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October 17, 2016

By ECF and Fax

Hon. Paul G. Gardephe  
Thurgood Marshall United States Courthouse  
40 Foley Square  
New York, New York 10007  
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**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 Amended Complaint in the above case. As detailed below, the plaintiffs' tortious interference claim duplicates their defamation claim, which is itself untimely, and the only other claim, for civil conspiracy, cannot proceed on its own.

## **Background**

The case was brought by two multi-millionaire promoters of anti-aging "medicine" who, in their original complaint, sought to bully Dr. Barrett into deleting an article from a nonprofit consumer advocacy website he operates called "Quackwatch." The article truthfully reported that the State of Illinois disciplined and fined the plaintiffs for falsely using the term "M.D." after their names. The plaintiffs have degrees from a school in Belize that does not qualify for an M.D. license under Illinois law.

The Court dismissed all the claims in the original complaint, on the following grounds:

- First, the Court dismissed the plaintiffs' defamation and N.Y. Gen Bus. L. § 349 claims because the article was not alleged to have said anything false. *Goldman v. Barrett*, 15 Civ. 9223, 2016 WL 5942529, at \*5, \*8 (S.D.N.Y. Aug. 24, 2016). To the extent the article's appearance on the "Quackwatch" site implied that the doctors are "quacks," it was not false or misleading. *Id.* at \*5. The term "quack" refers to someone who "falsely pretends to have medical skills or knowledge,"

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and, as the Court found, that is exactly what the plaintiffs did by improperly holding themselves out as M.D.s. *Id.* at \*5.

- Second, the Court dismissed the plaintiffs' tortious interference and prima facie tort claims as duplicative of the defamation claim. *Id.* at \*7-8.
- Third, the Court ruled that the civil conspiracy claim could not proceed absent an independently actionable tort. *Id.* at \*9
- Fourth, the Court dismissed all the claims on the independent ground that they were barred by the statute of limitations. *Id.* at \*9-11.

The Court granted leave to amend, *id.* at \*11, and the plaintiffs have filed an Amended Complaint based on different allegations that were suspiciously omitted from the original complaint. The plaintiffs now claim that, sometime in the spring of 2015 or earlier, Dr. Barrett spoke by phone with government officials from China and Malaysia who were conducting due diligence for business ventures with the plaintiffs, and he allegedly told the officials various defamatory falsehoods about the plaintiffs, including that the plaintiffs were likely face criminal prosecution in the U.S. (ECF 26 ¶¶ 41-62.) According to the complaint, these conversations caused the projects to be cancelled. (*Id.*) The plaintiffs have brought claims for (1) defamation, (2) tortious interference, and (3) civil conspiracy. (*Id.* ¶¶ 63-86.)<sup>1</sup>

The new allegations are a complete fabrication and are wildly implausible. Dr. Barrett never spoke to any government officials or made the statements attributed to him in the Amended Complaint. And it is simply unbelievable that government officials would, based solely on the say so of a retired doctor with no relationship to the plaintiffs, cancel otherwise lucrative business projects — apparently without even giving the plaintiffs an chance to defend themselves. It is especially suspicious that the alleged phone calls and cancellation of these lucrative contracts were not mentioned in the earlier complaint, or in any of the parties' discussions before the complaint was filed.

But even assuming the allegations to be true, they must be dismissed for the reasons summarized below.

### **The Tortious Interference Claim is Duplicative of the Defamation Claim**

In dismissing the plaintiffs' original complaint, the Court recognized that tortious interference claims "premised on the same factual allegations" as defamation claims must be

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<sup>1</sup> The Amended Complaint mentions the allegations concerning the Quackwatch article (*id.* ¶¶ 26-39), but does not actually assert any claims based on the article. (*Id.* ¶¶ 63-86.)

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dismissed. 2016 WL 5942529, at \*5 (quotations omitted). The plaintiffs had argued that their tortious interference claim in the original complaint was independent because they had separately alleged “the loss of prospective economic gain with business contacts.” *Id.* That was insufficient, the Court found, because the allegation did not state separate, tortious conduct but merely recited an injury that “flow[ed] from the effect of the [allegedly] defamatory” article. *Id.* (alterations added; quotation omitted).

These points are equally applicable to the new tortious interference claim. In their Amended Complaint, the plaintiffs allege in their tortious interference claim that Dr. Barrett “committed wrongful and culpable conduct by defaming” the plaintiffs in the phone calls at issue, and that he “used defamatory statements to not only harm the Plaintiffs’ reputations but their specific business interests” in the projects. (ECF 26 ¶¶ 77-78.) These allegations confirm that the tortious interference claim is premised on the same facts as the plaintiffs’ defamation claim, and that the injuries alleged on the tortious interference claim flow from the alleged defamation — just as before. Under the same reasoning as the Court’s prior ruling, the claim should be dismissed.

### **The Defamation Claim is Untimely**

The plaintiffs allege that the defamatory statements were made to the Chinese officials in March and April 2015 (ECF 26 ¶ 48), and to the Malaysian officials sometime in 2014 or earlier (*id.* ¶ 61). But the Amended Complaint was not filed until October 2016, which is outside the one-year statute of limitations for defamation claims. N.Y. CPLR § 215(3); *see also Stuart v. Am. Cyanamid Co.*, 158 F.3d 622, 626 (2d Cir. 1998) (in diversity cases, federal courts must apply statutes of limitations of the forum state).

The plaintiffs may argue that the Amended Complaint “relates back” to the original complaint, but that is permissible only when “the amendment asserts a claim or defense that arose out of the conduct, transaction, or occurrence set out—or attempted to be set out—in the original pleading.” Fed. R. Civ. P. 15(c)(1)(B). Under this standard, “[a]n amendment will not relate back if it sets forth a new set of operational facts; it can only make more specific what has already been alleged.” *Pruiss v. Bosse*, 912 F. Supp. 104, 106 (S.D.N.Y. 1996).

The Amended Complaint does not meet the relation back standard because it refers to instances of alleged defamation that are nowhere in the original complaint. Courts have uniformly recognized that “amendments alleging the separate publication” of the same “libelous statement” do not relate back to the allegations of the initial publication of the statement, 6A Charles A. Wright, et al., *Federal Practice & Procedure Civ.* § 1497 & n.6 (3d ed. 2010) (collecting cases), and so a separate instance of a *different* defamatory statement obviously cannot meet the relation back standard, either.

In *Pruiss*, for example, then-District Judge Parker ruled that a proposed amendment to allege a different instance of the same defamatory statement (that the plaintiff swim coach had

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sexual encounters with young girls) did not “relate back” to the original complaint, and he observed that ruling otherwise “would, in effect, allow the plaintiff to circumvent the statute of limitations.” 912 F. Supp. at 106. The same is true here, and the result should be the same.

### **There Can Be No Independent Conspiracy Claim**

If the substantive claims are dismissed, then, as the Court ruled before, there can be no civil conspiracy claim. 2016 WL 5942529, at \*9-11. In addition, there can be no “conspiracy” because Dr. Barrett’s co-defendant, Quackwatch, Inc., is a corporate entity that was dissolved in 2009, leaving Dr. Barrett as the only member of the supposed “conspiracy.” The claim therefore violates 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). Dr. Barrett has shown the plaintiffs corporate records of the dissolution, yet they have stubbornly persisted in including Quackwatch, Inc., in their Amended Complaint.<sup>2</sup>

\* \* \*

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

Respectfully,

A handwritten signature in blue ink, appearing to read "C. Michael".

Charles Michael

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<sup>2</sup> The undersigned counsel does not represent Quackwatch, Inc., but, given that it has indisputably been dissolved, *see* ECF 15-5, the Court should dismiss it from the case *sua sponte*.