

**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK**

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

Plaintiffs,

*—against—*

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

Defendants.

15 Civ. 9223 (PGG) (HBP)

**DR. STEPHEN J. BARRETT'S SUBMISSION REGARDING  
THE PROPER AMOUNT OF A SANCTIONS AWARD**

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## INTRODUCTION

The Court issued an Order last week finding that the core allegation of the Amended Complaint was “simply fabricated” and directed the defendant, Dr. Stephen Barrett, to submit briefing as to the appropriate amount of the resulting sanction and who should pay it. (ECF Doc. 57 at 20, 23.) As detailed below, Dr. Barrett respectfully submits that a sanction of **\$205,195** against the plaintiffs and their counsel, jointly and severally, is appropriate.

Rule 11 expressly authorizes sanctions in an amount to compensate for the fees and costs directly resulting from a frivolous filing, and the plaintiffs’ Amended Complaint — which never should have been filed — caused Dr. Barrett’s *pro bono* counsel to spend otherwise unnecessary time moving to dismiss the Amended Complaint, defending an appeal based solely on the Amended Complaint, and moving for sanctions. That time is worth \$105,195. Case law is clear that the fact that counsel is working *pro bono* should not change the award.

Dr. Barrett is also seeking a punitive sanction of an additional \$100,000 as a deterrent for the plaintiffs’ litigation abuse. This case was from the outset an attempt by the plaintiffs, two “anti-aging” promoters worth tens of millions of dollars, to bully Dr. Barrett, a retired doctor who runs a consumer website called “Quackwatch,” into deleting from the internet a truthful article about the plaintiffs’ phony credentials. When the Court dismissed the Original Complaint as untimely, the plaintiffs decided to fabricate allegations for an Amended Complaint, to keep the litigation going, and to continue to try to have leverage over Dr. Barrett into deleting the article. Their severe abuse of the legal system should be met with a proportionately severe response.

## BACKGROUND

### The Original Complaint

The plaintiffs are two “anti-aging” specialists who filed this suit in November 2015 accusing Dr. Barrett of defaming them via an article dated March 5, 2001 on his website, “Quackwatch,” reporting that the plaintiffs were fined by the State of Illinois for falsely holding themselves out as “M.D.s.” (ECF Doc. 2 ¶¶ 10-15, 22 (Complaint), ECF Doc. 15-6 (article).) The plaintiffs did not allege that the Quackwatch article was false in any way, nor could they have in good faith done so. The article consists of a five-sentence introduction and summary of the disciplinary proceedings against the plaintiffs, followed by a verbatim reprinting of the Consent Orders that they themselves signed. (*Compare id.* (article) *with* ECF Doc. 15-3 (Consent Orders); *see also* ECF Doc. 15-2 (records available online reflecting the fines paid).) As indicated in the Consent Orders, the plaintiffs have medical degrees from a school in Belize that does not qualify for “M.D” licensure under Illinois law, and they agreed to pay \$5,000 each for having nonetheless used the “M.D.” designation in Illinois. (ECF Doc. 15-3.)

It is unclear if the plaintiffs practice medicine today, but they have clearly achieved great success in their “anti-aging” business. The New York Times reported that they “have grown wealthy . . . as leading antiaging evangelists,” selling an 80% stake in their business relating to anti-aging conventions for \$49 million. (ECF Doc. 15-8, at 2 (Duff Wilson, *Aging: Disease or Business Opportunity*, N.Y. TIMES, April 15, 2007).)

The plaintiffs’ Original Complaint was from the outset an attempt to use their substantial resources and the legal system to try to remove from the public record the embarrassing episode about their credentials. Before the Original Complaint was filed, the plaintiffs sent Dr. Barrett a draft, and said that it would not be filed if Dr. Barrett “simply . . . remov[ed] the article[] in

question.” (Ex. B at 1.)<sup>1</sup> Dr. Barrett was not cowed, and, through counsel, told the plaintiffs that pursuing a frivolous case could result in sanctions. (*Id.* at 1, 3.)

On August 24, 2016, this Court dismissed all the claims in the Original Complaint. (ECF Doc. 23.) First, the Court dismissed the plaintiffs’ defamation claim because the plaintiffs did not “allege that any statement made in the Article constitutes a false statement fact.” (*Id.* at 6.) Second, the Court dismissed the remaining claims as either duplicative (tortious interference and prima facie tort), barred by the fact that there was no allegation of a false statement (N.Y. Gen. Bus. L. § 349), or otherwise failed to state a claim (civil conspiracy). (*Id.* at 12-17.) Finally, the Court dismissed all the claims on the independent ground that they were barred by the statute of limitations. (*Id.* at 17-21.)

### **The Amended Complaint**

In October 2016, the plaintiffs filed an Amended Complaint that no longer asserted any claims based on the Quackwatch article but instead focused on entirely new allegations. (ECF Doc. 26.) The Amended Complaint accused Dr. Barrett of disparaging them in calls with unnamed officials of the Chinese and Malaysian governments, in order to sabotage the plaintiffs’ multi-million dollar business deals in those countries. (*Id.* ¶¶ 40-62.) The phone calls allegedly occurred before this suit was originally filed (*id.* ¶¶ 48, 61)), yet were mentioned nowhere in the Original Complaint. The Amended Complaint asserted claims for defamation, tortious interference, and conspiracy to commit tortious interference. (*Id.* ¶¶ 63-86.)

Immediately after the Amended Complaint was filed, Dr. Barrett’s counsel called plaintiffs’ counsel to inquire about the new factual allegations, which Dr. Barrett denied and which appeared on their face to be wildly implausible. (ECF Doc. 51 ¶¶ 5-9.) Plaintiffs’ counsel

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<sup>1</sup> Citations in the form “Ex. \_\_” refer to the exhibits to the accompanying declaration of Charles Michael.

promised to provide an affidavit from an individual affiliated with the plaintiffs' anti-aging organization in China to corroborate the Amended Complaint (*id.* ¶ 6), but he never did so. Dr. Barrett ended up issuing a subpoena for his own phone records to show that he never called China or Malaysia. (*Id.* ¶¶ 10-12.) Those records were provided to plaintiffs' counsel, who still refused to withdraw the Amended Complaint or provide a factual basis for the Amended Complaint. (*Id.* ¶¶ 12-16.)

In February 2017, Dr. Barrett served plaintiffs with a motion for sanctions based on the plaintiffs' having no factual basis for the Amended Complaint (separate and apart from the Amended Complaint being untimely and otherwise legally insufficient). (ECF Doc. 53.)

#### **Dismissal of Amended Complaint and Appeal**

In July 2017, the Court dismissed the Amended Complaint with prejudice. (ECF Doc. 38.) First, the Court dismissed the defamation claim as untimely because the conversations with the Chinese and Malaysian officials allegedly occurred more than one year before the filing of the Amended Complaint, and did not relate back to the Original Complaint, which had nothing to do with those calls. (*Id.* at 11-14.) Second, the Court dismissed the plaintiffs' tortious interference claims (both the substantive claim and the conspiracy claim) as duplicative because those claims were "clearly premised on the same set of facts as their defamation claim." (*Id.* at 15.) Finally, the Court dismissed the conspiracy claim on the separate ground that Dr. Barrett could not "conspire" with his co-defendant, Quackwatch, Inc., since the company had been dissolved and no longer existed. (*Id.* at 16 n.8.)

In November 2017, the plaintiffs appealed the dismissal of the Amended Complaint. (Ex. C.) Notably, the plaintiffs did not challenge on appeal the Court's dismissal of the Original Complaint, which was based on the Quackwatch article, and instead focused exclusively on the



dismissal of the Amended Complaint, which was based on the phone calls with foreign government officials. (*Id.* at 12-18.)

The Second Circuit affirmed, and taxed costs to plaintiffs (ECF Docs. 55-56), which they still have not satisfied. (Michael Decl. ¶ 4 & Ex. G.)

### **The Court's Sanction Order**

On September 4, 2018, the Court granted Dr. Barrett's motion for sanctions, finding that "a reasonable attorney would have recognized that the new allegations set forth in the Amended Complaint are frivolous" and that those allegations "appear to have been simply fabricated." (ECF Doc. 57 at 20-21.) The Court directed Dr. Barrett to file a submission "concerning the proper amount of a sanctions award, and on whom that award should be imposed." (*Id.* at 23.)

## **DISCUSSION**

### **I. SANCTIONS ARE PROPER IN THE AMOUNT OF THE ATTORNEYS' FEES REQUIRED TO LITIGATE AGAINST THE AMENDED COMPLAINT AND THE APPEAL**

Rule 11 expressly authorizes "an order directing payment to the movant of part or all of the reasonable attorney's fees and other expenses directly resulting from the violation." Fed. R. Civ. P. 11(c)(4). Here, the Amended Complaint itself should never have been filed, and *all* of the defense fees and costs from the date the Amended Complaint was filed therefore "directly result[ed] from the violation." (Dr. Barrett does not seek any fees relating to defense of the Original Complaint.)

Unlike some cases, where frivolous claims are intertwined with non-frivolous ones, the *entirety* of the Amended Complaint is based on the phones calls the Court has correctly determined were fabricated. All three claims are premised on these calls:

- Count I, for defamation, is based on the "statements made by the Defendants to the Chinese officials" (ECF Doc. 26 ¶ 64);

- Count II, for tortious interference, is based on the allegation that, after the “Chinese Officials clearly explained to the Defendants the purpose of their call,” the defendants “defam[ed] Dr. Goldman and Dr. Klatz in the interviews with the intent to harm the Doctors” (*id.* ¶¶ 75, 77); and
- Count III, for conspiracy, is based on Dr. Barrett allegedly “defam[ing] Dr. Goldman and Dr. Klatz to Chinese and Malaysian governmental officials relating to the China Project and the Malaysia Project.” (*id.* ¶ 84.)

Put simply, without the invented phone conversations, there would have been no Amended Complaint at all.

Nor would there have been an appeal. The appeal was based *exclusively* on the dismissal of the Amended Complaint, which, again, never should have been filed. The plaintiffs’ appeal brief, in the “Summary of the Argument” section, begins with the sentence “The trial court erred in dismissing the FAC [First Amended Complaint].” (Ex. C at 10.) Nowhere does the brief take issue with this Court’s dismissal of the Original Complaint. Thus, the appeal, too, is exclusively a consequence of the frivolous filing.<sup>2</sup>

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<sup>2</sup> Appellate costs are properly awarded here, and *Cooter & Gell v. Hartmax Corp.*, 496 U.S. 384 (1990), is not to the contrary. In that case, the U.S. Supreme Court addressed only the narrow issue of “whether Rule 11 authorizes awards of attorney’s fees incurred on appeal of a Rule 11 sanction” and observed that Rule 11 “allow[s] expenses incurred on appeal to be shifted to appellants only when those expenses are caused by a frivolous appeal.” *Id.* at 388, 407. Here, Dr. Barrett does not seek fees for an appeal of a Rule 11 sanction—instead, Dr. Barrett seeks fees from an appeal of the order dismissing the Amended Complaint itself. That appeal stemmed directly from the sanctionable paper and was by its nature frivolous, as plaintiffs and their counsel knew that the Amended Complaint they were defending was based on falsehoods. *Id.* at 407 (distinguishing appeal of Rule 11 sanctions, which stems not from the underlying sanctionable conduct but rather from the district court’s sanctions order).

Plaintiffs and their counsel have been on notice since before the lawsuit was filed that it was frivolous (*see* Ex. B) and were on notice immediately after the Amended Complaint was filed that Dr. Barrett was disputing that the calls ever took place, and was eager for plaintiffs to disclose *any* factual basis for their claims. (ECF Doc. 51 ¶¶ 5-9.)

It is therefore appropriate to award Dr. Barrett all the costs and fees from the time the Amended Complaint was filed, as losses “directly resulting” from the violation. Fed. R. Civ. P. 11(c)(4). Courts across the country recognize that, when a complaint should never have brought (as is the case here), *all* the fees and costs from all ensuing litigation are appropriately awarded as sanctions.<sup>3</sup> That Dr. Barrett was represented *pro bono* does not change the analysis because, “[p]ro bono counsel is entitled to be compensated at market rates.” *Maledo v. D.C. Jail Facility*, 252 F.R.D. 63, 65 (D.D.C. 2008).

Accordingly, the Court should issue a sanction of **\$105,195**, reflecting the value of the fees and expenses since the Amended Complaint was filed. (Michael Decl. ¶ 3 & Ex. A.)<sup>4</sup>

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<sup>3</sup> *See Gaskell v. Weir*, 10 F.3d 626, 629 (9th Cir. 1993) (“In a case like this, where the original complaint is the improper pleading, all attorney fees reasonably incurred in defending against the claims asserted in the complaint form the proper basis for sanctions.”); *Estrada v. FTS USA, LLC*, No. 14-23388-CIV, 2018 WL 3697491, at \*9 n.23 (S.D. Fla. July 20, 2018) (“There is considerable precedent for shifting to plaintiff’s counsel defense attorneys’ fees incurred from the outset of a lawsuit, when the complaint violated Rule 11.”); *Shaw v. Harris*, No. 5:12-CV-804-BR, 2014 WL 1464847, at \*7 (E.D.N.C. April 15, 2014) (“Because plaintiff’s violation of Rule 11 occurred in the very filing of her complaint against Omega, the reasonable fees directly resulting from her violation include all reasonable attorney’s fees that Omega has incurred in this case.”); *Seto v. Kamai’Aina Care Inc.*, Civil No. 10-00351 SOM-BMK, 2011 WL 6780042, at \*5 (D. Hawaii Nov. 30 2011) (awarding “full fees and costs” where complaint never should have been filed); *Thurston v. Melton*, Civil No. 3:07CV00036, 2008 WL 376260, at \*4 (W.D. Va. Feb. 11, 2008) (“Plaintiff’s violation of Rule 11 occurred in the very filing of his Complaint, however, the reasonable fees directly resulting from his violation include all reasonable fees that Defendants have incurred in this case.”).

<sup>4</sup> Should the Court determine that a lesser sanction is appropriate, the fees and expenses since the filing of the Amended Complaint are detailed in the accompanying Michael Declaration, and divided into categories pertaining to the phases of the litigation. (Michael Decl. ¶ 3.)

## II. ADDITIONAL PUNITIVE SANCTIONS ARE WARRANTED TO DETER FUTURE CONDUCT

“Rule 11 sanctions are often punitive or aimed at deterrence.” *Cooper v. Salomon Bros. Inc.*, 1 F.3d 82, 85 (2d Cir. 1993). And “due to the punitive nature of the sanctions” there is no requirement for “perfect” correlation “between the sanctioned conduct and the attorney’s fees awarded.” *Williamson v. Recovery Limited Partnership*, 826 F.3d 297, 306 (6th Cir. 2016). Thus, “the rule permits a court to impose sanctions greater than the moving party’s attorney’s fees if the court in its discretion determines that such sanctions are required to deter further unreasonable conduct.” *Fox v. Acadia State Bank*, 937 F.2d 1566, 1571 (11th Cir. 1991). For example, in *Estate of Calloway v. Marvel Entertainment Grp.*, 9 F.3d 237, 242 (2d Cir. 1993), the Second Circuit upheld a punitive sanction of \$100,000 where a litigant claimed, without any factual basis, that a signature on document damaging to his case was a forgery.

Here, punitive sanctions against the plaintiffs and their counsel are appropriate given that this entire litigation was an effort by powerful, multimillionaire “doctors” to silence Dr. Barrett, who is retired and who has far less means than the plaintiffs. As mentioned, before the Original Complaint was even filed, the plaintiffs sent a draft to Dr. Barrett and said that he could “resolve this matter simply by removal of the article[] in question” (Ex. B at 1) — an article that is indisputably newsworthy and true. When the Original Complaint was dismissed, they were willing to fabricate grounds to file another one, to keep the pressure on Dr. Barrett.

The plaintiffs have tried similar tactics before. They sued Wikipedia because they did not like the entry about themselves (though it appears they abandoned the case at some point). (Exs. D, E.) They also once sued a University of Illinois professor who dared to question the “science” behind their anti-aging practices, but ultimately settled for \$0. (Ex. F.) It is clear that the plaintiffs are litigation bullies, and that should weigh in favor of the Court imposing appropriately punitive sanctions. A punitive sanction must be large enough to ensure that even

wealthy litigants such as plaintiffs — who reportedly have tens of millions of dollars (ECF Doc. 15-8, at 2) — will think twice before filing yet another baseless lawsuit, or trying to bully anyone else who challenges their controversial practices.<sup>5</sup> Dr. Barrett respectfully submits that a punitive sanction in the amount of **\$100,000** is appropriate.

### **III. ANY SANCTIONS SHOULD BE AWARDED JOINTLY AND SEVERALLY AGAINST PLAINTIFFS AND THEIR COUNSEL**

Rule 11 specifies that the attorney alone is responsible for sanctions where the improper conduct concerns frivolous “legal contentions,” but that restriction does not apply to frivolous “factual contentions,” Fed. R. Civ. P. 11(c)(5)(A), like those at issue here. Where the factual contentions are baseless, the district court has discretion “to impose sanctions on the client alone, solely on the counsel for one of the parties, or on both of them.” 5A Charles Alan Wright, et al., Federal Practice & Procedure § 1336.2 (3d ed. 2004). In exercising that discretion, courts typically sanction counsel only (not the client) “when the material is beyond the understanding of the client or when the client is unaware of the attorney’s wrongful conduct.” *Id.*

Here, plaintiffs’ attorney Wesley Paul should clearly be fully responsible (jointly and severally) for the sanction because, as counsel, he made the decision to sign and file the frivolous pleading. *See In re Australia and New Zealand Banking Group Ltd. Sec. Litig.*, 712 F. Supp. 2d 255, 270 (S.D.N.Y. 2010) (sanctioning attorneys for frivolous complaint). Rule 11 mandates that Mr. Paul’s firm, Paul Law Group, LLP, be responsible, as well. *See* Fed. R. Civ. P. 11(c)(1) (“Absent exceptional circumstances, a law firm must be held jointly responsible for a violation committed by its partner, associate, or employee.”).

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<sup>5</sup> All indications are that an award in this amount is well within the capacity of the plaintiffs to pay. If they contend otherwise, however, the Court should not merely rely on their say so, since “the burden [is] upon the parties being sanctioned to come forward with evidence of their financial status.” *In re Kunstler*, 914 F.2d 505, 524 (4th Cir. 1990).

The plaintiffs themselves should be jointly and severally liable, too, as they authorized making the frivolous allegations, and one of them even submitted a sworn declaration attempting to defend the frivolous filing. (ECF Doc. 47.) Courts routinely hold clients responsible for frivolous factual claims in complaints. *Byrne v. Nezhat*, 261 F.3d 1075, 1118 (11th Cir. 2001) (“Typically, sanctions are levied against a client when he misrepresents facts in the pleadings”); *Mason Agency Ltd. v. Eastwind Hellas SA*, No. 09 Civ. 6474, 2009 WL 3169567, at \*2 (S.D.N.Y. Sept. 29, 2009) (Rule 11 permits the court “to sanction an attorney, law firm, or party.”).

The core wrongdoing — fabricating the content of phone calls that never happened — is not a technical or procedural matter that should be outside the control or understanding of the clients themselves. That is especially so, given that the plaintiffs hold themselves out as highly sophisticated and successful. Dr. Goldman claims (among many other accolades) that he “holds Visiting Professorship[s] at numerous medical universities around the world.” (Ex. H (biography of Dr. Goldman).) Dr. Klatz claims to be a “Best-selling author/editor of 36+ books with over 2 million copies in print” and that he is “the inventor, developer, or administrator of 100-plus scientific patents.” (Ex. I ((biography of Dr. Klatz).) Plaintiffs are sophisticated litigants with a history of bullying tactics—who (along with their counsel) should have known better than to file a fabricated complaint. As a result, sanctions against both plaintiffs and their counsel, jointly and severally, are appropriate.

### CONCLUSION

For the foregoing reasons, Defendant Stephen J. Barrett respectfully requests that the Court award to him Rule 11 sanctions in the amount of **\$205,195**, assessed jointly and severally against plaintiffs and their counsel, Wesley Paul and the Paul Law Group, LLP.

Dated: New York, New York  
September 10, 2018

Respectfully submitted,

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