

UNITED STATES DISTRICT COURT

DISTRICT OF MASSACHUSETTS

DOCKET NO. 15CV10499-WGY

BHARANIDHARAN PADMANABHAN, MD, PHD,  
Plaintiff

CENTERS FOR MEDICARE & MEDICAID, ET AL.,  
Defendants

**PLAINTIFF’S OPPOSITION TO THE US ATTORNEY’S MOTION TO DISMISS**

Now comes Dr. Bharanidharan Padmanabhan (herein referred to as “Dr. Bharani”) and opposes the United States Attorney’s motion to dismiss. The Plaintiff’s opposition is supported by the attached affidavit and documentation. The motion to dismiss submitted by the United States Attorney necessitates that it be DENIED by this Court; with the grounds supporting that denial set forth:

**I. In the United States Attorney’s motion to dismiss, it specifically asserts only one basis for its motion to dismiss—lack of jurisdiction**

1. Pursuant to Fed. R. Civ. P. 7.1(b)(1), the actual motion, in and of itself—not the memorandum—must “state with particularity the grounds for seeking the order.”

2. The United States Attorney’s entire and complete statement in its motion to dismiss regarding the particularized grounds on which the motion is based states as follows:

As grounds for this motion, the Federal Defendants state that they have not waived their sovereign immunity to be sued, so this Court lacks jurisdiction over the matter. In further support, the Federal Defendants rely upon their memorandum of law filed simultaneously herewith.

3. As evidenced, the actual wording in the United States Attorney's motion to dismiss was *very, very* specific as to the basis for its motion to dismiss; and, as shown, the United States Attorney's motion *explicitly* limited its basis to one sole ground: lack of jurisdiction.

4. As demonstrated in the United States Attorney's motion to dismiss, there is no reference, in any manner, to any other grounds for dismissal.

5. Based on the well-crafted language set forth in the United States Attorney's motion, there can be no reasonable claim that there was an expressed intent to encompass other grounds on which to base its motion to dismiss.

6. In violation of Fed. R. Civ. P. 7.1(b)(1), the United States Attorney raised the assertion in its memorandum that Plaintiff Dr. Bharani's Complaint purportedly fails to state a claim upon which relief can be granted (Memorandum, page 6)—not in its motion.

7. In addition, an assertion was made in the memorandum regarding insufficiency of service—which was made, no less, in a *footnote* on page 6. Again, the motion to dismiss does not, in any manner, reference or indicate any such assertion.

8. Raising a purported basis for dismissal in a footnote compounds the necessity for the United States Attorney to be precluded from being able to be heard on that issue.

*Del Moral v. UBS Fin. Servs.*, 699 F.3d 93, 101 (1st Cir., 2012). The First Circuit Court of Appeals has well established that raising an issue in a footnote constitutes a waiver of that issue.

*Id.*

9. The First Circuit Court of Appeals has emphasized that asserting an issue in a footnote is not an adequate manner for presenting the merits of an issue; that it constitutes a waiver because placing an issue in a footnote deems that the issue was meant to be treated as if it were perfunctory and that raising an issue in a footnote means it is not to be taken seriously. *Id.*

10. Issues, such as, failure to state a claim upon which relief can be granted and insufficiency of service are entirely separate and distinct grounds from that of an assertion of lack of jurisdiction. These above-described grounds are in *no manner* interrelated; and they certainly are not interchangeable.

11. Demonstrating why the United States Attorney put the issue of service in a footnote are statements made that are inaccurate. As evidenced by the content in the Complaint, Plaintiff Dr. Bharani has filed suit exclusively against the named Defendants in their official capacity—they were not sued as private individuals.

12. The actual facts show that proper service was, in fact, made under Fed. R. Civ. P. 4(i) where Plaintiff Dr. Bharani served the United States attorney *for the district* where the action was brought. Fed. R. Civ. P. 4(i) does not *require* Plaintiff Dr. Bharani to, also, serve the Attorney General of the United States, as asserted by the United States Attorney. (A copy of the proof of service is provided in **Exhibit 1**).

13. Accordingly, pursuant to Fed. R. Civ. P. 7.1(b)(1), review of the United States Attorney's motion requires that it be limited to the lack of jurisdiction issue—which was specifically narrowed to the scope of sovereignty by the United States Attorney's own words; and that the United States Attorney be precluded from being heard on the other above-described issues as the manner in which the issues were asserted necessitate that they be treated as having been waived.

**As a matter of law, the United States Attorney has waived any and all claims specific to lack of jurisdiction**

14. As previously raised by Plaintiff Dr. Bharani in his filed motion to strike the United States Attorney's motion to dismiss—which has not yet been acted upon, prejudicing Plaintiff Dr. Bharani, the assertion of the claim of lack of jurisdiction based on the issue of sovereignty constitutes blatant and flagrant bad faith conduct on the part of the United States Attorney as the United States Attorney actively filed the Notice of Removal of the underlying Complaint *to* the U.S. District Court on February 23, 2015.

15. As a matter of law, such conduct establishes that the United States Attorney has already firmly invoked its position that this Court has jurisdiction. *Wang Laboratories, Inc. v. Applied Computer Sciences, Inc.* 958 F.2d 355, 358 (1992). (A copy of the electronic docket is provided in **Exhibit 2**).

16. Also, on February 23, 2015, the U.S. District Court mailed a certified notice of removal to the United States Attorney.

17. Per proper and customary protocol, the Norfolk Superior Court complied and effectuated the removal of the action to the U.S. District Court upon receiving the Notice of Removal—which is reflected in the docket for the Norfolk Superior Court Action. (A copy of the afore-described Norfolk docket is provided in **Exhibit 3**).

18. As evidenced by the incontrovertible court documentation, the United States Attorney's Office was the one to *initiate* and *effectuate* the removal of the underlying Complaint to the U.S. District Court of Massachusetts. Accordingly, it is an inescapable conclusion that the United States Attorney has already established its position that the U.S. District Court has

jurisdiction and the United States Attorney cannot now be allowed to retract that original position. *Wang Laboratories, Inc. v. Applied Computer Sciences, Inc.*, supra.

19. Under the well-established doctrine of judicial estoppel, the U.S. Court of Appeals for the First Circuit, in *Wang Laboratories, Inc. v. Applied Computer Sciences, Inc.*, supra, declared:

where a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position.

20. Plaintiff Dr. Bharani incorporates the afore-described filed motion to strike and accompanying memorandum into this opposition, as they establish overt bad faith acts by the United States Attorney—literal acts of cherry picking select Defendants to be parties removed to the U.S. District Court (Defendants Center for Medicare & Medicaid Service, Raymond Hurd and William Kassler) and, with deliberate acts of apparent backroom antics, aimed to have the other named Defendants remain in Norfolk Superior Court. (See copy email correspondence in **Exhibit 4**).

21. Of import, Plaintiff Dr. Bharani had been pro se at the time that the United States Attorney had filed to have her select Defendants be removed to the U.S. District Court.

22. Also, of significance, by the United States Attorney's filing the Notice of Removal, axiomatically, her actions outwardly held out to the public that she was unequivocally stating that the U.S. District Court does, in fact, have proper jurisdiction over the matter—otherwise, the necessary corollary is that the United States Attorney filed the Notice of Removal for the illicit purpose of having some unfair advantage in the U.S. District Court to secure a favorable outcome in the pending litigation.

23. As demonstrated from the evidence set forth above, the United States Attorney has waived all claims regarding lack of jurisdiction by the U.S. District Court. Accordingly, on this basis alone, it necessitates that the United States Attorney's motion to dismiss be denied.

## **II. Other incorrect assertions made by the United States Attorney**

### **The named Defendants are not entitled to the privilege of immunity**

24. The official capacities of the named Defendants do not fall under the category of absolute immunity; rather the issue encompasses one of qualified immunity.

25. As a matter of law, the veil of qualified immunity is pierced when a plaintiff presents evidence of the public official in question knowingly violated the law or that no reasonably competent public official would have considered that conduct to be lawful. *Brady et al. v. MaryAnn Dill, et al.*, 187 F.3d 104, 116 (1999). The allegations set forth in the Complaint made against the named Defendants satisfy this standard, subjecting these public officials to being sued by a private citizen.

### **The United States Attorney makes acknowledgements that Plaintiff's Complaint states federal causes of actions upon which relief can be granted**

26. The United States Attorney makes acknowledgements in its memorandum that Plaintiff Dr. Bharani's Complaint articulated claims that consist of original federally based subject matter; in particular, the United States Attorney explicitly describes claims of Medicare fraud and conspiracy to commit Medicare fraud. (Defendants' Memorandum, page 2-3). These allegations squarely fall within authorized federal original jurisdiction, such as 18 U.S.C. § 1962, and 18 U.S.C. § 1621.

26. Accordingly, the above-referenced federal statutes do, in fact, authorize civil actions to be brought by private citizens against public officials—contrary to the assertion by the United States Attorney.

27. In addition, the United States Attorney makes acknowledgements in its memorandum by articulating that Plaintiff Dr. Bharani alleges unlawful conduct pertaining to Plaintiff Dr. Bharani having filed a formal complaint, with details of his personal knowledge of Medicare fraud being committed and sought that an investigation be conducted; that Plaintiff Dr. Bharani's complaint was given to Defendant CMS; and that Defendants CMS, Hurd and Kassler engaged in conspiratorial acts to obstruct an investigation from being conducted by Defendant CMS. (Memorandum, page 2-3).

28. The United States Attorney makes acknowledgements in her memorandum that there was the motive and opportunity for Defendants CMS, Hurd and Kassler to conspire. She explicitly articulates facts that show a close relationship amongst the named Defendants. (Memorandum, page 2).

29. In fact, the motive to conspire to obstruct an investigation by Defendant CMS is overwhelmingly glaring where the prime party to be investigated was Dr. Leape's hospital—where the United States Attorney acknowledges Plaintiff Dr. Bharani's alleged facts that show a close relationship between Defendant Dr. Leape and the named Defendants. (Memorandum, pages 2-3).

30. As a matter of law, where there are affirmative acts alleged that show affirmative abuse of power by public officials, a cause of action does exist. *Daniels v. Williams*, 474 U.S. 327, 330 (1986). 42 U.S.C. § 1983 and 42 U.S.C. § 1985.

31. *Deliberate* decisions by government officials that deprive a person of liberty and property are a basis on which a cause of action can exist against a public official. *Id.* at 331.

32. It is a violation of the Fifth and Fourteenth Amendments of the Federal Constitution for public officials to abuse their power, as well as, the use of power as an instrument of oppression. *Collins v. City of Harker Heights, Texas*, 503 U.S. 115, 126 (1992).

33. As explicitly referenced on page 2 of the United States Attorney's memorandum, Plaintiff Dr. Bharani's Complaint contains allegations that the acts by the named Defendants have caused him the loss of liberty and property interests, specifically pertaining to his not being reinstated as an employed physician with Cambridge Public Health Commission and his faculty position with Harvard.

34. Also, alleged in the Complaint is Plaintiff Dr. Bharani's loss of liberty and property directly from the named Defendants' acts of abuse of power—particularly, in the knowing and deliberate obstruction of an investigation regarding Plaintiff Dr. Bharani's formal complaint of Medicare fraud, which directly deprived Plaintiff Dr. Bharani of being able to obtain entitled legal relief to enforcement of final adjudicatory findings for his reinstatement as an employed physician with Cambridge Public Health Commission and his faculty position with Harvard. (See Complaint, paragraphs numbered 173 through 181).

**PLAINTIFF'S REQUEST FOR ORAL ARGUMENT**

Pursuant to Local Rule 7.1(d) of the U.S. District Court for the District of Massachusetts, Plaintiff Dr. Bharani requests an oral argument for the above-captioned matter on the belief that a hearing may assist the Court.

WHEREFORE, for all the above reasons, based on waiver and Plaintiff Dr. Bharani's Complaint stating multiple valid causes of actions against the named Defendants, the United States Attorney's motion to dismiss should be DENIED.

Respectfully submitted,

/s/ Lisa Siegel Belanger

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