

# 17-2651

*To Be Argued By:*  
WESLEY J. PAUL

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IN THE  
**United States Court of Appeals**  
**FOR THE SECOND CIRCUIT**

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

*Plaintiffs-Appellants,*

—against—

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

*Defendants-Appellees.*

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF NEW YORK

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**BRIEF FOR PLAINTIFFS-APPELLANTS**

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## **JURISDICTIONAL STATEMENT**

The trial court had diversity jurisdiction pursuant to 28 U.S.C. § 1332(a) because the parties are citizens of different states and the amount in controversy exceeds \$75,000.

This Court has jurisdiction pursuant to 28 U.S.C. § 1291 because this appeal is from a final judgment of the District Court. The appeal is timely pursuant to Fed. R. App. P. 4(a). The district court entered an order dismissing the action on July 25, 2017, and final judgment was entered on July 27, 2017. Plaintiffs timely filed a Notice of Appeal on August 24, 2017.

## **STATEMENT OF THE ISSUES PRESENTED**

1. Whether the District Court erred in dismissing Plaintiffs' defamation claim as on time-barred.
2. Whether the District Court erred in dismissing Plaintiffs' claim for tortious interference with prospective economic advantage.
3. Whether the District Court erred in dismissing Plaintiffs' conspiracy claim.

## **STATEMENT OF THE CASE**

Plaintiffs Dr. Robert M. Goldman ("Dr. Goldman") and Dr. Ronald Klatz ("Dr. Klatz") (collectively, "Plaintiffs") brought this action against Defendants

Stephen Joel Barrett (“Dr. Barrett”) and Quackwatch, Inc. (“Quackwatch”) (collectively, “Defendants”). Plaintiffs brought this suit in November 2015, claiming defamation per se, defamation by implication, tortious interference with prospective economic advantage, conspiracy tortiously to interfere with prospective business relations, prima facie tort, civil conspiracy, New York deceptive business practice, and injunctive relief (the “Complaint”).

Defendants moved to dismiss the Complaint. The Court granted leave to amend. Plaintiffs filed their First Amended Complaint (“FAC”) on October 7, 2016. The FAC asserts three causes of action: defamation, tortious interference with prospective economic advantage, and conspiracy.

On July 25, 2017, the Honorable Paul G. Gardephe granted Defendants’ motion to dismiss the FAC, without leave to amend. The Plaintiffs timely appealed.

## **STATEMENT OF FACTS**

Dr. Goldman holds a Doctor of Medicine degree from Central America Health Sciences University, School of Medicine, and an osteopathic medical degree from Midwestern University/Chicago College of Osteopathic Medicine and Surgery. (A-50.) Dr. Klatz also holds (i) a Doctor of Medicine degree from Central America Health Sciences University, School of Medicine; and (ii) a Doctor

of Osteopathic Medicine and Surgery degree from the College of Osteopathic Medicine and Surgery in Des Moines, Iowa. (*Id.*) Plaintiffs are currently licensed to practice medicine and surgery in Illinois. (A-51.) They are highly accomplished professionals, with numerous awards and recognitions, who have dedicated their careers to helping others to live longer and healthier lives. (A-50-52.)

Defendant Dr. Barrett is a retired physician who owns and operates [www.quackwatch.org](http://www.quackwatch.org) (the “Website”), among other websites. (A-52.) The Website seeks to identify medical practitioners who engage in medical practices that Dr. Barrett deems questionable. (*Id.*) Dr. Barrett regularly maintains and updates the Website. (A-53.) Defendant Quackwatch, Inc., is or was a commercial entity that Dr. Barrett formed to advance his interests against “quackery.” (*Id.*)

Defendants posted on the Website a defamatory article regarding Plaintiffs (the “Article”). The Article was dated December 6, 2000, and was entitled “Anti-Aging ‘Gurus’ Pay \$5,000 Penalties.” (A-54.) It describes an Illinois medical board proceeding regarding Drs. Goldman and Klatz, reporting a settlement between them and the State of Illinois. (*Id.*) The Article claims that Plaintiffs agreed to pay \$5,000 to the State of Illinois as punishment for identifying themselves as M.D.s without being recognized as such by the state. (*Id.*)

However, in 2006, the Division of Professional Regulation in Illinois determined that Plaintiffs were, in fact, licensed physicians and surgeons of osteopathic medicine; therefore, Plaintiffs' previous fines were vacated through an administrative process. (*Id.*) Defendants failed to update the Article to reflect this 2006 determination, even though they regularly updated the Website with new materials during the entire relevant time period. (*Id.*) By posting the Article on a website aimed at identifying fraudulent medical practices, Defendants thereby suggested that Plaintiffs were not trustworthy medical practitioners.

Upon information and belief, Defendants actively engaged in search engine optimization practices to promote the Article and ensure its high placement in web searches regarding Plaintiffs. (A-54-55.) These actions included, but were not limited to, adding meta-tags to the Article to make it more prominent in search results regarding Plaintiffs. Plaintiffs contend that these actions constitute republication under defamation law. (*Id.*) Because Plaintiffs are successful entrepreneurs and businessmen who depend on their reputation, the prominence of the Article on the Internet was damaging to their current and prospective success.

Defendants intentionally interfered in Plaintiffs' prospective business arrangements. While the Complaint included sufficient allegations regarding this interference, the FAC fleshed out the details. In the Complaint, Plaintiffs alleged that "[t]he 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.” (A-16-17.) Further, Plaintiffs alleged that “[t]he Article caused such harm and resulted in damage to the reputations of Dr. Goldman and Dr. Klatz and also resulted in the loss of business opportunities.” (A-18.) Plaintiffs specifically alleged that “Defendants’ actions have resulted in the loss of not less than \$10 million in potential business opportunities.” (*Id.*) When the Complaint was prepared, Plaintiffs were still ascertaining details regarding Defendants’ interference with their business ventures.

Thereafter, Plaintiffs gathered more details. The FAC thus fleshed out these allegations. The FAC alleges that Defendants intentionally interfered with Plaintiffs’ projects in China and Malaysia, resulting in these projects’ terminations. (A-55-58.) In September 2014, Plaintiffs entered into an agreement to provide consulting services and support for numerous clinics and screening centers in China (the “China Project”). (A-55.) As part of the China Project, Plaintiffs were to receive a base consulting fee and equity in the venture, totaling at least \$10 million each if attainable benchmarks were reached. (*Id.*)

But when China officials conducted background diligence of Plaintiffs, they learned of the Article through Defendants’ website. (A-56.) Due to the Article, the officials contacted Defendants to inquire about Plaintiffs. These interviews

occurred in March and April 2015. (*Id.*) During these interviews, Dr. Barrett further defamed Plaintiffs by informing the officials (i) that Plaintiffs “had violated numerous U.S. laws and they would likely be criminally prosecuted in the near future”; (ii) that Plaintiffs “were under further indictment by other countries for distributing drugs to foreign nations”; and (iii) that Defendants “had more damning evidence against [Plaintiffs] and would provide such information if the circumstances were appropriate.” (A-56-57.) Following those interviews, the China Project was put on indefinite hold. Subsequently, it was terminated because of Defendants’ false statements regarding Plaintiffs. (A-57.)

Plaintiffs had also established a consulting arrangement with the Malaysian government regarding public health programs (the “Malaysia Project”). (*Id.*) Plaintiffs reached an agreement with various Malaysian officials and coordinated several trips to Malaysia. (*Id.*) In late 2014, the Malaysia Project was terminated with little explanation. (*Id.*) Plaintiffs ascertained that certain Malaysian officials had communicated with Defendants about the Article. (*Id.*) Plaintiffs believe these communications led to the Malaysia Project’s termination. (A-58.)

Based upon these facts, Plaintiffs asserted claims in the FAC for defamation per se, tortious interference with prospective business advantage, and conspiracy tortiously to interfere with prospective economic advantage.

### SUMMARY OF THE ARGUMENT

The trial court erred in dismissing the FAC. The defamation claim is timely because it relates back to the allegations of the Complaint. Thus, the Court erred in concluding that it was time-barred. The Complaint included allegations that Defendants interfered with Plaintiffs' business prospects, causing a financial loss to Plaintiffs of not less than \$10 million, however at the time of the original complaint, Plaintiff's did not have the specific facts of how such interference took place. In the FAC, after further evidence was gathered, the allegations became more detailed, however the "operational facts" remained the same. *See, e.g., Pruiss v. Bosse*, 912 F. Supp. 104, 106 (S.D.N.Y 1996). In the FAC, Plaintiffs fleshed out the details regarding, adding specific defamatory statements that Defendants made. Because the defamatory statements were made in March or April 2015, and the Complaint was filed in November 2015, the FAC's defamation claim is not time-barred because it relates back to the Complaint.

Plaintiffs' claim for tortious interference with prospective economic advantage is distinct from their defamation claim because Defendants intended to damage Plaintiffs' business opportunities, in addition to their reputations more generally. The Court erred in concluding that the claims were duplicative. Defendants intentionally interfered with Plaintiffs' business projects in China and

Malaysia, aiming to cause economic harm to Plaintiffs. Plaintiffs' allegations meet the four-prong test for tortious interference.

Finally, Plaintiffs' claim for conspiracy should not have been dismissed because the Court erred in concluding that Quackwatch, Inc., did not exist in any form that may subject it to suit, based solely upon a print-out of a 2009 dissolution of a Pennsylvania corporation of the same name. In dismissing the Complaint, the Court specifically *declined* to consider that 2009 document, but later changed its mind *sua sponte* without addressing the law-of-the-case doctrine. Moreover, the Court's conclusion regarding Quackwatch amounted to a determination of fact, which may not be made at this preliminary stage. Although a conspiracy claim cannot stand alone, so long as Plaintiffs' other claims are reinstated, Plaintiffs conspiracy claim should proceed as well. A motion to dismiss tests the sufficiency of the pleadings; it does not permit the Court to make factual determinations or adjudicate the probability of success. The Court's dismissal order strayed too far into those waters, and thus should be reversed and remanded.

### **STANDARD OF REVIEW**

This Court reviews the dismissal of claims under Fed. R. Civ. P. 12(b)(6) de novo. *See, e.g., Hogan v. Fischer*, 738 F.3d 509, 515 (2d Cir. 2013). In reviewing

a motion to dismiss, the court must accept Plaintiffs' allegations as true and draw reasonable inferences in Plaintiffs' favor. *See id.*

## **ARGUMENT**

For at least fifteen years, Drs. Goldman and Klatz have been the victims of a willful and malicious smear campaign perpetrated by Dr. Barrett. Plaintiffs seek to protect their livelihood from harmful defamatory attacks by Defendants, and to recoup the losses directly attributable to Defendants' interference with Plaintiffs' business prospects.

### **I. THE TRIAL COURT ERRED IN DISMISSING PLAINTIFFS' DEFAMATION CLAIM**

The Court erroneously dismissed Plaintiffs' defamation claim as untimely. Because the claim in the FAC related back to the Complaint, it was not time-barred.

All parties agree that, under New York law, defamation claims are subject to a one-year statute of limitations. *See* N.Y. C.P.L.R. 215(3) (CONSOL. 2015).<sup>1</sup>

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<sup>1</sup> New York Consolidated Laws, Civil Practice Law and Rules § 215 states: "The following actions shall be commenced within one year: . . . 3) an action to recover damages for assault, battery, false imprisonment, malicious prosecution, libel, slander, false words causing special damages, or a violation of the right of privacy under section fifty-one of the civil rights law. N.Y. C.P.L.R. 215 (CONSOL. 2015).

Plaintiffs' claim for defamation stems from Defendants' comments made in March or April 2015. The Complaint was filed in November 2015, which was timely.

The FAC arises from the same set of facts that were alleged in the Complaint, simply with greater detail. Under F.R.C.P. 15(c), “[a]n amendment to a pleading relates back to the date of the original pleading 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). The language of Rule 15(c) indicates the liberality of this rule through the phrase “*or attempted to be set out.*” *Id.* Plaintiffs need not achieve pleading perfection in order to fall within the broad auspices of Rule 15(c). The court erred in imposing an overly-strict interpretation of Rule 15(c). The main inquiry is “whether adequate notice has been given to the opposing party ‘by the general fact situation alleged in the original pleading.’” *Pruiss v. Bosse*, 912 F. Supp. 104, 106 (S.D.N.Y. 1996) (quoting *Rosenberg v. Martin*, 478 F.2d 520, 526 (2d Cir. 1973), *cert. denied*, 414 U.S. 872 (1973)). Certainly, Defendants were given notice of the nature of Plaintiffs’ accusations in the Complaint, including the allegations that Defendants had interfered with various business prospects of Plaintiffs.

The Complaint alleged that Defendants interfered with Plaintiffs’ business prospects and caused the loss of at least \$10 million in potential business

opportunities. (A-16.) (“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.”); (A-18.) (“[t]he Article caused such harm and resulted in damage to the reputations of Dr. Goldman and Dr. Klatz and also resulted in the loss of business opportunities.”); (A-18.) (“Defendants’ actions have resulted in the loss of not less than \$10 million in potential business opportunities.”).

The FAC simply provided more detail regarding those business opportunities and the nature of Defendants’ interference with them. The FAC provides more specificity regarding Defendants’ conduct and fleshes out Plaintiffs’ claim for defamation, but the underlying framework was already alleged in the Complaint. *See Pruiss*, 912 F. Supp. at 106 (an amendment relates back when it “make[s] more specific what has already been alleged”); *Holdridge v. Heyer-Schulte Corp.*, 440 F. Supp. 1088, 1093 (N.D.N.Y. 1977) (“The doctrine of relation back applies when an amendment adds a new theory of recovery based on the same transaction or occurrence as originally pleaded. . . . Similarly, the doctrine applies to correct specific factual details or to make more specific what has already been alleged.”) (internal citations omitted).

Plaintiffs did not add new claims in the FAC, but rather elaborated upon the claims asserted in the Complaint. Insofar as even brand-new claims can be found

to relate back, mere elaboration on existing claims surely relates back. *See, e.g., Sokolski v. Trans Union Corp.*, 178 F.R.D. 393, 397 (E.D.N.Y. 1998) (finding relation back when the new claims for statutory violations “are a ‘natural offshoot’ of the ‘basic scheme’ to defraud the original plaintiff debtor, and therefore relate back to the original complaint.”); *In re Chaus Sec. Litig.*, 801 F. Supp. 1257, 1264 (S.D.N.Y. 1992) (finding relation back where the initial complaint failed to mention accounts receivable at all, but gave general notice of alleged financial and accounting manipulations such that the newly-alleged accounts receivable scheme in the amended complaint would relate back).

Defendants’ dissemination and promotion of the Article led to its discovery by Plaintiffs’ business associates. The Complaint included numerous allegations about the Article and Defendants’ efforts with regards to it. It also put Defendants on notice that Plaintiffs were aware of their interference with their business prospects, to the tune of no less than \$10 million. With greater specificity, the FAC filled in those details regarding Plaintiffs’ business dealings. Plaintiffs allege in the FAC officials involved in the China Project and the Malaysia Project found the Article online and thereafter communicated with Defendants regarding Plaintiffs.

While Plaintiffs had been generally aware of certain discussions between their business associates and Defendants – enough to allege interference and the



loss of \$10 million in business prospects in the Complaint – the specific details did not emerge until a later date.

**II. PLAINTIFFS’ CLAIM FOR TORTIOUS INTERFERENCE WITH PROSPECTIVE ECONOMIC ADVANTAGE IS NOT DUPLICATIVE OF THE DEFAMATION CLAIM, AND SHOULD NOT HAVE BEEN DISMISSED**

The Court erroneously dismissed Plaintiffs’ claim for tortious interference with prospective economic advantage as being duplicative of the defamation claim. A distinct tortious interference claim exists because Plaintiffs suffered damage to particular economic interests, not simply their reputation generally. Because Plaintiffs have alleged an independent claim for tortious interference based upon to the two distinct business arrangements damaged by Defendants’ conduct, this dismissal was erroneous.

The fact that Defendants used words as a weapon against Plaintiffs does not mean that any resulting claim is one for defamation and it error to construe it as such. A claim for injury to “economic interests rather than . . . reputation” can be stated even when the interference occurred using only words. *Classic Appraisals Corp. v. DeSantis*, 552 N.Y.S.2d 402 (N.Y. App. Div. 1990). Not all claims in which a plaintiff is harmed by another’s speech fall under the rubric of defamation. It is well established that a tortious interference with contract or prospective business relations may be stated based upon words alone. *See Eisenberg v. Yes*

*Clothing Co.*, No. 90-cv-8280, 1991 WL 107432, at \*4 (S.D.N.Y. Jun 7, 1991) (finding plaintiff adequately alleged claim for tortious interference, in addition to defamation, because “[a]lthough part of plaintiff’s claim in Count I is that defendants’ actions injured her reputation, plaintiff also claims that her economic interests, of which defendants were aware, were injured by defendants’ intentional acts.”); *Lindner v. IBM Corp.*, No. 06-cv-4751, 2008 WL 2461934 (S.D.N.Y. June 18, 2008) (plaintiff adequately stated claim for tortious interference where defendants had interceded with prospective employers to dissuade them from hiring him, causing loss of employment and financial harm).

Accordingly, the court erred in construing Plaintiffs’ tortious interference claim as one for defamation. The harm alleged by Plaintiffs related to two specific business agreements that were in progress until Defendants intentionally interfered. The claim is not based upon a general allegation of reputational harm or loss of a hypothetical business prospect. Plaintiffs alleged two specific deals that they lost as a result of Defendants’ actions. In *Lindner*, the court explained that where the alleged harm suffered by the plaintiff is not “*precisely* the same as that caused by defamation,” the court should decline to construe a claim for tortious interference as one for defamation. *Lindner*, 2008 WL 2461934 at \*13 (quoting *Morrison v. Nat’l Broadcasting Co.*, 19 N.Y.2d 453 (N.Y. 1967)). The *Lindner* court declined to construe the tortious interference claim as a time-barred defamation claim

because the amended complaint defined the damages as more than merely harm to the plaintiff's reputation. *Id.* Here, the FAC alleges that Defendants did not simply harm Plaintiffs' reputations, but that Defendants directly interfered with the execution of at least two business deals. The FAC thus demonstrates a separate and specific injury apart from the general effect on Plaintiffs' reputation.

Under New York law, the elements of a claim for tortious interference with prospective economic advantage are: (1) a business relationship with a third party; (2) defendant's knowledge and intentional interference with that relationship; (3) defendant acting solely out of malice, or using dishonest, unfair, or improper means; and (4) resulting injury to the business relationship, causing harm to plaintiff. *See Kirch v. Liberty Media Corp.*, 449 F.3d 388, 400 (2d Cir. 2006) (quoting *Carvel Corp. v. Noonan*, 350 F.3d 6, 17 (2d Cir. 2003)). The FAC contains sufficient allegations to meet all four prongs. As a result of Defendants' statements, the China Project and the Malaysia Project were unilaterally cancelled. Therefore, the tortious interference claim can stand separate and apart from the defamation claim.

### **III. IN DISMISSING THE CONSPIRACY CLAIM, THE COURT ERRED IN FINDING THAT QUACKWATCH IS NOT SUBJECT TO SUIT**

The Court erred in taking judicial notice that Quackwatch, Inc. is a dissolved entity, and in subsequently dismissing the conspiracy claim on the basis that a

defendant cannot conspire with himself. Plaintiffs alleged in the FAC that “Defendant Quackwatch is a commercial entity formed by Barrett and his associates with the sole purpose of furthering Barrett’s agenda against so-called ‘quackery.’” (A-53.) Quoting Defendants’ website, Plaintiffs further alleged that “Quackwatch is an ‘international network of people concerned about health-related frauds, myths, fads, fallacies, and misconduct.’” (*Id.*) Plaintiffs did not allege Quackwatch’s state of incorporation.

In the order dismissing the Complaint, the Court noted that it was *not considering* various documents submitted by Defendants along with their motion “because they are not attached to, incorporated by reference in, or integral to the Complaint.” (A-29.) One of those documents was an ostensible printout from the Pennsylvania Department of State showing that a “Quackwatch, Inc.” had been dissolved in 2009. (A-23-26.) The Court specifically listed Ex. B-E as one of the documents it would not be considering. (A-29.) The Court dismissed the conspiracy claim solely because a conspiracy claim cannot stand without other viable claims, and no other claims remained. (A-43.)

Despite this prior rejection of the 2009 dissolution document, the Court later took judicial notice of it in ruling on the motion to dismiss the FAC. (A-64.) This change constitutes reversible error, particularly because Defendants did not request judicial notice, and the court did so *sua sponte*. (A-63-78.) (taking judicial notice

“of the Pennsylvania Secretary of State’s records concerning Quackwatch’s formation and dissolution.”) The Court was bound by law of the case, based upon its prior determination that the 2009 dissolution print-out should not be considered. (A-65.) *See, e.g., Westerbeke Corp. v. Daihatsu Motor Co.*, 304 F.3d 200, 218 (2d Cir. 2002) (“The ‘law of the case’ doctrine is a rule of practice followed by New York courts that dictates that ‘a decision on an issue of law made at one stage of a case becomes binding precedent to be followed in subsequent stages of the same litigation.’”) (quoting *In re Korean Air Lines Disaster*, 798 F. Supp. 755, 759 (E.D.N.Y. 1992)).

Even if the Court could properly take judicial notice of the 2009 dissolution document, that document alone is insufficient to dismiss Quackwatch, Inc. Additionally, even if an entity called Quackwatch, Inc., had been dissolved in Pennsylvania in 2009, Defendants did not established that Quackwatch is currently unable to be sued. They have not conclusively proven that: (1) the entity dissolved in 2009 is the same Quackwatch referred to by Plaintiffs; (2) Quackwatch was not incorporated or re-incorporated in another state at a different time; or (3) that Quackwatch does not currently exist as a legal entity of another form. Neither the Complaint nor the FAC specifically alleges Quackwatch’s location.

The Court overstepped its bounds by making a fact determination that Quackwatch does not presently exist in a form that might subject it to suit.

“[F]act-specific question[s] cannot be resolved on the pleadings.” *Todd v. Exxon Corp.*, 275 F.3d 191, 203 (2d Cir. 2001). Other courts have ruled that judicial notice of dissolution is improper on a motion to dismiss. *See, e.g., Old Republic Ins. Co. v. Hansa World Cargo Serv., Inc.*, 170 F.R.D. 361, 372-73 (S.D.N.Y. 1997) (declining to take judicial notice of dissolution when documentation was inadequate).

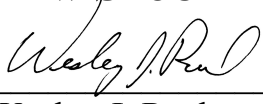
While a conspiracy claim cannot stand alone, once this Court reinstates the other claims, it should also reinstate the conspiracy claim.

### CONCLUSION

For the foregoing reasons, this Court should reverse the judgment below.

Dated: New York, NY  
November 30, 2017

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