

**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 THE AMENDED COMPLAINT**

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

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INTRODUCTION

The plaintiffs, two multi-millionaire promoters of anti-aging “medicine,” originally brought this case to bully the defendant, Dr. Stephen Barrett, into deleting from the internet a fully accurate article about the plaintiffs being fined by the State of Illinois for falsely holding themselves out as “M.D.s.” After the Court dismissed their case, the plaintiffs turned to a new method of bullying Dr. Barrett. They filed an amended complaint seeking \$10 million from Dr. Barrett on the wildly implausible theory that he made defamatory statements in phone conversations with Chinese and Malaysian government officials, causing the officials to cancel lucrative business deals with the plaintiffs. (Though Dr. Barrett must accept these allegations as true for purposes of this motion, these calls are a complete fabrication and never happened.) Dr. Barrett moved to dismiss these new claims, and, in opposition, the plaintiffs offer nothing to justify allowing the case to proceed further.

First, the plaintiffs’ tortious interference claim must be dismissed because it is duplicative of their defamation claim. Both claims are premised on identical events: Dr. Barrett’s allegedly defamatory phone calls. The plaintiffs allege that they suffered distinct harm from the tortious interference claim, but the alleged damages on that claim flow exclusively and directly from the allegedly defamatory remarks. The Court followed this same logic in concluding the first time around that the claims were duplicative, and should do so again.

Second, the defamation claim was filed outside the one-year statute of limitations, and the plaintiffs cannot rescue the claim by arguing that it “relates back” under Rule 15 to the original complaint. Allegations “relate back” only insofar as they add detail to what was already alleged, and the Amended Complaint is focused on conversations with government officials that are nowhere mentioned in the original complaint.

Finally, the plaintiffs' conspiracy claim cannot stand alone and must be dismissed with the substantive claims. The claim must be dismissed for the additional reason that Dr. Barrett's co-defendant, Quackwatch, Inc., was indisputably dissolved, leaving no co-conspirator.

The Court should dismiss this case with prejudice.

I. THE TORTIOUS INTERFERENCE CLAIM IS DUPLICATIVE OF THE DEFAMATION CLAIM

As the Court ruled earlier in this case, a tortious interference claim must be dismissed as duplicative where (i) it is "premised on the same factual allegations" as a defamation claim or where (ii) the alleged damages from the tortious interference claim "flow from the effect of the defamatory comments on Plaintiffs' reputation." *Goldman v. Barrett*, 15 Civ. 9223, 2016 WL 5942529, at *7 (S.D.N.Y. Aug. 24, 2016) (quotations and alterations removed). The plaintiffs' opposition papers cannot change the fact that their claims must be dismissed on these two grounds, as the Court ruled before.

Both claims are quite plainly premised on the same facts — namely, Dr. Barrett's remarks in phone calls with government officials. The complaint makes this abundantly clear because the defamation is alleged to have occurred via "statements made by the Defendants to" the government officials in due diligence phone interviews (ECF 26 ¶ 64), and the tortious interference is alleged to have arisen from Dr. Barrett "defaming Dr. Goldman and Dr. Klatz in the interviews" (*id.* ¶ 77 (emphasis added)). These are two slightly different ways of alleging the same facts. The tortious interference claim must be dismissed on this ground alone.

In addition, there can be no serious dispute that the alleged damages from the tortious interference claim "flow from the effect of the defamatory comments on Plaintiffs' reputation." 2016 WL 5942529, at *7. Again, the Court need look no further than the plaintiffs' own Amended Complaint. It alleges that Dr. Barrett's defamatory statements "cast immediate doubt into the Plaintiffs' qualifications as both medical doctors and businessmen and resulted in . . . a

direct and immediate lost business opportunity.” (ECF 26 ¶ 69.) This allegation links directly the alleged defamation (disparaging the plaintiffs’ qualifications) and the alleged harm (the lost business opportunities). Moreover, the tortious interference count states that Dr. Barrett “used *defamatory* statements” to harm the plaintiffs’ “specific business interests.” (*Id.* ¶ 78 (emphasis added).) These allegations leave no doubt that any lost business opportunities flowed from Dr. Barrett allegedly defaming the plaintiffs, which means that the allegations amount to, at best, a claim for defamation, not tortious interference.

The plaintiffs argue that the two claims are nonetheless distinct because the tortious interference claim alleges “a separate injury distinct from the effect on Plaintiffs’ reputation.” (ECF 33, at 12.) But the relevant question is not whether the plaintiffs suffered something more than reputational harm; it is whether there is injury separate from what would “*flow from*” that reputational harm. 2016 WL 5942529, at *7 (emphasis added). There are a “plethora of cases in which courts have found that claims brought under the guise of other causes of action actually sound in defamation, even if the plaintiff alleged economic harm” from specific lost business transactions. *Lesesne v. Brimecome*, 918 F. Supp. 2d 221, 225 (S.D.N.Y. 2013). The Court’s prior ruling is consistent with those cases because the Court ruled that the plaintiffs’ alleged “loss of prospective economic gain with business contacts” was insufficient to rescue their tortious interference claim from being duplicative of defamation. 2016 WL 5942529, at *7. The result should be the same again.

The three cases the plaintiffs cite in opposition are easily distinguishable, and further confirm why the tortious interference claim must be dismissed.

First, in *Eisenberg v. Yes Clothing Co.*, No. 90 Civ. 8280, 1991 WL 107432 (S.D.N.Y. June 7, 1991), the plaintiff was a sales manager at a clothing distributor, and alleged that one of

her employer's suppliers tortuously interfered with her employment contract by "demanding her termination" — a demand that was ultimately met. *Id.* at *2. The court found that the tortious interference claim was not duplicative because it arose "out of the *action taken* by defendants in inducing and compelling" the plaintiff's termination. *Id.* at *4 (emphasis in original; internal quotations omitted).

Second, *Lindner v. Int'l Bus. Machines Corp.*, No. 06 CIV. 4751, 2008 WL 2461934 (S.D.N.Y. June 18, 2008), the plaintiff alleged that his former work colleagues "interceded with" a vendor of the company to ensure that he would not get a new job there, and the court concluded that this conduct was distinct from defamation. *Id.* at *2, *12-14.

Third, in *Lesesne*, the plaintiff was a plastic surgeon who sued a dissatisfied patient for having spread false information about the surgeon on the internet and with medical regulators, and for having allegedly dissuaded patients from seeing him. 918 F. Supp. 2d at 223. The court found that most of the allegations sounded in defamation, with the "arguable exception" of the allegation about the defendant contacting the surgeon's patients. *Id.* at 226. But that allegation was too "conclusory" for the court to actually decide the point (which was unnecessary, as the claim was dismissed entirely on other grounds). *Id.*

In each of these cases, the defendant was accused of taking affirmative steps — such as using economic leverage block the plaintiff's career advancement (*Linder*) or to get the plaintiff fired (*Eisenberg*) — distinct from simply defaming the plaintiff. Here, by contrast, Dr. Barrett is accused of classically defamatory conduct — "cast[ing] doubt into the Plaintiffs' qualifications as both medical doctors and businessmen" (ECF 26 ¶ 69) — no more, and no less. That the allegedly resulting harm included lost business does not rescue the claim from being duplicative, as the Court has recognized already. 2016 WL 5942529, at *7.

The Court should therefore dismiss the plaintiffs' tortious interference claim.

II. THE COMPLAINT WAS FILED TOO LATE

A. **The Defamation Claim Should Be Dismissed as Untimely Because the Amended Complaint Does Not Relate Back to the Original Complaint**

The plaintiffs do not dispute that the Amended Complaint was filed beyond the one-year statute of limitations for defamation (ECF 32, at 4), but argue that it "relates back" under Rule 15 to the original complaint because the "general facts regarding [Dr.] Barrett's interference with the Doctors' business were stated" in the original complaint. (ECF 33, at 9 (citing ECF 1 ¶¶ 64-68).) That is simply untrue. The original complaint was focused only on allegations about the Quackwatch article — allegations the plaintiffs have now abandoned — not any phone conversations with Chinese or Malaysian officials or anyone else.

The portion of the original complaint the plaintiffs cite for their "relation back" argument is as follows: "The Article was accessed by prospective business clients of the Doctors and as a result, Dr. Goldman and Dr. Klatz suffered actual damages in the loss of prospective economic gain with business contacts." (ECF 1 ¶ 67.) But neither this allegation, nor anything else in the original complaint, indicates that Dr. Barrett spoke to anyone about plaintiffs or did anything other than publish the article. The alleged transactions in China and Malaysia that are the focus of the Amended Complaint are wholly absent from the original complaint.

Moreover, the original complaint refers only to interference with "prospective business clients" (*id.*) whereas the Amended Complaint alleges that Dr. Barrett interfered with a "contractual relationship[s]" the plaintiffs had already "entered into" (ECF 26 ¶ 74; *see also id.* ¶ 60 (alleging that "[t]erms of the Malaysia Project were agreed upon by the parties").) The existence of these agreements was never raised before.

The plaintiffs correctly state that a complaint “relates back” to an earlier one only to the extent it “make[s] more specific what has already been alleged” (ECF 33, at 8 (quoting *Pruiss v. Bosse*, 912 F. Supp. 104, 106 (S.D.N.Y. 1996))), yet there is no conceivable reading of the original complaint under which these basis of their new claims — phone conversations with government officials relating to existing business contracts — was “already alleged.”

In addition, the plaintiffs have failed to dispute that, as stated in Dr. Barrett’s opening brief, “amendments alleging the separate publication” of the same “libelous statement” do not relate back to the allegations of the initial publication of the statement. (ECF 32, at 4-5 (quoting 6A Charles A. Wright, et al., *Federal Practice & Procedure* § 1497 & n.6 (3d ed. 2010).) That proposition necessarily means that a separate instance of a *different* defamatory statement cannot meet the relation back standard, either. (*Id.*) The plaintiffs do not cite any authority to the contrary, or even address this point.

The Court should therefore conclude that the Amended Complaint does not “relate back” to the original, and dismiss the defamation claim as untimely.

**B. The Remaining Claims Are Time-Barred
Because They Are “In Essence” Defamation Claims**

The remaining claims (to the extent they are not dismissed on other grounds) should be dismissed as untimely because, as discussed above and in Dr. Barrett’s moving papers, they are “in essence” claims for defamation. (ECF 32, at 5.)

III. THE CONSPIRACY CLAIM MUST BE DISMISSED ON MULTIPLE GROUNDS

If the substantive claims are dismissed, then, as the Court ruled before, there can be no civil conspiracy claim. 2016 WL 5942529, at *9.

In addition, the conspiracy claim should be dismissed because Dr. Barrett has no co-conspirator. The plaintiffs do not dispute that Dr. Barrett cannot “conspire” with a

nonexistent co-defendant (*see* ECF 32, at 5-6), but they claim that there are still questions as to whether Dr. Barrett's co-defendant, Quackwatch, Inc., still exists (ECF 32, at 33). That is complete nonsense because the plaintiffs (who have failed to serve Quackwatch, Inc. in over 13 months) do not give any reason to doubt the corporate record of dissolution filed earlier. (ECF 15-5.) It is "clearly proper" to take judicial notice of "documents retrieved from official government websites," and "[c]ourts routinely" do so, *Wells Fargo Bank, N.A. v. Wrights Mill Holdings, LLC*, 127 F. Supp. 3d 156, 166 (S.D.N.Y. 2015) — including with respect to documents reflecting a corporate dissolution. *Town of New Windsor v. Avery Dennison Corp.*, No. 10-CV-8611 CS, 2012 WL 677971, at *6 (S.D.N.Y. Mar. 1, 2012) (taking judicial notice of corporate dissolution record); *Am. Cas. Co. v. Lee Brands, Inc.*, No. 05 CIV. 6701, 2010 WL 743839, at *4 (S.D.N.Y. Mar. 3, 2010) (same).

In addition, while the plaintiffs argue that Dr. Barrett "worked together" with Quackwatch, Inc. to commit the wrongdoing here (ECF 33, at 13), the complaint lacks any allegation as to Quackwatch, Inc. actually doing anything. The complaint focuses on Dr. Barrett speaking by phone with Chinese and Malaysian government officials, and does not suggest that anyone else representing Quackwatch, Inc. was on the line or working with him.

The Court should therefore dismiss the conspiracy claim.

CONCLUSION

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

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December 20, 2016

Respectfully submitted,

STEPTOE & JOHNSON LLP

By: /s/ Charles Michael
Charles Michael
Michael A. Keough
1114 Avenue of the Americas
New York, New York 10036
(212) 506-3900
cmichael@steptoe.com
mkeough@steptoe.com

Counsel for Dr. Stephen J. Barrett