granting [23] MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM ...[.] "Furthermore, the Court forewarns plaintiff, once again, that he will be subject to the imposition of sanctions himself if he continues to make gratuitous, inflammatory and groundless charges against defendants and their counsel. So ordered.""** Ax. 1

The lower court did not rule on numerous motions on black letter law and declared the case closed on February 4, 2016. This Court has jurisdiction pursuant to 28 U.S.C. § 1291 and 28 U.S.C. § 1294(1).

## Statutory background

The Computer Fraud and Abuse Act ("CFAA"), 18 U.S.C. § 1030, governs access to protected computers. Congress expanded this Act to provide a private cause of action to sanction and compensate for unauthorized access or access in excess of authorization provided the claimed loss amounted to $5000 in one calendar year. Ax. 2

> (g) Any person who suffers damage or loss by reason of a violation of this section may maintain a civil action against the violator to obtain compensatory damages and injunctive relief or other equitable relief.

The 105 Code of Massachusetts Regulations 700.012 strictly

governs access to confidential medical prescription information stored in a medical database run by the Massachusetts Department of Public Health ("DPH"). Ax. 3

The Stored Communications Act, 18 U.S. C. § 2701-2712, governs access to electronic communications while in electronic storage at a facility where electronic communication is provided.

## Statement of the case

Pursuant to Fed. R. App. Proc. 28(d), appellant, *pro se*, shall refer to himself simply as Dr. Bharani. The defendants are Maura Healey and her agents and clients who have chosen to be represented together. The Addendum is referred to as "Add." and the Appendix as "Ax."

Between 2008 and 2013, Dr Bharani raised complaints of Medicare/Medicaid fraud by the Cambridge Public Health Commission ("Cambridge") which then falsely reported him to the Board ("Board") of Registration in Medicine as having "Voluntarily resigned to avoid an investigation." On October 1, 2015, US District Judge William Young declared that Dr Bharani had properly reported fraud. Dr Bharani filed complaints documenting patient neglect and Medicaid fraud with the Inspector General, U.S. Department of Health and Human Services.

Dr Bharani also filed a criminal complaint with then-Attorney General Martha Coakley against the then-Director of the state's Office of Medicaid, Julian Harris, who had threatened Dr Bharani with an audit using a list of patients provided by Cambridge. After Dr Bharani filed his criminal complaints the threatened audit by the Office of Medicaid vanished without a trace. Dr Bharani followed that up with a discussion in person with Steven Hoffman, Deputy Chief of the state's Medicaid Fraud Control Unit, about the unlawful threat by Julian Harris. Ax 4.

During the Board hearing in January 2015 Dr Bharani repeatedly placed on the record that all the patient charts used by the Board were four years old and totally tainted by Cambridge and that the Board's investigators - James Paikos and Loretta Kish Cooke (who demanded that Dr Bharani's license be suspended and that he be driven out of the profession of medicine entirely) - never conducted an independent investigation in conscious violation of M.G.L. Ch112 § 5. Thus they do not possess any charts dating from after Dr Bharani was fired by Cambridge in November 2010.

This is a serious legal liability for James Paikos and Loretta Cooke as it demonstrates they merely are Cambridge's paid proxies.

These two Defendants delayed actions at the Board knowing the open docket blocked Dr Bharani from getting reimbursed for treating his patients or being hired for even temporary work. As a result Dr Bharani has been treating his patients for the past five years entirely for free. He has not been paid from any source. Ever since going solo in November 2010, Dr Bharani has neither billed government insurance for his services nor received a single tax dollar.

In October 2014, Dr Bharani commenced civil action *pro se* against James Paikos and Loretta Cooke in an effort to finally be able to earn a living as a physician. In March 2015, Attorney General Maura Healey chose to defend them at public expense in that private civil suit. On April 28, 2015, two Investigators from Maura Healey's Medicaid Fraud Unit suddenly arrived at Dr Bharani's apartment door with a 3-page demand letter that declared unequivocally that Dr Bharani was facing allegations of <u>Medicaid Fraud</u> and violations of the Social Security Act and demanded immediate access to the complete page-by-page medical records, paper and electronic, for sixteen patients. <u>Add.1</u>

As doing so would be totally explicitly unlawful, Dr Bharani refused to break the law. If Dr Bharani were the type to break the law

he would still have been employed by Cambridge.

It was instantly obvious to Dr Bharani from the patient list that Maura Healey had accessed the privileged confidential medical PMP database managed by the Department of Public Health ("DPH"). There was no way that list could have been procured from any other source on earth.

And given the exclusive reason of a <u>Medicaid Fraud investigation</u> stated by Maura Healey in her demand letter, said access explicitly violated 105 CMR 700.012, the Massachusetts regulation that governs access to this confidential medical database, the "Terms of Use" for this protected database, as detailed in Dr Bharani's *pro se* complaint and opposition. Dr Bharani also showed that Maura Healey's subsequent statement to the court that she was actually engaged in a <u>drug-related investigation</u> and ***not*** a <u>Medicaid Fraud investigation</u> is wholly and intentionally false. An outright denial of a documented material fact is perjury and a clear case of "willfully obstructing or impeding proceedings." *United States v. Dunnigan* (91-1300), 507 U.S. 87 (1993)

The only way Maura Healey's <u>Medicaid Fraud</u> Investigators arrived at Dr Bharani's apartment door with that demand letter was by

accessing this confidential medical database in violation of 105 CMR 700.012 and the CFAA. Maura Healey violated the CFAA in order to attempt procuring patient charts for the period after November 2010, solely to aid her clients James Paikos and Loretta Cooke in a private lawsuit. The Government *per se* had no need for the charts. As Dr Bharani is solo, not affiliated with any hospital and not reimbursed by any insurance company there was no way other than this direct assault to procure those patient charts.

This direct assault failed. Dr Bharani never heard from Maura Healey again despite her claimed need for "immediate" access as the "minimum" required for a Medicaid Fraud investigation.

In their Motion to Dismiss, Defendants deny that they were really engaged in a Medicaid Fraud investigation, claim that they did not access the confidential medical database, claim that if they did access the confidential medical database in violation of 105 CMR 700.012 they have every right to do so and that the confidential medical database is not a protected computer under the CFAA anyway. Add. 2

The lower court dismissed the complaint without an evidentiary hearing. All case law relied upon by Dr Bharani was totally ignored by

the lower court and went totally unmentioned in it's decision. The lower court refused to act as a neutral finder of fact on all the vital points of law and affirmed Maura Healey's false and selective quotations.

## Summary of the argument

Defendants violated the CFAA, the SCA, as well as the SJC's holding in *Kobrin*. Dr Bharani has suffered a massive loss as a result of said CFAA violation. The lower court refused to examine the evidence, actively misrepresented facts, fabricated a straw man argument, and ignored on-point case law as well as required legal standards. The dismissal under 12(b)(6) was improper and must be reversed.

## Argument

### 1 This Court should affirm that Defendants have indeed violated the CFAA, 28 U.S.C. § 1030.

Being *pro se*, Dr Bharani relied on reading through almost every CFAA ruling over the past 10 years prior to filing his complaint. In every single ruling where the court held that the $5000 loss threshold had not been met, the court made explicit that the defendants had indeed violated the CFAA but private civil action could not be sustained without showing a loss of $5000.

The lower court declared that Dr Bharani did not meet the $5000

loss threshold, based exclusively on case law submitted by Maura Healey while failing to address case law relied upon by Dr Bharani, *pro se*, but remained non-responsive as to whether the Defendants did indeed violate 105 CMR 700.012 and the CFAA.

Dr Bharani, *pro se*, even without the benefit of liberal discovery rules that he is entitled to in this district, had submitted clear and convincing evidence to prove that Defendants had undeniably accessed the confidential medical PMP database and that said access was in violation of 105 CMR 700.012 and thus the CFAA. The sockdolager level of evidence provided well exceeded the requirement of *Twombly* and *Iqbal*. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 127 S.Ct. 1955 (2007), *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009)

Dr Bharani, *pro se*, made it plain that Maura Healey proved unable to produce documentary evidence of compliance with the explicit requirements of 105 CMR 700.012(D)(1)(3).

> *(3) A request for information collected pursuant to 105 CMR 700.012 shall be in writing or, if applicable, transmitted electronically pursuant to 105 CMR 700.012(F) and shall be made in accordance with procedures established by the Commissioner or designee to ensure compliance with the requirements of 105 CMR 700.012(D) and (E).*

The Attorney General does ***not*** have *carte blanche* access to DPH's

confidential medical PMP database, only doctors do. Unlike the Attorney General, doctors are explicitly authorized to look up any patient in DPH's confidential medical PMP database any given day and are also officially encouraged to do so for all new patients. Maura Healey, not being a doctor, knew she is subject to the mandate to file a separate written request for authorization, prior to each and every single request to access and view this confidential medical database for each and every single patient.

This confidential database is a medical database, ***not*** a law enforcement database. Law enforcement cannot access it simply by claiming to be law enforcement and walking in without a clear paper trail. It's against the law. Defendants' actions directly threatens public health and safety. The lower court was non-responsive to Dr Bharani's evidence proving the above and consciously refused to make a finding of fact even though the rule of law demands it. Furthermore, the Third Circuit explicitly held in *Auernheimer*:

> "Congress, however, did not define a violation of § 1030(a)(2)(C) in terms of its effects. The statute simply criminalizes accessing a computer without authorization and obtaining information. It punishes only the actions that the defendant takes to access and obtain. It does not speak in terms of the effects on those whose information is obtained. The crime is complete even if the offender never looks at the information and immediately destroys it, or the

victim has no idea that information was ever taken."
*United States v. Andrew Auernheimer*, 13-1816 (3rd Cir. 2014)

This Court must explicitly declare, based on the written evidence in the record, that the Defendants violated 105 CMR 700.012 and the CFAA, that "the crime is complete." This mandatory finding of fact is independent of whether Dr Bharani suffered a $5000 loss.

## 2 Dr Bharani did not assert a private cause of action specifically on 105 CMR 700.012.

The lower court declared in it's decision that 105 CMR 700.012 "does not provide plaintiff with a private cause of action."

Dr. Bharani, *pro se*, did not assert a private cause of action based specifically on 105 CMR 700.012 and made explicit that 105 CMR 700.012 served as the "Terms of Use" for the confidential medical PMP database, violation of which gave rise to the CFAA violation. *EF Cultural Travel v. Zefer Corp.*, 318 F.3d 58 (1st Cir. 2003)

The lower court *sua sponte* consciously advanced a straw man argument. This Court must declare, based on the record, that the Defendants violated the "Terms of Use" and reject the lower court's straw man argument.

## 3 The lower court considered only case law submitted by the Defendants and not case law submitted by the *pro se*

**Plaintiff regarding his loss. It's decision must be vacated.**

It is unjust and unreasonable that the lower court did not mention at all the case law relied upon by Dr Bharani to show he meets the $5000 loss threshold and exclusively considered only case law submitted by Maura Healey. This makes Judge Nathaniel Gorton's memorandum very different from rulings in other CFAA cases that dismissed plaintiffs' claims for not meeting the loss threshold.

The lower court's failure to address case law relied upon by the *pro se* Plaintiff not only directly violates the standard established by both the Supreme Court and this District about construing *pro se* complaints liberally and giving guidance to *pro se* Plaintiffs, but also the standard for neutrally examining <u>both sides</u> of CFAA cases.

**(a) This Court should officially recognise the ruling in *Animators at Law, Inc. v. Capital Legal Solutions, LLC*, 786 F.Supp.2d 1114 (E.D. Va. 2011)**

The ruling in *Animators* has been considered and incorporated in multiple courts. In October 2015, the District Court in Maryland wrote when deciding on a motion to dismiss:

> "When appropriate, a court may also grant jurisdictional discovery to ensure that the record is fully developed. See, Animators at Law, Inc. v. Capital Legal Solutions, LLC, 786 F. Supp. 2d 1114, 1115 n.2 (E.D. Va. 2011) (granting jurisdictional discovery to allow consideration of pivotal issue on a

> more complete record)" *Wikimedia Foundation et al* v. *National Security Agency / Central Security Service et al*. Case No. l:15-cv-662.

In explicit contrast, the lower court here failed to do so.

**(b) This Court should officially recognise the ruling in *United States v. Andrew Auernheimer*, 13-1816 (3rd Cir. 2014)**

The defendant in *Auernheimer* was charged by the United States and convicted by a federal jury in November 2012 with violating the CFAA based on a loss of $73,167 that was spent on mailing letters in response to said CFAA violation.

> "The principal point of contention at the hearing was the amount of loss sustained by AT&T. A762. The Court found that Auernheimer was responsible for a loss of $73,167, which resulted in an eight-level increase in his total offense level. A770-71, A786."
> *Brief for United States*, Document: 003111395511

The conviction was later vacated by the Third Circuit in a precedential opinion exclusively on the basis of venue and ***not*** on the basis of qualifying loss. What is good for a huge corporation and the United States surely must be good for the *pro se* Plaintiff here.

> "We note our concern regarding the district court's failure to address the arguments against transfer Chatman-Bey stated explicitly in his response to the show cause order: "[P]rinciples of fairness suggest that a plaintiff receive some indication that the court considered and for good reason rejected his arguments." In re Scott, 709 F.2d at 721 n. 11. In this case, even more conspicuously than in *Scott,* the petitioner received no indication that his contentions were even examined." *In re Wilton Chatman-Bey, Petitioner* 718 F.2d 484 (D.C. 1983)

The petitioner here, Dr Bharani, *pro se*, received no indication that his contentions were even examined by Judge Nathaniel Gorton. Dr Bharani, *pro se*, explicitly relied on "on-point case law" and the plain language of the statute in his complaint and opposition. This Court must declare that the rulings in *Animators* and *Auernheimer* are recognised and must be considered within the District of Massachusetts and this Circuit.

The dismissal must be reversed and this case remanded to the district court to consider the impact of the holdings in *Animators* and *Auernheimer* in calculating Dr Bharani's loss and damages. See also *Creative Computing v. Getloaded. com LLC*, 386 F.3d 930 (9th Cir. 2004), *Modis, Inc. v. Bardelli*, 531 F. Supp. 2d 314 (D. Conn. 2008), *SuccessFactors, Inc. v. Softscape, Inc.*, 544 F. Supp. 2d 975 (N.D. Cal. 2008), *A.V. v. iParadigms, LLC*, 544 F. Supp. 2d 473 (E.D. Va. 2008), *United States v. Millot*, 433 F.3d 1057 (8th Cir.2006), *United States v. Blake Douglas Snowden*, No. 15-1107 (10th Circ. 2015), *United States v. Matthew Keys*, Cr. No. S-13-0082 KJM, (ED Cal. 2014), *EF Cultural Travel v. Explorica Corp.*, 274 F.3d 577 (1st Cir. 2001).

## 4 The plaintiff did indeed state that the patients' protected prescription information is an electronic communication

**from the pharmacies within the meaning of § 2510 (12) and the lower court deliberately misrepresented otherwise in it's decision.**

Dr Bharani, *pro se*, explained in detail in his complaint and opposition that the confidential prescription information was indeed an electronic communication within the meaning of § 2510 (12):

> Plaintiff in his complaint relies on the plain language of the law as explicitly written by Congress: 18 U.S. Code § 2711, § 2510(12) [.] Add. 3
>
> By law, access by Defendants to the protected private confidential stored prescription data of all of Plaintiff's patients, held on protected computers and an explicitly protected database, was explicitly unauthorized and intentionally in excess of authorization as defined by § 2701(a)(1) and § 2701(a)(2) of the SCA [.] Add. 1

It is therefore absolutely staggering that the lower court claims in writing:

> The Court agrees with defendants that plaintiff fails to allege that the purportedly protected information is protected by the SCA. That is because plaintiff neither claims that the patient information is an electronic communication within the meaning of § 2510 (12)... [.]

Dr Bharani is unable to discern a single good faith legitimate reason for Judge Nathaniel Gorton's above declaration and overt support for Maura Healey. The lower court's assertion is undeniably an unsupportable factual misrepresentation totally contrary to the record and undeniably calls into question the integrity of those proceedings.

Furthermore, Dr Bharani had also cited relevant case law:

> 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. Opp. pg. 16

The lower court deliberately and totally ignored recent on-point case law submitted by Dr Bharani, *pro se*. This violates even basic standards for construing a *pro se* plaintiff's complaint while ruling on a 12(b)(6) motion to dismiss for failure to state a claim. The lower court's dismissal, based on factual misrepresentations, was a clear legal error and must be reversed. The district court must consider *Robbins v. Lower Merion School District* upon remand. See also *In Re Pharmatrak*, 329 F.3d 9 (1st Cir. 2003)(transmissions of completed online forms [...] constitute electronic communications) which applies to prescriptions.

## 5 This Court must reverse the lower court's refusal to even acknowledge Defendants' failure to comply with LR 7.1, even though the rules should apply equally and the standard for state attorneys should be higher than for a *pro se* plaintiff.

The lower court did not address Defendants' failure to file the mandatory Certificate of Compliance, followed by the filing of factual misrepresentations in their "Judicial Notice." The lower court has

discretion to excuse/ignore harmless errors but not non-compliance with a mandatory requirement. The lower court claimed that Defendants were unable to confer with Dr Bharani even after Dr Bharani proved that particular claim is false. No court should excuse blatant disregard for court rules or the filing of factual misrepresentations.

This Court must declare that Defendants violated Local Rule 7.1 and dealt in bad faith even after this matter was raised.

## 6 The confidential medical PMP database is indeed a "protected computer" under the CFAA.

The lower court noted that Defendants "`dispute that the computers hosting the PMP database are "protected computers"`" but was itself non-responsive on this vital important crucial point of law. The lower court also ignored the expert opinion of Prof. Orin Kerr (Fred C. Stevenson Research Professor of Law, George Washington University), cited at length by Dr Bharani Add. 3 on what is a protected computer under the CFAA, even though Professor Kerr is respected as a credible authority on CFAA law within this district and Circuit and served as *amicus* to this Court for *United States v. Councilman*, reversed 418 F.3d 67 (1st Cir. 2005).

Dr Bharani, *pro se*, showed as a matter of law that the

confidential medical PMP database fully meets the definition of a protected computer within the meaning of the CFAA as written.

As a matter of law this Court must declare that the confidential medical PMP database, access to which is controlled by an explicit government regulation that requires the Attorney General to apply in writing for permission prior to accessing the confidential medical prescription for each patient, each time, and only for "drug-related" investigations, is a protected computer as defined by CFAA.

### 7 The lower court erred in not construing *pro se* Plaintiff's complaint liberally before dismissing under Rule 12(b)(6).

Per Rule 8 the plaintiff is required to present a short and plain statement of the claim showing he is entitled to relief. Dr. Bharani's *pro se* complaint provided ample clear and convincing evidence that more than complied with this Rule as well as the standard set by the Supreme Court via *Twombly* and *Iqbal*, *supra*.

Furthermore, in this district, as nationwide, *pro se* complaints are to be liberally construed. *Estelle et al v. Gamble*, 29 U.S. 97 (1976), *Haines v. Kerner*, 404 U.S. 519 (1972), *Alston v. Parker*, 363 F.3d 229 (3d Cir. 2004), *Vartanian v. Monsanto Co.*, 14 F.3d 697 (1st Cir. 1994), *Hart v. Mazur*, 903 F.Supp. 277 (D.R.I. 1995).

Every specific law-supported point in the *pro se* complaint was labelled “vague and conclusory” by the lower court in it’s memorandum which then also made deliberate factual misrepresentations regarding specific statements in the complaint.

The Supreme Court ruled “[i]n addition, when ruling on a defendant's motion to dismiss, a judge must accept as true all of the factual allegations contained in the complaint. *Bell Atlantic Corp.*, supra, at 1955, 127 S.Ct. 1955 (slip op., at 8-9) (citing *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506 (2002) ("This simplified notice pleading standard relies on liberal discovery rules . . . to define disputed facts and issues and to dispose of unmeritorious claims.").” *Erickson v. Pardus*, 127 S. Ct. 2197 (2007)

In this case here, despite a clear directive from the Supreme Court, not only was there no discovery allowed at all, the *pro se* Plaintiff’s plain-law- and case-law-supported briefs went totally unmentioned in the court’s decision as if he had not filed any at all. Also there was not even a short *pro forma* perfunctory eye-wash of an oral hearing. The court’s decision failed to meet the standard of review.

Instead, the lower court considered exclusively the case law and

assertions submitted by Maura Healey and dismissed without a hearing a very meritorious claim that is supported in the record by clear and convincing evidence. Accordingly, the Defendants failed on process by not filing a mandatory certificate and on merit by failing to prove they did have authorized access to the confidential medical database which is the crux of the case. Once again,

> "In this case, even more conspicuously than in *Scott,* the petitioner received no indication that his contentions were even examined." *In re Wilton Chatman-Bey, Petitioner* 718 F.2d 484 (D.C. 1983)

Given the existing legal standards for examining a motion under 12(b)(6) to dismiss a *pro se* complaint, at a minimum dismissal required guidance from the court as to claimed deficiencies in the *pro se* complaint as well as discovery to define disputed facts and whether a reasonably prudent person would find if the evidence presented was ambiguous or subject to interpretation. The lower court's decision, issued without an impartial evaluation of the merits or an evidentiary hearing and in fact asserting factual misrepresentations, is as void as the district court decision declared void by the Supreme Court in *Klapprott*. See *Klapprott v. United States*, 335 U.S. 601 (1949).

This Court must affirm that basic legal standards established by the Supreme Court, such as natural readings of the text, were disregarded by the lower court and must reverse the dismissal.

In *Rodi*, this Court ruled that "the complaint states one potentially actionable claim and another that is not beyond hope of repair. Consequently, we reverse the order of dismissal in part and remand for further proceedings." *Rodi v. Southern New England School of Law*, 389 F.3d 5, 2004 WL 2537204 (1st Cir., 2004)

Dr Bharani's *pro se* complaint states more than one actionable claim and this Court must reverse the order of dismissal here too.

## 8 The SJC holding in *Kobrin* applied squarely to this case.

The lower court asserted:

> "The SJC decision in Kobrin addresses the scope of the psychotherapist-patient privilege under M.G.L. c. 233, § 20B, an issue that is not presented by the facts of this case. See Kobrin, 395 Mass. at 284-85."

Given that Dr Bharani is a Board-certified neurologist and given that neurologists and psychiatrists have overlapping interests and patients and are therefore certified by a unified American Board of

Psychiatry and Neurology, the lower court was in clear error to assert that the "psychotherapist-patient privilege" did not apply to **immediate access** to the **un-redacted complete page-by-page medical records, both paper and electronic, of a neurologist's patients**, that Maura Healey demanded via the physical arrival at Dr Bharani's home of two of her **Medicaid Fraud investigators**, (one of whom refused to identify herself when politely asked to) and who certified in writing that the complete un-redacted medical records were the "minimum" required for a Medicaid Fraud investigation.

Maura Healey asserts, and Judge Nathaniel Gorton agrees, that a neurologist must immediately hand over, without prior written permission from his patients, the privileged complete un-redacted medical records of sixteen patients held in trust by Dr Bharani on behalf of his patients, even to persons who choose to remain anonymous, and in the marked absence of a judicial subpoena that Dr Bharani and his patients would have had a reasonable chance to contest. This is a vital point as Dr Bharani is not a registered Medicaid Provider and has not received any public money in five (5) years. Maura Healey has no jurisdiction over or right to view his patients' records for

any date after November 2010 and she has always known that.

The lower court's assertion that the "psychotherapist-patient privilege" does not apply to this case is unjust, unreasonable and unsupportable. The SJC has even ruled, already in 2009, that dragnet searches of even non-medical personal data by the government in the absence of probable cause, even with a search warrant in hand, is unlawful and impermissible. *In Re: Matter of a Search Warrant Executed on March 30, 2009 at the Residence of Movant Riccardo Calixte*, SJ-2009-0212. In 2015, Maura Healey was fully aware of the legal standard in Massachusetts and intentionally chose to violate it in a stealth attack on private medical records without even a court order.

The facts militate strongly for the conclusion that Maura Healey's demand violated the SJC's holding in *Kobrin* and this Court must declare so. To not condemn this conscious violation shall signal judicial acceptance of attitudes embodied by the Stasi and place at grave risk the medical privacy of every single person in Massachusetts.

## 9 The lower court's opinion ignored clear evidence, black letter law as well as the standard for construing pleadings.

The lower court declared:

> "General and vague statements that the alleged conduct violated 18 U.S.C. § 4 and other unidentified federal statutes also do not suffice to set forth a plausible claim for relief."

The lower court further declared:

> "Conclusory statements that defendants deliberately committed regulatory and statutory violations and accessed information under the pretext of legitimate investigative activity do not, by themselves, set forth a plausible claim for relief."

The lower court asserted the above <u>after</u> Dr Bharani, *pro se*, proved beyond any doubt that Defendants violated 105 CMR 700.012 and the CFAA and <u>did</u> intentionally access the confidential medical PMP database despite intentionally violating the "Terms of Use." Dr Bharani made explicit to the lower court that one of the patients on the list of sixteen was linked to him exclusively via one single prescription in the confidential medical PMP database and a therapeutic link between them could not have been discerned via any other source on earth. The lower court did not engage in even limited discovery or an unbiased evaluation. Defendants even conceded that any access by law enforcement <u>must</u> be strictly related to an ongoing **<u>drug-related</u>** investigation, which was absent.

Maura Healey et al deny accessing this confidential medical

database while at the same time offer their mere *ipse dixit* that if the Attorney General did so it must be legal, despite the explicit mandate of 105 CMR 700.012. The lower court did not label their claim as being merely conclusory.

Other than the pharmacist who filled the single confidential prescription for Dr Bharani's patient, there were only three people who knew about the confidential prescription for Plaintiff's patient - the Plaintiff, the patient and the unauthorized Attorney General's office.

The lower court had more than "plausible evidence" to prove that the AG's office made a conscious decision to violate the mandate of 105 CMR 700.012 and did access the confidential medical PMP database.

Based on the record, that the Defendants did indeed access the confidential medical PMP database is in no doubt. The crime is complete. *United States v. Andrew Auernheimer, supra.* Defendants deny it, which brings to mind Judge Mark Wolf's dictum that whoever "falsely testifies that he does not recall a material fact has committed perjury." *United States v. Ferrara*, 384 F.Supp.2d 384 at 397 n.10 (D.Mass. 2005) An outright denial to the court in the face of clear and convincing evidence is perjury too. *United States v. Dunnigan*, 507 U.S.

87 (1993) Also, Defendants' argument that Dr Bharani should already have named which individual defendant sat at a computer and physically looked up the database is counter to this country's pleading standards, as they well know. Based on clear and convincing evidence, this Court must declare that the Defendants violated 105 CMR 700.012 and CFAA, reverse the dismissal and remand the case.

### 10 In view of the facts and circumstances the lower court's warning to Dr Bharani *pro se* was designed to obstruct the quest for the truth.

The lower court wrote:
"Furthermore, the Court forewarns plaintiff, once again, that he will be subject to the imposition of sanctions himself if he continues to make gratuitous, inflammatory and groundless charges against defendants and their counsel." Doc. 50

It should be emphasised that Dr Bharani, *pro se*, in his complaint and opposition recited the factual record and did not attack anyone's person or resort to name-calling. As required, he recited conduct that was inappropriate, unethical and disrespectful to the court and the court process. Statements should be deemed "gratuitous, inflammatory and groundless" only when they are not true. Dr Bharani had also submitted sworn affidavits attesting to the veracity of his pleadings whereas Maura Healey strenuously refused to do so. Why refuse?

Dr Bharani, *pro se*, used the court process with the expectation that the district court would serve as a neutral finder of fact instead of harshly threatening a *pro se* plaintiff with sanctions for reciting the factual record that the court could immediately verify.

Dr Bharani agrees that the lower court would be justified in harshly warning a *pro se* Plaintiff if the facts were impartially examined and found to be false, meaning that Defendants and their Counsel actually did file a Certificate of Compliance with their motion to dismiss (they did not), did not falsely blame Plaintiff for the missing Certificate (they did blame Plaintiff), and did not make numerous conscious factual misrepresentations (they did) that Plaintiff detailed and rebutted in his opposition.

Dr. Bharani, *pro se,* purchased and paid for entry into the court system to use the district court for it's intended purpose with the expectation that he would receive equal justice under the law, a phrase engraved onto the Supreme Court, "a societal ideal that has influenced the American legal system" that was conspicuously absent in the lower court's treatment of his complaint.

Courts have long held that "[t]he law ministers to the vigilant not

to those who sleep upon perceptible rights." *Puleio v. Vose*, 830 F.2d 1197, 1203 (1st Cir. 1987). As Judge Bruce Selye put it "vigilance is good, somnolence is bad." *In re David Efron*, No. 13-1765 (1st Cir. 2014) Dr Bharani took these court pronouncements to heart, only to be harshly threatened with sanctions for bringing a meritorious claim.

This Court must declare that Dr Bharani, *pro se*, spoke the truth in all his sworn-affidavit-supported pleadings and did not make "gratuitous, inflammatory and groundless" claims.

## 11 The lower court refused to rule on important motions including requiring Defendants and their counsel Mark Sutliff to file sworn affidavits attesting to the veracity of their pleadings and to take Judicial Notice of facts.

Instead of examining impartially, neutrally and in an unbiased fashion, the facts submitted by Dr Bharani and supported by sworn affidavits, Judge Nathaniel Gorton chose to ignore the affidavits and the documentary record, accepted the false submissions by Maura Healey that contradicted the documentary record, and harshly threatened Dr Bharani with sanctions while refusing to arrive at the truth. Judge Nathaniel Gorton dealt with most motions *en masse* after dismissing the case. This forces Dr Bharani to conclude Judge Nathaniel Gorton was unwilling to publicly arrive at the truth and

further rewarded Maura Healey for “willfully obstructing or impeding proceedings.” *United States v. Dunnigan*, *supra*.

This Court must reverse the dismissal, and in the interest of the administration of justice, order the district court to rule on important motions that it hitherto had consciously ignored.

## 12 We have more than the mere appearance of impropriety envisaged by 28 U.S. Code § 455 and settled case law.

Judge Nathaniel Gorton has published numerous opinions in CFAA cases in this district over the years. An examination of his CFAA opinions uniformly reveals a balanced examination of the arguments and case law marshalled by both plaintiff and defendant, an impartial well-reasoned explanation for why one is more compelling than the other, what the court’s findings of fact are and why the final decision was reached. See for example *Guest-Tek Interactive Entertainment Inc. v. Pullen*, 731 F. Supp. 2d 80 (D. Mass. 2010), *iQuartic v. Simms*, No. 15-13015-NMG, 2015 WL 5156558 (D. Mass. 2015), *Jagex Limited v. Impulse Software*, 273 F.R.D. 357 (D. Mass. 2011).

This is in stark contrast to the decision finally issued in this case (after Dr Bharani, *pro se*, was forced to file a motion to expedite as motions had been pending for months) where the arguments, clear

evidence and cases submitted by Dr Bharani were consciously ignored, the decision merely quoted the arguments made by Maura Healey (which openly contradict the expert opinion of Professor Orin Kerr), stooped to fabricating a straw man argument, made factual misrepresentations and explicitly refused to state the court's own neutral finding of facts.

The nature and construction of Judge Nathaniel Gorton's decision in this case is so different from his norm it forces Dr Bharani, *pro se*, to conclude he has been treated disparately and that the Judge's threats were consciously designed to sweep massively unlawful conduct by the Government under the rug and make Dr Bharani, *pro se*, slink away quietly.

Dr Bharani also communicated with an attorney involved in *iQuartic v. Simms* who kindly informed him that "Judge Gorton ruled promptly on every motion/application we filed on behalf of iQuartic" and the case had already been satisfactorily resolved.

Lady Justice may be blind while holding up her scales but Dr Bharani, a scientist, is forced by Judge Nathaniel Gorton's disparate treatment to conclude the Judge was fully conscious that the main

defendant here is Maura Healey, the Attorney General, and did improperly place his thumb on the scale on her behalf to help conceal her conscious violations of major state and federal laws as well as a mandatory local rule. The evidence for this more than rises to the level established by the Supreme Court in *Liljeberg v. Health Svcs. Acq. Corp.* 486 U.S. 847 (1988).

## Conclusion

Dr Bharani, *pro se*, has presented this Court incontrovertible definite proof that as a matter of law Maura Healey et al accessed the confidential medical PMP database in violation of the CFAA and SCA and has 'put flesh on the bones' of his arguments. *United States v. Zannino*, 895 F.2d 1, 17 (1st Cir.1990)

This Court must REVERSE the dismissal, REMAND to the district court for discovery and trial on ALL Counts in the complaint, explicitly REASSIGN this case to a different Judge in the interest of justice and ORDER the district court to rule on numerous motions consciously ignored by Judge Nathaniel Gorton. Additionally, this Court *sua sponte* may make various findings of fact and grant the specific relief sought in the complaint.

Respectfully submitted,

**Bharanidharan Padmanabhan MD PhD**

*pro se*

2 March 2016

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(s) Bharani Pmd

Attorney for BHARANIDHARAN PADMANABHAN MD PhD PROSE

Dated: 2 MARCH 2016

## Certificate of service

Plaintiff-Appellant certifies that he has served a CD of the opening brief upon counsel for defendants via Certified Mail.

**Mark Sutliff Esq.**

7015 0920 0000 0470 4665

AGO, 11th Floor

One Ashburton Place

Boston MA 02108

**Bharanidharan Padmanabhan MD PhD**

*pro se*

2 March 2016