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December 23, 2015

VIA ECF and FAX

Hon. Paul G. Gardephe
Thurgood Marshall United States Courthouse
40 Foley Square
New York, New York 10007
Fax: (212) 805-7986

Re: **Goldman v. Barrett, 15 Civ. 9223 (S.D.N.Y.)**

Dear Judge Gardephe:

We write on behalf of our clients, the Plaintiffs Dr. Robert M. Goldman and Dr. Ronald Klatz, in response to Defendant Barrett's request for a pre-motion conference relating to a potential motion to dismiss under FRCP Rule 12. We respond pursuant to your individual rules to assert our intention to oppose such a motion.

We note initially that Dr. Barrett's attempt to color the current proceedings as "bullying" by Dr. Goldman and Dr. Klatz is wholly without merit. In fact, the opposite is true. For at least 15 years, Dr. Goldman and Dr. Klatz have endured a willful campaign by Defendants Dr. Barrett and Quackwatch to smear our clients' reputations and those of their affiliated organizations. Dr. Goldman and Dr. Klatz have repeatedly reached out either directly or through representatives to amicably air out their respective differences, but those efforts have been rebuffed. For instance, this year our clients have offered and invited Dr. Barrett to attend various functions hosted or organized by our clients and to debate in an open and academic forum the various concerns Dr. Barrett has with our clients and their medical organizations, but Dr. Barrett has refused.

Instead, Dr. Barrett insists on exercising what he characterizes as his First Amendment rights to continue to defame our clients. The First Amendment does not extend protections to the extent claimed by Dr. Barrett. The Supreme Court in the well-known *Chaplinsky* case determined that there are "certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem." *Chaplinsky v. New Hampshire*, 315 US 586 (1942). Those include "insulting or 'fighting words' – those which by their very utterance inflict injury..." *Id.* Dr. Goldman and Dr. Klatz have dedicated their entire lives to improving the health and longevity of the general public, without regard for any economic benefit. This Court may certainly find that calling someone who has devoted his entire life to such a cause, a "quack" should be deemed "fighting words" and therefore not protected First Amendment speech.

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Statute of Limitations

Defendant alleges that the Plaintiffs' claims are barred by the statute of limitations. It is widely accepted that the single publication rule applies to defamatory speech over the internet. *Firth v. State of NY*, 98 N.Y. 2d 365, 370 (2002). However, an exception to the single publication rule is the doctrine of republication. *Davis v. Mitan (In re Davis)*, 347 B.R. 607, 611 (W.D.Ky. 2006). Courts have analyzed what constitutes a republication over the internet, and while a mere link may not be enough, *see In re Philadelphia Newspapers, LLC*, 690 F.3d 161, 175, Defendant's affirmative actions in this case are enough to be considered republication.

Plaintiffs believe that in early 2015 or thereabouts, Defendant began to utilize search engine optimization ("SEO") and "meta tags" within the Defendant's Website in order to attract a new and wider audience to his articles than he had previously been able to reach. By doing so, he has affirmatively republished the Article as of early 2015. *See Firth*, 98 N.Y. 2d 365, 370, *Rinaldi v. Viking Penguin*, 52 NY2d 422, 433. Therefore, this case falls within the one year statute of limitations for defamation. Defendant argues that no such defamatory "meta-tags" exist but this is a question of fact that is not relevant to the contemplated motion by the Plaintiffs. SEO practices and defamatory "meta tags" are fairly recent developments in first amendment and defamation law but have the profound effect of reaching exponentially greater audiences which falls exactly within the reasoning set forth in *Rinaldi* and other similar cases.

We also note that the entire area of "meta-tagging," search-engine optimization and other related activities is highly complex. Distribution of information contained on a particular web page is not limited to simply the source code (hidden or otherwise) contained on that web page. Distribution can be effected through tagging with other sites, engaging other parties to advertise or distribute information, and/or providing "cookies" to viewers that direct that party to a particular website. All or a combination of these efforts may have been used to republish the Article and its context, the extent of which is a factual matter that is ripe for discovery.

Defamation and First Amendment

New York Courts have adopted a standard accepted by a number of other courts regarding defamation by implication. If by the particular manner or language in which the true facts are conveyed, the defamatory communication "supplies additional, affirmative evidence suggesting that the defendant intends or endorses the defamatory inference, the communication will be deemed capable of bearing that meaning." *Stepanov v Dow Jones & Co., Inc.*, 2013 NY Slip Op 33584 citing *White v Fraternal Order of Police*, 909 F2d 512, 520 (DC Cir 1990). "The theory of defamation by implication recognizes that the reputational injury caused by a communication may result not from what is said but from what is implied." *Heyward v. Credit Union Times*, 913 F.Supp.2d 1165, 1189 (D.N.M. 2012). By knowingly and affirmatively placing the Article within the context of the Website, and then affirmatively utilizing SEO practices and meta tags to reach a wider audience, the Defendant demonstrated a clear intent to endorse a defamatory inference against Dr. Goldman and Dr. Klatz.

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While the Article may not directly refer to the doctors as “quacks”, the Article cannot be viewed in a vacuum, as Defendant Barrett apparently asserts. A determination of whether a reasonable person would view statements as expressing or implying any facts must first look at the statements in their context. *Immuno Ag. V. Moor-Jankowski*, 77 NY 2d 335. The analysis must include looking at the content of the whole communication, its tone, and apparent purpose. *Id.* Defendant has operated a website since 1997 called “Quackwatch.” The byline to the website is, “Your guide to Quackery, Health Fraud, and Intelligent Decisions.” The Article’s presence within the context of Defendants’ Website, and all relevant metadata (and the like) hidden within the Article as part of the SEO practices, reasonably results in the false innuendo that Dr. Goldman and Dr. Klatz are “quacks” that somehow engage in activities tantamount to health fraud.ⁱ

Tortious Interference

Plaintiffs’ tortious interference claim (Claim 3) is more than merely duplicative, as Defendant describes, of the defamation claims. For many years, Defendant Barrett has taken an antagonistic approach against Dr. Goldman, Dr. Klatz, and other medical practitioners in the industry. Defendants advertise and celebrate their self-styled victories on the Website’s “Hot Topics”.ⁱⁱ The Defendant’s activities are apparently part of an overall effort to secure donations. There are numerous links to pages soliciting donations in the Website. The Defendants motives are clear. This campaign against our clients is just one of many that Dr. Barrett has orchestrated and will continue to orchestrate in an effort to claim “victories,” as his Website solicits donations in order to continue his questionable and potentially malicious practices.ⁱⁱⁱ

We thank the Court for its time and look forward to appearing before the Court as Your Honor may request.

Very truly yours,

PAUL LAW GROUP, LLP



By: Wesley J. Paul, Partner

ⁱ <http://www.quackwatch.com/00AboutQuackwatch/mission.html>

ⁱⁱ <http://www.quackwatch.com/11Ind/mercola.html>

ⁱⁱⁱ <http://www.quackwatch.org/00AboutQuackwatch/donations.html>