

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

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

Plaintiffs,

—v.—

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

Defendants.

15 Civ. 9223 (PGG) (HBP)

**DR. ROBERT M. GOLDMAN AND DR. RONALD KLATZ’S AFFIRMATION IN
OPPOSITION OF DEFENDANT BARRETT’S MOTION TO DISMISS**

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Table of Contents

INTRODUCTION.....	4
BACKGROUND	6
DISCUSSION	7
<u>I.</u> The Statute of Limitations Does Not Apply Because the Defendants Republished the Article	7
<u>II.</u> The Defendants’ Actions in Defaming Plaintiffs as Quacks Are Not Protected Free Speech.....	9
<u>III.</u> The Defendants’ Article Creates a Defamatory Implication against the Plaintiffs 	12
<u>IV.</u> Plaintiffs’ Tortious Interference Claim and Prima Facie Tort Claim are Not Duplicative of the Defamation Claims	14
<u>V.</u> Plaintiffs’ Claim Under N.Y. Gen. Bus. L. §349 Should Continue Because Defendants are Part of a Commercial Enterprise	15
<u>VI.</u> The Claims for Conspiracy and Injunctive Relief Should be Sustained	16
CONCLUSION	17

Table of Authorities

CASES

<i>Amaranth v. JP Morgan</i> , 71 AD 3d 40 (1st Dep’t. 2009)	14
<i>Armstrong v. Simon & Schuster</i> , 85 NY2d 373 (1995)	12
<i>Biro v. Conde Nast</i> , 883 F. Supp. 2d 441 (S.D.N.Y. 2012).....	12
<i>Celle v. Filipino Reporter Enterprises Inc.</i> , 209 F.3d 163 (2d Cir. 2000).....	10
<i>Chapin v. Knight-Ridder, Inc.</i> , 993 F.2d 1087 (4th Cir. 1993).....	12
<i>Churchill v. State</i> , 876 A.2d 311 (NJ 2005)	8
<i>City of New York v. Smokes-Spirits.Com, Inc.</i> , 911 N.E.2d 834 (N.Y. 2009)	15
<i>Comolli v. Huntington Learning Ctrs., Inc.</i> , 15-cv-1204 (SAS) (S.D.N.Y. 2015).....	8
<i>Consolidated Edison Co. v. Public Serv. Comm’n</i> , 447 US 530 (1980).....	15
<i>Cook v. Conners</i> , 215 NY 175 (1915)	7
<i>Firth v. State of NY</i> , 775 NE 2d 463 (NY 2002).....	7, 8
<i>Gates v New York Recorder Co.</i> , 155 N.Y. 228 (1898).....	9
<i>Goldman v. Metro. Life</i> 5 N.Y.3d 561(2005)	5, 9
<i>Gonzalez v. Gray</i> , 69 F. Supp. 2d 561(S.D.N.Y.1999), aff’d, 216 F.3d 1072 (2d Cir. 2000).....	10
<i>GPS Global Pkg. Sol’ns, LLC v. 151 W 17th St. Condo.</i> , 93 A.D. 3d 463 (1st Dep’t 2012).....	5, 9
<i>Haefner v. New York Media, LLC</i> , 82 A.D.3d 481 (1st Dep’t. 2011)	8
<i>NYPIRG v. Ins. Info. Inst.</i> , 554 N.Y.S. 2d 590 (1st Dep’t 1990)	15
<i>Rand v. New York Times Co.</i> , 75 A.D.2d 417 (1980).....	10
<i>Rinaldi v. Holt, Rinehart</i> , 42 NY2d 369 (1977)	9, 10
<i>Rinaldi v. Viking Penguin</i> , 52 NY2d 422 (1981).....	7
<i>Rinaldi v. Viking Penguin, Inc.</i> , 73 AD2d 43 (1st Dep’t. 1980).....	8
<i>Steinhilber v. Alphonse</i> , 68 N.Y.2d 283 (1986).....	10
<i>Stepanov v. Dow Jones & Company, Inc.</i> , 120 AD 3d 28 (1st Dep’t. 2014).....	12
<i>Sydney v. Macfadden Newspaper Pub. Corp.</i> , 242 N.Y. 208 (1926)	9
<i>Villager Pond, Inc. v. Town of Darien</i> , 56 F.3d 375 (2d Cir. 1995).....	5

STATUTES

N.Y. CPLR §215(3).	6
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TREATISES

Restatement (Second) of Torts § 577A cmt. c, d.	6
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Introduction

Plaintiffs in this defamation suit seek justice and an end to the Defendants' willful, antagonistic and malicious crusade against them. Dr. Robert Goldman and Dr. Ronald Klatz are physicians whose lives have been dedicated to improving their patients' quality of life. For at least the last 15 years, Dr. Goldman and Dr. Klatz have endured a willful campaign by Defendants Dr. Barrett and Quackwatch, Inc. ("**Quackwatch**") to smear their reputations and those of their affiliated organizations. Defendants advertise and celebrate their self-styled victories on the "Hot Topics" portion of their website. (Ex. A). Dr. Goldman and Dr. Klatz have attempted to go on with their professional and personal lives without interference from the Defendants. However, in early 2014 the Plaintiffs were no longer able to avoid the Defendants' defamatory and malicious crusade due to the reemergence of a defamatory article caused by the Defendants' targeted and defamatory online practices.

The Plaintiffs re-assert and re-allege the contents of their Complaint and emphasize that the Defendants' malicious conduct was intended to and has in fact caused the Plaintiffs harm for the reasons discussed in detail below.

There is a well-settled standard adopted by New York courts for determining a motion to dismiss:

When determining a motion to dismiss, the court must "accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory."

Goldman v. Metro. Life Ins. Co., 5 N.Y.3d 561, 570-71 (2005) (citations omitted); see also *GPS Global Pkg. Sol'ns, LLC v. 151 W 17th St. Condo.*, 93 A.D. 3d 463 (1st Dep't 2012). The issue "is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support his claims." *Villager Pond, Inc. v. Town of Darien*, 56 F.3d 375, 378 (2d Cir. 1995) quoting *Scheuer v. Rhodes*, 416 U.S. 232, 235-36, 94 S.Ct. 1683 (1974). Under this standard, novel factual allegations made by the Defendants in the motion to dismiss should be disregarded as they highlight the need for determinations of fact to be made prior to a judgment.

Defendants' misguided reference to a *New York Times* article suggesting that the *Times* expressed a view that the Plaintiffs' business is "quackery" is an incorrect factual assertion. The *New York Times* article in question does not reach a conclusion or a judgment on the type of work that the Plaintiffs do. In fact, the *Times* article speaks to many of the benefits of anti-aging medicine. Furthermore, the article refers to the individual Defendant by name and demonstrates his longstanding vendetta against the Plaintiffs. Defendant Barrett is quoted in the article and states that the American Academy of Anti-Aging Medicine is nothing more than "a money-making machine for Klatz and Goldman." (*Defendant Barrett's Memorandum of Law in Support of His Motion to Dismiss*¹, Ex. G). Much like the defamatory insinuation that is the subject matter of this suit, Defendants attempt to use the *New York Times* article to suggest that an objective third party has propounded a negative treatment regarding the Plaintiffs' medical practices. In fact, what has happened and what continues to happen is the perpetuation of a personal vendetta through the unfortunate and defamatory use of neutral sources. Defendants have been inflicting these attacks upon Dr. Goldman and Dr. Klatz for at least fifteen years.

¹ *Defendant's Memorandum in Support of His Motion to Dismiss* will be designated as "*Defendant's Memorandum*" in succeeding references.

Background

Plaintiffs Dr. Robert M. Goldman and Dr. Ronald Klatz are licensed and accredited doctors and surgeons in the State of Illinois. They have pioneered the use of the term “anti-aging” in medicine and have appeared in hundreds of lectures and seminars in some of the world’s leading academic institutions.

On December 6, 2000, the Defendants posted and made available on www.quackwatch.org (the “**Website**”)² an article entitled “Anti-Aging ‘Gurus’ Pay \$5,000 Penalties” (the “**Article**”). The Article describes an Illinois medical board proceeding relating to Dr. Goldman and Dr. Klatz and a reported settlement agreement between the Doctors and the State of Illinois whereby Dr. Goldman and Dr. Klatz agreed to pay \$5,000 each to the State of Illinois as punishment for identifying themselves as M.D.’s in Illinois’s without being recognized by the state. The Website states that the Article was last revised on March 6, 2001. Dr. Goldman and Dr. Klatz are in fact physicians licensed to practice in Illinois and they do not deserve to be defamed in this manner. Additionally, professional medical boards throughout the country universally recognize their right to practice all aspects of licensed medicine in the United States.

In early 2015, Dr. Goldman and Dr. Klatz were contacted by several business associates who were concerned about the content of the Article and its presence and wide dissemination online. Upon information and belief, Defendants engaged in active search engine optimization practices on websites such as Google and Bing and utilized defamatory “meta tags” on the Website and within the Article in order to actively promote and more widely disseminate the

² Defendants also own and operate www.quackwatch.com, which is, for all intents and purposes, the same website.

Article. (Compl. ¶¶ 31, 32). Together, the search engine optimization and use of meta-tags have been used to manipulate search results in order to guide consumers and web traffic towards the Article in order to promote the interests of the Defendants and harm the Plaintiffs (for clarity, the use of search engine optimization and defamatory meta-tags and related practices by the Defendants will hereinafter be referred to as “**Manipulative Practices**”).

Discussion

I. The Statute of Limitations Does Not Apply Because the Defendants Republished the Article

Defendants allege that the Plaintiffs’ claims are barred by the statute of limitations. Because the Article has been effectively republished on the Defendants’ Website, Plaintiffs assert that the cause of action has been brought within the one year statute of limitations for defamation. N.Y. CPLR §215(3).

New York applied the single publication rule to defamatory speech over the internet in *Firth v. State of NY*, 775 NE 2d 463 (NY 2002). A widely accepted exception to the single publication rule is the doctrine of republication. “Republishing material — including publishing a second edition or a book or periodical, editing and republishing defamatory material, or placing it in a new form — resets the statute of limitations.” Restatement [Second] of Torts § 577A Cmt. c, d. In *Firth*, the Court stated that “Republication, retriggering the period of limitations, occurs upon a separate aggregate publication from the original, on a different occasion, which is not merely “a delayed circulation of the original edition.”” See *Rinaldi v. Viking Penguin*, 52 NY2d 422, 435 (1981); Restatement [Second] of Torts §577A, Cmt. d, at 210. The justification for this exception is that the subsequent publication “is intended to and actually reaches a new

audience.” *Firth*, 775 NE 2d 463 at 466 quoting *Cook v. Conners*, 215 NY 175 (1915). The republication exception has been applied most frequently where the subsequent publication is intended to and actually reaches a new audience. *Comolli v. Huntington Learning Ctrs., Inc.*, 15-cv-1204 (SAS) (S.D.N.Y. 2015) quoting *Firth*, 775 NE 2d 463 at 466.

A case-by-case analysis is required to determine whether a particular event constitutes a republication giving rise to a new cause of action and therefore a new limitations period. *Martin v. Daily News, LP*, 2012 NY Slip Op 50660 (NY 2012) quoting *Rinaldi v. Viking Penguin, Inc.*, 73 AD2d 43, 45 (1st Dep’t. 1980). It is established that where substantive material is added to a website, and that material is related to defamatory material that is already posted, a republication has occurred. *Firth*, 775 NE 2d 463 at 466. Courts have tackled the issue of what constitutes republication on the internet on different facts but have not dealt specifically with the type of Manipulative Practices utilized in this case.³ The Manipulative Practices in this case involve much greater detail than mere technical changes. See *Churchill* 876 A.2d 311 at 320. The Manipulative Practices go so far that they constitute a republication of the material. They were used specifically to attract new audiences who may be browsing the internet or specifically searching for Dr. Goldman and Dr. Klatz. See *Firth*, 775 NE 2d 463 at 466; *Rinaldi*, 73 AD2d 43 at 45. These Manipulative Practices demonstrate a clear intent to reach a new audience and have succeeded in reaching a much greater audience than when the Article was first published. (Compl. ¶50).

³ See *Haefner v New York Media, LLC*, 82 AD3d 481, 482 (1st Dep’t. 2011) (where inclusion of hyperlinks in an Internet publication did not give rise to republication); *Martin v. Daily News*, 2012 NY Slip Op 50660 (N.Y. 2012) (Not republication where defendant who was forced to switch its content management system then had to cut and paste an old article into the new template); *Churchill v. State*, 876 A.2d 311 (N.J. 2005) (altering and moving the website menu bar and issuing a press release that directly referenced the defamatory report considered merely technical changes and not enough for republication).

Defendant Barrett has provided source code from the Website in an attempt to demonstrate that the Defendants have never engaged in the alleged Manipulative Practices.⁴ This factual assertion, in conflict with the facts of the Complaint even if accurate, addresses only a fraction of the misconduct and Manipulative Practices that Plaintiffs believe the Defendants coordinated. Defendant Barrett owns and operates several websites and has a strong internet presence. The Manipulative Practices likely involve the use of other websites and Defendants have not shown, and indeed, for the purposes of its motion, are precluded from introducing factual evidence to establish, that the allegations in the Complaint are false. *Goldman v. Metro. Life*, 5 N.Y.3d 561 at 570-71; *GPS Global Pkg. Sol'ns*, 93 A.D. 3d 463. To what extent the Defendants utilized Manipulative Practices is an evidentiary question that is ripe for discovery. Defendant Barrett, in introducing this evidence, demonstrates that factual disputes exist and by virtue of this demonstration that disputed facts are necessary for Defendants to support their motion, this case needs to be litigated.

II. The Defendants' Actions in Defaming Plaintiffs as Quacks Are Not Protected Free Speech

The Defendants attempt to assert that their actions are afforded free-speech protections should fail. A basic function of the tort of defamation is to protect individuals from untrue and damaging statements or “an evil opinion of him in the minds of right-thinking persons.” *Sydney v. Macfadden Newspaper Pub. Corp.*, 242 N.Y. 208, 211-212 (1926); *Gates v. New York Recorder Co.*, 155 N.Y. 228, 231 (1898). This principle is especially critical when it comes to damaging statements related to an individual in his role as a professional. See *Rinaldi v. Holt, Rinehart*, 42 NY 2d 369 (1977). Calling a medical professional a “quack” by labeling them

⁴ *Defendant's Memorandum*, pp. 3 and *Defendant's Memorandum*, Ex. F are cited by Defendants in support of this factual allegation

under a webpage title such as “Quackwatch” is not only malicious and derogatory, but also not recognized as protected.

Defendants attempt to invoke the idea of “rhetorical hyperbole” in defending the libel perpetuated and expanded by their actions. (*Defendant’s Memorandum*, pp. 10). However, this is completely specious. Professionals being called names that impugn their reputation unfairly and inaccurately fall squarely within the relief contemplated by the law of defamation and libel. *Rinaldi v. Holt* at 379. The case cited by the Defendants, *Gonzalez v. Gray*, is one in which the medical professional administered non-traditional treatments after which the patient passed away. *Gonzalez v. Gray*, 69 F. Supp. 2d 561(S.D.N.Y.1999), aff’d, 216 F.3d 1072 (2d Cir. 2000). The husband of the deceased patient in *Gonzalez* called the doctor a “quack.” In the present case, Defendant Barrett is simply a mean person with a grudge calling other medical professionals a derogatory name in order to damage them professionally.

Under New York law, expressions of pure opinion are not actionable as defamation by implication. *Celle v. Filipino Reporter Enterprises Inc.*, 209 F.3d 163 (2d Cir. 2000). The standard for whether a statement is a protected opinion involves whether, from the perspective of an ordinary reader, the words imply the existence of undisclosed facts justifying the opinion. *Id.* As stated above, the implication in this case is that Dr. Goldman and Dr. Klatz are inferior medical practitioners, or “quacks,” whose practices amount to something akin to health fraud.

An opinion is not protected if it implies “that the speaker knows certain facts, unknown to his audience, which support his opinion and are detrimental to the person about whom he is speaking.” *Steinhilber v. Alphonse*, 68 N.Y.2d 283, 290 (1986) citing *Rand v. New York Times Co.*, 75 A.D.2d 417, 422 (1980). While Defendants assert that the term “quack” is protected

opinion, an ordinary reader would infer the existence of further facts beyond the Article that led the Defendants to such a conclusion. Defendants hold themselves out as professionals and investigators with insight into the healthcare industry. An ordinary reader would see the Article on the Defendants' Website and assume that the Defendants have a deeper knowledge of the subject matter and understand facts beyond simply the Article on the page. As such, the Defendants' Article and use of Manipulative Practices cannot be seen as protected opinion.

Dr. Goldman and Dr. Klatz approach their profession honorably and with the intention of improving quality of life. To have an unaffected professional peer make these statements and insinuations, and to amplify them through Manipulative Practices, is deeply insulting and unjust.

Alternative approaches are not automatically quackery, just like so-called mainstream approaches do not always provide optimal results. The Plaintiffs, for instance, are not calling the individual Defendant, as an example, a shill of the medical establishment milking patients with little regard for their overall well-being, while lining his own pockets. They don't do that because that is not simply uncivil, and not simply unprofessional, but possibly libel. If there is truth to the statement, then in a civilized society we should restrain ourselves from behavior that is questionably libelous if we wish to avoid begging the question in a court of law. The point here is that, insofar as whether the protections of free speech have been compromised by libel, a factual dispute does exist, the statements and insinuations have been made, and the case should proceed as to a determination on its merits. Being labeled a "quack" as a doctor in a written medium such as the internet obviously damages the target's professional reputation.

III. The Defendants' Article Creates a Defamatory Implication against the Plaintiffs

Defendants argue that the Article is not defamatory and that it is merely a truthful reporting of a governmental disciplinary proceeding. (*Defendant's Memorandum* pp. 7). This is disingenuous given the context. Defendants have labeled the Website with the term "Quackwatch." (Compl. ¶17). Furthermore, unlike a traditional defamation claim, a claim for defamation by implication does not require that the statements be false. "Defamation by implication is premised not on direct statements but on false suggestions, impressions and implications arising from otherwise truthful statements." *Stepanov v. Dow Jones & Company, Inc.*, 120 AD 3d 28 (1st Dep't. 2014) quoting *Armstrong v. Simon & Schuster*, 85 NY 2d 373, 380 (1995). While the Plaintiffs do not concede the truthfulness or accuracy of the Article, the truthfulness of the Defendants' Article does not bar an action for defamation by implication.

To determine whether the Article asserts a defamatory implication or impression against the Plaintiffs, the Article cannot be viewed in a vacuum, as Defendant Barrett apparently asserts; nor can the analysis rely solely on the words on the page. 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 235, 254 (1991). The analysis must include the content of the whole communication, its tone, and apparent purpose. *Id* at 255.

New York courts have held that defamation claims based on implications and impressions will be recognized where the plaintiff shows that the language "can be reasonably read to impart a defamatory innuendo" and "affirmatively suggest[s] that the author intends or endorses the defamatory inference." *Biro v. Conde Nast*, 883 F. Supp. 2d 441, 465 (S.D.N.Y. 2012) quoting *Chapin v. Knight-Ridder, Inc.*, 993 F.2d 1087 (4th Cir. 1993). Defendants have

operated a website since 1997 called “Quackwatch.” The byline to the website is, “Your guide to Quackery, Health Fraud, and Intelligent Decisions.” (Compl. Ex. D). The overall tone of the Website is highly critical of the Plaintiffs and like-minded medical practitioners. The Article’s placement within the context of Defendants’ Website and the relevant Manipulative Practices conducted by the Defendants are affirmative endorsements of the negative inference against Plaintiffs.

Defendants’ Mission Statement and countless articles rallying against the Plaintiffs, their affiliates and associates demonstrate that they fully endorse the negative and harmful implication against the Plaintiffs that Dr. Goldman and Dr. Klatz are somehow involved in health fraud and that they are inferior medical practitioners. Any reasonable reader would take from reading the Article on the Website that the provider intends to demonstrate that Dr. Goldman and Dr. Klatz are “quacks” that somehow engage in activities tantamount to health fraud. Defendants have taken a perhaps unflattering publication and surrounded it with language and innuendo of a much worse form. To exacerbate this, as described in the Complaint, Defendants have taken further measures to optimize the availability and prominence of the Website during searches. (Compl. ¶ 31). This is a form of republication in the modern day electronic dissemination of information, where the actions are specifically intended to expand the audience to whom these professionally harmful and personally hurtful statements and insinuations are published. Defendants’ actions are not motivated by a mission to the public; rather they are driven by personal animus against the Plaintiffs.

It is unclear at this time the extent of the Defendants’ Manipulative Practices. Defendants by the terms of their argument demonstrate that factual allegations are in contention beyond the dispute of factual details currently asserted by the parties. Plaintiffs believe that discovery will

provide greater detail into the depth and breadth of these practices and urge the Court to allow the case to proceed.

IV. Plaintiffs' Tortious Interference Claim and Prima Facie Tort Claim are Not Duplicative of the Defamation Claims

Defendants assert that Plaintiffs' claims for tortious interference (Claim 3) and prima facie tort (Claim 5) must be dismissed as "duplicative" of the defamation claims (Claim 1 and Claim 2).

It has been well settled in New York that cases involving defamation and tortious interference will apply the tortious interference three-year statute of limitations when "the gravamen of a complaint is economic injury, rather than merely reputational harm." *Amaranth v. JP Morgan*, 71 AD 3d 40 (1st Dep't. 2009).

The Complaint sufficiently pleads a cause of action for tortious interference and alleges lost business opportunities amounting to not less than ten million dollars (Compl. ¶79). As such, it is clear that the economic injury is greater than mere reputational harm. Plaintiffs are willing to amend the Complaint to plead additional facts to further support the claim for tortious interference but believe that, given the circumstances already pled, they are entitled to discovery to clarify and support the facts alleged. While Plaintiffs do not require the use of the tortious interference statute of limitations due to the republication of the Article, the same reasoning should apply to allow the tortious interference claim to proceed past this stage.

V. Plaintiffs' Claim Under N.Y. Gen. Bus. L. §349 Should Continue Because Defendants are Part of a Commercial Enterprise

Defendants claim that the Article has no commercial purpose and would lead the Court to believe that the Defendants' enterprises merely serve as a public service. A cursory review of the Defendants' Website reveals this to be false. Section 349 has been limited to "practices arising out of commercial transactions." *NYPIRG v. Ins. Info. Inst.*, 554 N.Y.S. 2d 590, 592 (1st Dep't 1990). When courts are asked to determine whether speech is considered commercial, they look to the content of the expression. See *Consolidated Edison Co. v. Public Serv. Comm'n*, 447 US 530 (1980). Multiple locations on the Website home page link the reader to an opportunity to donate directly to Quackwatch in order to support research, writing, and legal actions such as this one. (Ex. B). Furthermore, the banner on the bottom of the Website provides "Links to Recommended Vendors," clearly directing consumers' decisions and likely demonstrating a business relationship between the Defendants and those vendors. (Ex. A). It is clear that Defendants' so-called public service is only a small part of a much larger commercial enterprise.

Defendants allege that their conduct was not misleading in a material way because the Article is truthful. As stated above, the overall impression of the Article taken as a whole is deceptive to any reasonable reader and defamatory to the Plaintiffs.

Defendants correctly state that Section 349 allows recovery only for direct injury to consumers and not for derivative or indirect injury. *City of New York v. Smokes-Spirits.Com, Inc.*, 911 N.E.2d 834, 838 (N.Y. 2009). Defendant, however, mischaracterizes the Plaintiffs and their Section 349 claim by alleging that the Plaintiffs are not directly injured by the Defendants' deceptive practices. Dr. Goldman and Dr. Klatz have a strong interest in the type of information

that is provided on the Defendants' Website. They are directly harmed by any misinformation or misguidance that the Defendants provide. The Defendants' conduct has resulted in direct harm to the Plaintiffs. (Compl. ¶¶ 79, 92).

VI. The Claims for Conspiracy and Injunctive Relief Should be Sustained

The Court should allow Plaintiffs' conspiracy claims (Claims 4 and 6) to continue because Defendants Dr. Barrett and Quackwatch have worked together to defame and harm Dr. Goldman and Dr. Klatz. Moreover, Defendant Barrett claims that co-defendant Quackwatch is merely a corporate entity that dissolved in 2009. While this is a factual issue that requires discovery, Plaintiffs maintain a belief that this is not the complete truth. Defendants' Website refers to "Quackwatch" as "an international network of people" and commonly uses the plural pronoun "we" to refer to the Defendants throughout the site. (*Defendant's Memorandum*, Ex. D). By Defendant Barrett's own terms, discovery is needed in order to determine who and what entities comprise Quackwatch.

The Plaintiffs' claim for injunctive relief (Claim 8) should be permitted to continue based on the facts alleged above and in the Complaint.

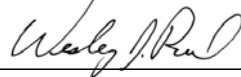
Conclusion

For the stated reasons, the Court should deny the Defendant's motion to dismiss in its entirety.

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February 9, 2016

Respectfully submitted,



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- [More Nasty Comments Sent to Quackwatch](#) (updated 6/4/15)

General Observations

- Quackery
 - [How Should It Be Defined?](#) (updated 4/23/08)
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 - [Victim Case Reports \(32\)](#) (updated 5/26/12) **FEATURE**
 - [Nonvictim Case Reports \(4\)](#) (updated 6/28/00)
 - [Ten Ways to Avoid Being Quacked](#) (posted 4/24/97)
 - [Signs of a Quack Device](#) (posted 9/23/00)
 - [Signs of a "Quacky" Web Site](#) (updated 9/6/06)
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Quackwatch
Chatham Crossing, Suite 107/208
11312 U.S. 15-501 North
Chapel Hill, NC 27517.

Quackwatch also receives support when visitors to our site place an order through some of the links listed below.

This page was revised on May 26, 2011.

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- [PharmacyChecker.com](#): Compare drug prices and save money at verified online pharmacies.
- [ConsumerLab.com](#): Evaluates the quality of dietary supplement and herbal products.
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