

UNITED STATES COURT OF APPEALS  
FOR THE FIRST CIRCUIT

BHARANIDHARAN PADMANABHAN, MD, PhD

Plaintiff-Appellant,

v.

MAURA HEALEY, STEVEN HOFFMAN,  
CHRIS CECCHINI, JAMES PAIKOS,  
LORETTA KISH COOKE, and ADELE AUDET,

Defendants-Appellees.

Case No. 16-1159

**DEFENDANTS-APPELLEES MAURA HEALEY, STEVEN HOFFMAN,  
CHRIS CECCHINI, JAMES PAIKOS, LORETTA KISH COOKE AND  
ADELE AUDET'S MEMORANDUM IN SUPPORT OF THEIR MOTION FOR  
SUMMARY DISPOSITION UNDER FIRST CIRCUIT LOCAL RULE 27.0(c)**

Pursuant to Rule 27.0(c) of the Local Rules of the Court of Appeals for the First Circuit, the Defendant-Appellees, Maura Healey, Steven Hoffman, Chris Cecchini, James Paikos, Loretta Kish Cooke and Adele Audet (collectively “the Defendants”), respectfully move this Court to summarily dispose of this matter by affirming the District Court judgment. Because “no substantial question is presented,” Loc. R. 27.0(c), summary disposition is appropriate.

The underlying complaint filed by Bharanidharan Padmanabhan (“Dr. Bharani”)<sup>1</sup> asserts a variety of claims related to his allegation that the Defendants improperly accessed the Commonwealth of Massachusetts’ Prescription Monitoring Program (PMP) database in connection with an investigation of Dr. Bharani. Specifically, Dr. Bharani brought claims for violation of the Computer Fraud and Abuse Act (CFAA) and the Stored Communications Act (SCA), for various forms of equitable relief, and for civil conspiracy.

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<sup>1</sup> Dr. Padmanabhan refers to himself as “Dr. Bharani”. *See generally* Appellant’s Brief. For consistency, the Defendants’ use the same name to refer to Dr. Padmanabhan.

The District Court properly ruled that these claims failed because:

- 1) The Complaint fails to allege sufficient facts to support a claim for violation of the CFAA because it does not assert a qualifying loss within the meaning of the statute.
- 2) The Complaint fails to allege sufficient facts to support a claim for violation of the SCA because it fails to allege that the purportedly accessed information is protected by the SCA.
- 3) The Complaint fails to allege sufficient facts to support or legal justification for any of the equitable relief sought.
- 4) The Complaint fails to allege sufficient facts that rise beyond mere conclusory statements which plausibly set forth a claim for civil conspiracy.

### **STATEMENT OF THE CASE**

#### **I. Procedural History**

On September 30, 2015, Dr. Bharani filed his Complaint commencing this action against the Defendants. The Complaint arises from Dr. Bharani's belief that the Commonwealth of Massachusetts' Prescription Monitoring Program (PMP) database was improperly accessed to procure a list of his patients in connection with an investigation conducted by the Medicaid Fraud Division of the Massachusetts Attorney General's Office. Based on this belief, Dr. Bharani asserts claims for violation of the CFAA (18 U.S.C. § 1030) (Count I) and for violation of the SCA (18 U.S.C. §§ 2701-2712) (Count II). The Complaint asserts two additional claims based on these alleged statutory violations: Count III seeks a variety of equitable relief including, but not limited to, the Defendants being referred to the United States Attorney for prosecution and the Defendants being enjoined from any further access to the PMP database; Count IV is a claim for civil conspiracy.

On November 16, 2015, Defendants moved to dismiss the Complaint in its entirety

pursuant to Fed. R. Civ. P. 12(b)(6) for failure to state a claim upon which relief may be granted. The Defendants' motion to dismiss argued that the factual allegations contained in the Complaint fail to plausibly support any claim for violation of either the CFAA or the SCA, and accordingly that the related claims for equitable relief and civil conspiracy also must be dismissed. On February 2, 2016, the court (Gorton, J.) issued a memorandum and order<sup>2</sup> allowing the Defendants' motion to dismiss for the reasons set forth above. *See Padmanabhan v. Healey*, 2016 WL 409673 (D. Mass. Feb. 2, 2016).<sup>3</sup>

## **II. Statement of Facts**

Dr. Bharani's *pro se* Complaint<sup>4</sup> can fairly be summarized as follows:

### **A. Allegations of Medicaid Fraud Against Others**

In March 2013, Dr. Bharani filed a complaint with the Massachusetts Attorney General against Dr. Julian Harris, who was then the Director of the Massachusetts Office of Medicaid, alleging the aiding and abetting of Medicaid fraud. Complaint, ¶ 20. In May 2013, at the Massachusetts Medical Society, Dr. Bharani personally informed Assistant Attorney General Steven Hoffman, Deputy Chief of the Medicaid Fraud Division, of his complaint and that no action seemed forthcoming. Complaint, ¶ 21. The Attorney General's Office never responded to Dr. Bharani's Complaint. Complaint, ¶ 22.

For two years, Dr. Bharani documented to the Massachusetts Board of Registration in Medicine that its employee, James Paikos, aided and abetted Medicaid fraud by the Cambridge

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<sup>2</sup> A copy of the District Court memorandum and order allowing the Defendants' motion to dismiss has been included in the addendum to Dr. Bharani's brief.

<sup>3</sup> Throughout the course of the litigation of this matter in the district court, Dr. Bharani filed numerous motions for sanctions, contempt and other relief based on allegations of misconduct by the Defendants and the undersigned counsel for the Defendants. These motions were all denied and on February 2, 2016 the court (Gorton, J.) entered an order which "...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." See USDC Docket Entry No. 50.

<sup>4</sup> A copy of the Complaint has been included in the addendum to Dr. Bharani's brief.

Public Health Commission. Complaint, ¶ 23. Dr. Bharani believes that Mr. Paikos violated state law and aided and abetted Medicaid fraud by the Cambridge Public Health Commission when Mr. Paikos demanded that Plaintiff's license be suspended in January 2013. Complaint, ¶ 24. Dr. Bharani filed a complaint regarding Mr. Paikos with the Attorney General's Office in January 2015; however, the Attorney General declined to investigate Mr. Paikos. Complaint, ¶ 25. Instead of investigating Mr. Paikos, the Attorney General chose to defend Mr. Paikos in a private civil action.<sup>5</sup> Complaint, ¶ 26.

#### **B. Alleged Access of the PMP Database**

Dr. Bharani believes that on or about April 2015, the Defendants<sup>6</sup> accessed the protected computer hosting the Massachusetts Prescription Monitoring Program (PMP) database and procured a list of sixteen (16) of Dr. Bharani's patients. Complaint, ¶ 28. The PMP database is managed by the Drug Control Program at the Massachusetts Department of Public Health. Complaint, ¶ 11. Dr. Bharani alleges that he can prove that the PMP database was accessed because the list of patients "could not have been compiled from any other source on earth" or without the knowledge and approval of Adele Audet, the Drug Control Program Liason with law enforcement. Complaint, ¶ 29. Dr. Bharani claims that the list of sixteen (16) of his patients was obtained in connection with an investigation by the Medicaid Fraud Division of the Attorney General's Office. Complaint, ¶ 30; Exhibit 1 (Administrative Notice).

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<sup>5</sup> The private civil action mentioned by Dr. Bharani is a separate earlier action commenced by Plaintiff against a variety of individuals including James Paikos and Loretta Kish Cooke, who have also been named in this action. This earlier action involves claims which stem from Dr. Bharani being the subject of a disciplinary proceeding before the Massachusetts Board of Registration in Medicine involving his care of patients while employed as a neurologist at the Cambridge Health Alliance. That action was filed in Norfolk Superior Court. *See* Norfolk Superior Court C.A. No. 1482CV01410. It was subsequently removed to federal court where the claims against the federal defendants were dismissed and the remaining claims were remanded back to state court. *See* USDC C.A. No. 1:15-cv-10499-WGY. The dismissal of the claims against the federal defendants is currently on appeal before this Court. *See* First Circuit Docket No. 15-2268.

<sup>6</sup> The Complaint only refers generally to the "Defendants" and Plaintiff makes no effort to allege any specific conduct by any of the named individuals. *See* Complaint, ¶ 28.

### **C. Medicaid Fraud Division Investigation and Delivery of Administrative Notice**

On April 29, 2015, an administrative notice was delivered to Dr. Bharani in connection with an investigation of the Medicaid Fraud Division of the Massachusetts Attorney General's Office. Complaint, ¶¶ 30, 37, 48; Exhibit 1 (Administrative Notice). The focus of the investigation was on allegations of violations of the rules and regulations governing the conduct of certain providers and recipients of Medicaid benefits. Complaint, ¶¶ 30, 37; Exhibit 1 (Administrative Notice). The notice seeks preservation of and access to medical records for several of Dr. Bharani's patients who are MassHealth members (i.e., Medicaid recipients). Exhibit 1 (Administrative Notice). The administrative notice was hand delivered to Dr. Bharani's residence by Chris Cecchini, an investigator in the Medicaid Fraud Division of the Massachusetts Attorney General's Office, and a female who refused to identify herself. Complaint, ¶ 48; Exhibit 1 (Administrative Notice). Dr. Bharani's parents were home at the time the administrative notice was delivered. Complaint, ¶ 51. Dr. Bharani's parents were intimidated and had the impression that Dr. Bharani would have been arrested so that his files could be taken by the Attorney General's Office. *Id.*

### **D. Allegations Regarding Legality of the Medicaid Fraud Investigation**

Dr. Bharani's Complaint contains numerous allegations regarding the legality of the Medicaid Fraud investigation. These allegations may fairly be summarized as follows.

- a) Dr. Bharani believes that the alleged accessing of the PMP database was an unlawful violation of the privacy rights of his patients as well as all of the citizens of Massachusetts. Complaint, ¶¶ 31-36.
- b) Dr. Bharani believes that the Medicaid Fraud Division investigation has no basis in fact because the Attorney General's Office has yet to obtain an indictment from a grand jury or a

subpoena from a judge. Complaint, ¶¶ 38-39.

c) Dr. Bharani challenges the legality and true intentions of the administrative notice seeking access to the medical records of his patients in connection with a Medicaid Fraud Division investigation:

- Dr. Bharani claims that including an allegation of Medicaid fraud in the administrative notice is an attempt to make a malicious end run around the due process protections of the Fourth Amendment. Complaint, ¶ 41.
- Dr. Bharani believes that the aim of the notice was to give the impression that he is a criminal who would alter the patient's medical records if given the chance and to intimidate and tamper with him. Complaint, ¶¶ 45-46.
- Dr. Bharani believes that requesting "immediate access" and "complete page-by-page" medical records is a violation of precedent set by the Massachusetts Supreme Judicial Court. Complaint, ¶¶ 54-58.
- Dr. Bharani believes that the Attorney General's Office had no legitimate need for the confidential medical records requested. Complaint, ¶¶ 59-62.

d) Dr. Bharani believes that the actions taken by the Attorney General's Office were attempts to aid and abet James Paikos, who is represented by the Attorney General's Office in a separate lawsuit filed by Plaintiff. Complaint, ¶¶ 47, 49-50.

## **ARGUMENT**

### **I. THE DISTRICT COURT CORRECTLY DISMISSED THE CLAIM FOR VIOLATION OF THE CFAA BECAUSE THE COMPLAINT DOES NOT ASSERT A QUALIFYING LOSS WITHIN THE MEANING OF 18 U.S.C. § 1030.**

The Computer Fraud and Abuse Act ("CFAA"), 18 U.S.C. § 1030, was enacted in 1984 to create a new category of crimes to address the issue of computer hacking, by criminalizing the

unauthorized access of computers under certain circumstances. *Advanced Micro Devices, Inc. v. Feldstein*, 951 F. Supp.2d 212, 216 (D. Mass. 2013). In addition to the CFAA's criminal application, it includes a private right of action. 18 U.S.C. § 1030(g). The statute provides that "[a]ny person who suffers damage or loss by reason of a violation of [the CFAA] may maintain a civil action against the violator to obtain compensatory damages and injunctive relief or other equitable relief." *Id.*

The Defendants' motion to dismiss asserted numerous reasons why Dr. Bharani's Complaint fails to state a claim for violation of the CFAA. Among them, and the one adopted by the District Court, is that the Complaint fails to assert a qualifying loss within the meaning of 18 U.S.C. § 1030 of the CFAA. The District Court correctly dismissed the claim on that basis.

In order to maintain a civil action for violation of the CFAA, the Plaintiff must demonstrate that he suffered "damage or loss by reason of" the alleged violation. 18 U.S.C. § 1030(g); see *EF Cultural Travel BV v. Explorica, Inc.*, 274 F.3d 577, 584 (1st Cir. 2001). "Damage" is defined as "any impairment to the integrity or availability of data, a program, a system, or information." 18 U.S.C. § 1030(e)(8). "Loss" is defined as "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." 18 U.S.C. § 1030(e)(11).

The District Court correctly ruled that Dr. Bharani's alleged patient consulting costs, legal fees and professional injuries did not qualify as losses under the statute. The District Court correctly noted that although this Court has held that the CFAA does not restrict "loss" under the statute to purely physical damage, *EF Cultural Travel BV v. Explorica, Inc.*, 274 F.3d 577, 584

(1st Cir. 2001), nothing in the statute suggests that the alleged loss or costs can be for matters unrelated to the computer. *Shirokov v. Dunlap, Grubb & Weaver, PLLC*, 2012 WL 1065578, at \*24 (D. Mass. Mar. 27, 2012).

In his brief, Dr. Bharani fails to offer any basis for this Court to find that these conclusions were in error. The only case that Dr. Bharani relies on is the Third Circuit decision in *United States v. Auernheimer*, 748 F.3d 525 (3rd Cir. 2014) (Plaintiff-Appellant's Brief at pp. 9-10), which is readily distinguishable from the facts of this case. *Auernheimer* involved the prosecution of two individuals under the criminal arm of the CFAA for a scheme to steal email addresses from AT&T. The decision did not address the question of whether there was a qualifying loss.<sup>7</sup> *Id.* Instead, Dr. Bharani cites to a brief that was filed by the United States mentioning that the loss sustained by AT&T was \$73,167.00 spent on mailing letters to notify customers of the breach. *See* Plaintiff-Appellant's Brief at pp. 12-13. Presumably, Dr. Bharani cites to this case for the proposition that it is like or similar to the loss that he alleges to have suffered. However, this is not the case. The monetary expense incurred by AT&T in sending the letters to its customers was directly related to the need to respond to a breach in its own computer systems that resulted in customer email data being leaked.

Here, in contrast, Dr. Bharani has not alleged any breach of or damage or loss to a computer or computer system owned by him. The computer system at issue in this case is the PMP database maintained by the Massachusetts Department of Public Health. 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

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<sup>7</sup> Moreover, "loss" was neither an element of the CFAA criminal provisions at issue in *Auernheimer* nor a statutory factor in the applicable punishments under such provisions. 748 F.3d at 531 (citing 18 U.S.C. § 1030(a)(2)(C) and (c)(2)(B)(ii)).



computer. *See Shirokov*, 2012 WL 1065578 (D. Mass. Mar. 27, 2012) (dismissing CFAA claim where plaintiff failed to allege damage to his computer or information or programs contained thereon, or loss of the use of his computer that fit within the statutory definition). Accordingly, Dr. Bharani's reliance on *Auernheimer* has no relevance to this case and does not demonstrate any error by the District Court.

Also, Dr. Bharani directs the Court's attention to *Animators at Law, Inc. v. Capital Legal Solutions, LLC*, 786 F. Supp. 1114 (E.D. Va. 2011) for the proposition that courts may grant jurisdictional discovery where appropriate. *See* Plaintiff-Appellant's Brief at pp. 11-12. Dr. Bharani provides no further explanation as to the relevance of this proposition or why jurisdictional discovery would be either necessary or appropriate in this case.

Since Dr. Bharani's Complaint contains no allegation of "loss" or "damage" within the meaning of CFAA, the claim for violation of the CFAA was properly dismissed.

**II. THE DISTRICT COURT CORRECTLY DISMISSED THE CLAIM FOR VIOLATION OF THE STORED COMMUNICATIONS ACT (SCA) BECAUSE THE COMPLAINT DOES NOT ASSERT THAT INFORMATION IN THE PMP DATABASE IS IN "ELECTRONIC STORAGE" AS DEFINED IN THE SCA.**

The District Court correctly dismissed the Stored Communications Act ("SCA") claim on the ground, *inter alia*, that the complaint failed to allege that information in the PMP database was in "electronic storage" as defined in the SCA. The SCA is part of the Electronic Communications Privacy Act, which was enacted in 1986 "to update and clarify Federal privacy protections and standards in light of dramatic changes in new computer and telecommunications technologies." *Telecommunications Regulatory Board of Puerto Rico v. CTIA-Wireless Ass'n*, 752 F.3d 60, 63 (1st Cir. 2014) (*citing S. Rep. No. 99-541*, at 1-2 (1986)). The statute establishes new crimes and punishments that address the threat to privacy presented by the rise of remote computing operations and large databanks of stored electronic communications. *U.S.*

*v. Councilman*, 418 F.3d 67, 82 (1st Cir. 2005); *see also* 18 U.S.C. § 2701(a). Like the CFAA, the SCA includes a private right of action through which any “person aggrieved by any violation of [the statute] in which the conduct constituting the violation is engaged in with a knowing or intentional state of mind” may obtain appropriate relief. 18 U.S.C. § 2707(a). Pursuant to § 2701(a), a violation of the SCA occurs where a person intentionally “without authorization” or “intentionally exceeding an authorization” accesses “a facility through which an electronic communication service is provided” and “thereby obtains, alters, or prevents authorized access to... [an] electronic communication while it is in *electronic storage* in such system[.]” 18 U.S.C. § 2701(a) (emphasis added).

Here the Complaint failed to allege that the purportedly accessed information was in “electronic storage” within the meaning of the SCA.<sup>8</sup> The SCA applies only to electronic communications held in “electronic storage.” *See* 18 U.S.C. § 2701(a); *see also Eagle Investment Systems Corp. v. Tamm*, 146 F.Supp.2d 105, 111 (D. Mass. 2001). The term “electronic storage” is defined for SCA purposes in 18 U.S.C. § 2510<sup>9</sup> as “any temporary, intermediate storage of a wire or electronic communication<sup>10</sup> incidental to the electronic transmission thereof,” as well as “any storage of such communication by an electronic communication service for purposes of backup protection of such communication.” 18 U.S.C. §

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<sup>8</sup> The District Court “agree[d] with defendants that plaintiff fails to allege that the purportedly accessed 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) nor asserts that the PMP database is stored at a facility that provides an electronic communication service.” *Padmanabhan*, 2016 WL 409673, at \*9. In this Motion for Summary Disposition the defendants will focus only on the “storage” issue, which is sufficient to dispose fully of the SCA claim.

<sup>9</sup> The SCA’s definitional section, 18 U.S.C. § 2711, incorporates the definitions set forth in 18 U.S.C. § 2510. *See* 18 U.S.C. § 2711(1).

<sup>10</sup> The term “electronic communication” is defined (with exclusions not relevant here) as “any transfer of signs, signals, writings, 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.” 18 U.S.C. § 2510(12). This Court has held that “the term ‘electronic communication’ [also] 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).

2510(17); *see also* *U.S. v. Councilman*, 418 F. 3d 67, 81 (1st Cir. 2005). Accordingly, “electronic storage” does not simply mean any storage of any information by electronic means. *See* 18 U.S.C. § 2510(17). Rather, it is limited to temporary storage incidental to the transmission of electronic communications and to backups of said communications by electronic communication service providers to ensure system integrity. *Id.* The data contained in the PMP database does not fall within either branch of the definition of “electronic storage.”

First, the PMP database does not constitute “temporary, intermediate storage of a wire or electronic communication incidental to the electronic transmission thereof[.]” *See* 18 U.S.C. § 2510(17). Rather, the PMP database is a collection of data concerning the prescribing and dissemination of controlled substances that may be accessed by authorized individuals for authorized purposes. *See* 105 CMR 700.012(A)(1); *see also* G.L. c. 94C, § 24A. While the data is ordinarily transmitted electronically to the PMP database by pharmacies, that data once it arrives in the PMP is not a communication in “temporary, intermediate storage ... incidental to the electronic transmission thereof[.]” 18 U.S.C. § 2510(17). Rather, it has arrived at its final destination. There is no other intended recipient, and the data that is transmitted to the database is held on a permanent, not temporary, basis. It *may* later be made electronically available to those authorized to access the data, *see* 105 CMR 700.012(D) and (F), but that does not necessarily mean that every piece of data in the PMP *will* be electronically further transmitted, or that storage in the PMP database is “temporary” or “intermediate”; it remains in the database permanently whether or not it is also accessed at some later date by an authorized user.

Second, the PMP database does not constitute “storage of [electronic] communication by an electronic communication service for purposes of *backup protection* of such communication.” *See* 18 U.S.C. § 2510(17) (emphasis added). The PMP database does not

serve as a backup to some other source or collection of data. Instead it is the primary repository for the data transmitted from pharmacies pursuant to statutory and regulatory requirements. *See* 105 CMR 700.012(A)(1); *see also* G.L. c. 94C, § 24A.

Third, the PMP database is not the “storage of [electronic] communication by an *electronic communication service* ....” *See* 18 U.S.C. § 2510(17) (emphasis added). “Electronic communication service” is defined as “any service which provides to users thereof the ability to send or receive wire or electronic communications[.]” *See* 18 U.S.C. § 2510(15). Although the PMP database, as maintained by the Department of Public Health, provides authorized users with electronic *access* to information that is received from pharmacies, it does not provide electronic *communication services* to those individuals and is therefore not subject to the SCA. *See Keithly v. Intelius Inc.*, 764 F. Supp. 2d 1257, 1271 (W.D. Wash. 2011) (holding that on-line information service providing customers with ability to perform background checks, search for individuals, and identify callers by cell phone number is not an electronic communication service subject to the SCA).

In his brief, Dr. Bharani fails to offer any serious argument that the Complaint sufficiently alleged that the PMP database was in “electronic storage” as defined in the SCA, or that he otherwise states a claim under the SCA. Dr. Bharani simply directs the Court’s attention to the same conclusory allegations in the Complaint which reference the statute. These are precisely the sort of mere labels and conclusions that are insufficient to state a claim upon which relief may be granted. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009); *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 559 (2007). Thus the claim for violation of the SCA was properly dismissed.

**III. THE DISTRICT COURT CORRECTLY DISMISSED THE CLAIMS FOR EQUITABLE RELIEF BECAUSE THE COMPLAINT FAILS TO ALLEGE SUFFICIENT FACTS TO SUPPORT OR PROPER LEGAL JUSTIFICATION FOR THE RELIEF SOUGHT.**

The equitable relief sought by Dr. Bharani is premised on punishing the Defendants for the alleged violations of the CFAA and the SCA. Much of what Dr. Bharani seeks in this claim is not equitable relief in the first place. For example, Dr. Bharani seeks an order that criminal action be taken against the Defendants for the alleged statutory violations (Complaint, ¶ 104) and disciplinary action be taken against certain Defendants by the Board of Bar Overseers (Complaint, ¶¶ 105, 108). Additionally, Dr. Bharani seeks for the Defendants to be enjoined from accessing the PMP database. (Complaint, ¶¶ 109-113).

The District Court correctly dismissed Dr. Bharani's claims for equitable relief on the basis that the Complaint's conclusory allegations that the Defendants falsely accused him of Medicaid fraud and improperly seized his medical records and engaged in witness intimidation, are not sufficient to state a claim for any constitutional, statutory, or regulatory violations where they are unsupported by factual assertions. *Padmanabhan*, 2016 WL 409673, at \*10-11; *see also Ashcroft*, 556 U.S. at 678; *Bell Atlantic Corp.*, 550 U.S. at 559. As the District Court notes, both Dr. Bharani's claims for violation of the CFAA and the SCA fail. Additionally, Dr. Bharani cannot bring any claim pursuant to either 105 CMR 700.012 or M.G.L. c. 94C, § 24A, which concern the PMP database, because neither provides a private cause of action. *Id.*

Dr. Bharani's Complaint makes additional allegations asserting the doctrine of "unclean hands" and claims that the request for access to his patients' records in connection with the Medicaid Fraud investigation was an attempt to circumvent the precedent established by the Massachusetts Supreme Judicial Court in *Commonwealth v. Kobrin*, 395 Mass. 284, 479 N.E.2d

674 (1985). The District Court addresses these allegations in connection with their decision on Dr. Bharani's claims for equitable relief.

The District Court correctly dismissed these claims, ruling that the doctrine of "unclean hands" and the *Kobrin* decision have no applicability to this case and do not support any viable claim against the Defendants. *Padmanabhan v. Healey*, 2016 WL 409673, at \*10 (D. Mass. Feb. 2, 2016). First, the doctrine of "unclean hands" has no applicability here because it "provides an affirmative defense by which a defendant may preclude a plaintiff from equitable relief due to the plaintiff's own engagement in relevant misconduct." *Id.* (citing *Vaqueria Tres Monjitas, Inc. v. Irizarry*, 587 F. 3d 464, 480 (1<sup>st</sup> Cir. 2009)). Second, the SJC holding in *Kobrin* "addresses the scope of the psychotherapist-patient privilege under M.G.L. c. 233, § 20B," which has no bearing on the claims that have been asserted by Dr. Bharani. As a result, the District Court correctly held that Dr. Bharani can assert no viable claims against the Defendants based on either of these theories.

Since Dr. Bharani's Complaint fails to provide either factual allegations which support any claim for equitable relief or a legal basis for any of the relief sought, the claims for equitable relief were properly dismissed.

#### **IV. THE DISTRICT COURT CORRECTLY DISMISSED THE CLAIM FOR CIVIL CONSPIRACY**

Dr. Bharani's civil conspiracy claim is based on his allegation that the Defendants conspired to access the PMP database without the authority to do so. The District Court correctly dismissed this claim due to Dr. Bharani's failure to allege sufficient facts to plausibly suggest an entitlement to relief. *Padmanabhan*, 2016 WL 409673, at \*11. As the District Court notes, bare conclusory statements that the Defendants utilized a Medicaid fraud investigation as pretext for accessing information in deliberate violation of regulatory and statutory provisions

cannot support a claim for relief. *Id.*; see also *Ashcroft*, 556 U.S. at 678; *Bell Atlantic Corp.*, 550 U.S. at 559.

Since Dr. Bharani's Complaint fails to provide sufficient non-conclusory factual allegations to support a claim for civil conspiracy, the claim for civil conspiracy was properly dismissed.

### CONCLUSION

For the above reasons, the Defendant-Appellees, Maura Healey, Steven Hoffman, Chris Cecchini, James Paikos, Loretta Kish Cooke and Adele Audet respectfully request that the District Court's judgment dismissing the complaint be affirmed.

Respectfully submitted by:

Defendant-Appellees,

MAURA HEALEY, STEVEN HOFFMAN,  
CHRIS CECCHINI, JAMES PAIKOS,  
LORETTA KISH COOKE, and ADELE AUDET

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June 17, 2016

### **CERTIFICATE OF SERVICE**

I hereby certify that on June 17, 2016, I electronically filed the foregoing Memorandum in Support of Motion for Summary Disposition with the United States Court of Appeals for the First Circuit by using the CM/ECF system. I further certify that this document filed through the ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF), and that the following party was served by U.S. Mail on this day:

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/s/ Adam R. LaGrassa  
Adam R. LaGrassa  
Assistant Attorney General