

UNITED STATES DISTRICT COURT

DISTRICT OF MASSACHUSETTS

DOCKET NO. 15CV10499WGY

BHARANIDHARAN PADMANABHAN, MD, PhD	)
	)
Plaintiff	)
	)
v.	)
	)
CENTERS FOR MEDICARE & MEDICAID, ET AL.,	)
	)
Defendants	)

**MEMORANDUM OF LEGAL AUTHORITY & REASONING IN SUPPORT OF MOTION TO VACATE AND MOTION FOR SANCTIONS**

**I. Defendants premised their motion for reconsideration on the knowing and intentional misrepresentation that the Court did not have complete information when it reviewed Defendants’ original motion for a protective order**

Defendants’ sole premise for supposedly warranting this Court’s reconsideration of its denial of Defendants’ original motion for a protective order is based on Defendants’ *knowingly* false assertion that this Court did not have knowledge about the unredacted patient information (cited by Defendants Pages 40-44 of Document 57-8 ) during this Court’s review of Defendants’ original motion for a protective order.

As evidenced by Plaintiff Dr. Bharani’s opposition to Defendants’ original motion for protective order (Document No. 63), this Court, in fact, was provided *full and complete information* for this Court’s review of Defendants’ original motion for a protective order.

Plaintiff Dr. Bharani *explicitly* and *directly* discussed in-depth the unredacted patient information referenced by Defendants (Pages 40-44 of Document 57-8). In fact, that very issue was the *whole focus* of Plaintiff’s opposition. (See pages 1 through 3, Document No. 63).

Furthermore, *prior* to Defendants' filing of their original motion for protective order (Document No. 59), counsel for Plaintiff emailed Clerk Matthew Paine *and* Attorney Rebecca Cobbs (together on the same email) the authorization and release by the patient at issue—specifically and explicitly authorizing and requesting Plaintiff Dr. Bharani to publicly disclose the patient's medical and identifying information in this underlying federal action. (A copy of email sent to Clerk Matthew Paine *and* Attorney Rebecca Cobbs provided in **Exhibit 1**).

The afore-referenced email sent to Clerk Matthew Paine and Attorney Rebecca Cobbs shows that public disclosure of the patient's medical information had already been addressed by the USAMA back at the time Plaintiff filed his Amended Complaint; and that upon the Plaintiff providing the USAMA the exact same authorization sent to Clerk Matthew Paine and Attorney Rebecca Cobbs, the USAMA *agreed* with Plaintiff that the patient's authorization was valid and compliant with HIPAA.

As evidenced, the above-described unredacted information was, *in fact*, before this Court for review of Defendants' original motion for a protective order.

Accordingly, where the USAMA fully intended to file a motion to strike the Plaintiff's Amended Complaint on the exact same unredacted patient information and then, upon review of the patient's authorization, determined that the patient's authorization *did not* pose any issue regarding HIPAA, it shows the utter disingenuousness and transparency of Defendants' claim that they are seeking a protective order purely out of a supposed interest for the patient.

As set forth above, Defendants' reliance on Fernandez-Vargas v. Pfizer, 522 F.3d 55 (1<sup>st</sup> Cir. 2008) and Green v. Union Mut. Life Ins. Co. of America, 764 F.2d 19 (1<sup>st</sup> Cir. 1985) is misplaced. No extraordinary circumstances existed for Defendants to pursue a motion for reconsideration—there was *no existence*, of any kind of mistake or omission. The sole

content of Defendants' motion for reconsideration is a mere regurgitation of their arguments *already presented* in their original motion for a protective order.

In addition, Plaintiff Dr. Bharani substantiated in his filed opposition to Defendants' original motion for a protective order that Defendants' *original motion* was based on misrepresentations.

To reiterate, this Court had all information during its review of Defendants' original motion for protection order. As set forth above, it is evidenced that this Court and Defendants had actual physical possession of the patient's authorization and 2) Plaintiff's entire opposition to Defendants' original motion for a protective order focused on the very issue of this *very* patient's unredacted patient information.

**II. Defendants have waived, any and all, perceived right to object to Plaintiff Dr. Bharani's public disclosure of the patient at issue's personal information**

**A. Defendants have previously disclosed the patient at issue's protected medical information in violation of the HIPAA Act and HITECH Act**

Defendant Cambridge Health Alliance and Defendant representatives of Cambridge Health Alliance (especially, Defendants Nardin and Bor) are fully aware that they, *themselves*, overtly disclosed the patient at issue's protected health information and full name in May of 2010.

Defendant Dr. Nardin sent ER Attending Physician (Dr. Melvin Schorin) an email, stating:

Hi Mel,  
I wanted to give you some f/u on [Patient's first and last name]. Repeat brain MRI still not showing acute infarct. CTA without vessel cutoff, dissection or stenosis. His deficits have persisted. They are working him up for both stroke and giving him Solumedrol for possible MS flare. I think it's still possible that he had a small anterior choroidal artery infarct. Anyway, I think you did a great job caring for him and it was a pleasure to work with you!

Best,  
Rachel

A redacted copy of the email is provided in **Exhibit 2**. As evidenced by the actual email, Defendant Dr. Nardin—acting on behalf of Defendant Cambridge Health Alliance—violated the HIPAA Act and HITECH Act by having cc'd Plaintiff Dr. Bharani at [scleroplex@gmail.com](mailto:scleroplex@gmail.com) and *not* to Plaintiff Dr. Bharani's official Cambridge Health Alliance email address.

Of significance, by Defendant Dr. Nardin's using Plaintiff Dr. Bharani's gmail address, she sent the patient at issue's protected medical information and personal identifying information *through the public internet*; and of grave import, Defendant Dr. Nardin *had literally cut and pasted* the patient's protected medical information *directly from the MGH electronic database*. (See <http://www.hhs.gov/ocr/privacy/hipaa/administrative/enforcementrule/enfifr.pdf>, where the HITECH Act calls for monetary fines up to \$1.5 Million per calendar year).

Crucially, further evidencing Defendant Dr. Nardin's violation of the HIPAA Act and the HITECH Act to be knowing and deliberate is the irrefutable fact she had *full* knowledge of Plaintiff Dr. Bharani's Cambridge Health Alliance email address; yet, *instead* she consciously chose to use Plaintiff's gmail address (well known and established as the public internet).

Accordingly, as substantiated by Defendants' above-described conduct in May of 2010, preclusion of a protective order is necessitated based on the unclean hands doctrine; Defendants' conduct is especially repugnant and hypocritical where Defendants have knowingly misused the judicial system to conceal Plaintiff Dr. Bharani's disclosure of the patient's name and information that was implemented through a written and sworn

authorization, *explicitly showing* that the patient gave the authorization *very willingly* and that it is the patient's *own desire* for his name and medical information to be publicly disclosed.

**B) Defendants did not raise any objection to the unredacted patient information in Plaintiff's amended complaint**

Defendants have waived, any and all, purported right to object to the issue of Plaintiff Dr. Bharani's disclosure of the patient's medical information; especially, where the patient explicitly authorized and *personally desired* that Plaintiff Dr. Bharani publicly disclose this unredacted information in this very federal action.

When Plaintiff Dr. Bharani filed his Amended Complaint, the above-described patient information had been noticeably present (see paragraph numbered 175); and, yet, Defendants *did not* raise any objection to the unredacted information in their motion to dismiss Plaintiff's Amended Complaint.

The patient's unredacted information was open and plainly visible in the Plaintiff's Amended Complaint—in fact, the unredacted information was easy to spot where it was set apart from the other text in the main body of the Complaint. (See Amended Complaint, Document No. 47).

Accordingly, Defendants failure to object to the public disclosure of the unredacted information in their motion to dismiss Plaintiff's Amended Complaint constitutes a waiver.

**III. Defendants do not have standing to claim privilege under the HIPAA Act**

**A. Defendants misstate the true purpose of the HIPAA Act**

HIPAA is a set of procedures designed to protect healthcare providers from being sued by a patient claiming that the healthcare provider wrongfully disclosed health information. 2

Peter Brynicka, 26 GPSOLO 28 (March 2009). The sole focus of the HIPAA Act is circumscribed around the conduct of a healthcare provider's release of records. Id.

Crucially, Defendants' request for relief has *absolutely nothing* to do with Defendants being asked to provide patient's medical information. Accordingly, Defendants are overtly attempting to use the HIPAA Act for purposes that are completely inapplicable.

It is indisputable that the circumstances in the issue at hand solely involve the patient having provided an authorization (signed under oath) directly and specifically to Plaintiff Dr. Bharani, and, even more so, the patient explicitly stated that he *personally* desires Plaintiff Dr. Bharani to publicly disclose the patient's medical and identifying information in this very underlying federal action.

The fact that the patient's medical services were provided by Defendant Cambridge Hospital is entirely irrelevant—no matter who the healthcare provider, a patient retains the *absolute and inalienable right* to the use of his own name. As demonstrated, Defendants have no legitimate capacity or interest to provide standing for the protective order sought by Defendants under the HIPAA Act.

**B. HIPAA does not create any privileges**

As articulated by Peter Brynicka in The HIPAA Hurdle, supra at 29:

Given that state law sets forth myriad variations on the doctor-patient privilege and that **HIPAA** does not create any privileges, state law is the only game in town when it comes to the issue of whether the information received from a covered entity ultimately is discoverable or admissible.

**IV. Defendants seek a protective order based solely on illicit motives to conceal their misconduct**

Defendants claim that the afore-described patient information is not relevant to the Plaintiff Dr. Bharani's underlying federal action (see page 5 of Defendant's memorandum); however, as evidenced in Plaintiff's original Complaint and Amended Complaint, such patient information is overwhelmingly relevant.

The patient's personal information is evidence that shows Defendants had a motive for carrying out malicious retaliatory conduct against Plaintiff. Establishing a motive for malicious retaliation is an essential component in each and every cause of action presented in Plaintiff's Complaint and Amended Complaint. (See pages 38 through 51 of Amended Complaint).

As can be seen in the above provided copy of Defendant Dr. Nardin's email to Dr. Mel Schorin, Defendant Dr. Nardin makes *outright* incriminating statements that she had *knowingly* disregarded the patient's known and established diagnosis of Multiple Sclerosis; that she *purposefully* took overt action to cover up her deliberate disregard of the Multiple Sclerosis diagnosis by trying to disguise the patient's symptoms as an "acute infarct."

Of significance, the *only* person to speak of an infarct was Defendant Dr. Nardin; and, in the face of *repeatedly* presented objective evidence, it is conclusive that the patient *did not* have an infarct during the above-described event with Defendant Dr. Nardin; that the incident was solely and exclusively a result of the patient having Multiple Sclerosis, as originally and correctly diagnosed by Plaintiff Dr. Bharani.

Defendant Dr. Nardin's email bolsters Plaintiff Dr. Bharani's allegations that Defendant Dr. Nardin had on, multiple occasions, disparaged Plaintiff Dr. Bharani to his patients; that Defendant Dr. Nardin had stated to Plaintiff Dr. Bharani's patients that Plaintiff

was not knowledgeable about Multiple Sclerosis and that Plaintiff had misdiagnosed them as having Multiple Sclerosis.

As set forth in paragraphs numbered 81 through 83 of the Amended Complaint, Plaintiff Dr. Bharani reported the gross medical misconduct committed by Defendant Dr. Nardin in her treatment of the patient at issue (see Defendant Dr. Nardin's afore-described email) to Plaintiff's immediate supervisor (Dr. Thomas Glick) and to Defendant Cambridge Health Alliance. Also, set forth in Plaintiff's Amended Complaint is Defendants' continuous and repeated concerted illicit efforts to protect Defendant Dr. Nardin and Defendant Cambridge Health Alliance from repercussions that are supposed to occur from formal oversight.

As demonstrated, there are no limits to what Defendants are willing to do to conceal their illegal and inhumane acts; therefore, the patient information at issue is *highly* material and significant in Plaintiff establishing Defendants' motives to engage in malicious retaliation—including, but not limited to: colluding to have Plaintiff's medical privileges unlawfully suspended and his employment unlawfully terminated, along with, filing false reports and complaints with the Board of Registration in Medicine against Plaintiff and the National Practitioners Data Bank.

## **V. Equity necessitates the vacating of this Court's Order of June 19, 2015**

### **A. The Order of June 19, 2015 sets a precedent that infringes on the Federal Constitutional guarantees to private individuals' freedom of autonomy in their own personal affairs**

Crucially, the Court's Order of June 19, 2015 precedent involves a subject matter of grave public importance, that has far-reaching ramifications. If the Order of June 19, 2015 were allowed to stand, a precedent would be set to put patients' autonomy in a tail spin.



*Effectively, this Court's Order of June 19, 2015 renders the patient's authorization as invalid; and, thereby, contravenes the fundamental and inalienable Federal Constitutional guarantees for a private citizen to be able to use his or her own information in the manner that he or she chooses.*

The June 19, 2015 Order sets a precedent that signifies that from now on when a person seeks any care from a hospital that *private individual* has forever lost his or her *own right* to disclose his or her medical information with his or her name and now renders a patient's legal and valid affidavit—setting forth their desire as to how their own name and medical information is to be used—as entirely ineffective and meaningless.

Accordingly, the First, Fifth and Fourteenth Amendments of the United States Constitution compels that the protective order issued by this Court on June 19, 2015 be vacated.

**B. Plaintiff was precluded from his Fifth and Fourteenth Amendment Federal Constitutional guarantee to be fully and adequately heard**

As set forth in Plaintiff's motion to vacate, this Court ruled on Defendants' motion for reconsideration without affording Plaintiff an opportunity to present evidence and argument. Crucially, Defendants did not claim any exigency or urgency in their motion for reconsideration—as well as their prior conduct evidencing that there, in fact, was no urgency for a court ruling to issue before the 14-day deadline for Plaintiff to file an opposition. Also of import, this Court did not notify Plaintiff that an expedited ruling was necessary and did not request Plaintiff to file an opposition earlier than the established 14-day protocol.

WHEREFORE, for all the above reasons, Plaintiff Dr. Bharani requests that his motion to vacate this Court's Order of June 19, 2015 be GRANTED and that the Order of June 12, 2015 be re-instated. In addition, where Plaintiff has provided substantial evidence of knowingly-made bad faith and deceptive conduct, Plaintiff requests, pursuant to Local Rules 7.1(b)(1), 83.6.3 and 83.6.4(a), that Defendant and counsel be ordered to pay Plaintiff's attorney's fees related to opposing the Defendants' motions for protective order and in filing this motion to vacate.

Respectfully submitted,

/s/ Lisa Siegel Belanger

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