UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

BHARANIDHARAN PADMANABHAN, MD, PhD,	)	
Plaintiff,	)	
v.	)	1:15-cv-10499-WGY
CITY OF CAMBRIDGE, et al.	)	
Defendants.	)	

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT JAMES PAIKOS' MOTION TO DISMISS PLAINTIFF'S COMPLAINT

Defendant James Paikos ("Defendant Paikos") submits this memorandum in support of his Motion to Dismiss Plaintiff's claims with prejudice on the following grounds: Plaintiff's alleged claims are based on an ongoing disciplinary proceeding before the Massachusetts Board of Registration in Medicine ("BORIM") and Massachusetts Division of Administrative Law Appeals ("DALA") and should be dismissed under the *Younger* abstention doctrine; Plaintiff's claims are barred by the doctrine of quasi-judicial immunity as Defendant Paikos' alleged actions were intimately associated with his prosecutorial role in an administrative disciplinary proceeding against Plaintiff, and the alleged slanderous statements were protected by an absolute privilege; Plaintiff's claims fail to state a claim for due process violations under 42 U.S.C. § 1983 as Plaintiff was not deprived of any property interest by Defendant Paikos, and Plaintiff has procedural protections for any of Defendant Paikos' alleged flaws provided through the administrative hearing and judicial review of any disciplinary decision; Defendant Paikos is not

subject to suit under the so-called Healthcare Whistleblower Act, M.G.L. c. 149, § 187; and Plaintiff's claims for fraud fail to meet the pleading requirements of Fed. R. Civ. P. 8(a).

The voluminous 270 numbered paragraph complaint naming approximately 71 defendants is divided into four sections, including twelve counts: "Parties" (Complaint at ¶¶ 1-73); "Factual Background" (Complaint at ¶¶ 74-222); "Statement of Claim" setting forth twelve counts (Complaint at ¶¶ 231-270). Of the twelve counts, Defendant Paikos is either specifically identified in the count or identified as a member of "Party G" defendants as characterized by Plaintiff: Healthcare Whistleblower Violation, Count 3 (Complaint at ¶¶ 237-239); Slander, Count 5 (Complaint at ¶¶ 243-244) and Count 9 (Complaint at ¶¶ 257-260); Due Process Violation, Count 6 (Complaint at ¶¶ 245-248) and Count 8 (Complaint at ¶¶ 252-256); and Fraud, Count 9 (Complaint at ¶¶ 257-260) and Count 11 (Complaint at ¶¶ 263-267).

ALLEGED FACTS

Plaintiff was recruited in 2007 to provide in-house neurology coverage at the Cambridge Health Alliance ("CHA") Whidden Hospital. Complaint at ¶ 83. Plaintiff's position at Whidden Hospital qualified him for a "J-1 visa waiver," and he would obtain a visa after three years. *Id.* at ¶ 84. The complaint in various paragraphs describes Plaintiff's work at Whidden Hospital. *Id.* at ¶¶ 87-94. In May 2009, the CHA leadership allegedly proposed that physicians working at CHA take a pledge swearing off any and all contact with industry. *Id.* at ¶ 99. Plaintiff was opposed to such "coercive" pledges based on his experience living in Hungary. *Id.* Plaintiff alleges he was able to demonstrate that if physicians refused to take the pledge, they would be denounced as unethical, corrupt, and not caring about patients. *Id.* at ¶ 100. Plaintiff alleges he was proved correct and everyone saw the proposed pledge as having been made in bad faith. *Id.* The CHA rank and file allegedly rebelled, and the proposed pledged was "shelved." *Id.* Plaintiff was

allegedly warned by another physician that he was likely to be "disappeared" by the progressive leadership at CHA. *Id.* at ¶ 103.

In August 2009, Dr. Rachel Nardin of Beth Israel Deaconess Hospital joined the CHA staff. *Id.* at ¶ 106. She had supported public pledges by students and faculty swearing off contact with industry. *Id.* at ¶ 107. Dr. Nardin began compiling a dossier on Plaintiff after she joined the CHA staff. *Id.* at ¶ 108. Dr. Nardin reviewed Plaintiff's clinical notes, hospital records and the like concerning Plaintiff's practice at CHA. *Id.* at ¶ 109. Dr. Nardin was appointed head of neurology at Whidden Hospital in December 2009. *Id.* at ¶ 112. Shortly thereafter, she met with Plaintiff stating she had received a substantial number of complaints from the primary care community. *Id.* at ¶ 113. The complaint describes Plaintiff's patients diagnosed with multiple sclerosis whose diagnoses were subsequently questioned and doubted by Dr. Nardin. *Id.* at ¶¶ 116-128.

In November 2010, CHA's Medical Executive Committee summarily suspended Plaintiff's privileges at CHA, and recommended CHA Trustees terminate his employment. *Id.* at ¶ 144. On November 11, 2010, Plaintiff was told his CHA employment was terminated for cause, and his visa from CHA would terminate on December 27, 2010. *Id.* at ¶¶ 147-148. Plaintiff subsequently requested a so called "Fair Hearing." *Id.* at ¶¶ 151-152. On February 28, 2011, the Fair Hearing Panel held there was no credible evidence to terminate Plaintiff's privileges and employment at CHA. *Id.* at ¶ 162. However, the CHA Chief Executive Officer did not present the panel's determination to CHA's Trustees for their final decision. *Id.* at ¶ 165. In August 2011, Plaintiff sought relief in Middlesex Superior Court seeking an order requiring the CHA Trustees to issue a final verdict. *Id.* at ¶ 173. A hearing was held before the court

where Plaintiff received the so called "Greeley Report" commissioned by CHA. *Id.* at ¶ 175. Plaintiff's complaint was dismissed after the court held it was not ripe. *Id.* at ¶ 174.

Plaintiff alleges CHA commissioned a report by the Greeley Company that was given to him at the hearing in Middlesex Superior Court. *Id.* at ¶ 175. Plaintiff claims he was terminated from his position at CHA in November 2011. *Id.* at ¶ 179. However, Plaintiff alleges CHA reported to the Board of Registration in Medicine ("BORIM") that he voluntarily resigned from CHA to avoid an investigation. *Id.* at ¶ 181. CHA provided a copy of the Greeley Report to James Paikos at the BORIM. *Id.* at ¶ 191. CHA allegedly paid for the Greeley Report, the substance of which is not described in the complaint. *Id.* Although it is not clearly expressed in the complaint, Plaintiff became the subject of a disciplinary investigation at the BORIM. *Id.* at ¶ 192. The BORIM investigation was apparently initiated in 2010 under the BORIM Docket Number 2010-426. *Id.* Defendant Paikos brought Plaintiff's docket to the BORIM's Complaint Committee in January 2013 -- 805 days after the BORIM initiated the investigation. *Id.* Plaintiff alleges the BORIM knew the delay "prevented [Plaintiff] from earning a living," but he does not provide any reasons how the BORIM's alleged delay prevented him from earning a living. *Id.*

Plaintiff alleges Defendant Paikos stated during a telephone conversation that a comprehensive independent investigation was done. *Id.* According to Plaintiff, Defendant Paikos stated he would recommend Plaintiff's suspension to the BORIM Complaint Committee. *Id.* However, if Plaintiff "pled guilty," Defendant Paikos would allegedly recommend a 5-year probation period with monthly assessments of Plaintiff's clinical skills by an expert whose clinical skills were better than those of Plaintiff. *Id.* Plaintiff claims he told Defendant Paikos there were no experts with better clinical skills than his own, and the telephone call was terminated. *Id.*

The complaint alleges an unspecified hearing occurred in January 2013 where Defendant Paikos quoted from the Greeley Report, and allegedly stated he had hired the report's author as part of his comprehensive independent investigation. *Id.* at ¶ 193. Plaintiff informed the Complaint Committee that Defendant Paikos "deliberately lied" by stating the report and expert were paid with the BORIM funds. *Id.* at ¶ 194. Plaintiff alleges the report was "custom ordered and paid for by CHA" as retaliation for his whistleblower activity. *Id.* The BORIM's use of the report shows that the BORIM was not a neutral fact finder as required by statute, and the BORIM did not conduct a comprehensive independent investigation. *Id.* at ¶ 195. Plaintiff alleges the BORIM's use of the Greely Report and the report's author shows "corrupt collusion and racketeering" between the BORIM and CHA. *Id.* at ¶ 196. The failure of the BORIM to render a verdict exonerating Plaintiff in 2013 allegedly prevented Plaintiff from earning a living, and was aimed to drive Plaintiff away from the practice of medicine and the United States. *Id.* at ¶ 197. In May 2014, Plaintiff was called again before the BORIM's Complaint Committee. *Id.* at ¶ 198. Plaintiff alleges Defendant Paikos repeated the words from the Greeley Report, and refused to identify the independent expert used by the BORIM to declare Plaintiff represented an imminent danger to public safety. *Id.* The BORIM provided the last name of the independent expert to Plaintiff pursuant to an order of an Administrative Law Magistrate. *Id.* The BORIM subsequently advised the Administrative Magistrate that the independent expert was reluctant to testify concerning his opinion. *Id.* Plaintiff alleges the BORIM knew that Defendant Paikos violated the United States Constitution by presenting anonymous testimony to the Complaint Committee paid by an "outside" party. *Id.* at. ¶ 200. There is no allegation that the proceeding before BORIM and DALA has concluded, or that any disciplinary action was taken by BORIM against plaintiff.

I. Where Plaintiff's Claims Are Based On An Ongoing State Quasi-Judicial Administrative Proceeding, The Claims Against Defendant Paikos Should Be Dismissed Under the *Younger* Abstention Doctrine.

This Court should dismiss Plaintiff's claims against Defendant Paikos pursuant to the *Younger* abstention doctrine. "Abstention is a device designed to facilitate the side-by-side operation of federal and state courts, balancing their respective interests in the spirit of comity." *Coggeshall v. Mass. Bd. of Reg. of Psychologists*, 604 F.3d 658, 664 (1st Cir. 2010) citing *Younger v. Harris*, 401 U.S. 37, 44 (1971). Plaintiff's claims are based on an ongoing quasi-judicial administrative proceeding before the BORIM and DALA. *See*, Exhibit 1, DALA Docket. "Under *Younger* principles, a federal court must abstain from hearing a case if doing so would 'needlessly inject' the federal court into ongoing state proceedings." *Coggeshall*, 604 F.3d at 664, citing *Brooks v. N.H. Supreme Court*, 80 F.3d 633, 637 (1st Cir. 1996). The only question under the *Younger* abstention doctrine is whether the state courts provide an adequate opportunity to litigate claims fully and fairly. *Coggeshall*, 604 F.3d at 665. The determination of the applicability of the doctrine involves three factors: whether "(1) the [ongoing state] proceedings are judicial…in nature; (2) [the state proceedings] implicate important state interests; and (3) [the state forums] provide an adequate opportunity to raise federal constitutional challenges." *Coggeshall*, 604 F.3d at 664, citing *Bettencourt v. Bd. of Registration in Medicine of Comm. of Mass.*, 904 F.2d 772, 777 (1st Cir. 1990). The factors are assessed as of the date of the filing of the complaint in federal court. *Id.*

This case is a paradigm for the *Younger* abstention doctrine just as the First Circuit recognized in *Coggeshall*. *Id.* at 665. It is beyond question that the disciplinary proceeding against Plaintiff before BORIM and DALA is a quasi-judicial proceeding. *Id.* at 663. The Commonwealth "has a profound interest in the licensure of health-care professionals ... and the

maintenance of appropriate standards of practice for such professionals." *Id.* at 664-65. Plaintiff has an adequate opportunity to raise federal constitutional questions before DALA and the state courts. *See* Argument III, *infra* at pp. 13-15.

II. Any Claims For Damages Against Defendant Paikos In His Individual Capacity Should Be Dismissed Because He Is Immune From Liability Under The Doctrine Of Quasi-Judicial Immunity And Any Claims In His Official Capacity Should Be Dismissed Under Eleventh Amendment Immunity.

Although the complaint is unclear, it can be reasonably inferred that Plaintiff is the subject of a disciplinary proceeding before the BORIM involving Defendant Paikos who is prosecuting the case as compliance counsel. *See generally,* Complaint at ¶¶ 191-201. Massachusetts law affords absolute immunity to prosecutors for acts taken "in the discharge of their official duties." The doctrine embodies "a tradition of judicial and prosecutorial immunity rooted in history and based upon sound considerations of public policy." *Chicopee Lions Club v. District Attorney for the Hampden Dist.*, 396 Mass. 244, 252 (1985); *LaLonde v. Eissner*, 405 Mass. 207, 210 (1989).

The same policy considerations supporting an absolute immunity for judges under Massachusetts common law justify a similar protection for public prosecutors. "The public interest requires that persons occupying such important positions as did these defendants and being so closely identified with the judicial department of the government should not be liable to private suits for what they do in the discharge of their official duties, and such officers are entitled to the protection that the law gives them, not because of concern for their personal immunity, but because such immunity tends to insure zealous and fearless administration of the law." *Chicopee*, 396 Mass. at 251, quoting *Andersen v. Bishop*, 304 Mass. 396, 400 (1939); *Whirty v. Lynch*, 27 Mass. App. Ct. 498 (1989) (affirming the dismissal of a complaint on

summary judgment against an assistant district attorney holding that prosecutorial immunity applied to allegations that the prosecutor misstated the plaintiff's criminal record, and disseminated CORI information during a criminal proceeding that was reported in the media); *Oliveira v. Commonwealth*, 64 Mass.App.Ct. 1108 (2005) (holding district attorneys were absolutely immune from plaintiff's claim that she was deprived of property without due process of law because the forfeiture action was conduct "intimately associated with the judicial phase of the criminal process").

Massachusetts courts have been consistently generous in extending immunity to prosecutors for their actions outside the courtroom. In *Chicopee*, the Supreme Judicial Court affirmed the dismissal of a civil rights action against the district attorney pursuant to Mass. R. Civ. P. 12(b)(6), holding that he was absolutely immune from suit for his threat to shut down a fundraiser because he thought it constituted illegal gambling. *Chicopee*, 396 Mass. at 250-51. In so holding, the court found it unnecessary to decide whether to adopt the "functional" approach of the federal courts to prosecutorial immunity, being content with the observation "that the scope of prosecutorial immunity under State common law and under [the Massachusetts Civil Rights Act] is at least as broad as under [42 U.S.C.] § 1983." *Chicopee*, 396 Mass. at 251. The court also extended absolute immunity to two assistant attorneys general who advised the Department of Public Works to refrain from paying a plaintiff a judgment until they examined potential post-judgment remedies. *Dinsdale v. Commonwealth*, 424 Mass. 176 (1997) (reversing trial court's denial of summary judgment asserting prosecutorial immunity against civil rights claims); *Johnson v. Bd. of Bar Overseers of Mass.*, 70 Mass.App.Ct. 1113 (2007) (applying prosecutorial immunity to defamation claim against bar counsel because "publishing the status of actions on the BBO website, speaking to the press regarding pending actions, and incorporating

file numbers in a clearance letter are 'reasonably regarded as incidental' to the specified tasks of the BBO, bar counsel, and staff").

Thus, prosecutorial immunity does not require that the prosecutor be engaged in a trial, or that he actually bring charges, or that he even be right about his decision to prosecute. It is also well established under federal law that prosecutors are absolutely immune from suit arising out of their role as an advocate for the state or for conduct closely associated with the judicial phase of the criminal process. *Van de Kamp, et al., v. Goldstein*, 555 U.S. 335, 343 (2009); *Buckley v. Fitzsimmons*, 509 U.S. 259, 269-71 (1993); *Burns v. Reed*, 500 U.S. 478, 489-92 (1991); *Imbler v. Pachtman*, 424 U.S. 409, 427-28, 430-31 (1976). Without such protection, "harassment by unfounded litigation would cause a deflection of the prosecutor's energies from his public duties, and the possibility that he would shade his decisions instead of exercising the independence of judgment required by his public trust." *Burns*, 500 U.S. at 485 (quoting *Imbler*, 424 U.S. at 423).

In *Imbler*, the plaintiff brought a civil rights action pursuant to 42 U.S.C. § 1983 which alleged that the prosecutor-defendant intentionally allowed a witness to give false testimony which led to the plaintiff's indictment. *Imbler*, 424 U.S. at 431. The Supreme Court held that a state prosecutor had absolute immunity for the initiation and pursuit of a criminal prosecution. The acts undertaken by prosecutors in the initiation of a criminal prosecution which occur in the course of their role as advocates of the State, including the presentation of the State's case at a probable cause hearing, before a grand jury, or at trial, are entitled to the protections of absolute immunity. *Buckley*, 509 U.S. at 273;[1] *Imbler*, 424 U.S. at 431. *See Burns*, 500 U.S. at 487-88

[1]In *Buckley v. Fitzsimmons*, 509 U.S. at 267 n.3, the plaintiff alleged, *inter alia*, that the defendant prosecutor presented fabricated evidence to a grand jury. The Court, however, was not presented with any question regarding this claim in the *certiorari* petition, and it left intact the conclusion of the Court of

(prosecutor absolutely immune for eliciting misleading testimony from a witness at a probable cause hearing). The *Imbler* Court noted that at common law prosecutors were immune from suits which alleged the knowing use of false testimony before the grand jury and at trial. *Imbler*, 424 U.S. at 421-24, 426 n.23. The interests supporting the common law immunity were held to be equally applicable to suits under § 1983. *Id*. at 422-23. *See Yaselli v. Goff*, 12 F.2d 396 (1926), *aff'd,* 275 U.S. 503 (1927) (prosecutor immune from liability for claim that he procured plaintiff's indictment by the willful introduction of false and misleading evidence).

Where Plaintiff's claim is plainly based on Defendant Paikos' role as an advocate in a disciplinary proceeding before the BORIM, it cannot be the basis for liability. For purposes of absolute immunity, it matters not whether the defendants' actions were malicious or taken in bad faith. *See Burns*, 500 U.S. at 489-90 (prosecutor enjoyed absolute immunity for making false or defamatory statements, or for eliciting false and defamatory testimony from witnesses, in judicial proceeding); *Imbler*, 424 U.S. at 430-31 (prosecutor entitled to absolute immunity for knowing use of false evidence at trial and for knowing use of false evidence at trial and for suppression of exculpatory evidence); *Reid v. State of New Hampshire*, 56 F.3d 332, 336-38 (1st Cir. 1995) (prosecutors entitled to absolute immunity for knowing suppression and delayed disclosure of exculpatory evidence and for misleading the court to conceal their conduct).

Absolute quasi-judicial immunity protects individuals acting in roles intimately associated with the judicial phase of the administrative proceedings. "There are some officials whose special functions require a full exemption from liability." *Bettencourt*, 904 F.2d at 782, quoting *Butz v. Economou*, 438 U.S. 478, 508 (1978). "Such officials include, among others,

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Appeals that these actions were entitled to absolute immunity. *Id*. *See Buckley v. Fitzsimmons*, 919 F.2d 1230, 1243 (7th Cir. 1990).

judges performing judicial acts within their jurisdiction," as well as "certain 'quasi-judicial' agency officials who, irrespective of their *title*, perform *functions* essentially similar to those of judges or prosecutors, in a setting similar to that of a court." *Bettencourt*, 904 F.2d at 782 (citing *Butz*, 438 U.S. at 511-17).

In *Bettencourt*, the Court held that members of the Massachusetts Board of Medicine were entitled to absolute immunity from liability for damages, in connection with actions that they took in their roles as adjudicators in resolving disciplinary charges against a licensed doctor. *Bettencourt*, 904 F.2d at 782-84. The Court recognized that the role of Board members was "functionally comparable" to that of a judge, since the Board members weighed evidence, made factual and legal determinations, chose sanctions, and issued written opinions. *Id.* at 783. In addition, the Court observed that the act of imposing disciplinary sanctions against a licensed doctor was "likely to stimulate a litigious reaction from the disappointed physician, making the need for absolute immunity apparent." *Id.* at 783. Finally, the Court found that sufficient safeguards existed in the Medicine Board's proceedings so as to protect a physician's constitutional rights, since the Board proceedings were adversarial in nature (including the right to present evidence and cross-examine witnesses, a right to counsel, a transcribed record, issuance of a tentative decision and an opportunity for objections, and judicial review). *Id.* at 783. Based on the foregoing factors, the Court concluded that "absolute immunity barred plaintiff's claim for damages against the Board members acting in their 'quasi-judicial' capacities." *Id.* at 784.

Defendant Paikos was acting in a prosecutorial function as compliance counsel in the BORIM proceeding involving the Plaintiff. Plaintiff alleges Defendant Paikos unduly delayed bringing Plaintiff's docket to the BORIM's Complaint Committee until 805 days after the

BORIM initiated the investigation. Complaint at ¶ 192. Plaintiff additionally alleges Defendant Paikos "deliberately lied" in the hearing before the BORIM Complaint Committee by stating the so-called Greeley Report and expert were paid with the BORIM funds. *Id.* at ¶ 194. Plaintiff alleges Defendant Paikos repeated the words from the Greeley Report at the BORIM hearing, and refused to identify the independent expert used by the BORIM to declare Plaintiff represented an imminent danger to public safety. *Id.* at 198. Defendant Paikos is also alleged to have presented "anonymous testimony" to the BORIM. *Id.* at 200. The allegations clearly seek to impose liability against Defendant Paikos for his decision as to when and what evidence to present to the BORIM concerning Plaintiff, and for alleged conduct presenting evidence before the BORIM. Defendant Paikos' actions were intimately associated with the judicial phase of the BORIM disciplinary proceeding against Plaintiff, similar to the proceeding in *Bettencourt*. *See Bettencourt v. Bd. of Registration in Medicine of Comm. of Mass.*, 904 F.2d 772 (1st Cir. 1990). In addition, the BORIM's proceedings provide Plaintiff the same procedural protections present in *Bettencourt*, namely an adversarial process which includes the right to present evidence, cross-examine witnesses, be represented by counsel, file objections to a tentative decision, and obtain judicial review of a Board decision. M.G.L. c. 30A, § 11; Mass. Regs. Code Title 801, § 1.01.

To the extent Defendant Paikos is named in his official capacity, the claim should be dismissed as it is against the Massachusetts Board of Registration in Medicine. The BORIM is "an arm of the state government, [and] enjoys Eleventh Amendment immunity from suits for money damages brought in federal court, absent consent, waiver, or the like. *Coggeshall*, 604 F.3d 662; *see Alden v. Maine*, 527 U.S. 706, 756-57 (1999); *Vaqueria Tres Monjitas, Inc. v. Irizarry*, 587 F.3d 464, 477 (1st Cir. 2009); *see also* U.S. Const. amend. XI. As in *Coggeshall*, the Commonwealth of Massachusetts has neither consented to be sued for damages in a federal

court in the circumstances of this case nor waived its Eleventh Amendment immunity. Therefore, any official capacity claim against Defendant Paikos for money damages must be dismissed.

Wherefor, Counts 3, 5, 6, 8, 9 and 11 against Defendant Paikos should be dismissed.

III. Because Plaintiff Was Not Deprived Of Any Property Interest, And Where Plaintiff Was Provided Procedural Safeguards, Plaintiff Fails To State A Claim For Relief Under 42 U.S.C. § 1983.

42 U.S. C. § 1983 does not create substantive rights; rather, it provides "remedies for deprivations of rights established elsewhere." *City of Oklahoma City v. Tuttle*, 471 U.S. 808 (1985). A prima facie case under § 1983 requires a showing that the plaintiff was: (1) deprived of a federal right (2) by a person acting under color of state law. *Conn v. Gabbert*, 526 U.S. 286, 290 (1999). Plaintiff's due process claim fails for the fundamental reason that Defendant Paikos did not deprive Plaintiff of a federal right. Plaintiff alleges Defendant Paikos' actions prevent him from earning a living as a doctor. Complaint at ¶ 200. However, the complaint clearly alleges that Plaintiff's employment as a physician was terminated by CHA. Complaint at ¶¶ 147, 148, 179. There are no allegations in the complaint that Defendant Paikos or the BORIM took any disciplinary action against him. In fact, Plaintiff is in the midst of a hearing before DALA, and no decision has been issued by the BORIM adversely affecting his right to practice medicine. (Exhibit 1, DALA Docket).

Pursuant to the *Parratt-Hudson* doctrine, "[w]hen a deprivation of a property interest is occasioned by random and unauthorized conduct by state officials, the Supreme Court has repeatedly emphasized that the due process inquiry is limited to the issue of the adequacy of the post deprivation remedies provided by the state." *O'Neill v. Baker*, 210 F.3d 41, 50 (1st Cir. 2000) (internal quotation marks omitted). In other words, "there is no denial of procedural due

process, even by the official, where the prerequisites of random and unauthorized conduct and adequate post-deprivation remedies are met." *Id.*

"[A] government official has committed a random and unauthorized act when he or she misapplies state law to deny an individual the process due under a correct application of state law." *Hadfield v. McDonough*, 407 F.3d 11, 20 (1st Cir. 2005). Said differently, "conduct is 'random and unauthorized' within the meaning of *Parratt-Hudson* when the challenged state action is a flaw in the official's conduct rather than a flaw in the state law itself." *Id.*

Here, the complaint squarely challenges Defendant Paikos' supposed failure to follow state law, not the constitutional adequacy of the law itself. *See* Complaint at ¶ 201(alleging that Defendant Paikos violated M.G.L. c. 149, § 187 by allowing CHA to retaliate against Plaintiff (a whistleblower) through the proceeding before the BORIM. According to Plaintiff's allegations, Defendant Paikos' actions were "random and unauthorized" within the meaning of the *Parratt-Hudson* doctrine.

The *Parrat-Hudson* analysis turns to whether Plaintiff has adequate post-deprivation remedies to correct the alleged flaws created by Defendant Paikos' conduct. Plaintiff is in the midst of a hearing before DALA pursuant to M.G.L. c. 30A where he has the opportunity to challenge the BORIM's alleged consideration of the Greeley Report through a motion to exclude the report, cross-examine witnesses concerning the report, and present his own witnesses, including experts, to refute the report.[2] Following a decision by the BORIM concerning the complaint against him, Plaintiff has the right to appeal to the superior court to raise constitutional

[2] 243 CMR 1.00 governs the disposition of matters relating to the practice of medicine by any person holding or having held a certificate of registration issued by the Board of Registration in Medicine under M.G.L. c. 112, §§ 2 through 9B, and the conduct of adjudicatory hearings by the Board. A hearing before the BORIM is defined as "a formal administrative hearing conducted pursuant to M.G.L. c. 30A." 243 CMR 1.01(2).

violations, errors of law, and whether the BORIM decision is supported by substantial evidence. *See*, M.G.L. c. 30A, § 14(7). The board may, after a hearing pursuant to M.G.L. c. 30A, take specified disciplinary action against a physician based on designated offenses upon proof satisfactory to a majority of the board. M.G.L. c. 112, § 5.

Here, Plaintiff has constitutionally sufficient post-deprivation remedies. *See, e.g.*, M.G.L. c. 30A, § 11; Mass. Regs. Code Title 801, § 1.01. Therefore, Plaintiff, as a person "aggrieved by the alleged actions of Defendant Paikos," has the right to a hearing before the BORIM, and an appeal of the BORIM's decision to the superior court pursuant to M.G.L. c. 30A. Accordingly, Massachusetts law provides Plaintiff with adequate procedures to address and remedy any deprivation alleged in his Complaint.

Wherefor, Plaintiff's due process claims in Counts 6 and 8 should be dismissed.

IV. Defendant Paikos Had An Absolute Privilege For Any Statements Made Relating To Plaintiff's Disciplinary Proceeding Before The BORIM.

Plaintiff seeks to impose liability against Defendant Paikos for statements made during the course of the BORIM proceeding. Complaint at ¶¶ 193, 194. It is well established in Massachusetts that "statements by a party, counsel or witness in the institution of, or during the course of, a judicial proceeding are absolutely privileged provided such statements relate to that proceeding." *Sriberg v. Raymond*, 370 Mass. 105, 108 (1976); *accord*, *Fisher v. Lint*, 69 Mass.App.Ct. 360, 366(2007) (holding the privilege extends to circumstances where the statements are made preliminary to a proposed or contemplated judicial proceeding as long as they bear some relation to the proceeding). "Attorneys must have complete freedom of expression and candor in communications in their efforts to secure justice for their clients." *Sriberg*, 370 Mass. at 108. "Statements made in the course of a judicial proceeding which

pertain to that proceeding are absolutely privileged and cannot support a claim of defamation, even if uttered with malice or in bad faith." *Correllas v. Viveiros*, 410 Mass. 314, 319 (1991). The absolute privilege extends to proceedings before administrative bodies. *Visnick v. Caulfield*, 73 Mass.App.Ct. 809 (2009) (holding letter submitted to EEOC for proceedings are sufficiently judicial in nature for application of the privilege).

Wherefor, Plaintiff's slander claim in Counts 5 and 9 against Defendant Paikos should be dismissed.

V. Because Defendant Paikos Is Not A Health Care Facility, Plaintiff's Healthcare Whistleblower Claim Should Be Dismissed.

The Healthcare Whistleblower Act prohibits a "health care facility" from taking retaliatory action against a "health care provider" who engages in specified protected activity defined in the statute. *See*, M.G.L. c. 149, § 187. The statute is specific to the health care industry and is designed to safeguard patient care by protecting the rights of health care providers who expose deficiencies in care that violate laws or regulations or professional standards that endanger public health. The term "health care facility" in M.G.L. c. 149, § 187[3], "is directed at the facility providing the care, i.e., the hospital, clinic, nursing home, or other

[3] M.G.L. c. 149, § 187(a) defines "health care facility" as "an individual, partnership, association, corporation or trust or any person or group of persons that employs health care providers, including any hospital, clinic, convalescent or nursing home, charitable home for the aged, community health agency or other provider of health care services licensed, or subject to licensing by, or operated by, the department of public health; any facility as defined in section 3 of chapter 111B; any private, county or municipal facility, department or unit which is licensed or subject to licensing by the department of mental health pursuant to section 19 of chapter 19, or by the department of developmental services pursuant to section 15 of chapter 19B; any facility as defined in section 1 of chapter 123; the Soldiers' Home in Holyoke, the Soldiers' Home in Massachusetts; or any facility as set forth in section 1 of chapter 19 or section 1 of chapter 19B."

health care center." *Commodore v. Genesis Health Ventures, Inc.*, 63 Mass.App.Ct. 57, 66 (2005).

Under the plain language of the statute, Defendant Paikos was not at any time alleged in the complaint a "health care facility" providing care subject to suit for alleged violations of the statute. Defendant Paikos' sole involvement was as the BORIM's compliance counsel performing duties in the disciplinary proceeding against Plaintiff.

Wherefor, Plaintiff's claim in Count 3 against Defendant Paikos for violation of the Healthcare Whistleblower statute, M.G.L. c. 149, § 187 should be dismissed.

VI. Plaintiff's Claims Should Be Dismissed Because The Claims Do Not Meet The Pleading Requirements Of Fed. R. Civ. P. 8(a).

"To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to "state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) citing *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id*. "The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully." *Id*.

Counts 9 and 11 of Plaintiff's complaint allege "fraud" against Defendant Paikos as part of the "Party G" defendants designated by Plaintiff. Other than the labels of "conscious fraud," "honest services fraud," and "mail fraud" in Counts 9 and 11, there are no factual allegations against Defendant Paikos plausibly suggesting an entitlement to relief. The court must accept all factual allegations in the complaint as true and draw all reasonable inferences in the plaintiff's favor. *Langadinos v. American Airlines, Inc.*, 199 F.3d 68, 69 (1st Cir. 2000). While the court

must accept as true all of the factual allegations contained in the complaint, that doctrine is not applicable to legal conclusions. *Iqbal*, 556 U.S. at 678. "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Id*.; *see also Sanchez v. Pereira–Castillo*, 590 F.3d 31, 48 (1st Cir.2009) ("In other words, a plaintiff must offer 'more than an unadorned, the-defendant-unlawfully-harmed-me accusation,' in order to claim a 'plausible entitlement to relief."). A complaint does not state a claim for relief where the well-pleaded facts fail to warrant an inference of any more than the mere possibility of misconduct. *Iqbal*, 556 U.S. at 679.

Wherefor, Plaintiff's claims in Counts 9 and 11against Defendant Paikos should be dismissed.

CONCLUSION

For the foregoing reasons, Plaintiff's claims against Defendant James Paikos should be dismissed with prejudice.

Respectfully submitted,
JAMES PAIKOS,

By his Attorneys,

MAURA HEALEY
ATTORNEY GENERAL

/s/ Mark P. Sutliff_____
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Date: March 24, 2015

CERTIFICATION UNDER LOCAL RULE 7.1

Counsel for Defendant James Paikos hereby certifies, pursuant to Local Rule 7.1(a)(2), that on March 23, 2015, I conferred with plaintiff's counsel concerning the issues set forth in the attached motion to dismiss.

/s/ Mark P. Sutliff
Mark P. Sutliff

CERTIFICATE OF SERVICE

I, Mark P. Sutliff, Assistant Attorney General, hereby certify that I have this day, March 24, 2015, served a copy of **Defendant James Paikos' Motion to Dismiss, Memorandum, Exhibits and Certification of Local Rule 7.1** upon all parties, by electronically filing to all ECF registered parties and by sending a copy, first class mail, postage prepaid to all unregistered parties.

/s/ Mark P. Sutliff
Mark P. Sutliff