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December 18, 2015

By ECF and Fax

Hon. Paul G. Gardephe
Thurgood Marshall United States Courthouse
40 Foley Square
New York, New York 10007
Fax: (212) 805-7986

Re: *Goldman v. Barrett*, 15 Civ. 9223 (S.D.N.Y.) (PGG) (HBP)

Dear Judge Gardephe:

I write on behalf of defendant Dr. Stephen J. Barrett to request a pre-motion conference at the Court's earliest convenience in connection with Dr. Barrett's anticipated motion to dismiss the above case.

The case was brought by two multi-millionaire promoters of anti-aging "medicine" who are attempting to bully Dr. Barrett's into deleting an article from a nonprofit consumer advocacy website he operates called "Quackwatch." The article truthfully reports that the State of Illinois disciplined and fined the plaintiffs for falsely using the term "M.D." after their names.

The Court should dismiss the case because the article was published more than 14 years ago, and thus any statute of limitations has long since expired. More fundamentally, the free speech protections of the First Amendment include the right to disclose truthful facts about public governmental proceedings, which is all that happened here. These and other grounds for dismissal are summarized below.

Background

The plaintiffs, Dr. Robert Goldman and Dr. Ronald Klatz, are "anti-aging" doctors who specialize in trying to "retard and optimize the human aging process." (Compl. ¶¶ 10-11.) They each received a doctor of osteopathy degree from schools in the United States, and a medical degree from the Central American Health Sciences University in Belize. (*Id.* ¶¶ 3, 5.)

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In 2000, the Illinois Department of Financial and Professional Regulation began investigating their use of the designation “M.D.” Under Illinois law, the “M.D.” designation may be used only by doctors with degrees from schools meeting the state’s “minimum education standards.” 225 Ill. Comp. Stat. §§ 60/11, 60/28. In December 2000, they each agreed “to cease and desist using the designation ‘M.D.’” and to pay a \$5,000 fine.¹

Defendant Dr. Stephen Barrett runs a website, www.quackwatch.org, dedicated to exposing “health-related frauds, myths, fads, fallacies, and misconduct.” (Compl. ¶¶ 13, 17.) The second defendant, Quackwatch, Inc., was a nonprofit Pennsylvania corporation that has been dissolved since 2009.

In 2000, the Quackwatch website posted a five-sentence article that reported the fines and reproduced a copy of the Consent Order.² The article has not changed since March 2001.

The *New York Times* reported on the disciplinary action in an article in 2007, stating: “Licensing authorities in Illinois did not recognize the Belize degrees, and in 2000 fined the doctors \$5,000 each for adding M.D. after their names.” See Duff Wilson, *Aging: Disease or Business Opportunity?*, N.Y. TIMES (Apr. 15, 2007). The article explains that, although Dr. Goldman and Dr. Katz have made tens of millions of dollars from their “anti-aging” business, the medical establishment considers their practices to be “quackery or hype” and considers their promotion of human growth hormones to be “medically and legally specious.” (*Id.*)

Last month, Dr. Goldman and Dr. Klatz filed this lawsuit seeking to have Dr. Barrett “preliminarily and permanently restrained and enjoined by the Court from maintaining” the Quackwatch article and seeking an Order directing Dr. Barrett “to remove or delete all disparaging statements and remarks pertaining to Dr. Goldman and Dr. Klatz from” his website. (Compl. ¶¶ 98, 101.)

The complaint does not allege that the article actually asserts anything false. Instead, the complaint alleges that the article creates the “false innuendo” that Dr. Goldman and Dr. Klatz are untrustworthy “quacks.” (*Id.* ¶ 57.) It further alleges that Dr. Barrett failed to “post[] any follow-up” article to account for a later order from Illinois supposedly confirming that the plaintiffs are fully licensed in a way that is “equivalent” to being an “M.D.” (*Id.* ¶¶ 24, 26.) In fact, the later order merely states that Illinois would not take action in light of the plaintiffs having placed an ad in Illinois that, again, wrongly referred to themselves as “M.D.s.” Nothing changes the earlier disciplinary action or the fact that they cannot call themselves “M.D.s.”

¹ See https://www.idfpr.com/licenselookup/disc.asp?lic_nbr=36064669;
https://www.idfpr.com/licenselookup/disc.asp?lic_nbr=36074384

² <http://www.quackwatch.org/11Ind/klatz.html>

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The complaint also alleges that Dr. Barrett has recently inserted defamatory “meta-tags” — text that describes a webpage’s content but that is not visible — on the Quackwatch site to drive more traffic to the article. (Compl. ¶¶ 35, 47-50.) The source code for the page reveals, however, that there are no defamatory “meta-tags,” nor have there ever been any.

The complaint seeks relief under theories of defamation (Claims 1 and 2), tortious interference (Claim 3), conspiracy (Claims 4 and 5), prima facie tort (Claim 5), and N.Y. Gen. Bus. L. § 349 (Claim 7), and includes a separate claim for preliminary and permanent injunctive relief (Claim 8). (Compl. ¶¶ 43-101.)

The Plaintiffs Filed Suit Far Too Late

Because the article was published more than 14 year ago, the plaintiffs’ claims are barred by any conceivable statute of limitations. The plaintiffs attempt to avoid the statute of limitations by alleging that the limitations period restarted in “early 2015,” when they allegedly discovered that Dr. Barrett was using “meta-tags” to improve search engine results and to thereby “republish” the article. (Compl. ¶¶ 35-36; 48, 60.)

These allegations are demonstrably false but in all events irrelevant because courts uniformly recognize that making an internet article easier to find does not “re-publish” it. *See, e.g., In re Philadelphia Newspapers, LLC*, 690 F.3d 161, 175 (3d Cir. 2012) (concluding that, “though a link and reference may bring readers’ attention to the existence of an article,” and may “allow for easy access” to the article, they do not in any sense “republish the article”); 1 Hon. Robert. B. Sack, *Sack on Defamation: Libel, Slander & Related Problems* §§ 7.2.2, 7.3.1.B (4th ed. 2015) (collecting cases and concluding that “changes in the manner in which . . . material may be accessed” on the internet do not constitute republication).

The First Amendment Bars the Lawsuit Entirely

Even if this suit were timely, the free speech protections of the First Amendment include the right to disclose truthful facts about public governmental proceedings or documents. *The Florida Star v. B.J.F.*, 491 U.S. 524, 534 (1989); *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 495 (1975). That alone is grounds to dismiss this case.

Dr. Goldman and Dr. Klatz do not allege the article makes any false assertions, but they claim that the article is nonetheless defamatory because, in context, it creates the “false innuendo” that the doctors “are [1] ‘quacks,’ and are [2] not licensed medical professionals or [3] trustworthy businessmen.” (Compl. ¶ 57.) These allegations do not amount to defamation.

First, the article does not refer to the doctors as “quacks,” and, even if it did, that would be a classic statement of protected opinion or hyperbole. *Chau v. Lewis*, 771 F.3d 118, 129 (2d Cir. 2014) (rejecting defamation claims brought by a financial professional described in a book as a “‘crook[],” “‘moron[],” and the “‘pilot[]” of the “‘ship of doom,” “because those were simply

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‘non-actionable opinions’” and “hyperbole”); *Gonzalez v. Gray*, 69 F. Supp. 2d 561 (S.D.N.Y.1999), *aff’d*, 216 F.3d 1072 (2d Cir. 2000) (husband’s claim on television that wife was “seduced by a quack” doctor was not actionable).

Second, the article does not imply that the doctors are “not licensed professionals” (Compl. ¶ 57) because it reproduces in full the Consent Order, which states that each is a “licensed osteopath.”

Third, the article does not state or imply anything about whether the doctors are a “trustworthy businessman” (Compl. ¶ 57), beyond whatever truthful and perfectly appropriate inference one could draw from the fact of their misconduct and discipline.

The plaintiffs also complain about the article not having been updated, but the Court should reject those allegations out of hand because the relevant inquiry is whether the statements were true at the time of the publication. A true story cannot later morph into a defamatory one simply because it is not “update[d]” to be “be as complete a story as [the plaintiff] would like.” *See Martin v. Hearst Corp.*, 777 F.3d 546, 553 (2d Cir. 2015) (rejecting defamation claims against media outlets that reported the arrest of plaintiff but refused to update their stories after the charges were dropped). In any event, the supposedly “new” information is a later order from Illinois that, far from justifying an update, *confirms* that the plaintiffs cannot hold themselves out as “M.D.s” in Illinois.

The Plaintiffs Fail to State a Claim

Even apart from the First Amendment and statute of limitations issues, either of which suffices to dismiss the complaint in its entirety, the complaint fails to state a claim and should be dismissed.

First, for the reasons discussed, the plaintiffs’ defamation claims (Claims 1 and 2) fail to allege any false statements. *Biro v. Conde Nast*, 883 F. Supp. 2d 441, 458 (S.D.N.Y. 2012) (dismissing claims on the pleadings); *Chung v. Better Health Plan*, 96 Civ. 7310, 1997 WL 379706, at *4 (S.D.N.Y. July 9, 1997) (same).

Second, their tortious interference claim (Claim 3) must be dismissed as duplicative of the defamation claim. *Krepps v. Reiner*, 588 F. Supp. 2d 471, 485 (S.D.N.Y. 2008), *aff’d*, 377 F. App’x 65 (2d Cir. 2010) (plaintiffs are “not permitted to dress up a defamation claim as a claim for intentional interference with a prospective economic advantage”); *Restis v. Am. Coal. Against Nuclear Iran, Inc.*, 53 F. Supp. 3d 705, 726 (S.D.N.Y. 2014) (dismissing tortious interference claims arising “out of . . . allegedly defamatory statements”).

Third, their claim under N.Y. Gen. Bus. L. § 349 (Claim 7) must be dismissed because it (1) fails to allege any conduct was “was misleading in a material way,” *Stutman v. Chem. Bank*, 731 N.E.2d 608, 611 (N.Y. 2000); (2) fails to allege deceptive practices “arising out of

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commercial transactions,” *NYPIRG v. Ins. Info. Inst.*, 554 N.Y.S.2d 590, 592 (1st Dep’t 1990); and (3) alleges only injury that is derivative of readers’ direct injury of supposedly being misled by the article, *Silvercorp Metals Inc. v. Anthion Mgmt. LLC*, 959 N.Y.S.2d 92, 2012 WL 3569952 (N.Y. Sup. Ct. 2012) (dismissing company’s claim that false websites drove its stock price down because injury was “derivative” of website readers being misled).

Finally, the plaintiffs’ conspiracy and injunction claims (Claims 4, 6 and 8) cannot proceed independently of other, substantive claims.

* * *

We thank the Court for its attention to this matter and look forward to a pre-motion conference.

Respectfully,

A handwritten signature in dark ink, appearing to read "C. Michael", written in a cursive style.

Charles Michael