

UNITED STATES DISTRICT COURT

DISTRICT OF MASSACHUSETTS

DOCKET NO. 15CV10499-WGY

BHARANIDHARAN PADMANABHAN, MD, PHD,

Plaintiff

CENTERS FOR MEDICARE & MEDICAID, ET AL.,

Defendants

**MEMORANDUM OF REASONS & LEGAL AUTHORITY IN SUPPORT OF
PLAINTIFF'S MOTION TO ENTER DEFAULT & JUDICIAL NOTICE OF
ESTABLISHED LIABILITY**

The grounds on which this motion to enter default against Defendant James Paikos, Loretta Kish Cooke, Stephen Hctor, Robert Bouton, Candace Lapidus Sloane, Marianne Felice, and Julian Harris are set forth as follows:

1. Plaintiff Dr. Bharani filed the underlying Complaint regarding the above-referenced action with the Massachusetts trial court of Norfolk Superior Court on October 17, 2014.

2. A true copy of the docket sheet for the above-referenced filed Complaint with Norfolk Superior Court (NOCV2014-01410)—that undersigned counsel downloaded from the AOTC electronic system—is attached hereto as **Exhibit 1**.

3. Defendant James Paikos is Complaint Counsel for the Massachusetts Board of Registration in Medicine. The official capacity in which Defendant James Paikos is being sued is his role and function as an investigator of the Enforcement Division.

4. Provided is a copy of the registration of information for Defendant James Paikos with the Board of Bar Overseers in **Exhibit 2**. Defendant James Paikos was served with a summons and the afore-referenced Complaint on January 7, 2015. He was served at his listed office address at the Board of Registration in Medicine at 200 Harvard Mill Square, Suite 330, Wakefield, MA; with the agent in charge at the Board of Medicine having accepted service. (See return of service in **Exhibit 3**).

5. Defendant Loretta Kish Cooke, an investigator of the Board of Medicine, was served with a Summons and a copy of the afore-referenced Complaint on January 7, 2015 at the office of the Board of Medicine, with the agent in charge at the Board of Medicine having accepted service. (See return of service in **Exhibit 4**).

6. Defendant Stephen Hocter, an investigator of the Board of Medicine, was served with a Summons and a copy of the afore-referenced Complaint on January 13, 2015 at the office of the Board of Medicine, with the agent in charge at the Board of Medicine having accepted service. (See return of service in **Exhibit 5**).

7. Defendant Robert Bouton, an investigator of the Board of Medicine was served with a Summons and a copy of the afore-referenced Complaint on January 13, 2015 at the office of the Board of Medicine, with the agent in charge at the Board of Medicine having accepted service. (See return of service in **Exhibit 6**).

8. Defendant Candace Lapidus Sloane, Chair of the Board for Medicine, was served with a Summons and a copy of the afore-referenced Complaint on January 13, 2015 at the office of the Board of Medicine, with the agent in charge at the Board of Medicine having accepted service. (See return of service in **Exhibit 7**).

9. Defendant Marianne Felice, Complaint Committee member of the Board of Medicine, was served with a Summons and a copy of the afore-referenced Complaint on January 13, 2015 at the office of the Board of Medicine, with the agent in charge at the Board of Medicine having accepted service. (See return of service in **Exhibit 8**).

10. Defendant Julian Harris, Director of MassHealth (Massachusetts Office of Medicaid), was served with a Summons and a copy of the afore-referenced Complaint on January 21, 2015 by certified mail, with the signed receipt submitted to the Norfolk Superior Court. (See return of service and return receipt in **Exhibit 9**).

11. On Friday, January 30, 2015, at that time a pro se litigant, Plaintiff Dr. Bharani went to the Norfolk Superior Court Clerk's Office and filed in hand a written request for default against Defendant James Paikos and a written request for default against Defendant Loretta Kish Cooke.

12. It was only after Plaintiff Dr. Bharani's having submitted the afore-described written requests for default to the Norfolk Superior Clerk's Office that, on February 2, 2015, the above-named Defendants, collectively, filed a motion for enlargement of time to file an answer or motion to dismiss the Complaint.

13. Plaintiff Dr. Bharani received a telephone call from the Norfolk Superior Clerk's Office informing him that the afore-described written requests for default had not been docketed because the summonses and complaint had not been served to the Defendants in person at the office of the Medical Board and that the filings had been mailed backed to him; which, subsequently, Plaintiff Dr. Bharani did receive his original written requests for default from the Clerk's Office. (Copies of the written requests mailed back from the Clerk's Office and the envelope are provided in **Exhibit 10**).

14. On February 5, 2015, a recorded entry was made on the docket that Plaintiff Dr. Bharani's request for default had been "returned to Bharanidharan Padmanabhan MD PhD [Dr. Bharani] due to poor service. Individuals must be signed at the last and usual residence or in hand."

15. As evidenced above, Plaintiff Dr. Bharani's written request for default had not been officially acted on by the Norfolk Superior Court. De facto, the written pleading was not submitted before the Norfolk Superior Court to be ruled on, and, therefore, no official court action occurred. As set forth above, the original filed written request for default was physically removed from the court file and sent back by mail to Plaintiff Dr. Bharani.¹

16. As evidenced by the docket sheet, there is no name provided as to a clerk-magistrate or judge having issued any order or judgment in the afore-described docket entry—it is well established procedure that the name of a clerk-magistrate or judge is entered immediately following the allowance or denial of a pleading.

17. In addition to the representation made in the docket entry that service was invalid because there had been no official action made by a clerk-magistrate or judge, such representation was an incorrect application of the law. Service made to a person's place of business is presumptively good service when an agent of that person accepts service—there was no affidavit submitted by the Assistant Attorney General that any of the individuals who signed from the office of the Board Medicine were not agents of the named Defendants. Patino v. City of Revere, 13-11114-FDS (page 4) (D. Mass. 2014).

¹ Being a pro se litigant, due to the afore-described representations made by the Clerk's Office to Plaintiff Dr. Bharani, he had the Constable, again, serve a summons and Complaint upon Defendant James Paikos at his residence. (A copy of the second return of service is provided in **Exhibit 11**).

18. On February 12, 2015, the Norfolk Superior Court (Leibensperger, J.), extended the Defendants' motion for enlargement of time for filing a responsive pleading to February 25, 2015.

19. On February 24, 2015—one day before the court ordered extended deadline for filing a responsive pleading, the Defendants chose to file an emergency motion seeking to strike Plaintiffs' returns of service of the afore-named Defendants, as well as, an enlargement of time to file a responsive pleading. It is well-established and expressed within the very content of Rule 55(a) for State and Federal rules of civil procedures that a responsive pleading consists of one of two methods: either by the serving of an answer to the Complaint or the serving of a motion to dismiss.

20. As evidenced, the named Defendants *did not* file an answer or motion to dismiss by the court ordered deadline of February 25, 2015.

21. As demonstrated by the Defendants' caption of the above-described emergency motion itself, such filing does not constitute a responsive pleading; especially, where the Assistant Attorney General *explicitly* requested an enlargement of time to file a response to the Complaint. As demonstrated, the Assistant Attorney General overtly acknowledged the fact that the emergency motion was *not* a responsive pleading.

22. On March 2, 2015, the Norfolk Superior Court (Leibensperger, J.) denied the above-referenced emergency motion for motion to strike service upon the named Defendants and the second request for an enlargement of time to file a response. (Provided is a copy of the Order in **Exhibit 12**).

23. Of significance, the Norfolk Superior Court denied the Assistant Attorney General's emergency motion of **February 24, 2015** despite the Assistant Attorney General having specifically claimed that the Norfolk Superior Court had "denied" Plaintiff Dr. Bharani's request for default because of improper service.

24. The Norfolk Superior Court's denial of the Assistant Attorney General's emergency motion to strike service is supported by the fact that the Assistant Attorney General's claim regarding Plaintiff Dr. Bharani's requests for default was, in fact, not an accurate and true assertion—as explained in detail above.

25. De facto, effective **March 2, 2015**, the afore-named Defendants had been already in default for five (5) days.

26. The Court had already set an extended deadline for the named Defendants to file a responsive pleading as **February 25, 2015**.

27. The Assistant Attorney General sent a motion to dismiss exclusively on the behalf of Defendant James Paikos to Plaintiff Dr. Bharani on **March 6, 2015** (a copy is provided in **Exhibit 13A**) and a motion to strike service and/or motion to dismiss motion on **March 12, 2015** for the remaining Defendants (a copy of which is provided in **Exhibit 13B**). The motions—specifically designated to be ruled on by the Norfolk Superior Court— were not served within the required court ordered date of **February 25, 2015**.

28. As confirmed by the Appeals Court in Kennedy v. Beth Israel Deaconess Medical Center, 73 Mass. App. Ct. 459, fn7 (2009), the Assistant Attorney General's afore-described motions are fatally defective and moot where the Norfolk Superior Court had issued an order on **March 2, 2015** that the Assistant Attorney General's request for an extension to file a response was denied.

29. Furthermore, Notice of Removal to the U.S. District Court sent out to the parties by the Norfolk Superior Court was recorded by the Norfolk Clerk's Office as having taken place on **March 10, 2015**. (A copy of the notice is provided in **Exhibit 14**). The U.S. District Court provided a certificate Notice of Removal to Susan Poswistilo, USAMA on February 23, 2015, and, as reflected on the docket, Norfolk Superior Court received a Notice of Removal on February 27, 2015—which the Norfolk Superior Court complied and effectuated the removal of the action to the U.S. District Court).

30. As set forth above, *prior* to the removal of the Norfolk action to the U.S. District Court, the above-named Defendants were, effectively, in default for failure to provide a responsive pleading to the Complaint pursuant to the Civil Rules of Procedure for the Massachusetts Superior Court; and, upon the removal of the Norfolk action to the U.S. District Court, the named Defendants are in default pursuant to Rules 55(a) and 81 of the Federal Rules of Civil Procedure.

31. As evidenced above, the Defendants' failure to provide a responsive pleading to the Complaint was knowing and willful where Defendants' *first* request for an enlargement of time was *allowed* by the Norfolk Superior Court and then, one day prior to the court ordered deadline, the Defendants chose to file an emergency motion instead of a responsive pleading.

32. As demonstrated above, the named Defendants do not have legitimate or reasonable grounds for excusable failure to file a responsive pleading to the Complaint after the court ordered deadline of February 25, 2015.

33. Upon the entry of default, each of the allegations of fact made by the Plaintiff in his complaint must be taken as true and each of his claims must be considered established as a matter of law. Brockton Savings Bank v. Peat, Marwick, Mitchell & Co., 771 F.2d 5, 13 (C.A.1 (Mass.) 1985).

WHEREFORE, for all the above reasons, Plaintiff requests that his motion for an entry of default be entered against the named Defendants, and that it be judicially deemed that the claims against the named Defendants are established as a matter of law.

Respectfully submitted,

/s/ Lisa Siegel Belanger

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