

**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. ROBERT M. GOLDMAN AND DR. RONALD KLATZ’S MEMORANDUM OF
LAW IN OPPOSITION TO DEFENDANT BARRETT’S MOTION FOR SANCTIONS**

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PROCEDURAL HISTORY

On November 23, 2015, Plaintiff's filed a civil Complaint in the United States District Court of the Southern District of New York (ECF 1). The plaintiffs alleged eight causes of action: 1) defamation per se; 2) defamation by implication; 3) tortious interference with prospective economic advantage; 4) conspiracy to tortuously interfere with prospective business relations; 5) prima facie tort; 6) civil conspiracy; 7) NY deceptive business practice; and 8) injunctive relief. (Id.) Defendant's moved for a 12(b)(6) motion to dismiss on February 16, 2016, (ECF 13), which was so ordered by this Court on August 8, 2016 with leave to amend. (ECF 23)

On October 7, 2016, the plaintiffs filed an Amended Complaint (ECF 26) The Amended Complaint, contained additional claimed based on information that was not fully known by the Plaintiffs at the time of the filing of the original Complaint. The Amended Complaint provided greater detail and particularity into conversations between the Defendants and the Plaintiffs' business associates. On November 29, 2016, Defendant moved to dismiss the Amended Complaint under a 12(b)(6) motion to dismiss. (ECF 31) This motion was granted by the Court and the Amended Complaint was ordered dismissed on July 25, 2017, (ECF 38), and thereafter the Court granted leave to the Defendant to file this Motion which is now opposed by the Plaintiffs.

ARGUMENT

Defendants have brought a motion for sanctions under Rule 11 of the Federal Rules of Civil Procedure (FRCP) and under 28 U.S.C. § 1927 for First Amended Complaint (ECF 26.) Under either Rule 11 or section 1927 sanctions are not warranted.

I. Sanctions sought under FRCP Rule 11 Should Not Apply

Rule 11 of the Federal Rules of Civil Procedure is designed to ensure that claims brought in federal courts have merit and are not brought for an improper purpose. The Rule imposes upon an attorney or litigant a duty to make a reasonable examination of the merits and motives behind a claim before signing a paper and filing it with court. Fed. R. Civ. P. 11. advisory comm. nn. Unlike sanctions under § 1927, Rule 11 sanctions can be imposed not only upon the signing attorney, but also the party he or she represents. *Id.* In general, an attorney must conduct a reasonable inquiry into the merits of a claim before filing a paper with the court. *Eastway Constr. Corp. v. City of New York*, 762 F.2d 243, 253 (2d Cir. 1985), modified on other grounds, 821 F.2d 121 , cert. denied, 108 S. Ct. 269 (1987).¹ The nature of inquiry depends on the circumstances. Important circumstances the courts has espoused include, the amount of time the attorney has to make the investigation, the complexity of the matter, the attorney's familiarity with the matter, and the degree of access to relevant information. *CQ International Company v. Rochon International Incorporated, USA*, 659 F.3d 53, 62 (1st Cir. 2011).

Rule 11, however, does not require an absolute knowledge of all facts and issues in order to file a complaint in federal court. Generally, an attorney may rely upon the reasonable representations of their client, but good practice is to seek verification of those facts when possible to do so. *Dubois v. U.S. Department of Agriculture*, 270 F.3d 77, 82-83 (1st Cir. 2001). Courts agree that attorneys' inquiry into the legal and factual basis of their claims need only be

¹ "What constitutes a reasonable inquiry may depend on such factors as how much time for investigation was available to the signer, whether he had to rely on a client for information as to the facts underlying the pleading, motion, or other paper; whether the pleading, motion, or other paper was based on a plausible view of the law; or whether he depended on forwarding counsel or another member of the bar.

Fed. R. Civ. P. 11 advisory committee's note, reprinted in 97 F.R.D.

reasonable under the circumstances. *Zenith Elecs. Corp. v. Exzec, Inc.*, No. 93 C 5041, 1997 U.S. Dist. LEXIS 20762, at *38-41 (N.D. Ill. Dec. 24, 1997) (use of “information and belief” pleading not sanctionable at early stages of litigation where facts are complex), *aff’d*, 182 F.3d 1340 (Fed. Cir. 1999). A reasonable inquiry does not require, however, “that an investigation into the facts be carried to the point of absolute certainty.” *Forbes v. Eagleson*, 228 F.3d 471, 488 (3d Cir. 2000) (internal citations omitted). Also, Rule 11 incorporates a cost-benefit analysis, whereby Rule 11 does not require steps that are not cost-justified or unlikely to produce results. *See Szabo Food Serv., Inc. v. Canteen Corp.*, 823 F.2d 1073, 1083 (7th Cir. 1987); *Cambridge Prods., Ltd. v. Penn Nutrients, Inc.*, 962 F.2d 1048, 1050 (Fed. Cir. 1992) (upholding denial of sanctions where attorney undertook a reasonable pre-filing inquiry, where “[w]ithout the aid of discovery, any further information was not practicably obtainable”).

In this matter, some of the core issues relating to the complaint and amended complaint related to complex legal issues that were unsettled such as the scope and nature of what constitutes “republication” of potentially defamatory materials, the scope and nature of “defamation by implication,” whether the implication of defamation can change over time based on the scope and nature of the republication (which is an issue that was not directly addressed by this Court). Time, care and analysis were taken by the Plaintiffs and their counsel to analyze these complex matters and to solicit the opinions of certain relevant independent third parties prior to the filing of a complaint. (*See generally*, Paul Decl.; Goldman Decl.) While the Plaintiffs’ counsel relied upon in part on representations of the Plaintiffs, these representations were reasonable in light of the long-standing representation of the Plaintiffs by the Plaintiffs’ counsel and also in light of the circumstances which indicated unusual web activity for an article that had long been considered dormant. Communications between the Plaintiffs’ counsel and

Defendant Dr. Barrett and Dr. Barrett's counsel evidence that the disagreement between the Plaintiffs and the Defendants were based on triable issues of fact and law, which did not appear to be likely to be resolved absent the commencement of a formal proceeding. (Paul Decl. Ex. B-F.)² Moreover, Plaintiff and Plaintiff's counsel proceeded to the point where additional information would not likely be possible without formal action. (*Id.* ¶¶ 20; Ex. B-F.)

More specifically, on February 10, 2015, the Plaintiffs delivered to the Plaintiffs at the general email address provided for the Defendants' website, Quackwatch.org (the "Demand Letter") (*Id.* Ex. B.) The article in controversy has been previously described in numerous prior filings (ECF 26 ¶ 26) and will be referred to herein as the "Article." This February 10, 2015 letter merely demands the removal of the Article. The Demand Letter further provides notice to Dr. Barrett that, "[The Defendants] continued failure to abide by [the Plaintiffs] reasonable requests will be construed by [the Plaintiffs] to be your willful intention to cause our clients economic harm." (Paul Decl. Ex. B.)

The Demand Letter further provides a legal basis for a potential defamation claim based on the information available to the Plaintiffs at the time of the Demand Letter. This basis was clearly set forth in the Demand Letter, specifically:

"Your organization's actions may lead to legal liability. There is an established line of cases supporting the assertion that you are currently defaming our clients. See, for example, the holdings of one federal court which held that "...[I]f the communication, by the particular manner or language in which the true facts are conveyed, supplies additional, affirmative evidence suggesting that the defendant *intends* or *endorses* the defamatory inference, the communication will be deemed capable of bearing that meaning" (*White v Fraternal Order of Police*, 909 F2d 512, 520, 285 U.S. App. D.C. 273 (DC Cir. 1990); *see Janklow v*

² We note that Defendant's counsel threatened Plaintiff with Rule 11 motions even prior to the commencement of this action. (Paul Decl. Ex. F.)

Newsweek, Inc., 759 F.2d 644, 648-649 (8th Cir. 1985), *cert denied* 479 U.S. 883 (1986). By continuing to selectively include information regarding Dr. Goldman and Dr. Klatz on your website in a misleading manner, you are directly and falsely questioning the professional credibility and integrity of our clients.”

(Paul Decl. Ex. B)

The defamation theory endorsed by the line of *White* line of cases cited above is commonly referred to as the “defamation by implication” legal theory.

In further communications to Dr. Barrett, the reasonableness of the Plaintiffs’ requests is further evidenced by the Plaintiffs’ offer to provide a neutral, public forum for Dr. Barrett to voice his concerns provided that the Defendants remove the Article. (Paul Decl. Ex. C and E.) The Defendants did not respond to these invitations (*Id.* Ex. D and F.)

The Defendants referred the Demand Letter to their counsel. Counsel for the respective parties in this matter engaged in various communications. Illustrative examples of such communications are included as Exhibit D and Exhibit F to the Paul Declaration accompanying this Opposition. Exhibit C and Exhibit E illustrate, at a minimum, that the Plaintiffs had and continue to have reasonable grounds upon which to dispute the ongoing publication of the Article by the Defendants. Moreover, responses by the Plaintiffs provide further substantiation that the claims made by the Plaintiffs (through their counsel), we made with proper consideration and examination. “Any delay in my response has been used to gather additional information in order to prepare for a filing against your client and your client’s associates.” (*Id.* Ex. E.).

Moreover, the Defendants were on notice as early as March 14, 2015 that the Clients were contemplating bringing claims that were subject to the amended complaint (ECF 26). “We further believe there are grounds to claim tortious interference, conspiracy and other causes of action.” (*Id.*) Therefore, the Defendants’ prior claims suggesting surprise at the amended

complaint should be construed as disingenuous since the Defendants were put on notice of potential tortious interference claims more than a year and a half prior the filing of the amended complaint. (ECF 32.)

A draft of the original complaint was provided to the Defendant's counsel two months prior to the actual filing, thus providing a final opportunity for the parties to attempt to come to a reasonable resolution of this matter. The original complaint was not filed until November 23, 2015, more than nine months after sending the Demand Letter. A substantial amount of time between the filing of the Demand Letter was devoted to obtaining further information relevant to the complaints. (Goldman Decl. ¶¶ 12 - 13.) For instance, the Plaintiffs engaged third-party information technology and computer consultants in order to examine web traffic from the Defendants' websites where unusual activity occurred. (Paul Decl. ¶¶ 17 - 20) (Goldman Decl. ¶¶ 6-8.)

The Plaintiffs (a) had a good faith factual and legal bases for grievances against the Defendants, (b) attempted to arrive at a reasonable resolution by simply demanding the removal of the Article, (c) further evidenced their reasonableness by attempting to give the Defendant's an alternative open forum to discuss their ongoing concerns, (d) conducted months of further investigation both prior to filing the original complaint and continued to do so prior to filing the amended complaint, (e) have zealously asserted their rights, but have at all times acted with professionalism and propriety.

II. Sanctions Requested Under 28 U.S.C. § 1927 Should Not Apply

The Defendants have petitioned the court for sanctions under section 1927. This section states:

“Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so

multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct.”

28 U.S.C. § 1927 (2012).

The sanctions award under section 1927 are only made against attorneys or other persons authorized to practice before the court. *Schlaifer Nance & Co., Inc. v. Estate of Warhol*, 194 F.3d 323 (2d Cir. 1999). Sanctions under sections 1927 are only appropriate when: 1) the challenged claim was without a colorable basis, and 2) the claim was brought in bad faith. *Id.* at 336.

First, a claim is without a colorable basis “when it lacks *any* legal or factual basis.” *Sierra Club v. United States Army Corps of Eng'rs*, 776 F.2d 383, 390 (2d Cir.1985) (citing *Nemeroff v. Abelson*, 620 F.2d 339, 348 (2d Cir. 1980) (per curiam)). Conversely, a claim is colorable “when it has some legal and factual support, considered in light of the reasonable beliefs of the individual making the claim.” *Nemeroff*, 620 F.2d at 348. The court has stated that “[a] claim is colorable when it reasonably *might* be successful, while a claim lacks a colorable basis when it is utterly devoid of legal or factual basis.” *Schlaifer Nance*, 194 F.3d at 337 (emphasis in original). Even if a claim is dismissed as a matter of law, such as the court granting a 12(b)(6) motion to dismiss, the judgment itself is not a sufficient condition for finding a total lack of colorable basis. *See id.*

The second prong of the section 1927 test requires that the claim also be brought in bad faith. *See id.* at 336, 340 (reversing an order for sanctions by finding that “there [was] no evidence to suggest that [the plaintiffs] had utterly no basis for their subjective belief in the merits of their case”). Under section 1927, bad faith can only be inferred if the claim is “so completely without merit as to require the conclusion that [the claim] must have been undertaken

for some improper purpose." *Id.* at 333 (quoting *Keller v. Mobil Corp.*, 55 F.3d 94, 99 (2d Cir. 1995)). Thus, section 1927 requires "the touchstone of bad faith", which is more than mere negligence or lack of merit. *See Schwartz v. Millon Air, Inc.*, 341 F.3d 1220, 1225-27 (11th Cir. 2003).

As discussed above and described generally in the Goldman Declaration, at no time was bad faith involved in the disputes described in the original complaint or the amended complaint. The course of communications between the Plaintiffs' counsel and the Defendants' counsel has at all relevant times evidenced the existence of bona fide disputes. The Plaintiffs at all times had a good faith belief that the Article was defamatory and provided a reasonable basis for their claims. The Plaintiffs attempted to reasonably resolve the issues on numerous occasions. (Paul Decl. Ex. C and E). Care was taken by the Plaintiffs to provide colorable and prima facie claims upon which relief may be granted. (*Id.*)

The element of bad faith is also a central element to § 1927 as in Rule 11. "The amended rule attempts to deal with the problem by building upon and expanding the equitable doctrine permitting the court to award expenses, including attorney's fees, to a litigant whose opponent acts in bad faith in instituting or conducting litigation. *See, e.g., Roadway Express, Inc. v. Piper*, 447 U.S. 752, (1980); *Hall v. Cole*, 412 U.S. 1, 5 (1973); Fed. R. Civ. P. 11 advisory committee nn. Therefore, a failure to find any bad faith in connection with Rule 11 likely necessitates also a finding of a lack of bad faith pursuant § 1927, which is a necessary element for valid § 1927 claims.

III. The Cases Cited by Defendants Are Inapposite

The primary cases cited by the Defendants are not applicable and fully distinguishable from the case in this case.

The plaintiff in the first case cited by the Defendants was sanctioned after refusing to withdraw complaint despite being informed that the conduct alleged in complaint never occurred. *Gambello v. Time Warner Commc'ns., Inc.*, 186 F. Supp. 2d 209 (E.D.N.Y. 2002). The *Gambello* Court, however, only issued sanctions after there had been extensive discovery by the parties, including depositions and even oral testimony on the merits of the case. No discovery has taken place in this matter. In our case, we are in the initial stage, and there has not been any discovery at all in our case and, thus, the *Gambello* is not proper authority for the relief being requested.

While Defendants have offered phone records as “proof” that conversations between Dr. Barrett and the Chinese officials did not take place, there are a myriad of other ways of communication besides the telephone by which the Defendant could have communicated with the such officials. Therefore, Plaintiffs have not had a “reasonable opportunity for further investigation or discovery” which is necessary to even begin the consideration the sanctions currently being sought. Fed. R. Civ. P. 11.

Similarly, the Defendants cite *T.B.I. Indus. Corp. v. Emery Worldwide*, 900 F. Supp. 687 (S.D.N.Y. 1995) in further support of their Motion. The *TBI* case however, is also not applicable to the current matter. In *TBI*, the plaintiff was sanctioned for refusing to withdraw a complaint after being provided with documentation demonstrating the claims were meritless. However, once again, the *TBI* Court only awarded sanctions after the parties had a reasonable opportunity for further investigation and discovery, in this case only awarding sanctions AFTER the summary judgment stage.³

³ Additionally, the *TBI* Court denied sanctions against the third-party plaintiff because it found that although the plaintiff’s allegations “were not made without a reasonable inquiry into their

In the instant case, there has been no chance to complete any discovery, and furthermore, after a reasonable inquiry into the facts and circumstances the Plaintiffs and their counsel reasonably believe that the Plaintiffs' claims are not frivolous but justified.

Finally, the Defendants cite to *Fuerst v. Fuerst*, 832 F. Supp. 2d 210 (E.D.N.Y. 2011) in support of their motion for sanctions. *Fuerst*, however, is also wholly distinguishable from this matter. *Fuerst* Court issued sanctions because the plaintiff's brought the suit after there was a valid settlement agreement between the parties that stipulated a release of all claims. Clearly, there has not been any settlement agreement nor any release applicable in this matter. It is also noteworthy that the Court in *Fuerst* denied sanctions on the defendants' allegation that the plaintiff's complaint was filed with the improper purpose of harassment and the defendants' allegation that the attorney failed to make a reasonable inquiry into the causes of action. On the basis of the *Fuerst* Court's denial of sanctions based on the filing of the complaint, the *Fuerst* case actually supports this Opposition rather than the Defendants' motion by suggesting that the mere filing of a complaint in *Fuerst* was not a sufficient basis for sanctions.

In this case, such comparable facts do not exist. After a reasonable inquiry of the evidence the Plaintiff had before the original complaint was filed, Plaintiffs and Plaintiff's counsel believed that the causes of action had merit, were not frivolous, and were supported by evidentiary support (or would be further supported after additional discovery). Additionally, the Defendant has only pointed to the limited evidence of phone records as support for his argument that the conversations never happened. Defendant's Memorandum of Law, page 6. This limited evidence is not a reasonable basis to conclude that our claims are without merit or lacking of evidentiary support, especially at such an early stage of this matter.

factual basis" and the stated cause of action was "not so frivolous as to justify the imposition of sanctions." *Id.* at 696.

After distinguishing the cases cited by the Defendants, there is no binding authority that appears to support the Defendants requests for sanctions. Rule 11 Sanctions should be “made with restraint,” *Schlaifer Nance*, 194 F.3d at 333, and when "dividing the point at which an argument turns from merely 'losing' to losing *and* sanctionable, [the Court of Appeals has] instructed district courts to resolve all doubts in favor of the signer." *Associated Indemnity Corp. v. Fairchild Industries, Inc.*, 961 F.2d 32, 34 (2d Cir.1992).

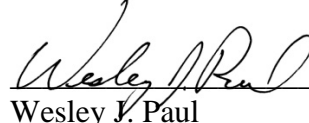
CONCLUSION

For the stated reasons set forth above, the Plaintiffs and Plaintiffs’ counsel request that the Defendants’ motion for sanctions be denied.

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September 5, 2017

Respectfully submitted,



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