

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

PAUL T. HARDY
14905 Dinsdale Drive
Silver Spring, MD 20906,

and

EWA M. CZERSKA
5802 Massachusetts Avenue
Bethesda, MD 20816,

and

ROBERT C. SMITH
14204 Arbor Forest Drive
Rockville, MD 20850,

and

JULIAN J. NICHOLAS
11587 Carowind Lane
San Diego, CA 92131,

and

R. LAKSHMI VISHNUVAJJALA
1130 Betts Trail Way
Rockville, MD 20854,

Plaintiffs,

v.

JEFFREY E. SHUREN
Director, Center for Devices and
Radiological Health
U.S. Food and Drug Administration
10903 New Hampshire Avenue
W066-5422
Silver Spring, MD 20993,

Civil Action No. 11- _____

Filed Sept. 28, 2011

JURY TRIAL DEMANDED

and)
)
DONALD J. ST. PIERRE)
OIVD, CDRH)
Food and Drug Administration)
10903 New Hampshire Avenue)
Silver Spring, MD 20093,)
)

and)
)
MICHAEL O'HARA)
Division of Radiological Devices)
Food and Drug Administration)
10903 New Hampshire Avenue)
Silver Spring, MD 20093,)
)

and)
)
JANINE MORRIS)
Urology and Lithotripsy Devices Branch)
Food and Drug Administration)
10903 New Hampshire Avenue)
Silver Spring, MD 20093,)
)

and)
)
MARY PASTEL)
Division of Radiological Devices)
Food and Drug Administration)
10903 New Hampshire Avenue)
Silver Spring, MD 20093,)
)

and)
)
GREGORY CAMPBELL)
Division of Biostatistics)
Food and Drug Administration)
10903 New Hampshire Avenue)
Building 1, Room 4239)
Silver Spring, MD 20993,)
)

and)
)
ALBERTO GUTIERREZ)
Director, OIVD, CDRH)

Food and Drug Administration)
10903 New Hampshire Avenue)
Building 1, Room 4239)
Silver Spring, MD 20993,)

and)

KIMBERLY A. HOLDEN)
Assistant Commissioner for Management)
Food and Drug Administration)
10903 New Hampshire Avenue)
Building 1, Room 4239)
Silver Spring, MD 20993,)

and)

RUTH MCKEE)
Office of the Center Director, CDRH)
10903 New Hampshire Ave)
Silver Spring, MD 20093,)

and)

WILLIAM MAISEL)
WO-Building 66- Room 5429)
10903 New Hampshire Ave)
Silver Spring, MD 20993,)

and)

NELSON CABRERA)
General Law Division)
Office of the General Counsel)
Department of Health and)
Human Services)
330 Independence Avenue, SW Room 4760)
Washington, DC 20201,)

and)

JAMES E. SIMPSON)
Attorney, General Law Division)
Office of the General Counsel)
U.S. Department of Health and)
Human Services)

Cohen Building, Room 4748)
300 Independence Avenue, SW)
Washington, DC 20201,)
)
and)
)
John and Jane Doe)
Employees 1-99)
Department of HHS)
10903 New Hampshire Ave)
Silver Spring, MD 20993,)
)
and)
)
MARGARET A. HAMBURG)
Commissioner)
U.S. Food and Drug Administration)
10903 New Hampshire Avenue)
WO-31)
Silver Spring, MD 20993,)
)
and)
)
KATHLEEN SEBELIUS)
Secretary, Department of Health and)
Human Services)
200 Independence Ave, SW, Room 120F)
Washington, DC 20201,)
)
and)
)
UNITED STATES DEPARTMENT OF)
HEALTH AND HUMAN SERVICES)
200 Independence Avenue, SW)
Washington, DC 20201,)
)
and)
)
THE UNITED STATES OF AMERICA)
c/o United States Department of Justice)
9th & Pennsylvania Avenue, NW)
Washington, DC 20530,)
)
Defendants.)
_____)

COMPLAINT

Plaintiffs Paul T. Hardy, Ewa M. Czerska, Robert C. Smith, Julian J. Nicholas, and R. Lakshmi Vishnuvajjala (collectively “Plaintiffs”) bring this action against Defendant Kathleen Sebelius, Margaret Hamburg, Jeffrey E. Shuren, Donald J. St. Pierre, William Maisel, Kimberly A. Holden, Ruth McKee, Nelson Cabrera, James E. Simpson, John and Jane Doe Employees 1-99, Department of Health and Human Services (“HHS” or “Agency”), and The United States of America (collectively “Defendants”), in their official capacity, pursuant to the Fifth Amendment of the United States Constitution, *et seq.* Defendants have taken and converted private emails without Due Process or Just Compensation in violation of the Fifth Amendment of the United States Constitution.

JURISDICTION AND VENUE

1. This Court has both subject matter jurisdiction over this action and personal jurisdiction over Defendants pursuant to 28 U.S.C. § 1331. Venue is appropriate under 28 U.S.C. § 1391.

PARTIES

2. Plaintiff Paul T. Hardy (“Hardy”) is a U.S. citizen residing in the State of Maryland.

3. Plaintiff Ewa M. Czerska (“Czerska”), M.D., Ph.D., is a U.S. citizen residing in the State of Maryland.

4. Plaintiff Robert C. Smith (“Smith”), M.D., J.D., is a U.S. citizen residing in the State of Maryland.

5. Plaintiff Julian J. Nicholas (“Nicholas”), M.D., is a U.S. citizen residing in the State of California.

6. Plaintiff R. Lakshmi Vishnuvajjala (“Vishnuvajjala”), Ph.D., is a U.S. citizen residing in the State of Maryland.

7. Defendant Department of Health and Human Services is a United States Government Agency.

8. Defendant Kathleen Sebelius is a U.S. citizen who works in the District of Columbia for the Department of Health and Human Services and is being sued in her official capacity.

9. Defendant Margaret Hamburg is a U.S. citizen who works in the State of Maryland for the Department of Health and Human Services and is being sued in her official capacity.

10. Defendant Jefferey E. Shuren is U.S. citizen who works in the State of Maryland for the Department of Health and Human Services and is being sued in his official capacity.

11. Defendant Kimberly A. Holden is a U.S. citizen who works in the State of Maryland for the Department of Health and Human Services and is being sued in her official capacity.

12. Defendant Ruth McKee is a U.S. citizen who works in the State of Maryland for the Department of Health and Human Services and is being sued in her official capacity.

13. Defendant Donald J. St. Pierre is a U.S. citizen who works in the State of Maryland for the Department of Health and Human Services and is being sued in his official capacity.

14. Defendant William Maisel is a U.S. citizen who works in the state of Maryland for the Department of Health and Human Services and is being sued in his official capacity.

15. Defendant Nelson Cabrera is a U.S. citizen who works in the District of Columbia for the Department of Health and Human Services and is being sued in his official capacity.

16. Defendant James E. Simpson is a U.S. citizen who works in the District of Columbia for the Department of Health and Human Services and is being sued in his official capacity.

17. Defendant John and Jane Doe Employees 1-99 work for the Department of Health and Human Services IT department and are being sued in their official capacity.

FACTS

18. Plaintiffs authored personal correspondences which constitute their property.

19. Plaintiffs' correspondence was sent through electronic communication ("email"). Plaintiffs used their private email accounts, i.e., Gmail and Yahoo. Alternatively, the Plaintiffs communicated via attachments to their emails.

20. Plaintiffs' email correspondence constitutes the personal property of the author ("Proprietary Emails").

21. These Proprietary Emails are afforded full property rights.

22. The Proprietary Emails were sent through protected communications from an author's personal email account and sent directly to the recipient's private email account.

23. Plaintiffs corresponded on their own time and intended that their Proprietary Emails be private.

24. The Proprietary Emails were password protected and communicated via the internet in an encrypted format using a personal private email account.

25. Plaintiffs sent and received the Proprietary Emails on their own time, intending these private emails not be read, taken, maintained or copied by HHS and converted into a system of records.

26. Defendants without knowledge, consent, or notice of the authors, took the Proprietary Emails and converted them into the property of the Defendants.

27. Defendants thereafter stored the Proprietary Emails on a variety of records systems controlled by the Defendants, again without knowledge of, consent of, or notice to the authors.

28. Defendants have used and continue to use the Proprietary Emails for their own benefit without consent.

29. At no time were any of the Plaintiffs compensated for their Proprietary Emails.

30. Defendants engaged in a wide scale practice of taking Proprietary Emails of the Plaintiffs, making the property part of their databases, and using the documents as if they were the owners, without giving Plaintiffs compensation or Due Process.

FIRST CAUSE OF ACTION

(Fifth Amendment- Due Process and Takings Clause)

31. Plaintiffs repeat and re-allege the facts contained in the paragraphs set forth above.

32. Defendants violated the Due Process Clause and the Takings Clause of the Fifth Amendment of the United States Constitution.

33. Defendants took Plaintiffs' Proprietary Emails and subsequently converted them into their system of records without Due Process of Law.

34. Defendants took the Plaintiffs' Proprietary Emails and subsequently converted them into their system of records without any compensation.

35. As authors of these Proprietary Emails, Plaintiffs have the right to prevent communication to other persons, and control their use and distribution.

36. By unlawfully converting, communicating, controlling, using and distributing their Proprietary Emails, Defendants violated Plaintiffs' property rights.

37. Plaintiffs were not compensated for the taking of their Proprietary Emails.

PRAYER FOR RELIEF

WHEREFORE, Paul T. Hardy, Ewa M. Czerska, Robert C. Smith, Julian J. Nicholas, and R. Lakshmi Vishnuvajjala pray that this Court:

- (1) Order all Defendants to return the Proprietary Emails to each respective plaintiff;
- (2) Order all Defendants to delete and expunge any original, copies, excerpts, or summaries of the Proprietary Emails, converted or otherwise, from their system of records;
- (3) Order all Defendants to return Plaintiffs' Proprietary Emails in an expedited fashion;
- (4) Prohibit all Defendants from using the property of Plaintiffs in any manner whatsoever.
- (5) Order all Defendants to inform all third parties to whom Defendants may have provided, sent, communicated, summarized, excerpted or told about the Proprietary Emails that the Proprietary Emails were obtained illegally, and request the third parties delete and expunge the Proprietary Emails and their copies, summaries, or excerpts.
- (6) Order all Defendants to inform all third parties to whom Defendants may have provided, sent, communicated, summarized, excerpted or told about the Proprietary Emails that

the Proprietary Emails were obtained illegally, and request the third parties provide the Proprietary Emails to (Plaintiffs).

(7) Order all Defendants to make a complete accounting of all Third Parties provided with the Proprietary Emails, and provide that accounting to Plaintiffs.

(8) Order all Defendants to make a complete accounting of every record system in which the Proprietary Emails have been stored, and provide that accounting to Plaintiffs.

(9) Order all Defendants to make a full accounting of all people who received, transmitted, excerpted, summarized or otherwise saw or manipulated the Proprietary Emails.

(10) Enjoin all Defendants from all such future takings;

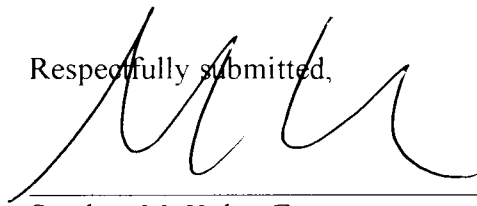
(11) Order all Defendants to expunge any and all documents for which they used the correspondences in question unless the author voluntarily consents to such use.

(12) Order Defendants to pay all Plaintiffs' attorneys fees and costs.

(13) Grant all equitable, injunctive and declaratory relief permitted under the Fifth Amendment;

(14) Grant such other relief as the Court may deem just and proper;

Respectfully submitted,



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Dated Sept. 28, 2011

JURY TRIAL DEMANDED