15-14889

United States Court of Appeals
for the
Eleventh Circuit

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,

– against –

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.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA
CASE NO. 9:14-cv-80781-RLR

BRIEF FOR *AMICI CURIAE* THE ASSOCIATION OF AMERICAN PUBLISHERS, INC., THE AMERICAN BOOKSELLERS FOR FREE EXPRESSION, COMIC BOOK LEGAL DEFENSE FUND, THE FREEDOM TO READ FOUNDATION, AND MEDIA COALITION FOUNDATION IN SUPPORT OF DEFENDANTS-APPELLEES

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CERTIFICATE OF INTERESTED PERSONS

Pursuant to 11th Cir. R. 26.1 and 28.1(b), I hereby certify that the following persons constitute a complete list of the trial judge(s), all attorneys, persons, associations of persons, firms, partnerships, or corporations that have an interest in the outcome of the particular case or appeal, including subsidiaries, conglomerates, affiliates and parent corporations, including any publicly held corporation that owns 10% or more of the party's stock, and other identifiable legal entities related to a party:

1. The Association of American Publishers, Inc. – a non-profit organization and Amicus Curiae.
2. The American Booksellers for Free Expression – a not-for-profit organization and Amicus Curiae.
3. Babbin, Jeffrey R. – trial counsel for Yale University, Defendant.
4. Bloom, Jonathan – counsel for Amici Curiae Association of American Publishers, Inc., et al.
5. Bona, Jarod – trial counsel for Edward Tobinick, M.D., an individual, 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, Appellants.

6. Bona Law, PC – trial counsel for Edward Tobinick, M.D., an individual, 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, Appellants.

7. Cahen, Geoffrey Michael – trial counsel for Edward Tobinick, M.D., an individual, 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, Appellants.

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9. Cole, Scott A. – counsel for Society for Science-Based Medicine Inc., Appellee.

10. Cole, Scott & Kissane, P.A. – counsel for Society for Science-Based Medicine Inc., Appellee.

11. The Comic Book Legal Defense Fund – a non-profit organization and Amicus Curiae.

12. Cullin O'Brien Law, P.A. – trial and appellate counsel for Edward Tobinick, M.D., an individual, 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, Appellants.

13. Doroghazi, John M. – trial counsel for Yale University, Defendant.

14. Fischer, Jason Allan – trial counsel for Steven Novella, M.D., an individual, Appellee.

15. The Freedom to Read Foundation – a non-profit organization and Amicus Curiae.

16. Gott, Aaron – trial counsel for Edward Tobinick, M.D., an individual, 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, Appellants.

17. INR PLLC d/b/a Institute of Neurological Recovery, a Florida professional limited liability company, Appellant.

18. Kain Spielman, P.A. trial counsel for SGU Productions, LLC a Connecticut limited liability company, Appellee.

19. Media Coalition Foundation – a not-for-profit corporation and Amicus Curiae.

20. Novella, Steven, M.D., an individual, Appellee.

21. O'Brien, Cullin Avram – trial counsel and appellant counsel for Edward Tobinick, M.D., an individual, 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, Appellants.

22. Polk, Edward Samuel – trial counsel for Society for Science-Based Medicine, Inc., Appellee.

23. Randazza, Marc J. – trial counsel for Steven Novella, M.D., Appellee.

24. Randazza Legal Group, PLLC - trial counsel for Steven Novella, M.D., Appellee.

25. Rich, R. Bruce – counsel for Amici Curiae Association of American Publishers, Inc., et al.

26. SGU Productions, LLC, a Connecticut corporation, Appellee.

27. Society for Science-Based Medicine, Inc. a Florida corporation,

Appellee.

28. Spielman, Darren Joel – trial counsel for SGU Productions, LLC a Connecticut limited liability company, Appellee.

29. The Honorable Robin L. Rosenberg, United States District Court Judge.

30. The Honorable Dave Lee Brannon, United States District Court Magistrate Judge.

31. The Institute of Neurological Recovery, a California Medical Corporation, Appellant.

32. Tobinick, Edward, M.D., an individual, Appellant.

33. Tobinick, Edward Lewis, M.D., a Medical Corporation d/b/a The Institute of Neurological Recovery, a California Medical Corporation, Appellant.

34. Weil, Gotshal & Manges LLP – counsel for Amici Curiae Association of American Publishers, Inc., et al.

35. Wiggin and Dana, LLP – trial counsel for Yale University, Defendant.

36. Wolman, Jay Marshall – trial counsel for Steven Novella, M.D., Appellant.

37. Yale University, a Connecticut corporation, Defendant.

CORPORATE DISCLOSURE STATEMENT

The Association of American Publishers, Inc. is a non-profit organization that has no parent corporation and issues no stock.

The American Booksellers for Free Expression is a not-for-profit trade association that has no parent corporation and issues no stock.

Comic Book Legal Defense Fund is a non-profit organization that has no parent corporation and issues no stock.

The Freedom to Read Foundation is a non-profit organization that has no parent corporation and issues no stock.

Media Coalition Foundation is a 501(c)(3) not-for-profit corporation that has no parent corporation and issues no stock.

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INTRODUCTION AND INTEREST OF THE AMICI[1]

This amicus brief is filed by The Association of American Publishers, Inc. (AAP), The American Booksellers for Free Expression (ABFE), The Freedom to Read Foundation (FTRF), Comic Book Legal Defense Fund (CBLDF), and Media Coalition Foundation in support of Appellees, urging affirmance of the decision below granting summary judgment to Appellees on their Lanham Act and state unfair competition claims.

AAP is the national trade association of the U.S. book publishing industry. AAP's members include most of the major commercial book publishers in the United States, as well as smaller and non-profit publishers, university presses, and scholarly societies. AAP members publish hardcover and paperback books in every field; educational materials for the elementary, secondary, postsecondary, and professional markets; scholarly journals; computer software; and electronic products and services. The Association represents an industry whose very existence depends upon the free exercise of rights guaranteed by the First Amendment. AAP works to maintain full First Amendment protection for its members' publishing activities. This effort includes the filing of amicus briefs

[1] Pursuant to Fed. R. App. P. 29, Amici state that this brief was not authored in whole or in part by counsel for any party, and no party, counsel for any party, or person other than Amici or its counsel made a financial contribution to the preparation or submission of this brief.

aimed at ensuring that literary works of all kinds – including blog posts – are properly treated as noncommercial speech.

ABFE, a division of the American Booksellers Association (ABA), is the bookseller's voice in the fight against censorship. ABFE's mission is to inform and educate booksellers, other members of the book industry, and the public about the dangers of censorship and to promote and protect the free expression of ideas, particularly freedom in the choice of reading materials. ABA is comprised of more than 1,700 locally owned and operated independent bookstores nationwide.

CBLDF is dedicated to defending the First Amendment rights of the comic book industry. CBLDF, which has its principal place of business in New York, New York, represents over 1,000 comic book authors, artists, retailers, distributors, publishers, librarians, and readers located throughout the country and the world.

FTRF is an organization established by the American Library Association to promote and defend First Amendment rights, foster libraries as institutions that fulfill the promise of the First Amendment, support the right of libraries to include in their collections and make available to the public any work they may legally acquire, and establish legal precedent for the freedom to read of all citizens.

Media Coalition Foundation monitors potential threats to free expression, and engages in litigation and education to protect free speech rights, as guaranteed

by the First Amendment. As such, it is concerned by the issues raised by this case for the reasons set forth below.

The distinction between commercial and noncommercial speech remains one of great consequence in First Amendment law and hence for Amici, as commercial speech "may be regulated in ways that would be impermissible if the same regulation were applied to noncommercial expressions." *Bosley Med. Inst., Inc. v. Kremer*, 403 F.3d 672, 677 (9th Cir. 2005) (citing *Fla. Bar v. Went For It, Inc.*, 515 U.S. 618, 623 (1995)); *see also 44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 498 (1996) (plurality) (stating that commercial speech is a form of expression that the government "may regulate . . . more freely than other forms of protected speech"). Only commercial speech may be restricted solely on the ground that it is false or misleading without offending the Constitution. To the extent that noncommercial speech may be false, wrongheaded, offensive, malicious, or otherwise objectionable but neither fraudulent nor defamatory, its correction must occur through the unfettered public dialogue protected by the First Amendment against both government regulation and private causes of action.

In this case, rather than rely on the exercise of his own free-speech rights to defend his medical practices, Appellant Tobinick chose to invoke, *inter alia*, the Lanham Act and California unfair competition law as a means of punishing Appellee Novella for a blog post criticizing Tobinick's off-label use and novel

administration of immunosuppressive drugs to treat Alzheimer's disease. Novella is a clinical neurologist and assistant professor at Yale University School of Medicine. He is also a well-known commentator on medical and scientific issues in podcasts and blog posts under the auspices of the non-profit New England Skeptical Society (NESS). His post on NESS's blog on the website www.sciencebasedmedicine.org concerning Tobinick's practices responded to an article about Tobinick in the *Los Angeles Times*; it was a contribution to an existing public dialogue on a matter of unquestionable public concern. Writing from the skeptical perspective for which he is known, Novella expressed alarm specifically over Tobinick's off-label use of the drug Enbrel and sought to raise public awareness about it. The post plainly was not an advertisement for Novella's medical practice nor for his Skeptics' Guide to the Universe podcast, which is itself fully protected speech concerning topics such as "myths, conspiracy theories, pseudoscience, the paranormal, and many general forms of superstition, from the point of view of scientific skepticism." *The Skeptics' Guide to the Universe*, Wikipedia, https://en.wikipedia.org/wiki/The_Skeptics'_Guide_to_the_Universe.

By expressing concern with Tobinick's practices, Novella was seeking to inform; he was not trying to sell or promote anything other than rigorous scientific inquiry and critical thinking. The district court correctly held that Novella's blog post (as well as a similar one he published after the initiation of this lawsuit) was

not commercial speech and that summary judgment therefore was warranted on Tobinick's Lanham Act and state unfair competition claims.

Tobinick's contention that Novella's post was commercial speech because Novella's company, SGU Productions, sells advertising on *its own* website and in its podcast as well as memberships and merchandise such as t-shirts is without merit. The supposedly damning "money trail" Tobinick purports to establish by means of elaborate flow charts is a red herring; it has no relevance to whether the speech at issue is commercial. To begin with, the site on which Novella's critique was posted, www.sciencebasedmedicine.org, is owned by NESS, a non-profit entity, and it features (noncommercial) commentary on scientific issues. More to the point, though, even if ads *were* sold in connection with Novella's blog post or on the site generally, such ads would not change the noncommercial nature of the post. The mere fact that speech is sold or otherwise generates revenue does not make it commercial. It is beyond dispute, for example, that the appearance of ads in the *Miami Herald* and on the *Herald*'s website, including ads for its own merchandise and sponsored events, not to mention sales of the paper itself in any medium, do not turn *Herald* articles and editorials into commercial speech. The same is true of Novella's commentary.

If the Court were to accept the assertion that benefitting financially from speech, even indirectly, makes that speech commercial, professional journalism

and academic debate would be crippled by the risk of unfair competition claims. Critical speech could be characterized by unscrupulous/misguided plaintiffs as an effort to promote the author's economic interests, and the asserted need for discovery into the author's business affairs would routinely preclude the dismissal of frivolous claims directed at what obviously is fully protected expression. The First Amendment requires that non-profit-sponsored opinions such as Novella's not be the subject of protracted litigation and invasive discovery aimed at ferreting out legally irrelevant commercial motivation.

In short, the dangerous and unprecedented expansion of the commercial speech doctrine that Tobinick urges would chill the kinds of critical thought and expression in which commentators like Novella regularly engage in fora as formal as daily newspapers and as informal as personal blogs. The risk of litigation would stifle discussion of public health and other important controversies that warrant more, rather than less, speech. Debate that should play out in books, magazines, academic journals, podcasts, blogs, and other electronic media would instead wind up in the courts, where judges and juries would be asked to adjudicate the merits of competing views on controversial, often factually unsettled, issues.

Nearly one hundred years ago, Justice Oliver Wendell Holmes wrote that "the best test of truth is the power of the thought to get itself accepted in the competition of the market." *Abrams v. United States*, 250 U.S. 616, 630 (1919)

(Holmes, J. dissenting). This now central premise of modern First Amendment jurisprudence was invoked in Justice Kennedy's plurality opinion in *United States v. Alvarez*, 132 S. Ct. 2537 (2012), which emphasized "the right and civic duty to engage in open, dynamic, rational discourse." *Id.* at 2550. Outside of certain narrow categories of unprotected speech, the remedy for speech we do not like, Justice Kennedy stated, is "more speech, not enforced silence." *Id.* (quoting *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring)). That principle should govern this dispute, rather than consumer protection laws that do not apply to speech that clearly is neither commercial advertising nor promotion for goods or services.

STATEMENT OF THE ISSUES

Issue Presented: Are the blog posts that are the basis of Tobinick's federal and state unfair competition claims commercial speech?

Brief Answer: No. The blog posts did not constitute commercial advertising or promotion. Therefore, as the district court correctly found, they are fully protected, noncommercial expression and, as such, cannot form the basis of an unfair competition claim under the Lanham Act or California law.

SUMMARY OF THE ARGUMENT

Noncommercial speech is entitled to a higher level of protection under the First Amendment than commercial speech. With limited exceptions not applicable

here, noncommercial speech cannot give rise to liability solely on the ground that it is false or misleading under either federal or state unfair competition law. The court below correctly determined that the blog posts at issue in this case, in which Novella criticized certain medical practices by Tobinick that had already drawn scrutiny in the press, were fully protected, nonactionable, noncommercial expression. The posts did not advertise or promote any products or services; instead, they expressed Novella's views on a matter of public concern – *i.e.*, the kind of expression the First Amendment "marketplace of ideas" most clearly protects.

Tobinick's attempt to silence a critic by characterizing his commentary as commercial speech clashes with the fundamental First Amendment principle that debate concerning scientific matters should occur freely in the public arena and not be refereed by a court. The asserted link between Novella's speech and certain ancillary revenue streams does not make the speech commercial; it is well established that speech is not commercial simply because it is sold or generates advertising revenue. Commercial motivation alone is not enough; were it otherwise, every newspaper would be commercial speech. Moreover, even if there were a commercial component of Novella's speech – and there was not – the presence of a commercial element intertwined with noncommercial expression that is subject to restriction does not convert the entire work into commercial speech.

If Tobinick's overly broad theory of commercial speech were accepted, it would have a profound chilling effect on discussion of matters of public concern, as opinion could readily be claimed to be commercially motivated and thus fair grounds for litigation under unfair competition law. The First Amendment forecloses such misuse of laws designed to protect against consumer confusion. Summary judgment was properly granted on Tobinick's unfair competition claims.

ARGUMENT

I. NOVELLA'S SPEECH IMPLICATES CORE FIRST AMENDMENT PRINCIPLES

The claims asserted in this case implicate fundamental First Amendment principles. The First Amendment prohibits Congress and the states from making any law "abridging the freedom of speech, or of the press." At its core, this means that the government "has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 95 (1972) (citations omitted). The free exchange of ideas protected by the First Amendment reflects the recognition that "novel and unconventional ideas might disturb the complacent, but [the authors of the First Amendment] chose to encourage a freedom which they believed essential if vigorous enlightenment was ever to triumph over slothful ignorance." *Martin v. City of Struthers*, 319 U.S. 141, 143 (1943). The framers of the First Amendment understood that it was essential that "men may speak as they think on matters vital to them and that

falsehoods may be exposed through the processes of education and discussion. . . ." *Thornhill v. Alabama*, 310 U.S. 88, 95 (1940).

Within the arena of fully protected expression, the First Amendment embodies the theory that the truth will best emerge from the unfettered competition of ideas, as stated almost one hundred years ago by Justice Holmes:

> [W]hen men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas – that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out.

Abrams, 250 U.S. at 630 (Holmes, J., dissenting); *see also Whitney*, 274 U.S. at 377 (Brandeis, J., concurring) ("If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence"). In *Whitney*, Justice Brandeis observed that "freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth" and that discussion "affords ordinarily adequate protection against the dissemination of noxious doctrine." 274 U.S. at 375 (Brandeis, J., concurring). Two generations later, in the context of a protest against a different war (Vietnam), the Supreme Court stated:

> The constitutional right of free expression . . . is designed and intended to remove government restraints from the arena of public discussion, putting the decision as to what views shall be voiced largely into the hands of each of us,

> in the hope that use of such freedom will ultimately produce a more capable citizenry and more perfect polity. . . .

Cohen v. California, 403 U.S. 15, 24 (1971). This understanding of the First Amendment constitutes the proper framework for resolution of this appeal.

The marketplace of ideas protected by the First Amendment extends far beyond political speech. *See Time, Inc. v. Hill*, 385 U.S. 374, 388 (1967) ("The guarantees for speech and press are not the preserve of political expression or comment upon public affairs . . . . 'Freedom of discussion, if it would fulfill its historic function in this nation, must embrace all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period'" (quoting *Thornhill*, 310 U.S. at 102). Thus, any speech on a matter of "public concern," *i.e.*, any speech "relating to any matter of political, social, or other concern to the community," *Snyder v. Phelps*, 562 U.S. 443, 453 (2011) (internal quotation marks omitted), occupies "the highest rung of the hierarchy of First Amendment values, and is entitled to special protection." *Id.* at 452 (internal quotation marks omitted).

Scientific/medical controversies are no exception to this system of free expression. For example, in a Lanham Act case involving promotional use of a peer-reviewed scientific article by a drug company, the Second Circuit found that in a "novel area of research, propositions of empirical 'fact' advanced in the

literature may be highly controversial and subject to rigorous debate by qualified experts," but courts are "ill-equipped to undertake to referee such controversies." *ONY, Inc. v. Cornerstone Therapeutics, Inc.*, 720 F.3d 490, 497 (2d Cir. 2013). Instead, the court wrote, "the trial of ideas plays out in the pages of peer-reviewed journals, and the scientific public sits as the jury." *Id.*; *see also Underwager v. Salter*, 22 F.3d 730, 736 (7th Cir. 1994) ("Scientific controversies must be settled by the methods of science rather than by the methods of litigation . . . . More papers, more discussion, better data, and more satisfactory models – not larger awards of damages – mark the path toward superior understanding of the world around us.").

Any suggestion that Novella's blog posts are entitled to a lesser level of First Amendment protection than speech by the institutional media is without merit. In *Citizens United v. Federal Election Commission*, 558 U.S. 310, 352 (2010), the Supreme Court stated: "We have consistently rejected the proposition that the institutional press has any constitutional privilege beyond that of other speakers" (citation omitted), and in *Obsidian Finance Group, LLC v. Cox*, 740 F.3d 1284 (9th Cir. 2014), the Ninth Circuit observed that the protections of the First Amendment "do not turn on whether the defendant was a trained journalist, formally affiliated with traditional news entities" and that "a First Amendment distinction between the institutional press and other speakers is unworkable." *Id.*

at 1291. The *Obsidian* court held, accordingly, that a blogger sued for statements critical of a bankruptcy trustee was entitled to the First Amendment's protections for defamatory speech.

The foregoing First Amendment principles do not apply to factual claims made in the course of commercial advertising or promotion, which frequently are the subject of litigation over whether the claims are false or misleading. This is why the stakes are so high in drawing the line between commercial speech that is subject to the Lanham Act and noncommercial speech that is not. The district court had little trouble placing Novella's speech on the noncommercial side of the line, and neither should this Court.

II. THE LANHAM ACT CLAIM FAILS BECAUSE NOVELLA'S SPEECH IS NOT COMMERCIAL

The Supreme Court has stated that commercial speech is "usually defined as speech that does no more than propose a commercial transaction." *United States v. United Foods Inc.*, 533 U.S. 405, 409 (2001); *see also Edenfield v. Fane*, 507 U.S. 761, 767 (1993) (same). As this Court has stated, commercial speech encompasses "communications designed to advance business interests, *exclusive of beliefs and ideas*." *Kleiner v. First Nat'l Bank of Atlanta*, 751 F.2d 1193, 1203 n.22 (11th Cir. 1985) (emphasis added). Because Novella's speech does not meet this criterion, Tobinick's federal and state unfair competition claims fail. The only competition involved in this case is one of ideas that are protected by the First Amendment.

A. The Lanham Act Only Applies to Commercial Speech

The Lanham Act "protect[s] persons engaged in . . . commerce against unfair competition," *POM Wonderful LLC v. Coca-Cola Co.*, 134 S. Ct. 2228, 2233 (2014) (citation omitted), by "protect[ing] the ability of consumers to distinguish among competing producers." *Two Pesos, Inc. v. Taco Cabana, Inc.*, 505 U.S. 763, 774 (1992). Section 43(a) of the Lanham Act, which Tobinick invokes, applies only to false or misleading statements made "in connection with . . . goods or services." 15 U.S.C. § 1125(a). That is, the speech at issue must be "for the purpose of influencing customers to buy the defendant's goods or services." *Grubbs v. Sheakley Grp.*, 807 F.3d 785, 801 (6th Cir. 2015). As the court noted in *Farah v. Esquire Magazine*, 736 F.3d 528, 541 (D.C. Cir. 2013), "Every circuit court of appeals to address the scope of [section 43(a)] has held that [its provisions] apply only to commercial speech." [2]

Speech with the purpose of selling or promoting a product or service is different from speech that has an inherent value. The latter type of speech is not commercial simply because there is a financial motive for its creation; were this not so, every book, newspaper, and magazine, whether published in print or online, would be commercial speech. *See, e.g.*, *Time, Inc.*, 385 U.S. at 397 ("That books,

[2] The California unfair competition claims fail for the same reason. *See Chern v. Bank of Am.*, 15 Cal. 3d 866, 875-76 (1976).

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.") (quoting *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 501-02 (1952)); *City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 756 n.5 (1988) ("[T]he degree of First Amendment protection is not diminished merely because the [protected expression] is sold rather than given away."); *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 761-62 (1976) (noting that speech is entitled to full First Amendment protection "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") (citations omitted); *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 . . . does not fall outside of the protection of the First Amendment because it may help to sell copies."); *Cardtoons, L.C. v. Major League Baseball Players Ass'n*, 95 F.3d 959, 970 (10th Cir. 1996) ("The fact that expressive materials are sold neither renders the speech unprotected nor alters the level of protection under the First Amendment") (citations omitted); *Lacoff v. Buena Vista Publ'g, Inc.*, 705 N.Y.S.2d 183, 190 (Sup. Ct. N.Y. Co. 2000) (holding, with respect to investment advice book, that "[n]either the fact that it was sold for a profit, nor defendant

publishers' economic motivation, is sufficient to turn the Book into commercial speech").

Recognizing that the Lanham Act applies only to commercial speech, other circuits have thrown out claims directed toward noncommercial criticism of the plaintiff's opinions or business practices. *See, e.g.*, *Farah*, 736 F.3d at 541 (dismissing Lanham Act claim based on satirical blog post criticizing author of Obama "birther" book); *Utah Lighthouse Ministry v. Found. for Apologetic Info. & Research*, 527 F.3d 1045, 1051-54 (10th Cir. 2008) (dismissing Lanham Act claims against creators of parody website that critiqued bookstore's views); *Bosley v. Med. Inst., Inc. v. Kremer*, 403 F.3d 672, 677-80 (9th Cir. 2005) (affirming summary judgment for disgruntled hair transplant customer who created website dedicated to criticism of plaintiff's services).

In finding the Lanham Act inapplicable to the defendant's criticism, the Ninth Circuit in *Bosley* stated that the defendant's use of the plaintiff's trademark was "not in connection with a sale of goods or services" but "in connection with the expression of his opinion *about* [the plaintiff's] goods and services." 403 F.3d at 679 (emphasis in original). The plaintiff, the court noted, "cannot use the Lanham Act either as a shield from [the defendant's] criticism, or as a sword to shut [him] up." *Id.* at 680. In *Farah*, similarly, the D.C. Circuit found that the defendant's satirical blog post about the plaintiff's birther conspiracy book was

political speech, explaining that "[t]he mere fact that the parties may compete in the *marketplace of ideas*" was "not sufficient to invoke the Lanham Act." 736 F.3d at 541 (emphasis in original).

B. Novella's Speech Was Not Commercial

As the fully protected status of newspapers, books, and other expressive works demonstrates, commercial motivation is not enough to render speech commercial. In *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60 (1983), the Supreme Court, evaluating an informational pamphlet concerning contraception that made reference to the defendant's brand of condoms, identified three factors relevant to determining whether the pamphlet was commercial speech: (1) whether the speech was in the format of an advertisement; (2) whether it contained explicit reference to a product; and (3) whether the speaker had an economic motivation for the speech. 463 U.S. at 66-67 & n.13. Although the pamphlets concededly were advertisements; although they contained reference to a specific brand of prophylactics; and although the manufacturer had an economic motivation for publishing the pamphlets, none of these facts, taken alone, rendered the pamphlets commercial speech. Indeed, the Court stated, "the fact that Youngs has an economic motivation for mailing the pamphlets *would clearly be insufficient by itself to turn the materials into commercial speech*." *Id.* at 67 (emphasis added). The Court held, however, that the *combination* of these factors warranted treating

the pamphlet as commercial speech. *Id.* In this case, Novella's speech lies farther onto the protected side of the line, as both the advertising format and commercial motivation factors are missing.

This case is closer factually to *Gordon and Breach Science Publishers S.A. v. American Institute of Physics*, 859 F. Supp. 1521 (S.D.N.Y 1994), which this Court has cited as the "most widely-accepted test for determining whether something is 'commercial advertising or promotion.'" *Suntree Techs., Inc. v. Ecosense Int'l, Inc.*, 693 F.3d 1338, 1349 (11th Cir. 2012). The district court in *Gordon and Breach* held that the fact that nonprofit scientific societies that published comparative academic studies purporting to measure the relative value of scientific journals "stood to benefit from publishing [the] results – even that they *intended* to benefit" was "insufficient by itself to turn the articles into commercial speech." 859 F. Supp. at 1541 (emphasis in original). In language quoted by the district court here, the court explained:

> Non-profit organizations must be free to participate fully in the marketplace of ideas without fear of sanctions, even if such participation redounds to their financial benefit. To hold otherwise would be to squelch the expression of facts and opinions which might not otherwise find ready expression through commercial media.

Id. at 1541; *see also id.* at 1544 ("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 court further explained the threat to free speech posed to academic debate by burdensome Lanham Act litigation:

> Commercial plaintiffs should not be allowed to make use of the Lanham Act to gain access to court-sanctioned discovery unless they have made a prima facie showing that speech which appears fully protected is in fact undeserving of full First Amendment protection. Allowing such suits to proceed without such a showing could cast a substantial chill on the "robust exchange of ideas."

Id. at 1543 (citation omitted). Like Novella's Skeptical Society, the defendants in *Gordon & Breach* were non-profit entities with "purposes beyond the solely commercial," *id.* at 1540, and the articles at issue examined "an issue of considerable public significance." *Id.* at 1541. The court held that these factors outweighed the fact that the defendants stood to benefit from publishing the articles.

Even where there is a commercial component to otherwise noncommercial speech, that does not render the speech commercial in its entirety. Commercial speech that is "inextricably intertwined" with expressive speech enjoys full First Amendment protection when it is the expressive aspect of the speech that is being regulated. *See Riley v. Nat'l Fed'n of the Blind*, 487 U.S. 781, 796 (1988). For example, in *The Monotype Corp. v. Simon & Schuster Inc.*, No. 99 C 4128, 2000 WL 1852907 (N.D. Ill. Sept. 8, 2000), the defendant published a book and CD-ROM set; the book provided technical information on the science of typography

designed to accompany a collection of typographic fonts contained on the CD-ROM. The plaintiff, an owner of trademarks used in connection with the distribution of digitized typeface designs, sued for, *inter alia*, false advertising, insofar as the statements in the book mischaracterized the plaintiff's fonts. In granting summary judgment to the defendant on this claim, the court held that even though there was an undeniable commercial component (namely, to sell the CD-ROM), and there were commercial statements within its text, the 270-page book was "technical" and "non-commercial" in nature and thus constituted protected noncommercial speech in its entirety. *Id.* at *7.

In *Oxycal Laboratories, Inc. v. Jeffers*, 909 F. Supp. 719 (S.D. Cal. 1995), the plaintiff alleged that statements in a book violated the Lanham Act by conveying falsely that the plaintiff's specifically identified products contained a carcinogen. *Id.* at 720-21. The court found that the book was noncommercial speech even though it contained suggestions about foods to eat, products to buy, and shops to patronize (including one in which two defendants had an interest). *Id.* at 725. After considering "whether the speech [was] primarily motivated by commercial concerns" and whether "the central message of the Book [was] commercial," the court denied the plaintiff's preliminary injunction motion, holding that the book was protected noncommercial speech:

> The Court, at this stage in the proceedings finds that the purpose of the Book is to advance [the author-

> defendant's] theories on the causes of cancer and the ways to eliminate cancer. That her methods recommend the use of certain products is secondary. That her theories may lack scientific foundation is not for this Court to decide. [The author-defendant]'s Book is non-commercial speech which is afforded First Amendment protection.

Id. at 726.

Although there was no commercial component to Novella's speech, assuming for argument's sake that such a component existed (e.g., that there was an implied pitch for his own services), there is no question that Tobinick's claims are directed to noncommercial expression – Novella's criticism of Tobinick's practices – not at any alleged promotion of Novella's own economic interests. Thus, as the cases discussed above demonstrate, Novella's speech is fully protected by the First Amendment.

Plaintiff relies heavily on *World Wrestling Federation Entertainment, Inc. v. Bozell*, 142 F. Supp. 2d 514 (S.D.N.Y. 2001), but that case is easily distinguishable. The educational/advocacy materials at issue there, which decried the violence in the defendant's programming, were expressly used by the (nonprofit) defendants for promotional or fundraising communications with members. The court found that "the goals of making money and self-promotion . . . support the WWFE's allegation that defendants' speech is commercial, notwithstanding the fact that their speech discussed public issues." *Id.* at 526.

The court noted that the challenged statements "were part of what could fairly be characterized as advertisements; the communications referred to specific products or services – the WWFE's programs . . . as well as defendants' services and programs; and defendants had an economic motivation for their statements – raising money and self-promotion." *Id.* This result was consistent with that reached by the Supreme Court in *Bolger*.

Notably, the same district court judge who decided *Bozell* (Denny Chin, now on the Second Circuit) came to the opposite conclusion five years later in a case much closer factually to this one than *Bozell*. In *Gorran v. Atkins Nutritionals, Inc.*, 464 F. Supp. 2d 315 (S.D.N.Y. 2006), Judge Chin rejected arguments that the late Dr. Robert C. Atkins' book *Dr. Atkins' New Diet Revolution* and related diet advice on the Atkins website constituted commercial speech. With respect to the book, the court found it to be

> not an advertisement for defendants' products; rather, it is a guide to leading a controlled carbohydrate lifestyle . . . . The fact that the Book . . . contains several references to defendants' products and services does not transform the Book into commercial speech. Furthermore, any financial gain that accrues to defendants from sales of the Book does not support the conclusion that the Book is commercial speech. It is well settled that the mere fact that there is an underlying economic motivation in one's activity does not turn that activity into commercial speech.

Id. at 327. As for the Atkins website, the plaintiff argued that it functioned "as an electronic store to promote various [D]iet-related food products" and that its content was therefore commercial speech. However, the court found that although the site contained both commercial and noncommercial elements – advertisements for, and links for making purchases of, Atkins products as well as "a wealth of information on how to follow the Diet and recommendations for optimizing health and nutrition," *id.* – the fact that the website included commercial content did not provide the basis for an unfair competition claim under Florida law because the plaintiff did not "premise liability on any commercial transaction proposed on the Website, but, rather, on the Website's general advice pertaining to the Diet." *Id.* at 328.

The Second Circuit summarily affirmed, finding Atkins' "advice and ideas" to be noncommercial speech, fully protected by the First Amendment. *Gorran v. Atkins Nutritionals, Inc.*, 279 F. App'x 40 (2d Cir. 2008).[3] The court held that the book and website were not expression "related solely to the economic interests of the speaker and its audience," *id.* at 41 (citing *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 561 (1980)), but instead "[sought] to communicate a particular view on health, diet, and nutrition, with an offer to

[3] AAP filed an amici curiae brief with the Second Circuit in *Gorran* directed to the commercial speech issue.

purchase the message." *Id.* The court pointed out that "[a]lthough the website contains commercial elements of speech . . . [the plaintiff did] not allege that these elements were the source of his deception." *Id.*

Review of Novella's articles in light of the foregoing cases leads inescapably to the conclusion that they are noncommercial speech. The ancillary money flows to which Tobinick points do not convert the ideas and opinions in the articles into advertising or promotion for Novella's products or services. Nor does the fact that Novella or his organization may have hoped to benefit from posting the articles raise a genuine issue of material fact as to whether they are commercial speech. The articles contain thoughts and ideas intended to educate and inform, not to sell or promote Novella's services. The proper conclusion to be drawn from Novella's medical credentials is not that his speech must be commercial because he is a competitor of Tobinick's (he is not), but rather that he is someone in a position to offer informed commentary on Tobinick's practices. As one commentator noted:

> The articles here proposed no commercial transaction, and weren't related solely to the economic interests of the speaker and its audience. They clearly intended to raise public awareness about issues pertaining to Tobinick's treatments. They were also unlike the commercial speech in *Bolger*: they were not concededly advertisements; to the extent the second article referred to Novella's practice, "it is in direct response to the instant litigation as opposed to an independent plug for that practice."

Rebecca Tushnet, *Why we need an anti-SLAPP law: skeptic's article still not commercial speech*, Rebecca Tushnet's 43(B)log (Nov. 9, 2015), http://tushnet.blogspot.com/2015/11/why-we-need-anti-slapp-law-skeptics.html.

It bears noting that determining the noncommercial character of a publication prior to trial is important because "unnecessarily protracted litigation" has "a chilling effect upon the exercise of First Amendment rights," such that "speedy resolution of cases involving free speech is desirable." *Winter v. DC Comics*, 69 P.3d 473, 480 (Cal. 2003) (citation omitted) (holding that whether comic book portrayal of plaintiff rock musicians was an actionable commercial exploitation of their identities could be determined as a matter of law by reviewing the material in question).

CONCLUSION

For the foregoing reasons, the district court's ruling granting summary judgment to Defendants-Appellees should be affirmed.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because this brief contains 5,820 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), as counted by Microsoft® Word 2010, the word processing software used to prepare this brief.

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft® Word 2010, Times New Roman, 14-point.

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Dated: May 27, 2016

CERTIFICATE OF SERVICE

I hereby certify that on May 27, 2016, a true and correct copy of the foregoing was filed electronically with the Clerk of the Court for the United States Court of Appeals for the Eleventh Circuit. Notice of this filing was sent by operation of the Court's ECF electronic filing system to all parties indicated on the electronic filing receipt.

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