

**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK**

DR. ROBERT M. GOLDMAN and  
DR. RONALD KLATZ,

Plaintiffs,

*—against—*

DR. STEPHEN J. BARRETT and  
QUACKWATCH, INC.,

Defendants.

15 Civ. 9223 (PGG) (HBP)

**DR. STEPHEN J. BARRETT'S MEMORANDUM OF LAW  
IN SUPPORT OF HIS MOTION TO DISMISS**

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## **INTRODUCTION**

By this defamation suit, two multi-millionaire promoters of anti-aging “medicine” are attempting to bully the operator of a nonprofit consumer advocacy website called “Quackwatch” into deleting a completely truthful article about the fact that the State of Illinois disciplined and fined them for improperly using the term “M.D.” after their names.

The Court should dismiss the case at the outset because the article was published more than 14 years ago, and thus any statute of limitations has long since expired. The plaintiffs argue that recent “search engine optimization” has “republished” the article and thereby restarted the statute of limitations, but that is demonstrably false. The argument is also irrelevant because, as courts uniformly recognize, making an internet article easier to find does not “re-publish” it.

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 was done here. The plaintiffs do not dispute that they were disciplined and fined, but vaguely claim that reporting that undisputed fact somehow creates “false innuendo” that they are untrustworthy quacks. The article does not directly or indirectly make those assertions, but, even if it did, they would be protected statements of opinion. The First Amendment allows anyone to express their view that the plaintiffs’ controversial “anti-aging” business is “quackery” — as, for example, the *New York Times* has already done in an article about the plaintiffs’ questionable practices.

For these reasons, and others discussed more fully below, the Court should dismiss this case in its entirety.

## **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.” (Ex. A (“Compl.)

¶¶ 10-11.)<sup>1</sup> They each received a doctor of osteopathy degree in the United States, and a medical degree from the Central American Health Sciences University in Belize. (*Id.* ¶¶ 3, 5.)

In 2000, the Illinois Department of Financial and Professional Regulation began investigating their use of the designation “M.D.” (Ex. B (online disciplinary records from Illinois).) 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. (Ex. B; Ex. C.)

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

In 2000, the Quackwatch website posted a five-sentence article that reported the fines against Dr. Goldman and Dr. Klatz and reproduced a copy of the Consent Order. (Ex. F.) The article has not changed since March 2001. (Ex. G.)

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.” Duff Wilson, *Aging: Disease or Business Opportunity?*, N.Y. TIMES, Apr. 15, 2007 (Ex. H). The *Times* article explains that, although Dr. Goldman and Dr. Klatz have made tens of millions of dollars from their “anti-aging” business, the medical establishment considers their practices to be “quackery or hype”

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<sup>1</sup> Citations in the form “Ex. \_\_” refer to the exhibits to the accompanying declaration of Dr. Stephen Barrett.

and considers their promotion of human growth hormones as an anti-aging tool to be “medically and legally specious.” (*Id.*)<sup>2</sup>

In November 2015, Dr. Goldman and Dr. Klatz filed this lawsuit seeking to have Dr. Barrett “preliminarily and permanently restrained” from keeping the article online 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, it alleges that the article creates “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 they are fully licensed in a way that is “equivalent” to being an “M.D.” (*Id.* ¶¶ 24, 26.) But the later order did not, as the complaint implies, alter the earlier one at all. It merely stated that Illinois would not take action in light of Dr. Klatz having used the title “M.D.” in an Illinois medical journal advertisement, “in contravention” of the 2000 order. (Ex. I at 1-2.) While 2006 order clarified that the Illinois authorities would not “have jurisdiction” for advertisements that were not “aimed specifically or solely at Illinois,” it did not undo the 2000 disciplinary order in any way. (*Id.* at 2.)

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

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<sup>2</sup> For purposes of this motion, the Court may consider (i) the plaintiffs’ disciplinary records that are available online from the state of Illinois, (ii) historical versions of the Quackwatch website, and (iii) the *Times* article. *In re Methyl Tertiary Butyl Ether (MTBE) Products Liab. Litig.*, 07 Civ. 10470, 2013 WL 6869410, at \*4 & n.65 (S.D.N.Y. Dec. 30, 2013 (“data on government websites” and “the contents of internet archives” from archive.org); *Garber v. Legg Mason, Inc.*, 537 F. Supp. 2d 597, 612 n.4 (S.D.N.Y. 2008) (news articles).



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. (Ex. F.)

The complaint seeks relief under theories of defamation (Claims 1 and 2), tortious interference (Claim 3), conspiracy (Claims 4 and 6), 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.)

Dr. Barrett filed a pre-motion letter in anticipation of moving to dismiss (Ex. J), and, following the plaintiffs’ response (Ex. K), the Court authorized this motion. (Dkt.12.)

## **DISCUSSION**

### **I. THE COMPLAINT SHOULD BE DISMISSED IN ITS ENTIRETY BECAUSE IT WAS FILED TOO LATE**

#### **A. The Plaintiffs Filed Suit Far Outside The One-Year Statute of Limitations**

Dr. Goldman and Dr. Klatz waited to file suit for over 14 years since the article was last edited (Compl. ¶¶ 22, 25), which is long past any possible statute of limitations.

In diversity cases like this one (*see* Compl. ¶ 19), a federal court in New York must apply New York’s statute of limitations. *Stuart v. Am. Cyanamid Co.*, 158 F.3d 622, 626 (2d Cir. 1998). For defamation claims, the limitations period is one year. N.Y. CPLR § 215(3). A plaintiff whose case is “in essence, one for defamation” cannot extend that period by adding claims for “prima facie tort,” “interference with economic relations,” or “any other characterization designed to circumvent an otherwise short limitation period.” *Ramsay v. Mary Imogene Bassett Hosp.*, 495 N.Y.S.2d 282, 284 (3d Dep’t 1985).

Here, all the claims are premised on the allegedly defamatory article, and hence are subject to the one-year period.<sup>3</sup> Even if any claim were somehow distinct from the defamation claims, none would be even close to timely after 14 years. *See* N.Y. CPLR § 214(2), (4) (three years for claims involving damage to property or statutory claims, such as N.Y. Gen. Bus. L. § 349); § 213(1) (six years where “no limitation is specifically prescribed by law”).

**B. The Case Cannot Be Rescued With Allegations That the Defendants Only Recently Discovered “Improper” Search Engine Optimization**

Dr. Goldman and Dr. Klatz 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 direct more readers to the article. (Compl. ¶¶ 35-36, 48, 60.) These allegations are demonstrably false. The source code of the article, which is available to anyone with an internet browser, shows that there have been no newly-added meta-tags at all. (Ex. G.)

Even if Dr. Goldman and Dr. Klatz could somehow show that Dr. Barrett took some action to change the meta-tags within the limitations period, the complaint would still be untimely. That is because the statute of limitations for defamation begins to run from the moment a defamatory statement is published in one form (such as single issue of a newspaper), *Gregoire v. G. P. Putnam’s Sons*, 81 N.E.2d 45, 47 (N.Y. 1948), and does not restart unless the material is republished in a manner that is “not merely ‘a delayed circulation of the original.’” *Firth v. State*, 775 N.E.2d 463, 466 (N.Y. 2002) (citation omitted).

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<sup>3</sup> *See* Compl. ¶¶ 43-62 (Claims 1 and 2 for defamation); ¶¶ 66, 72 (Claims 3 and 4 for tortious interference and conspiracy alleging defendants’ “culpable conduct by defaming” plaintiffs); ¶ 77 (Claim 5 for prima facie tort alleging that article “resulted in damage to the reputations” of plaintiffs); ¶ 83 (Claim 6 for “conspire[acy] to publish and post defamatory statements”); ¶ 91 (Claim 7 under N.Y. Gen. Bus. L. § 349 alleging that defendants falsely suggested that the plaintiffs “are somehow inferior medical doctors”); ¶ 101 (Claim 8 for injunction directing defendants “to remove or delete all disparaging statements” about plaintiffs).

Courts have uniformly concluded that changes to a website that leave the allegedly defamatory statements unaltered do not constitute a “republishing,” even if the changes draw more attention to the statements. For example, in *In re Philadelphia Newspapers, LLC*, 690 F.3d 161 (3d Cir. 2012), a company that runs charter schools sued the *Philadelphia Inquirer* over a series of articles critical of its business practices. *Id.* at 165. The company claimed that the defamatory statements were “republished” when another *Inquirer* columnist later provided an internet link to the earlier articles, as follows: “[I]f you follow the remarkable reporting of my colleague Martha Woodall (<http://go.philly.com/charter>), you’ll see greedy grown-ups pilfering public gold under the guise of enriching children’s lives.” *Id.* at 166.

The Third Circuit concluded 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” — “regardless [of] how favorable” the subsequent references may be. *Id.* at 175. The decision emphasized that, because websites “are constantly linked and updated,” holding otherwise would mean that “the statute of limitations would be retriggered endlessly and its effectiveness essentially eliminated.” *Id.*

Judge Sack’s leading treatise on defamation endorses the Third Circuit’s holding explicitly, and concludes that “changes in the manner in which . . . material may be accessed” on the internet do not constitute republication. 1 HON. ROBERT. B. SACK, *SACK ON DEFAMATION: LIBEL, SLANDER & RELATED PROBLEMS* §§ 7.2.2, 7.3.1.B (4th ed. 2015). Courts across the country agree. *See, e.g., U.S. ex rel. Klein v. Omeros Corp.*, 897 F. Supp. 2d 1058, 1074 (W.D. Wash. 2012) (internet link merely “tells the new audience where the defamatory material can be found” and is not a republication); *Salzer v. S. Poverty Law Ctr., Inc.*, 701 F. Supp. 2d 912, 916-17 (W.D. Ky. 2009) (concluding that “[m]aking access to the referenced article easier does

not” republish it). Here, any alleged meta-tags would, at best, allow for easier access to the article, in the same way as a new hyperlink to the article would do, and so, as a matter of law, there can no republication.

Dr. Goldman and Dr. Klatz concede that a mere link “may not be enough” to constitute republication, but suggest that Dr. Barrett took vaguely-described “affirmation actions” that “*are* enough.” (Ex. K at 2 (emphasis added).) But that allegation (which is false) misses the point. Republication on the internet is not determined by the extent to which subsequent references to pre-existing material are “favorable” or successfully generate new readers. *Philadelphia Newspapers*, 690 F.3d at 175. The question is whether “new substantive information was added to the actual webpage defaming the plaintiffs.” *Salyer*, 701 F. Supp. 2d at 917. Enforcing this clear rule ensures that the deliberately short statute of limitations for defamation is meaningful in the internet context, and avoids tasking courts with making the impossible judgment of exactly when links or similar promotions of pre-existing content cross the line into “republication.”

For these reasons, the Court should conclude that complaint was filed far too late and dismiss it entirely.

## **II. THE COMPLAINT SHOULD BE DISMISSED IN ITS ENTIRETY ON FIRST AMENDMENT GROUNDS**

### **A. Dr. Barrett Has a First Amendment Right to Truthfully Report on a Governmental Disciplinary Proceeding Against the Plaintiffs**

The free speech protections of the First Amendment include the right to disclose truthful facts about public governmental proceedings or documents, and, accordingly, the Court should dismiss this case in its entirety.

The Supreme Court adopted this basic principle in *Cox Broad. Corp. v. Cohn*, 420 U.S. 469 (1975), which held that a television station could not be liable for broadcasting a rape victim’s name that had already been disclosed in court documents. The Court observed that

“[p]ublic records by their very nature are of interest to those concerned with the administration of government, and a public benefit is performed by the reporting of the true contents of the records by the media.” *Id.* at 495.

In *The Florida Star v. B.J.F.*, 491 U.S. 524 (1989), the Supreme Court made clear that the rule in *Cox* extends beyond facts disclosed in formal court proceedings. In that case, a police department made available in its press room a police report that identified a rape victim, whose name was then repeated in a newspaper article. The Supreme Court ruled that the newspaper had a First Amendment right to publish the victim’s name and noted that, to hold otherwise, would foist onto the media the “onerous obligation of sifting through government press releases, reports, and pronouncements to prune out material arguably unlawful for publication.” *Id.* at 536.

The First Amendment rights of Dr. Barrett are no different than those of the journalists in *Florida Star* and *Cox*, even though that Dr. Barrett is not part of the institutional media. The Second Circuit has squarely held that, for First Amendment purposes, “a distinction drawn according to whether the defendant is a member of the media or not is untenable.” *Flamm v. Am. Ass’n of Univ. Women*, 201 F.3d 144, 149 (2d Cir. 2000).

Here, the complaint fails to identify a single false statement contained in the article. In fact, the website of the Illinois Department of Financial and Professional Regulation to this day confirms that, exactly as the article reports, Dr. Goldman and Dr. Klatz were the subject of official government disciplinary proceedings, and that they each paid a \$5,000 fine for improperly holding themselves out as licensed “M.D.s” in Illinois. (Ex. B.) Specifically, an online query for the disciplinary record of each doctor states:

Agreed to cease and desist using the designation “M.D.” in addition to the appropriate “D.O.” title. He received a degree as a doctor of medicine, but was never properly licensed to use the title ‘M.D.’ in Illinois. \$5000 FINE DUE AND PAID.

(*Id.*) The same information was even repeated in the *New York Times*, as part of an article on dubious “science” of anti-aging: “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.” (Ex. H.) The Quackwatch article here does nothing more than truthfully report these indisputable facts.

Dr. Goldman and Dr. Klatz argue that their claims fall outside the First Amendment under the “fighting words” exception (Ex. K at 1), but that exception refers only to speech that is “inherently likely to provoke violent reaction.” *Cohen v. California*, 403 U.S. 15, 20 (1971). Questioning a doctor’s credentials is a far cry from inciting violence.<sup>4</sup>

In sum, Dr. Barrett had every right under the First Amendment to publish the article, and should not be bullied into helping Dr. Goldman and Dr. Klatz conceal their prior misconduct from the public record.

**B. The Article Does Not Imply Anything False or Defamatory and There Was No Need or Legal Obligation to Update It**

Recognizing that the article is completely factually accurate, Dr. Goldman and Dr. Klatz 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.) They further complain that the article was not properly updated. (*Id.* ¶¶ 26, 84.) The Court should reject these arguments because the article itself is not remotely susceptible to the alleged innuendo, and because the article was true when published (and, in all events, it remains true today).

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<sup>4</sup> Dr. Goldman and Dr. Klatz have referred to language in *Chaplinsky v. State of New Hampshire*, 315 U.S. 568, 572 (1942) that could be read to define “fighting words” to include those that merely “inflict injury” (Ex. K at 1), but the Supreme Court has defined “fighting words” in at least seven subsequent cases by reference to violence — omitting the “inflict injury” phrasing — and has never actually held that “fighting words” could exist absent a risk of an “an immediate breach of the peace.” *Purtell v. Mason*, 527 F.3d 615, 624-25 (7th Cir. 2008) (collecting cases).

First, the article does not state, directly or indirectly, that the doctors are “quacks.” That the article is contained within a website called “Quackwatch” hardly suggests that every doctor referenced in every article is a “quack.” That is especially so because, as the complaint concedes, the website’s stated mission is “exposing health related frauds . . . and *misconduct*.” (Compl. ¶ 55 (emphasis added).) There can be no dispute that the article exposed “misconduct” — namely that Goldman and Dr. Klatz were improperly holding themselves out as M.D.s in Illinois, which is why they agreed to cease doing so and to pay a \$5,000 fine each.

Even if the article had expressly called the doctors “quacks,” that would be a classic form of opinion or “rhetorical hyperbole” that cannot amount to defamation. *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 17 (1990). For example, the Second Circuit rejected defamation claims brought by a financial professional described in a book as a “sucker,” “fool,” “frontman,” “crook[,],” “moron[,],” and the “pilot[ ]” of the “ship of doom,” “because those were simply ‘non-actionable opinions’” and “hyperbole.” *Chau v. Lewis*, 771 F.3d 118, 129 (2d Cir. 2014).

The word “quack” is no different. In *Gonzalez v. Gray*, 69 F. Supp. 2d 561 (S.D.N.Y.1999), *aff’d*, 216 F.3d 1072 (2d Cir. 2000), a television journalist reported that a man believed that his wife, who died of cancer after undergoing non-traditional treatments, had “been seduced by a quack.” *Id.* at 566. Judge Sweet dismissed the doctor’s defamation claims against the husband because, “[g]iven the obviously controversial nature of [the doctor’s] methods, a reasonable viewer would understand the [s]tatements as expressing [the husband’s] opinion as to the validity of those methods.” *Id.* at 568. So too here. Given the obviously controversial nature of Dr. Goldman and Dr. Klatz’s “anti-aging” practices (Ex. G), even an explicit statement that the plaintiffs are “quacks” would be protected. *See also Yiamouyiannis v. Thompson*, 764

S.W.2d 338, 341 (Tex. App. 1988) (holding that “references to [the defendant] as a quack, a hoke artist, and a fearmonger are assertions of pure opinion” and “vintage hyperbole”).

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.” (Ex. F.)

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

Finally, the plaintiffs’ complaint the article was not updated should be rejected 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 any advertisements “aimed specifically or solely at Illinois.” (Ex. I at 2.)

### **III. THE COMPLAINT FAILS 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 allege facts sufficient to state a claim and should be dismissed.

#### **A. The Defamation Claims Fail to Allege Any False Statements**

Defamation claims must be dismissed where the allegedly defamatory statement is “substantially true.” *Biro v. Conde Nast*, 883 F. Supp. 2d 441, 458 (S.D.N.Y. 2012) (granting



motion to dismiss); *Chung v. Better Health Plan*, 96 Civ. 7310, 1997 WL 379706, at \*4 (S.D.N.Y. July 9, 1997) (same). “[C]omplete accuracy” is unnecessary, so long as the “gist” is correct. *Printers II, Inc. v. Professionals Pub., Inc.*, 784 F.2d 141, 146 (2d Cir. 1986).

As discussed, Dr. Goldman and Dr. Klatz have failed to identify anything that is untrue about the challenged article. Thus, the defamation claims (Claims 1 and 2) must be dismissed.

**B. The Tortious Interference and Prima Facie Tort Claims Must Be Dismissed As Duplicative of the Defamation Claims**

Plaintiffs are “not permitted to dress up a defamation claim as a claim for intentional interference with a prospective economic advantage,” *Krepps v. Reiner*, 588 F. Supp. 2d 471, 485 (S.D.N.Y. 2008), *aff’d*, 377 F. App’x 65 (2d Cir. 2010); *see also, e.g., 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”).

Similarly, “where the factual allegations underlying the prima facie tort cause of action relate to the dissemination of allegedly defamatory materials, that cause of action must fail.” *McKenzie v. Dow Jones & Co.*, 355 F. App’x 533, 536 (2d Cir. 2009); *see also Springer v. Viking Press*, 457 N.Y.S.2d 246, 248 (1st Dep’t 1982), *aff’d*, 458 N.E.2d 1256 (N.Y. 1983) (holding there was “no warrant for invocation of the prima facie tort doctrine” because the claim could not be “established without, at the same time, establishing the classical tort of libel”).

The Court should therefore dismiss as duplicative the claims for tortious interference and (Claim 3) and prima facie tort (Claim 5).

**C. The Plaintiffs' Claim Under N.Y. Gen. Bus. L. § 349 Must Be Dismissed On Multiple Grounds**

**1. The Article is Not Materially Misleading**

A plaintiff seeking relief under N.Y. Gen. Bus. L. § 349 must plead that the defendant's conduct was "was misleading in a material way." *Stutman v. Chem. Bank*, 731 N.E.2d 608, 611 (N.Y. 2000). As discussed, the article in question is completely truthful.

**2. Section 349 Covers Only Commercial Transactions**

Section 349 prohibits "[d]eceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service." N.Y. Gen. Bus. L. § 349(a). Based on this language, and based on concerns about encroaching on First Amendment protections, courts have limited § 349's application to "practices arising out of commercial transactions." *NYPIRG v. Ins. Info. Inst.*, 554 N.Y.S.2d 590, 592 (1st Dep't 1990).

In *NYPIRG*, for example, an insurance industry advocacy firm bought television and magazine ads complaining about the "explosion of civil law suits and escalating jury awards." *Id.* at 591. A consumer advocacy group alleged the ads were misleading under § 349, but the First Department found that § 349 was not implicated at all because the ads were not "directed at potential purchasers" of insurance or and were not otherwise "propos[ing] a commercial transaction." *Id.* at 592. Instead, the ads were meant "to influence public officials, voters and citizens in general." *Id.*

Here, the Quackwatch article likewise has no commercial purpose. It is self-evidently aimed at informing the public, and thus the § 349 claim must be dismissed. *See also Steinmetz v. Energy Automation Sys., Inc.*, 990 N.Y.S.2d 440, 2014 WL 1386954, at \*10 (Sup. Ct. Kings Cnty. 2014) (allegations challenging Better Business Bureau's ratings of a business fall outside § 349); *Cusack v. 60 Minutes Div. of CBS, Inc.*, No. 600060/98, 2001 WL 36412188 (Sup. Ct.

N.Y. Cnty. 2001) (allegations of false television newscast did not concern the type of “commercial activity” covered by § 349).

### **3. The Plaintiffs Lack Standing Because Any Injury Would Be Derivative**

Section 349 allows recovery only for direct injury to consumers, not for “derivative” injury arising indirectly from the consumers’ injury. *City of New York v. Smokes-Spirits.Com, Inc.*, 911 N.E.2d 834, 838 (N.Y. 2009). In *Silvercorp Metals Inc. v. Anthion Mgmt. LLC*, 959 N.Y.S.2d 92, 2012 WL 3569952 (Sup. Ct. N.Y. Cnty. 2012), for example, a public company accused the defendants of driving down its stock price by publishing misinformation on the internet. The court dismissed the § 349 claim because “defendants’ alleged deceptive acts were aimed at the ‘readerships’ of defendants’ respective websites, who then took certain action based on defendants’ acts.” *Id.* at \*15. In other words, any injury was merely derivative.

The same is true here. Dr. Goldman and Dr. Klatz allege that customers who would be “potentially interested in doing business” with them were misled by the article, causing the doctors “significant loss of potential earnings.” (Compl. ¶¶ 88, 92.) Because any deception would be aimed at readers (not the doctors), any “injury” to the doctors would be classically derivative, and could not be the subject of a § 349 claim.

### **D. The Claims For Conspiracy and Injunctive Relief Cannot Proceed Independently**

Injunctive relief (Claim 8) is “not available when the plaintiff does not have any remaining substantive cause of action.” *Weinreb v. 37 Apartments Corp.*, 943 N.Y.S.2d 519 (1st Dep’t 2012). Similarly, New York law does not recognize “a substantive tort of conspiracy” (Claims 4 and 6) absent “allegations of an independent actionable tort.” *Antonios A. Alevizopoulos & Assocs., Inc. v. Comcast Int’l Holdings, Inc.*, 100 F. Supp. 2d 178, 187-88 (S.D.N.Y. 2000). The conspiracy claims should be dismissed for the independent reason that Dr.

Barrett's co-defendant is a corporate entity that was dissolved in 2009, leaving Dr. Barrett as the only member of the supposed "conspiracy." (Ex. E.) The claims therefore violate the "tenet basic to our law that no one may conspire with himself." *Lewis v. Friedman-Marks Clothing Co.*, 418 N.Y.S.2d 60, 61 (1st Dep't 1979).


These injunction and conspiracy claims must therefore be dismissed, as well.

### CONCLUSION

For the stated reasons, the Court should dismiss the plaintiffs' complaint with prejudice.

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Respectfully submitted,

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