No. 16-16210

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

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.,

Appellants/Plaintiffs,

vs.

STEVEN NOVELLA, M.D.,

Appellee/Defendant.

Appeal from the United States District-Court
for the Southern District of Florida
West Palm Beach Division

PLAINTIFFS'-APPELLANTS' REPLY BRIEF

Cullin O'Brien
Fla. Bar. No. 0597341
CULLIN O'BRIEN LAW, P.A.
6541 NE 21st Way
Ft. Lauderdale, Florida 33308
Telephone: (561) 676-6370
Fax: (561) 320-0285
cullin@cullinobrienlaw.com

Counsel for Appellants/Plaintiffs

CERTIFICATE OF INTERESTED PERSONS

1. Babbin, Jeffrey R. - trial counsel for Yale University, defendant.

2. 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.

3. Cole, Scott A. - counsel for Society for Science-Based Medicine Inc., Defendant.

4. Cole, Scott & Kissane, P.A. - counsel for Society for Science-Based Medicine Inc., Defendant.

5. 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.

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

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

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

9. Novella, Steven, M.D., an individual, Defendant/Appellee.

10. 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.

11. Polk, Edward Samuel – trial counsel for Society for Science-Based Medicine, Inc., Defendant.

12. Randazza, Marc J. - trial counsel for Steven Novella, M.D., Defendant/Appellee.

13. Randazza Legal Group, PLLC - trial counsel for Steven Novella, M.D., Defendant/Appellee.

14. SGU Productions, LLC, a Connecticut corporation, Defendant.

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

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

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

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

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

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

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

22. Wolman, Jay Marshall - trial counsel for Steven Novella, M.D., Defendant/Appellee.

23. Yale University, a Connecticut corporation, Defendant.

24. 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.

25. 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.

26. Cahen Law PA - 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.

27. 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.

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

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

CORPORATE DISCLOSURE STATEMENT

1. Appellant/Plaintiff Edward Lewis Tobinick, M.D., a Medical Corporation d/b/a The Institute of Neurological Recovery, is a medical corporation organized under the laws of the State of California.

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

3. Appellant Edward Tobinick, M.D., is an individual.

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I. REPLY BRIEF

A. Introduction

The lower-court's fee award based on its findings of "belated attempts" and "unsupported allegations of perjury" (Doc. 333 at page 16) are incorrect findings of fact that mandate this Court's reversal of the fee award under an abuse of discretion standard (*see* Section J). Granting fees to Novella here will hinder the ability of businesses to defend themselves from false commercial disparagement. Plaintiffs' efforts to defend their reputation and medical practice from published falsehoods were complicated by the unprecedented conduct of Novella, who, after litigation began, continued to launch multiple false webpage/podcasts against Plaintiffs. There were complex legal concepts to navigate. There was no credible evidence of bad faith, fraud, or baseless or unreasonable litigation conduct by Plaintiffs. The lower-court made an incomplete analysis of commercial speech in assessing fees, which could not have occurred with a correct review of the record. The lower-court also misapplied the law and changed legal standards throughout the case. Novella's fee petition itself was not based on reliable evidence.

Under the circumstances highlighted herein and explained in the opening brief, the fee award here is contrary to the public interest, inequitable and inconsistent with the law. Nothing Novella submitted changes this.

B. Novella Omits the Fact that the Lower-Court Found Inappropriate Billing, Which Is Further Evidence of Unclean Hands Militating Against an Award of Exceptional Fees

Novella contends that his "fee requests were appropriate." (Ans.Br.,*pg*.31,*fn*.23). The record evidence demonstrates that Novella's contention is indefensible and egregious, because not only did Novella previously admit that he sought fees to which he was not entitled, (Doc.315,*pg*.9//Doc.304-3-9//Doc.333,*pg*.13), the lower-court deemed as follows regarding Novella's billing:

> Plaintiffs raise several objections to the requested fees based on opinions from their experts, attorneys John Heller and Lester Langer. First, they contend that the fee records contain duplicate entries, *see* DE 304-5 (Heller's spreadsheet identifying duplicate entries), and that Novella's counsel is seeking recovery of time not related to litigating the Anti-SLAPP motion, *see* DE 304-4 (Heller spreadsheet identifying time entries not related to the Anti-SLAPP motion). Second, they contend that some of time records contain block billing. *See* DE 304-10 at 5-6 (Langer Declaration). Third, they contend that the hourly rates charged by Novella's counsel are not reasonable. *See* DE 304 at 9-10 (Omnibus Opposition to Fee Motion). Last, they contend the fees should not be subject to a multiplier. *Id*. at 23.
>
> ***With the exception of the challenge to Novella's counsel's hourly rates, the Court agrees with Plaintiffs***. ***Novella's reply largely admits that his counsel's time records contain duplicative entries and that he sought recovery of time not related to litigation of the Anti-SLAPP motion***. *See* DE 315 at 10 (Reply). Additionally, the Court does not find that this case contained novel issues or other factors that California courts have recognized as warranting a fee multiplier. The Court therefore agrees with Plaintiffs' expert, *see* DE 304-3 at 3 ¶ 4 (Heller Declaration), that Novella is entitled to recover $36,186.00 in fees and costs under the California Anti-SLAPP statute.

(Doc.333,*pgs.*12-13) (emphasis added).

Novella's mischaracterization of his previous fee request as "appropriate," along with his previous overbilling, and the other facts discussed herein, warrant the denial of the award of any and all fees under the Lanham Act and the anti-SLAPP procedure. *See*, *e.g*., *Zero Down Supply Chain Solutions v. Global Transp. Solutions*, No. 2:07–cv–400 TC, 2012 WL 5194230, at *2-*3 (D. Utah Oct. 19, 2012) ("[T]he Court denies Defendants' motion for attorneys' fees under the doctrine of unclean hands."); *Precision Instrument Mfg. Co. v. Auto. Maintenance Machinery Co*., 324 U.S. 806, 814 (1945) (noting "a self-imposed ordinance that closes the doors of a court of equity to one tainted with inequitableness or bad faith relative."); *Keystone Driller Co. v. General Excavator Co*., 290 U.S. 240, 245 (1933) ("The equitable powers of this court can never be exerted in behalf of [one] who has acted fraudulently, or who by deceit or any unfair means has gained an advantage. To aid a party in such a case would make this court the abetter of iniquity.") (internal citation omitted); *Ellis v. Toshiba Am. Info. Sys*., 218 Cal.App.4th 853, 854 (Cal. Ct. App. 2013) ("A fee request that appears unreasonably inflated is a special circumstance permitting the trial court to reduce the award or deny one altogether.") (internal citations and quotations omitted); *Vocca v. Playboy Hotel of Chicago*, 519 F. Supp. 900, 901–902 (N.D. Ill. 1981) ("For these and other reasons plainly evident in the record before this court, the

request for fees must be denied in its entirety."); *Pistoresi v. Madera Irrigation Dist.*, No. CV–F–08–843–LJO–DLB, 2009 WL 910867, at *7-*8 (E.D. Cal. Apr. 2, 2009) ("[M]ost of the factors justifying a denial of an anti-SLAPP attorneys' fees award are present in the instant action. For disobeying this Court's order, failing to provide adequate documentation, requesting an excessive amount, and claiming unearned fees, this Court denies in full the Stoel Rives attorneys' fees request."); *Farris v. Cox*, 508 F. Supp. 222, 227 (N.D. Cal. 1981) ("The present situation is an appropriate occasion for the court to exercise its discretion and deny all fees relating to work on the fee petition because the request here represents a grossly inflated bill.").

And although the lower-court found inappropriate billing, it also overlooked the expert and other evidence of inappropriate billing for both the Lanham Act and anti-SLAPP fee petitions. (Doc.304,pgs.1-2,4-7//Docs.304-3-21).

Furthermore, Novella's counsel admitted that it is "improper" to use the anti-SLAPP statute to try to strike Lanham act claims, (Doc.304-25,*Tr.*@20:25-21:1), but nonetheless did just that by directing the anti-SLAPP motion at the California Plaintiff's entire complaint (Doc.93,*pg.*20//Doc.106,*pg.*11), which had the Lanham Act claim, (Doc.55,*pgs.*18-20). It would be fundamentally inequitable to award Novella fees for these additional reasons, particularly under all of the circumstances discussed herein and in the opening brief, including the lower-

court's exceptional fee award based on incorrect factual findings. *See*, *e.g.*, *Zero Down*, *supra*; *Precision Instrument*, *supra*; *Keystone Driller*, *supra*; *Ellis*, *supra*; *Vocca*, *supra*; *Pistoresi*, *supra*; *Farris*, *supra*.

C. Novella Obfuscates the Cascade of Plain Error Created by the Absence of the Fee Agreement Between Novella and Randazza

Novella incorrectly states that he "disclosed . . . the material terms of the fee agreement" between Novella and Marc Randazza ("Randazza"). (Ans.Br.,*pg*.45). All that was disclosed was a vague reference to a "partial contingency" agreement without any specifics to any negotiated hourly rate, the nature of the alleged contingency, and, equally as importantly, the amounts Novella supposedly paid Randazza. (Doc.292-2,¶23). And this disclosure was based on the testimony of just one person – Randazza. Novella himself did not provide any testimony on any aspect of the fee issue, despite having provided many prior declarations on other issues.

The absence of a fee agreement between Novella and Randazza prevented the lower-court from justifiably relying on Randazza's testimony given the credibility issues with Randazza, and this warrants additional emphasis.

There was a pattern of Randazza submitting misleading fee petitions about the fees his clients have actually "incurred." (Doc.329-1,*pgs*.2-4//Doc.329-1,*pgs*.42-43*of*173). That pattern and practice included a fee petition with

Randazza's former employer, Gibson, who informed the 9th Circuit that Randazza caused an award of more fees than Gibson was entitled. (Doc.329-1,*pgs.*2-4//Doc.329-1,*pgs.*42-43*of*173)

Eventually, that former employer, Gibson, obtained an interim arbitration award against Randazza concerning allegations regarding Randazza's "violations of fiduciary duty in connection with his negotiating for a $75,000 'bribe,'" (Doc.304-10,*pgs.*36-37,53). This interim arbitration award allegedly caused Randazza to seek bankruptcy protection. (Doc.304-12,*pgs.*2-5). The amount sought in the fee petition here was suspiciously similar in amount to the interim arbitration award against Randazza. (*Compare*Doc.292,*pg.*37*with*Doc.304-10,*pgs.*53-56). Further, Randazza omitted his years of employment with Gibson from his *curriculum vitae* in support of the fee petition. (Doc.329-2,*pg.*10). Plaintiffs' expert, Kennedy, explained why this was a material omission from the lower-court by Randazza. (Doc.329-2,*pg.*10).

Thus, the lower-court had no credible proof of what Novella had paid Randazza, particularly without a fee contract. *See*, *e.g.*, *Asbun v. Resende*, No. 15-cv-61370, 2016 WL 4272372, at *2-*3 (S.D. Fla. Aug. 4, 2016) ("[T]he party opposing a motion for attorney's fees and costs should not be required to rely upon the assertions of opposing counsel as to what type of fee agreements exists."). Moreover, the lower-court's ruling did not reconcile its own conclusion that

Randazza was overbilling to specify what permissible billing (if any) occurred, much less reconcile Plaintiffs' and Plaintiffs' experts line-item objections to the billing. Had the lower-court required compliance with the Local Rules, or accepted a potential cure by Novella, these problems would have been avoided.

It was fundamentally improper for the lower-court to take into account the totality of this evidence and somehow not allow it to "cast doubt on the reliability of the records and statements at issue here." (Doc.333,*pg.*10,*n.*5). Further, the lower-court itself created and fostered a scenario that irreparably compromised the fees judgment. That cannot be proper discretion.

D. Novella Misses the Point as to Why the Lower-Court Had No Discretion to Fashion Hourly Rates Under the Facts of This Case

The $650/hour rate Randazza sought made no sense. And, worse, Randazza attempted to justify the $650/hour rate by citing to a $500/hour rate from *Magnat*, (Doc.292,pg.16*of*9//Doc.330,*pg.*2), which was a fictitiously-obtained rate, (Doc.329-1). Instead of informing the lower-court that Gibson challenged the *Magnat* fee order, (Doc.329-1), Randazza was trying to deprive the lower-court of properly discovering the problems in Randazza asking for a $650/hour rate based on the *Magnat* fee order that involved Gibson.

Randazza's former employer explained how Randazza deceived the *Magnat* court in a fee petition "incurring" $500/hour in a case:

> Despite these various assertions, Liberty neither incurred nor was charged attorney fees in the amount stated in support of its motion. Marc Randazza, Esq. of the Randazza Legal Group served as Liberty's general counsel during the course of the underlying litigation, and in that capacity was a salaried employee of Liberty. See Leonard Declaration, paragraph 5. Mr. Randazza consequently did not charge Liberty on an hourly basis for his own services in the Oron matter …. Liberty did not actually incur attorney fees in that amount at the Randazza Legal Group's regular hourly rates or otherwise.
>
> ***
>
> 5. Marc Randazza, Esq. of the Randazza Legal Group served as Liberty's general counsel during the course of the Oron Litigation, and in that capacity was a salaried employee of Liberty. Mr. Randazza did not charge Liberty an hourly rate for his own services in the Oron Litigation.

(Doc.329-1,*pgs.*36&44*of*172).

According to Novella, Randazza was "worth" $500/hour at that time so it does not matter if Randazza misrepresented to the *Magnat* court that Gibson did not actually "incur" $500/hour expense for Randazza's services. This Court should not countenance Novella's response.

Randazza's dealings with *Magnat* was a proverbial "house of cards" upon which Randazza built his escalating fee requests, including in this case. The entire fee petition warrants denial given Randazza's lack of candor regarding the issues with the *Magnat* fee order, which allowed him to achieve the fee order at issue here. Regardless, the lower-court did not have discretion to award Randazza a

$650/hour rate, given Randazza's blatant deception, the interim arbitration award against Randazza, and Randazza's pending bankruptcy.

E. Novella Fails to Adequately Address the Lower-Court's Absence of the Required Secondary/Promotional Use Analysis

The Panel found that the proper analysis for determining whether a defendant is engaged in "commercial speech" under the Lanham Act is by examining the secondary/promotional uses of the speech, including determining whether the defendant is putting the speech into a commercial "window." *Tobinick v. Novella,* --- F.3d ---- 2017 WL 603832, at *10 (11th Cir. Feb. 15, 2017).[1] This secondary/promotional use analysis was articulated in the *Gordon & Breach* case the Panel adopted:

> 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.

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[1] Plaintiffs are seeking *en banc* and panel rehearing of the opinion. Plaintiffs preserve all arguments made therein.

Gordon & Breach Sci. Pubs. S.A. v. Am. Institute of Physics, 859 F. Supp. 1521, 1544 (S.D.N.Y. 1994) (italics in the original).

Despite adopting the secondary/promotional use analysis, the Panel admitted to not taking into account the "full context" of Novella's attacks, including three of Novella's five attacks. *Tobinick*, 2017 WL 603832, at *10, *fns*. 13 & 14. Importantly, moreover, the Panel ***did not*** find that, when all of Novella's attacks are considered, Novella is free from Lanham Act liability.

In this age of the Internet, Novella's for-profit webpages are the commercial "windows" described by the Panel and *Gordon & Breach*; Novella presenting his first two attacks on his for-profit webpages/podcast is the paradigmatic scenario described by the Panel and *Gordon & Breach* where secondary/promotional uses of speech manifests in "commercial speech." Novella took excerpts of the first attack and placed it into this commercial "window" of the third attack, (Doc.274-2,*pg.*18), and placed a direct hyperlink to the second attack in the commercial "window" of the fourth attack/podcast. (Doc.177-8,*pg.*2//Doc.177-9). The final attack contained hyperlinks to SGU's "windows." (Doc.261-20,pgs.21-22*of*33).

Thus, Plaintiffs' litigation strategy and efforts to pursue Lanham Act claims were appropriate since, *inter alia*, Plaintiffs were trying to show the lower-court that Novella was making lucrative secondary/promotional uses of his attacks

including by putting his attacks into the commercial "windows" of his for-profit webpages.

The lower-court never performed the secondary/promotional use analysis required by the Panel, including whether Novella was using a commercial "window." Thus, the Panel's decision shows that the lower-court's "exceptional case" determination was error by, *inter alia*, not looking at the secondary/promotional uses of Novella's attacks. *Tire Kingdom v. Morgan Tire & Auto*, 253 F.3d 1332, 1335-1336 (11th Cir. 2001). Moreover, Plaintiffs could not have been in bad faith trying to support the secondary/promotional use analysis required by the Panel. And assuming *arguendo* that *Octane Fitness v. ICON Health & Fitness*, 134 S.Ct. 1749 (2014), were applicable, by definition, the lower-court failed to perform the secondary/promotional use analysis required to take account of the "totality of the circumstances," *id.* at 1754.

In other words, the lower-court never analyzed whether, had Novella's final three attacks been considered, Novella would be engaging in "commercial speech." Whether or not the lower-court considered the final three attacks in the substantive summary judgment ruling, the lower-court was obliged to analyze this evidence and Plaintiffs' litigation strategy in determining whether this was an "exceptional case." Plaintiffs' continued pursuit of Lanham Act liability was at the core of the lower-court's exceptional fee analysis. It was an abuse of discretion to award

Lanham Act fees under these circumstances, when the lower-court's commercial speech analysis was materially incomplete.

Further, Plaintiffs cannot be faulted for not predicting that the lower-court would disregard the material admissible record evidence of Novella's secondary/promotional uses in its summary judgment analysis. There was no such prior indication especially since the lower-court already accounted for the evidence at the preliminary injunction stage after a court-ordered stipulation. (Docs.128,132//Doc.172*pgs.*2-4,10-11). And although the Panel also decided to disregard material admissible record evidence of Novella's secondary/promotional uses, the Panel did not cite legal authority for doing that. Plaintiffs believed that their evidence of secondary/promotional use would be considered by the lower-court (and by the Panel) based on settled Supreme Court and Circuit Court precedent. *Osmose v. Viance*, 612 F.3d 1298, 311 (11th Cir. 2010); *Hickson Corp. v. N. Crossarm Co.*, 357 F.3d 1256, 1261 (11th Cir. 2004); *Celotex Corp. v. Catrett*, 477 U.S. 317, 330 n.2 (1986); *Tippens v. Celotex Corp.*, 805 F.2d 949, 952 (11th Cir. 1986); *Bolger v. Youngs Drug Prods.*, 463 U.S. 60 (1983); *Vidal Sassoon v. Bristol-Myers Co.*, 661 F.2d 272, 276 (2d Cir. 1981); *Jordan v. Jewel Food Stores*, 743 F.3d 509, 517-518 (7th Cir. 2014); *United Indus. Corp. v. Clorox Co.*, 140 F.3d 1175, 1181 (8th Cir. 1998); *Castrol Inc. v. Pennzoil Co.*, 987 F.2d

939, 946 (3d Cir. 1993); *Adventure Commc'ns v. Kentucky Registry of Elec. Fin.*, 191 F.3d 429, 441 (4th Cir. 1999).

Novella fails to effectively refute the secondary/promotional use of his first two attacks, in comparison with the degree to which Plaintiffs' discussed it in their opening brief. (Plaintiffs' Opening Brief ("POB"),*pgs.*10,16,20,36-44,52,63-64).

F. Novella Overlooks the Complexity of the Case and Why it Negates an Exceptional Fee Award

The lower-court recognized that the "commercial speech" issues regarding Novella were "complex." (Doc.313,*Tr.*@194:12-17). The lower-court recognized that even regarding the Society, the issues were "important enough to merit oral argument" and not "straightforward." (Doc.227,*pg.*3). And, given the Panel's opinion in comparison to the lower-court's inconsistent commercial speech analyses, the "commercial speech" doctrine is clearly in flux.

Where parties are attempting to navigate "complex," "important, not "straightforward," and in flux legal issues, like the issue of "commercial speech" here, it is an abuse of discretion to assess exceptional case fees. *See*, *e.g.*, *Gametek LLC v. Zynga*, No. CV 13-2546 RS, 2014 WL 4351414, at *3 (N.D. Cal. Sept. 2, 2014) (denying attorney fees "where the critical issue of inventive concept is evolving"); *EON Corp. IP Holdings v. FLO TV Inc.*, No. 10-cv-812-RGA, 2014 WL 2196418, at *2 (D. Del. May 27, 2014) (denying attorney fees where the "case

turned on a complex and evolving area of law" and "the [court's] decision was not an easy one").

G. Novella Overlooks the Significance of the Lower-Court's Encouragement to Pursue "Complex," "Important" and not "Straightforward" Claims

Novella fails in obscuring the endorsement by the lower-court giving repeated encouragement to pursue their Lanham Act claims and by the Magistrate Judge. There are profound constitutional problems (and there is no other way to say it) with the lower-court punishing Plaintiffs for pursuing litigation the lower-court itself and the Magistrate Judge encouraged throughout the case. That is especially so where the lower-court itself found that the issues were "complex," "important," and not "straightforward." (Doc.313,*Tr.*@194:12-17//Doc.227,*pg.*3). As much as Novella tries, the facts are simply not capable of debate and bear additional emphasis.

The summary judgment ruling as to the Society was an express message by the lower-court for Plaintiffs to continue to pursue their Lanham Act claims against Novella, because the "commercial speech" issue as to Novella was of a different character than that of the Society. (Doc.157,*pgs.*9,12,13). The Panel's opinion highlights why that is since, according to the Panel, the issue of commercial speech cannot be decided without looking into the secondary/promotional uses of the speech – *e.g.*, the use of the speech in a commercial "window." *Tobinick v.*

Novella, 2017 WL 603832, at *10. Novella made secondary/promotional uses of Novella's first two webpages that the Society never made. (Docs.274-2,*pg.*18// Doc.177-8,*pg.*2//Doc.177-9//Doc.261-20,*pgs.*21-22*of*33//POB,*pgs.*10,16,20,36-44,52,63,64). As stated above, Plaintiffs were trying to show the lower-court Novella's secondary/promotional uses, which would not be applicable to the Society.

The lower-court further encouraged Plaintiffs to proceed with their Lanham Act claims in: (a) multiple denials of Novella's motions for sanctions seeking dismissal based on the commercial speech issue; (b) setting a hearing on Novella's motion for summary judgment on the "commercial speech" issue; (c) allowing Novella to withdraw that motion for summary judgment; (d) compelling Novella to produce discovery to Plaintiffs, allowing for Jay Novella's deposition and for Plaintiffs to continue with the course of the scheduling order; (e) commending Plaintiffs' litigation efforts in pursuing Lanham Act claims against Novella at the preliminary injunction stage; and, (f) determining that the case was not "exceptional" under the Lanham Act, in response to the Society's motion. (POB,*pgs.*3-12,56-57). And the Magistrate Judge further encouraged Plaintiffs to continue proceeding at the discovery conferences. (POB,*pgs.*12,56-57).

Novella does not effectively deal with the reality that these facts show how Plaintiffs' continued pursuit of Lanham Act liability was reasonable and that,

considering the circumstances, the levying of exceptional fees against Plaintiffs was manifestly arbitrary, capricious, and an abuse of discretion.

H. Novella Does Not Justify Why It Would Be Proper to Award Attorneys' Fees After He Falsely Disparaged a Competitor

Contrary to Novella's imputations, there is scientific support for the safety and efficacy of Plaintiffs' treatment, including the findings that Plaintiffs' PSE stroke treatment is within the standard of care. (Doc.261-30,*pgs*.28-29*of*30//Doc.261-29,*pg*.4*of*12). Novella's attacks on Plaintiffs caused significant harm to Plaintiffs' business. (POB,*pg*.45). Plaintiffs had every right to file a lawsuit to defend itself from the actual harm caused by Novella's attacks, especially given *Lexmark Int'l v. Static Control Components*, 134 S.Ct. 1377 (2014).

A "totality of the circumstances" analysis distinguishes this case from others, such as *CarMax Auto Superstores v. StarMax Finance,* 192 F. Supp. 3d 1279 (M.D. Fla. 2016), where there was "patently unreasonable" and continued trademark infringement, *id.* at 1284, and *Donut Joe's v. Interveston Food Servs*., 116 F. Supp. 3d 1290 (N.D. Ala. 2015), where the party failed to "present *any* evidence" on an issue, *id.* at 1294. Here, where Plaintiffs were disparaged with a litany of factual falsehoods, repeatedly, resulting in significant harm to their

reputations and business, (POB,*pgs.*32-49), it adds insult to injury and further injury and is neither equitable nor just to assess exceptional fees against Plaintiffs.

I. Novella's Assertion of Frivolity Has No Merit

The Panel held oral argument in case number 15-14889, something which, by definition, means that Plaintiffs' claims were not frivolous. Fed. R. App. P. 34 (a)(2)(A); 11th Cir. R. 34-3 (b)(1). The Panel did not find Plaintiffs' claims to be frivolous in the subsequent opinion. *Tobinick v. Novella*, 2017 WL 603832, at *1. Plaintiffs' claims cannot be frivolous if there is no adjudication nor indication of the relative strengths of the elements of Plaintiffs' claims. *Tire Kingdom*, 253 F.3d at 1335-1336.

J. The Panel's Opinion Illustrates Why the Lower-Court Abused its Discretion in Faulting Plaintiffs for Addressing Novella's Alleged Discovery Abuses

The lower-court found Plaintiffs' Lanham Act claims to be exceptional because of Plaintiffs' continued pursuit of Lanham Act claims (as described above) and "Plaintiffs' belated attempts to inject new issues into the proceedings by making unsupported allegations of perjury." (Doc.333*pg.*16). The Panel-Opinion, considered together with the facts in the record evidence, highlight why this was factually and legally erroneous.

Plaintiffs only learned of the falsity of Novella's deposition testimony when they received Novella's discovery responses, consisting of e-mails between

Novella and Zarembo, Novella and Barrett, and Novella and Ingraham on August 19, 2015, and then confirmed the falsity of the testimony during Novella's deposition on August 24, 2015. Plaintiffs' motions were filed only a week later. (Docs.258-261). Thus, the lower-court's "belated" finding is factually incorrect.

The lower-court's factual assertion that Plaintiffs had no support for their discovery-related motions is also clearly erroneous. A prime example of the lower-court's error concerns Novella's March 5, 2015 deposition testimony regarding his communications with Alan Zarembo:

> Q. Moving on to a slightly different subject. I'm going to bounce around a little bit just to let you know. Are you familiar with the author of the L.A. Times article about Dr. Tobinick, Zarembo?
> **A. What do you mean familiar with?**
> Q. Have you ever met him?
> **A. No.**
> Q. Have you ever communicated with him by e-mail or any other source?
> **A. No.**

(Doc.260-9,*Tr.*@284:22-285:9). On August 19, 2015, in response to Plaintiffs' discovery requests, Novella provided Plaintiffs with multiple e-mails documenting a back and forth exchange between Novella and Zarembo discussing Tobinick (Docs.260-27//260-28//260-29//260-30). These e-mails are self-explanatory and include this email sent by Novella to Zarembo:

> **From**: stevennovella@comcastnet [mailto:stevennovella@comcast.net]
>
> **Sent**: Thursday, May 09, 2013 1:54 PM

> **To**: Zarembo, Alan
> **Subject**: Re: l.a. times writer
>
> You should ask the California board of health why they are not continuing to go after him [Tobinick].
>
> Yes – I was involved with the case of Dr. William Hammesfahr who uses vasodilators off label in a very similar way to Tobinick. He has likewise evaded regulation. This guy makes Tobinick look like an amateur.
>
> Steve

These Novella-Zarembo emails were authenticated by Novella during his August 24, 2015 Deposition. (Doc.260-31). The L.A. Times article by Zarembo was an important element of the litigation, referred to by both parties (Docs.26-1//30//36-1//65//65-1//93//93-3//105//105-1//105-39//136-18//177-7//260-18). Thus, Novella's inconsistencies regarding Zarembo were the proper subject of a motion by Plaintiffs alleging discovery-related misconduct. (Docs.258-261). This and other evidence submitted by Plaintiffs directly and definitively contradicts the lower-court's characterization of Plaintiffs' conduct as "…making *unsupported* allegations of perjury." (Doc.333*pgs*.15-16). (emphasis added).

Further, the Panel found inconsistencies between Novella's testimony and other record evidence. *Tobinick*, 2017 WL 603832, at *8-*9. That also invalidates the lower-court's finding of "unsupported allegations" and "no evidence to support" Plaintiffs' discovery-related motions regarding these inconsistencies.

(Doc.333*pg.*15). To be sure, the record evidence for Novella's discovery inconsistencies was substantial. (Docs.258-261,269).

Plaintiffs' allegations were neither "belated" nor "unsupported" and the lower-court's ruling based on those factual errors, (Doc.333pg.16), is an abuse of discretion. Moreover, Plaintiffs sought exactly the type of relief litigants are supposed to seek when confronted with discovery inconsistencies – Plaintiffs did not seek to assert claims of "perjury" against Novella. (Docs.258-261). Novella fails to recognize and does not effectively refute this.

K. Novella Cannot Credibly Deny Plaintiffs' Right to Seek Lanham Act Protection

Novella effectively fails to refute the essential aspects of Plaintiffs' facts and arguments regarding commercial speech:

> Novella's articles were part of a "funnel" that routed money, in the form of SGU membership fees, *etc*. directly to Novella; (POB,*pgs*.32-49);
>
> The first two webpages were used for secondary, promotional purposes by Novella utilizing his additional publications targeted at Plaintiffs; (POB,*pgs*.32-49), and,
>
> Novella and Plaintiffs were direct competitors and Novella was falsely disparaging and the commercial aspects of their competing medical practice (staffing, geographic location, treatment results, pricing, patents, *etc.*) in his publications ("articles", webpages, podcasts) directed at Plaintiffs. (POB,*pgs*.32-49).

Novella overlooks all of this and the fact that his attacks were on the commercial aspects of Plaintiffs' practice as a direct competitor with Plaintiffs. (POB,*pgs.*32-49). The significance warrants additional emphasis.

1. Novella Fails to Effectively Refute the Convincing Evidence of False Commercial Disparagement

False commercial disparagement by a competitor is the classic Lanham Act case. *See*, *e.g.*, *Handsome Brook Farm v. Humane Farm Animal Care*, 193 F. Supp. 3d 556, 569-570 (E.D. Va. 2016) ("The competitive relationship in this case is sufficient to state a claim under the Lanham Act."). The lower-court found a disputed issue of material fact regarding competition. (Doc.288,*pg.*5). The Panel did not reach the totality of the commercial disparagement evidence, (Panel-Opinion,*pgs.*29-30,*fns.*13-14), but it was properly before the lower-court in its consideration of the totality of the record. The record evidence of disparagement against Plaintiffs by a competitor, Novella, was ample and substantial.

Plaintiffs' patented PSE treatment for multiple neurological conditions is in competition with neurologists practicing general neurology, like Novella. (Doc.261-9,*Tr.*@9,43,47-48,55-56,62//Doc.105-1¶¶58//Doc.55,¶¶17-18//Doc.260-8,*Mar.31Tr.*@17:13-18//Doc.272-22,*lines*150-151). Plaintiffs treat back pain, Alzheimer's, dementia, stroke, and headaches (Doc.105-1,¶58//Doc.260-8,*Mar.31Tr.*@17:14-18). 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). Novella is not somehow a mere "research neurologist" – Novella actively practices in the Yale General Neurology clinic. (Doc.260-9,*Tr.*@43:16-20,47:16-25,48:1-23,55:10-14,62:11-12).

Novella believes that Plaintiffs "have the exclusive right to perform certain medical procedures, as related to Enbrel injections" because of Plaintiffs' patents covering the PSE treatment. (Doc 26-1,¶13). There is a turf war between Plaintiffs, a group of board-certified internal medicine physicians who were treating patients with neurological problems versus board-certified neurologists practicing general neurology, such as Novella. (Doc.261-13//Doc.261-2,*pg.*3//Doc.267-11,*pgs.*34-35). Prospective patients performing Google searches for Plaintiffs' PSE treatment were presented with two competing sources of information: Plaintiffs' webpages versus Novella's webpage attacks that discouraged patients from seeking Plaintiffs' services. (Doc.304-26//Doc.272-22//Doc.260-8,*Mar.30Tr.*@159-172). In this age of the Internet, that is the equivalent of the hypothetical noted at oral argument of Novella standing outside of Plaintiffs' practice with a sign "saying don't go to Dr. Tobinick's clinic."

Novella's attacks, three of which were not part of the Panel's opinion, disparaged Plaintiffs using factual falsehoods. For instance, Novella represented to the public that Tobinick had a 2014 Medical Board accusation against him, (Doc.177-11*pg.*6*of*17), despite knowing that the accusation was withdrawn. (Doc.261-8,*3/31Tr.*@91-95//Doc.261-30//261-20;272-18). Novella even corrected a misrepresentation to the lower-court about the withdrawn 2014 accusation (Doc.281*pg.*1), but then repeated that the same misrepresentation in the appeal in his January 9, 2017 response to supplemental authority in Case No. 15-14889.

Likewise, Novella called Tobinick "disgusting." (Doc.177-9,*pg.*9). Novella falsely stated that there were "no double-blind placebo controlled trials looking at Enbrel for Alzheimer's," (Doc.177-9,pg.7), despite constructive knowledge of an ongoing "double blind, placebo controlled study of etanercept for Alzheimer's," (Doc.177-15,*pg.*20). Novella falsely stated that Chiate "continued to progress, without any apparent change in the course of the illness," (Doc.177-9,*pg.*9), despite the fact that the Zarembo article upon which he relied documents "apparent changes" during treatment reported by the patient's husband, caretaker, and sister (Doc.26-2*pgs.*4-6*of*9). Novell falsely stated that drug delivery patents are unethical under AMA guidelines (*Compare*Doc.177-5*pg.*4*with*Doc.272-26*pg.*2).

Novella's falsely published that Tobinick lacked "formal training in neurology" (Doc.260-18,*pg.*19), lacked board certification, (Doc.260-17,*pg.*5), and

did not have proper training, (Doc.260-17,*pg*.6), all of which was proven false, (Doc.136-2//Doc.261-8,*3/31Tr*.@175-182), including through expert testimony. (Doc.272-24).

Novella falsely published that Plaintiff Tobinick is not publishing peer-reviewed scientific articles: "Part of the scientific process is to publish in a peer review, which he's not doing, number 1" (260-17,*pg*.8//Docs.105-1,*et seq*.), despite being notified of Tobinick's peer-reviewed scientific publications months before Novella published this factually false statement, (Doc.55-4,*pgs*.10-11).

Novella fails to effectively address the record evidence of false commercial disparagement/defamation against Plaintiffs by Novella, which is a compelling reason why Plaintiffs should not have been penalized for pursuing their Lanham Act claims. *CrossFit v. Nat'l Strength and Conditioning Assoc.*, No.:14cv1191-JLS-(KSC), 2016 WL 5118530, at *7-*8 (S.D. Cal. Sept. 21, 2016); *Handsome Brook Farm*, *supra*.

L. Novella Cannot Credibly Argue that the Lower-Court's Ruling on Summary Judgment as to Novella Was Either Obvious or a Foregone Conclusion

Novella wrongly suggests that there was somehow a law of the case bar on Plaintiffs given the summary judgment ruling as to the Society on the issue of commercial speech. Different facts and a different analysis applied to Novella than to the Society, especially as the record evidence developed. This is seen by the

Panel's adoption of a secondary/promotional use analysis for determining commercial speech – something which applies to Novella much differently than to the Society since Novella was making use of his attacks in his commercial "windows" on his for-profit webpages. *Tobinick v. Novella*, 2017 WL 603832, at *10. The law of the case doctrine does not and cannot make the lower-court's summary judgment ruling as to the Society apply to Novella.

While the lower-court later implied in the fee order that the March 2015 summary judgment ruling as to the Society was somehow the functional equivalent of a ruling as to Novella, this merely serves to highlight why that determination and the entire fee award was an abuse of discretion. In the March 2015 summary judgment ruling, ***the lower-court itself stated that the ruling was not the functional equivalent of a ruling as to Novella***. (Doc.157,*pgs.*9,12,13). Thus, it is fundamentally inequitable, irrational, and an abuse of discretion for the lower-court to have allowed Novella attorneys' fees starting from the March 2015 summary judgment ruling regarding the Society when the lower-court itself initially stated the ruling does not apply to Novella.

M. Novella Overlooks Why His Own Litigation Position Negates Exceptional Fees

How Novella responded to this case is an essential part of an exceptional case analysis. *NXP B.V. v. BlackBerry*, 58 F. Supp. 3d 1313, 1325 (M.D. Fla.

2014). Novella did not answer the complaint until nearly a year after it was filed. (Doc.204). When Novella finally did, Novella did not have "commercial speech" in affirmative defenses. (Doc.204,*pg.*13). Prior to that, Novella did not file a Rule 12(b)(6) motion to dismiss based on "commercial speech" argument. Moreover, Novella had withdrawn a summary judgment motion on the issue of "commercial speech." (Docs.206,214,215). Novella also failed to provide discovery until the eve of the deadline. (Docs.212,350-353). And despite Novella's *post hoc* insinuations regarding evidence outside of the record, Novella's counsel specifically stated that they "respect the fact that [Tobinick] believes that he will prevail on his [Lanham Act] claims," (Doc.292-6,*pg.*7).

Through this conduct, Novella cannot obtain an exceptional case windfall for the time Novella spent litigating. *NXP*, 58 F. Supp. 3d at 1325 (denying fees and stating, "Any delay, expense or inconvenience that resulted is a shared responsibility of the parties.").

N. Novella Fails to Understand Why It Was Fundamentally Unfair for the Lower-Court to Switch the "Exceptional Case" Legal Standards During the Case

The lower-court addressed two different "exceptional case" motions during the litigation, but applied two different standards. In ***denying*** the Society's motion, the lower-court used the "bad faith" standard. (Doc.227,*pg.*2). *Octane Fitness* had already been decided a year before the lower-court chose the "bad faith" standard.

134 S.Ct.1749. But then in ***granting*** Novella's motion, the lower-court used the *Octane Fitness* standard. (Doc.333,*pgs.*13-14). That judicial surprise is not fair. Courts should not apply two different standards to the same motion in the same case.

Thus, Plaintiffs seek oral argument by this Court because, *inter alia*, there is a novel application of the *Octane Fitness* standard to a false advertising case under the Lanham Act. And the legal standard was inconsistently applied by the lower-court with ***drastically different outcomes*** to the detriment of Plaintiffs.

O. Novella's Actual Malice Bars Fees

Although the Panel did not consider all three of Novella's attacks in its opinion, *Tobinick v. Novella*, 2017 WL 603832, at *10, *fns*. 13 & 14, the totality of the attacks support an overwhelming inference of actual malice. (POB,*pgs*.33-49)//*See supra* at *pgs*. 22-23.

Novella also fails to properly refute Plaintiffs' contention that Novella intentionally and falsely attacked Plaintiffs to "tarnish[] personal integrity and reputation" and to imply "professional misconduct and deceit." *Competitive Enters. Institute v. Mann*, 150 A.3d 1213, 1242-1243 (D.C. Ct. App. 2016). Plaintiffs produced compelling evidence that Novella was caught admitting to republishing false statements ("one-man institute" and "moved his clinic to

Florida") that he temporarily corrected because of their falsity, evidence to which Plaintiffs pointed in their opening brief:

> Q. Did you at any point revise this article to change it from a one-man institute to: "... but it is still nothing more than a private clinic, not part of any academic institution"?
> **A. Yes.**
> Q. When did you do that?
> **A. When I received the cease and desist letter detailing the complaints about my article.**
> Q. And why did you do it?
> **A. It's our policy to correct any factual errors if they're pointed out to us, and usually we're pretty liberal about that. We'll give people the benefit of the doubt, but I undid the change, again, when it was apparent that this was going to lead to a lawsuit.**
> ***
> Q. Under what appears to be a quote from the L.A. Times, you have a sentence that says: "Tobinick has since opened a clinic in Florida, which is a very quack-friendly state." Is that correct?
> **A. Yes.**
> Q. Did you change that sentence from a previous version?
> **A. Yes.**
> Q. When did you change it?
> **A. Upon receiving the cease and desist letter.**
> Q. And did you change it because you realized that in your original article, the statement you made was inaccurate?
> **A. Yes.**
> Q. Subsequent to your correction, you have changed it back to: "Tobinick has since moved his clinic to Florida, which is a very quack-friendly state." Is that correct?
> **A. Correct.**

(Doc.261-9@*Tr*.157:8-23,159:2-25). That is the textbook definition of actual malice – Novella admitted to re-publishing known falsehoods. These falsehoods

were a cardinal feature and hallmark at dissuading Plaintiffs' potential patients. (Doc.272-22//Doc.304-26).

Considering these facts, it would be inequitable and an abuse of discretion to award anti-SLAPP fees to Novella, particularly, when, as here, Novella remains effectively silent regarding these compelling facts.

II. CONCLUSION

For the foregoing reasons and the reasons stated in the opening brief,[2] Plaintiffs respectfully ask this Court to grant Plaintiffs' prayers for relief.

CERTIFICATE OF COMPLIANCE

Type-Volume. This document complies with the word limit of FRAP 32 because, excluding the parts of the document exempted by FRAP 32(f) and applicable rules, this document contains 6,048 words according to Microsoft Word word processing software. **Typeface and Type-Style**. This document complies with the typeface requirements of FRAP 32(a)(5) and the type-style requirements of FRAP 32(a)(6).

s/Cullin O'Brien
Cullin O'Brien, attorney for Plaintiffs

[2] Novella's accusation that Plaintiffs' opening brief is non-compliant is wrong.

CERTIFICATE OF SERVICE

I hereby certify that on February 28, 2017, 7 copies of the brief were dispatched for delivery to the Clerk's Office of the United States Court of Appeals for the Eleventh Circuit by third-party commercial carrier for overnight delivery at the following address:

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On February 28, 2017, a copy of the brief as served on the following by CM/ECF or in some other authorized manner for those counsel or parties who are not authorized to receive electronic Notices of Electronic Filing.

s/Cullin O'Brien
Cullin O'Brien