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Brief of Amici Curiae Intellectual Property Law Professors

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No. 15-14889

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.,
Plaintiffs/Appellants,
v.
STEVEN NOVELLA, M.D.,
Defendant/Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA
CASE NO: 9:14-cv-80781-RLR
(Hon. Robin L. Rosenberg)

MOTION FOR LEAVE TO FILE BRIEF OF AMICI CURIAE INTELLECTUAL PROPERTY LAW PROFESSORS

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INTRODUCTION

Pursuant to Rule 29(b) of the Federal Rules of Appellate Procedure, Amici Intellectual Property Law Professors request leave to file the accompanying amicus curiae brief in support of Appellee Novella. Pursuant to Eleventh Circuit Rule 29, Amici attempted to obtain the consent of all parties before moving for permission to file the proposed brief. Appellees have consented to the filing of this brief, but Appellants have refused consent.

IDENTITY AND INTEREST OF AMICUS CURIAE

Amici are intellectual property law professors who teach and have written extensively about the Lanham Act and related intellectual property subjects. Our sole interest is in the orderly development of Lanham Act law and First Amendment law in a way that serves the public interest.

THE AMICUS'S BRIEF WILL ASSIST THE COURT AND IS RELEVANT TO THE DISPOSITION OF THE CASE

Amici Intellectual Property Law Professors offer this brief to explain how this Court can avoid an inappropriate application of the Lanham Act to noncommercial speech, while also reserving an appropriate scope for the false advertising provisions of the Lanham Act in true commercial speech cases. Amici are concerned both about overextension of the Lanham Act to interfere with any speech that could be construed as fundraising and about overstatements of the

constraints that the First Amendment should put on ordinary Lanham Act false advertising cases.

Given the recurring question of the intersection of the Lanham Act and the First Amendment, resolution of this case is likely to have significant legal impact, and Amici hope to provide useful background for the Court as it considers the case.

CONCLUSION

For the reasons stated herein, Amici request that this Court accept the attached brief as filed.

Dated: November 30, 2015

RESPECTFULLY SUBMITTED,

By: __/Mark P. McKenna/_____

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CERTIFICATE OF SERVICE

I hereby certify that I filed the foregoing MOTION FOR LEAVE TO FILE BRIEF OF AMICI CURIAE INTELLECTUAL PROPERTY LAW PROFESSORS IN SUPPORT OF APPELLEE.

I further certify that I served the foregoing MOTION FOR LEAVE TO FILE BRIEF OF AMICI CURIAE INTELLECTUAL PROPERTY LAW PROFESSORS IN SUPPORT OF APPELLEE on counsel for the parties, by sending a copy thereof by UPS to the address of each counsel, as listed below:

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May 27, 2016

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Counsel of Record

No. 15-14889

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, the undersigned states that none of the Amici is a corporation or has a parent corporation.

Dated: May 27, 2016

By: /Mark P. McKenna/

Counsel for Amici Curiae

CERTIFICATE OF COMPLIANCE WITH RULE 29(c)(5)

Counsel for the parties did not author this brief in whole or in part. The parties have not contributed money intended to fund preparing or submitting the brief. No person other than Amici Curiae or their counsel contributed money to fund preparation or submission of this brief.

Dated: May 27, 2016

By: /Mark P. McKenna/

Counsel for Amici Curiae

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IDENTITY AND INTEREST OF THE AMICI CURIAE

Amici are law professors who teach and have written extensively about advertising law and related subjects. Our sole interest in this case is in the orderly development of advertising law in a way that serves the public interest. Amici take no position on the merits of the factual claims, or on the legal issues except insofar as they relate to the Lanham Act false advertising claims.[*]

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[*] All signatories speak only on behalf of themselves. Institutional affiliations are listed for identification purposes only.

CONSENT OF THE PARTIES

Counsel for Appellees consented to the filing of this brief. Counsel for Appellants declined to consent. Amici's motion for leave to file this Amicus Brief is enclosed herewith.

I. Summary of Argument

The District Court correctly determined that the challenged speech of Dr. Steven Novella was not commercial speech for purposes of applying the Lanham Act. Appellant's argument to the contrary conflates "seeking profit" with "commercial speech."

II. Argument

There are difficult cases about the boundary between commercial and noncommercial speech. This is not one of them. Commercial speech, at its core, "does 'no more than propose a commercial transaction.'" *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 66 (1983) (quoting *Virginia Pharmacy Board v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 762 (1976)). Here, "the 'common-sense' distinction between speech proposing a commercial transaction ... and other varieties of speech," *Ohralik v. Ohio State Bar Assn.*, 436 U.S. 447, 455-456 (1978), on which the Supreme Court's doctrine "heavily" rests, *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626, 637 (1985), is enough to decide this case.

Appellant seeks to have Appellees' speech characterized as commercial because Appellees stood to benefit from membership fees by people who agreed with Appellees' outlook on scientific issues and/or wanted to support similar content. That's the definition of advocacy, not of commercial speech—speech

designed to support the sale of something other than speech itself. Appellant makes a category error, conflating for-profit informative speech with commercial speech, a far more limited subset thereof. *See, e.g.*, Appellant's Br. at iv, vii, 50-51.

The fact that a diagram is needed to track the alleged connection between Appellees' speech and profit suggests the problem with Appellant's theory. *See, e.g.*, Appellant's Br. at v. Such an attenuated connection between the content of the speech and the ultimate financial benefit to the speaker is a hallmark of noncommercial speech, not commercial speech. *Cf. Gordon & Breach Science Publishers, S.A. v. American Institute of Physics*, 859 F. Supp. 1521, 1541 (S.D.N.Y. 1994) (stating that the separate interests of an officer of a nonprofit association didn't have a sufficient connection to the nonprofit's publications to "convert [the nonprofit's] fully protected commentary into less-protected commercial speech").

The *New York Times* seeks a return on its capital, and may even hope to lure advertisers targeting particular demographics, for example by running a section on wealthy New Yorkers, but neither of those facts makes its speech "commercial" speech, a specific category of content under the First Amendment. Appellant's argument can't distinguish Appellees' activities from those of traditional press entities such as the *New York Times* or investigatory non-profit

ProPublica.[1] *See* Appellant's Br. at 5 (arguing that Appellees' speech was commercial because website ran ads for third parties); *id.* at 46-47 (arguing that soliciting donations to support investigations was commercial speech).

The district court found the dispositive facts: 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 Appellant's treatments. The only products or services the articles referenced were Appellant's treatments. To the extent the second article referred to Appellee Novella's practice, "it is in direct response to the instant litigation as opposed to an independent plug for that practice." *Tobinick v. Novella*, --- F. Supp. 3d ---- , 2015 WL 6777458, at *4 (S.D. Fla. 2015).

Matters might well be different if, in the course of soliciting patients for his own practice, Appellee Novella had made factual statements about Appellant's treatments. It is notable, however, that Appellant carefully avoided any such allegation. *See, e.g.*, Appellant's Br. at vii (failing to specify what, exactly, Appellee did to further his "goals of making money and self-promotion"). Appellant argues only that the challenged speech served to draw dollars to

[1] Award-winning journalism organization ProPublica investigates specific entities and industries. ProPublica may inflict economic harm when its reporting reveals disturbing facts. Furthermore, ProPublica actively solicits donations to continue this work. *See* https://www.propublica.org/investigations/. Appellant accuses Appellees of doing exactly the same thing, and calls that commercial speech.

Appellee SGU, not to medical services provided by Appellee Novella. Appellant's Br. at 2-5. This concession simplifies matters considerably. According to the facts as produced to the district court on summary judgment, the only path to profit for Appellees from the challenged articles lay in convincing audiences that their *speech* was worth supporting—not that Appellee Novella's medical practice was. That profit mechanism is insufficient to trigger the Lanham Act. *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 501 (1952) (rejecting the argument that "motion pictures" fall outside "the First Amendment's aegis because their production, distribution, and exhibition is a large-scale business conducted for private profit"); *Dryer v. National Football League*, 814 F.3d 938, 944 (8th Cir. 2016) (concluding that "the NFL's economic motivations alone cannot convert these productions into commercial speech" despite the fact that films enhanced the NFL's brand and increased the appeal of NFL Football generally).

The district court's holding that Novella could be a noncommercial speaker in some contexts, while also being a practicing doctor, made sense of the commercial/noncommercial distinction. When Dr. Oz counsels an individual patient, his speech is professional speech, and it may result in malpractice liability if it falls below the standard of care without implicating the First Amendment. *See, e.g.*, Robert Post, *Informed Consent to Abortion: A First Amendment Analysis of Compelled Physician Speech*, 2007 U. ILL. L. REV. 939, 950. When Dr. Oz touts

remedies that he offers to sell, his speech about those remedies is commercial speech. When Dr. Oz sells books touting amazing cures, he is not ordinarily engaging in commercial speech.[2]

Appellant's attempt to muddy the distinction between constitutionally noncommercial, for-profit speech and commercial speech shows only the wisdom of that distinction, which allows consumer protection law to coexist with robust freedom for political speech. Appellant relies on *World Wrestling Federation Entertainment, Inc. v. Bozell*, 142 F. Supp. 2d 514 (S.D.N.Y. 2001), in which defendants ran a campaign with "the stated goal . . . to 'educate' its members" and the WWF's sponsors and advertisers that the WWF was a dangerous entity. *Id.* at 521. *Bozell* found that the attacks on the WWF were "featured prominently in a fundraising video" for the organization, which bragged that the campaign "hurt the WWF[] and had increased the [Parents Television Council's] fundraising revenue and given it increased notoriety." *Id.* at 525. *Bozell* rejected a motion to dismiss in part because the court concluded that a reasonable fact-finder could find the

[2] Except insofar as his representations about his books are commercial: if he misrepresented the price of the books, false advertising law would be implicated. Further, if Dr. Oz were using excerpts from his books to tout particular remedies he was also selling, that would be a different matter. *Cf. Gordon & Breach*, 859 F. Supp. at 1536 (holding that general publication of journal article was protected speech; use of article reprints in specific advertising pitches to consumers of the products evaluated in the article was commercial speech subject to the Lanham Act). Fortunately, this Court need not decide such issues here, where Appellant has challenged Appellees' speech to the public.

defendant's speech to be commercial because of the defendant's goals of making money and promoting itself.

Amici respectfully disagree with the result in *Bozell*. It is inconsistent with the overall case law. For example, *Bozell*'s conclusion that self-promotion is "commercial" is wildly overbroad. *See Religious Tech. Ctr. v. Netcom On–Line Commc'n Services, Inc.*, 923 F. Supp. 1231, 1244 (N.D. Cal. 1995) (pointing out, in copyright case, that counting self-promotion or notoreity as "commercial" benefit renders the concept so broad as to be meaningless).

Numerous other cases reject *Bozell*'s reasoning. In *Raymen v. United Senior Ass'n, Inc.*, 409 F. Supp. 2d 15 (D.D.C. 2006), for example, the court found that a nonprofit's internet advertisement stating its political opinions was not commercial speech, even though the nonprofit sought contributions from people who clicked on the ad. As the court pointed out, "only after using the advertisement (by clicking on it) to access the webpages were viewers exposed to the information about USA Next and the solicitation for financial contributions." *Id.* at 24. The *Raymen* court distinguished this from direct promotion of a defendant's own services and noted that "the advertisement here discusses public policy issues that are currently the subject of public debate." *Id.* (citations omitted). Similarly, cognizant of the risks of deterring speech on matters of public interest, another court found that fundraising appeals by People for the Ethical

Treatment of Animals which contained allegedly false statements about an animal testing lab were noncommercial speech. *Huntingdon Life Scis., Inc. v. Rokke*, 978 F. Supp. 662, 666 (E.D. Va. 1997); *see also Wojnarowicz v. American Family Ass'n*, 745 F. Supp. 130, 141–42 (S.D.N.Y. 1990) (reaching result inconsistent with *Bozell* for advocacy speech used in fundraising). The D.C. Circuit has specifically held that the kind of general "ideological" competition involved in this case is not commercial. *See Farah v. Esquire Magazine*, 736 F.3d 528, 541 (D.C. Cir. 2013) (blog post about book was noncommercial political speech, though *Esquire* stood to profit from gaining readers).

In general, critical analyses of a plaintiff's offerings are not "commercial speech" simply because the defendant is also a commercial entity. As the D.C. Circuit explained:

> Of course, writers write and publishers publish political tracts for commercial purposes, and it is possible that the kinds of commercial methods made illegal by the Lanham Act could be applied to such tracts. The actions alleged, however, do not involve such methods. The mere fact that the parties may compete in the *marketplace of ideas* is not sufficient to invoke the Lanham Act. To the contrary, it reinforces Esquire's position that its blog post was political speech ….

Farah, 736 F.3d at 541; *see also Neurotron, Inc. v. American Ass'n of Electrodiagnostic*, 189 F. Supp. 2d 271, 276-77 (D. Md. 2001) (article in professional medical journal about medical devices wasn't commercial speech); *Rotbart v. J.R. O'Dwyer Co., Inc.*, 34 U.S.P.Q.2d 1085 (S.D.N.Y. 1995) (critical

comments about plaintiff in defendant's newsletter were not actionable under § 43(a) because they did not promote defendant's newsletter at the expense of plaintiff's competing newsletter); *National Artists Management Co., Inc. v. Weaving*, 769 F. Supp. 1224, 1232 (S.D.N.Y. 1991) (interpreting the Lanham Act to avoid application to "speech that relates to both goods and services, as well as political issues—for example, misrepresentations made by interested groups which may arguably disparage a company and its products because of the company's failure to divest its South African holdings, or disparaging statements regarding a corporation's policy toward product design, included in a law review article addressing the law of product liability"); *see also Gaudiya Vaishnava Soc. v. City of San Francisco*, 952 F.2d 1059, 1066 (9th Cir. 1990) ("[W]here nonprofits engage in activities where pure speech and commercial speech are inextricably intertwined the entirety must be classified as fully protected noncommercial speech.").

Bozell's lack of fit with the case law is unsurprising, because the reasoning in *Bozell* is misguided. Fundraising isn't in itself commercial speech. When ProPublica touts its award-winning investigations and asks for public support, that does not convert those investigations into commercial speech so that its targets can

now sue it under the Lanham Act's strict liability regime rather than under the more speech-protective defamation regime.[3]

The rule for which Appellant argues is a dangerous one with the potential to convert almost every political dispute into a false advertising case. Pro-choice organizations accuse pro-life organizations of deceptive conduct and seek to fundraise as part of their advocacy missions;[4] pro-life organizations do the same thing.[5] Politicians make disputed factual claims about other politicians' business activities, seeking to energize their supporters with these claims, to gain publicity with them, and to solicit more contributions as a result.[6] None of these disputes

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[3] Some statements by nonprofits might be commercial speech: In a solicitation of a donation in return for a commemorative mug, the description of the mug might well qualify as commercial speech, because of the tangible product provided to the donor in return for the donation. Similarly, statements promising that specific services would be provided to third parties in return for a donor's money could trigger the concerns underlying the commercial speech doctrine. But neither situation would make the nonprofit's *other* communicative activities commercial speech, and each is easily distinguishable from the situation here.

[4] *See, e.g.*, Laura Bassett, Planned Parenthood Sees Spike In Donations As Attacks Escalate, Huffington Post, July 30, 2015, available at http://www.huffingtonpost.com/entry/planned-parenthood-donations_us_55ba2e3fe4b095423d0df22e.

[5] *See, e.g.*, National Right to Life, The Truth About Planned Parenthood, http://www.nrlc.org/abortion/plannedparenthood/ (visited Apr. 20, 2016) (soliciting donations on page attacking Planned Parenthood).

[6] *See, e.g.*, Alexander Mallin, President Obama Mocks Trump's Business Ventures, ABCNews.Go.Com, Mar. 11, 2016, available at http://abcnews.go.com/Politics/president-obama-mocks-trumps-business-ventures-wine/story?id=37591368.

should be adjudicated according to the Lanham Act's strict liability standard. Under Appellant's logic, all of them should be.

III. Conclusion

Noncommercial speech, like that of Appellees, is not unregulated. Appellant could, and did, challenge it under the rigorous standards set forth by *New York Times v. Sullivan*, 376 U.S. 254 (1964), for defamation. His inability to prevail under that standard does not entitle him to a lower one, and his arguments for why the speech at issue is commercial would put all for-profit—and even much nonprofit—speech at risk.

For the foregoing reasons, the judgment of the District Court on the Lanham Act claim should be affirmed.

Respectfully submitted,

/Mark P. McKenna/

CERTIFICATE OF COMPLIANCE.

I hereby certify that pursuant to Fed. R. App. P. 32(a)(7)(C) this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and (6), because it is written in 14-pt Times New Roman font, and with the type-volume limitations of Fed. R. App. P. 29(d) and Eleventh Circuit Rule 32-4, because it contains 2,226 words, excluding the portions excluded under Fed. R. App. P. 32(a)(7)(B)(iii). This count is based on the word count feature of Microsoft Word.

Dated: May 27, 2016

By: /Mark P. McKenna/

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