

**In the Supreme Court of the United States**

EDWARD LEWIS TOBINICK, MD,  
a Medical Corporation d/b/a INSTITUTE OF  
NEUROLOGICAL RECOVERY, INR PLLC, d/b/a  
INSTITUTE OF NEUROLOGICAL RECOVERY,  
EDWARD TOBINICK, M.D.,

*Petitioners,*

—v—

STEVEN NOVELLA, M.D.,

*Respondent.*

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**On Petition for Writ of Certiorari to the United  
States Court of Appeals for the Eleventh Circuit**

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**PETITION FOR WRIT OF CERTIORARI**

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## QUESTIONS PRESENTED

In our age of the Internet, false disparagement against individuals and businesses can be lucrative. An Internet entrepreneur can funnel web-traffic for profit, through sophisticated uses of disparaging “click baiting,” “Internet trolling,” hyperlinks, hypertext, clickable banner ads, podcasts, Facebook, Instagram, email listservs and other systems. Individuals seeking legal redress from false Internet defamation can confront state court anti-SLAPP procedures that accelerate adjudication of the defendant’s “actual malice.” In contrast, businesses seeking federal court protection from false Internet disparagement under the Lanham Act, 15 U.S.C. § 1125(1)(B), are entitled to the summary adjudication safeguards of Federal Rule of Civil Procedure 56.

The questions presented to this Court are:

1. When a defendant is sued for both common law defamation and business disparagement under the Lanham Act, 15 U.S.C. § 1125(a)(1)(B), does the application of state civil court anti-SLAPP procedure irreconcilably conflict with Federal Rule of Civil Procedure 56?

2. Is commercial competition a necessary element of whether business disparagement is actionable “commercial advertising or promotion” under the Lanham Act, 15 U.S.C. § 1125(a)(1)(B), in light of this Court’s definitive holding that commercial competition is not a requirement for standing to sue under the Lanham Act in *Lexmark Int’l v. Static Control Components*, 134 S.Ct. 1377, 1392-1395 (2014)?

3. In a Federal Rule of Civil Procedure 56 summary judgment analysis of whether business disparagement is actionable “commercial speech” under the Lanham Act, 15 U.S.C. § 1125(a)(1)(B), is a court required to consider the “full context” of how the defendant is disseminating the disparagement, including the defendant’s secondary and for-profit uses of the disparagement?

## LIST OF PARTIES

### *Petitioners and Plaintiffs Below*

- Edward Lewis Tobinick, MD, A Medical Corporation d/b/a Institute of Neurological Recovery INR PLLC, d/b/a Institute of Neurological Recovery
- Edward Tobinick M.D.

### *Respondent and Defendant Below*

- Steven Novella, M.D.

### *Defendants Below Who Were Dismissed from the Case, and No Longer Respondents Pursuant to Rule 12.6*

- SGU Productions, LLC
- Society for Science-Based Medicine, Inc.
- Yale University

## **CORPORATE DISCLOSURE STATEMENT**

No Petitioner corporation is publicly held or has a parent corporation, and no publicly held company owns 10 percent or more of any Petitioner corporation stock.

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## OPINIONS BELOW

Petitioners Edward Lewis Tobinick, MD, A Medical Corporation d/b/a Institute of Neurological Recovery, INR PLLC, d/b/a Institute of Neurological Recovery, Edward Tobinick M.D. (“Petitioners”) pray that a writ of certiorari issue to review the judgment in favor of Respondent Steven Novella, M.D. (“Novella”) below:

- *Tobinick v. Novella*, 848 F.3d 935 (11th Cir. 2017)
- *Tobinick v. Novella*, 142 F.Supp.3d 1275 (S.D. Fla. 2015)



## JURISDICTION

This Court’s jurisdiction is invoked under 28 U.S.C. § 1254(1). The Eleventh Circuit Court of Appeals entered its judgment on February 15, 2017, and denied a petition for rehearing on April 6, 2017. Justice Thomas extended the time for Petitioners to file this petition until September 5, 2017.



## STATUTORY PROVISIONS

The following statutory provisions and judicial rules are reproduced in the appendix:

- 15 U.S.C. § 1125  
False Designations of Origin, False Descriptions, and Dilution Forbidden (App.46a)
- California Code of Civil Procedure  
CCP § 425.16 (App.58a)
- Fed. R. Civ. P. 56  
Summary Judgment (App.62a)



## STATEMENT OF THE CASE

### A. Material Facts

1. **Petitioners Conduct a Group Internal Medicine Specialty Practice That Uses Their Patented Drug Treatment for Neurological Disorders That Competes with Drug Treatments Offered by Practicing Neurologists and That Is Part of a Medical Turf War**

Petitioners are specialized in internal medicine and invented and pioneered a drug treatment for patients with neurological disorders, perispinal etanercept (“PSE”). (App.2a, 3a.) PSE is a groundbreaking treatment that competes with drug treatments offered by practicing neurologists in a

competitive turf war between medical specialties. (App.71a.-73a.) (Doc.267-11)<sup>1</sup>

Petitioners have trained physicians from multiple continents to use this emerging off-label treatment. (Doc.105-1.) The PSE treatment is scientifically-supported in the peer-reviewed literature.<sup>2</sup> The PSE treatment for stroke was found by a court to be supported by expert opinion and within the standard of care:

[The doctor] also submitted eight declarations or affidavits from [doctors and professors] from around the world, all of whom expressed opinions in support of the scientific merit and efficacy of [PSE] as a treatment for chronic post-stroke neurological dysfunction . . . [T]here is sufficient data and research about the drug's safety and potential effectiveness to support the [PSE] treatment espoused by Dr. Tobinick and followed by [the doctor] . . . The evidence presented at the hearing establishes that physicians can provide medication or treatments to their patients consistent with the standard of care.

(Doc.261-31, pgs.3-4, 18.)

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<sup>1</sup> "Doc.\_\_\_\_" represents docket entries in the district court record. They are separated by the symbol " ; ".

<sup>2</sup> (Doc.105-1-48; Doc.136-1-33; Doc.261-31, pgs.23-24; Doc.267-11)

**2. Novella Is a Practicing Neurologist and an Internet Entrepreneur Who Launched Disparaging Internet Attacks Against Petitioners Through False Statements About Their Reputation and the Commercial Aspects of Their Medical Practice and Patented Treatment**

Novella is practicing neurologist at Yale who uses off-label drug treatments. (Doc.260-9, pgs.9, 42-62). Novella is also an Internet entrepreneur as a professional “skeptic.” (Doc.260-9, pgs.85-86, 185-188, 265). Novella runs and owns a for-profit “skeptics” website which generates hundreds of thousands of dollars of annual revenue and a monthly salary for Novella.<sup>3</sup> Petitioners sued Novella under the false advertising provision of the Lanham Act, 15 U.S.C. § 1125(a)(1)(B), and for common law defamation because Novella launched a series of false and disparaging Internet attacks on Petitioners about their patents, staffing, pricing, geographic location, training and qualifications. (Doc.55.)

For instance, Novella falsely characterized Petitioners as being engaged in “Health Fraud” through a “quack” and “dubious clinic.” (Doc.55-1, pg.3; Doc.260-15, pg.28; Doc.260-18, pg.18.) Novella falsely characterized Petitioners’ patents as being unethical and falsely denied the existence of “double-blind placebo-controlled” studies supporting the PSE treatment. (Doc.260-17, pg.6; Doc.260-18, pg.19; Doc.260-19, pg.15.) And among other false and disparaging Internet attacks on Petitioners, Novella suggested that Peti-

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<sup>3</sup> (Doc.260-9, pgs.75-86; Doc.260-10, pgs.127-128; Doc.219-2, @admission#18; Doc.302-1, pgs.79, 94-95.)

tioners' PSE treatment was illegal in certain states and that they were somehow running from the law: "Tobinick has since moved his clinic to Florida, which is a very quack-friendly state." (Doc.55-1, pg.3.)

Petitioners submitted expert testimony showing that "Dr. Novella's false and scientifically unjustified attack against Dr. Tobinick and the use of [PSE] for neuroinflammatory indications is unconscionable, unethical, improper, falsely defamatory and not in the public interest." (Doc.274-24, pg.6.)

Novella's false disparaging attacks had a devastating impact on Petitioners' medical practice, which was a goal articulated by Novella's cohort: "I doubt Tobinick has a clue just how much of a Streisand Effect he's in for. If he thought Google's search results were unkind to him before, he hasn't seen anything yet." (Doc.177-5, pg.9.) But Novella's false attacks on Petitioners also served Novella's purpose of "funnell[ing]" revenue into his sophisticated Internet business. (Doc.272-26, pgs.1-3.)

### **3. Novella Used His Disparaging Internet Attacks on Petitioners as Part of His Internet Business to Funnel Web-Traffic to Novella's For-Profit "Skeptic" Website**

Novella makes money from "click baiting," "Internet trolling," and other types of self-generated controversies that "monetize[e]" web traffic. (Doc.272-26, pgs.1-3; 260-1, pgs.127, 131.) Novella's Internet business model is to use inflammatory web postings, nearly a million Facebook followers, hyperlinking, a misleading .org domain name and other attention grabbers unique to the Internet to "funnel" web traffic

to Novella's for-profit website.<sup>4</sup> Novella uses his status as a Yale neurologist to help draw people into the "funnel," by couching his controversial web postings as scientific journalism from an Ivy League personality. (Doc.261-8, pgs.148-149; Doc.26-1, ¶ 4.)

Novella's two brothers are salaried employees helping to run Novella's for-profit website. (Doc.260-9, pg.188). One brother summarized Novella's Internet business model at a conference designed to help other Internet entrepreneurs as follows:

Facebook is our main social media entry point. You can think of it as the top of a funnel where we convert people who know nothing about us into a like. That like puts [us] on their feed where they might click into one of our posts. Many of our posts are news items on [Novella's for-profit] website. I started a news page . . . We get ad revenue from that traffic as well as some conversions over to podcast listeners . . . [W]e use Facebook as the top of our funnel to drive people all the way to becoming [Novella's for-profit website] members. This concept won't work for everyone because there are other business models.

(Doc.272-26, pgs.1-3.)

Novella makes revenue from advertisers on his skeptic website such as Amazon, Hulu, and Stamps.

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<sup>4</sup> (Doc.272-26, pgs.1-3; Doc.260-10, pgs.38-42, 60, 127, 131, 136; Doc.177-9, pg.54; Doc.177-11, pg.11; Doc.177-5, pg.6; Doc.261-20, pgs.22-23; Doc. 260-17, pg.8; Doc.274-2, pgs.16-18; Doc.274-3, pg.7; Doc.272-28.)

com. (Doc.260-10, pgs.38-42; Doc.177-9) Novella makes even more revenue if the people he “funnels” to visit his website purchase an automatically-renewing paid subscription to the website or its “premium content,” purchase a paid subscription to Novella’s website podcast, buy Novella’s products at his web store, or purchase Novella’s “Great Courses,” all of which Novella solicits with banner ads, hypertext, hyperlinks, podcast commercials, and other sophisticated Internet marketing methods.<sup>5</sup> Novella’s web activities and use of a “.org” domain on multiple websites confuse Novella’s subscribers as to whether his skeptics business is a non-profit. (Doc.274-3, pgs.16-18.)

Novella’s false Internet disparagement of Petitioners was part of Novella’s scheme to make money from being an Ivy League Internet personality and professional “skeptic.” Novella tracked the “Google results” from his various webpage attacks on Petitioners, even describing the launch of a series of attacks as “Tobinick Day.” (Doc.272-35.) Novella also made secondary and promotional uses of his false Internet attacks about Petitioners throughout the litigation on Novella’s for-profit webpages.<sup>6</sup> One of Petitioners’ expert witnesses, in testifying how Novella’s

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<sup>5</sup> (Doc.272-26, pgs.1-3; Doc.260-10, pgs.38-42, 60, 127, 131; Doc.177-9, pg.54; Doc.177-11, pg.11; Doc.177-5, pg.6; Doc.261-20, pgs.22-23; Doc. 260-17, pg.8; Doc.274-2, pgs.16-18; Doc.274-3, pg.7; Doc.272-28.)

<sup>6</sup> (Doc.177-9, pg.54; Doc.177-11, pg.11; Doc.177-5, pg.6; Doc.261-20, pgs.22-23; Doc. 260-17, pg.8; Doc.274-2, pgs.16-18; Doc.260-10, pg.60.)

business model applied to Novella's Internet disparagement of Petitioners stated:

[P]rospective patients won't recognize that Dr. Novella is running a business based on being a professional skeptic. [Novella's for-profit] web site solicits memberships ranging from \$48 to \$2400 a year and sells \$20 t-shirts. The website ends in .org which suggests that it is a non-profit organization which enhances its credibility. It is, in fact, a for-profit organization. There are also advertisements for Amazon, Hulu Plus, and GoToMeeting.com on the web site. . . . It is unreasonable to expect the typical consumer to understand that Dr. Novella benefits financially from being a professional skeptic.

(Doc.272-22, pgs.8-9.)

**4. The Central Issues in the Litigation Became "Actual Malice" and "Commercial Speech," After the Petitioners Sued Novella for Common Law Defamation and Business Disparagement Under the Lanham Act**

After Novella refused to remove his false attacks on Petitioners from the Internet, Petitioners sued Novella in the Southern District of Florida federal court for common law defamation and under the false advertising provision of the Lanham Act, 15 U.S.C. § 1125(a)(1)(B). (Doc.1.)

Novella's central defense to the common law defamation claim was that he was not acting with "actual malice." (Doc.93.) Novella's central defense to the Lanham Act claim was that he had a First

Amendment right to disparage Petitioners because, according to Novella, the disparagement was not actionable “commercial speech” regulated by the Lanham Act. (Doc.172; Doc.251.)

## **B. The District Court’s Rulings**

### **1. The District Court Used a California State Court “Anti-SLAPP” Procedure to Dismiss the California Common Law Claims, Even Though the District Court Recognized the Circuit Conflict in Applying State Court “Anti-SLAPP” Procedure in Federal Court**

Novella invoked the California anti-SLAPP procedure on Petitioners’ state common law claims, through a “special motion to strike.” (Doc.93.) The motion sought dismissal of the common law claims on the basis that that Novella did not have “actual malice” for his Internet postings about Petitioners. (Doc.93.) Novella invoked the California anti-SLAPP procedure against the California plaintiff even though he was a Connecticut citizen and two of the three plaintiffs were Florida citizens. (Doc.55, pg.2.)

The district court acknowledged the circuit split as to whether state court anti-SLAPP procedure can apply in federal court:

The Court recognizes that as of April 24, 2015, there exists a circuit split on whether or not states’ anti-SLAPP acts’ pretrial dismissal provisions apply in federal court notwithstanding Federal Rules of Civil Procedure 12 and 56. *Compare Abbas v. Foreign Policy Grp., LLC*, 783 F.3d 1328,

1337–38 (D.C. Cir. 2015) (finding that Rules 12 and 56, as opposed to the anti-SLAPP’s special motion to dismiss provision, apply in federal courts exercising diversity jurisdiction), *with Godin v. Schencks*, 629 F.3d 79, 81 (1st Cir. 2010) (applying Maine anti-SLAPP); *Henry v. Lake Charles Am. Press, L.L.C.*, 566 F.3d 164, 168 (5th Cir. 2009) (applying Louisiana anti-SLAPP); *Newsham, supra*. Because the majority of circuit courts have found anti-SLAPP special motions to strike permissible, and because the specific anti-SLAPP statute at issue has previously been allowed in federal court, the Court follows *Newsham* and applies state law.

*Tobinick v. Novella*, 108 F.Supp.3d 1299, 1305 n.4 (S.D. Fla. 2015).

The district court then granted dismissal of the state court common law claims under the state procedure on the basis that Novella did not have “actual malice.” *Id.* at 1311-1312.

## **2. The District Court Subsequently Denied Petitioners’ Timely Motion for Leave to Amend the Complaint, Even Though Amendment Would Have Mooted the California State Court “Anti-SLAPP” Procedure Ruling**

Prior to issuance of the California anti-SLAPP ruling, Petitioners sought to amend their complaint to account for the admissible record evidence developed during discovery and used in the preliminary injunction proceedings. (Doc.173.) The evidence included Novella’s additional Internet-based attacks on Petitioners that

continued during the litigation and evidence regarding Novella's business model of funneling web-traffic for profit through "click baiting" and "Internet trolling." (Doc.173.) Although Novella prevailed in the preliminary injunction proceedings, Novella had not answered the operative complaint at that point. (Doc.172; Doc.204.) Petitioners had not previously been given court-ordered leave to amend. Moreover, the request for amendment was timely under the district court's scheduling order. (Doc.110; Doc.173.)

However, the district court denied Petitioners' timely motion for leave to amend the complaint because it would have "essentially reset the case." (Doc.202, pg.2.) The proposed amended complaint would have mooted the district court's California anti-SLAPP procedure ruling by eliminating the California common law causes of action.

**3. In the District Court's Summary Judgment Analysis of Whether Novella Was Engaged in Actionable "Commercial Advertising or Promotion" Under the Lanham Act, the District Court Used the Multi-Factor *Gordon & Breach* Test but Also Held That This Court's *Lexmark* Decision Nullified the "Commercial Competition" Factor**

The district court analyzed Novella's summary judgment motion on the Lanham Act claim, 15 U.S.C. § 1125(a)(1)(B), solely as to the issue of whether Novella's Internet attacks were "commercial advertising or promotion." (App.35a-42a.) To define "commercial advertising or promotion," the district court looked to the four-factor test set forth in *Gordon & Breach Sci.*

*Pubs. S.A. v. Am. Institute of Physics*, 859 F. Supp. 1521 (S.D.N.Y. 1994):

In order for representations to constitute “commercial advertising or promotion” under [15 U.S.C. § 1125(a)(1)(B)], they must be: (1) commercial speech; (2) by a defendant who is in commercial competition with plaintiff; (3) for the purpose of influencing consumers to buy defendant’s goods or services. While the representations need not be made in a “classic advertising campaign,” but may consist instead of more informal types of “promotion,” the representations (4) must be disseminated sufficiently to the relevant purchasing public to constitute “advertising” or “promotion” within that industry.

*Id.* at 1535–36. (App.35a.) Many circuit courts look to these *Gordon & Breach* factors for determining “commercial advertising or promotion” under the Lanham Act, 15 U.S.C. § 1125(a)(1)(B).<sup>7</sup>

However, the district court here found that the second element, “commercial competition,” did not apply:

Regarding the second prong of this test, the Supreme Court recently ruled that a plaintiff does not need to show defendant was in

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<sup>7</sup> *Suntree Techs. v. Ecosense Int’l*, 693 F.3d 1338 (11th Cir. 2012); *Podiatrist Ass’n v. La Cruz Azul de Puerto Rico*, 332 F.3d 6 (1st Cir. 2003); *Proctor & Gamble Co. v. Haugen*, 222 F.3d 1262 (10th Cir. 2000); *Coastal Abstract Serv. v. First Am. Title Ins. Co.*, 173 F.3d 725 (9th Cir. 1999); *Seven-Up Co. v. Coca-Cola Co.*, 86 F.3d 1379 (5th Cir. 1996).

commercial competition with plaintiff to have standing under the Lanham Act. *See Lexmark Intl., Inc. v. Static Control Components, Inc.*, 134 S.Ct. 1377, 1394 (U.S. 2014) . . .

(App.36a.)

**4. The District Court Found that Novella Was Not Engaged in Actionable “Commercial Speech” Under the Multi-Factor *Gordon & Breach* Test, But Failed to Conduct the Secondary/Promotional Use Analysis Required by *Gordon & Breach* and Refused to Consider the Pertinent Admissible Record Evidence**

The district court granted summary judgment on the Lanham Act claim solely as to the issue of “commercial speech,” using all of the factors of the *Gordon & Breach* test except for “commercial competition.” (App.35a-42a.) However, the district court failed to conduct the secondary/promotional use analysis for determining “actionable commercial speech” under the Lanham Act set forth in *Gordon & Breach* and refused to consider the admissible record evidence pertinent to the secondary/promotional use analysis.

In *Gordon & Breach*, the court recognized that secondary/promotional uses of speech can create actionable “commercial speech”:

While we have held that non-profit organizations must be free to publish on any topic, even those that redound to their financial benefit, without fear of Lanham Act liability, the same does not apply to subsequent (or, occasionally, prior) promotional uses of

that speech . . . [A] restaurant clearly engages in commercial speech when it posts the New York Times review in its window, and General Motors engages in commercial speech when it announces in a television commercial that its car was ranked first by *Consumer Reports*. The *Consumer Reports* article, of course, does not somehow become commercial speech; rather, G.M.'s use of the article is commercial speech.

*Gordon & Breach*, 859 F. Supp. at 1544.

Petitioners specifically pled in their operative complaint that Novella was falsely disparaging them in order to generate revenue for himself, including through secondary/promotional uses of the disparaging websites described in the complaint. (Doc.55, ¶¶ 24-30.) However, the district court made no reference to any secondary or promotional uses of Novella's Internet activities.

Instead, the district court limited the admissible record evidence it considered in its factual summary judgment analysis to the evidence that Petitioners "pled" in the operative complaint. (App.38a, fn.4, 39a, fn.4.) The district court even refused to consider the parties' stipulated, admissible evidence used during the prior preliminary injunction proceedings. (App. 66a-69a.) The district court justified its truncated review of the admissible record evidence at summary judgment as follows:

In their response to Defendant Novella's summary judgment motion, Plaintiffs argue that other statements made by Novella are "[l]ies and [m]isleading." DE 272 at 7-9. To

the extent Plaintiffs are attempting to argue that statements other than those made in the First and Second Articles are violations of the Lanham Act, this is improper because these statements were not pled in Plaintiffs' complaint.

(App.38a, fn.4, 39a, fn.4.)

Ultimately, therefore, the district court intentionally excluded from its "commercial speech" analysis three out of the five falsely disparaging website and podcast postings against Petitioners that Novella published and were part of the admissible record evidence. Thus, in refusing to consider the admissible record evidence detailing Novella's secondary/promotional uses of his false, disparaging attacks on Petitioners, the district court failed to adjudicate the actual case at issue.

Indeed, the district court's prior anti-SLAPP decision about "actual malice" under the interloping state court procedure utilized more admissible record evidence than the district court was willing to consider in its subsequent summary judgment order on the Lanham Act claim. Whereas the district court constrained the evidence it considered in its factual summary judgment analysis to the evidence "pled" in the operative complaint, the district court's view of the extensive record had previously been expansive under the anti-SLAPP procedure:

Declarations, affidavits, and evidence which were not available at the time the anti-SLAPP motion was filed have since become available. Some of this evidence came before the Court in conjunction with other motions,

while some came from discovery associated with the motion for preliminary injunction filed by Plaintiffs. . . . The Court believes that whether or not it were to consider the additional evidence, the result would be the same.

*Tobinick v. Novella*, 108 F.Supp.3d at 1311, n.11.

### C. The Eleventh Circuit’s Published Ruling

#### 1. The Eleventh Circuit’s Summary Judgment Review of Whether Novella Was Engaged in Actionable “Commercial Advertising or Promotion” Under the Lanham Act Also Used the Four-Factor *Gordon & Breach* Test, But the Eleventh Circuit Ignored this Court’s Decision in *Lexmark* and Found that Petitioners Failed to Meet the “Commercial Competition” Factor

The Eleventh Circuit, like the district court, utilized the four-factor *Gordon & Breach* test for determining whether Novella was engaged in actionable “commercial advertising or promotion” under the Lanham Act. (App.24a.) However, unlike the district court, the Eleventh Circuit found that Petitioners were required to meet the factor of “commercial competition.” (App.24a). The Eleventh Circuit made no reference to this Court’s decision in *Lexmark* nor to its elimination of competition with the defendant as a requirement for standing to sue under the Lanham Act.

Instead, the Eleventh Circuit made the requirement of competition the crux of the case at oral argument, (App.71a-73a, 77a.-82a.), including as follows:

COUNSEL FOR PETITIONERS, MR. O'BRIEN:  
Well, Your Honor, they both—Dr. Novella's  
a neurologist. Dr. Novella treats patients—

THE COURT: No, I understand the facts. I just  
wanted to know where you made the argu-  
ment about competing for patients in your  
opening brief.

MR. O'BRIEN: Okay . . . the Plaintiffs get the  
same types of patients that Dr. Novella sees  
from New England. There are people from  
New England who utilize Plaintiffs' services.  
They pull patients from the same geographical  
location. I don't have the cite on the brief,  
but I-I will get that for you.

THE COURT: And really what I'm talking about  
that you argue that his motivation for doing  
the blog was to get patients from your—  
from your client but that's—

MR. O'BRIEN: That's one of the motivations.  
There's many motivations. One was to get  
money for himself.

THE COURT: I mean I hear you. I just-when  
you come back, you can tell me where that  
is in your brief.

MR. O'BRIEN: Absolutely, Your Honor . . . This  
is a medical turf war. You have . . . dogmatists  
who were neurologists and you have Plain-  
tiffs who have a patented treatment for  
treating the conditions that neurologists  
treat. Neurologists use off-label treatments.

For example, there's record evidence that Dr. Novella uses Neurontin to treat patients. Dr. Tobinick and the Plaintiffs use Etanercept. They're both off-label treatments to treat the same neurological dysfunctions.

(App.71a-73a.)

After showing where Petitioners showed competition with Novella for neurology patients in the opening brief, counsel for Petitioners also discussed the public policy for why competition is not required under the Lanham Act:

MR. O'BRIEN: I think it would be a very bad rule of law to say you know what, unless you're a competitor, we don't care whether what you're saying is false. I think that's not a good rule of law because you would have businesses that would not know how to exist because you'd have false statements all up and down the Internet.

(App.81a.)

Nevertheless, the Eleventh Circuit required a showing of commercial competition under the Lanham Act based on the Eleventh Circuit's own pre-*Lexmark* precedent, (App.24a), which it previewed at oral argument: "I don't know whether that's the right test or the wrong test, but that's the test this court adopted . . ." (App.79a.) The Eleventh Circuit went on to conclude that Petitioners were not in competition with Novella. (App.26a.)<sup>8</sup>

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<sup>8</sup> The Eleventh Circuit overlooked the record evidence that: (1) Petitioners treat back pain, Alzheimer's, dementia, stroke, and

**2. The Eleventh Circuit Determined that Novella Was Not Engaged in Actionable “Commercial Speech” By Intentionally Limiting its Fact-Based Summary Judgment Analysis to the Evidence Described in the Operative Complaint and By Expressly Disregarding Admissible Record Evidence and the “Full Context” of Novella’s For-Profit Activities from the Analysis**

The Eleventh Circuit also found that Novella was not engaged in actionable “commercial speech” under the Lanham Act. (App.24a-30a.)

At oral argument, Petitioners’ counsel explained why the court was obligated to consider the full context of the entire admissible record evidence in its “commercial speech” analysis:

COUNSEL FOR PETITIONERS, MR. O’BRIEN:  
 [T]he District Court committed fundamental errors in excluding record evidence. The Plaintiffs did not get their day in court. The District Court was required to consider the full context of Dr. Novella’s false, misleading and deceptive factual attacks that were designed with the dual purpose of vilifying the Plaintiffs in obtaining paid members and selling merchandise for him. The District Court did not take into account this full context. As we see in the record,

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headaches (Doc.105-1, ¶ 58; Doc.260-8, *Mar.31Tr.@17:14-18*); and, (2) Novella treats headaches but also “quite often” treats patients with back pain, “see[s] a lot of Alzheimer’s and dementia patients” as part of his participation in the Yale General Neurology clinic, and also treats stroke patients. (Doc.260-9, *Tr.@43:16-20,47:16-48:23,55:10-14,62:10-12*).

Docket No. 272-26, Dr. Novella clearly “uses Facebook as the top of our funnel to drive people all the way to becoming SGU members.”

Docket No. 272-27 is an example of the Facebook posting that’s designed to garner membership in its for-profit entity. The District Court was also required to consider the secondary promotional uses of Dr. Novella’s false attacks, including Dr. Novella’s goals of hurting Plaintiffs’ competing business, funneling money to his for-profit entity—

. . .

The whole point of the civil system is that the evidence that comes into the case is before the Court.

We’re dealing with the Lanham Act case, full context. You’re not supposed to look at the . . . face in parts. You’re not supposed to look at the ear separately from the nose, just to look at the face in full context.

We had record evidence right here that the District Court just assumed out of the case and then said it’s not commercial speech because I’m only going to consider the first two attacks, not the full context. What it does is incentivizes people who are attacking businesses, to wait until the amended complaint is done and then start attacking and then well, it doesn’t matter because those attacks won’t be part of the case.

So we can just keep attacking and attacking and attacking. It's not going to be part of the full context. It wasn't around at the time of the amended complaint. That's fundamentally unfair.

(App.71a, 76a.-77a.)

Nevertheless, the Eleventh Circuit, like the district court, confined its fact-based summary judgment analysis under Federal Rule of Civil Procedure 56 to the evidence described in the complaint. (App.27a, fn.13, App.28a, fn.14.) Thus, the Eleventh Circuit's *de novo* summary judgment analysis of whether Novella was engaged in actionable "commercial speech" under the four-factor *Gordon & Breach* test did not include three out of five of Novella's false and disparaging web postings and podcasts about Petitioners that were part of the parties' stipulated record evidence used at the preliminary injunction proceeding. (App.27a, fn.13, App.28a, fn.14.) The Eleventh Circuit justified its refusal to consider that admissible record evidence in deciding the issue of "commercial speech" at the summary judgment stage as follows:

[Petitioners] argue that the court should consider the "full context" of the "interrelated websites, promotion and links that funnel money directly to [Novella]." But, much of the "full context" [Petitioners] implore us to now consider are merely the websites and factual allegations that [Petitioners] sought to add to their complaint by moving for leave to amend. Because we determined above that the district court did not abuse

its discretion in denying leave to amend, we limit our review, as we must, to the allegations included in the operative amended complaint.

(App.27a, fn.13.)

To the extent that [Petitioners] argue that SGU's legal defense webpage sought donations, as discussed, the allegations regarding that webpage are not under review as they were not made in the operative amended complaint.

(App.28a, fn.14.)

Despite refusing to consider the "full context" of the "interrelated websites, promotion and links that funnel money directly to [Novella]," (App.27a, fn.13, App.28a, fn.14), the Eleventh Circuit nonetheless also recognized that secondary/promotional uses of speech can create actionable "commercial speech," such as repurposing speech in a commercial "window." (App.26a). Yet the admissible record evidence the Eleventh Circuit refused to consider constituted Novella's repurposing of his attacks on Petitioners in his commercial "windows."

In fact, the Eleventh Circuit, like the district court, overlooked the fact that Petitioners specifically pled in their operative complaint that Novella was disparaging Petitioners in order to generate revenue for himself, including through secondary/promotional uses of the disparaging websites described in the complaint. (Doc.55, ¶¶ 24-30). Thus, in refusing to consider the allegations of the operative complaint and the admissible record evidence detailing Novella's

secondary/promotional uses of his disparaging attacks on Petitioners through commercial “windows,” the Eleventh Circuit also failed to adjudicate the actual case at issue. And just like the district court, the Eleventh Circuit’s decision as to whether Novella was engaged in “actual malice” under the state law claim under the anti-SLAPP procedure utilized more record evidence than the Eleventh Circuit was willing to recognize in its factual summary judgment analysis on the Lanham Act claim. (App.10a-19a.)

**3. The Eleventh Circuit Found that Petitioners Waived Arguments Regarding the Use of the California anti-SLAPP Procedure, Despite the Circuit Conflict on the Issue and Despite the Manner in Which Use of the State Court Procedure thwarted a Summary Judgment Ruling on the Lanham Act Claim**

At oral argument, the Eleventh Circuit questioned counsel for Petitioners about whether they waived the Eleventh Circuit’s ability to weigh in on the circuit conflict over the use of the state court anti-SLAPP procedure in federal court. (App.73a.-77a.). Counsel for Petitioners explained why the Eleventh Circuit should not find waiver, given the district court’s consideration of the circuit split, given the deepening of the circuit split itself during the course of the proceedings, and given how the problems with the anti-SLAPP procedure were not apparent until the district court’s summary judgment ruling:

**COUNSEL FOR PETITIONERS, MR. O’BRIEN:**

But, Your Honor, the hearing was held . . . in November of 2014. Since that hearing, more cases came out, including the *Intercon* case.

And regardless, the District Court has a footnote in her order where she specifically talks about the *Erie*<sup>9</sup> problem. She considered the *Erie* problem and said there is no *Erie* problem.

THE COURT: Well, the problem is there was a concession before the District Court on that *Erie* wasn't—that it wasn't a problem.

MR. O'BRIEN: Well . . . it was a concession at that time. There's new law. It was fundamental error.

THE COURT: Well . . . did the new law come in after the case was already before the Court of Appeals or did it come before the case was before the Court of Appeals?

MR. O'BRIEN: The *Intercon* case came before this case was before the Court of Appeals. We didn't —

THE COURT: You didn't go back to the District Court?

MR. O'BRIEN: Correct, we did not. . . . but we didn't know . . . how bad it would affect summary judgment. Because the anti-SLAPP procedure infected everything. And so had we known it would have infected summary judgment, we would have made an *Erie* question at summary judgment. We did not believe that it would infect summary judgment. Here's how it infected it.

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<sup>9</sup> *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938).

We tried to amend. We tried to amend this complaint consistent with the scheduling order. We tried to amend to include these additional attacks that kept coming up during the case. A couple weeks later, the District Court issued the anti-SLAPP ruling. Then a couple weeks after that, the District Court said I'm not going to give you leave to amend because it essentially resets the case in light of the anti-SLAPP order.

So we move for leave to amend, which would've . . . completely mooted the anti-SLAPP issue. The District Court issued an anti-SLAPP order and then didn't allow us to amend because of that order. It got even worse on summary judgment. The Court cited back to the anti-SLAPP order and the denial of leave to amend to exclude record evidence.

The District Court literally excluded record evidence. The statements in podcast 472, the statements in the update page, the manner in which Dr. Novella was using the SGU website as a commercial window, a funnel, took it out of the case. I didn't get any leave to amend. Anti-SLAPP comes in, I'm not going to let you amend because of my anti-SLAPP order. . . . [W]e didn't know that that was going to happen. That is by definition an *Erie* problem. . . . Dr. Novella . . . [h]ad not even answered at the time that we asked for a leave to amend, [nor] at the time that leave to amend was denied.

We move for leave to amend in the time of the scheduling order. There was no finding of futility. There was no finding of prejudice. It was literally it will essentially reset the case.

I just issued this anti-SLAPP order. I'm not going to give you leave to amend. So had we known that that was going to happen, we would have handled it differently. But more cases came out, Your Honor, on anti-SLAPP. The 9th Circuit's case came out . . . during the pendency of this appeal.

(App.73a-76a.)

The Eleventh Circuit nevertheless found waiver, (App.11a-13a), but failed to examine all of the cases showing the circuit conflict previously identified by the district court's order under review, *Tobinick v. Novella*, 108 F.Supp.3d at 1305 n.4, and all of the cases identified by Petitioners.

#### **D. Subsequent Proceedings Prior to This Petition**

The Eleventh Circuit denied Petitioners' petition for rehearing without discussion or analysis. (App.44a.) The Eleventh Circuit denied Petitioners' motion to stay its mandate without discussion or analysis.

Petitioners had also filed a petition for writ of mandamus, which this Court denied on June 19, 2017. *In Re Edward Lewis Tobinick, et al.*, No. 16-1281 (U.S. S.Ct.).

## REASONS FOR GRANTING THE PETITION

- I. IT IS ESSENTIAL FOR THIS COURT TO PROTECT THE LEGAL RIGHTS OF U.S. BUSINESSES BY RESOLVING THE CONFLICT BETWEEN THE ELEVENTH, FOURTH AND SIXTH CIRCUITS AS TO WHETHER COMMERCIAL COMPETITION IS REQUIRED FOR PLAINTIFFS TO ESTABLISH ACTIONABLE “COMMERCIAL ADVERTISING OR PROMOTION” UNDER THE LANHAM ACT, IN LIGHT OF THIS COURT’S DEFINITIVE ELIMINATION OF “COMPETITION” AS A PREREQUISITE FOR STANDING TO SUE UNDER THE LANHAM ACT IN THE *LEXMARK* CASE

The Lanham Act is designed to help businesses seek redress from falsely disparaging “commercial advertising or promotion.” 15 U.S.C. § 1125(a)(1)(B). In *Lexmark Int’l v. Static Control Components*, 134 S.Ct. 1377, 1392-1395 (2014), this Court definitively eliminated “competition” as a requirement for standing to sue for false disparagement under the Lanham Act:

[W]hen a party claims reputational injury from disparagement, competition is not required for proximate cause . . . To invoke the Lanham Act’s cause of action for false advertising, a plaintiff must plead (and ultimately prove) an injury to a commercial interest in sales or business reputation proximately caused by the defendant’s misrepresentations.

134 S.Ct. at 1392-1395.

However, in *Lexmark*, this Court left open the question of how to define “commercial advertising or promotion”:

Lexmark contends that Static Control's allegations failed to describe "commercial advertising or promotion" within the meaning of 15 U.S.C. § 1125(a)(1)(B). That question is not before us, and we express no view on it. We assume without deciding that the communications alleged by Static Control qualify as commercial advertising or promotion.

134 S.Ct. at 1385, n.1. Since *Lexmark* was decided, "the Supreme Court [has not] determined how to assess whether a communicative message is commercial advertising or promotion." *Handsome Brook Farm v. Humane Farm Animal Care*, \_\_\_ Fed.Appx. \_\_\_, 2017 WL 3601506, at \*4 (4th Cir. Aug. 22, 2017).

There is a circuit split about whether *Lexmark's* elimination of competition for standing to sue under the Lanham Act necessarily also eliminates competition as a factor for determining whether a message is "commercial advertising or promotion." Here, the Eleventh Circuit ignored *Lexmark* and determined that competition is a required factor for determining "commercial advertising or promotion" under the Lanham Act. (App.24a.). On the other hand, the Fourth and Sixth Circuits have both decided that *Lexmark* eliminates competition as a factor for determining "commercial advertising or promotion" under the Lanham Act. *Handsome Brook Farm*, \_\_\_ Fed.Appx. \_\_\_ 2017 WL 3601506, at \*4 ("[W]e do not adopt the second factor requiring a competitive relationship."); *Grubbs v. Sheakley Grp.*, 807 F.3d 785, 800-01 (6th Cir. 2015) ("We decline to adopt the requirement that the parties be in competition.").

The confusion among the circuit courts arises from the facts that the Lanham Act does not use the term “commercial speech” and that this Court has not yet defined “commercial advertising or promotion” in the context of the Lanham Act. Instead, many circuit courts have been guided by the four-factor test set forth in the *Gordon & Breach* case,<sup>10</sup> the second factor of which is “commercial competition.” But the *Gordon & Breach* case is a district court case that pre-dates *Lexmark* by decades.

Thus, while the Eleventh, Fourth and Sixth Circuits relied on the *Gordon & Breach* factors for defining “commercial advertising or promotion,” the Fourth and Sixth Circuits determined that if this Court’s *Lexmark* decision means that competition is not a barrier to bringing a lawsuit under the Lanham Act, it also must mean that competition cannot be a barrier for establishing “commercial advertising or promotion” under the Lanham Act. In contrast, the Eleventh Circuit here did not believe that *Lexmark* required nullification of the second *Gordon & Breach* factor—the “commercial competition” requirement. Indeed, the Eleventh Circuit here did not reference *Lexmark* anywhere in its opinion, even though the district court’s summary judgment order under review took the position that *Lexmark* eliminated the “commercial competition” requirement. (App.36a.)

If the Eleventh Circuit is correct, then a business has no recourse against a non-competitor for false disparagement under the Lanham Act. While *Lexmark* gives the business standing to sue, the

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<sup>10</sup> See note 7 *supra*.

Eleventh Circuit's position is that the business would ultimately lose the case without being able to establish "commercial advertising or promotion" through a showing of "commercial competition." On the other hand, if the Fourth and Sixth Circuits are correct, then plaintiffs suing non-competitors would have a remedy under the Lanham Act to address a non-competitor's false, disparaging "commercial advertising or promotion" because "commercial competition" is not required.

Without definitive clarity from this Court on whether a showing of competition is required to establish "commercial advertising or promotion" under the Lanham Act, there will be considerable confusion among courts and litigants as to whether a Lanham Act plaintiff can sue a non-competitor and how to apply *Lexmark*. Such confusion and uncertainty has high stakes given that Lanham Act claims may carry an award of attorneys' fees if the case is "exceptional." 15 U.S.C. § 1117(a). Moreover, this confusion could embolden an increase in false commercial disparagement due to the ease with which the unscrupulous can use the Internet for business disparagement. The overall effect would be to decrease the legal protection of U.S. businesses from false disparagement—something which the *Lexmark* decision dissuades. *Lexmark*, 134 S.Ct. at 1387-1395.

**II. THIS CASE IS A PROPER SCENARIO FOR THIS COURT TO RESOLVE THE PRESSING SPLIT BETWEEN THE ELEVENTH, NINTH, SEVENTH, AND D.C. CIRCUITS AS TO WHETHER STATE COURT ANTI-SLAPP PROCEDURAL STATUTES SHOULD APPLY IN FEDERAL COURT, BECAUSE USE OF THE CALIFORNIA ANTI-SLAPP PROCEDURE HERE CAUSED A FACTUALLY INCOMPLETE AND DEFECTIVE SUMMARY ADJUDICATION OF PETITIONERS' LANHAM ACT CLAIMS UNDER FEDERAL RULE OF CIVIL PROCEDURE 56**

A properly-enabled federal court procedure rule prevails where there is a conflicting state court procedural rule. *Shady Grove Orthopedic Associates, P.A. v. Allstate Insurance Co.*, 559 U.S. 393, 398-415 (2010). The California anti-SLAPP statute Novella invoked is a rule of California state procedure. Cal. Code Civ. P. § 425.16(c).

This California anti-SLAPP procedure, which is similar to anti-SLAPP laws in some other states,<sup>11</sup>

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<sup>11</sup> Ariz. Rev. Stat. Ann. 12-751 (2011); Ark. Code. Ann. 16-63-501-8 (2010); Del. Code. Ann. tit. 10 section 8136 (2011); D.C. Law 16-5501; Fla. Stat. 768.295 (2011); Ga. Code. Ann. 9-11-11.1; Haw. Rev. Stat. 634F-1 to 634F-4 (2011); 735 Ill. Comp. Stat. 110/15 (2011); Ind. Code. 34-7-7-1 to 10 (2011); Public Speech Protection Act (HB 2054) passed March 2016. Added by SB 319, § 1; La. Code. Civ. Proc. Ann. art 971 (2010); Me. Rev. Stat. tit. 14 section 556 (2011); Md. Code Ann., Cts. & Jud. Proc. 5-807 (2011); Mass. Gen. Laws ch. 231 section 59H (2011); Minn. Stat. section 554.01-.05 (1994); Mo. Rev. Stat. section 537.528 (2004); Neb. Rev. Stat. section 25-21, 243-6; Nev. Rev. Stat. section 41.635-670 (1993); N.M. Stat. section 38-2-9.1-2 (2001); N.Y. CLS Civ. R. § 70-a & 76-a (2008); NY CLS CPLR R 3211; 2013 OK. HB 2366, the Oklahoma Citizens Participation Act (2014); Or. Rev. Stat. section 31.150 et seq (2001); 27 Pa.

advances the summary disposition of whether the defendant who allegedly made defamatory statements had “actual malice” through the use of a “special motion to strike.” A “special motion to strike” is decided early in a case, before the close of discovery, and carries prevailing party attorneys’ fees for the movant. Thus, by interposing the accelerated summary disposition of whether the defendant has “actual malice,” a state court anti-SLAPP procedure can prevent a plaintiff from presenting record evidence on ultimate issues and, therefore, nullify the adjudicatory protections of federal procedure.

There is split in circuit courts over whether state court procedure invoked under state anti-SLAPP statutes can apply in federal court.<sup>12</sup> As explained by Judge Kozinski of the Ninth Circuit:

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Cons. Stat. section 7707 and section 8301-3 (2000); R.I. Gen. Laws section 9-33-1—9-33-4 (1995); Tenn. Code. Ann. section 4-21-1001—21-1004 (1997); Tex. Civ. Prac. & Rem. Code section 27.002-9; Utah Code Ann. section 78B-6-1401–5 (2001); 12 V.S.A. section 1041; RCW 4.24.510.

<sup>12</sup> Compare, e.g., *Abbas v. Foreign Policy Grp.*, 783 F.3d 1328, 1337 (D.C. Cir. 2015) (“A federal court exercising diversity jurisdiction therefore must apply Federal Rules 12 and 56 instead of the D.C. Anti-SLAPP Act’s special motion to dismiss provision.”) and *Intercon Solutions v. Basel Action Network*, 791 F.3d 729, 732 (7th Cir. 2015) (Washington state anti-SLAPP statute not proper in federal court because it “requires a judge to resolve factual disputes that properly belong to a jury”) with *U.S. ex rel. Newsham v. Lockheed Missiles & Space Co.*, 190 F.3d 963, 973 (9th Cir. 1999) (California anti-SLAPP procedure did not violate *Erie* doctrine); see also *Makaeff v. Trump University*, 736 F.3d 1180, 1189-90 (9th Cir. 2013) (“California’s anti-SLAPP statute creates the same conflicts with the Federal Rules that animated the Supreme Court’s

[A]nti-SLAPP cases have spread like kudzu through the federal vineyards. A casual Westlaw search suggests that such cases have more than tripled over the last ten years. . . . other circuits are starting to recognize this problem for what it is. When our court last considered the place of anti-SLAPP motions in federal court, some of our colleagues saw unanimity among our sister circuits and were reluctant to create a split. We can stop worrying: The D.C. Circuit has reached the overdue conclusion that anti-SLAPP motions don't belong in federal court because they directly conflict with the Federal Rules of Civil Procedure. *Abbas v. Foreign Policy Grp., LLC*, 783 F.3d 1328, 1333-37 (D.C. Cir. 2015). Now we've got a circuit split, and we're standing on the wrong side.

It's time to get it right. We should follow the D.C. Circuit's lead in giving these trespassing procedures the boot.

*Travelers Cas. Ins. Co. of Am. v. Hirsh*, 831 F.3d 1179, 1182-1186 (9th Cir. 2016) (Kozinski, J., concurring).<sup>13</sup>

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ruling in *Shady Grove*.”) (Watford, J., joined by Kozinski, C.J., Paez, J., and Bea, J., dissenting from the denial of rehearing *en banc*).

<sup>13</sup> *Cf. Block v. Tanenhaus*, \_\_\_ F.3d\_\_\_ 2017 WL 3482246, at \*2 (5th Cir. Aug. 15, 2017) (“The applicability of state anti-SLAPP statutes in federal court is an important and unresolved issue in this circuit.”); *Ernst v. Carrigan*, 814 F.3d 116, 119 n.1 (2d Cir. 2016) (“[W]e do not reach the issue of whether Vermont’s anti-SLAPP statute is applicable in federal court.”).

This Court should grant this petition to resolve the circuit split over whether anti-SLAPP procedures are proper in federal court, especially given how the California anti-SLAPP procedure enabled a summary judgment ruling on the issue of “commercial speech” under the Lanham Act that did not reflect the pertinent admissible record evidence.

Petitioners wanted to amend their complaint to add admissible record evidence bearing upon the issue of “commercial speech.” But they sought amendment after the district court issued its anti-SLAPP procedural order and, according to the district court, amendment would have “essentially reset the case.” (Doc.202, pg.2.) There was no prejudice to Novella. Novella had not even answered the complaint at that point. Thus, “essentially reset the case” meant that amendment would have made the district court’s anti-SLAPP procedural order moot and obsolete. The proposed amended complaint did not contain California common law causes of action that were subject to the California anti-SLAPP procedure.

Thus, to justify the anti-SLAPP procedure and its effect of preventing an amended complaint, the Eleventh Circuit later refused to consider the evidence Petitioners wanted to include in an amended complaint at the summary judgment stage. (App.27a, fn.13, App.28a, fn.14.) According to the Eleventh Circuit: “Because we determined above that the district court did not abuse its discretion in denying leave to amend, we limit our review, as we must, to the allegations included in the operative amended complaint.” (App.27a, fn.13.) (emphasis added).

Ultimately, therefore, the California anti-SLAPP procedure did not allow Petitioners' Lanham Act claim to be decided on its merits or on the actual record evidence. Indeed, the district court considered the expansive record evidence in deciding actual malice under the California anti-SLAPP procedure and at the preliminary injunction stage, and both the district court and the Eleventh Circuit refused to consider all of that same evidence in deciding summary judgment on the Lanham Act claim. It is fundamentally unfair for the anti-SLAPP procedure to result in a factually truncated summary judgment analysis under Federal Rule of Civil Procedure 56.

**III. THE ELEVENTH CIRCUIT'S INTENTIONAL REFUSAL TO CONSIDER PERTINENT AND ADMISSIBLE RECORD EVIDENCE IN ITS SUMMARY JUDGMENT ANALYSIS AND DECISION TO INSTEAD LIMIT ITS REVIEW TO THE EVIDENCE DESCRIBED IN THE COMPLAINT SO FAR DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS AS TO CALL FOR AN EXERCISE OF THIS COURT'S SUPERVISORY POWER IN ORDER TO PROTECT THE FUNDAMENTAL RIGHTS OF ALL LITIGANTS IN FEDERAL COURT**

After filing their complaint, Petitioners developed a substantial amount of admissible record evidence, including expert evidence, illustrating how Novella used a sophisticated, for-profit Internet marketing scheme to falsely disparage Petitioners over the Internet. The Eleventh Circuit expressly refused to consider this relevant admissible record evidence in deciding the issue of "commercial speech" on summary judgment under Federal Rule of Civil Procedure 56. (App.27a, fn.13, App.28a, fn.14.) The Eleventh Circuit

instead made a factual determination on the issue of “commercial speech” based solely on the evidence described in the complaint. (App.27a, fn.13, App.28a, fn.14.) Thus, the Eleventh Circuit surgically excised from its analysis pertinent and admissible record evidence bearing upon whether Novella was engaged in “commercial speech.”

The Eleventh Circuit’s intentional refusal to consider pertinent admissible record evidence in deciding an ultimate issue on summary judgment under Federal Rule of Civil Procedure 56 is fundamentally at odds with the way that federal civil litigation works. This Court has been expressly clear that in deciding summary judgment, “the court is obliged to take account of the entire setting of the case and must consider all papers of record as well as any materials prepared for the motion.” *Celotex Corp. v. Catrett*, 477 U.S. 317, 330 n.2 (1986); *see also Poller v. Columbia Broadcasting Sys.*, 368 U.S. 464, 477-478 (1962) (“[T]he draftsmen of [Federal Rule of Civil Procedure 56] of course did not intend to cut off a litigant’s right to a trial before the appropriate fact-finder if triable issues remained unresolved after the pleadings were closed and pretrial discovery had.”).

Thus, it is blackletter law that a court cannot ignore admissible record evidence and confine its fact-based summary judgment analysis under Federal Rule of Civil Procedure 56 to the evidence described in the complaint:

[T]he formal issues framed by the pleadings are not controlling on a motion for summary judgment; the court must consider the issues presented by the other materials offered by

the parties on the motion to determine whether the Rule 56 request should be granted . . . the Court is obliged to take account of the entire setting of the case as a Rule 56 motion. In addition to the pleadings, it will consider all papers of record . . .

10A WRIGHT, MILLER & KANE, FEDERAL PRACTICE AND PROCEDURE § 2721 (4th ed.). Indeed, the Eleventh Circuit had previously been steadfast in applying that doctrine. *See, e.g., Tippens v. Celotex Corp.*, 805 F.2d 949, 952 (11th Cir. 1986) (stating that courts are required to “consider all evidence in the record when reviewing a motion for summary judgment.”).

In this case, however, the Eleventh Circuit acted as if a substantial amount of admissible record evidence, including expert evidence, bearing upon the issue of whether Novella was engaged in actionable “commercial speech” did not exist for its summary judgment analysis. The Eleventh Circuit refused to consider the admissible record evidence detailing Novella’s secondary and promotional uses of his false, disparaging attacks on Petitioners, (App.27a, fn.13, App.28a, fn.14.), even though the Eleventh Circuit held that secondary use of speech in a commercial “window” bears directly on the question of whether the speech is actionable under the Lanham Act. (App.26a). The Eleventh Circuit even characterized Petitioners as having “implored” the Eleventh Circuit to consider this extensive body of admissible evidence, (App.27a, fn.13), as if Petitioners were somehow begging.

Litigants in this country should not have to beg courts to consider pertinent admissible record evidence at the summary judgment stage. The reason why a

federal court is required to consider the entire record evidence in deciding summary judgment is because we are a free, constitutional democracy that requires cases to be decided on their actual merits. In our country, cases are not supposed to be decided on false factual constructs that omit critical admissible record evidence.

The Eleventh Circuit's refusal to consider admissible record evidence at the summary judgment stage is antithetical to our country's constitutional legal process. The record evidence the Eleventh Circuit buried had been admitted and was part of the district court's preliminary injunction and anti-SLAPP procedure analyses. What the Eleventh Circuit has done endangers every litigant in this country who is confronted with summary adjudication. The Eleventh Circuit so far departed from the accepted and usual course of judicial proceedings so as to call for an exercise of this Court's supervisory power.

**IV. IT IS CRITICAL FOR THIS COURT TO PROVIDE U.S. BUSINESSES WITH PREDICTABLE LEGAL DOCTRINE IN BUSINESS DISPARAGEMENT CASES UNDER THE LANHAM ACT BY RESOLVING THE CONFLICT BETWEEN THE ELEVENTH, SECOND, THIRD, FOURTH, SEVENTH AND EIGHTH CIRCUITS ABOUT WHETHER THE "COMMERCIAL SPEECH" ANALYSIS REQUIRES COURTS TO EXAMINE THE "FULL CONTEXT" OF HOW THE DEFENDANT IS DISSEMINATING THE DISPARAGEMENT, INCLUDING THE DEFENDANT'S FOR-PROFIT ACTIVITIES**

In its summary judgment analysis of whether Novella was engaged in actionable "commercial speech" under the Lanham Act, the Eleventh Circuit inten-

tionally limited its review of the evidentiary context for Novella’s Internet disparagement and for-profit activities. The Eleventh Circuit refused to consider the “full context” of Novella’s sophisticated Internet marketing scheme and the corresponding admissible record evidence. (App.27a, fn.13, App.28a, fn.14.) The Eleventh Circuit’s narrow perspective on Novella’s for-profit activities directly conflicts with the broad contextual analysis required by other circuit courts for testing the “commercial speech” element of false advertising liability under the Lanham Act. *Jordan v. Jewel Food Stores*, 743 F.3d 509, 517-518 (7th Cir. 2014) (“[E]valuating the text requires consideration of its context, and this truism has special force when applying the commercial-speech doctrine.”); *Vidal Sassoon, Inc. v. Bristol-Myers Co.*, 661 F.2d 272, 276 (2d Cir. 1981) (“Viewing the ‘entire mosaic’ of the advertisements rather than ‘each tile separately’ . . .”) (internal citation omitted); *United Industries Corp. v. Clorox Co.*, 140 F.3d 1175, 1181 (8th Cir. 1998) (“In assessing whether an advertisement is literally false, a court must analyze the message conveyed within its full context.”); *Castrol Inc. v. Pennzoil Co.*, 987 F.2d 939, 946 (3d Cir. 1993) (same); *cf. Adventure Communications, Inc. v. Kentucky Registry of Election Finance*, 191 F.3d 429, 441 (4th Cir. 1999) (“Consideration of the full context of the speech is therefore critical.”).

The Seventh Circuit is extremely insightful as to why it is essential to conduct a broad contextual analysis in determining whether a defendant’s actions constitute “commercial speech” under the Lanham Act:

Modern commercial advertising is enormously varied in form and style. We know from common experience that commercial advertising occupies diverse media, draws on a limitless array of imaginative techniques, and is often supported by sophisticated marketing research. It is highly creative, sometimes abstract, and frequently relies on subtle cues. The notion that an advertisement counts as “commercial” only if it makes an appeal to purchase a particular product makes no sense today, and we doubt that it ever did.

*Jordan*, 743 F.3d at 517-518.

Thus, in stark contrast to the Eleventh Circuit’s refusal to consider the “full context” of the admissible record evidence of Novella’s entrepreneurial activities on the Internet, other circuits would require the “commercial speech” analysis in this case to include review and consideration of all of the admissible record evidence of Novella’s attacks on Petitioners, the expert evidence, and the “full context” of Novella’s business model of funneling web traffic for profit.

For instance, a single email by the defendant about the plaintiff egg producer’s purported lack of certification and support for “its representations that its eggs are organic and pasture raised,” warranted an injunction under the Lanham Act, given the “context” in which the defendant non-profit entity was using the email. *Handsome Brooke Farm*,--Fed.Appx.--2017 WL 3601506, at \*1, \*6-\*9. Thus, if the “context” of the use of a single email by a non-profit shows the email to be actionable commercial speech, then the

“context” of the use of Novella’s multiple false attacks on Petitioners as part of Novella’s business model of converting his controversial statements to funnel web-traffic for profit should also establish actionable commercial speech. But, according to the Eleventh Circuit, none of the “full context” is relevant for determining “commercial speech” under the Lanham Act. (App.27a, fn.13, App.28a, fn.14.)

This Court must resolve the circuit split as to whether a factual analysis about “commercial speech” under the Lanham Act requires the “full context” of the admissible record evidence regarding the defendant’s for-profit activities. Our age of the Internet requires doctrinal synthesis and uniformity for how to ferret-out whether false, disparaging conduct on the Internet amounts to actionable “commercial speech” and false advertising regulated by the Lanham Act. If left unchallenged, an Internet entrepreneur like Novella here, can use false, disparaging web content for commercial purposes and in order to funnel web-traffic for profit.



**CONCLUSION**

Petitioners respectfully ask this Court to grant this petition for writ of certiorari.

Respectfully submitted,

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SEPTEMBER 1, 2017

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OPINION OF THE ELEVENTH CIRCUIT  
(FEBUARY15, 2017)

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IN THE UNITED STATES COURT OF APPEALS  
FOR THE ELEVENTH CIRCUIT

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EDWARD LEWIS TOBINICK, MD, a Medical Corporation, d.b.a. the Institute of Neurological Recovery, INR PLLC, a Florida Professional Limited Liability Company, d.b.a. Institute of Neurological Recovery, M.D. EDWARD TOBINICK, an Individual,

*Plaintiffs–Appellants,*

v.

STEVEN NOVELLA, an Individual,  
SOCIETY FOR SCIENCE-BASED MEDICINE, INC.,  
a Florida Corporation, SGU PRODUCTIONS, LLC,  
a Connecticut limited Liability Company, ET AL.,

*Defendants–Appellees.*

YALE UNIVERSITY,  
a Connecticut Corporation, ET AL.,

*Defendants.*

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No. 15-14889

D.C. Docket No. 9:14-cv-80781-RLR

Appeal from the United States District Court  
for the Southern District of Florida

Before: HULL and MARTIN, Circuit Judges,  
and RESTANI,\* Judge.

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RESTANI, Judge:

Appellants Edward Lewis Tobinick, MD (“INR CA”), INR PLLC (“INR FL”), and M.D. Edward Tobinick (“Dr. Tobinick”) (collectively, the “Tobinick Appellants”) appeal the district court’s orders striking INR CA’s state law claims pursuant to California’s anti-SLAPP statute, twice denying amendment of the Tobinick Appellants’ complaint, denying relief pursuant to Federal Rules of Civil Procedure (“Rule”) 37, 56(d), and 60 due to potential discovery-related abuses, and granting summary judgment against the Tobinick Appellants on their Lanham Act claim. We affirm the district court in all respects.

### **Background**

This case concerns a dispute between two doctors regarding the medical viability of a novel use for a particular drug.

#### **I. The Parties**

Dr. Tobinick is certified in internal medicine and dermatology, and he is licensed in both California and Florida. He has two clinics that conduct business as The Institute of Neurological Recovery: INR CA in Los Angeles, California, and INR FL in Palm Beach County, Florida. Dr. Tobinick has developed an unorthodox use for the drug etanercept by delivering it

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\* Honorable Jane A. Restani, Judge for the United States Court of International Trade, sitting by designation.

through perispinal administration, which involves a needle injection near particular spinal ligaments. Dr. Tobinick claims that this new use of etanercept is effective at treating spinal pain, post-stroke neurological dysfunctions, and Alzheimer's disease. Etanercept is the generic name of Enbrel, which was first approved by the United States Food and Drug Administration ("FDA") in November 1998 to treat rheumatoid arthritis. Notably, Enbrel has not been FDA approved for the purposes which Dr. Tobinick seeks to use the drug.

Steven Novella ("Dr. Novella") is a neurologist at Yale New Haven Hospital in the Botulinum Program and treats patients with a variety of conditions, including headaches, back pain, Alzheimer's disease, dementia, and seizures. Dr. Novella also engages in endeavors apart from these professional obligations. For instance, he is on the board of the non-profit Society for Science-Based Medicine, Inc. ("Society"). In addition, in May 2005, Dr. Novella began working with his brother, Jay Novella ("Jay"), to produce and broadcast a podcast that discusses a variety of scientific issues. This podcast, "The Skeptics Guide to the Universe," is hosted on a website ([www.theskepticsguide.org](http://www.theskepticsguide.org)) owned by the for-profit company SGU Productions, LLC ("SGU"). Also, Dr. Novella is the executive editor of and contributor for the Science-Based Medicine ("SBM") blog ([www.sciencebasedmedicine.org](http://www.sciencebasedmedicine.org)), which examines issues related to science and medicine, and is operated by a non-profit entity, the New England Skeptical Society.<sup>1</sup>

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<sup>1</sup> The Society is a separate entity from the SBM blog. The Society has its own website that was first made available to the public on January 1, 2014.

## II. Factual Background

In response to a May 5, 2013, Los Angeles Time article discussing Dr. Tobinick's novel treatments, Dr. Novella published an article "Enbrel for Stroke and Alzheimer's" in SBM's blog on May 8, 2013 (the "first article"). In this six-page article, Dr. Novella explains that he learned of the Los Angeles Time article, the typical characteristics of "quack clinics" or "dubious health clinics," the key features of Dr. Tobinick's clinic, and lastly the plausibility of and the evidence supporting Dr. Tobinick's allegedly effective use of etanercept. Particularly relevant to this case, Dr. Novella also quotes a portion of the Los Angeles Time article, which reported that "[Dr. Tobinick's] claims about the back treatment led to an investigation by the California Medical Board, which placed him on probation for unprofessional conduct and made him take classes in prescribing practices and ethics." Am. Compl. Ex. 1 at 3, *Edward Lewis Tobinick, MD v. Novella*, No. 9:14-cv-80781-RLR (S.D. Fla. Aug. 1, 2014), ECF No. 55 ("Am. Compl.").

On June 9, 2014, the Tobinick Appellants filed a complaint against Appellees Dr. Novella, the Society, SGU (collectively, the "Novella Appellees"), and also Yale University ("Yale"), challenging Dr. Novella's first article. In response to the lawsuit and on July 23, 2014, Dr. Novella published another article in SBM's blog entitled "Another Lawsuit To Suppress Legitimate Criticism—This Time SBM" (the "second article"). In the second article, Dr. Novella details the lawsuit filed by the Tobinick Appellants and provides Dr. Novella's view that the lawsuit is designed to silence his public criticism of Dr. Tobinick's practices. He also restates in large part his same criticisms of

Dr. Tobinick's practices as set forth in the first article. In doing so, Dr. Novella again mentions the Medical Board of California ("MBC")'s investigation into Dr. Tobinick's practices, explains that the MBC "filed an accusation in 2004, amended in 2005 and 2006," and lists in detail the different allegations made in the 2004 Accusation against Dr. Tobinick. Am. Compl. Ex. 5 at 3-4.<sup>2</sup>

### III. Course of Proceedings

As stated above, the Tobinick Appellants filed their initial complaint on June 9, 2014. On June 11, 2014, the Tobinick Appellants moved for a preliminary injunction to enjoin the Novella Appellees from continuing to display the articles. On August 1, 2014, the Tobinick Appellants filed an amended complaint to add allegations relating to the second article that was published just nine days prior. This operative amended complaint contests several aspects of the first article, including claims that these neurological conditions "not known to be immune mediated [can be] treated by a specific immunosuppressant,"<sup>3</sup> claims that

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<sup>2</sup> The Society's website also contains a short entry about Dr. Tobinick's use of etanercept. The entry discusses the MBC's 2006 Second Amended Accusation and subsequent settlement and Dr. Novella's criticism of Dr. Tobinick. The entry also links to Dr. Novella's entire article on the SBM blog.

<sup>3</sup> According to Dr. Novella, his statement that the neurological conditions treated by Dr. Tobinick are "not known to be immune mediated" means "that the current consensus is not that these conditions are primarily caused by or driven by an autoimmune disease that could be modified by this treatment." Dep. of Steven Novella, M.D., at 35-36, *Edward Lewis Tobinick, MD v. Novella*, No. 9:14-cv-80781-RLR (S.D. Fla. Sept. 1, 2015), ECF

Dr. Tobinick's retrospective case studies are not probative medical evidence, implications that Dr. Tobinick is committing a health fraud, statements that Dr. Tobinick's clinics are "a one-man institute," and that Florida is a "very quack-friendly state." Am. Compl. ¶¶ 54, 60, 63, 69, 71. Regarding the second article, the Tobinick Appellants' operative complaint specifically takes issue with only one new statement therein, that "there have been no double-blind placebo-controlled clinical trials of the treatment provided by [Dr. Tobinick]." Am. Compl. ¶ 102. These disputes are covered in the operative complaint by the following causes of action: violation of the Lanham Act, 15 U.S.C. § 1125(a) (Count I); common law unfair competition (Count II); trade libel (Count III); libel per se (Count IV); and tortious interference with business relationships (Count V).

On August 8, 2014, and August 13, 2014, SGU and Yale, respectively, moved to dismiss the action as to them for lack of personal jurisdiction. On August 11, 2014, Dr. Novella moved to dismiss all claims against him for various reasons. On August 18, 2014, the Society moved to dismiss the action against it for failure to state a claim, or for summary judgment, because, inter alia, the Society did not engage in false advertising under the Lanham Act.

On September 25, 2014, pursuant to SGU's and Yale's motions to dismiss for lack of personal jurisdiction, the district court dismissed each from the case. On September 30, 2014, Dr. Novella invoked

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No. 261-9. Dr. Novella identified etanercept as an example of an immunosuppressant. *Id.*

California's anti-SLAPP law<sup>4</sup> and moved to strike the only California plaintiff's, INR CA's, state law claims. On January 23, 2015, the district court denied Dr. Novella's motion to dismiss in nearly all respects but granted his motion to dismiss Count V of the amended complaint, *i.e.*, the tortious interference claim, because Florida's single publication rule barred that claim. The Tobinick Appellants do not challenge this dismissal on appeal.

On March 16, 2015, after converting the Society's motion to dismiss into a motion for summary judgment, the district court granted summary judgment in favor of the Society with respect to the Lanham Act (Count I) and the unfair competition (Count II) claims, explaining that the articles were not commercial speech. The district court also dismissed without prejudice the trade libel (Count III) and libel per se (Count IV) claims against the Society because the Tobinick Appellants failed to properly notice the Society of these claims as required by Florida law. The district court, therefore, dismissed the Society from the action, but it did provide the Tobinick Appellants leave to re-file their claims against the Society in a separate suit.<sup>5</sup> On April 2, 2015, following limited discovery,

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<sup>4</sup> The purpose of the anti-SLAPP law is to curb the "increase in lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances." *See* Cal. Civ. Proc. Code § 425.16(a). Such causes of action are subject to a special motion to strike. *Id.* § 425.16(b)(1).

<sup>5</sup> On appeal, the Tobinick Appellants do not explicitly challenge the order granting summary judgment in favor of the Society. Their discovery-related requests for relief could be generously construed as a challenge to the validity of this summary judgment order. But, because we conclude that the district court

the district court denied the Tobinick Appellants' motion for a preliminary injunction.

On May 11, 2015, the deadline for amended pleadings, the Tobinick Appellants moved for leave to file a second amended complaint, adding new factual allegations some of which related to new webpages and a podcast that discussed Dr. Tobinick,<sup>6</sup> raising a new claim for common law civil conspiracy, re-asserting claims against the previously-dismissed defendant SGU, and inserting two new defendants—Jay and Paul Ingraham (“Ingraham”), a co-blogger of Dr. Novella. On May 15, 2015, the Tobinick Appellants filed a corrected version of their motion for leave to amend.

On June 4, 2015, the district court granted Dr. Novella's special motion to strike INR CA's state law claims (“anti-SLAPP order”). On June 18, 2015, the district court issued an omnibus order denying the Tobinick Appellants' corrected motion for leave to file a second amended complaint. In that omnibus order, the district court also granted Dr. Tobinick's and INR FL's request for voluntary dismissal of Counts III and IV for trade libel and libel per se, respectively.

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did not abuse its discretion in denying the requests for discovery-related relief, we see no remaining challenge to the grant of summary judgment in favor of the Society.

<sup>6</sup> More precisely, the Tobinick Appellants add allegations regarding (1) a July 23, 2014, legal defense webpage on SGU's website, which requests donations to help defend against the Tobinick Appellants' suit, (2) a July 26, 2014, SGU podcast that discusses Dr. Tobinick's medical treatments, the transcript of which was published on August 7, 2014, and (3) an April 1, 2015, article in SBM's blog that provided an update on the status of the litigation against the Tobinick Appellants.

Shortly thereafter, on June 25, 2015, Dr. Novella filed his answer to the operative amended complaint.

On August 18, 2015, the Tobinick Appellants again moved for leave to file another second amended complaint in order to add a claim under the Florida Deceptive and Unfair Trade Practices Act (“FDUTPA”). On August 20, 2015, the district court denied the Tobinick Appellants’ motion.

On August 25, 2015, Dr. Novella moved for summary judgment on all remaining claims. On September 1, 2015, the Tobinick Appellants filed two motions based on the allegation that Dr. Novella provided false deposition testimony, one motion pursuant to Rule 37 seeking sanctions and one pursuant to Rule 60(b) seeking reconsideration of the district court’s anti-SLAPP order. The Tobinick Appellants argued that Dr. Novella falsely denied that he had communicated with the author of the May 5, 2013, Los Angeles Times article; denied that he had ever discussed Dr. Tobinick with Ingraham; and denied communicating with another physician, Stephen Barrett, regarding Dr. Tobinick.

On September 15, 2015, the district court denied each of the Tobinick Appellants’ motions based on the alleged discovery-related abuses. On October 2, 2015, the district court found that Dr. Novella’s speech is not commercial and then granted summary judgment in favor of Dr. Novella on both remaining claims. The district court reasoned that the Tobinick Appellants largely based their unfair competition claim (Count II) on their Lanham Act false advertising claim (Count I). The Tobinick Appellants now appeal.

## **Jurisdiction and Standard of Review**

We have jurisdiction of this appeal pursuant to 28 U.S.C. § 1291. We review de novo “the district court’s interpretation and application of a statute” such as California’s anti-SLAPP statute. *Royalty Network, Inc. v. Harris*, 756 F.3d 1351, 1354 (11th Cir. 2014). We review for an abuse of discretion the district court’s denial of leave to amend and the denial of requests for relief brought under Rules 37, 56(d), and 60(b). *World Holdings, LLC v. Fed. Republic of Germany*, 701 F.3d 641, 649, 654-55 (11th Cir. 2012) (Rule 56(d)); *Garfield v. NDC Health Corp.*, 466 F.3d 1255, 1270 (11th Cir. 2006) (leave to amend); *Serra Chevrolet, Inc. v. Gen. Motors Corp.*, 446 F.3d 1137, 1146-47 (11th Cir. 2006) (Rule 37); *Cox Nuclear Pharmacy, Inc. v. CTI, Inc.*, 478 F.3d 1303, 1314 (11th Cir. 2000) (Rule 60(b)).

Further, we review a grant of summary judgment de novo, “viewing all facts in the light most favorable to the nonmoving party and drawing all reasonable inferences in favor of that party.” *McCullum v. Orlando Reg’l Healthcare Sys., Inc.*, 768 F.3d 1135, 1141 (11th Cir. 2014). “Summary judgment is appropriate where there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law.” *Id.*

## **Discussion**

### **I. Dr. Novella’s Special Motion to Strike**

The Tobinick Appellants challenge the district court’s anti-SLAPP order on two grounds. First, the Tobinick Appellants contend that the district court erred in adopting the anti-SLAPP expedited procedures

because doing so “trampled federal procedure and constitutional rights” and violated the doctrine of *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938). Second, the Tobinick Appellants argue the district court’s determination that there was no evidence of actual malice by Dr. Novella is erroneous. Dr. Novella responds that the Tobinick Appellants waived their *Erie* claim and, in the alternative, that the district court did not err on the merits of that claim. Dr. Novella also avers that the Tobinick Appellants fail to point to evidence of actual malice.

#### **A. Waiver of Erie Claim**

We do not consider an issue “not raised in the district court and raised for the first time in an appeal.” *Access Now, Inc. v. Sw. Airlines Co.*, 385 F.3d 1324, 1331 (11th Cir. 2004) (quoting *Walker v. Jones*, 10 F.3d 1569, 1572 (11th Cir. 1994)). We have recognized exceptions to the waiver doctrine, including, inter alia, where there is a: (1) “pure question of law, and if refusal to consider would result in a miscarriage of justice[.]” or (2) “no opportunity to raise [the objection] at the district court level.” *Id.* at 1332 (quoting *Wright v. Hanna Steel Corp.*, 270 F.3d 1336, 1342 (11th Cir. 2001)).

The Tobinick Appellants waived their challenge to the district court’s application of California’s anti-SLAPP statute based on the *Erie* doctrine. The Tobinick Appellants did not raise the *Erie* claim in their response to Dr. Novella’s special motion to strike INR CA’s state law claims, nor do the Tobinick Appellants now contend that they ever raised the issue before the district court. Moreover, when asked by the district judge “what about the issue of anti-SLAPP statutes

applying in diversity cases in federal court?” the Tobinick Appellants’ counsel responded “[t]here seems to be a plethora of case law that suggests that it is allowable in diversity actions in federal court.” Tr. of Mot. Hr’g, at 26, *Edward Lewis Tobinick, MD v. Novella*, No. 9:14-cv-80781-RLR (S.D. Fla. Nov. 20, 2014), ECF No. 113. The Tobinick Appellants, therefore, waived the issue. *See, e.g., NCDR, L.L.C. v. Mauze & Bagby, P.L.L.C.*, 745 F.3d 742, 753-54 (5th Cir. 2014) (deeming waived party’s argument that Texas’ anti-SLAPP statute conflicts with the certain federal Rules).

No exception to waiver saves the Tobinick Appellants’ claim. The Tobinick Appellants have not identified any miscarriage of justice resulting from a finding of waiver, nor do we see one, given the weakness of the Tobinick Appellants’ state law claims.<sup>7</sup> Furthermore, not only did the Tobinick Appellants squarely concede the *Erie* issue at the hearing, the district court nevertheless considered the argument in its anti-SLAPP order. The district court acted reasonably in applying California’s anti-SLAPP statute to the state law claims, stating that “the majority of circuit courts have found anti-SLAPP special motions to strike permissible, and . . . the specific anti-SLAPP statute at issue has previously been allowed in federal court.” *Edward Lewis Tobinick, MD v. Novella*, 108 F.Supp.3d 1299, 1305 n.4 (S.D. Fla. 2015) (“*Tobinick*”). Moreover, that the Seventh Circuit’s June 29, 2015, decision in *Intercon Solutions, Inc. v. Basel Action Network*, on which the Tobinick Appel-

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<sup>7</sup> As reflected in the discussion of actual malice, *infra*, it seems highly unlikely that the Tobinick Appellants’ state law claims would survive even without the availability of an anti-SLAPP motion.

lants rely, had not been issued until after the district court issued its June 4, 2015, anti-SLAPP order does not excuse the Tobinick Appellants' waiver. *See* 791 F.3d 729, 731-32 (7th Cir. 2015) (holding that Washington's anti-SLAPP statute was inapplicable in federal court after that state's highest court interpreted that anti-SLAPP statute as going beyond a summary judgment procedure and as violating the right to a trial by a jury by requiring a judge to make factual findings).

First, *Intercon* is obviously of limited applicability. Second, notwithstanding the date of the *Intercon* decision, the Tobinick Appellants explicitly conceded the *Erie* issue at the hearing in which Dr. Novella's counsel alerted the district court of that potential issue. Even more telling, the Tobinick Appellants did not raise the *Erie* issue in their September 1, 2015, motion for reconsideration of the district court's anti-SLAPP order, which was filed months after *Intercon* had been decided. Accordingly, we decline to consider the merits of the Tobinick Appellants' *Erie*-based challenge for the first time on appeal.

## **B. Actual Malice**

In applying California's anti-SLAPP statute,<sup>8</sup> the district court reasoned that Dr. Tobinick was a

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<sup>8</sup> The anti-SLAPP statute provides:

A cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech under the United States Constitution or the California Constitution in connection with a public issue shall be subject to a special motion to strike, unless the court determines that

limited public figure<sup>9</sup> and that he had not produced evidence of actual malice such that INR CA, Dr. Tobinick's California entity, had a probability of prevailing on its state law claims. *Tobinick*, 108 F.Supp.3d at 1308, 1309; *see* Cal. Civ. Proc. Code § 425.16(b)(1). The Tobinick Appellants challenge only the latter holding regarding actual malice.

Actual malice is defined as “with knowledge that [a statement] was false or with reckless disregard of whether it was false or not” and must be shown “by clear and convincing evidence.” *Reader's Digest Ass'n, Inc. v. Superior Court*, 690 P.2d 610, 617 (Cal. 1984) (quoting *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 280 (1964)). To show reckless disregard for truth or falsity, California courts apply a subjective test in which “[t]here must be sufficient evidence to permit

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the plaintiff has established that there is a probability that the plaintiff will prevail on the claim.

Cal. Civ. Proc. Code § 425.16(b)(1).

<sup>9</sup> As we have explained, the Supreme Court has identified two types of public figures in this context. An all-purpose public figure is one that “occup[ies] positions of such persuasive power and influence that they are deemed public figures for all purposes.” *Silvester v. Am. Broad. Cos.*, 839 F.2d 1491, 1494 (11th Cir. 1988) (quoting *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 345 (1974)). A limited public figure, by contrast, “ha[s] thrust [himself] to the forefront of particular public controversies in order to influence the resolution of the issues involved.” *Id.* (quoting *Gertz*, 418 U.S. at 345). Both types of public figures must prove that the defamatory statements were made with actual malice. *See Gertz*, 418 U.S. at 336; *Reader's Digest Ass'n, Inc. v. Superior Court*, 690 P.2d 610, 615 (Cal. 1984) (“Unlike the ‘all purpose’ public figure, the ‘limited purpose’ public figure loses certain protection for his reputation only to the extent that the allegedly defamatory communication relates to his role in a public controversy.”).

the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication.” *Id.* at 617-18 (quoting *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968)). California courts consider factors such as “[a] failure to investigate, anger and hostility toward the plaintiff, [and] reliance upon sources known to be unreliable or known to be biased.” *Id.* at 618-19 (citations omitted); see *Christian Research Inst. v. Alnor*, 55 Cal. Rptr. 3d 600, 612 (Cal. Ct. App. 2007).

The Tobinick Appellants have not presented evidence that rises to the level of actual malice. The Tobinick Appellants believe there is actual malice because (1) Dr. Novella improperly relied on the MBC’s 2004 Accusation, which had been superseded by a 2006 Second Amended Accusation, (2) Dr. Novella provided false declarations to the district court because one declaration indicates that, in researching the articles, Dr. Novella relied on the MBC’s 2004 Accusation and other declarations state he relied on the MBC’s 2006 Second Amended Accusation, (3) the articles contained false statements, such as claiming Dr. Tobinick ran a “one-man institute,” and (4) Dr. Novella’s deposition included false testimony regarding communications with certain third-parties. Here, even all of the Tobinick Appellants’ circumstantial evidence taken as true is insufficient to show that Dr. Novella had serious doubts as to the truth of the content contained in his two articles.

Contrary to the Tobinick Appellants’ arguments, the evidence indicates that Dr. Novella consulted both the MBC’s 2004 Accusation and the 2006 Second Amended Accusation. We see no reason why the fact that Dr. Novella consulted the 2006 document precludes him from having also consulted the 2004 document.

Notwithstanding the alleged discrepancy, the Tobinick Appellants are unable to point to a definitively false statement in either of Dr. Novella's articles stemming from the reliance on the 2004 Accusation.<sup>10</sup> Instead, Dr. Novella's second article explicitly acknowledges that the MBC's 2004 Accusation was amended in 2006, thereby laying credence to the belief that Dr. Novella had seen both documents.

Similarly, the allegedly false statements in Dr. Novella's articles and the inconsistencies in his deposition testimony are insufficient to demonstrate actual malice. Neither speaks to whether Dr. Novella was "aware of any erroneous statements or [was] in any way reckless in that regard" when he wrote the articles. *Sullivan*, 376 U.S. at 286. The mere existence of a false statement does not, on its own, demonstrate Dr. Novella's knowledge of its falsity. Tellingly, the Tobinick Appellants are unable to show that many of

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<sup>10</sup> The Tobinick Appellants do state that both the 2004 Accusation and the 2006 Second Amended Accusation were superseded by an MBC 2007 Decision adopting a Stipulated Settlement and Disciplinary Order, which recognized that "studies . . . have provided evidence that perispinal etanercept is effective for treatment of disc-related pain." Pls.' Corrected Rule 60(b) Mot. for Relief from June 4, 2015 Order and Sanctions and Incorporated Mem. of Law Ex. 29, at 4, *Edward Lewis Tobinick, MD v. Novella*, No. 9:14-cv-80781-RLR (S.D. Fla. Sept. 1, 2015), ECF No. 261. The Tobinick Appellants do not identify which of Dr. Novella's statements is in conflict with this settlement; instead, they seem to imply that Dr. Novella's articles are misleading as to existence of these studies incorporated in the MBC's 2007 Decision. Not only is this implication on its own insufficient to rise to the level of actual malice, but Dr. Novella's second article appears to reference these very studies. The second article admits that "[t]here are small studies for disc herniation showing conflicting results." Am. Compl. Ex. 5 at 3.

Dr. Novella's statements are actually false or that they are anything more than medical or personal opinion. As an example, the Tobinick Appellants rely on Dr. Novella's characterization of Florida as a "very quack-friendly state," Am. Compl. ¶ 71, but this statement is plainly Dr. Novella's opinion and cannot be proven as true or false. The Tobinick Appellants, instead, point to isolated statements, which do not pertain to the article's essential criticism of Dr. Tobinick's medical practices, as evidence that Dr. Novella recklessly included falsities in the article. But, this evidence at most demonstrates mere negligence and does not raise to the level of reckless disregard needed to prove actual malice. *See Sullivan*, 376 U.S. at 271-72 ("[E]rroneous statement is inevitable in free debate, and . . . it must be protected if the freedoms of expression are to have the 'breathing space' that they 'need to survive[.]'"). For instance, the Tobinick Appellants allege that Dr. Novella "falsely implies" that Dr. Tobinick's clinics "have committed a health fraud inasmuch as the [first article] was placed into a category identified as 'Health Fraud.'" Am. Compl. ¶ 63. The article itself, however, never states that Dr. Tobinick is committing or has committed health fraud. And, placement in a category on a website is insufficient here where there is no evidence that Dr. Novella decided in which category the article would be included. Furthermore, regarding the "one-man institute" comment, the Tobinick Appellants have failed to rebut Dr. Novella's statement that he looked at the websites for Dr. Tobinick and his clinic and "Dr. Tobinick [was] the only physician named and profiled on the websites." Def. Dr. Steven Novella's Mot. to Dismiss Ex. 1, ¶ 30, *Edward Lewis Tobinick, MD v. Novella*, No. 9:14-cv-80781-RLR (S.D. Fla. July

23, 2014), ECF No. 36. Dr. Novella's statement is reasonably held, as the name of Dr. Tobinick's California clinic, "Edward Lewis Tobinick, MD," further supports his belief that "Dr. Tobinick was a solo practitioner[.]" *Id.* Instead, as the district court acknowledged, Dr. Novella's articles contain "a more nuanced discussion of the issues than [INR CA's] pleading admits." *Tobinick*, 108 F.Supp.3d at 1311.

As to the allegedly false statements in the deposition testimony, they relate primarily to Dr. Novella's communications with certain third-parties after the first article had been published and do not speak to Dr. Novella's knowledge of the accuracy of the statements made in either of his articles. In any event, as discussed infra, the Tobinick Appellants' challenges to Dr. Novella's allegedly false deposition testimony are based on mere conjecture and, if true, at most demonstrate ill will towards Dr. Tobinick, likely based on differing views on medical matters. *See Reader's Digest Ass'n*, 690 P.2d at 619 ("[M]ere proof of ill will on the part of the publisher may . . . be insufficient [to prove actual malice].").

Moreover, although "[t]he failure to conduct a thorough and objective investigation, standing alone, does not prove actual malice," *id.* at 619, we conclude that the evidence of Dr. Novella's investigation, in which he looked to trustworthy sources, demonstrates his lack of subjective belief that the articles contained false statements. Before writing, Dr. Novella consulted the Los Angeles Times article, many of Dr. Tobinick's case studies, the MBC's accusations, and the Tobinick Appellants' own websites. *See Tobinick*, 108 F.Supp.3d at 1310. Accordingly, because the Tobinick Appellants have not demonstrated a probability of success on the

actual malice issue, the district court did not err in granting Dr. Novella’s special motion to strike the state law claims pursuant to California’s anti-SLAPP statute.

## **II. The Tobinick Appellants’ Motion for Leave to Amend**

The Tobinick Appellants argue that the district court erred in twice denying them leave to amend the operative complaint because there would not have been prejudice to the Novella Appellees.

Rule 15 provides that “[a] party may amend its pleading once as a matter of course. . . .” Fed. R. Civ. P. 15(a)(1). And “[i]n all other cases, a party may amend its pleading only with . . . the court’s leave. The court should freely give leave when justice so require.” *Id.* 15(a)(2). The Supreme Court has explained that a district court may properly deny leave to amend for reasons “such as undue delay.” *Foman v. Davis*, 371 U.S. 178, 182 (1962).

The district court did not abuse its discretion in twice denying leave to amend the operative complaint. Both motions for leave to amend were sought approximately a year after the Tobinick Appellants filed the original complaint. By the time the Tobinick Appellants sought amendment, the course of proceedings had been markedly advanced—the district court had dismissed SGU and Yale for lack of personal jurisdiction, dismissed Count V of the operative complaint, granted summary judgment in favor of the Society, and denied the Tobinick Appellants’ motion for preliminary injunction. The Tobinick Appellants filed the first motion for leave to amend on the deadline for amended pleadings and sought extensive changes to

the operative complaint: they alleged new factual allegations, added a civil conspiracy claim, reinserted previously-dismissed SGU back into the case, and added two new defendants. The second motion to amend also sought to supplement the complaint with the new FDUTPA cause of action.

In denying the first motion, the district court reasonably concluded that allowing amendment “would essentially reset the case.” Omnibus Order, at 2, *Edward Lewis Tobinick, MD v. Novella*, No. 9:14-cv-80781-RLR (S.D. Fla. June 18, 2015), ECF No. 202. The district court noted the “aggressively litigated” course of proceedings, the extent of the amendments sought by the Tobinick Appellants, and the fact that the Tobinick Appellants “could only identify a limited number of recent statements incorporated into the proposed” complaint. *Id.* at 1-2. Indeed, many of the new factual allegations added by the Tobinick Appellants related to the legal defense webpage and the SGU podcast, which were both initially published in July 2014, nearly a year before the Tobinick Appellants filed their first motion for leave to amend. Similarly, the district court denied the second motion, which was filed after the deadline for amended pleadings, in a docket entry “for all of the reasons previously stated on the record at the Court’s Status Conference on June 18, 2015, as well as the timing of the Motion in relation to the dispositive motion deadline, which is imminent, and trial, which is two months hence.” Paperless Order, *Edward Lewis Tobinick, MD v. Novella*, No. 9:14-cv-80781-RLR (S.D. Fla. Aug. 20, 2015), ECF No. 245. Thus, even though Dr. Novella had not yet filed his answer, the district court did not abuse its discretion because it properly

sought to prevent an undue delay caused by the Tobinick Appellants' last-minute attempts to amend their complaint.

### **III. The Tobinick Appellants' Discovery-Related Requests for Relief**

The Tobinick Appellants argue that the district court abused its discretion in not granting relief under Rules 37, 56(d), and 60(b) because Dr. Novella misled the Tobinick Appellants and the district court through his deposition testimony, thereby prejudicing the Tobinick Appellants by an unfavorable summary judgment ruling.

Under Rule 60(b), a party may move for relief from a final judgment or order, for reasons including fraud. Fed. R. Civ. P. 60(b).<sup>11</sup> The moving party must show “by clear and convincing evidence that an adverse party has obtained the verdict through fraud, misrepresentation, or other misconduct.” *Cox Nuclear Pharmacy*, 478 F.3d at 1314 (quoting *Frederick v. Kirby Tankships, Inc.*, 205 F.3d 1277, 1287 (11th Cir. 2000)).

Under Rule 37(b)(2), a party may move for sanctions for failure to comply with a discovery order. Fed. R. Civ. P. 37(b)(2). A district court has broad discretion in applying these sanctions, and “a default judgment sanction,” as requested by the Tobinick

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<sup>11</sup> Because the Tobinick Appellants did not specify the grounds on which they were moving, the district court reasonably construed the basis as for “fraud . . . , misrepresentation, or misconduct by an opposing party.” *Edward Lewis Tobinick, M.D. v. Novella*, No. 9:14-cv-80781, 2015 WL 11254727, at \*1 (S.D. Fla. Sept. 15, 2015) (quoting Fed. R. Civ. P. 60(b)(3)). On appeal, the Tobinick Appellants do not challenge the district court's construction.

Appellants, “requires a willful or bad faith failure to obey a discovery order.” *Malautea v. Suzuki Motor Co.*, 987 F.2d 1536, 1542 (11th Cir. 1993).

Rule 56(d) provides: “[i]f a nonmovant shows by affidavit or declaration that, for specified reasons, it cannot present facts essential to justify its opposition, the court may: (1) defer considering the motion or deny it; (2) allow time to obtain affidavits or declarations or to take discovery; or (3) issue any other appropriate order.” Fed. R. Civ. P. 56(d).

First, to support his requests for Rules 37 and 60(b) relief, the Tobinick Appellants allege a scheme to ruin Dr. Tobinick perpetrated by Dr. Novella and other co-conspirators, but none of his claims are sufficient to demonstrate bad faith or fraud justifying sanctions or reconsideration. Dr. Novella explained each of the alleged false statements in his deposition. As to his communications with the author of the Los Angeles Times article, Dr. Novella testified that at the time of the deposition he did not remember a brief email conversation that had occurred more than two years prior. And, Dr. Novella explained that he truthfully answered his reasonable interpretation of the questions regarding his communications with Ingraham and Barrett.<sup>12</sup> The Tobinick Appellants’

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<sup>12</sup> Specifically, Dr. Novella’s declaration provided that his deposition did not contain false statements because (1) as to Ingraham, he was asked if he discussed the topic of Dr. Tobinick with Ingraham, but the emails show one-sided emails from Ingraham to Dr. Novella, but did not contain responses from Dr. Novella, and (2) as to Barrett, he answered that he could not recall whether or not an email exchange took place and therefore never falsely denied the existence of such emails in his deposition.

conjecture of an elaborate conspiracy is not sufficient to controvert Dr. Novella's reasonable explanations and certainly is insufficient to demonstrate bad faith or fraud. It, consequently, was not an abuse of discretion for the district judge to deny the motions under Rules 37 and 60(b).

Second, the district court did not abuse its discretion on the Rule 56(d) issue as the Tobinick Appellants never made a proper motion for Rule 56(d) relief. "A request for a court order must be made by motion." Fed. R. Civ. P. 7(b)(1). Instead, the Tobinick Appellants requested Rule 56(d) relief in their brief responding to Dr. Novella's motion for summary judgment. The district court did not issue an order regarding Rule 56(d), likely because it was not moved to do so. Indeed, the Tobinick Appellants had once before sought relief pursuant to Rule 56(d) by motion pending the close of discovery, and the district court both considered and ultimately granted the motion. To the extent that the Tobinick Appellants' request for Rule 56(d) relief is premised on the same discovery-related abuses as their other two motions, their claim fails because for the reasons already stated the district court did not abuse its discretion. Thus, the district court did not abuse its discretion in denying each of the Tobinick Appellants' discovery-related requests for relief.

#### **IV. The Tobinick Appellants' Lanham Act Claim**

The Tobinick Appellants argue that the district court erred in granting summary judgment against them on their Lanham Act claim because there are material facts in dispute regarding the commercial nature of Dr. Novella's speech, chiefly as it relates to

his economic motivations. The Tobinick Appellants further contend that Dr. Novella's statements are false and misleading and that the Tobinick Appellants have satisfied the remaining elements of a Lanham Act claim.

The Lanham Act prescribes liability for false advertising to "commercial advertising or promotion." 15 U.S.C. § 1125(a)(1)(B). Commercial advertising or promotion includes "(1) commercial speech; (2) by a defendant who is in commercial competition with plaintiff; (3) for the purpose of influencing consumers to buy defendant's goods or services[;]" and (4) "the representations . . . must be disseminated sufficiently to the relevant purchasing public to constitute 'advertising' or 'promotion' within that industry." *Suntree Techs., Inc. v. Ecosense Int'l, Inc.*, 693 F.3d 1338, 1349 (11th Cir. 2012) (quoting *Gordon & Breach Sci. Publishers S.A. v. Am. Inst. of Physics*, 859 F. Supp. 1521, 1535-36 (S.D.N.Y. 1994)).

Commercial speech is "expression related solely to the economic interests of the speaker and its audience." *Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 561 (1980). The "core notion" of commercial speech extends to speech that proposes a commercial transaction. *Bolger v. Young Drug Prods. Corp.*, 463 U.S. 60, 66 (1983). The Supreme Court has identified three factors in looking beyond the core notion of commercial speech: (1) that the material was "conceded to be advertisements," (2) it contained a "reference to a specific product," and (3) the speaker "has an economic motivation" for distributing the material. *Id.* No one factor is dispositive. *See id.* at 67. "The combination of all three characteristics, however, provides strong support

for the . . . conclusion that the [material is] properly characterized as commercial speech.” *Id.* at 62, 67. But, “speech is not rendered commercial by the mere fact that it relates to an advertisement.” *Pittsburgh Press Co. v. Pittsburgh Comm’n on Human Relations*, 413 U.S. 376, 384 (1973).

There is no genuine dispute of material fact regarding whether Dr. Novella’s articles are commercial speech. A plain reading of the first and second articles makes clear that they do not fall within the core notion of commercial speech as they do not propose a commercial transaction. Instead, Dr. Novella’s articles evoke many characteristics of noncommercial speech. The articles “communicate[] information, express[] opinion, [and] recite[] grievances, . . . .” See *Sullivan*, 376 U.S. at 266. Dr. Novella, who posted the articles on SBM’s blog, states in his second article that the purpose of the SBM blog is to “provide an objective analysis of questionable or controversial medical claims so that consumers can make more informed decisions . . . .” Am. Compl. Ex. 5 at 1. The content of the articles corroborates this stated educational purpose, as the articles discuss the plausibility of Dr. Tobinick’s practices in relation to the different medical conditions treated, the way etanercept works, and the shortage of medical studies supporting Dr. Tobinick’s position. These articles, which conclude that Dr. Tobinick’s perispinal administration of etanercept is ineffective, add to the public debate regarding the viability of a non-FDA approved medical treatment and are clearly of import to the public.

We turn next to the three factors outlined by the Supreme Court in *Bolger* with regard to non-core commercial speech and conclude that these factors do

not save the Tobinick Appellants' Lanham Act claim. First, the Novella Appellees do not concede that the articles are advertisements, nor can they reasonably be construed as such. The first article makes no mention of Dr. Novella's practice or medical services. Although the second article does make such a mention, it was authored in response to the Tobinick Appellants' filing of their lawsuit, criticizes the lawsuit as an attempt to suppress Dr. Novella's critiques, and mentions Dr. Novella's medical practice only to provide context regarding the lawsuit. In addition, Dr. Novella clarifies in his second article that he primarily treats headaches, thereby distancing the types of medical services he provides from the services marketed by Dr. Tobinick, who does not claim to treat headaches.

Second, the articles do not discuss any products for sale by Dr. Novella, and, as discussed, only briefly mention his practice for context. The articles' sole reference to a product is found in their discussion of Dr. Tobinick's medical treatments. But, these references to Dr. Tobinick's medical treatments are, by themselves, insufficient to subject Dr. Novella's otherwise protected speech to Lanham Act liability. *See Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 761-62 (1976) (explaining that speech that includes content on commercial topics is not automatically commercial speech). In *Gordon & Breach Sci. Publishers S.A.*, the district court explained that "a restaurant or movie review or a . . . product report" on its own is not commercial speech under the Lanham Act, 15 U.S.C. § 1125(a), but can be transformed into commercial speech when, for instance, a restaurant "posts the . . . review in its window." 859 F.Supp. at 1544. Dr. Novella's discussion of Dr. Tobinick's use of

etanercept, which resembles a medical peer review of a treatment's viability, therefore, does not render the articles commercial speech.

Third, the Tobinick Appellants have not demonstrated economic motivation sufficient to transform Dr. Novella's speech into commercial speech. As a preliminary matter, there is no factual dispute as to where the articles were displayed online, how the websites were set up, and whether the websites generated revenue through advertisements and membership subscriptions. The Tobinick Appellants describe a complex "funneling" scheme to generate profit for Dr. Novella, in which the Tobinick Appellants claim that the two articles are connected to other websites through hyperlinks in a way that readers are directed to websites that generate revenue for Dr. Novella, such as through advertising or membership subscriptions.<sup>13</sup> This funneling theory, which attempts to connect the articles to revenue sources, relies on such a level of attenuation that it fails to demonstrate economic motivation in the commercial speech context.

The Tobinick Appellants' reliance on *World Wrestling Federation Entertainment, Inc. v. Bozell* is misplaced. 142 F.Supp.2d 514, 525 (S.D.N.Y. 2001).

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<sup>13</sup> The Tobinick Appellants argue that the court should consider the "full context" of the "interrelated websites, promotion and links that funnel money directly to [Dr.] Novella." But, much of the "full context" the Tobinick Appellants implore us to now consider are merely the websites and factual allegations that the Tobinick Appellants sought to add to their complaint by moving for leave to amend. Because we determined above that the district court did not abuse its discretion in denying leave to amend, we limit our review, as we must, to the allegations included in the operative amended complaint.

There, a wrestling organization sued a council comprising concerned parents who had initiated a public attack campaign about the risk to children of portraying violence in wrestling television programs. *Id.* at 521. The district court denied a motion to dismiss the complaint and held that the allegations were sufficient to demonstrate that the council engaged in commercial speech because it featured the attacks “prominently in a fundraising video,” in “fundraising letters,” and in order “to raise the profile of [the council].” *Id.* at 525, 526. Unlike the speech in *Bozell*, Dr. Novella’s articles are neither featured prominently in fundraising efforts<sup>14</sup> (or other similar solicitations for money), nor have the Tobinick Appellants shown that these articles are the central content driving advertising or membership-based revenue.

To be sure, neither the placement of the articles next to revenue-generating advertising nor the ability of a reader to pay for a website subscription would be sufficient in this case to show a liability-causing economic motivation for Dr. Novella’s informative articles. Both advertising and subscriptions are typical features of newspapers, whether online or in-print. But, the Supreme Court has explained that “[i]f a newspaper’s profit motive were determinative, all aspects of its operations—from the selection of news stories to the choice of editorial position—would be subject to regulation if it could be established that they were conducted with a view toward increased sales. Such a basis for regulation clearly would be

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<sup>14</sup> To the extent that the Tobinick Appellants argue that SGU’s legal defense webpage sought donations, as discussed, the allegations regarding that webpage are not under review as they were not made in the operative amended complaint.

incompatible with the First Amendment.” *Pittsburgh Press*, 413 U.S. at 385.

Furthermore, as our sister circuits have recognized, magazines and newspapers often have commercial purposes, but those purposes do not convert the individual articles within these editorial sources into commercial speech subject to Lanham Act liability. *See Farah v. Esquire Magazine*, 736 F.3d 528, 541 (D.C. Cir. 2013) (holding that a satirical article about a book in a magazine’s online blog was not commercial speech subject to Lanham Act liability even though “writers write and publishers publish . . . for commercial purposes”); *Hoffman v. Capital Cities/ABC, Inc.*, 255 F.3d 1180, 1186 (9th Cir. 2001) (“A printed article meant to draw attention to the for-profit magazine in which it appears, however, does not fall outside of the protection of the First Amendment because it may help to sell copies.”). We agree. Even if Dr. Novella receives some profit for his quasi-journalistic endeavors as a scientific skeptic, the articles themselves, which never propose a commercial transaction, are not commercial speech simply because extraneous advertisements and links for memberships may generate revenue. *See Va. State Bd. of Pharmacy*, 425 U.S. at 761 (“Speech . . . is protected . . . even though it may involve a solicitation to purchase or otherwise pay or contribute money.”); *see also Burstyn v. Wilson*, 343 U.S. 495, 501 (1952) (“That books, newspapers, and magazines are published and sold for profit does not prevent them from being a form of expression whose liberty is safeguarded by the First Amendment.”). Thus, because the articles are not commercial speech, they cannot be subject to Lanham Act liability as commercial advertising or promotion. Accordingly,

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we need not reach the other elements of a prima facie Lanham Act false advertising action.

**Conclusion**

For all of the reasons stated above, the judgment of the district court is

**AFFIRMED**

ORDER GRANTING DEFENDANT  
DR. STEVEN NOVELLA M.D.'S MOTION  
FOR SUMMARY JUDGMENT  
(SEPTEMBER 30, 2015)

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UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF FLORIDA

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EDWARD LEWIS TOBINICK, MD ET AL,

*Plaintiffs,*

v.

STEVEN NOVELLA, M.D.,

*Defendants.*

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Case No. 9:14-CV-80781 Rosenberg/Brannon

Before: Robin L. ROSENBERG,  
United States District Judge.

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THIS CAUSE comes before the Court on Defendant Dr. Steven Novella M.D.'s Renewed Motion for Summary Judgment [DE 251]. The Court has reviewed the motion, the response [DE 272], the reply [DE 277], and the attached exhibits. The Court has also reviewed the record and is otherwise fully advised in the premises. For the reasons set forth below, the Motion [DE 251] is GRANTED. The speech at issue is not actionable under the Lanham Act because it is not commercial speech, and Plaintiffs' unfair competi-

tion claims fail as well because they rely on a similar theory of liability.

## I. Background

Plaintiffs' Amended Complaint, filed on August 1, 2014, brought five counts against four defendants. *See* DE 55. Many claims and defendants have been disposed of earlier in this litigation. The only remaining claims are: Count I for violation of the Lanham Act, 15 U.S.C. § 1125(a), and Count II for unfair competition.<sup>1</sup> The only remaining Defendant is Dr. Steven Novella, M.D.<sup>2</sup>

Counts I and II of the Amended Complaint are based on two articles written by Defendant Novella and published online at [sciencebasedmedicine.org](http://sciencebasedmedicine.org). DE 55 at ¶¶ 24, 101. Both articles address the practice of Plaintiff Edward Tobinick ("Plaintiff Tobinick"), a doctor who provides medical treatment to patients with "unmet medical needs" via two institutes—"Edward Lewis Tobinick M.D.," a California medical corporation, and "INR PLLC," a Florida professional limited liability company—both doing business as the "Institute of Neurological Recovery" (collectively "Plaintiffs"). DE 55 at ¶¶ 2-4, 12. Novella published

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<sup>1</sup> The Court dismissed Count V on January 23, 2015. *See* DE 117. On June 4, 2015, the Court struck Counts as brought by California Plaintiff Edward Lewis Tobinick, M.D., under California's Anti-SLAPP statute. *See* DE 193 at 16-17. The remaining Plaintiffs then voluntarily dismissed their claims under Counts *See* DE 201-02.

<sup>2</sup> The Court dismissed SGU Productions and Yale University for lack of personal jurisdiction, *see* DE 91-92, and granted the Society for Science-Based Medicine, Inc.'s motion for summary judgment, *see* DE 157.

the first article, “Enbrel for Stroke and Alzheimer’s” (“the First Article”), on May 8, 2013 in response to a piece published in the *Los Angeles Times*. DE 55-1 at 1. As Novella described it,

The [*Times*] story revolves around Dr. Edward Tobinick and his practice of perispinal etanercept (Enbrel) for a long and apparently growing list of conditions. Enbrel is an FDA-approved drug for the treatment of severe rheumatoid arthritis. It works by inhibiting tumor necrosis factor (TNF), which is a group of cytokines that are part of the immune system and cause cell death. Enbrel, therefore, can be a powerful anti-inflammatory drug. Tobinick is using Enbrel for many off-label indications, one of which is Alzheimer’s disease (the focus of the LA Times story).

*Id.* The allegedly false statements in the First Article concern the viability of Plaintiff Tobinick’s treatments, the scientific literature discussing those treatments, the size and locations of Plaintiff Tobinick’s Institutes, and the categorization of Plaintiff Tobinick’s practice as “health fraud.” See DE 55 ¶¶ 54-56, 60-61, 63-64, 69-70, 71-72. Novella published the second article, entitled “Another Lawsuit To Suppress Legitimate Criticism—This Time SBM” (“the Second Article”), on July 23, 2014, after Plaintiffs filed the instant lawsuit. DE 55-5 at 1. In large part, the Second Article simply restates the content of the first. DE 55-1 ¶¶ 102-03. The only statement in the Second Article which Plaintiffs allege is false and misleading is Novella’s statement, as characterized by Plaintiffs, that “there have been no double-blind

placebo-controlled clinical trials of the treatment provided by the Plaintiffs.”<sup>3</sup> *Id.*

## II. Summary Judgment Standard

Summary judgment is appropriate where “the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a). A dispute is genuine if “a reasonable trier of fact could return judgment for the non-moving party.” *Miccosukee Tribe of Indians of Fla. v. United States*, 516 F.3d 1235, 1243 (11th Cir. 2008). A fact is material if “it would affect the outcome of the suit under the governing law.” *Id.*

In deciding a summary judgment motion, the Court views the facts in the light most favorable to the non-moving party and draws all reasonable inferences in that party’s favor. *See Davis v. Williams*, 451 F.3d 759, 763 (11th Cir. 2006). The Court does not weigh conflicting evidence. *See Skop v. City of Atlanta*, 485 F.3d 1130, 1140 (11th Cir. 2007). Thus, upon discovering a genuine dispute of material fact, the Court must deny summary judgment. *See id.*

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<sup>3</sup> In the second article, Novella actually states that “I[Novella] could not find a single double-blind placebo-controlled trial establishing the efficacy of [Tobinick’s] treatment for any of the conditions I listed above. (There are small studies for disc herniation showing conflicting results.)” DE 55-5 at 3 (emphasis added).

### III. Discussion

#### A. The Lanham Act (Count I)

Defendant Novella argues that summary judgment should be granted in his favor on Count I, the Lanham Act claim, because the statements in the First and Second Articles are not commercial speech. *See* DE 251 at 4. The Lanham Act provides in relevant part:

(1) Any person who, on or in connection with any goods or services, or any container for goods, uses in commerce any word, term, name, symbol, or device, or any combination thereof, or any false designation of origin, false or misleading description of fact, or false or misleading representation of fact, which—

[ . . . ]

(B) in commercial advertising or promotion, misrepresents the nature, characteristics, qualities, or geographic origin of his or her or another person's goods, services, or commercial activities,

shall be liable in a civil action by any person who believes that he or she is or is likely to be damaged by such act.

15 U.S.C. § 1125(a)(1)(B) (emphasis added). The Eleventh Circuit has adopted “[t]he most widely-accepted test for determining whether something is ‘commercial advertising or promotion,’” *Suntree*, 693 F.3d at 1349, which was set forth in *Gordon and Breach Science Publishers S.A. v. American Institute of Physics*, 859 F.Supp. 1521 (S.D.N.Y. 1994):

In order for representations to constitute “commercial advertising or promotion” under [15 U.S.C. § 1125(a)(1)(B)], they must be: (1) commercial speech; (2) by a defendant who is in commercial competition with plaintiff; (3) for the purpose of influencing consumers to buy defendant’s goods or services. While the representations need not be made in a “classic advertising campaign,” but may consist instead of more informal types of “promotion,” the representations (4) must be disseminated sufficiently to the relevant purchasing public to constitute “advertising” or “promotion” within that industry.

*Id.* at 1535-36.

Regarding the second prong of this test, the Supreme Court recently ruled that a plaintiff does not need to show defendant was in commercial competition with plaintiff to have standing under the Lanham Act. *See LexMark Intl., Inc. v. Static Control Components, Inc.*, 134 S.Ct. 1377, 1394 (U.S. 2014) (“[W]hen a party claims reputational injury from disparagement, competition is not required for proximate cause; and that is true even if the defendant’s aim was to harm its immediate competitors, and the plaintiff merely suffered collateral damage.”); *see also Educ. Impact, Inc. v. Danielson*, No. CIV 14-937 FLW LHG, 2015 WL 381332, at \*13-14 (D.N.J. Jan. 28, 2015) (defendant’s “assertion that because [defendant] is not in ‘commercial competition with plaintiff’ there can be no violation of the Lanham Act is incorrect” under *Lexmark*). Thus, to the extent the parties dispute whether Plaintiffs and Defendant Novella are competitors, *see* DE 272 at 10 and DE 277 at 3, this

issue is not dispositive of whether the speech at issue constituted “commercial advertising or promotion” within the meaning of 15 U.S.C. § 1125(a)(1)(B).

Regarding the first prong of this test, speech regulated by the Lanham Act “must at least fall within the meaning of ‘commercial speech’ pursuant to First Amendment jurisprudence.” *Suntree Techs., Inc. v. EcoSense Int’l, Inc.*, 802 F.Supp.2d 1273, 1286 (M.D. Fla. 2011) (collecting cases), *aff’d*, 693 F.3d at 1338. This is because the Act “was not intended to apply, and cannot constitutionally be applied, to representations other than those determined to be commercial speech.” *Gordon & Breach*, 859 F.Supp. at 1533. Under the “commercial speech’ doctrine developed by the United States Supreme Court,” commercial speech “is entitled to a lesser degree of protection than other forms of constitutionally guaranteed expression.” *Id.* at 1536.

“Speech that does no more than propose a commercial transaction falls within the core notion of commercial speech, but other communications also may constitute commercial speech notwithstanding the fact that they contain discussions of important public issues[.]” *Jordan v. Jewel Food Stores, Inc.*, 743 F.3d 509, 516 (7th Cir. 2014) (internal citations omitted). In *Central Hudson Gas and Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557, 561 (1980), the Supreme Court described commercial speech as “expression related solely to the economic interests of the speaker and its audience.” In *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60 (1983), which involved informational pamphlets addressing “important public issues such as venereal disease and family planning,” the Supreme Court took an even more nuanced

approach. *Id.* at 68 (internal footnote omitted). In determining whether these pamphlets constituted commercial speech, the Supreme Court found it relevant that the communications were conceded to be advertisements, that they referred to specific products sold by the defendant, and that the defendant had an economic motivation for the speech. *Id.* at 66 & n.13, 67. It was “[t]he combination of all these characteristics” that led the Supreme Court in *Bolger* to conclude that the informational pamphlets constituted commercial speech. *Id.* at 67. Thus, *Bolger* “suggest[s] certain guideposts for classifying speech that contains both commercial and noncommercial elements; relevant considerations include whether: (1) the speech is an advertisement; (2) the speech refers to a specific product; and (3) the speaker has an economic motivation for the speech.” *Jordan*, 743 F.3d at 517; *see, e.g., Kleiner v. First Nat’l Bank of Atlanta*, 751 F.2d 1193, 1203 n.22 (11th Cir. 1985) (relying on *Bolger* and holding, “[t]aken together, the defense of the Bank’s business conduct, the underlying profit motive, and the invitation to opt out branded the telephone canvass as speech of commercial nature).

Considering the above-cited case law, the Court finds that the speech at issue here—that is, the First and Second Articles, published on [www.sciencebasedmedicine.org](http://www.sciencebasedmedicine.org)<sup>4</sup>—is not commercial speech. The Articles

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<sup>4</sup> In their response to Defendant Novella’s summary judgment motion, Plaintiffs argue that other statements made by Novella are “[l]ies and [m]isleading.” DE 272 at 7-9. To the extent Plaintiffs are attempting to argue that statements other than those made in the First and Second Articles are violations of the Lanham Act, this is improper because these statements were not pled in Plaintiffs’ complaint. *See Dantzler, Inc. v. PNC Bank, Nat’l Ass’n*, 946 F.Supp.2d 1344, 1361-62 (S.D. Fla. 2013)

proposed no commercial transaction, and consequently do not fall within the “core notion” of protected speech. *See Bolger*, 463 U.S. at 66. Furthermore, the Articles do not fall within the scope of the definition expounded in *Central Hudson*, “expression related solely to the economic interests of the speaker and its audience.” 447 U.S. at 561. Both articles clearly state their intent to raise public awareness about issues pertaining to Plaintiffs’ treatments.

Thus, the First and Second Articles can only potentially qualify as commercial speech under *Bolger*. Yet the Articles differ from the pamphlets at issue in *Bolger* in a number of ways. First, the Articles are not conceded to be advertisements. Second, the only products referenced in the First Article are Plaintiffs’ treatments. To the extent that the Second Article mentions Defendant Novella’s practice, it is in direct response to the instant litigation as opposed to an independent plug for that practice.

The third and final factor from *Bolger*, whether there was an “economic motivation” for the speech, is the primary basis for Plaintiffs’ opposition to summary judgment. *See* DE 272. Essentially, Plaintiffs contend that the Articles are commercial speech because SGU Productions, a for-profit company controlled by Defendant Novella, earns money by selling advertisements on its website (skepticsguide.net), advertisements in a podcast, memberships, and goods such as t-shirts.

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(a party may not raise a new theory for the first time in response to a summary judgment motion; the proper procedure for a plaintiff is to amend its complaint in accordance with Rule 15(a)). The Court previously denied Plaintiffs’ motions to amend their complaint. *See* DE 202, 245.

See DE 272 at 5; DE 272-1 at ¶ 3. The website on which the Articles were published (sciencebasedmedicine.org) is registered to SGU, although Defendant Novella's brother, Jay Novella, testified the website is actually owned by the New England Skeptical Society ("NESS"), a separate non-profit organization also controlled by the Novellas. DE 261-10 at 1820. Plaintiffs contend that SGU Productions, NESS, and the Articles are all part of an interrelated scheme to "funnel" money to Defendant Novella personally, and that the Articles are commercial speech in furtherance of this scheme. See DE 272 at 4-6, 13.

It is "settled or beyond serious dispute" that "[s]peech . . . is protected even though it is carried in a form that is 'sold' for profit, . . . and even though it may involve a solicitation to purchase or otherwise pay or contribute money." *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 761 (1976) (emphasizing, that "[i]f there is a kind of commercial speech that lacks all First Amendment protection, . . . it must be distinguished by its content."); see also *Maverick Boat Co., Inc. v. Am. Marine Holdings, Inc.*, Case No. 02-14102-CIV, 02-14283-CIV, 2004 WL 1093035 (S.D. Fla. Feb. 10, 2004) ("[T]he Court assumes [the speaker], president and CEO of Maverick Boat Company, a private business enterprise, is also interested in making a profit from his products. The Court finds that this existence of an economic interest alone should not deprive the speech of constitutional protection."). Thus, even if Defendant Novella directly earns money from an organization sponsoring or producing the speech, this alone would not make the speech commercial. Furthermore, the specific evidence elicited in this case regard-

ing SGU does not point to a strong economic motivation for the speech. Although Plaintiffs argue that “[t]he flow of money to Novella . . . is significant, as [Jay] Novella testified to over \$200,000 last year,” DE 272 at 5-6 (citing DE 260-10 at 127-28), Jay Novella also testified that, despite this profit, SGU “made no profit after expenses” because “we reinvest the vast majority of the money back into the company when we have a positive cash flow.” DE 261-10 at 154. Plaintiffs have failed to point the Court to any evidence that Defendant Novella is actually paid a salary or otherwise earns any personal income from SGU. Moreover, Jay Novella testified that the goal of SGU is “to educate people in science and critical thinking,” DE 260-10 at 131-32, 154, which is consistent with the Court’s prior observation that the content of the Articles is directed towards raising public awareness of scientific issues, rather than promoting an economic interest.<sup>5</sup>

The Court therefore finds that Defendant Novella’s speech in the First and Second Articles does not qualify as commercial speech, such that the Articles can form the basis of a Lanham Act claim. Accordingly, Defend-

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<sup>5</sup> While the present motion for summary judgment was pending, the parties filed motions contesting the admissibility of certain evidence cited by Plaintiffs in opposition to summary judgment: namely, audio recordings of Jay Novella discussing SGU’s marketing practices at a conference [DE 283, 287]. To the extent the parties are contesting the evidence’s admissibility in relation to summary judgment, the Court declines to rule on this issue because it finds the evidence duplicative of admissible deposition testimony by Jay Novella regarding SGU’s marketing practices, and otherwise irrelevant. To the extent the parties seek a ruling as to this evidence’s admissibility at trial, this issue is moot due to the grant of summary judgment for Defendant Novella.

ant Novella is entitled to summary judgment on Count I.

## **B. Unfair Competition (Count II)**

“Under Florida common law, unfair competition is an ‘umbrella for all statutory and nonstatutory causes of action arising out of business conduct which is contrary to honest practice in industrial or commercial matters.’” *Ameritox, Ltd. v. Millennium Labs., Inc.*, No. 8:11-CV-775-T-24-TBM, 2012 WL 33155, at \*4 (M.D. Fla. Jan. 6, 2012) (quoting *Third Party Verification, Inc. v. Signaturelink, Inc.*, 492 F.Supp.2d 1314, 1325 (M.D. Fla. 2007)). “[A] party may claim unfair competition under a variety of theories, including trademark infringement, . . . and tortious interference with business relations. . . . Therefore, there is no single set of ‘elements that apply uniformly to all claims of unfair competition.’” *Id.* (quoting *Alphamed Pharm. Corp. v. Arriva Pharm., Inc.*, 432 F.Supp.2d 1319, 1353 (S.D. Fla. 2006)). “Accordingly, courts have applied elements from other established claims to unfair competition claims, where appropriate, on a case-by-case basis.” *Id.*

In their Amended Complaint, Plaintiffs allege that Defendant Novella “published [the Articles], and the false and misleading statements contained therein, in furtherance of promoting his own interests,” that this conduct was “willful and intentional,” and that the statements caused “substantial injury to their goodwill and reputation.” DE 55 at ¶¶ 120, 124-25. Plaintiffs are therefore “bas[ing] [their] common law unfair competition claim on a theory of false advertising.” *Ameritox*, 2012 WL 33155 at \*5. The Court

has evaluated Plaintiffs' common law unfair competition claims through the lens of the Lanham Act, and based on the Court's conclusion that Defendant Novella is entitled to summary judgment on that claim, the Court finds Defendant Novella is likewise entitled to summary judgment on Count II for unfair competition. *See id.*; *Natural Answers, Inc. v. SmithKline Beecham Corp.*, 529 F.3d 1325, 1332-33 (11th Cir. 2008) ("Since Natural Answers is unable to bring an unfair competition claim under the Lanham Act under the theory of either false advertising or trademark infringement, it follows that the common law claims based on unfair competition and trademark infringement must fail as well."); *see also Planetary Motion, Inc. v. Techsplosion, Inc.*, 261 F.3d 1188, 1193 n.4 (11th Cir. 2001) ("Courts may use an analysis of federal infringement claims as a 'measuring stick' in evaluating the merits of state law claims of unfair competition.").

#### IV. Conclusion

For the foregoing reasons, it is hereby ORDERED AND ADJUDGED that Defendant Dr. Steven Novella, M.D.'s Motion for Summary Judgment [DE 251] is GRANTED. All pending motions are DENIED AS MOOT, all deadlines are TERMINATED, and the Clerk of the Court is directed to CLOSE THIS CASE.

DONE AND ORDERED in Chambers, Fort Pierce, Florida, this 30th day of September, 2015.

/s/ Robin L. Rosenberg  
United States District Judge

**ORDER OF THE ELEVENTH CIRCUIT  
DENYING PETITION FOR REHEARING  
(APRIL 6, 2017)**

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IN THE UNITED STATES COURT OF APPEALS  
FOR THE ELEVENTH CIRCUIT

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EDWARD LEWIS TOBINICK, MD, a Medical Corporation, d.b.a. the Institute of Neurological Recovery, INR PLLC, a Florida Professional Limited Liability Company, d.b.a. Institute of Neurological Recovery, M.D. EDWARD TOBINICK, an Individual,

*Plaintiffs–Appellants,*

v.

STEVEN NOVELLA, an Individual,  
SOCIETY FOR SCIENCE-BASED MEDICINE, INC.,  
a Florida Corporation, SGU PRODUCTIONS, LLC,  
a Connecticut limited Liability Company, ET AL.,

*Defendants–Appellees.*

YALE UNIVERSITY,  
a Connecticut Corporation, ET AL.,

*Defendants.*

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No. 15-14889-AA

Appeal from the United States District Court  
for the Southern District of Florida

On Petition(s) for Rehearing and  
Petition(s) for Rehearing En Banc

Before: HULL and MARTIN, Circuit Judges,  
and RESTANI,\* Judge.

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PER CURIAM:

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.

Entered for the Court:

/s/ Frank M. Hull  
United States Circuit Judge

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\* Honorable Jane A. Restani, Judge for the United States Court of International Trade, sitting by designation.

**RELEVANT STATUTORY PROVISIONS  
AND JUDICIAL RULES**

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**15 U.S.C. § 1125**

**False Designations of Origin,  
False Descriptions, and Dilution Forbidden**

**(a) Civil action**

(1) Any person who, on or in connection with any goods or services, or any container for goods, uses in commerce any word, term, name, symbol, or device, or any combination thereof, or any false designation of origin, false or misleading description of fact, or false or misleading representation of fact, which—

(A) is likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection, or association of such person with another person, or as to the origin, sponsorship, or approval of his or her goods, services, or commercial activities by another person, or

(B) in commercial advertising or promotion, misrepresents the nature, characteristics, qualities, or geographic origin of his or her or another person's goods, services, or commercial activities,

shall be liable in a civil action by any person who believes that he or she is or is likely to be damaged by such act.

(2) As used in this subsection, the term “any person” includes any State, instrumentality of a State or employee of a State or instrumentality of a State acting in his or her official capacity. Any State, and

any such instrumentality, officer, or employee, shall be subject to the provisions of this chapter in the same manner and to the same extent as any nongovernmental entity.

(3) In a civil action for trade dress infringement under this chapter for trade dress not registered on the principal register, the person who asserts trade dress protection has the burden of proving that the matter sought to be protected is not functional.

**(b) Importation**

Any goods marked or labeled in contravention of the provisions of this section shall not be imported into the United States or admitted to entry at any customhouse of the United States. The owner, importer, or consignee of goods refused entry at any customhouse under this section may have any recourse by protest or appeal that is given under the customs revenue laws or may have the remedy given by this chapter in cases involving goods refused entry or seized.

**(c) Dilution by Blurring; Dilution by Tarnishment**

**(1) Injunctive Relief**

Subject to the principles of equity, the owner of a famous mark that is distinctive, inherently or through acquired distinctiveness, shall be entitled to an injunction against another person who, at any time after the owner's mark has become famous, commences use of a mark or trade name in commerce that is likely to cause dilution by blurring or dilution by tarnishment of the famous mark, regardless of the presence or absence of

actual or likely confusion, of competition, or of actual economic injury.

**(2) Definitions**

(A) For purposes of paragraph (1), a mark is famous if it is widely recognized by the general consuming public of the United States as a designation of source of the goods or services of the mark's owner. In determining whether a mark possesses the requisite degree of recognition, the court may consider all relevant factors, including the following:

- (i) The duration, extent, and geographic reach of advertising and publicity of the mark, whether advertised or publicized by the owner or third parties.
- (ii) The amount, volume, and geographic extent of sales of goods or services offered under the mark.
- (iii) The extent of actual recognition of the mark.
- (iv) Whether the mark was registered under the Act of March 3, 1881, or the Act of February 20, 1905, or on the principal register.

(B) For purposes of paragraph (1), "dilution by blurring" is association arising from the similarity between a mark or trade name and a famous mark that impairs the distinctiveness of the famous mark. In determining whether a mark or trade name is likely to cause dilution by blurring, the court may consider all relevant factors, including the following:

- (i) The degree of similarity between the mark or trade name and the famous mark.
  - (ii) The degree of inherent or acquired distinctiveness of the famous mark.
  - (iii) The extent to which the owner of the famous mark is engaging in substantially exclusive use of the mark.
  - (iv) The degree of recognition of the famous mark.
  - (v) Whether the user of the mark or trade name intended to create an association with the famous mark.
  - (vi) Any actual association between the mark or trade name and the famous mark.
- (C) For purposes of paragraph (1), “dilution by tarnishment” is association arising from the similarity between a mark or trade name and a famous mark that harms the reputation of the famous mark.

### **(3) Exclusions**

The following shall not be actionable as dilution by blurring or dilution by tarnishment under this subsection:

- (A) Any fair use, including a nominative or descriptive fair use, or facilitation of such fair use, of a famous mark by another person other than as a designation of source for the person’s own goods or services, including use in connection with—

- (i) advertising or promotion that permits consumers to compare goods or services; or
  - (ii) identifying and parodying, criticizing, or commenting upon the famous mark owner or the goods or services of the famous mark owner.
- (B) All forms of news reporting and news commentary.
- (C) Any noncommercial use of a mark.

#### **(4) Burden of Proof**

In a civil action for trade dress dilution under this chapter for trade dress not registered on the principal register, the person who asserts trade dress protection has the burden of proving that—

- (A) the claimed trade dress, taken as a whole, is not functional and is famous; and
- (B) if the claimed trade dress includes any mark or marks registered on the principal register, the unregistered matter, taken as a whole, is famous separate and apart from any fame of such registered marks.

#### **(5) Additional Remedies**

In an action brought under this subsection, the owner of the famous mark shall be entitled to injunctive relief as set forth in section 1116 of this title. The owner of the famous mark shall also be entitled to the remedies set forth in sections 1117(a) and 1118 of this title, subject to the discretion of the court and the principles of equity if—

- (A) the mark or trade name that is likely to cause dilution by blurring or dilution by tarnishment was first used in commerce by the person against whom the injunction is sought after October 6, 2006; and
- (B) in a claim arising under this subsection—
  - (i) by reason of dilution by blurring, the person against whom the injunction is sought willfully intended to trade on the recognition of the famous mark; or
  - (ii) by reason of dilution by tarnishment, the person against whom the injunction is sought willfully intended to harm the reputation of the famous mark.

**(6) Ownership of Valid Registration a Complete Bar to Action**

The ownership by a person of a valid registration under the Act of March 3, 1881, or the Act of February 20, 1905, or on the principal register under this chapter shall be a complete bar to an action against that person, with respect to that mark, that—

- (A) is brought by another person under the common law or a statute of a State; and
- (B)
  - (i) seeks to prevent dilution by blurring or dilution by tarnishment; or
  - (ii) asserts any claim of actual or likely damage or harm to the distinctiveness or reputation of a mark, label, or form of advertisement.

**(7) Savings Clause**

Nothing in this subsection shall be construed to impair, modify, or supersede the applicability of the patent laws of the United States.

**(d) Cyberpiracy Prevention**

(1)

(A) A person shall be liable in a civil action by the owner of a mark, including a personal name which is protected as a mark under this section, if, without regard to the goods or services of the parties, that person—

(i) has a bad faith intent to profit from that mark, including a personal name which is protected as a mark under this section; and

(ii) registers, traffics in, or uses a domain name that—

(I) in the case of a mark that is distinctive at the time of registration of the domain name, is identical or confusingly similar to that mark;

(II) in the case of a famous mark that is famous at the time of registration of the domain name, is identical or confusingly similar to or dilutive of that mark; or

(III) is a trademark, word, or name protected by reason of section 706 of Title 18 or section 220506 of Title 36.

(B)

(i) In determining whether a person has a bad faith intent described under subparagraph

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- (A), a court may consider factors such as, but not limited to—
- (I) the trademark or other intellectual property rights of the person, if any, in the domain name;
  - (II) the extent to which the domain name consists of the legal name of the person or a name that is otherwise commonly used to identify that person;
  - (III) the person's prior use, if any, of the domain name in connection with the bona fide offering of any goods or services;
  - (IV) the person's bona fide noncommercial or fair use of the mark in a site accessible under the domain name;
  - (V) the person's intent to divert consumers from the mark owner's online location to a site accessible under the domain name that could harm the goodwill represented by the mark, either for commercial gain or with the intent to tarnish or disparage the mark, by creating a likelihood of confusion as to the source, sponsorship, affiliation, or endorsement of the site;
  - (VI) the person's offer to transfer, sell, or otherwise assign the domain name to the mark owner or any third party for financial gain without having used, or having an intent to use, the domain name in the bona fide offering of any goods or

services, or the person's prior conduct indicating a pattern of such conduct;

(VII) the person's provision of material and misleading false contact information when applying for the registration of the domain name, the person's intentional failure to maintain accurate contact information, or the person's prior conduct indicating a pattern of such conduct;

(VIII) the person's registration or acquisition of multiple domain names which the person knows are identical or confusingly similar to marks of others that are distinctive at the time of registration of such domain names, or dilutive of famous marks of others that are famous at the time of registration of such domain names, without regard to the goods or services of the parties; and

(IX) the extent to which the mark incorporated in the person's domain name registration is or is not distinctive and famous within the meaning of subsection (c).

(ii) Bad faith intent described under subparagraph (A) shall not be found in any case in which the court determines that the person believed and had reasonable grounds to believe that the use of the domain name was a fair use or otherwise lawful.

(C) In any civil action involving the registration, trafficking, or use of a domain name under this paragraph, a court may order the forfeiture or cancellation of the domain name or the transfer of the domain name to the owner of the mark.

(D) A person shall be liable for using a domain name under subparagraph (A) only if that person is the domain name registrant or that registrant's authorized licensee.

(E) As used in this paragraph, the term "traffics in" refers to transactions that include, but are not limited to, sales, purchases, loans, pledges, licenses, exchanges of currency, and any other transfer for consideration or receipt in exchange for consideration.

(2)

(A) The owner of a mark may file an in rem civil action against a domain name in the judicial district in which the domain name registrar, domain name registry, or other domain name authority that registered or assigned the domain name is located if—

(i) the domain name violates any right of the owner of a mark registered in the Patent and Trademark Office, or protected under subsection (a) or (c); and

(ii) the court finds that the owner—

(I) is not able to obtain in personam jurisdiction over a person who would have been a defendant in a civil action under paragraph (1); or

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(II) through due diligence was not able to find a person who would have been a defendant in a civil action under paragraph (1) by—

(aa) sending a notice of the alleged violation and intent to proceed under this paragraph to the registrant of the domain name at the postal and e-mail address provided by the registrant to the registrar; and

(bb) publishing notice of the action as the court may direct promptly after filing the action.

(B) The actions under subparagraph (A)(ii) shall constitute service of process.

(C) In an in rem action under this paragraph, a domain name shall be deemed to have its situs in the judicial district in which—

(i) the domain name registrar, registry, or other domain name authority that registered or assigned the domain name is located; or

(ii) documents sufficient to establish control and authority regarding the disposition of the registration and use of the domain name are deposited with the court.

(D)

(i) The remedies in an in rem action under this paragraph shall be limited to a court order for the forfeiture or cancellation of the domain name or the transfer of the domain name to the owner of the mark. Upon receipt

of written notification of a filed, stamped copy of a complaint filed by the owner of a mark in a United States district court under this paragraph, the domain name registrar, domain name registry, or other domain name authority shall—

- (I) expeditiously deposit with the court documents sufficient to establish the court's control and authority regarding the disposition of the registration and use of the domain name to the court; and
- (II) not transfer, suspend, or otherwise modify the domain name during the pendency of the action, except upon order of the court.

(ii) The domain name registrar or registry or other domain name authority shall not be liable for injunctive or monetary relief under this paragraph except in the case of bad faith or reckless disregard, which includes a willful failure to comply with any such court order.

(3) The civil action established under paragraph (1) and the in rem action established under paragraph (2), and any remedy available under either such action, shall be in addition to any other civil action or remedy otherwise applicable.

(4) The in rem jurisdiction established under paragraph (2) shall be in addition to any other jurisdiction that otherwise exists, whether in rem or in personam.

**California Code of Civil Procedure—CCP § 425.16**

(a) The Legislature finds and declares that there has been a disturbing increase in lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances. The Legislature finds and declares that it is in the public interest to encourage continued participation in matters of public significance, and that this participation should not be chilled through abuse of the judicial process. To this end, this section shall be construed broadly.

(b)

- (1) A cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech under the United States Constitution or the California Constitution in connection with a public issue shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim.
- (2) In making its determination, the court shall consider the pleadings, and supporting and opposing affidavits stating the facts upon which the liability or defense is based.
- (3) If the court determines that the plaintiff has established a probability that he or she will prevail on the claim, neither that determination nor the fact of that determination shall be admissible in evidence at any later stage of the case, or in any subse-

quent action, and no burden of proof or degree of proof otherwise applicable shall be affected by that determination in any later stage of the case or in any subsequent proceeding.

(c)

(1) Except as provided in paragraph (2), in any action subject to subdivision (b), a prevailing defendant on a special motion to strike shall be entitled to recover his or her attorney's fees and costs. If the court finds that a special motion to strike is frivolous or is solely intended to cause unnecessary delay, the court shall award costs and reasonable attorney's fees to a plaintiff prevailing on the motion, pursuant to Section 128.5.

(2) A defendant who prevails on a special motion to strike in an action subject to paragraph (1) shall not be entitled to attorney's fees and costs if that cause of action is brought pursuant to Section 6259, 11130, 11130.3, 54960, or 54960.1 of the Government Code. Nothing in this paragraph shall be construed to prevent a prevailing defendant from recovering attorney's fees and costs pursuant to subdivision (d) of Section 6259, or Section 11130.5 or 54960.5, of the Government Code.

(d) This section shall not apply to any enforcement action brought in the name of the people of the State of California by the Attorney General, district attorney, or city attorney, acting as a public prosecutor.

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(e) As used in this section, “act in furtherance of a person’s right of petition or free speech under the United States or California Constitution in connection with a public issue” includes: (1) any written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law, (2) any written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law, (3) any written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest, or (4) any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest.

(f) The special motion may be filed within 60 days of the service of the complaint or, in the court’s discretion, at any later time upon terms it deems proper. The motion shall be scheduled by the clerk of the court for a hearing not more than 30 days after the service of the motion unless the docket conditions of the court require a later hearing.

(g) All discovery proceedings in the action shall be stayed upon the filing of a notice of motion made pursuant to this section. The stay of discovery shall remain in effect until notice of entry of the order ruling on the motion. The court, on noticed motion and for good cause shown, may

order that specified discovery be conducted notwithstanding this subdivision.

(h) For purposes of this section, “complaint” includes “cross-complaint” and “petition,” “plaintiff” includes “cross-complainant” and “petitioner,” and “defendant” includes “cross-defendant” and “respondent.”

(i) An order granting or denying a special motion to strike shall be appealable under Section 904.1.

(j)

(1) Any party who files a special motion to strike pursuant to this section, and any party who files an opposition to a special motion to strike, shall, promptly upon so filing, transmit to the Judicial Council, by e-mail or facsimile, a copy of the endorsed, filed caption page of the motion or opposition, a copy of any related notice of appeal or petition for a writ, and a conformed copy of any order issued pursuant to this section, including any order granting or denying a special motion to strike, discovery, or fees.

(2) The Judicial Council shall maintain a public record of information transmitted pursuant to this subdivision for at least three years, and may store the information on microfilm or other appropriate electronic media.

**Fed. R. Civ. P. 56—Summary Judgment**

**(a) Motion for Summary Judgment or Partial Summary Judgment**

A party may move for summary judgment, identifying each claim or defense—or the part of each claim or defense—on which summary judgment is sought. The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. The court should state on the record the reasons for granting or denying the motion.

**(b) Time to File a Motion**

Unless a different time is set by local rule or the court orders otherwise, a party may file a motion for summary judgment at any time until 30 days after the close of all discovery.

**(c) Procedures**

**(1) Supporting Factual Positions**

A party asserting that a fact cannot be or is genuinely disputed must support the assertion by:

- (A) citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials; or

(B) showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact.

**(2) Objection That a Fact Is Not Supported by Admissible Evidence**

A party may object that the material cited to support or dispute a fact cannot be presented in a form that would be admissible in evidence.

**(3) Materials Not Cited**

The court need consider only the cited materials, but it may consider other materials in the record.

**(4) Affidavits or Declarations**

An affidavit or declaration used to support or oppose a motion must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant or declarant is competent to testify on the matters stated.

**(d) When Facts Are Unavailable to the nonmovant**

If a nonmovant shows by affidavit or declaration that, for specified reasons, it cannot present facts essential to justify its opposition, the court may:

- (1) defer considering the motion or deny it;
- (2) allow time to obtain affidavits or declarations or to take discovery; or
- (3) issue any other appropriate order.

**(e) Failing to Properly Support or Address a Fact**

If a party fails to properly support an assertion of fact or fails to properly address another party's assertion of fact as required by Rule 56(c), the court may:

- (1) give an opportunity to properly support or address the fact;
- (2) consider the fact undisputed for purposes of the motion;
- (3) grant summary judgment if the motion and supporting materials-including the facts considered undisputed-show that the movant is entitled to it; or
- (4) issue any other appropriate order.

**(f) Judgment Independent of the Motion**

After giving notice and a reasonable time to respond, the court may:

- (1) grant summary judgment for a nonmovant;
- (2) grant the motion on grounds not raised by a party; or
- (3) consider summary judgment on its own after identifying for the parties material facts that may not be genuinely in dispute.

**(g) Failing to Grant All the Requested Relief**

If the court does not grant all the relief requested by the motion, it may enter an order stating any material fact-including an item of damages or other relief-that is not genuinely in dispute and treating the fact as established in the case.

**(h) Affidavit or Declaration Submitted in Bad Faith**

If satisfied that an affidavit or declaration under this rule is submitted in bad faith or solely for delay, the court-after notice and a reasonable time to respond-may order the submitting party to pay the other party the reasonable expenses, including attorney's fees, it incurred as a result. An offending party or attorney may also be held in contempt or subjected to other appropriate sanctions.

**STIPULATION REGARDING  
INJUNCTION HEARING  
(FEBRUARY 4, 2015)**

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UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF FLORIDA  
WEST PALM BEACH

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EDWARD LEWIS TOBINICK, M.D., a Medical Corporation d/b/a The Institute of Neurological Recovery, a California Medical Corporation; INR PLLC d/b/a Institute of Neurological Recovery, a Florida Professional Limited Liability Company; and EDWARD TOBINICK, M.D., an Individual,

*Plaintiffs,*

v.

STEVEN NOVELLA, M.D., an Individual; YALE UNIVERSITY, a Connecticut Corporation; SGU PRODUCTIONS, LLC, a Connecticut Limited Liability Company; and SOCIETY FOR SCIENCE-BASED MEDICINE, INC., a Florida Corporation,

*Defendants.*

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Case No. 14-CV-80781-RLR

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Following the January 28, 2015 status conference, and pursuant to the Court's January 29, 2015 Scheduling Order (DE 128), the Parties hereby stipulate to the following regarding the Plaintiffs' Verified Mo-

tion for Temporary and Preliminary Injunctive Relief (DE 6) (the “Motion for Preliminary Injunction”):

1. The following internet postings are at issue in the Motion for Preliminary Injunction (collectively, the “Postings”):

- May 8, 2013 posting entitled “Enbrel for Stroke and Alzheimer’s” at [www.sciencebasedmedicine.org](http://www.sciencebasedmedicine.org) (as identified in the Plaintiffs Amended Complaint (DE 55));
- July 23, 2014 posting entitled “Another Lawsuit to Suppress Legitimate Criticism—This Time SBM” at [www.sciencebasedmedicine.org](http://www.sciencebasedmedicine.org) (as identified in the Plaintiffs Amended Complaint (DE 55));
- July 26, 2014, podcast published (and playable or downloadable) at <http://www.theskepticsguide.org/podcast/sgu/472> (identified as “Podcast 472” in the Plaintiffs October 16, 2014 Affidavit in support of Plaintiffs Opposition to Defendant Steven Novella M.D.’s Motion to Strike (Anti-SLAPP Motion) (DE 105-1)); and
- Any webpage(s) authored and/or published by any Defendant and/or under the control of any Defendant, that republishes or reprints in any way all or any portion of any of the postings listed above.

2. The Postings are authored by the individuals as indicated therein. There is no dispute regarding the authenticity of the Postings listed above dated May 8, 2013, July 23, 2014 and July 26, 2014, and those specific items are admissible in connection with the hearing on the Motion for Injunction. The Parties

reserve their objections to authenticity, relevance and admissibility as to any other webpage(s) that may be utilized by any Party.

3. The scope of the Court's ruling on the Motion for Injunction shall include the Postings.

4. Except as specifically stated to the contrary herein, the Parties retain all rights and/or defenses relative to the Postings and related issues in connection with the Motion for Injunction.

Respectfully submitted,

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Dated: February 4, 2015

**TRANSCRIPT OF ORAL ARGUMENT,  
RELEVANT EXCERPTS  
(JANUARY 26, 2017)**

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IN THE UNITED STATES COURT OF APPEALS  
FOR THE ELEVENTH CIRCUIT

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EDWARD LEWIS TOBINICK, MD, a Medical Corporation, d/b/a the Institute of Neurological Recovery, INR PLLC, a Florida Professional Limited Liability Company, d/b/a Institute of Neurological Recovery, M.D. EDWARD TOBINICK, an Individual,

*Plaintiffs–Appellants,*

v.

STEVEN NOVELLA, an Individual,  
SOCIETY FOR SCIENCE-BASED MEDICINE, INC.,  
a Florida Corporation, SGU PRODUCTIONS, LLC,  
a Connecticut limited Liability Company, ET AL.,

*Defendants–Appellees.*

YALE UNIVERSITY,  
a Connecticut Corporation, ET AL.,

*Defendants.*

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No. 15-14889

D.C. Docket No. 9:14-cv-80781-RLR

Before: Hon. Frank HULL, Hon. Beverly MARTIN,  
and Hon. Jane RESTANI, Judges

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*[January 26, 2017 Transcript, p.3]*

(The following RECORDED proceedings were had):

COUNSEL FOR PETITIONERS, MR. O'BRIEN:

Good morning, Your Honors. May it please the Court, we're here today because the District Court committed fundamental errors in excluding record evidence.

The Plaintiffs did not get their day in court.

The District Court was required to consider the full context of Dr. Novella's false, misleading and deceptive factual attacks that were designed with the dual purpose of vilifying the Plaintiffs in obtaining paid members and selling merchandise for him.

The District Court did not take into account this full context.

As we see in the record, Docket No. 272-26, Dr. Novella clearly "uses Facebook as the top of our funnel to drive people all the way to becoming SGU members."

Docket No. 272-27 is an example of the Facebook posting that's designed to garner membership in its for-profit entity.

The District Court was also required to consider the secondary promotional uses of Dr. Novella's false attacks, including Dr. Novella's goals of hurting Plaintiffs' competing business, funneling money to his for-profit entity—

[ . . . ]

THE COURT: I'm talking about patients. I'm not talking about funding.

MR. O'BRIEN: Well, Your Honor, they both—Dr. Novella's a neurologist. Dr. Novella treats patients—

THE COURT: No, I understand the facts. I just wanted to know where you made the argument about competing for patients in your opening brief.

MR. O'BRIEN: Okay. Just Dr.—the Plaintiffs get the same types of patients that Dr. Novella sees from New England. There are people from New England who utilize Plaintiffs' services. They pull patients from the same geographical location. I don't have the cite on the brief, but I—I will get that for you.

THE COURT: And really what I'm talking about that you argue that his motivation for doing the blog was to get patients from your – from your client but that's—

MR. O'BRIEN: That's one of the motivations. There's many motivations. One was to get money for himself.

THE COURT: I mean I hear you. I just—when you come back, you can tell me where that is in your brief.

MR. O'BRIEN: Absolutely, Your Honor. This is—this is a turf war. This is a medical turf war. You have dog — dogmatists who were neurologists and you have Plaintiffs who have a patented treatment for treating the conditions that neurologists treat. Neurologists use off-label treatments. For example, there's record evidence that Dr. Novella uses Neurontin to treat patients. Dr. Tobinick

and the Plaintiffs use Etanercept. They're both off-label treatments to treat the same neurological dysfunctions.

[ . . . ]

THE COURT: Sorry.

MR. O'BRIEN: No problem. I just want to be clear for the record because Dr. Novella filed two different motions to dismiss.

THE COURT: And did he raise Erie in one of them?

MR. O'BRIEN: In response to that motion, we did not raise Erie. But the District Court—

THE COURT: Now in any of his responses before the District Court did he raise Erie?

MR. O'BRIEN: My clients are [sic]—Dr. Novella?

THE COURT: Your—your clients?

MR. O'BRIEN: My clients, I don't believe so.

But the hearing that was held preliminarily on the anti-SLAPP—

THE COURT: Right.

MR. O'BRIEN: —motion which is Docket No.—

THE COURT: Which would be the logical place to raise the Erie issue.

MR. O'BRIEN: But, Your Honor, the hearing was held in 2014, in November of 2014. Since that hearing, more cases came out, including the Intercon case. And regardless, the District Court has a footnote in her order where she specifically talks about the Erie problem. She considered the Erie problem and said there is no Erie problem.

THE COURT: Well, the problem is there was a concession before the District Court on that Erie wasn't—that it wasn't a problem.

MR. O'BRIEN: Well, it wasn't—it was—it was a concession at that time. There's new law. It was fundamental error.

THE COURT: Well, did you go back after this new law came in and say—ir [sic] did the new law come in after the case was already before the Court of Appeals or did it come before the case was before the Court of Appeals?

MR. O'BRIEN: The Intercon case came before this case was before the Court of Appeals. We didn't—

THE COURT: You didn't go back to the District Court?

MR. O'BRIEN: Correct, we did not. But what we—but we didn't know is that how bad it would affect summary judgment. Because the anti-SLAPP procedure infected everything.

And so had we known it would have infected summary judgment, we would have made an Erie question at summary judgment.

We did not believe that it would infect summary judgment.

Here's how it infected it.

We tried to amend. We tried to amend this complaint consistent with the scheduling order. We tried to amend to include these additional attacks that kept coming up during the case.

A couple weeks later, the District Court issued the anti-SLAPP ruling.

Then a couple weeks after that, the District Court said I'm not going to give you leave to amend because it essentially resets the case in light of the anti-SLAPP order.

So we move for leave to amend, which would've mooted, which would've completely mooted, completely mooted the anti-SLAPP issue.

The District Court issued an anti-SLAPP order and then didn't allow us to amend because of that order.

It got even worse on summary judgment.

The Court cited back to the anti-SLAPP order and the denial of leave to amend to exclude record evidence.

The District Court literally excluded record evidence.

The statements in podcast 472, the statements in the update page, the manner in which Dr. Novella was using the SGU website as a commercial window, a funnel, took it out of the case.

I didn't get any leave to amend. Anti-SLAPP comes in, I'm not going to let you amend because of my anti-SLAPP order. I think that is—we didn't know that that was going to happen. That is by definition an Erie problem. Rule 15, leave to amend freely given.

Dr. Novella didn't even—hadn't even answered. Had not even answered at the time that we asked

for a leave to amend, hadn't even answered at the time that leave to amend was denied.

We move for leave to amend in the time of the scheduling order. There was no finding of futility. There was no finding of prejudice. It was literally it will essentially reset the case. I just issued this anti-SLAPP order. I'm not going to give you leave to amend.

So had we known that that was going to happen, we would have handled it differently.

But more cases came out, Your Honor, on anti-SLAPP. The 9th Circuit's case came out during—during the pendency of this appeal.

[ . . . ]

The whole point of the civil system is that the evidence that comes into the case is before the Court.

We're dealing with the Lanham Act case, full context. You're not supposed to look at the you're not supposed to look at the face in parts.

You're not supposed to look at the ear separately from the nose, just to look at the face in full context.

We had record evidence right here that the District Court just assumed out of the case and then said it's not commercial speech because I'm only going to consider the first. two attacks, not the full context.

What it does is incentivizes people who are attacking businesses, to wait until the amended complaint is done and then start attacking and

then well, it doesn't matter because those attacks won't be part of the case.

So we can just keep attacking and attacking and attacking. It's not going to be part of the full context. It wasn't around at the time of the amended complaint.

That's fundamentally unfair.

[ . . . ]

THE COURT: There is a question pending for plaintiff about where in your opening brief it said that Dr. Novella was competing for patients with Dr. Tobinick.

I think that question is hanging out there.

THE COURT: Yeah.

And specifically his motivation for doing the blogs was to compete for patients, so thank you.

[ . . . ]

THE COURT: Can I just follow up with you on that?

So when I asked your colleague, I believe on that side of the courtroom, what was the 11th Circuit test for commercial speech, I think he said the case from the Southern District of New York, which I took to mean the wrestling case.

And you're saying that that case is not good law or it's not in keeping with the Supreme Court's precedent.

COUNSEL FOR AMICUS CURIAE, MR. VOLOKH:  
Yes, Your Honor.

It's confusing. There are two Southern Districts.

THE COURT: Okay.

MR. VOLOKH: I believe he was referring to Gordon and Breach because I believe he was referring to the Suntree case where this circuit—

THE COURT: Okay.

MR. VOLOKH: —had specifically endorsed the Gordon and Breach test.

[ . . . ]

THE COURT: Okay. And you're talking about Suntree Techs—

MR. VOLOKH: Exactly.

THE COURT: —adopted Gordon and Breach. And Suntree Techs was 2012, and Gordon and Breach was Southern District 1994.

MR. VOLOKH: Yes, Your Honor.

At page 1349 Suntree Tech—

THE COURT: Yeah.

MR. VOLOKH: —says the most widely accepted test for determining as set forth in Gordon and Breach—

THE COURT: Right.

MR. VOLOKH: And then proceeds to—

THE COURT: To set forth the test.

MR. VOLOKH: Yes, Your Honor. So we view that—

THE COURT: The first prong of Gordon and Breach is commercial speech?

[ . . . ]

THE COURT: Where the representations must be commercial speech by defendant who is in commercial competition with the Plaintiff.

MR. VOLOKH: Yes, Your Honor. Those are some elements that are required, but those by themselves are not sufficient for that.

THE COURT: Right. I realize, but I'm not even sure they are met here.

Speech by a defendant who is in commercial competition with the Plaintiff for the purpose—I'm quoting from 1349.

MR. VOLOKH: Uh-huh.

THE COURT: —for the purposes of influencing customers to buy the defendant's goods.

I don't know how this is trying to get them to buy Dr. Novella versus the Plaintiff.

MR. VOLOKH: Your Honor, I agree—I agree entirely.

And on top of that, there is also the commercial speech element we think is not met.

THE COURT: Well, that's the first element.

MR. VOLOKH: Right.

THE COURT: But even if it is, it's still got to be for the purpose of influencing consumers to buy the defendant's goods.

I don't know whether that's the right test or the wrong test, but that's the test this court adopted in *Suntree*.

MR. VOLOKH: Your Honor, we agree entirely.

THE COURT: Right.

MR. VOLOKH: And we think this is a test that would lead to the conclusion that this speech is not actionable under the Lanham Act.

THE COURT: Right.

THE COURT: You think that's our test and you think that's the right test.

MR. VOLOKH: Yes, we do.

THE COURT: Okay.

Thank you.

[ . . . ]

THE COURT: I have a question.

Your page 40, it says that Novella was trying to make money by his blog or his post. He's an actual competitor because he treats people for stroke, back pain and sciatica and Alzheimer's disease.

That sentence, that's it?

He's an actual competitor?

MR. O'BRIEN: Yes.

THE COURT: And he treats those people?

MR. O'BRIEN: Yes.

THE COURT: Okay.

MR. O'BRIEN: He prescribes off label treatments.

THE COURT: Okay.

So you're saying—

MR. O'BRIEN: And they both solicit patients from the same geographical area.

THE COURT: And this was to get his—get Dr. Tobinick's patients away from him and to Dr. Novella?

MR. O'BRIEN: Well, yes.

THE COURT: Okay.

MR. O'BRIEN: I would refer you to the expert report, Professor Glassman, Docket No. 272-22.

He talks about the way that a patient, when they go to the Internet and they see these attacks, what it makes them think about the Plaintiffs.

He's also promoting consumer choice on this legal defense page. This is what we do so that consumers can make informed decisions.

He's specifically stating that the whole point of this is to drive consumers away from the Plaintiffs.

There's a comment. There's a comment.

THE COURT: It has to be to drive them away from Plaintiffs and to get them for himself.

MR. O'BRIEN: It doesn't have to be. I think it would be a very bad rule of law to say you know what, unless you're a competitor, we don't care whether what you're saying is false.

I think that's not a good rule of law because you would have businesses that would not know how to exist because you'd have false statements all up and down the Internet.

Oh, hey, they're not a competitor. They don't sell Coca-Cola products, they can say any false statements they want.