No 21-1597

IN THE SUPREME COURT OF THE UNITED STATES

Seyed Mohsen Sharifi Takieh,
Petitioner,
v.

Banner Health, Janice Dinner, Michael O'Connor, M.D., Peter Fine, Christopher Volk, Michael O'Meara, M.D., Steven Maxfield, M.D.
Respondents.

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

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I. DR. SHARIFI DOES NOT EXTENSIVELY REFERENCE THE TRIAL COURT'S RULING IN THE INJUNCTION ACTION IN THE FIRST AMENDED COMPLAINT.

Respondents contend that Sharifi "extensively" references Judge Flores' ruling (the "Ruling") in the state court Injunction Action in ¶¶'s 427 – 461 of the First Amended Complaint (FAC). This is simply untrue. While a handful of these allegations refer indirectly to the Injunction Action, or evidence the Superior Court did (or did not) consider, the bulk of these allegations do not even implicate the Ruling. The vast majority refer to the Fair Hearing, or other decisions in the Injunction Action, like the court's refusal (in ruling on Sharifi's Motion for New Trial) to consider any of the recently (at the time) acquired evidence of racial hostility toward Sharifi in the form of sworn Declarations of witnesses who overheard various participants in the process which led to the termination of Sharifi's privileges make derogatory racial remarks about him. These declarants also confirmed numerous other facts and details alleged in the FAC suggesting a long-standing plot "to get rid" of Sharifi whether he had done anything to deserve it, or not, and which strongly suggested that his race was the reason.

Consequently, any notion that the FAC incorporated the Ruling so that the contents could be construed as

true on a 12(b)(6) motion to dismiss is absurd. The allegations in the FAC are incompatible with the so-called "findings" in the Ruling. This is precisely the dilemma Sharifi describes in his Petition that requires guidance, or resolution from this Court. It is clear that both of the lower courts accepted the factual findings in the Ruling as true, even where they directly conflicted with allegations in the FAC. As a result, Sharifi was deprived of the pleading benefits to which he is entitled – his allegations taken as true, and all reasonable inferences from those allegations resolved in his favor.

Although incorporation by reference generally permits courts to accept the truth of matters asserted in incorporated documents, it is improper to do so only to resolve factual disputes against the plaintiff's well-pled allegations in the complaint. The incorporation-by-reference doctrine does not override the fundamental rule that courts must interpret the allegations and factual disputes in favor of the plaintiff at the pleading stage. See *Sgro v. Danone Waters of N. Am., Inc.*,532 F.3d 940, 942, n. 1 (9th Cir. 2008) (finding it proper to consider a disability benefits plan referenced in complaint, but declining to accept the truth of the plan's contents where the parties disputed whether defendant actually implemented the plan according to its terms); see also *In re ECOtality, Inc. Sec. Litig.* , No. 13-03791, 2014 WL 4634280, at *3 (N.D. Cal. Sept. 16, 2014) (declining to assume the

truth of incorporated documents where it "would mean assuming the truth of all of Defendants' allegedly false or misleading statements," which would make it "impossible ever to successfully plead a fraud claim").*Khoja v. Orexigen Therapeutics, Inc.*, 899 F.3d 988, 1015 (9th Cir. 2018).

Incorporation requires much more than a passing reference to a document. It requires more than the mention of an event to which the document is related, or even a recitation of the pre-textual reasons Respondents provided at the Injunction Hearing for Sharifi's termination– strictly for the purpose of refuting the validity of those reasons – whether the superior court discussed them in its Ruling, or not.

II. THE CONTENTION THAT THE FAC DOES NOT PLAUSIBLY ALLEGE "BUT FOR" CAUSATION IS NECESSARILY BASED ON ACCEPTANCE OF THE TRUTH OF ANY FINDINGS IN THE RULING IN THE INJUNCTION ACTION.

a. RESPONDENTS HAVE NOT IDENTIFIED ANY UNWARRANTED DEDUCTIONS OF FACT, CONCLUSORY ALLEGATIONS, OR UNREASONABLE INFERENCES.

Not all allegations in a complaint are entitled to the presumption of truth, but neither Respondents, nor any of the courts below have identified conclusory allegations, unreasonable inferences, or unwarranted

deductions of fact contained in the FAC that fall into these categories for the purposes of a 12(b)(6) motion to dismiss.

Instead, Respondents insist that even after presuming the truth of all allegations, and construing them in his favor, Sharifi still failed to plausibly allege that race was the cause of the discriminatory conduct directed at him. Respondents contend that *Comcast* dictates this result. They further argue that reference to the Ruling is unnecessary to resolve factual disputes – like the real reason for his termination – and therefore permissible because Sharifi's own allegations fail to establish causation under *Comcast's* standard.

Respondents' explanation invariably circles back to the supposed incorporation of the Ruling. There is no way to read the FAC in any light favorable to Sharifi, and harmonize the allegations with the Ruling in the Injunction Action. The allegations in the FAC are largely directed at demonstrating that the purportedly race-neutral reasons for Sharifi's termination were mere pretexts for racial discrimination.

b. DR. SHARIFI PRODUCED SUBSTANTIAL DIRECT EVIDENCE OF RACIAL DISCRIMINATION IN THE SWORN DECLARATIONS

If the District Court incorporated the Ruling in the Injunction Action based on a few indirect references to the Injunction Action, then it should have had no trouble incorporating the other documents Sharifi

attached to the FAC. These documents actually were referred to extensively, and they strongly support the allegations that race was the real reason for Respondents' actions. When confronted by these extremely damaging (to Respondents) Declarations, all of the lower courts have simply refused to consider them, while the District Court incredibly construed them against Sharifi.

While not required in light of the direct evidence of racial discrimination, Sharifi nevertheless provided examples of similarly situated non-Arab physicians, many of whom committed acts more egregious than those of which he was accused, but who were much more favorably treated. These examples of disparate treatment are highly probative of the question whether Sharifi's race was the cause of his termination.

c. DR. SHARIFI DID NOT ALLEGE ANY RACE-NEUTRAL REASONS FOR HIS TERMINATION WITHOUT EXPLAINING WHY EACH REASON WAS A PRETEXT

In order to survive a motion to dismiss under Rule 12(b)(6), the plausibility requirement outlined in *Iqbal* and *Twombly* requires plaintiffs to offer allegations tending to exclude the defendant's innocuous alternative explanation for its conduct. When faced with "two possible explanations, only one of which can

be true and only one of which results in liability, plaintiffs cannot offer allegations that are merely consistent with their favored explanation but are also consistent with the alternative explanation." *In re Century Aluminum Co. Sec. Litig.*, 729 F.3d 1104, 1108 (9th Cir. 2013) (quoting *Iqbal*, 556 U.S. at 678).

Plaintiffs must offer "facts tending to exclude the possibility that the alternative explanation is true, in order to render plaintiffs' allegations plausible within the meaning of *Iqbal* and *Twombly*." *Id.* If two alternative explanations exist, "one advanced by defendant and the other advanced by plaintiff, both of which are plausible, plaintiff's complaint survives a motion to dismiss under Rule 12(b)(6). Plaintiff's complaint may be dismissed only when defendant's plausible alternative explanation is so convincing that plaintiff's explanation is implausible." *Id.* (quoting *Starr*, 652 F.3d at 1216).

Within this framework, Sharifi never offered any alternative race neutral explanations for Respondents' conduct that were not accompanied by allegations detailing why the explanations were simply pretexts. Sharifi has already produced evidence of both disparate treatment, and direct evidence of racial discrimination that further tends to negate any race neutral reasons offered to explain the conduct.

Allegations concerning the Arizona Medical Board (AMB), and its repeated rejection of Respondents'

claims against Sharifi based on the same evidence used at the Fair Hearing provide additional corroboration to the allegations contained in the FAC. The combination of these allegations with the AMB and 10 other hospital dismissals of Respondents' complaints plausibly tend to exclude the reasons Respondents have offered to justify Sharifi's termination as the true reasons for the described conduct.

d. DR. SHARIFI INCLUDED BOTH DIRECT EVIDENCE (IN THE FORM OF SWORN DECLARATIONS OF DISINTERESTED WITNESSES) AND DISPARATELY TREATED PHYSICIANS

Respondents argue that Sharifi simply failed to allege sufficient facts to conclude that the non-Arab physicians who were treated disparately. Other employees are similarly situated to the plaintiff when they "have similar jobs and display similar conduct." *Vasquez v. County of Los Angeles*, 349 F.3d 634, 641 (9th Cir. 2003)). The employees need not be identical, but must be similar in material respects. *Hawn v. Exec. Jet Mgmt., Inc.,* 615 F.3d 1151, 1157 (9th Cir.2010). Materiality depends on the context and is a question of fact that "cannot be mechanically resolved." Id. at 1157–58. The Seventh Circuit has noted that it is "important not to lose sight of the

common-sense aspect" of the similarly situated inquiry.. [658 F.3d 1115]. See *Humphries v. CBOCS West, Inc.*, 474 F.3d 387, 405 (7th Cir.2007). "It is not an unyielding, inflexible requirement that requires near one-to-one mapping between employees" because one can always find distinctions in "performance histories or the nature of the alleged transgressions." Id.

"Other employees are similarly situated to the plaintiff when they 'have similar jobs and display similar conduct.'" *Earl v. Nielsen Media Research, Inc.*, 658 F.3d 1108, 1114 (9th Cir. 2011) (quoting *Vasquez v. County of Los Angeles*, 349 F.3d 634, 641 (9th Cir. 2003)). Employees "must only be similar in all material respects," and materiality "depend[s] on context and the facts of the case." *Hawn v. Exec. Jet Mgmt., Inc.*, 615 F.3d 1151, 1157 (9th Cir. 2010). Further, "whether two employees are similarly situated is ordinarily a question of fact." *Beck v. United Food & Commercial Workers Union, Local 99*, 506 F.3d 874, 883 n.4 (9th Cir. 2007); *Cortes v. Cnty. of Santa Clara* (9th Cir. 2016).

III. BANNER HAS MISCHARACTERIZED AND MISREPRESENTED SIGNIFICANT FACTS TO LOWER COURTS

Regrettably the State Courts did not consider violations of Banner described below as "substantial evidence" to rule in favor of Sharifi:

1. In Banner's terminology, an "External Reviewer" is an "Internal Reviewer". In clear violation of the Bylaws which required the "Reviewer to be outside Banner, in the same specialty and Board certification (as Sharifi) and with no conflict of interest or even appearance of conflict of interest with Banner and the Medical Executive Committee (MEC)", Banner chose Dr. Kevin Hirsch, it's salaried employee at another Banner facility and in another Department and with another Board certification to be its "External Reviewer". Hirsch had not had a single publication in venous disease (as opposed to Sharifi with nearly 200). He is a Banner employee who for a fee regularly testifies against Banner's targets. Dinner herself, wrote the External Reviewer report with no signatures attached which was used against Sharifi. Hirsch's comments and Dinner's report were refuted by 6 experts of Sharifi including the Head of American Venous Forum, (most prestigious Society in the field) who opined on Hirsch's "ignorance in the current practices in the venous field and recommending sanctions against him for his numerous intentional misrepresentations". When Sharifi protested on violation of the Bylaws, Dinner simply changed the Bylaws to deprive Sharifi of his right to a true External Reviewer knowing well that any true outside reviewer will refute Banner's allegations. To

dismiss Sharifi's reviewers' positions, Banner used a simple ploy: it asked the reviewers if they had reviewed the "entire medical records". The reviewers had reviewed the "pertinent medical records", more than adequate to render their expert opinions. Mr. Randy Yavetz, a close friend of Dinner was appointed as the Hearing Officer. The decision of theFair Hearing Panel (FHP) was swayed by Yavetz who insisted that Sharifi's reviewers must have had "incomplete information". Anticipating this ploy, Sharifi had numerously asked Banner to provide "all necessary records" that were used by Banner's reviewers, so the exact records could be forwarded to Sharifi's reviewers but Banner refused. The pertinent records however were more than adequate for any reviewer to reach an accurate conclusion.

2. The Bylaws prevented MEC members who had voted against Sharifi to appoint the FHP and the Hearing Officer. However the Bylaws clearly allowed for those who had not voted against Sharifi to appoint them. This would have derailed Banner's plans. Banner again changed the Bylaws calling this important protection afforded to Sharifi "an ambiguity in need of a resolution" as to invalidate Sharifi's rights to an unbiased proceeding. Rather than abiding by the Bylaws, Banner changed it again.

3. The Bylaws did not allow the Hearing officer to

participate in FHP deliberations so they could remain independent from undue influence. Banner changed the Bylaws a third time to allow Yavetz participate in the deliberations as to "sway" the panel.

4. Banner's own Cardiology Peer Review Committee (PRC) earlier had dismissed the allegations against Sharifi concluding that no further action is required. Had O'Meara abided by this decision (which had been thus far final for all non-Arabs), the proceedings would have been terminated and the case closed. He did not. The decision of PRC which is final is always released in 5-7 days after each meeting. O'Meara and Dinner withheld the release of the decision for nearly 90 days as to override it by the MEC and invalidate the decision of the PRC with no support from the Bylaws. Never had O'Meara invalidated the decision of the PRC against a non-Arab or held its release for 90 days.
5. Over half of the physicians in the MEC objected to O'Meara's discriminatory practices, demanded an impartial review and later quit their participation in attending or voting. O'Meara simply ignored their objection. Therefore all future MEC votes were done in the absence of these conscientious objectors. O'Meara even brought some old and already adjudicated and dismissed cases from other hospitals and rescored them to the detriment of

Sharifi-an action which has never been done for non-Arabs in the entire history of Banner.

6. The FHP was made of members of groups with exclusive contracts with Banner who were not inclined to endanger their financial livelihood. Contrary to Banner's assertion that the FHP was the independent adjudicator of the case, its role according to the Bylaws, was only to "advise and recommend" with the ultimate decision still resting in the hands of the MEC with O'Meara at its helm (with ongoing lawsuit against him), now with broad new powers, and in the absence of conscientious objectors who has already quit participating in the sham proceedings. Even if the FHP had voted in favor of Sharifi, O'Meara would have undoubtedly overruled it as he had done the same with the decision of the PRC which had dismissed the case earlier. Therefore, Banner's assertion on trying to portray neutrality of "three doctors who had not participated in the MEC recommendation and were not economic competitors of Sharifi" is a mischaracterization of facts. Yes they were not economic competitors of Sharifi but were totally dependent on exclusive contacts with Banner, were appointed by those why had wanted Sharifi be fired and were swayed by Yavetz.
7. Yavetz did not allow Sharifi to testify by placing an arbitrary time limit. Sharifi had asked for only a few hours to defend himself which was rejected.

8. The allegations against Sharifi for over one year were based solely on "medical incompetence". Shortly after initiation of his lawsuit in the State Courts and reporting of Dinner to the State Bar and Banner's Compliance Line, just before the Fair Hearing, Banner conveniently concocted "legal bullying", "disruptive behavior" and "alteration of medical records" as independent reasons of termination. Dinner had previously even fabricated the allegation of "dissemination of alcoholic drinks to Banner staff' by Sharifi which were retracted after learning that Sharifi is a devout Muslim who does not drink alcohol. Dinner also disseminated a rumor that Sharifi is getting divorced.
9. In the eye of Banner, the appeal of Sharifi to the judicial system to which every honorable citizen is entitled was considered "legal bullying". Any reasonable observer would question how a solo practitioner could bully a multibillion-dollar corporation with an army of attorneys. All correspondence of Sharifi with O'Meara and MEC was highly professional, confidential and through peer review channels. There were no altercations, fowl language or disruptive behavior.
10. Twenty experts dismissed the new and old allegations of Banner. The AMB dismissed the allegations of Banner in their entirety on 3 separate occasions. Ten other hospitals and health facilities, during their recredentialing

process, examined all evidence of Banner in depth and dismissed them. After all, Banner's allegations were very serious and had they been true, the AMB would undoubtedly taken action against Sharifi under multiple provisions of the law. Even Banner's own PRC had dismissed the allegations. Therefore, there was not a single independent entity outside Banner which agreed with Banner.

Payment of Sharifi to Banner in Attorneys' Fees

After his loss in the Superior Court, Judge Whitten ruled that Sharifi must pay over $133,000.00 to Dinner in attorneys' fees. Sharifi posted a bond and appealed the ruling. The appellate court affirmed the ruling and ordered an additional $29,000.00 in further attorneys' fees. Sharifi filed for a motion to reconsider. Due to the difference in interpretation of time for electronic v. paper filing the motion was rejected as "untimely". This was a great miscarriage of Justice. Banner even sued for the interest accrued over the appeal period which was $11,000.00. Therefore, in May and June 2022 and based on the rulings of the State Courts, Sharifi paid Banner in excess of $173,000.00 in cash.

IV. CONCLUSION

The lower courts need guidance on how to properly apply the pleading standards in the face of competing alternative explanations for conduct.

To this end, the outright dismissal of well plead discrimination allegations (under 42 U.S.C. § 1981) based on erroneous inference from Comcast violates the prevailing views of holding the allegations as true at the pleading stage. At issue here is whether such discrimination lawsuits can continue or whether they will be cut off by insurmountable pleading standards. Therefore, it is respectfully requested the Court grant certiorari to review the Ninth Circuit's opinion or grant such other relief as justice requires.

Respectfully submitted,

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