U.S. DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA
FILED Mar 23, 2023
CAROL L. MICHEL
CLERK
SMS Walk-In

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF LOUISIANA

UNITED STATES OF AMERICA ** CRIMINAL NO: 21-98

** SECTION: SECT 1 MAG.4

vs

** VIOLATION: 18 U.S.C § 1347

SHIVA AKULA, HONORABLE JUDGE AFRICK

MOTION TO DISQUALIFY AUSA KATHRYN MCHUGH

NOW INTO COURT, Defendant, SHIVA AKULA, ("Dr. Akula"), moves to Disqualify AUSA Kathryn McHugh, and states as follows:

Assistant United States Attorney Kathryn McHugh must be recused, disqualified, and prevented from any further investigation or prosecution involving this matter.

A pattern of prosecutorial misconduct by McHugh has been pervasive and present in these proceedings from the get go.

Dr. Akula has acquired evidence that McHugh has been directing one of Dr. Akula's employees to retrieve information from Canon Hospice, by stealing information and providing it to McHugh illegally, without the authority of a search warrant.

TENDERED FOR FILING

MAR 23 2023

U.S. DISTRICT COURT
Eastern District of Louisiana
Deputy Clerk

First, in August 2021, it was a one page document. This one page document, dubbed as the "Press Release",[1] was at all times the property of Canon Hospice. *See Exhibit 1.* At the direction and instruction by McHugh to an unknown employee at Canon Hospice, this one page document was delivered to McHugh. McHugh then used this Press Release to issue grand jury subpoenas to the physician advocacy group which drafted the Press Release for the benefit of Dr. Akula.

Then, most recently, on March 7, 2023, after Dr. Akula was provided for the first time with the government's discovery, through Stephen Shapiro, in reviewing the discovery, Dr. Akula uncovered personal handwritten notes of Dr. Akula himself, that also appear to have been illegally and without the authority of a search warrant, removed from his office and delivered to McHugh. *See Exhibit 2.* The time frame of the handwritten notes (*Exhibit 2*) and the one page Press Release (*Exhibit 1*) appear to be the same- after the indictment and around the time of "detention" hearing. It appears that the government turned around and produced these handwritten notes to Dr. Akula inadvertently.

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[1] Although this one page document was dubbed as the "Press Release" that was drafted in response to the DOJ's Press Release, this Press Release was never released to the media.

McHugh's prosecutorial conduct in these proceedings have offended the very and every essence of due process under the Fifth and Fourteenth Amendment and is grounds for her disqualification.

McHugh has exhibited a deeply concerning lack of candor and persistence to present false information to the court and/or the grand jury which has reached a prohibitive level for her to continue as a prosecutor in this case.

FACTUAL BACKGROUND

1. Dr. Akula is an infectious disease specialist who has practiced in the New Orleans area for more than three decades. In his private practice located at 3600 Prytania Street Suite 65 New Orleans, Dr. Akula sees patients who are elderly and chronically ill who suffer from a variety of infectious diseases, including HIV, COVID, and other bacterial, viral, and parasitic borne diseases.

2. Dr. Akula also owns Canon Hospice, which provides end of life care to thousands of patients in the state of Louisiana. Hospice patients suffer from illnesses such as Alzheimer's, Chronic Pulmonary Disease, and Dementia.

3. Dr. Akula is a father to three boys one of whom serve in the United States Airforce. Dr. Akula is also grandfather to three grandchildren.

4. In 2013, an unprecedented settlement was reached between Dr. Akula and the Department of Justice where, *not* Dr. Akula, but the DOJ settled claims that were filed against it for attorneys' fees requiring the DOJ to pay Dr. Akula the total

sum of $704,881.58 in Canon Health Care v. Kathleen Sebelies 2:12-cv-02120. *See Exhibit 3.* Dr. Akula was represented by Attorney Les Johnson in this settled case.

5. Immediately after this settlement, in fact, almost instantly, and in retaliation, an audit notification was sent to Canon Hospice for hundreds of patients which ultimately culminated in the criminal investigation that then led to the instant indictment against Dr. Akula.

6. On April 17, 2018, relying on the audits that were sent out immediately after the settlement of $704,881.58, the FBI executed a search warrant at the Canon hospice facility in South Shore, seizing patient records, billing records, and a large number of emails consisting of attorney-client communications between Dr. Akula and his own in-house counsel, Les Johnson.

7. From 2018 through 2021, Senior Prosecutor Patrice Sullivan was in charge of the Akula criminal investigation. Under Senior Prosecutor Sullivan, and pursuant to extensive grand jury subpoenas, there were two failed true bills by the grand jury.

8. After Ms. Sullivan left the Eastern District of Louisiana, at a time when there was a widely known internal reorganization at the United States Attorney for the Eastern District of Louisiana, Junior Prosecutor, Kathryn McHugh was assigned to Dr. Akula's case.

9. In 2021, McHugh was working with Dr. Akula's former pre-indictment counsel, William Barzee, and there was only one goal by both Barzee and McHugh which was to push for a plea deal using various brow beating methods to coerce a guilty plea.

10. William Barzee was not providing Dr. Akula with any of the evidence which the government contended proved Dr. Akula's guilt. There were just scare tactics implemented telling Dr. Akula that he would be losing everything and dying in prison.

11. In or about July 2021, Dr. Akula heard of a physician advocacy group, known as Physicians Against Abuse, ("PAA"). After contacting the group, Dr. Akula realized that he definitely needed to see the government's purported evidence that established guilt on his part. Dr. Akula also realized that it appeared that the government did not understand fully that Dr. Akula was not the provider for any of the patients subject of the indictment as these hospice patients received their medical care directly from a third party group, Ochsner Physicians. In fact, Dr. Akula was not involved in making the decision of what medical care was delivered and therefore what billing was used for any of the patients which was being investigated by the government.

12. When Dr. Akula asked William Barzee to provide him the government's purported evidence of guilt, Barzee was unable to do so and as such Dr. Akula terminated Barzee's services.

13. On July 29, 2021, Dr. Akula authorized PAA to contact McHugh so that a meeting between Dr. Akula and PAA can occur in which explanations and clarifications could be provided to the government regarding numerous misconceptions by McHugh. *See Exhibit 4.*

14. McHugh did not respond to PAA's outreach efforts and within just a few days of the attempt to set up a meeting, on August 5, 2021, McHugh filed her indictment against Dr. Akula, alleging 23 counts of healthcare fraud. *Doc 1.*

15. The government then issued its DOJ press release regarding Dr. Akula. *See Exhibit 5.*

16. PAA responded in kind and drafted its Press Release. *See Exhibit 1.* Although the Press Release never made it to the media, it was highly critical of McHugh. PAA's release was only provided internally to a single Canon Hospice employee. Next thing, McHugh had obtained a copy of this internal document, without the authority of a search warrant.

17. PAA's Press Release was a turning point for McHugh as it converted this prosecution to one that became personal for McHugh.

18. To serve her revenge for the unpleasant comments about McHugh in PAA's Press Release, McHugh fabricated lies that PAA and its Board Member, Dr. Christina Paylan Black ("Dr. Black") were purportedly engaging in witness tampering. McHugh made up these lies so she could use grand jury subpoena power to acquire all communications between Dr. Akula and PAA and Dr. Black.

19. PAA's Press Release about McHugh was on August 6, 2021, and on August 12, 2021, Dr. Black and PAA were served with grand jury subpoenas by McHugh where the subpoenas were delivered by United States Marshall to Dr. Black at her private residence in Treasure Island, Florida. [2]

20. Subsequently, McHugh communicated to PAA's counsel that she was pursuing witness intimidation charges against Dr. Akula, Dr. Black and PAA based on this Press Release, threatening Dr. Akula with more charges, and threatening Dr. Black and PAA with criminal investigation and prosecution. *See Exhibit 6: Affidavit of Christina Black, MD.*

21. In the months following PAA's Press Release, McHugh also launched a full blown smear campaign against Dr. Black once McHugh realized that Dr. Black and PAA offered substantial valuable resources for Dr. Akula, such as vetting

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[2] While the subpoenas themselves are not subject to the secrecy provision of grand jury, out of an abundance of caution, when Dr. Black was contacted about her affidavit in support of this motion, PAA's counsel notified Dr. Akula that Dr. Black would be sending the grand jury subpoenas to Judge Africk directly with a cover letter for this Court to decide whether the subpoenas could be filed on the docket.

medical experts, dumbing down the medical data and conducting medical investigations, which McHugh did not want Dr. Akula to benefit from.

22. McHugh launched relentless personal attacks against PAA, its general counsel, Sebastian Ohanian, and Dr. Black and used these personal attacks to justify her goal of precluding PAA and Dr. Black from having access to Akula's discovery. McHugh then drafted a protective order to present to Judge Roby. But McHugh was so adamant that Judge Roby know the so-called "background truth" about Dr. Black, that McHugh did the unthinkable by contacting Judge Roby's chambers, ex parte, to tell her to contact another judicial officer, Judge Ashe before whom the grand jury subpoenas were being litigated. McHugh also relayed to Judge Roby, ex parte, to check not just Dr. Black's background but also PAA's website.[3]

23. Based on McHugh's ex parte contact, Judge Roby was concerned about McHugh's unethical conduct, and expressed her concerns in her order as follows:

> **JUDGE ROBY**:
>
> Interestingly the government, despite its request to conduct research and submit a memorandum supporting its position that Dr. Black and Mr. Ohanian should not be granted authority to access the documents via the protective order, failed to do so.
>
> Oddly, and without response by the Court, on Tuesday, January 24, 2022, AUSA McHugh telephoned chambers and suggested that the undersigned speak to another district judge in the Court regarding information about Dr. Black which the undersigned remains unaware of. Finding the behavior

[3] While Judge Roby has indicated that she never did take the ex parte call from McHugh, Judge Roby used the information from McHugh's phone call to look up the website for PAA which she eventually incorporated into her order. .

> inappropriate, and a possible attempt to have an *ex parte* communication with the Court, or to influence the Court's decision, the undersigned ignored the call, took no action, and prepared for the status conference.
> ***McHugh also lacked candor*** by only disclosing that Dr. Black was involved in a press release leak and suggesting that there was an attempted to intimidate witnesses. ***AUSA McHugh clearly knew that the Court was being mislead and filed [sic] to correct the falsity.***
>
> Finally, and most concerning is AUSA McHugh's call to chambers suggesting the undersigned contact another judicial officer to obtain information regarding Dr. Black

See Exhibit 7: Order by Judge Roby

24. Judge Roby's January 2022 order outlining McHugh's highly unethical behavior lacking candor with the Court, failing to correct falsity presented to the Court, would have called for permanent removal of any prosecutor in most United States Attorneys' offices in the country. However, in the Eastern District of Louisiana, this kind of unethical conduct is apparently punishable only by a 6-month removal from the post at EDLA where McHugh was sent to Washington D.C. for a period of 6- months. At some point during the course of this 6-month removal from her post, McHugh herself claimed to Cassidy that she was sent to work on a "project".

25. The hearing before Judge Roby was *not the first time* that McHugh had presented falsities to this Court. During First Appearance hearing, McHugh made another huge false representation to the Court in order to detain Dr. Akula, telling the Court:

> To provide some background in this case, when the government did execute a search warrant at Canon Hospice, a relative of Mr. Akula's who was involved in the fraud fled the country. We have not been able to locate him since then

See Exhibit 8: Transcript of September 21, 2022, pg 5.

26. McHugh knew she was making false representations to the Court when she spoke about a relative of Dr. Akula, Rajeshwar Biyyam, having fled the country. Communications with Mr. Biyyam's family proved that Mr. Biyyam not only had *never* fled the country, but he could not even get out of bed due to an illness that he had developed, making him bed bound and country bound right here in New Orleans. McHugh knew she was presenting falsity to the Court when she told the court about Biyyam fleeing the country. *See Affidavit of Christina Black, MD.*

27. After returning back to EDLA from her 6-month absence, McHugh continued with presenting more falsities to the Court. At the March 14, 2023 hearing, in response to the Court's question regarding discovery, McHugh responded as follows:

> MS. MCHUGH: Your Honor, to avoid any further issues on this, the government has produced -- is ready to produce today and has 23 -- approximately 23 gigabyte hard drive of everything that's been previously turned over....

See Exhibit 9: Transcript of March 14, 2023.

28. While trying to meddle her words so as not to be too committal, McHugh made the outrageously false statement that she "has produced" and

immediately caught herself and corrected to say "—is ready to produce....23 gigabyte hard drive" of discovery which she claimed to be "everything that's been previously turned over". There has never been a 23-gigabyte hard drive production of discovery prior to March 14, 2023 in this case.

29. In regards to the substance of the discovery, McHugh also continued to make other falsities by maintaining that she had disclosed all of the discovery to Dr. Akula's former counsel. McHugh conveniently left out the fact that she was blanketly withholding every single witness statement until five days before trial on McHugh's own speculation that Dr. Akula might bring civil suits against these witnesses.

30. Then, McHugh improperly disguised her unlawful decision to withhold these witnesses statements by disingenuously characterizing these witnesses as falling under the *Jencks Act*- in spite of her full knowledge that the instant case is neither a case of national security nor a case where there is any remote possibility of physical or non- physical harm to any government witnesses. *See McHugh's Proposed Scheduling Order at Doc 152.*

McHugh's behavior, lack of candor and persistent representation of false facts to this Court along with her unconventional arrangements for an unidentified employee or employees to steal documents that are the property of Canon without the lawful authority of a search warrant, have all significantly interfered with

orderly progress and disposition in this case denying Dr. Akula his due process right to a normal, disinterested and ethical prosecutor.

Based on the foregoing facts and the existing law on prosecutorial disqualification, the grounds for McHugh's disqualification has been met.

APPLICABLE LAW AND ARGUMENT

A prosecutor is the administrator of justice who should exercise sound discretion and independent judgment in serving the public interest and must act with integrity while avoiding the appearance of impropriety. *See ABA Standard 3-1.2.* Prosecutors should not allow improper considerations, such as partisan, political or personal considerations, to effect prosecutorial discretion, nor can their judgment be influenced by a personal interest in potential media attention. *ABA Standard 3-1.6(a); ABA Standard 3-1.10(h).* Courts have previously looked at violations of the rules of professional conduct in evaluating whether a prosecutorial conflict exists, and these considerations form the foundation of much of the law on disqualification.

The prosecutor is "a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore in a criminal prosecution is not that it shall win a case, but that Justice shall be done. *Berger v. United States*, 295 U.S. 78 (1935); *see also Young v. USS. ex rel. Viition* et Fils S.A. 481 U.S. 787, 803 (1987).

The "prosecutor has more control over life, liberty, and reputation than any other person in America." *Robert H. Jackson, Att'y Gen.of the US., The Federal Prosecutor, Address to the Second Annual Conference of United States Attorneys (Apr. 1, 1940).*

Appointment of an interested prosecutor creates an appearance of impropriety that diminishes faith in the fairness of the criminal justice system in general. "The narrow focus of harmless-error analysis is not sensitive to this underlying concern. If a prosecutor uses the expansive prosecutorial powers to gather information for private purposes, the prosecution function has been seriously abused even if, in the process, sufficient evidence is obtained to convict a defendant. Prosecutors have available a terrible array of coercive methods to obtain information, such as "police investigation and interrogation, warrants, informers and agents whose activities are immunized, authorized wiretapping, civil investigatory demands, (and] enhanced subpoena power." "The misuse of those methods "would unfairly harass citizens, give unfair advantage to [the prosecutor's personal interests], and impair public willingness to accept the: legitimate use of those powers." *Young v. United States ex rel. Vuitton Et Fils S.A.* 481 U.S. 787 (1987) at 811.

The Supreme Court also highlighted in *Young* that: Public confidence in the disinterested conduct of that official is essential.

Fifth Circuit precedence also weighs heavily in favor of McHugh's disqualification in light of her conduct as outlined in paragraphs 1-30.

In *United States v. Kitchin*, 592 F.2d 900 (5th Cir. 1979), the Fifth Circuit ruled that trial court may disqualify an attorney "only when there is a reasonable possibility that some specifically identifiable impropriety actually occurred and, in light of the interest underlying the standards of ethics, the social need for ethical practice outweighs the party's right to counsel of his choice". While the *Kitchin* was decided in the context of disqualifying defense counsel, "what is good for the goose is good for the gandor" and just as much as a defendant does not have unfettered right to counsel of his choice, neither should the Government have unfettered right to be represented by a certain assigned prosecutor, who like McHugh, has demonstrated lack of candor and pattern of false representations to this Court.

A. McHugh Developed a Disqualifying Personal Agenda From Very Early On After PAA's Release That Was Highly Critical of McHugh

McHugh has proven herself to be an amateur and immature individual who happens to wear the badge of Assistant United States Attorney. Allowing her personal emotions to dictate her prosecutorial conduct, PAA's Press Release was a turning point for McHugh after which she dug her heels into Dr. Akula and any person associated with assisting Dr. Akula. In doing so, McHugh has directly impacted Dr. Akula's ability to prepare a defense in this case.

McHugh slighted by the critical comments against her in PAA's Press Release. Anyone who conducts just a cursory review of this case since its inception will readily see that McHugh became obsessed with PAA and Dr. Black after the Press Release and vowed to either criminally prosecute PAA and Dr. Black or to drive them away from Dr. Akula. *See Doc 122*[4].

In furtherance of her revenge for PAA's Press Release, McHugh improperly used her grand jury subpoena powers to issue subpoenas to obtain communications between PAA and Dr. Akula, after she provided false information to the grand jury and the presiding judge, Judge Ashe. McHugh disguised her grand jury subpoenas under "witness tampering" just so that she could get Judge Ashe to authorize the subpoenas to go through when PAA and Dr. Black moved to quash the subpoenas. McHugh's lies were so obvious but McHugh was such a good liar that in the absence of other information, Judge Ashe did not see through McHugh's lies. As for one issue, there could not have been any witness tampering by the date of the issuance of the grand jury subpoenas, August 12, 2021 because the indictment had just been filed on August 5, 2021, merely one week prior, and McHugh had not yet released the names or identified any of government's witnesses.

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[4] McHugh took out 5 pages in her response to Dr. Akula's motion for disqualification to provide not only inaccurate but wholly irrelevant information about Dr. Black evincing her continued obsession with Dr. Black, and taking no heed from the admonishment of Judge Roby on this same issue.

In fact, McHugh has never released the names of any government witnesses. So for McHugh the wild claims that Dr. Akula, Dr. Black or PAA are engaging in witness tampering is absurd and more evidence of McHugh's unhinged behavior of providing false information in the course of these criminal proceedings just to get the information that she wants to get to serve her revenge – in response to her being personally insulted by PAA's Press Release. Insulting a prosecutor who attacks an innocent doctor without any evidence is not a crime and the fact that McHugh did not hesitate to make wild claims of witness tampering without having produced the name of a single witness shows to what extent she will go to in order to achieve her own personal vindication. McHugh has long abandoned the role of a prosecutor, in the manner and ways that our criminal justice system describes and that is a violation of Dr. Akula's due process rights.

Based on the foregoing, it is abundantly clear that McHugh will make any lie and make any false claim in order to invoke criminal proceedings which is a textbook basis for prosecutorial disqualification.

B. McHugh Illegally Orchestrated the Removal of Dr. Akula's Personal Notes Through the Use of a "Mole" After the Filing of Indictment

Just like how McHugh orchestrated the removal of PAA's Press Release from Canon Hospice, she also orchestrated the removal of Dr. Akula's handwritten notes on a yellow pad which was then delivered to McHugh, and then inadvertently

produced as part of discovery in the government's recent disclosure provided to Dr. Akula on March 7, 2023. *See Exhibit 2.*

Dr. Akula found these handwritten notes when he opened one of the folders in the thumb drive that was provided by Stephen Shapiro. As these handwritten notes refer to a "detention hearing", the time frame of when these notes were generated was from a time that could have only been after the filing of the indictment. *See Exhibit 2.*

While Dr. Akula has no knowledge of which employee provided stole these handwritten notes from his office and provided them to McHugh, the evidence is irrefutable and undeniable that McHugh has been orchestrating the illegal removal of documents from Canon Hospice after the filing of the indictment without the authority of a search warrant.

Even assuming for argument sake, that some disgruntled employee is stealing this property that belongs to Dr. Akula, McHugh is duty bound not only not to accept it but also not to use these stolen documents for any purpose whatsoever.

As Dr. Akula has not yet completed review of the 375,000 plus documents on the thumb drive that he was provided, there is no telling what else McHugh has gotten her hands on illegally and in violation of Dr. Akula's due process and in violation of ABA standards. The fact that these handwritten notes do not have a bates stamped reinforces the inadvertent disclosure just as with the Press Release that has

never been produced in discovery even though it has undeniably been in McHugh's possession through whoever her "mole" is at Canon Hospice.

McHugh's conduct of illegally acquiring documents from Dr. Akula's office and Canon Hospice by having a mole to remove steal these documents is outrageous and warrants her disqualification, with the additional step of a referral to both State Bar and the Department of Justice so that the necessary steps to strip McHugh of her prosecutorial powers can be considered by these regulatory agencies.

C. McHugh Intentionally and Blanketly Mischaracterized All Witness Statements as *Jencks* Material

McHugh has also illegally withheld all witness statements in connection with the allegations in the indictment since the filing of this indictment. For the first time, in November of 2022, McHugh revealed to Cassidy that she was withholding these witness statements because of her speculation that if witness names were revealed to defense, that Dr. Akula would file civil suits against these individuals. This is yet another outrageous display of prosecutorial misconduct. "Prosecutors may not argue that a defendant should be punished for exercising his constitutional rights". *Chapman v. California*, 386 U.S. 18, 20-21 (1967).

After November 2022, McHugh repeated these same reasons for not disclosing the names of all government's witnesses and then finally in the most disingenuous way, McHugh advanced the argument that she was not revealing

witnesses until five days before the trial because in her mind, these witnesses all fall under the *Jencks* Act. *See Exhibit 10.*

"Prosecutorial misconduct in disingenuously denying obligation to tender impeachment materials and proceeding with bank fraud prosecution based on questionable evidence, violated defendants' right to fair trial." *United States v. Ramming*, 915 F. Supp. 854 (S.D. Tex. 1996). In the instant case, the misconduct is more pronounced because there is blanket withholding of all witness statements in a case where the indictment is premised on "she said-he said" type allegations and the prosecutor, McHugh, is disingenuously mischaracterizing all witnesses in the case as falling under the *Jencks* Act in an attempt to justify the unjustifiable of not turning in witness statements until five days before the trial. There is no way that McHugh cannot distinguish the *Jencks* Act and its progeny from the instant health care fraud case where there is no national security at issue and where witnesses are not facing any physical or non-physical harm. McHugh cannot act as judge, prosecutor and executioner by speculating first that Dr. Akula will file civil suits against government witnesses upon disclosure of the identity of those witnesses, and then even if Dr. Akula did file suit, McHugh cannot be the judge that Dr. Akula's exercise of his civil rights to sue individuals is an act amounting to "harm" to the government witnesses. Filing civil lawsuits is a constitutional right. McHugh cannot stand in the

middle of these rights because she has insufficient evidence with weak witnesses who will apparently fall apart at the filing of a civil suit.

As such, McHugh's conduct of withholding blanketly all witnesses from Dr. Akula while representing to this Court that _all_ discovery was disclosed is disingenuous and false. The subsequent "CYA" efforts to justify her intentional nondisclosure that these witnesses fall under *Jencks* category is prosecutorial misconduct warranting McHugh's disqualification.

WHEREFORE, Defendant, SHIVA AKULA, respectfully requests that this Court issue an Order Disqualifying AUSA Kathryn McHugh, prohibiting her from being involved further in any investigation or prosecution in any manner connected to Dr. Akula, and grant any other relief as the Court may deem just and proper.

Shiva Akula, MD
1750 St. Charles Ave. 7th Floor #D
New Orleans, LA 70130
Tel: (504) 669-3825
Email: akulashiva12@gmail.com

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was sent to counsel of record via email on this 23rd day of March, 2023.

Shiva Akula, MD

EXHIBIT 1

PHYSICIANS AGAINST LEGAL ABUSE

In the Absence of Accountability, There Can be No Reliability

PRESS RELEASE

August 9, 2021

IN THE MATTER OF US V. DR. SHIVA AKULA

On August 5, 2021, the Government, through Assistant United States Attorney, Kathryn McHugh filed an indictment against Dr. Shiva Akula, a physician who has been in the New Orleans area practicing medicine for over 30 years.

Ms. McHugh, who does not currently show that she holds a Louisiana State Bar license, relied on a disgruntled former employee of Dr. Akula, Kelly Anderson, to make false accusations against Dr. Akula.

The employment rap sheet for Kelly Anderson is a mile long with threats and extortion while she was an employee at Canon Hospice. When Ms. Anderson did not get the raise that she wanted from Dr. Akula, she turned to the government to get that money that she was looking for by turning herself into a so-called "whistleblower". Ms. Anderson is not a whistleblower. She is a disgruntled former employee who just happened to meet an unseasoned prosecutor who did not investigate Ms. Anderson's false claims. Ms. McHugh, the Assistant United States Attorney, who has just recently completed law school, is an inexperienced prosecutor who does not understand Medicare's billing practices.

We are somewhat taken back by the Government's sloppy work demonstrated through the indictment filed by Ms. McHugh. We are not used to the Government filing such charges without a thorough and verified investigation.

PHYSICIANS AGAINST LEGAL ABUSE

In the Absence of Accountability, There Can be No Reliability

Dr. Akula is absolutely innocent of every one of the charges in the indictment. It is a disgrace that the Government does not understand the gravity of allowing unseasoned and inexperienced prosecutors like Ms. McHugh to file such factually false indictments against a reputable physician like Dr. Akula, which inevitably will result in permanent damage to Dr. Akula's reputation in the community.

As a physician, Dr. Akula's services to his community are unmatched. Before, through and after Katrina, there are only a handful of physicians like Dr. Akula who remained on the front lines of providing stellar medical care under the most challenged circumstances to the community.

We will not allow this indictment to tarnish Dr. Akula's impeccable reputation.

As an organization which fights against frivolous prosecution and persecution of physicians, we will prove that the Government came out swinging in Dr. Akula's case without conducting a proper investigation and armed only with the words of a disgruntled former employee, Kelly Anderson, who was just looking for money. Further, we will show that Mark Tobey, who is Kelly Anderson's fiancé and her lawyer in the case where Kelly Anderson is looking to cash in from the Government, are the bad actors that the Government is relying on.

We stand resolute against this pernicious design between the Government and bad actors like Kelly Anderson and Mark Tobey to ruin a reputable physician like Dr. Akula who has dedicated his entire adult life to serve his community.

PHYSICIANS AGAINST LEGAL ABUSE

In the Absence of Accountability, There Can be No Reliability

For all inquiries and questions regarding this matter, please contact Physicians Against Legal Abuse at 727-534-5044.

Physicians Against Legal Abuse
110 Pinellas Way North
St. Petersburg, Florida 33710
Tel: 727534-5044 Fax: 727914-7732
www.physiciansagainstabuse.com

EXHIBIT 2

DETENTION HEARING

RELATIVE LIED

DETENTION

KATIE → LIED

MAJISTRATE

KATIE →

CORRECTED 1/E

LOUIS - STILL WORKING

ANNETTE USED TO WORK IN MEDICAL RECORDS

PROBABLY TESTIFY HOW MEDICAL RECORDS OBTAINED TO ADDRESS ADR
Additional Documents Requested

SEVERAL ADR; WERE ADDRESSED FOR YEARS
MOST OF THEM GOT PAID

CURRENTLY AN APPEAL IS ON
DR BLACK IS WORKING
FOR BATCH OF CLAIMS

EXHIBIT 3

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

CANON HEALTHCARE HOSPICE, LLC	*	**CIVIL ACTION NO.: 10-3450 c/w 11-2066, and 12-2120**
Plaintiff,	*	
v.	*	**SECTION: "N" (2)**
KATHLEEN SEBELIUS, SECRETARY OF THE U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES,	*	
Defendant.	*	

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STIPULATION OF SETTLEMENT

This Stipulation of Settlement is made between Plaintiff Canon Healthcare Hospice, LLC ("Canon") and Defendant Kathleen Sebelius, Secretary of Health and Human Services ("the Secretary") (collectively, "the Parties").

WHEREAS, the Secretary administers the Medicare program through the Centers for Medicare & Medicaid Services ("CMS");

WHEREAS, Canon has brought the three consolidated lawsuits listed above challenging the Secretary's final decisions regarding Medicare overpayments received by Canon for hospice services for the 2003 cap year (ending October 31, 2003), 2004 cap year (ending October 31, 2004), 2005 cap year (ending October 31, 2005), and 2006 cap year (ending October 31, 2006);

WHEREAS, Canon has repaid in full the Medicare overpayments at issue for the 2003, 2004, and 2005 cap years and has repaid in large part the Medicare overpayment at issue for the 2006 cap year;

WHEREAS, the Secretary has filed Answers to each of Plaintiff's Complaints, denying any liability as to Plaintiff's allegations in each Complaint and in each civil action; and

WHEREAS, the Parties wish to resolve the disputes that are the subject of Plaintiff's Complaints in these civil actions without the expense and burden of further litigation;

NOW THEREFORE, Canon and the Secretary, intending to be legally bound, hereby enter into the following Stipulation of Settlement ("Stipulation"):

1. The Secretary shall pay Canon the sum of $704,881.58 ("the payment") in full and final satisfaction of Canon's claims asserted in this litigation concerning the Secretary's calculation of Canon's hospice caps for the 2003, 2004, 2005, and 2006 cap years; in making the payment, the Secretary may, in accordance with applicable rules and requirements, offset any outstanding Medicare debt owed by Canon.

2. In consideration of the payment described in paragraph 1, Canon hereby releases the Secretary and her agents from all claims asserted in this litigation arising from or on account of the Secretary's calculation of Canon's hospice caps for the 2003, 2004, 2005, and 2006 cap years.

3. The Parties agree that the Secretary shall make the payment to Canon within sixty (60) days of the execution of this Stipulation.

4. This Stipulation shall constitute a full accord and satisfaction of all claims arising from and pertaining to any of Plaintiff's allegations in any Complaint filed in the above-captioned cases and in this civil action, including any claims for reimbursement, interest, attorney fees, and costs. Each Party to the Stipulation shall bear all of its own costs and attorney fees for all aspects of this lawsuit and for all aspects of the administrative proceedings that pre-dated this lawsuit.

5. Canon, for itself, its employees, officers, agents, and assigns, hereby releases and forever discharges HHS and its employees, officers, agents, agencies, subsidiaries, divisions, departments, officers, employees, legal representatives, and assigns, from any and all claims,

demands, obligations, causes of action, damages, costs, expenses and compensation of any nature whatsoever, both legal and equitable, and whether for compensatory or punitive damages, which Canon now has against HHS arising from and pertaining to the allegations made by Canon in the Complaints in this civil action, including the claims based upon the Provider Reimbursement Review Board and CMS Administrator Decisions at issue herein. It is understood and agreed that Canon will not pursue, either at present or in the future, any legal, equitable, administrative or any other remedy whatsoever respecting the allegations made by Canon in this civil action.

6. This Stipulation shall not constitute an admission of liability or default on the part of the Secretary, her agents, servants, or employees, and is entered into for the sole purpose of settling disputed claims and avoiding the expenses and risks of further litigation.

7. This Stipulation shall not be used as evidence or otherwise in any pending or future civil or administrative action against or involving the Secretary, her agents, servants, or employees, except as may be necessary to establish or clarify the Parties' respective rights and obligations under this Stipulation.

8. This Stipulation shall be binding upon and inure to the benefit of the Parties hereto and their respective predecessors, successors, agents, and assigns.

9. The Parties hereby declare that they have voluntarily entered into this Stipulation in good faith, have read and fully understand the entire Stipulation, and consider it to be a fair and reasonable settlement agreement. The Parties hereby declare further that the undersigned counsel are fully authorized to enter into this Stipulation on behalf of their respective clients.

10. Wherever possible, each term, covenant and condition of this Agreement shall be interpreted in such manner as to be valid under applicable law, but if any provision shall be

invalid, such provision shall be ineffective but shall not invalidate the remainder of the terms, covenants or conditions of this Agreement.

11. The terms of this Stipulation shall constitute the entire settlement agreement of the Parties regarding both the final disposition of the above-captioned civil action and the Parties' respective rights and obligations under this Stipulation, and any prior oral or written statement, representation, agreement, or understanding that is not expressly contained herein, shall have no force or effect whatsoever. This Stipulation, including this Paragraph 11, may not be changed, modified, or terminated orally, but only by a further written agreement that is signed by a duly authorized representative of each Party after the effective date of this Stipulation. Any waiver of the provisions of this Stipulation must be in writing and signed by a duly authorized representative of the Party against whom enforcement of such waiver is sought. One or more waivers of any provision of this Stipulation shall not be construed as a waiver of a subsequent breach or of any other covenant, condition, or provision of the Stipulation. This Stipulation shall be deemed to have been drafted jointly by the Plaintiff and the Defendant, and no alleged ambiguity shall be construed against any Party as the drafter.

12. The Parties may execute this Stipulation in counterparts, each of which constitutes an original and all of which constitute one and the same Stipulation. Facsimiles of signatures shall constitute acceptable, binding signatures for purposes of this Stipulation.

13. The Parties agree to file, pursuant to Fed. R. Civ. P. 41(a)(1)(A)(ii), a Stipulation of Dismissal with Prejudice, which will constitute a voluntary dismissal of this action with prejudice, except that either Party may bring an action in a court of competent jurisdiction for the sole purpose of enforcing the terms of this Stipulation.

DATED this ____ day of ________,2013

By: ________________________________

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jlohnson@lilesparker.com
Attorney for Plaintiff, Canon Healthcare Hospice, LLC

DANA J. BOENTE
UNITED STATES ATTORNEY

DATED this ____ day of ________,2013

By: ________________________________

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MELISSA D. HART
Attorney
CMS Division
United States Department of Health and Human Services

EXHIBIT 4

PHYSICIANS AGAINST ABUSE

In the Absence of Accountability, There is No Reliability

Email: cblack@physiciansagainstabuse.com

July 29, 2021

Via Overnight Fedex Delivery

Kathryn McHugh
Assistant US Attorney
Eastern District of Louisiana
The Poydras Center
650 Poydras Street, Suite 1600
New Orleans, Louisiana 70130

Dear Ms. McHugh,

We are contacting you on behalf of Dr. Shiva Akula.

If I may, let me first explain our role and purpose with respect to Dr. Akula.

We are an organization which was formed by physicians in large part due to increasing number of criminal prosecutions attempting to put the burden of the entire opioid crisis on licensed health care practitioners. We formed our organization somewhat akin to a specialty defense insurance company providing services to health care professionals that range from legal representation in criminal and civil cases to assisting them with administrative/licensure proceedings.

Sometime ago, recognizing that Mr. William Barzee was providing ineffective assistance to Dr. Akula, Dr. Akula contacted us for assistance in the matter involving your investigation of Canon Hospice.

We have reviewed substantial information regarding employees, provider services, contractual agreements as well as the organizational structure for billing services at Canon Hospice.

It appears that you do not have the accurate picture of the organizational structure of Canon Hospice and that your resources are highly faulty and unreliable in pursuing Dr. Akula. We are actually dumbfounded that you have been pursuing Dr. Akula regarding any billing practices at Canon Hospice. We attribute this in part to Mr. Barzee who appears not to have explained and relayed to you pertinent information regarding the billing practices at Canon Hospice.

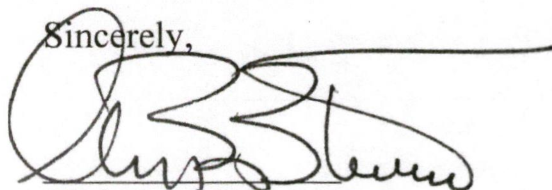
Let me also reassure you that based on our resources, we take only a handful of selected cases. However, for those selected cases that we take, we essentially leave no stone unturned once we conclude that the doctor involved is innocent. We wholeheartedly believe that Dr. Akula is innocent and we are prepared to prove it.

However, as we do in almost every one of our cases, before we let you go down further into the rabbit hole, we would like you to give us the opportunity to explain what has caused your faulty conclusions. We are confident that you were provided substantial amount of misinformation by those who have their own personal agenda. We are certain that you lack the information we have acquired regarding how you were misled by a number of actors.

Dr. Akula has already terminated Mr. Barzee's services. We are now fully on board and would like to set up a Zoom meeting with you and our staff early next week at your convenience so that we may all prevent a senseless prosecution that is only bound to uncover a list of bad actors, and on that list, Dr. Akula is not one of them.

Please let me know if and when you are available for a Zoom meeting with us and I will have my assistant set it up and send you the link.

Sincerely,



Christina Black, MD
Executive Director

cc: Dr. Shiva Akula

110 Pinellas Way North St. Petersburg, Florida 33710
Tel: 813-382-1999 Fax: 727-914-7732
www.physiciansagainstabuse.com

EXHIBIT 5

THE UNITED STATES ATTORNEY'S OFFICE
EASTERN DISTRICT of LOUISIANA

U.S. Attorneys » Eastern District of Louisiana » News

Department of Justice

U.S. Attorney's Office

Eastern District of Louisiana

FOR IMMEDIATE RELEASE

Friday, August 6, 2021

Hospice Facility Owner Indicted for Health Care Fraud

NEW ORLEANS – U.S. Attorney Duane A. Evans announced that **SHIVA AKULA ("AKULA")**, age 65, of New Orleans, Louisiana was charged by a grand jury on August 5, 2021, in a 23-count Indictment for Health Care Fraud.

AKULA owned and oversaw the day-to-day operations of Canon Healthcare, a hospice facility.

According to the Indictment, **AKULA** unlawfully enriched himself by submitting and causing the submission of false and fraudulent claims to health care benefit programs, including Medicare. **AKULA** instructed Canon employees to improperly bill for General Inpatient ("GIP") services to maximize reimbursement from health care benefit programs, knowing that those services were not medically necessary.

Canon routinely billed physician services with Common Procedural Terminology ("CPT") Code 99233 for beneficiaries who were receiving GIP services, in addition to the daily per diem rate. CPT Code 99233 is an evaluation and management code, which requires two of the three following components: (1) detailed interval history; (2) detailed examination; or (3) medical decision making of a high complexity. Usually, the beneficiary is unstable or has developed a significant complication or a significant new problem.

Canon routinely billed for physician services for CPT Code 99236 for beneficiaries who were admitted into GIP and remained on GIP for more than 24 hours. CPT Code 99236 should only be billed when a patient is admitted to inpatient hospital care for a minimum of 8 hours, but less than 24 hours and discharged on the same calendar day. In addition, when billing for CPT Code 99236, the physician shall identify that he or she was physically present and that he or she performed the initial hospital care service. The physician shall personally document the admission and discharge notes and include the number of hours the beneficiary remained in inpatient hospital status.

From on or about January 1, 2013, to on or about August 25, 2017, Canon submitted approximately 1,053 claims for CPT code 99236 and was paid approximately $223,601 by Medicare. During that same time period, Canon submitted approximately $2,281,251. These physician services reflected in CPT Codes 99236 and 99233 should not have been billed as a separate line item in addition to the GIP services because they were included within the daily per diem rate that Medicare paid for the GIP services.

From on or about January 1, 2013, through on or about August 25, 2017, Canon submitted claims to Medicare for approximately 1,949 home visits using CPT code 99350 that were purported to have been

performed by a doctor, when a doctor did not perform home visits. As a result of these 1,949 home visits, Medicare reimbursed Canon approximated $316,384.

From January 2013 to December 2019, Canon billed Medicare approximately $62,833,346.28 and was paid approximately $47,106,838.94.

If convicted, **AKULA** faces a maximum of 10 years imprisonment, a fine of not more than $250,000, supervised release of up to 3 years, and a mandatory special assessment of $100 as to each count.

U.S. Attorney Evans reiterated that the Indictment is merely a charge and that the guilt of the defendant must be proven beyond a reasonable doubt.

The case was investigated by the Federal Bureau of Investigation, the Department of Health and Human Services Office of Inspector General, and the Louisiana Department of Justice, Medicaid Fraud Control Unit. The case is being prosecuted by Assistant U.S. Attorney Kathryn McHugh.

* * *

Attachment(s):
Download akula_shiva_revindictment_redacted.pdf

Topic(s):
Health Care Fraud

Component(s):
Federal Bureau of Investigation (FBI)
USAO - Louisiana, Eastern

Updated August 6, 2021

EXHIBIT 6

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF LOUISIANA

UNITED STATES OF AMERICA	**	CRIMINAL NO: 21-98
	**	SECTION: SECT 1 MAG.4
VS	**	VIOLATION: 18 U.S.C § 1347
SHIVA AKULA,		HONORABLE JUDGE AFRICK

AFFIDAVIT OF CHRISTINA BLACK, MD

1. My name is Christina Paylan Black. I am over the age of 18 and make the statements in this affidavit based on my own personal knowledge and if called upon, I will testify to the statements made in this affidavit.

2. I am a physician and a Board Member of a physician advocacy group known as Physicians Against Abuse. Physicians Against Abuse was founded to address the astronomical convictions against physicians on the standard that is akin to a medical malpractice suits where one physician's differing opinion on treatment of a patient results in the accused physician losing his or her entire professional life and freedom. Physicians Against Abuse was at the forefront of the issues presented to the United States Supreme Court in *Ruan v. United States* 213 L. Ed. 2d 706, 142 S. Ct. 2370 (2022)

3. Physicians Against Abuse, ("PAA") provides qualified and tailored experts as well as thorough medical investigation in cases involving allegations of health care and/or prescription fraud. PAA's sole objective is to ensure that what is portrayed in the courtroom to a jury and judge is consistent with the realities of the practice of medicine and that no physician faces prosecution or conviction for practicing medicine without a *mens rea* as articulated in the *Ruan* decision by the United States Supreme Court.

4. In July of 2021, Dr. Shiva Akula contacted Physicians Against Abuse for assistance in a criminal investigation that had been ongoing since 2018.

5. After reviewing preliminary documents, Board members of PAA concluded that the it could provide assistance to Dr. Akula. In furtherance of this decision, I wrote a letter to Ms. Kathryn McHugh asking her to meet with us prior to any decision to file an indictment against Dr. Akula.

6. Ms. McHugh ignored my letter and within days filed an indictment against Dr. Akula on August 5, 2021.

7. Immediately thereafter, the Department of Justice issued a press release that was significantly derogatory to Dr. Akula.

8. PAA then prepared its own Press Release, as it does in every other physician case, that was drafted for release which contained information that was critical of Ms. McHugh based upon the documents PAA had reviewed and the

disjointed descriptions of CPT codes and allegations of crimes involving health care fraud in the indictment. PAA's Press Release was drafted and sent to a designated employee at Canon Hospice on or about August 6, 2021.

9. Less than a week after this Press Release, on August 12, 2021, Ms. McHugh issued grand jury subpoenas directed to myself and PAA. She further had a United States Marshall serve these subpoenas including the subpoena directed at PAA, to be served on me, at my beach house in Treasure Island, Florida.

10. Ms. McHugh claimed that because the Press Release was critical of her, that somehow myself or PAA was engaging in witness intimidation and she advanced this false premise to our general counsel, Sebastian Ohanian.

11. Ms. McHugh did not have a scintilla of evidence of witness intimidation. All Ms. McHugh had was that PAA was making critical statements about her which apparently got in the hands of an individual who then provided the Press Release to Ms. McHugh.

12. In her conversations with PAA's lawyer, Mr. Ohanian, Ms. McHugh also continued to make statements to intimidate me and threaten me with criminal prosecution solely based on the fact that a Press Release was drafted by PAA that was critical of Ms. McHugh.

13. Neither PAA nor myself had the time to speak to any witnesses from August 6 through August 12 when we were served with grand jury subpoenas

under the pretense that there was witness tampering. Moreover, we had not received any witness information from the government during this one week time from the time that the indictment was filed to the time that I was served with grand jury subpoenas for the purpose of building a case of witness tampering. The only event that preceded the grand jury subpoenas was the Press Release drafted by PAA that was highly critical of Ms. McHugh and I perceived the grand jury subpoenas as Ms. McHugh's retaliation against myself and PAA by service of grand jury subpoenas that were clearly predicated on the false premise of a witness tampering.

14. I personally spoke to only one individual and that was the daughter of Raj Biyyam whom Ms. McHugh, during the first appearing hearing, represented to Magistrate Judge as being a family member of Dr. Akula who had purportedly fled the country. When I talked to the daughter, I learned that Mr. Biyyam had been bed bound due to an illness and was not in a position to leave his house, yet alone the country at any time as Ms. McHugh represented to the Magistrate Judge during the first appearance hearing.

15. Ms. McHugh's obsession with me grew when she overtly engaged in ex parte contact with Judge Roby in advance of a hearing on a motion for protective order where Ms. McHugh made misrepresentations about me to Judge Roby and wanted Judge Roby to know "everything about my background" so

Judge Roby does not allow either myself or PAA to have access to Dr. Akula's discovery.

16. In every way, Ms. McHugh worked to eliminate PAA and myself from Dr. Akula's defense.

17. It was not until Mr. Bernard Cassidy came on board and told us that he absolutely wanted PAA and myself on board as valuable resources in preparation of the defense for Dr. Akula. Much to Ms. McHugh's chagrin, PAA and myself were then on board.

18. Sometime in late November of 2022, PAA learned that Ms, McHugh had made the decision not to disclose any witness statement to Dr. Akula. The basis was her belief that Dr. Akula would file civil suits against these witnesses.

19. This angered Dr. Akula tremendously and he demanded that something be done about it. Nothing was done by Mr. Cassidy.

20. We never received any witness statements from Ms. McHugh.

21. Then, in a completely surprise and unexpected move, one day we received an email from Dr. Akula in which he told us that he had delivered a letter to Judge Africk that requested Judge Africk's financial disclosures. We immediately notified Dr. Akula about the absurdity of his request. PAA also specifically relayed to Dr. Akula that this information is available to the public and that the Judge was not required to disclose this information especially absent

evidence of some kind of actual or appearance of conflict. Dr. Akula relayed to us that he was extremely frustrated with Mr. Cassidy's lack of pursuing discovery and obtaining of witness statements and that he believed that Mr. Cassidy was not acting in Dr. Akula's best interest.

22. We offered to set up interviews with other counsel so Dr. Akula could hire other counsel when we were then, in yet another surprising move, notified by Dr. Akula that he had made the decision to represent himself.

23. Because PAA's bylaws do not allow assistance to physicians who are not represented by counsel, PAA then notified Dr. Akula of its decision to withdraw from his case which included investigative and defense assistance in his criminal case and withdrawal from all of his administrative cases.

24. After PAA's withdrawal from Dr. Akula's case, I received a phone call from Dr. Akula that he needed an affidavit from me regarding the chronology of events which occurred during PAA's involvement of his case going back to August 2021 because he was filing a motion to disqualify Ms. McHugh.

25. As such, I wrote this affidavit in response to Dr. Akula's request. I have refused to turn over the grand jury subpoenas that were issued to me to Dr. Akula because I have not been convinced by any legal advice or case law that I read that these subpoenas are not subject to the secrecy clause. However, because

these grand jury subpoenas are directly relevant to Dr. Akula's motion, I will provide these separately by mail to this Court.

26. I declare under penalty of perjury that the statements I make here are true and correct.

Dated: March 22, 2023

Christina Black, MD

EXHIBIT 7

MINUTE ENTRY
ROBY, M.J.
January 26, 2022

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

UNITED STATES OF AMERICA	**CRIMINAL ACTION**
VERSUS	**NO: 21-CR-98**
SHIVA AKULA	**SECTION: "I" (4)**

JUDGE KAREN WELLS ROBY, PRESIDING

LAW CLERK: Jayde Encalade
COURT REPORTER/RECORDER: Alexis Vice

Appearances: **Kathryn McHugh** for the United States of America
Rachel Conner for Defendant.

Minute Entry and Amended Order

Before the Court is a **Motion for Protective Order Governing the Use of Protected Material (R. Doc. #51)** filed by the Government seeking an order prohibiting the release of confidential and sensitive information contained in the documents produced during discovery. The motion is opposed. R. Doc. #60. The United States also provided a reply to Defendant's opposition. R. Doc. #61. The motion was heard by oral argument via video teleconference on January 19, 2022. Counsel participated in a status conference via video teleconference with the Court on January 26, 2022.

I. Background

On August 5, 2021, Defendant, Dr. Shiva Akula ("Dr. Akula") was charged by indictment with twenty-three (23) counts of health care fraud in connection with his ownership and operation of Canon Healthcare ("Canon"). Dr. Akula is an infectious disease specialist in

the New Orleans area. R. Doc. 60, p. 1. In addition to his private practice, Dr. Akula owned and operated Canon, a nonprofit hospice care facility with three locations in Louisiana. *Id.*

During Canon's operations, claims were submitted to Medicare for reimbursement. To receive Medicare funds, providers, their authorized agents, employees, and contractors are required to abide by the provisions and regulations promulgated under the Social Security Act as well as the policies, procedures, rules, and regulations issued by the Centers for Medicare and Medicaid Services. R. Doc. 1, p. at 4. It is alleged that from January 2013 to December 2019, Dr. Akula, through Canon, violated these policies and regulations by improperly billing Medicare $62,833,346.28, resulting in Cannon being paid approximately $47,106,838.94 in reimbursements.

It is first alleged that Dr. Akula improperly treated and billed patients in hospice care. Medicare beneficiaries are eligible for hospice care when they are certified as being terminally ill. *Id.* p. 3 at 9. Under Medicare there are three levels of care: continuous home care, general inpatient ("GIP"), and respite care. *Id.* p. 3 at 7. GIP is available for a hospice beneficiary who is in need of pain management or symptom management that cannot be provided in any other setting. *Id.* p. 3 at 8. When a Medicare beneficiary receives hospice care the medical provider is paid a per diem rate based on the number of days and level care. *Id.* p. 6 at 22. The per diem includes payment for all services directly provided or arranged by the hospice care provider. *Id.*

In the indictment, it is alleged that Akula instructed his employees to improperly admit patients and automatically billed for GIP services. *Id.* at p. 8. It is further alleged that he instructed Canon employees to improperly bill for GIP services to maximize reimbursements, while knowing that the services being billed for were not medically necessary. *Id.*

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Each year the American Medical Association ("AMA") publishes Common Procedural Terminology (CPT) codes that are used for reporting medical services and procedures performed by medical providers. *Id.* p. 2 at 5. These codes were used by the employees at Canon when submitting reimbursements to Medicare. It is alleged that Dr. Akula violated CPT code 99233, CPT code 99236, and CPT code 99350. *Id.* at p. 8. Regarding CPT code 99233 and CPT code 99236, it alleged that Dr. Akula engaged in double billing.

CPT 99233 is a code designated for subsequent hospital care for an unstable patient with significant or new complication or problems. It requires at least two of the following components to be completed: (1) detailed interval history; (2) detailed examination; and/or (3) medical decision making of a high complexity. *Id.* p. 7 at 25. The indictment alleges that Canon routinely billed for physician services using this code when the beneficiary was receiving GIP services. *Id.* at p. 8. Since the patient was receiving GIP services, the Government alleges that it was improper for Canon to also bill separately for individual services using CPT code 99233. The Government alleges that from approximately January 1, 2013 to August 25, 2017 Canon submitted 23,000 claims using this code and was paid approximately $2,281,251 in reimbursements. *Id.* at p. 8.

CPT code 99236 is billed when a patient is admitted to in-patient care for a minimum of 8 hours but less than 24 hours. *Id.* p. 7 at 26. When billing using the code, it is required that a physician be present and perform the initial hospice care service. *Id.* The physician is also required to personally document admission and discharges notes and include the number of hours the patient was in inpatient status. *Id.* The indictment alleges that Cannon routinely billed for physician services using CPT code 99236 while patients were admitted for GIP hospice services. *Id.* at p. 8. Again, the Government alleges that Canon should not have billed separately

using this code while also billing for the GIP services. As a result, the Government alleges that Cannon submitted approximately 1,053 claims using this code and was paid approximately $223,601 by Medicare. *Id.*

CPT Code 99350 is used to bill for home visits for the evaluation and management of established beneficiaries who present problems of moderate to high severity which require immediate physician assistance. *Id.* p. 7 at 27. The code requires a physician to be present at the home visit in order to seek reimbursement using this code. *Id.* It is alleged in the indictment that Cannon purported that home visits were performed by a doctor when a doctor did not perform the visits. *Id.* at p. 8. As a result of these home visits, it is alleged that Medicare reimbursed Canon approximately $316, 384. *Id.*

II. <u>Non-Lawyer Advocacy Group -Physicians Against Abuse</u>

Dr. Akula hired Physicians Against Abuse ("PAA"), a physician's advocacy group, to assist him with defending the case. However, this fact was not disclosed to the Court at the original discovery hearing in this case in January 29, 2022. According to its website, PAA is a non-lawyer advocacy group that serves as conduit for the retention of lawyers and experts, they also "dive into the evidence and follow every lead to prove beyond a shadow of doubt the lack of merit in the case filed". *See* PAA website[1].

PAA retained Rachel Conner ("Ms. Conner"), an attorney licensed to practice in this Court, to represent Dr. Akula in this case. By virtue of their relationship with Ms. Conner and Dr. Akula, Dr. Christina Black ("Dr. Black") and Sebastian Ohanian ("Mr. Ohanian") believe they are entitled to access the evidence in the case. Ms. Conner, counsel for Dr. Akula, acknowledged that she represents him, while still advocating to permit Dr. Black and Mr.

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[1] Physicians Against Abuse Webpage, http://physiciansagainstabuse.com/ (last visited January 26, 2022)

Ohanian, the ascribed consultants, to gain access to the case evidence for the purpose of aiding in defending Dr. Akula. Ms. Conner also requested an allowance for the evidence in this case to be used in administrative proceeding for Dr. Akula. But, when requested by the Court, Ms. Conner failed to present information regarding the nature of those administrative matters. Ms. Conner also originally failed to disclose that she was hired by PAA to serve as counsel for Dr. Akula.

III. The Motion

The Government opposes the release of the discovery produced in this case to PAA. The government, represented by AUSA Kathryn McHugh ("AUSA McHugh"), generally argued that the information should not be produced specifically to Dr. Black, a PAA board member. AUSA McHugh argued that as a consultant hired by the defendant, Dr. Akula, and not his counsel Ms. Conner, Dr. Black and Mr. Ohanian should not have access to the discovery. AUSA McHugh further represented that Dr. Black was previously involved in the issuance of an incendiary press release and that members of Dr. Akula's trial team were using information related to the investigation to intimidate current and potential witnesses. R. Doc 61-2, p. 2.

Given the lack of transparency by both counsels, and evaluating the evidence provided at the hearing of January 19, 2022, the Court concluded that Dr. Black and Mr. Sebastian Ohanian, who was represented to be a consultant and Dr. Black's attorney, were granted permission to sign the protective order and have access to the discovery. AUSA McHugh and Ms. Conner were ordered to submit an updated draft of the protective order consistent with the Court's ruling. The government requested seven days to conduct research to challenge the appropriateness of allowing Dr. Black and Mr. Ohanian access to the information in this Medicaid fraud case. The government was given until Wednesday, January 26, 2022 to file a

supplemental memorandum, but the Court maintained its position regarding the submission of a draft protective order by Friday, January 21, 2022.

Counsel complied with one portion of the order and submitted a draft protective order noting their dispute. A dispute remained about the language in the protective order, specifically regarding the appropriateness of allowing Dr. Black and Mr. Ohanian access to discovery. The Court had advised counsel during the original hearing that if a dispute remained upon submission of the protective order, they should contact chambers and request a status conference. As a result of the ongoing dispute and upon request of counsel, a status conference was noticed to the parties on Wednesday, January 26, 2022.

Interestingly the government, despite its request to conduct research and submit a memorandum supporting its position that Dr. Black and Mr. Ohanian should not be granted authority to access the documents via the protective order, failed to do so. Oddly, and without response by the Court, on Tuesday, January 24, 2022, AUSA McHugh telephoned chambers and suggested that the undersigned speak to another district judge in the Court regarding information about Dr. Black which the undersigned remains unaware of. Finding the behavior inappropriate, and a possible attempt to have an *ex parte* communication with the Court, or to influence the Court's decision, the undersigned ignored the call, took no action, and prepared for the status conference.

In preparation for the status conference the Court attempted to research the third-party consultants and discovered during this research that they were affiliated with PAA, a fact which was not disclosed by the defense or prosecution counsel. Prior to the conference, the Court received a phone call from Kelly with Ms. Conner's office about a scheduling conflict. The Court also received an email from Dr. Akula's counsel, Ms. Conner, regarding whether Dr.

Akula, Dr. Black, and Mr. Ohanian would be granted permission to attend the status conference. Upon responding to the scheduling conflict, a request was once again made for Dr. Black and Mr. Ohanian to attend the status conference. Finding the request, peculiar, the Court questioned why such a request was being made at this point given that Dr. Black and Mr. Ohanian appeared on at the zoom hearing the week prior. The Court then declined to respond to the request and left it to the discretion of counsel. During the call, Ms. Conner's office even inquired if her client was granted permission to attend and was advised by the Court's staff that the client is always permitted to attend.

The status conference occurred as scheduled but Dr. Akula did not participate. During the conference the Court proceeded to admonish both counsel about their lack of candor and reminded them that they both had a duty of candor to the Court. It was only at this point that Dr. Akula's counsel, Ms. Conner, disclosed that she was retained by PAA to represent Dr. Akula. She also continued to advocate for Dr. Black and Mr. Ohanian to have access to the documents because they were "consultants" in this Medicaid fraud case. Understanding the ethical implications regarding the presentation, and concerned about a non-lawyer, non-expert gaining access to evidence in the case, the Court rescinded its prior decision, and denied PAA, including Dr. Christina Black and Mr. Sebastian Ohanian, (lawyer not licensed to practice in the Eastern District of Louisiana) access to the evidence in this case.

After the status conference, Dr. Black, a PAA Board Member, forwarded a rather incendiary letter to this Court containing a threat of pursuing disciplinary action against the undersigned. The Court interprets Dr. Blacks communication as an attempt at intimidation in an effort to influence this Court's decision. Dr. Black's actions not only demonstrate her lack of

legal acumen, but further supports the Court's decision to preclude a non-expert consultant from accessing discovery information in this case.

Having detailed the events to the present, the Court will proceed with its analysis denying the non-lawyer advocacy group, their board member, and non-admitted attorney access to discovery in this case.

IV. **Standard of Review**

Federal Rule of Criminal Procedure 16 "requires the Government to produce, upon the defendant's request, any documents and data that are material to preparing the defense." Fed. R. Crim. P. 16(a)(1)(A)–(G)). Rule 16(d)(1) of the Federal Rules of Criminal Procedure provides, in pertinent part, that "[a]t any time the court may, for good cause, deny, restrict, or defer discovery or inspection, or grant other appropriate relief." Entering a protective order falls under this provision. The entry of a protective order under Rule 16(d)(1) is within the trial court's discretion.

[T]he trial court can and should, where appropriate, place a defendant and his counsel under enforceable orders against unwarranted disclosure of the materials which they may be entitled to inspect." *Alderman v. United States*, 394 U.S. 165, 185, 89 S. Ct. 961, 22 L.Ed.2d 176 (1969) (citing prior version of Fed. R. Crim. Pr. 16(d)); see also *Bittaker v. Woodford*, 331 F.3d 715, 726 (9th Cir.2003) ("The power of courts ... to delimit how parties may use information obtained through the court's power of compulsion is of long standing and well-accepted."). In doing so, the court should seek to ensure that disclosure of discovery materials to a defendant "involve[s] a minimum hazard to others." *Alderman,* 394 U.S. at 185, 89 S. Ct. 961 (1969). Additionally, a court must consider whether the imposition of the protective order would prejudice the defendant. *See*, e.g., *United States v. Davis*, 809 F.2d 1194, 1210 (6th

Cir.1987) (requiring the defendant to "demonstrate substantial prejudice" from "imposition of a Rule 16 protective order"). Finally, "[t]he good cause determination must also balance the public's interest in the information against the injuries that disclosure would cause." *United States v. Wecht*, 484 F.3d 194, 211 (3d Cir.2007) (citing *Pansy v. Borough of Stroudsburg*, 23 F.3d 772, 787–91 (3d Cir.1994)).

V. <u>Analysis</u>

This order in addition to addressing the Court's reasons for reversing its decision of last week will also address the ethical implications of counsel conduct.

First, the order regarding who gets access to discovery produced in this case is modified. Dr. Black is not a Medicaid expert retained to examine the evidence to assist Dr. Akula, instead she and Mr. Sebastian Ohanian (counsel for PAA, not Akula) are consultants that only serve as intermediaries between the client, counsel, and experts as such, there is no reason for either of them to have direct access to the discovery. The actual experts retained to evaluate the coding in this case and who are retained to provide an opinion as to whether the entries were appropriate and why they are appropriate, are certainly granted access to the discovery in this case. Further, they are required to sign the attachment to the protective order agreeing to be bound by the terms of this Court's order.

While the Court was willing to consider a modification of the order if presented with tangible evidence as to why the evidence provided in this case would assist Dr. Akula in administrative proceedings regarding his license or his relationship with health insurance providers, his counsel has failed to present any evidence of a need for such modification. Regarding the appropriateness of any limited modification, counsel may, upon motion, request consideration of the issue by this Court.

Regarding the behavior of both counsel in this case, first both counsels failed to inform the Court about the type of consultant Dr. Black and Sebastian Ohanian were. While Dr. Akula has the right to hire whoever he chooses in this case, consultants typically work in the background have no right to interfere with the Court's proceedings or to be involved in the evaluation of the discovery.

Regarding PAA's retention of Ms. Conner, Louisiana Rules of Ethics 1.8f ("Rule 1.8f") provides that a lawyer shall not accept compensation for representing a client from one other than the client unless:

1. The client gives informed consent, or the compensation is provided by contract with a third person such as an insurance contract or a prepaid legal services plan;
2. There is no interference with the lawyer's independence or professional judgment or with the client-lawyer relationship; and
3. Information relating to representation of a client is protected as required by Rule 1.6 which deals with confidentiality of client information.

Presumably, Dr. Akula gave informed consent and authorized PAA to compensate Ms. Conner. However, Ms. Conner disclosed that she was not only compensated by PAA, but she also was retained by PAA to represent Dr. Akula. Ms. Conner then proceeded to advocate for PAA by seeking to permission for PAA through Dr. Black and Mr. Ohanian to have access to the discovery which implicates the second prong Rue 1.8f. The second prong of Rule 1.8f requires that the person or entity who pays for the representation shall not interfere with the lawyer's independence.

It is this Court's opinion that Ms. Conner's independence may have been interfered with, as a trained lawyer Ms. Conner should know that a consultant does not review evidence, this is

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only done by retained experts for the purpose of either consultation or testimony that will aid the defendant. PAA, Dr Black, and Mr. Sebastian only marshal the people with the expertise to conduct the review, and do not serve in the expert role themselves. Moreover, the Court received two requests from Ms. Conner's office specifically requesting permission for Dr. Black and Mr. Ohanian to be present at a status conference. This was an unusual request and illustrates possible interference with Ms. Conner's independence because as she is likely aware of status conferences are generally conducted between counsel, the client, and the Court.

The third provision of Rule 1.8f is also implicated because communicating evidence to PAA, Dr. Black, and Mr. Sebastian could result in a compromise of the attorney client privilege. For example, assuming that Dr. Black would review the discovery and give advice to Ms. Conner and Dr. Akula, her advice and communications are not privileged. Furthermore, communication between Ms. Conner and Dr. Akula which he shares with Dr. Black may result in a waiver of privilege. To guard and to protect Dr. Akula's sacrosanct right of attorney client privilege it is important to limit the disclosure of discovery to counsel and the actual experts, and not allow access to a "consultant" whose job it is to marshal the actual players who will provide the service to the defendant.

The Court also admonished both counsels, AUSA Kathryn McHugh, and counsel for Dr. Akula, Rachel Conner, regarding their duty of candor to the Court which was clearly lacking in this case.

Under Rule 3.3 of the Louisiana Rules of Professional Conduct, which governs a lawyer's duty of candor toward the court, lawyers may not knowingly make a false statement of fact or law to the court or fail to correct a false statement of material fact or law that the lawyer previously made to the court. La. St. Bar Art. 16 RPC Rule 3.3(a)(1). This duty continues to the

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conclusion of the proceeding. La. St. Bar Art. 16 RPC Rule 3.3(c). In addition, under Rule 3.4, lawyers may not "knowingly disobey an obligation under the rules of [the court], except for an open refusal based on an assertion that no valid obligation exists." La. St. Bar Art. 16 RPC Rule 3.4(c).

As the Fifth Circuit has stated, a federal court may hold attorneys accountable to the state code of professional conduct. *In re: Deepwater Horizon*, 824 F.3d 571, 577 (5th Cir. 2016). Pursuant to its inherent authority, the Court may sanction an attorney for engaging in bad-faith conduct, which may include violations of the attorney's duty of candor to the Court. *See Deepwater Horizon*, 824 F.3d at 583, 586–87; *Sandifer v. Gusman*, 637 F. Appx 117, 121 (5th Cir. 2015); *U.S. ex rel. Holmes v. Northrop Grumman Corp.*, 642 F. Appx 373, 378–79 (5th Cir. 2016) (applying the American Bar Association's Model Rules of Professional Conduct).

Neither counsel upon questioning by the Court stated that Dr. Black and Mr. Ohanian were associated with Physician Against Abuse Organization. Conner generally represented that they were "consultants" but failed to specify the type of consultant. She also craftly alluded to PAA assisting Dr. Akula in administrative hearings, something that is consistent with their website.

Further, AUSA McHugh fairs no better than counsel for the defendant. McHugh also lacked candor by only disclosing that Dr. Black was involved in a press release leak and suggesting that there was an attempted to intimidate witnesses. AUSA McHugh clearly knew that the Court was being mislead and filed to correct the falsity.

Finally, and most concerning is AUSA McHugh's call to chambers suggesting the undersigned contact another judicial officer to obtain information regarding Dr. Black. ABA Model Rule 2.9 regarding *ex parte* communications provides: (A) that A judge shall not initiate,

permit, **or consider *ex parte* communications** or consider other communications made to the judge outside of the presence of the parties or their lawyers concerning a pending or impending matter except as follows:

(1) When circumstances require it, ex parte communication for scheduling, administrative, or emergency purposes, which does not address substantive matters, is permitted, provided:

(a) the judge reasonably believes that no party will gain a procedural, substantive, or tactical advantage as a result of the ex parte communication; and

(b) the judge makes provision promptly to notify all other parties of the substance of the ex parte communication and gives the parties an opportunity to respond.

It is this Court's opinion that AUSA McHugh's call was an improper attempt to influence the judgment of this Court. While the court did not contact the judicial officer, the behavior of counsel was unprofessional. This order shall serve as a warning to both counsel to perform in a manner consistent with the Rules of Professional Conduct and the Louisiana Rules of Ethics. Any further misconduct may result in discipline and a referral to the Court's ethics committee.

IV. Conclusion

Accordingly,

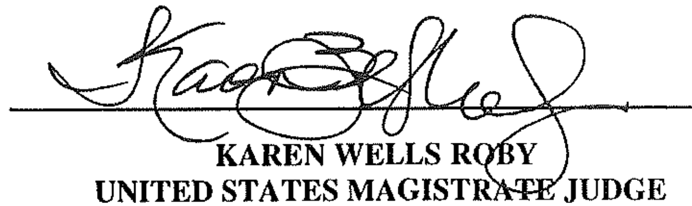
IT IS HEREBY ORDERED that the Court Amends' its previous order as follows:

Neither Physicians Against Abuse, Dr. Christina Black, nor Sebastian Ohanian shall be allowed to receive discovery in this case. This order however does not prohibit experts retained to assist Dr. Akula with his defense and who are retained for the purpose of providing

substantive assistance to be subject to the protective order and receive discovery as determined by Dr. Akula's trial attorney

IT IS FURTHER ORDERED that counsel comply with Rules of Professional Conduct and the Louisiana Rules of Ethics in all further proceedings in this matter.

New Orleans, Louisiana, this 28th day of January 2022.



KAREN WELLS ROBY
UNITED STATES MAGISTRATE JUDGE

MJSTAR 00:32

CLERK TO NOTIFY:
Mr. Duane Evans
Interim United States Attorney
Eastern District of Louisiana