UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA, *ex rel.* ROBERT BAUCHWITZ, M.D., PH.D. Plaintiff, v. WILLIAM K. HOLLOMAN, Ph.D., *et. al.*, Defendants	CIVIL ACTION No. 04-2892 (TJS) JURY TRIAL DEMANDED

AFFIDAVIT OF MISCONDUCT
Concerning Attorney
Marc S. Raspanti
and All Others Relevant

A. Background

Marc Raspanti was the lead attorney for two of the defendants in the *qui tam* case cited in the caption above. I was the relator and plaintiff. Of great concern to me, Mr. Raspanti had been the very first attorney I contacted in 2004 about representing me, as he held himself out as exclusively representing plaintiffs in *qui tam* cases. He took case information from me and then recommended my first attorney, whom he knew. She continued to communicate with him while the case was under seal, prior to the time the defendants were served with the complaint.

Yet in 2007, Raspanti entered his appearance for the defendants. Other attorneys who were consulting on the case recommended that we challenge the presence of Raspanti, for example as referenced in the following message from me to my attorneys on December 28, 2007:

> In addition to questions of judicial partiality, ***I remain very concerned that we have allowed Mr. Raspanti and his firm to remain involved in this case despite my having sent information to him when he considered taking it on my behalf***. It was Raspanti who then recommended Regina Poserina to me. … Overall, given the potentially conflicted connections, ***I think that Mr. Dong's recommendation to challenge the involvement of Raspanti's firm may have been wise***. Would it still be possible to do so?

Yet another attorney who reviewed the matter wrote:

> "Raspanti clearly took information from you that was confidential. You obviously had the belief that the information was confidential and privilege[d]. Raspanti ultimately referred your case to another attorney [Poserina] and later, possessing what was labeled and concluded to be confidential information, ***took it upon himself and his firm to defend a Defendant on the very claims he reviewed with you as Plaintiff***. This is unethical and clearly if the information you have supplied is accurate, amounts to a violation of the Professional Rules of Attorney Conduct."

In addition to the above, of primary concern here are serious misrepresentations which were made by defense attorney **Marc Raspanti** in his **letter of January 29, 2010** to the Court and other counsel in the case United States *ex rel* Bauchwitz v. Holloman *et. al*. (See "1_Raspanti Harvard Letter and Attachments of 012910.pdf" and "2_Harvard Lopez to Morse 1207.pdf for comparison to Raspanti Tab A 0110.pdf".) Raspanti's misrepresentations were ***subsequently introduced into the court record*** prior to settlement of the case.

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1. "Obviously, because the research was performed in the 1993-94 timeframe, it is our understanding that ***most of the documentation that existed at the time is now unavailable***." (p.1)

2. "At the outset of this litigation in 2007, we had contacted Ms. Lopez [of the Harvard University Office of General Counsel] seeking the same documentation from Harvard Microchemistry as that requested by the Court, and she had provided a ***limited*** number of responsive documents. ***Those documents, and Ms. Lopez's associated correspondence from both 2007 and 2009, are attached hereto at Tab A***." (p.1)

3. "Unfortunately, it appears that Harvard implemented a new database tracking system in late 1994, ***limiting the amount of information that it was able to locate in response to our initial request***." As evidence, Raspanti provided to the Court an email made PRIOR to Harvard's search of their physically archived records. (p.2)

4. "***The documents attached hereto are the full and complete extent of records that we were able to locate*** in response to our understanding of the Court's request." (p.2)

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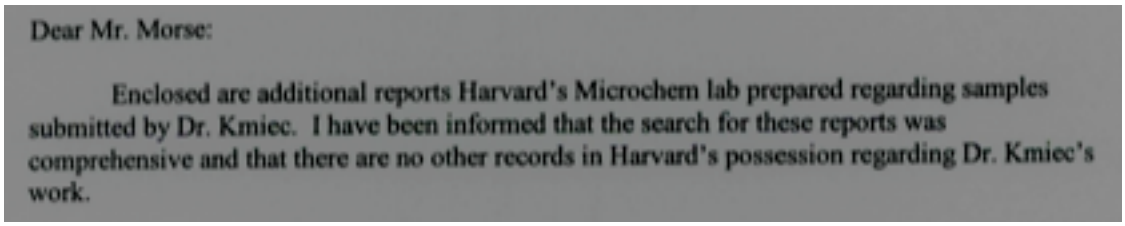
C. Actual Statements by Harvard University to Defense Attorneys in 2007 Relevant to the Misrepresentations and False Statements by Attorney Raspanti

1. Raspanti claimed to the Court and the other attorneys in the case in his January 29, 2010 letter that documentation from Harvard was ***"unavailable"***. (See I.a., above.) ***despite knowing at the time he made this claim that Harvard had definitively stated the opposite***.

What Harvard told Raspanti and the other defense attorneys, including his colleague at the time, Michael Morse, (see "2_Harvard Lopez to Morse 1207 for comparison to Raspanti Tab A 0110.pdf") was that the search for relevant records was "***comprehensive and that there are no other records in Harvard's possession regarding Dr. Kmiec's work***":



Dear Mr. Morse:

Enclosed are additional reports Harvard's Microchem lab prepared regarding samples submitted by Dr. Kmiec. I have been informed that the search for these reports was comprehensive and that there are no other records in Harvard's possession regarding Dr. Kmiec's work.

Email of December 11, 2007 from Diane E. Lopez of the Office of the General Counsel, Harvard University to Michael A. Morse, Esq., an attorney with the firm, Miller, Alfano, and Raspanti.

Raspanti released this email in his letter to the court. The email itself does not support the claim made in his cover letter that he "understood" from Harvard that documentation is "***now*** unavailable". (The claim is reproduced at I.a., above)

Of further significance, ***three of the four attachments to the December 11, 2007 letter are absent***. Also, the fourth attachment did not directly derive from Harvard but rather from Raspanti's client, Kmiec, and is altered (circles around peaks).

2. ***Raspanti's letter to the court of January 29, 2010 did not reveal the actual attachments he and his colleagues had received from Harvard in 2007***.

Attached to the letter of December 11, 2007 to Attorney Morse from Harvard's Office of General Counsel were **four sheets of data**, according to the stapled document received from Harvard during discovery in March 2010. (See "2_Harvard Lopez to Morse 1207 for comparison to Raspanti Tab A 0110.pdf".) These show 1) the lack of amino acid sequence obtained from sample recB, 2) an HPLC profile of a recB tryptic digest, 3) the amino acid sequence obtained from the recB-CT144 tryptic digest peak, and 4) the lack of amino acid sequence obtained from sample EK1.

Nevertheless, despite Lopez's statement of comprehensiveness, and despite the actual attachments she had originally sent to defense counsel, the attachments from Raspanti forwarded to the Court in what he labeled, "Tab A", show **only a single sheet of data**, an altered version of the second data sheet she had attached, (see number "2" of the preceding paragraph). Yet Raspanti claimed to the Court, "***The documents attached hereto are the full and complete extent of records that we were able to locate*** in response to our understanding of the Court's request." (I.d.; see p.2 of his letter of 1/29/10).

3. ***Raspanti used an email from Harvard produced prior to their search for documents to support his claim that a database change by Harvard did in fact limit the amount of information they could find***.

Specifically, Raspanti claimed in his cover letter that:

> "Unfortunately, it appears that Harvard implemented a new database tracking system in late 1994, ***limiting the amount of information*** that it was ***able to locate*** in response to our initial request. *See e.g.* Email from B. Lane to E. Kmiec (May 29, 2007) (attached at Tab B[3])."

[Emphasis added].

In Harvard's September through December 2007 communications to Raspanti and his colleagues, it was clearly stated, and therefore known to Raspanti and the other defense attorneys, that Harvard believed it had comprehensively accounted for all research it had performed for Kmiec and Holloman during the period at issue. Harvard did not ever claim that ***after*** their search of their physical archives that they believed there had been any limitation to the information they could recover. Nor did Harvard ultimately claim, by the end of their searches in 2007, that they were reliant upon an electronic database for such records. They were clear in noting that they had printed archives which they had searched. Indeed, Plaintiff had previously reported the existence of such archives in the court record. Nevertheless, in 2010, Raspanti sent his misinformation **to the Court**.

In the statement at issue, Raspanti does specify that the email was received in response to their "***initial***" request, but he knew there was no such limitation in recovering documents as he claimed in the letter to the Court. It seems apparent that this was clearly an attempt by him to be deceptive, since the only real issue as far as the Court or anyone else was concerned was whether relevant documents had been accounted for by the time the extant letter was written by him in January 2010.

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D. Warnings Provided by Plaintiff to His Attorneys Regarding the Veracity of the Raspanti Letter and Attachments

Plaintiff was immediately suspicious of the so-called attachment at Tab A from Raspanti, since it had a fax information line at its top that indicated it had been sent from the University of Delaware, where Raspanti's client, Defendant Kmiec had his laboratory at the time. ***Plaintiff reported his suspicions in writing to his attorneys, including McNamara*** :

> It is troubling that he research graph displayed in Tab A dated December 11, 2007 (page 8), purportedly produce by the Harvard General Counsel directly to defense attorney Morse (letter, page 7), has fax markings that indicate it originated on October 16, 2007 at the University of Delaware[5], where Defendant Kmiec worked at the time. Kmiec was not at the University of Delaware when the work was performed in 1994.

If lead attorney Raspanti (for some hard to imagine reason) did not have his own copies of the Lopez documents, he could have and should have obtained the original documents sent by Harvard to Morse, his former colleague. (Note that Raspanti had left their firm by 2010[1]).

Therefore, **I assert that there was no legitimate basis for Raspanti's sending an incomplete set of attachments** (i.e. none of the real attachments, but only one page in the form of a fax apparently from Defendant Kmiec), despite asserting to the court that "***The documents attached hereto are the full and complete extent of record"*** (II.d., above).

[The following might go to its own MISREPRESENTATION]

I surmised that the premature presentation of the purported Harvard documents was possibly a means by the Defendants to release damaging information in a more one-sided and favorable light, i.e. **by clearly implying that I, the Plaintiff, had falsely claimed there was no data at all at Harvard**. In fact, Raspanti and his colleagues well knew that I had reported exactly what I had been told by the Harvard intake specialist, McCallum, as ***it was the Defense counsel who had transcribed the relevant recordings I had made in calls to the Harvard Microchemistry laboratory***.[2]

Furthermore, the Defendants, through their former co-conspirator's counsel and now proxy submissions to the Court, could appear as if they were not hiding anything, and rather had been "responsive" to the Court[3]. Nevertheless, in no way would Plaintiff

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[1] It has also been of note to Plaintiff that Morse, Raspanti's colleague at the time, withdrew from the case, and Raspanti left the Miller Alfano Raspanti law firm after that as well. Perhaps Morse and the others at Miller Alfano had some problem with Raspanti's methods, since they definitely knew what Harvard had sent and that the defendants had committed fraud.

[2] More importantly, the data that was present at Harvard, despite the confusion caused by the change-over of databases, nevertheless just as clearly illustrated the fundamental fraud. The work actually performed by Harvard on behalf of the Defendants was shown conclusively by these documents to have been completely falsified and fabricated by the Defendants when they reported it. This amino acid sequence data, which was held forth by the Defendants as the ultimate proof that what had been the "Rec1" strand exchange activity was actually produced by the *REC2* gene (which happened to have the sequence motifs of a recombinase), was the foundation of a fraud which led to many millions of dollars in inappropriate federal grant funding.

[3] In reality, there was probably no truth to Raspanti's implication in his cover letter that the Court ever requested such documents. Plaintiff knew of a request by the Court made during a December 16, 2009 scheduling conference to obtain DNA sequencing records. Defense counsel then present for defendants

have been willing to have a letter by Defense counsel making deceptive and inaccurate statements released to the public by way of the court record.

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E. Standards of Professional Conduct Known to the Plaintiff

The definition of "**misrepresentation**" being used here is derived from the Pennsylvania Rules of Professional Conduct (PRPC), which state that **"Misrepresentations can also occur by partially true but misleading statements or omissions that are the equivalent of false statements."** Comment to Rule 4.1, "Truthfullness in Statements to Others".

The **Pennsylvania Rules of Professional Conduct** (PRPC) are based on the ABA's Model Rules of Professional Conduct. The following quotes are from the PRPC:

Rule 3.3 Candor Toward the Tribunal

"A lawyer shall not knowingly:

(1) make ***a false statement of material fact*** or law to a tribunal …

Comments by the Pennsylvania Supreme Court on **Rule 3.3: "Candor Toward the Tribunal"** include the following:

> "[2] This rule set forth the special **duties of lawyers as officers of the court to avoid conduct that undermines the integrity of the adjudicative process**. … The lawyer ***must not allow the tribunal to be misled by false statements of law or fact or evidence that the lawyer knows to be false***."
>
> "[3] ***an assertion purporting to be on the lawyer's own knowledge***, as in an affidavit by the lawyer or in a statement in open court, may properly be made only when the lawyer knows the assertion is true or believes it to be true ***on the basis of a reasonably diligent inquiry***."

"There are circumstances where ***failure to make a disclosure is the equivalent of an affirmative misrepresentation***."

Holloman and Cornell asserted that such records would show that they had data contradicting that which Plaintiff had presented in his Complaint. Discovery showed that to have been a bogus assertion by those attorneys, but even so, the records were not related to Harvard Microchemistry and neither Raspanti nor anyone from his firm was present, almost certainly because the Court had (incorrectly) dismissed his clients despite their being named as conspirators on the remaining counts.

Raspanti was the lead attorney on the case for his firm, Miller, Alfano, Raspanti, not his associate, Michael Morse. Therefore, Plaintiff asserts that there is no excuse for the deceptive claims based on missing documents.

Rule 1.6(d) states, **"(d) In an ex parte proceeding**, a lawyer shall inform the tribunal of **all material facts known to the lawyer** that will enable the tribunal to make an informed decision, ***whether or not the facts are adverse***".

Rule 3.5 **Impartiality and Decorum of the Tribunal**
"A lawyer shall not: (a) seek to influence a judge, juror, prospective juror or other official by means prohibited by law;

Comment [1] states: "Many forms of improper influence upon a tribunal are proscribed by criminal law. Others are specified in the **ABA Model Code of Judicial Conduct** with which an advocate should be familiar. A lawyer is required to avoid contributing to a violation of such provisions."

Rule 4.1 Truthfulness in Statements to Others

In the course of representing a client a lawyer shall not knowingly:

(a) **make a false statement of material fact** or law to a third person; or

From Comments by the Pennsylvania Supreme Court on **Rule 4.1:**

"Misrepresentations can also occur by partially true but misleading statements or omissions that are the equivalent of false statements."

The Plaintiff asserts that this is what Raspanti was doing in his release of information from Harvard. Especially with respect to the deception that it was Harvard's belief that they would not be able to account for all the research they produced for the defendants.

"For dishonest conduct that does not amount to a false statement or for misrepresentations by a lawyer other than in the course of representing a client, see Rule 8.4."

Rule 8.4 Misconduct
"It is professional misconduct for a lawyer to:

(a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;

(b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;

(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;

(d) engage in conduct that is prejudicial to the administration of justice;

The deceptive and false statements that Raspanti made in his letter of January 29, 2010 to the Court ***are not the only ethical issues*** that concern Plaintiff.

Raspanti entered the case for the defendants ***after having obtained case information from Plaintiff***, and also after having recommended Plaintiff's original attorney to him and apparently ***subsequently having had discussions with her***. (See 6_Raspanti issues to OBM 1010.pdf.)

An analysis of the conduct of Marc Raspanti by Attorney Matthew Owens led to the following conclusion:

> "Raspanti clearly took information from you that was confidential. You obviously had the belief that the information was confidential and privilege[d]. Raspanti ultimately referred your case to another attorney [Poserina] and later, possessing what was labeled and concluded to be confidential information, ***took it upon himself and his firm to defend a Defendant on the very claims he reviewed with you as Plaintiff***. This is unethical and clearly if the information you have supplied is accurate, amounts to a violation of the Professional Rules of Attorney Conduct."

The statements made here about Marc Raspanti are not meant to relieve from responsibility any other counsel or firm who are represented by or on the documents at issue. Marc Raspanti is specified in this affidavit because he was the primary signatory of the Letter of January 29, 2010 under which cover the documentary misrepresentations were submitted to the Court and other attorneys.

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By the facts submitted in this affidavit, the Plaintiff/Relator is alleging that Marc S. Raspanti, and all others associated with him on the Letter of January 29, 2010 referenced above, have violated the Pennsylvania Rules of Professional Conduct (as well as Fed R. Civ. Proc. Rule 11(b)) by making misrepresentations and false statements that could not have been proper after reasonable inquiry, and that such statements were very likely made with the improper purpose to deny the Plaintiff effective counsel and fair consideration of the Court.

I, Robert P. Bauchwitz, signed this affidavit on _____ at Hershey, PA.

_____

Robert P. Bauchwitz

SUBSCRIBED AND SWORN TO BERFORE ME on _____ at Hershey, PA.

Enclosures:
1_Raspanti Harvard Letter and Attachments of 012910.pdf
2_Harvard Lopez to Morse 1207 for comparison to Raspanti Tab A 0110.pdf
3_Supplemental_Declaration_of_TSM_030810-introducing Raspanti Harvard into ct rec copy.pdf
4_Plaintiff's_comments_on_Harvard_Microchem_release_013110_w_email_to_attnys.pdf
5_Consolidated Reply Brief introducing Raspanti Harvard doc127-main.pdf
6_Raspanti_issues_to_OBM_1010.pdf

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