

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.

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15 Civ. 9223 (PGG)

ORDER

PAUL G. GARDEPHE, U.S.D.J.:

On November 23, 2015, Plaintiffs Robert M. Goldman and Ronald Klatz filed this action against Defendants Stephen J. Barrett and Quackwatch, Inc., asserting claims for defamation per se, tortious interference with prospective economic advantage, and conspiracy to tortiously interfere with prospective economic advantage. (Am. Cmplt. (Dkt. No. 26) ¶¶ 63-86)

On August 24, 2016, this Court granted Defendants' Rule 12(b)(6) motion to dismiss. (Order (Dkt. No. 23))¹ The Court's dismissal order granted leave to amend (see id. at 22)², and on October 7, 2016, Plaintiffs filed an Amended Complaint. (See Am. Cmplt. (Dkt. No. 26)) On July 25, 2017, this Court granted Defendants' Rule 12(b)(6) motion to dismiss the Amended Complaint. (Order (Dkt. No. 38))³

Defendant Barrett has moved for sanctions against Plaintiffs and their counsel pursuant to Fed. R. Civ. P. 11 and 28 U.S.C. § 1927. (Mot. (Dkt. No. 49); Def. Br. (Dkt. No. 50))

¹ Familiarity with the August 24, 2016 order is presumed.

² The page numbers of documents referenced in this Order correspond to the page numbers designated by this District's Electronic Case Filing system.

³ Familiarity with the July 25, 2017 Order is likewise presumed.

at 6). Defendant Barrett contends that sanctions are warranted, because “the claims in the Amended Complaint have no basis in fact, and . . . [Plaintiffs] refused to drop their claims in the face of evidence showing that their claims are untrue.” (Def. Br. (Dkt. No. 50) at 6)

BACKGROUND

Plaintiffs Goldman and Klatz are licensed to practice medicine, and are the co-founders of the American Academy of Anti-Aging Medicine, a “not-for-profit medical organization dedicated to the advancement of technology to detect, prevent, treat and research aging[-]related diseases.” (Am. Cmplt. (Dkt. No. 26) ¶¶ 8, 12) Defendant Barrett – a retired psychiatrist – owns and operates the website www.quackwatch.org (the “Quackwatch Website”). (Id. ¶ 17) One stated objective of the Quackwatch Website is to identify medical practitioners who use what Barrett considers to be questionable medical practices. (Id. ¶ 19)

I. THE COMPLAINT

In the Complaint, Plaintiffs allege that on or about December 6, 2000, Defendant posted an article on the Quackwatch Website entitled “Anti-Aging ‘Gurus’ Pay \$5,000 Penalties” (the “Article”). (Cmplt. (Dkt. No. 2) ¶ 22) The Article describes a settlement agreement in which Plaintiffs agreed “to pay \$5,000 each to the State of Illinois and to stop identifying themselves as M.D.s in Illinois unless authorized to do so by the Illinois Department of Professional Regulation.” (Id.; Article (Dkt. No. 15-6) at 1)

The Complaint further alleges that on February 28, 2006, the Division of Professional Regulation of the Illinois Department of Financial and Professional Regulation determined that Plaintiffs were “licensed physicians and surgeons of osteopathic medicine in good standing in Illinois for over 20 years, which allows them to practice and carry out all duties equivalent to what a medical doctor, an M.D., may do in Illinois.” (Cmplt. (Dkt. No. 2) ¶¶ 24-

26). The Defendants, however, never posted “any follow-up on the [Quackwatch] Website to reflect the February 2006 Illinois decree or to clarify the statuses of Dr. Goldman and Dr. Katz.” (Id. ¶ 26)

Defendants also allegedly employed search engine optimization techniques to ensure that the Article would appear high on the list of Internet search results for any online search conducted concerning Plaintiffs. (Id. ¶¶ 31-34) Moreover, despite requests by Plaintiff that Defendants remove the Article from the Quackwatch Website, Defendants refused to do so. (Id. ¶¶ 37-42)

The Complaint asserts claims for defamation per se, defamation by implication, tortious interference with prospective economic advantage, conspiracy to tortiously interfere with prospective business relations, prima facie tort, deceptive business practices under New York General Business Law, Section 349, and civil conspiracy. (Id. ¶¶ 43-94) All of the claims in the Complaint are premised on the allegedly defamatory statements in the Article. (See id.)

II. THE AUGUST 24, 2016 ORDER DISMISSING THE COMPLAINT

Defendants moved to dismiss (Mot. (Dkt. No. 13)), and on August 24, 2016, this Court granted Defendants’ motion, finding, inter alia, that (1) Plaintiffs had not demonstrated that the Article constitutes defamation per se or defamation by implication; (2) Plaintiffs’ claims for tortious interference with prospective economic advantage and conspiracy to tortiously interfere with prospective economic advantage are duplicative of their defamation claims; (3) Plaintiffs’ prima facie tort claim is duplicative of the defamation claims; (4) Plaintiffs have not pled facts sufficient to make out the “materially misleading” element of Section 449 of N.Y. Gen. Bus. Law; and (5) because all of Plaintiffs’ underlying claims are subject to dismissal, Plaintiffs’ civil conspiracy claim is likewise dismissed. (See Order (Dkt. No. 23) at 5-17)

Because “the essence of all of Plaintiffs’ causes of action [in the Complaint] is defamation” (id. at 18), this Court also determined that all of Plaintiffs’ claims were time-barred under the one-year statute of limitations applicable to defamation claims. (Id. at 17-21)

This Court granted Plaintiffs leave to amend. (Id. at 22)

III. THE AMENDED COMPLAINT

Plaintiffs filed an Amended Complaint on October 7, 2016. (See Am. Cmplt. (Dkt. No. 26)) The Amended Complaint pleads causes of action for defamation per se, tortious interference with prospective economic advantage, and conspiracy to tortiously interfere with prospective economic advantage. (See id. ¶¶ 63-86) The Amended Complaint contains most of the Complaint’s factual allegations, but adds new allegations regarding defamatory statements Defendants made to unidentified Chinese and Malaysian government officials at unspecified points in time. (See id. ¶¶ 47-62)

Plaintiffs allege that in September 2014 they entered into an agreement “with a Chinese anti-aging company” “to provide consulting services and support for a number of health education clinics and screening centers to be set up in various high density population areas in China (the ‘China Project’).” (Id. ¶¶ 41-42)

According to Plaintiffs, unidentified Chinese ministry officials conducted diligence in connection with the China Project and learned about the Defendants through a cursory internet search revealing the Article and its mention of [Plaintiffs] on the Defendant’s website.

The Officials then contacted the Defendants to inquire further about the Article and more specifically about [Plaintiffs].

(Id. ¶¶ 46-47)

Plaintiffs further allege that in March and April 2015, Chinese officials “interview[ed]” Defendants. (Id. ¶ 48) “[T]he Officials provided the Defendants with

information relating to the China Project and the roles that [Plaintiffs] had within the China Project.” (Id. ¶ 49)

In response,

[t]he Defendants told the Officials that [Plaintiffs] had violated numerous U.S. laws and [] would likely be criminally prosecuted in the near future[;]

[t]he Defendants told the Officials that [Plaintiffs] had tried to silence Dr. Barrett by using physical force and other intimidation tactics but that the Defendants had the means and financial support to defeat [Plaintiffs][;]

[t]he Defendants told the Officials that [Plaintiffs] were under further indictment by other countries for distributing drugs to foreign nations[;]

[t]he Defendants asked the Officials whether providing this information to them would allow Barrett to collect a fee or reward and whether such information might terminate Dr. Goldman and Dr. Klatz’s involvement in the China Project[;] [and]

[t]he Defendants told the Officials that they had more damning evidence against Dr. Goldman and Dr. Klatz and would provide such information if the circumstances were appropriate.

(Id. ¶¶ 50-54)

After Defendants spoke with the unnamed Chinese ministry officials, “the planned clinic was put on indefinite hold.” (Id. ¶ 55) Moreover, “approval of . . . the China Project never occurred,” and ultimately the China Project was “terminated.” (Id. ¶¶ 55-56)

“[Plaintiffs] were informed that the main reason for termination related to the inability to secure the required initial governmental approval for the construction of the test clinics.”⁴ (Id. ¶ 57) Plaintiffs assert “[u]pon information and belief, [that] such approvals were denied based on the Defendants’ false and malicious assertions to the Officials regarding [Plaintiffs].” (Id. ¶ 58)

⁴ The Amended Complaint does not disclose who told Plaintiffs the reason why the China Project was terminated.

Plaintiffs also claim that at some unspecified time they had a “consulting arrangement” with the “Malaysian government regarding various public health programs designed to increase health and productive longevity among the general population (the ‘Malaysia Project’).” (*Id.* ¶ 59) The Amended Complaint alleges that Defendants made unspecified defamatory statements concerning Plaintiffs to unidentified Malaysian government officials. According to Plaintiffs, the alleged defamatory statements made to unidentified Malaysian government officials caused their “consulting arrangement” with the Malaysian government to be terminated (*id.* ¶¶ 59-62): “The Malaysia Project was terminated in late 2014, initially with little explanation. Upon further inquiry by the Plaintiffs, it was determined that certain officials in the Malaysian government had discussions concerning the Article and the Defendants.” (*Id.* ¶ 61) Plaintiffs allege “upon information and belief, [that] it is likely [that] Defendant Barrett had a similar conversation with Malaysian officials regarding the Malaysian Project which caused the consulting arrangement to be terminated.” (*Id.* ¶ 62)

IV. DEFENDANTS’ MOTION TO DISMISS THE AMENDED COMPLAINT AND SANCTIONS MOTION

On November 29, 2016, Defendants moved to dismiss the Amended Complaint (*See* Mot. (Dkt. No. 31)); Plaintiffs filed their opposition on December 13, 2016 (*see* Pltf. Opp. (Dkt. No. 33); and Defendants filed a reply brief on December 20, 2016. (*See* Def. Reply (Dkt. No. 34))

Defendants moved to dismiss all of the claims in the Amended Complaint on the grounds that: (1) the defamation claim is untimely because the allegations in the Amended Complaint do not relate back to the Complaint, and the alleged conduct falls outside of the one-year statute of limitations for defamation; (2) the tortious interference claim is duplicative of the defamation claim; (3) the remaining claims are time-barred because “they are ‘in essence’ claims

for defamation”; and (4) the civil conspiracy claim must be dismissed because (a) if the substantive claims are dismissed, then there can be no civil conspiracy claim; (b) Dr. Barrett has no co-conspirator, because Quackwatch was dissolved in 2009; and (c) “while the plaintiffs argue that Dr. Barrett ‘worked together’ with Quackwatch, Inc. to commit the wrongdoing . . . the complaint lacks any allegation as to Quackwatch, Inc. actually doing anything.” (Def. Br. (Dkt. No. 32) at 6-9; Def. Reply (Dkt. No. 34) at 5-10)

In a January 25, 2017 letter – sent while the motion to dismiss the Amended Complaint was pending – defense counsel Charles Michael informed Plaintiffs’ counsel Wesley Paul that “the allegations in the Amended Complaint are false,” and that the alleged conversations between Dr. Barrett and “several unnamed government officials in China and Malaysia” never happened. (Michael Decl., Ex. D (January 25, 2017 email) (Dkt. No. 51-4) at 2-3) Michael further informed Paul that Dr. Barrett would seek sanctions in the event that Plaintiffs did not drop their claims. (See id.) Although – as explained below – Michael agreed to temporarily withdraw his letter pending additional information from Paul regarding the factual basis for the allegations in the Amended Complaint (see Michael Decl., Ex. E (January 25, 2017 email chain) (Dkt. No. 51-5)), Plaintiffs ultimately refused to proffer any such information. (See Michael Decl., Ex. F (Feb. 6, 2017 email) (Dkt. No. 51-6) at 1 (“[M]y client is not willing to discuss the case with you further pending resolution of the current motion to dismiss.”) Accordingly, in a February 6, 2017 email – substantially similar to the January 25, 2017 email – Michael notified Paul that Dr. Barrett intended to seek sanctions in the event that Plaintiffs did not drop their claims, because the “Amended Complaint lacked a sufficient factual basis.” (See Michael Decl., Ex. G (Feb. 6, 2017 email resp.) (Dkt. No. 51-7) at 1-5) Plaintiffs refused to drop their claims (see Michael Decl. Ex. H (Feb. 6, 2017 email resp.) (Dkt. No. 51-8) at 1), and

on February 14, 2017, Dr. Barrett served his motion for sanctions on Plaintiffs. (See Aff. of Serv. (Dkt. No. 53)) On October 17, 2017 – after the 21-day period to withdraw the Amended Complaint had passed – Dr. Barrett filed his motion for sanctions. (See Mot. (Dkt. No. 49))

On July 25, 2017, this Court granted Defendants’ motion to dismiss. (Order (Dkt. No. 38)) This Court held, inter alia, that: (1) all of Plaintiffs’ claims against Quackwatch were time-barred, because Quackwatch was dissolved in 2009 and the instant lawsuit was not filed until six years later – well outside the applicable two-year statute of limitations for bringing suit against a dissolved corporation; (2) Plaintiffs’ new defamation claim concerning the alleged statements made by Defendants to Chinese and Malaysian officials did not “relate back” to the allegations in the original complaint and was, therefore, time-barred; (3) Plaintiffs’ tortious interference claims were premised on the same set of facts as the defamation claim and were dismissed as duplicative. (Id. at 1-2 n. 3, 11-16)

This Court further found, in the alternative, that Plaintiffs’ tortious interference claims were time-barred under the one-year statute of limitations, because they were “based on conduct that took place in 2014 and 2015, and the Amended Complaint was filed on October 7, 2016.” (Id. at 15-16 n. 8) Moreover, “[t]o the extent that Plaintiffs’ tortious interference conspiracy claim [wa]s based on Barrett’s alleged statements to Malaysian officials, that portion of the conspiracy claim [wa]s also dismissed as speculative,” because “Plaintiffs have not pled who Barrett spoke with in the Malaysian government, what Barrett said, or when he said it.” (Id.) The Court also found the tortious interference conspiracy claim fatally deficient because “the only alleged conspirators are Barrett and Quackwatch, Inc.,” and Quackwatch was dissolved in 2009, and can no longer be sued. (Id.) This claim also ran afoul of the basic principle “that a corporation and its owner cannot conspire with one another.” (Id.)

V. DEFENDANT BARRETT'S MOTION FOR SANCTIONS

Defendant Barrett has now moved for sanctions pursuant to Fed. R. Civ. P. 11 and 28 U.S.C. § 1927. (Mot. (Dkt. No. 49); Def. Br. (Dkt. No. 50) at 5-6) Barrett argues that the newly-added allegations in the Amended Complaint – concerning Defendants’ alleged contact with Chinese and Malaysian government officials – have no basis in fact, and that sanctions are warranted because Plaintiffs and their counsel “refused to drop their claims in the face of evidence showing that their claims are untrue.” (Def. Br. (Dkt. No. 50) at 6)⁵ Barrett maintains that the alleged conversations with Chinese and Malaysian government officials cited in the Amended Complaint are “not only implausible,” but “false,” because he “ha[s] never spoken to any government official in China or Malaysia regarding the plaintiffs (or, for that matter, regarding anything).” (Def. Br. (Dkt. No. 50) at 5; Barrett Decl. (Dkt. No. 52) ¶ 2)

Plaintiffs contend that the Amended Complaint’s allegations regarding Defendants’ alleged contact with Chinese and Malaysian government officials were justified based on a “reasonable inquiry into the facts.” (Pltf. Br. (Dkt. No. 45) at 14)

A. Defendant’s Evidence

The Amended Complaint was filed on October 7, 2016 (see Am. Cmplt. (Dkt. No. 26)), and on October 17, 2016 Charles Michael – Defendants’ counsel – called Plaintiffs’ counsel Wesley Paul to discuss the factual basis for the new allegations in the Amended Complaint. (Michael Decl. (Dkt. No. 51) ¶ 5) Michael informed Paul that the new allegations “were untrue because Dr. Barrett had never spoken with government officials.” (Id.) Paul responded that the

⁵ Because Defendant’s sanctions motion is premised solely on the new allegations added in the Amended Complaint (see Def. Br. (Dkt. No. 50) at 4, 6; Def. Reply (Dkt. No. 48) at 5 (“Dr. Barrett’s sanctions motion does not relate to the original Complaint at all.”)), Plaintiffs’ arguments concerning the Quackwatch article (see Pltf. Br. (Dkt. No. 45) at 8-10; Paul Decl., Exs. 2-6 (Dkt. Nos. 46-2 – 46-26)) are irrelevant.

factual basis for the new allegations in the Amended Complaint “came from a woman named Stephanie Kuo, who, in turn, heard from a person in the Chinese Ministry of Zoning about the conversation that scuttled the business deal in China.” (Id. ¶ 6) Paul further stated that he would obtain an affidavit setting forth what Kuo knew. (Id.)

After this call, Michael conducted a Google search and discovered that Kuo is the president of the Chinese branch of the Asian-Pacific Academy of Anti-Aging Medicine, an organization co-founded by Plaintiffs. (Id. ¶ 7; Michael Decl., Ex. A (Advisory Board of Anti-Aging Academy) (Dkt. No. 51-1) at 2) Michael states that he found Paul’s stated basis for the Amended Complaint “suspicious,” because Paul was “relying on third-hand information sourced only to one of the plaintiffs’ colleagues, and because the overall fact pattern remained implausible.” (Michael Decl. (Dkt. No. 51) ¶ 8)

In order to demonstrate that the alleged conversations never occurred, Michael obtained records for both telephones used by Dr. Barrett – a cell phone and a landline. (Id. ¶¶ 8-9) The telephone records showed no calls to or from China or Malaysia during the relevant time frame. (Michael Decl. (Dkt. No. 51) ¶¶ 10-11) On January 25, 2017, Michael sent Paul copies of these telephone records, and urged him to drop the case. (Michael Decl., Ex. D (January 25, 2017 email) (Dkt. No. 51-4) at 1-3) Michael’s letter reads as follows:

I write on behalf of defendant Dr. Stephen J. Barrett to respectfully request that you voluntarily agree to withdraw the Amended Complaint in the above matter within 10 business days. While we believe that Amended Complaint lacked a sufficient factual basis to have been filed in the first place, we are supplying with this letter phone records that should eliminate any doubt that the allegations in the Amended Complaint are false.

As you know, the central allegation in the Amended Complaint is that Dr. Barrett defamed your clients in phone calls with several unnamed government officials in China and Malaysia who were conducting diligence for prospective business ventures, thereby causing the projects to be cancelled. (ECF 26 ¶¶ 41-62.) Our pending motion to dismiss details several legal flaws with the case, including that it is untimely.

Apart from these legal flaws, the factual allegations of the Amended Complaint are wildly implausible. It is highly unlikely that foreign government officials would decide to scuttle a potentially profitable project based solely on a telephone conversation with a retired doctor – whom they had never met – without giving your clients a chance to rebut these allegations. It is further suspicious that these phone conversations allegedly occurred before this suit was originally filed, yet were mentioned nowhere in the original complaint or in any of the parties’ discussions.

In fact, these phone conversations never happened. Dr. Barrett will testify under oath that he used only two telephone numbers during the relevant time period: a home telephone provided by Vonage, and a cell phone provided by Consumer Cellular. Call records for these phone numbers from 2014 and 2015 are attached to this letter as Exhibit A and Exhibit B, respectively. (We recently received the Vonage records via a subpoena.) As you can see, the records contain no calls to or from China (country code +86) or Malaysia (country code +60). Consistent with these records, Dr. Barrett will testify under oath that he has never spoken to government officials in China or Malaysia regarding your clients (or anything else, for that matter).

I have asked you before to explain the factual basis for these allegations, and you have indicated only that Stephanie Kuo, the President of the Chinese branch of your clients’ “anti-aging” business, was told about these conversations from the government officials at issue. This type of third-hand information is hardly sufficient to satisfy a lawyer’s obligation to conduct an adequate pre-suit investigation, particularly when the third-hand information is so implausible. But even assuming Ms. Kuo’s account were sufficient in the first place to justify the filing of the Amended Complaint, the attached phone records should demonstrate that the information supplied to you is simply not true.

In light of these facts, further pursuit of these claims is improper and unethical. Under Rule 11, “sanctions are appropriate where an attorney or party declines to withdraw a claim upon an express request by his or her adversary after learning that [the claim] was groundless.” Fuerst v. Fuerst, 832 F. Supp. 2d 210,220 (E.D.N.Y. 2011). Further, under 28 U.S.C. § 1927, a lawyer can be personally liable for prolonging the litigation for claims that the lawyer learns are groundless. See, e.g., Baker v. Urban Outfitters, Inc., 431 F. Supp. 2d 351,362 (S.D.N.Y. 2006).

Please let us know within 10 business days if you will drop your claims, or we will serve a Rule 11 motion for sanctions.

(Id. at 2-3)

Paul called Michael that same day. (Michael Decl. (Dkt. No. 51) ¶ 13) Paul stated that “he was confident that he had satisfied his ethical obligations to conduct an adequate pre-suit investigation,” but he would not share any information related to his pre-suit

investigation with Michael. (Id.) Paul requested, however, that Michael withdraw the sanctions letter so that Paul could seek his clients' permission to disclose more information concerning the new allegations in the Amended Complaint. (See id.) Michael agreed, and memorialized the parties' agreement in the following January 25, 2017 email:

Nice speaking with you now. As agreed, we will withdraw the letter below through the close of business Monday, in the hope that in the intervening time you will be able to share whatever information you would like as to (i) the factual basis for your allegations, or (ii) what discovery you would potentially seek that would bear on those allegations.

(Michael Decl., Ex. E (January 25, 2017 email chain) (Dkt. No. 51-5) at 1) Paul responded:

Thank you Charles. I will plan to speak to my client in the meantime and obtain his approval to share information to you in the meantime as the current motion is being considered. Have a good rest of the week.

(Id.)

In a February 6, 2017 email, however, Paul informed Michael that his client was not willing to share information concerning the new allegations while the motion to dismiss the Amended Complaint was pending:

Charles, my client is not willing to discuss this case with you further pending resolution of the current motion to dismiss. If your client withdraws the motion and we proceed to case management conference, my client will proceed accordingly.

Have you discussed with your client the possibility of a mediation? I believe my client may be willing, under stay, to proceed on this basis particularly as part of any court ordered mediation by Judge Gardephe. I believe the Court encourages such constructive attempts to resolve matters.

(Michael Decl., Ex. F (Feb. 6, 2017 email) (Dkt. No. 51-6) at 1)

Later that day, Michael sent Paul an email stating that he was "disappointed that [Paul's] clients were unwilling to share any information," and attached a letter substantially similar to the January 25, 2017 sanctions letter, again requesting that Paul drop the case.

(Michael Decl., Ex. G (Feb. 6, 2017 email resp.) (Dkt. No. 51-7) at 1-5) Paul responded as follows:

My clients are perfectly willing to share information during discovery. You are attempting to coerce my clients under a spurious threat of Rule 11 sanctions. It is your client that filed the pending motion to dismiss, thereby staying all proceedings pending resolution of this motion. Now you are complaining about the lack of sharing information? Your letter is outrageous and I look forward to vigorously contesting it.

(Michael Decl. Ex. H (Feb. 6, 2017 email resp.) (Dkt. No. 51-8) at 1)

B. Plaintiffs' Evidence

Plaintiff Goldman states that he is a co-founding member of the American Academy of Anti-Aging Medicine, and that “[t]hroughout approximately the past twenty years, [he] ha[s] been aware of efforts led by Dr. Stephen Barrett and his associates to discredit me, my partner Ronald Klatz” and the Academy of Anti-Aging Medicine. (Goldman Decl. (Dkt. No. 47) ¶¶ 2-3)

According to Goldman, in mid-2014 Plaintiffs entered into a series of transactions in China and Malaysia to promote anti-aging clinics, workshops and centers, and entered into a joint venture agreement with Stephanie Kuo. (*Id.* ¶ 9; *see also* Paul Decl., Ex. A (Joint Venture Agmt.) (Dkt. No. 46-1)) Kuo was then Deputy Director of the Health Services Industry Bureau, International Cooperation Center of National Development and Reform Commission. “Upon information and belief,” her position involved “liasing with various government offices of the People’s Republic of China.” (Paul Decl. (Dkt. No. 46) ¶ 10; Goldman Decl. (Dkt. No. 47) ¶ 9)

Pursuant to the Joint Venture Agreement with Kuo, a Chinese branch of the American Academy of Anti-Aging Medicine was formed and Kuo was appointed as its chairman. (Paul Decl. (Dkt. No. 46) ¶ 14) Paul states that, “[u]pon information and belief,” the Chinese branch “operates independently of the American Academy of Anti-Aging Medicine.” (*Id.* ¶ 15)

According to Goldman, Kuo “was not previously employed by either [Dr. Goldman], Dr. Klatz or any entities that either [Dr. Goldman] or Dr. Katz controlled.” (Goldman Decl. (Dkt. No. 47) ¶ 9)

After the joint venture agreement with Kuo was executed, Plaintiffs began to submit applications for several franchises in China, which required government approval. (See id. ¶¶ 10, 12; Paul Decl. (Dkt. No. 46) ¶ 14) According to Goldman, if the franchises were approved, Plaintiffs had the potential to realize more than \$20 million in yearly revenue “after the startup phase.” (Goldman Decl. (Dkt. No. 47) ¶ 11) In late 2015, however, Kuo informed Plaintiffs that their applications for franchises had been rejected. (Id. ¶ 12)

In early 2016, Kuo informed Plaintiffs that “the likely reason for such rejections focused on concerns that resulted from the [Quackwatch] Article and communications that the government likely had with Dr. Barrett during diligence.” (Id.) Kuo explained that it was common for Chinese government officials to communicate with a wide array of people in conducting due diligence, and to outsource diligence procedures to parties located in the United States when conducting diligence examinations. (Id.) Goldman asked Plaintiffs’ counsel Wesley Paul to follow up with Kuo to obtain additional information regarding the rejection of Plaintiff’s applications for various joint venture licenses and permitting requests. (Id. ¶ 13; Paul Decl. (Dkt. No. 46) ¶ 22)

According to Goldman, discussions regarding a project in Malaysia also ended unexpectedly. (Id. ¶ 14) Although “[n]o reason was given,” Goldman states that based on prior experience, he believes that “the Article and Dr. Barrett’s influence also similarly caused the cessation of these developments.” (Id. ¶ 14)

Paul states that he communicated with Kuo “at various points in late 2015 and 2016,” primarily through the Chinese social media app Weixen (commonly known as WeChat). (Paul Decl. (Dkt. No. 46) ¶ 21) Kuo informed Paul “of the facts relating to the termination of various joint venture license and permitting requests made in connection with the Joint Venture Agreement [in China] . . . which were generally described in the Amended Complaint.” (*Id.* ¶ 22) Paul does not disclose the content of his communications with Kuo, however, nor does he state what “facts” Kuo told him. (*See id.*) Paul asserts, however, that he had “no substantial reason to doubt the statements made [by] Ms. Kuo as she did not appear to have any legal or economic conflicts with [his] clients and her communications appeared to be consistent with [his] general experience . . . relating to communications with government authorities” in China. (*Id.* ¶ 23) Paul further asserts that – in order to corroborate the information supplied by Kuo – the case “would need to proceed to the discovery stage and . . . information requests would need to comply with applicable international treaties (e.g., Hague Evidence Request).” (*Id.* ¶ 24)

DISCUSSION

I. LEGAL STANDARDS

“Rule 11 imposes an ‘affirmative duty on each attorney to conduct a reasonable inquiry into the viability of a pleading’ before actually signing it.” *O’Malley v. New York City Transit Auth.*, 896 F.2d 704, 706 (2d Cir. 1990) (citation omitted). By signing or filing a complaint, an attorney is certifying that to the best of his or her knowledge, information, and belief, formed after an inquiry reasonable under the circumstances “the factual contentions have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery.” Fed. R. Civ. P. 11(b)(3). “In determining whether a signer has violated Rule 11, a district court applies an objective standard

of reasonableness.” Derechin v. State Univ. of N.Y., 963 F.2d 513, 516 (2d Cir. 1992). “The reasonableness of an inquiry depends upon the surrounding circumstances, including ‘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 . . . ; or whether he depended on forwarding counsel or another member of the bar.’” Hedges v. Yonkers Racing Corp., 48 F.3d 1320, 1329 (2d Cir. 1995) (quoting Advisory Committee Note on 1983 amendment to Fed. R. Civ. P. 11).

“Drawing a line between zealous advocacy and frivolous conduct, Rule 11 provides a vehicle for sanctioning an attorney, a client, or both.” United States v. Int’l Bhd. of Teamsters, Chauffeurs, Warehousemen & Helpers of Am., AFL-CIO, 948 F.2d 1338, 1343 (2d Cir. 1991). “Rule 11(c) provides in pertinent part that ‘[i]f . . . the court determines that subdivision (b) has been violated, the court may . . . impose an appropriate sanction. . . .’” Perez v. Posse Comitatus, 373 F.3d 321, 325 (2d Cir. 2004) (quoting Fed. R. Civ. P. 11(c)). “The decision whether to impose a sanction for a Rule 11(b) violation is thus committed to the district court’s discretion.” Id. (collecting cases).

The Second Circuit has cautioned, however, that decisions regarding the imposition of Rule 11 sanctions should be “made with restraint and discretion.” Schlaifer Nance & Co. v. Estate of Warhol, 194 F.3d 323, 333 (2d Cir.1999)). “Doubts as to the viability of a signed pleading, are to be resolved in favor of the signer.” O’Malley, 896 F.2d at 706 (citations omitted). “With regard to factual contentions [under Rule 11(b)(3)], ‘sanctions may not be imposed unless a particular allegation is utterly lacking in support.’” Storey v. Cello Holdings, L.L.C., 347 F.3d 370, 388 (2d Cir. 2003) (quoting O’Brien v. Alexander, 101 F.3d 1479, 1489 (2d Cir. 1996)). Accordingly, “[e]ven if the district court concludes that the assertion of a given

claim violates Rule 11 . . . the decision whether or not to impose sanctions is a matter for the court's discretion.” Perez, 373 F.3d at 325.

“Rule 11 and principles of due process require that ‘the subject of a sanctions motion be informed of: (1) the source of authority for the sanctions being considered; and (2) the specific conduct or omission for which the sanctions are being considered so that the subject of the sanctions motion can prepare a defense.’” Star Mark Mgmt., Inc. v. Koon Chun Hing Kee Soy & Sauce Factory, Ltd., 682 F.3d 170, 175 (2d Cir. 2012) (quoting Schlaifer, 194 F.3d at 334). Under Rule 11’s “safe harbor provision”, the subject of the sanctions motion must be served with the motion at least 21 days in advance of the filing of the motion. See Fed. R. Civ. P 11(c)(2); Star Mark Mgmt., Inc., 682 F.3d at 176.

“Another basis for sanctions lies in 28 U.S.C. § 1927.” Int’l Bhd. of Teamsters, 948 F.2d at 1344. The statute provides that “[a]ny attorney . . . 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. “By its terms, § 1927 looks to unreasonable and vexatious multiplications of proceedings[,] and it imposes an obligation on attorneys throughout the entire litigation to avoid dilatory tactics.” Int’l Bhd. of Teamsters, 948 F.2d at 1345. Because “[t]he purpose of this statute is ‘to deter unnecessary delays in litigation[,]’” id., “§ 1927 invites attention to a course of conduct[.]” Id. at 1346.

Section 1927 requires a showing of “subjective bad faith by counsel.” Id. at 1346. The Second Circuit has interpreted the bad faith standard restrictively, requiring “clear evidence that (1) the offending party’s claims were entirely without color, and (2) the claims were brought in bad faith – that is, ‘motivated by improper purposes such as harassment or delay.’” Eisemann

v. Greene, 204 F.3d 393, 396 (2d Cir. 2000) (quoting Schlaifer, 194 F.3d at 336)). Moreover, “[t]he Court’s factual findings of bad faith must be characterized by a high degree of specificity.” Id. (quoting Schlaifer, 194 F.3d at 338). “In contrast with sanctions under Rule 11, awards pursuant to § 1927 may be imposed only against the offending attorney; clients may not be saddled with such awards.” Int’l Bhd. of Teamsters, 948 F.2d at 1345.

II. ANALYSIS

Here, there is no dispute that Defendant Barrett complied with Rule 11(c)(2)’s safe harbor provision. As recounted above, in a January 25, 2017 letter, defense counsel sent plaintiffs’ counsel a letter notifying him that “the allegations in the Amended Complaint are false,” and that the alleged conversations between Dr. Barrett and “several unnamed government officials in China and Malaysia” never happened. (Michael Decl., Ex. D (January 25, 2017 email) (Dkt. No. 51-4) at 2-3) Defense counsel warned Plaintiffs’ counsel of Defendant Barrett’s intent to seek sanctions in the event that Plaintiffs did not drop their claims. (See id.) Although defense counsel agreed to temporarily withdraw the Rule 11 letter pending additional information from Plaintiff’s counsel regarding the factual basis for the new allegations in the Amended Complaint, (see Michael Decl., Ex. E (January 25, 2017 email Chain) (Dkt. No. 51-5)), Plaintiffs later refused to provide any such information. (See Michael Decl., Ex. F (Feb. 6, 2017 email) (Dkt. No. 51-6) at 1) Accordingly, in a February 6, 2017 communication, defense counsel again warned Plaintiffs’ counsel that Defendant Barrett intended to seek sanctions in the event that Plaintiffs did not drop their claims. (See Michael Decl., Ex. G (Feb. 6, 2017 email resp.) (Dkt. No. 51-7) at 1-5) Plaintiffs refused to drop their claims (see Michael Decl. Ex. H (Feb. 6, 2017 email resp.) (Dkt. No. 51-8) at 1), and on February 14, 2017, Defendant Barrett served a copy of his sanctions motion on Plaintiffs. (See Aff. of Serv. (Dkt. No. 53)) After the

21-day period to withdraw the Amended Complaint had passed, Barrett filed his sanctions motion. (See Mot. (Dkt. No. 49))

The new allegations in the Amended Complaint that provide the basis for Dr. Barrett's sanctions motion reflect purported defamatory statements Dr. Barrett made to unidentified Chinese and Malaysian government officials. The Amended Complaint asserts that, in the process of "conduct[ing] diligence," certain unidentified Chinese officials contacted Dr. Barrett, and that Dr. Barrett and Quackwatch provided the following information to the unidentified Chinese officials:

[t]he Defendants told the Officials that [Plaintiffs] had violated numerous U.S. laws and [] would likely be criminally prosecuted in the near future;

[t]he Defendants told the Officials that [Plaintiffs] had tried to silence Dr. Barrett by using physical force and other intimidation tactics but that the Defendants had the means and financial support to defeat [Plaintiffs];

[t]he Defendants told the Officials that [Plaintiffs] were under further indictment by other countries for distributing drugs to foreign nations;

[t]he Defendants asked the Officials whether providing this information to them would allow Barrett to collect a fee or reward and whether such information might terminate Dr. Goldman and Dr. Klatz's involvement in the China Project; [and]

[t]he Defendants told the Officials that they had more damning evidence against Dr. Goldman and Dr. Klatz and would provide such information if the circumstances were appropriate.

(Am. Cmplt. (Dkt. No. 26) ¶¶ 46-47, 50-54)

The Amended Complaint goes on to assert that Dr. Barrett also made defamatory statements about Plaintiffs to unidentified Malaysian government officials, and that these unspecified defamatory statements concerning Plaintiffs caused the Malaysian government to terminate a "consulting arrangement" with Plaintiffs. (Id. ¶¶ 59-62) According to the Amended Complaint, "[t]he Malaysia Project was terminated in late 2014, initially with little explanation,"

and “upon information and belief, it is likely [that] Defendant Barrett had a similar conversation with Malaysian officials regarding the Malaysian Project which caused the consulting arrangement to be terminated.” (Id. ¶¶ 61-62)

The record now before this Court – including the declarations submitted by Dr. Goldman and Plaintiffs’ Counsel Wesley Paul in opposition to Defendant Barrett’s motion for sanctions – makes clear that there was no factual basis for the new allegations in the Amended Complaint. Indeed, the declarations demonstrate that the new allegations in the Amended Complaint concerning Barrett’s alleged contact with Chinese and Malaysian government officials were based on no more than speculation.

With respect to the alleged conversations between Dr. Barrett and unnamed Chinese government officials, Dr. Goldman relates that Kuo told him that “it was not unusual during diligence examinations for Chinese government officials to hold formal or informal meetings with a wide array of people,” including sources in the United States. (Goldman Decl. (Dkt. No. 47) ¶ 12) Based on this alleged practice, Kuo posited that “the likely reason for [the rejection of Plaintiffs’ franchise applications in China] focused on concerns that resulted from . . . communications that the government likely had with Dr. Barrett during diligence.” (Id.) Kuo’s speculation that conversations may have taken place between Barrett and Chinese government officials provides no support for the allegations in the Amended Complaint, including those charging Dr. Barrett with having told Chinese government officials that Plaintiffs had threatened Defendants, that Plaintiffs were under indictment for distributing drugs, or that Plaintiffs had violated numerous laws. (See Am. Cmplt. (Dkt. No. 26) ¶¶ 46-47, 50-54) These allegations appear to have been simply fabricated.

Paul’s conclusory statement in his declaration that “Kuo informed [him] of the

facts relating to the termination of various joint venture license and permitting requests made in connection with the Joint Venture Agreement” – absent disclosure of what exactly Kuo said – is of no use to this Court. (See Paul Decl. (Dkt. No. 46) ¶ 22) Indeed, counsel’s “inexplicable silence . . . ‘strong[ly]’ suggest[s]’ that the factual allegations lack evidentiary support.” See Kingvision Pay-Per-View Ltd. v. Ramierez, No. 05 Civ. 2778 (HB), 2005 WL 1785113, at *3 (S.D.N.Y. July 28, 2005) (citations omitted).

Goldman and Paul’s declarations likewise make clear that there was no factual basis for the assertion that Dr. Barrett had made defamatory statements to Malaysian government officials. The only factual support provided for this claim is Dr. Goldman’s statement that discussions with the Malaysian government “halted unexpectedly,” and that “based on prior experience, [Dr. Goldman] believe[d] that the Article and Dr. Barrett’s influence also similarly caused the cessation of these developments. (Goldman Decl. (Dkt. No. 47) ¶ 14) Notably, Paul’s declaration does not address – in any fashion – Dr. Barrett’s alleged communications with unidentified Malaysian government officials. (See Paul Decl. (Dkt. No. 46) ¶¶ 21-24).

Under these circumstances, a reasonable attorney would have recognized that the new allegations set forth in the Amended Complaint are frivolous, and run afoul of Rule 11(b)(3). See, e.g., Ho Myung Moolsan Co. v. Manitou Mineral Water, Inc., 665 F. Supp. 2d 239, 264-65 (S.D.N.Y. 2009) (“I find that these claims are completely lacking in support and plaintiffs offer no evidence that they conducted a reasonable pre-filing inquiry into the evidentiary and factual support for these claims. Plaintiffs assert in their supporting papers that ‘[a]ll of these parties acted in concert with one another and conspired together, as the discovery has revealed in this case.’ However, plaintiffs give no indication in any of their motion papers of any specific facts to support the newly asserted claims.” (citations omitted)); Kingvision, 2005

WL 1785113, at *3 (concluding that counterclaim violated Rule 11 where defense counsel “failed to submit an affidavit detailing what evidence — representations by his client or otherwise — supports the allegations”); Abner Realty, Inc. v. Adm’r of Gen. Servs. Admin., No. 97 Civ. 3075 (RWS), 1998 WL 410958, at *6 (S.D.N.Y. July 22, 1998) (finding a violation of Rule 11(b)(3) where “the accusations . . . of fraud, conspiracy, and corruption were without any investigation or evidence to substantiate the claims”); Kirsh v. Scott, No. 93 Civ. 4767 (KTD), 1994 WL 132383, at *2-4 (S.D.N.Y. Apr. 11, 1994) (concluding that the factual allegations lacked evidentiary support where counsel’s declaration was based on hearsay, including “unsworn statements of one of his pro bono clients,” and the hearsay statements — even if credited — did not support the petition’s allegations). Accordingly, Defendant Barrett’s motion for sanctions under Rule 11 will be granted.⁶ As set forth below, the Court will allow the parties to brief the issue of an appropriate financial sanction, and on whom such a sanction should be imposed.⁷

⁶ An award of sanctions under 28 U.S.C. § 1927 is not appropriate. The Court cannot find under Section 1927 that Plaintiffs’ counsel was “motivated by improper purposes such as harassment or delay.” Eisemann, 204 F.3d at 396. Plaintiffs’ failure to withdraw their claims did not result in substantial additional expense or delay, because Defendants’ motion to dismiss the Amended Complaint was already fully briefed by the time that defense counsel notified Plaintiff’s counsel of Defendants’ intent to seek sanctions. (See Dkt. Nos. 31-34; Michael Decl., Ex. D (January 25, 2017 email) (Dkt. No. 51-4) at 1-3; Michael Decl., Ex. G (Feb. 6, 2017 email resp.) (Dkt. No. 51-7) at 1-5)

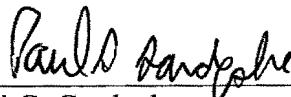
⁷ Barrett seeks an order “requiring Plaintiffs and/or their counsel to reimburse Dr. Barrett’s fees and costs in defending this action and filing this motion.” (Def. Br. (Dkt. No. 50) at 8) An award of all fees and costs expended in this action does not appear to be consistent with Rule 11, however, because — as discussed above — defense counsel did not put Plaintiffs on notice of Defendant Barrett’s intent to seek sanctions until briefing was complete on Defendants’ motion to dismiss the Amended Complaint.

CONCLUSION

For the reasons stated above, Defendant Barrett's motion for sanctions is granted. The Clerk of Court is directed to terminate the motion (Dkt. No. 49). By **September 10, 2018**, Defendant Barrett will submit briefing concerning the proper amount of a sanctions award, and on whom that award should be imposed. Plaintiffs' submission concerning these issues is due on **September 17, 2018**.

Dated: New York, New York
August 31, 2018

SO ORDERED.



Paul G. Gardephe
United States District Judge