

**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 REPLY MEMORANDUM OF LAW
IN FURTHER SUPPORT OF HIS MOTION TO DISMISS**

STEPTOE & JOHNSON LLP
1114 Avenue of the Americas
New York, New York 10036
Tel: (212) 506-3900
Fax: (212) 506-3950

February 16, 2016

TABLE OF CONTENTS

INTRODUCTION	1
DISCUSSION	2
I. THE COMPLAINT SHOULD BE DISMISSED ENTIRELY BECAUSE IT WAS FILED TOO LATE.....	2
A. The Article’s Source Code Conclusively Shows That Dr. Barrett Did Not Alter Any Meta-Tags At All, Much Less During the Limitations Period.....	2
B. Even Assuming Dr. Barrett Promoted the Article in the Past Year, the Content of the Article Was Unchanged and Thus It Was Never Republished	3
II. THE COMPLAINT SHOULD BE DISMISSED ENTIRELY ON FIRST AMENDMENT GROUNDS.....	5
A. The Article Does Not Imply Anything False	5
B. At Best, the Article Expresses Protected Opinion	6
III. THE COMPLAINT FAILS TO STATE A CLAIM.....	7
A. The Defamation Claims Fail to Allege Any False Statement.....	7
B. The Tortious Interference and Prima Facie Tort Claims Must Be Dismissed As Duplicative of the Defamation Claims.....	7
C. The Plaintiffs’ Claim Under N.Y. Gen. Bus. L. § 349 Must Be Dismissed	8
D. The Claims For Conspiracy and Injunctive Relief Cannot Proceed Independently	9
CONCLUSION.....	9

TABLE OF AUTHORITIES

CASES

<i>Brandon v. City of New York</i> , 705 F. Supp. 2d 261 (S.D.N.Y. 2010).....	5
<i>Churchill v. State</i> , 378 N.J. Super. 471 (N.J. App. Div. 2005).....	4
<i>Doron Precision Sys., Inc. v. FAAC, Inc.</i> , 423 F. Supp. 2d 173 (S.D.N.Y. 2006).....	6
<i>Firth v. State</i> , 98 N.Y.2d 365 (2002)	4
<i>Gonzalez v. Gray</i> , 69 F. Supp. 2d 561 (S.D.N.Y.1999), <i>aff'd</i> , 216 F.3d 1072 (2d Cir. 2000)	6
<i>Haefner v. New York Media, LLC</i> , 82 A.D.3d 481 (1st Dep’t 2011)	4
<i>Levy v. Southbrook Int’l Investments, Ltd.</i> , 263 F.3d 10 (2d Cir. 2001).....	2
<i>Martin v. Daily News</i> , 35 Misc. 3d 1212(A), 2012 WL 1313994 (Sup. Ct. N.Y. Cnty. Feb. 10, 2012)	4
<i>NYPIRG v. Ins. Info. Inst.</i> , 161 A.D.2d 204 (1st Dep’t 1990)	8
<i>O’Brien v. Nat’l Prop. Analysts Partners</i> , 719 F. Supp. 222 (S.D.N.Y. 1989).....	3
<i>Spelson v. CBS, Inc.</i> , 581 F. Supp. 1195 (N.D. Ill. 1984), <i>aff’d</i> , 757 F.2d 1291 (7th Cir. 1985)	7
<i>Stoner v. Walsh</i> , 772 F. Supp. 790 (S.D.N.Y. 1991).....	3
<i>Turkmen v. Ashcroft</i> , 589 F.3d 542 (2d Cir. 2009).....	6
<i>Zoll v. Jordache Enterprises, Inc.</i> , 01 Civ. 1339, 2002 WL 31873461 (S.D.N.Y. Dec. 24, 2002)	4

STATUTES

225 Ill. Comp. Stat. §§ 60/11	5
N.Y. Gen. Bus. L. § 349	8, 9

INTRODUCTION

Defendant Dr. Stephen Barrett has asked the Court to dismiss this case because it was filed too late, and because it directly conflicts with his First Amendment right to accurately report in an online article that the plaintiffs were fined for improperly using the term “M.D.” after their names. The plaintiffs’ opposition brief does not undo these flaws or rescue the case.

On the timeliness question, the plaintiffs argue that the article was “republished” in 2015 by search engine optimization, but refuse to address that the article’s source code conclusively shows otherwise. In all events, courts uniformly conclude that material is not republished unless its content is changed, which concededly did not happen here. A contrary rule would undermine the deliberately short statute of limitations for defamation, and would be particularly problematic on the internet, where websites are often updated to make older content more accessible.

Separately, the free speech protections of the First Amendment include the right to disclose truthful facts about public governmental proceedings, which is all that the article does. The plaintiffs do not identify a single false statement in the article. They complain instead that the article, by virtue of being on the Quackwatch website, implies they are “quacks,” but that hardly follows and would in all events not support a defamation claim. Calling a doctor with controversial methods — such as the plaintiffs’ peddling of the fountain of youth — a “quack” merely expresses an opinion about one side in the debate. That is why the plaintiffs are free to say, as they do on their own website, that the medical establishment is “corrupt” for doubting them. It is irrelevant to this motion whether the plaintiffs have, in fact, discovered how to reverse the aging process, or whether, as the medical establishment believes, they are deceptive hucksters. In either case, the First Amendment protects the rights of anyone, including Dr. Barrett, to express an opinion on the subject.

DISCUSSION

I. THE COMPLAINT SHOULD BE DISMISSED ENTIRELY BECAUSE IT WAS FILED TOO LATE

A. The Article's Source Code Conclusively Shows That Dr. Barrett Did Not Alter Any Meta-Tags At All, Much Less During the Limitations Period

The plaintiffs concede that their case is timely only if the Court agrees with them that, in the year before this case was filed, Dr. Barrett “republished” the article through “search engine optimization” tactics aimed at driving more readers to the article. (*Compare* Def. Br. at 4-7 with Opp. 7-9.) The only specific search engine optimization tactic referenced in the complaint is the allegation that Dr. Barrett added new “meta tags” in the article’s source code. (Compl. ¶¶ 32-25.) But the source code itself shows that this allegation is a complete fiction. (Ex. G.)

The plaintiffs do not challenge the authenticity of the source code but instead argue, without citing any authority, that the Court cannot consider the source code on a motion to dismiss. (Opp. 9.) That is incorrect: the Court can consider documents “referred to in the complaint,” *Levy v. Southbrook Int’l Investments, Ltd.*, 263 F.3d 10, 13 & n.3 (2d Cir. 2001), and, here, the complaint repeatedly references the article and the supposedly improper meta-tags in the source code. (Compl. ¶¶ 32-25.)

The complaint also vaguely alleges that Dr. Barrett engaged in “active search engine optimization practices (‘SEO’) on websites such as Google and Bing” (Compl. ¶ 31), but that allegation does give any hint as to what those practices might be, other than the demonstrably false allegation about meta-tags. To the extent the plaintiffs are suggesting additional, unpleaded conduct, they have not even met the minimal notice pleading standards under Rule 8. In any

event, the allegation is nonsensical because there is no way to engage in optimization practices “on” search engine websites; search engines “crawl” the internet for content existing elsewhere.¹

The plaintiffs’ opposition brief adds a new allegation on this topic — that Dr. Barrett “likely” used “several websites” that he “owns and operates” to promote the article in unspecified ways (Opp. 9) — but that should be disregarded entirely for purposes of this motion. The Court must consider only the allegations actually pleaded in the complaint, which “cannot be amended by the briefs in opposition to a motion to dismiss.” *O’Brien v. Nat’l Prop. Analysts Partners*, 719 F. Supp. 222, 229 (S.D.N.Y. 1989).

The plaintiffs’ repeated requests for discovery (Opp. 9, 13-14) reflect a sue-first attitude that is wholly improper, and that should not be grounds for this case to proceed. What they appear to misunderstand is that the “purpose of discovery is to find out additional facts about a well-pleaded claim, not to find out whether such a claim exists.” *Stoner v. Walsh*, 772 F. Supp. 790, 800 (S.D.N.Y. 1991).

The Court should therefore dismiss this case entirely because it was filed too late.

B. Even Assuming Dr. Barrett Promoted the Article in the Past Year, the Content of the Article Was Unchanged and Thus It Was Never Republished

Even assuming there are fact disputes about whether Dr. Barrett promoted the article within the limitations period, the case would still be untimely, because there is no dispute that the article’s content remained unchanged. As Dr. Barrett’s motion explained, courts uniformly conclude that efforts to attract more readers to pre-existing content do not constitute republication, unless the content is changed in some way. (Def. Br. 5-7.) In other words, “the

¹ See <https://www.google.com/insidesearch/howsearchworks/crawling-indexing.html> (“We use software known as ‘web crawlers’ to discover publicly available webpages.”); <http://help.bing.microsoft.com/#apex/18/en-us/10016/0> (“Bing automatically crawls the web to build an index of new and updated pages (or URLs) to display as a set of search results relevant to a user-initiated search or action.”)

touchstone element in treating a publication as a republication is the fact of modification or revision.” *Zoll v. Jordache Enterprises, Inc.*, 01 Civ. 1339, 2002 WL 31873461, at *10 (S.D.N.Y. Dec. 24, 2002).

The plaintiffs do not dispute that the article has been unchanged for over 14 years, nor could they, in the face of readily available historical versions of the article. (Ex. G.) They likewise fail to cite a single case, and we are aware of none, in which an online article was deemed to be republished without its substance changing at all. In fact, the only cases cited by the plaintiffs on this point (Opp. at 3) all support the Dr. Barrett’s position. *Haefner v. New York Media, LLC*, 82 A.D.3d 481 (1st Dep’t 2011) (continuous access to Web article via link on another website not republication); *Martin v. Daily News*, 35 Misc. 3d 1212(A), 2012 WL 1313994, at *4 (Sup. Ct. N.Y. Cnty. Feb. 10, 2012) (later addition of “share” links to article not republication); *Churchill v. State*, 378 N.J. Super. 471, 477, 485 (N.J. App. Div. 2005) (addition of menu bar and link to article not republication).

A rule along the lines of what the plaintiffs propose would wreak havoc on the internet because any online newspaper or other publication that that improved accessibility to its archives or other older material, through search engine optimization or otherwise, would risk restarting the statute of limitations for every historical article. The safer course, if the law were as the plaintiffs’ suggest, would be to leave material in obscure parts of a website alone, with no improvements to accessibility. The Court of Appeals has specifically cautioned against using the republication doctrine to “reduc[e] the Internet’s unique advantages,” *Firth v. State*, 98 N.Y.2d 365, 372 (2002), which is exactly what the plaintiffs’ view of the law would do.

The Court should therefore reject the plaintiffs’ republication theory, and dismiss this case entirely as untimely.

II. THE COMPLAINT SHOULD BE DISMISSED ENTIRELY ON FIRST AMENDMENT GROUNDS

The plaintiffs' opposition brief fails to identify a single false statement in the article. They do not dispute that they were fined for improperly holding themselves out as M.D.s in Illinois, nor do they dispute that the First Amendment protects the right to truthfully report on governmental proceedings, like the ones that led to their fines. (Def. Br. 7-9.) Their opposition instead rests entirely on the argument that they were defamed by the "implication" that they are "quacks." (Opp. 9-14.)² This is wrong because the article does not imply anything false; at most, it expresses a protected opinion.

A. The Article Does Not Imply Anything False

The article says nothing to imply that the plaintiffs are "quacks," beyond what is truthfully reported. The term "quack" means "a person who pretends to have medical knowledge and skill,"³ and the plaintiffs paid a fine for having held themselves out as something (licensed M.D.s) that, by Illinois law, they were not. 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, and there is no dispute that their "degrees" from Belize did not qualify. There is no "quackery" suggested by the article beyond that.

The plaintiffs argue that the article would lead an ordinary reader to "infer the existence of further facts beyond" the article or to assume that Dr. Barrett had "deeper knowledge of the subject matter." (Opp. 10-11.) What could possibly lead a reader to these conclusions? The plaintiffs do not say. These arguments do not approach the level of "plausibility" required to

² The complaint alleges other allegedly false implications from the article (that the doctors are "not licensed" or not "trustworthy") and complains that the article was not updated. (Compl. ¶¶ 26, 57, 84.) The plaintiffs' opposition brief fails to defend these theories against Dr. Barrett's motion (Def. Br. 7-9), and these theories should therefore be deemed abandoned and dismissed. *Brandon v. City of New York*, 705 F. Supp. 2d 261, 268 (S.D.N.Y. 2010).

³ <http://www.merriam-webster.com/dictionary/quack>

survive a motion to dismiss. *Turkmen v. Ashcroft*, 589 F.3d 542, 546 (2d Cir. 2009). (The plaintiffs erroneously rely on the somewhat more generous state court standard. (Opp. 4-5).)

B. At Best, the Article Expresses Protected Opinion

The case should in any event be dismissed because calling a doctors who engage in or promote controversial forms of medicine “quacks” amounts to nothing more than expressing the speaker’s view that he or she favors one side in the controversy — which is a protected statement of opinion. (Def. Br. 10-11.) There can be no dispute that the plaintiffs’ “anti-aging” activities, which follow long tradition of hucksters marketing the fountain of youth, are controversial. That is why the *New York Times* reported that the medical establishment calls anti-aging medicine “quackery or hype” and labels the practices the plaintiffs promote as “medically and legally specious.” (Ex. H.)

In fact, the plaintiffs’ own website, which can be considered on this motion, *Doron Precision Sys., Inc. v. FAAC, Inc.*, 423 F. Supp. 2d 173, 179 n. 8 (S.D.N.Y. 2006), complains vociferously that the plaintiffs face criticism from “corrupt” “political elites” who have a “dark agenda” and for whom “science, truth and objective scientific method are not at all sacred.”⁴ The medical establishment (or anyone else) has a right to express the opposite view, and to similarly use pejorative or inflammatory language to do so.

For these same reasons, Judge Sweet found that calling a doctor, who used non-traditional cancer treatments, a “quack,” was protected by the First Amendment. *Gonzalez v. Gray*, 69 F. Supp. 2d 561, 570-71 (S.D.N.Y. 1999), *aff’d*, 216 F.3d 1072 (2d Cir. 2000) (discussed in Def. Br. at 10). The plaintiffs attempt to distinguish *Grey* on the ground that the

⁴ See <http://www.worldhealth.net/pdf/A4M-2013-Position-Statement-HRT.pdf>, at 3-4 (a copy is attached for the Court’s convenience as Exhibit 1 to this memorandum). See also Compl. ¶ 10 (confirming that the plaintiffs are co-founders of A4M).

patient in that case died (Opp. 10), but that distinction makes no sense. The First Amendment does not spring into effect only in life-or-death matters.

In another similar case, *Spelson v. CBS, Inc.*, 581 F. Supp. 1195 (N.D. Ill. 1984), *aff'd*, 757 F.2d 1291 (7th Cir. 1985), the court dismissed the defamation claims of a chiropractor, who was accused on a television broadcast of “quackery” for his unconventional method of treating cancer with large doses of vitamins, because the statement was protected opinion. *Id.* at 1197-98. The court observed the underlying science of how to treat cancer is “one upon which there can be much debate and disagreement.” *Id.* at 1202. In language appropriate for this case, the court added: “That but one view among many is presented does not give rise to a cause of action for libel. To hold otherwise would be to place the unconstitutional power of censorship in the hands of the courts.” *Id.* at 1202-03.

The Court should reject the plaintiffs’ attempt at censorship and dismiss this case.

III. THE COMPLAINT FAILS TO STATE A CLAIM

In addition to the issues discussed above, the complaint should be dismissed because it fails to state a claim.

A. The Defamation Claims Fail to Allege Any False Statement

The plaintiffs have not stated a defamation claim because, as discussed, they have not alleged that the article is false. (Def. Br. 11-12.)

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

The plaintiffs do not dispute or challenge the settled case law holding that defamation claims preclude claims based on the same conduct for tortious interference and prima facie tort. (Def. Br. 12.) They point out that tortious interference claims can sometimes have a longer

statute of limitations (Opp. 14), but fail to explain why that should matter here, or how it can allow duplicative claims to proceed.

The Court should therefore dismiss the plaintiffs' claims for tortious interference and prima facie tort.

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

The plaintiffs' claim under N.Y. Gen. Bus. L. § 349 must be dismissed because, again, the article is true. (Def. Br. 13.)

In addition, the plaintiffs do not dispute that N.Y. Gen. Bus. L. § 349 protects only direct (not derivative) injury, nor do they dispute that their theory of relief for this claim is based on potential customers or business partners being misled by the article. (Def. Br. 14.) Any injury to the plaintiffs is therefore derivative. (*Id.*)

In opposition, the plaintiffs state that they "have a strong interest in the type of information" on the Quackwatch website and, without further explanation, that they are "directly harmed" by alleged misinformation. (Opp. 15-16.) But what their complaint actually alleges is that the article would mislead "consumers who are potentially interested in doing business with" them (Compl. ¶ 88), not that the plaintiffs themselves were misled. It does not even make sense to argue that the plaintiffs were misled about their own disciplinary history and qualifications.

The claim under § 349 must be dismissed on the additional ground that the article does not "propose[] a commercial transaction." *NYPIRG v. Ins. Info. Inst.*, 161 A.D.2d 204, 206 (1st Dep't 1990) (discussed in Def. Br. at 13). The plaintiffs try to avoid the rule in *NYPIRG* by pointing out that Quackwatch accepts donations (Opp. 15), but the *NYPIRG* court specifically held that its protections extend even to speech that "is economically motivated or reflects the interest of a commercial enterprise." *Id.* at 206. Here, regardless of any overall economic

motivation for Quackwatch (and there is none), the article itself does not propose a commercial a transaction and hence falls outside § 349.

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

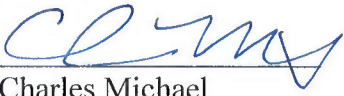
The plaintiffs do not dispute that their claims for injunctive relief and conspiracy cannot proceed independently of their substantive claims and, for this reason, those claims must be dismissed. (*Compare* Def. Br. 14 *with* Opp. 16.) Dr. Barrett had also argued that it would be impossible for him to conspire with his long-since dissolved co-defendant, yet the plaintiffs want to maintain this claim on the ground that “discovery is needed” to show whether there are other co-conspirators. (Opp. 16.) Once again, the plaintiffs have it exactly backwards. Discovery should be used to support well-pleaded claims, not to find out if they exist.

CONCLUSION

For the stated reasons, and those in Dr. Barrett’s moving papers, the Court should dismiss the plaintiffs’ complaint with prejudice.

Dated: New York, New York
February 16, 2016

Respectfully submitted,

By: 
Charles Michael
Michael A. Keough
STEPTOE & JOHNSON LLP
1114 Avenue of the Americas
New York, New York 10036
Tel: (212) 506-3900
Fax: (212) 506-3950

Counsel for Dr. Stephen J. Barrett