SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: O. PETER SHERWOOD PART 49
Justice

ALCOR LIFE EXTENSION FOUNDATION,

Plaintiff,

-against-

LARRY JOHNSON, VANGUARD PRESS, INC. and SCOTT BALDYGA,

Defendants.

INDEX NO. 113938/2009

MOTION DATE May 11, 2013

MOTION SEQ. NO. 009

MOTION CAL. NO.

The following papers, numbered 1 to _____ were read on this motion for summary judgment.

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion for summary judgment is decided in accordance with the accompanying decision and order.

Dated: May 1, 2014

O. PETER SHERWOOD, *J.S.C.*

Check one: ☑ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/ JUDG. ☐ SETTLE ORDER/ JUDG.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 49

----------X

ALCOR LIFE EXTENSION FOUNDATION,

Plaintiff,

-against-

LARRY JOHNSON, VANGUARD PRESS, INC. and SCOTT BALDYGA,

Defendants.

----------X

DECISION AND ORDER
Motion Seq. Nos.: 009 -and- 011

Index No.: 113938/2009

O. PETER SHERWOOD, J.:

BACKGROUND

This is an action by plaintiff Alcor Life Extension Foundation ("Alcor"), a not-for-profit organization engaged in the practice of cryonics, against Dr. Larry Johnson ("Johnson"), Scott Baldyga ("Baldyga") and Vanguard Press, Inc. ("Vanguard"). Cryonics is a process by which a clinically dead human body or detached head or brain is frozen and kept at an extremely low temperature in the hope of later restoring it to life with the help of future medical technologies. The complaint asserts various claims including defamation and breach of fiduciary duty stemming from the publication by Vanguard of a book co-authored by Johnson and Baldyga titled *"Frozen: A True Story, My Journey Into the World of Cryonics, Deception, and Death" ("Frozen")*. The book purports to describe Johnson's experiences during the approximately eighth-month period in 2003 when he was employed by Alcor.

Prior to commencing the instant action, Alcor sued Johnson twice for his disclosures claimed to be in violation of the confidentiality provision of his employment agreement. The unauthorized disclosures began as early as 2003, when an article about Johnson and his concerns regarding Alcor's practices was published in *Sports Illustrated* magazine. The article focused on a celebrity client of Alcor, the legendary Boston Red Sox left field player and Baseball Hall of Famer, Ted Williams. Alcor obtained a default judgment against Johnson in the Superior Court of Arizona, Maricopa County, dated July 7, 2009 (the "Arizona Judgment"), for violation of the confidentiality provision and barring Johnson from "publishing or communicating any information about Alcor to third

parties, including but not limited to, any and all information which disparages Alcor in any way" (NYSCEF Doc. No. 72). *Frozen* was released to the public on October 4, 2009. The Arizona Judgment was domesticated in New York pursuant to the order of Justice Yates dated March 1, 2010 (NYSCEF Doc. No. 68).

Alcor's third amended complaint (NYSCEF Doc. No. 359) ("TAC") alleges that *Frozen* contains 32 false and defamatory statements and that Johnson's statements in the book about Alcor violate various agreements and judgments prohibiting him from speaking about Alcor. In February 2012, Alcor settled its claims against Johnson. Alcor filed a Stipulation of Discontinuance as against Johnson on or about July 3, 2012 (NYSCEF Doc. No. 163). The remaining claims which are against Vanguard and Baldyga are:

> 4th Cause of Action- Aiding and Abetting Violations of Binding Legal Documents and Court-Entered Judgment (TAC ¶104-10); and
>
> 6th Cause of Action- Defamation (TAC ¶ 120-135).

In the two motions now pending decision, Vanguard and Baldyga move for summary judgment dismissing these causes of action.

Vanguard states and Alcor does not dispute, that Alcor's claims against it are all premised on the publication of *Frozen*. Vanguard argues that the case cannot succeed because Alcor cannot make the requisite showing of liability given the protections accorded the press by the First Amendment of the United States Constitution. Vanguard maintains that Alcor is a public figure, and as such, cannot meet the burden of showing clearly and convincingly that Vanguard published *Frozen* with "actual malice". Vanguard adds that even if Alcor were deemed a private figure, Alcor could not show that Vanguard was grossly irresponsible in publishing the matters of public concern in issue here.

In arguing that Alcor is a public figure, Vanguard observes that "Alcor's unorthodox mission and actions, so plainly at odds with accepted scientific and social norms - and illustrated most glaringly, by its decapitating dead bodies and cryopreserving them to permit future re-animation -

naturally and inevitably drew intense public attention" (Vanguard Br., NYSCEF Doc. No. 267, at 1-2). Vanguard states - - and Alcor does not dispute - - that "over a *thousand* national, international, and local media reports during the two decades prior to this lawsuit cast Alcor squarely in the public spotlight. Those reports concerned, *inter alia*, the the controversial science fact-or-fiction world of cryonics, Alcor's shocking cryopreservation of baseball Hall of Famer Ted Williams, and Alcor's questionable activities and methods and those of so-called 'Alcorians' – all at issue here. Alcor harnessed and exploited that attention. It thrust itself into the limelight to increase its notoriety and public profile, bolster its self described 'world leadership' and 'pioneer' status in cryonics, and boost its membership and donations" (*id* at 2 [emphasis in original]).

Specifically, Vanguard notes that Alcor "gained substantial media attention in the two decades prior to this lawsuit, with such events as

- a 1988 homicide investigation into whether Alcor accelerated the death of the mother of Board member Saul Kent prior to decapitation for cryopreservation;
- a 2002 Williams family legal feud, and a 2004 legal dispute between Alcor and some Williams family members over the disposition of Ted Williams' remains;
- 2003 disclosures by Johnson of details of Williams' brutal cryopreservation by Alcor;
- the 2004 publication of books involving Alcor – an award-winning book by a Boston Globe reporter about Ted Williams detailing his gruesome cryopreservation, and a book about cryonics, Alcor and the Dora Kent death by the investigating Deputy Coroner, who was also a former Police Detective and Chief;
- a multitude of public reports spanning 2003-2009 based on disclosures by Johnson and others about Alcor, Alcorians, their procedures and methods, and threats received by Johnson and others."

(*id*, at 4-5).

Vanguard argues further that Alcor was not content to sit out the publicity but instead, joined in the debate. "Its CEO and other personnel made television appearances in 2002, 2003, 2006, 2008 and other times on such national programs as *ABC's Good Morning America* and *Nightline*, NBC's

Evening News and CNN's *Crossfire, Live from the Headlines, Wolf Blitzer* and *Paula Zahn Now.* Its personnel gave interviews to national and international publications like the *New York Times, The Wall Street Journal, The Boston Globe, The Los Angeles Times, The Guardian, BBC News*, and Australia's *Sunday Mail.* Alcor played host to print and broadcast news outlets from around the world, providing televised on-site tours and interviews and footage of actual cryopreservation procedures. It burnished its notoriety and public profile through its own numerous print articles, industry or trade conferences, published responses to particular controversies (such as its response to a pair of 2003 *Sports Illustrated* articles about its Ted Williams cryopreservation), press releases, its quarterly 'full-color glossy magazine with an Editorial Board overseeing themed issues,' a promotional documentary and other internet articles and postings. It had a public relations agenda to increase membership and made lobbying efforts to influence public opinion and oppose regulation" *(id).*

In defense of its editorial judgments, Vanguard argues that the contents of *Frozen* were newsworthy, of substantial public concern and warranted public exposition; the manuscript was credible and responsible. By the time Vanguard was contacted in 2009 by Johnson's literary agent and publicist about *Frozen*, media news outlets had been publishing "startling and troubling" disclosures about Alcor and Alcorians for nearly six years without those outlets sued for defamation *(id).*

Vanguard states that the "corroborating materials the authors provided Vanguard, Johnson's 30-year career as a paramedic, his service evacuating injured federal agents in the Waco Branch Davidian siege, his positions as Director of Clinical Services and acting Chief Operations Officer while at Alcor – coupled with Alcor's own glowing description of him and that of *Sports Illustrated" (id)* gave significant credence to the contents of the book.

In addition, Vanguard states that it proceeded with "a high degree of diligence". Specifically,

- It engaged Philip Turner, an editor and publisher with 30 years of experience, who reviewed the manuscript and worked as an editor with the authors;

- It subjected the manuscript to thorough legal review by outside counsel experienced in defamation and other publishing concerns;

- It engaged a fact checker with 20 years of experience who subjected the manuscript to meticulous fact-checking and confirmed that the factual statements about Alcor were credibly supported or corroborated;

- It confirmed support for the factual statements Alcor challenges (and the disclosed factual bases for the authors' opinions) in (i) materials provided by Johnson, (ii) publicly available materials (iii) Alcor's own documents, and (iv) confirmed source accounts, as detailed in the record; and

- The Publisher and Associate Publisher also reviewed the manuscript, and Vanguard did not publish *Frozen* until all reviews, legal vetting and fact checking were completed

(*id* at 6-7 [citations to the record omitted]).

Vanguard asserts that those facts establish that it acted responsibly and diligently in publishing *Frozen*. It states that when Vanguard published the book, it did not believe that the challenged factual statements in *Frozen* were false, and that it had no knowledge of its possible falsehood. To the contrary, Vanguard believed that the factual contents of *Frozen* were true and responsible, and that the authors were credible and reliable. According to Vanguard, its editorial and publishing process confirmed those beliefs.

Alcor disputes relatively few of the facts alleged by Vanguard. Instead, it vigorously challenges Vanguard's characterization of the facts. Alcor also questions the degree and quality of the diligence conducted by Vanguard prior to publication of *Frozen*. Alcor asserts that Johnson obtained the information used in the book by dishonest means, that he is a "confessed thief and a confessed liar" and an "adjudicated wrongdoer" and that Vanguard had "absolutely no basis to rely on information provided by Johnson" (Alcor Brief, NYSCEF Doc. No. 351at 2-3) ("Alcor Br. at ____"). None of the quoted statements are accompanied by citations to the record.

Alcor contends that *Frozen* contains thirty-two (32) statements that are "manifestly false." As to Vanguard's defense that if any of the statements were false, Vanguard published them without knowledge of the falsity of the statements, Alcor disagrees. It also asserts that Linda Sanders, the

fact-checker Vanguard hired in connection with publication of the book, "intentionally ignored publicly available information contradicting the defamatory statements" (*id* at 4).

Alcor concedes that it is a limited purpose public figure (*see id* at 8). It also concedes implicitly that twenty-one (21) of the thirty-two (32) statements may relate to matters within the scope of its "core business" and thus are subject to the heightened standard of proof applicable to limited purpose public figures (*see id* at 10).[1] Alcor maintains that there is ample basis for dispute

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[1] Alcor points to just eleven (11) statements which it maintains relate to matters outside the scope of Alcor's core business. Those statements are set forth in the TAC at ¶122 A-K and are reproduced below:

122. The false statement *(sic)* include . . . statements such as the following which were contained in [*Frozen*] (unless specifically noted otherwise):

A. ALCOR and related persons were involved in an "international illegal drug trafficking operation" and that "people associated with Alcor had been arrested in Florida on cocaine smuggling charges."

B. ALCOR was "Ordering Mannitol in bulk...It is, however, commonly used in the illegal drug trade as a cutting agent for heroin, methamphetamines, and other illicit drugs;" "I had seen Mannitol myself while working at Alcor in Scottsdale...."

C. "I never knew why Alcor stored Mannitol, but Detective Alan Kunzman's informant alleged that some Alcorians had run an international cocaine smuggling venture;" "And, after working for [sic] other Alcorians, I believed they would do anything to further their cause and to protect themselves, the self-styled saviors of humanity..."

D. "I was scared to death. I didn't want to have them... start doing experiments on me," implying specifically that ALCOR was capable of imminently harming JOHNSON physically. This comment was stated on national television network CNN on a program called "The Situation Room" with Wolf Blitzer.

E. ALCOR and cryonicists had a "Fortress...Ventureville in the Phoenix area" which contained "survivalist gear buried out there. Guns, bombs, medical supplies, cryonics equipment, everything they'd need to hole up prior to Armageddon and prepare for its aftermath. There were underground bunkers... surrounded by barbed wire and claymore mines;""Buses...joined together underground. These were filled with water pumps and supplies, and the entire area was mined."

F. "I found references to a separate, underground storage facility—a salt mine Alcor owned outside Hutchinson, Kansas... It was the kind of thing weapons manufacturers did. They would buy an abandoned salt mine in the middle of nowhere and store sensitive materials and documents inside it."

G. "Desert locations where he believed bodies could be found. Teenage runaways and homeless people . . . Alcorians and David Pizer's Venturists had kidnaped 'people who

as to whether Vanguard entertained serious doubt concerning the accuracy of at least some of the thirty-two (32) statements (*see id* at 13). Apart from disputing the legitimacy of the legal review conducted prior to publication, Alcor has not identified the matters that are the "basis" for that dispute. Instead, Alcor emphasizes that summary judgment should be denied as premature because Alcor has not been given a reasonable time and opportunity to conduct disclosure.

DISCUSSION

The issue to be decided on these motions for summary judgment is whether Alcor is a public figure (as Vanguard argues) or a private entity or limited public figure (as Alcor maintains). The veracity of the alleged defamatory statements is not before the court, nor is the question of whether the statements, if untrue, might be defamatory.

A. Standard for Summary Judgment

The standards for summary judgment are well settled. Summary judgment is a drastic remedy which will be granted only when the party seeking summary judgment has established that there are no triable issues of fact (*see,* CPLR 3212 [b]; *Alvarez v Prospect Hosp.*, 68 NY2d 329

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would not be missed' and then experimented on them until they died;" "That was a very serious and shocking allegation. However, after having spent time with Pizer and his followers, I believed it could be true . . . That was one of the reasons I had wanted to stay even longer at Alcor, bugging my colleagues, to get proof of those rumored kidnappings and alleged murders."

H. In August 2003 "Someone at Alcor posted [JOHNSON'S] picture on CryoNet.org, along with [JOHNSON'S] Scottsdale address."

I. JOHNSON received death threats from ALCOR and ALCOR associated individuals, as set forth at Pages 308, 342 and 370 of the Book.

J. "Alcorians [*sic*] actually posted physical threats against [Arizona State Representative Robert Stump] on Cryonet.org."

K. "And then, the one time they were faced with regulation, they [*i.e.*, ALCOR] avoided it by threatening the life of Arizona state representative who wrote the reform bill."

Contrary to the above allegations, a number of the statements contained in *Frozen* do not refer to Alcor at all. Further some statements are taken out of context and some merely recount comments of third parties (*see* Sanders Affd, Ex 1).

[1986]; *Sillman v Twentieth Century-Fox Film Corporation*, 3 NY2d 395 [1957]). To prevail, the party seeking summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law tendering evidentiary proof in admissible form, which may include deposition transcripts and other proof annexed to an attorney's affirmation (*see, Alvarez v Prospect Hosp., supra*; *Olan v Farrell Lines*, 64 NY2d 1092 [1985]; *Zuckerman v City of New York*, 49 NY2d 557 [1980]). Absent a sufficient showing, the court should deny the motion without regard to the strength of the opposing papers (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 [1985]).

Once the initial showing has been made, the burden shifts to the party opposing the motion for summary judgment to rebut the prima facie showing by producing evidentiary proof in admissible form sufficient to require a trial of material issues of fact (*see, Kaufman v Silver*, 90 NY2d 204,208 [1997]). Although the court must carefully scrutinize the motion papers in a light most favorable to the party opposing the motion and must give that party the benefit of every favorable inference (*see, Negri v Stop & Shop, Inc.*, 65 NY2d 625 [1985]), and summary judgment should be denied where there is any doubt as to the existence of a triable issue of fact (*see, Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223, 231 [1978]), bald, conclusory assertions or speculation and "a shadowy semblance of an issue" are insufficient to defeat a summary judgment motion (*S.J. Capalin Assoc. v Globe Mfg. Corp.*, 34 NY2d 338 [1974]; *see, Zuckerman v City of New York, supra; Ehrlich v American Moninga Greenhouse Manufacturing Corp.*, 26 NY2d 255, 259 [1970]).

Lastly, "'[a] motion for summary judgment should not be granted where the facts are in dispute, where conflicting inferences may be drawn from the evidence, or where there are issues of credibility'" (*Ruiz v Griffin*, 71 AD3d 1112 [2d Dept 2010], quoting *Scott v Long Is. Power Auth.*, 294 AD2d 348 [2d Dept 2002]).

B. Defamation

The requirements for a successful defamation claim depend on the status of the subject of the allegedly defamatory statement(s). The burden plaintiff must shoulder depends on whether it is a public figure or a private entity. If a plaintiff is a "public figure," it must show with "convincing

clarity" that the defendants' qualifying statements were published with "actual malice" (*New York Times Co. v Sullivan*, 376 US 254, 279-80 [1964]). "The essential element underlying the category of public figures is that the publicized person has taken an affirmative step to attract public attention" (*Park v Capital Cities Comm's.* 181 AD2d 192, 197 [4th Dept 1992]). General public figures usually are entities which "occupy positions of such persuasive power and influence that they are deemed public figures for all purposes" (*Gertz v Robert Welch, Inc.*, 418 US 323, 351 [1974]). To determine whether a person or entity is a general public figure, courts may consider, among other things, a plaintiff's name recognition, notoriety in the press, and whether the person or entity's prominence was voluntary (*see Waldbaum v Fairchild Publ'ns, Inc.*, 627 F2d 1287, 1295 [DC Cir 1980]).

An entity becomes a limited purpose public figure by "voluntarily inject[ing] [itself] or [being] drawn into a particular public controversy and thereby becom[ing] a public figure for a limited range of issues" (*Gertz*, 418 US at 351). For example, in *James v Gannett Co.*, 40 NY2d 415, 418 (1976), the professional bellydancer plaintff had given an interview to a Gannett newspaper reporter for a feature story about her performances. She subsequently asserted that certain statements in the article about her were defamatory. The court noted that James had, "[b]y her purposeful activity, . . . thrust herself into the public spotlight and sought a continuing public interest in her activities," which led the court to decide James was a "public figure with respect to accounts of her stage performances" (*id* at 423). Another plaintiff was found to be a limited public figure because she had published various articles and "voluntarily injected herself into the controversial debate on whether HIV causes AIDS with a view toward influencing the debate" (*Farber v Jefferys*, 103 AD2d 514 [1st Dept 2013]). The court held that she had "project[ed her] name and personality before . . . readers of nationally distributed magazines . . . to establish [her] reputation as a leading authority," and had become "a contentious figure within the traditional HIV/AIDS community (*id*).

Even if an entity does not seek to participate in a public controversy but nonetheless becomes the subject of a public controversy, it still may become an involuntary, limited purpose public figure (*see Daniel Goldmeyer, Ltd. v Dow Jones & Co.*, 259 AD2d 353 [1st Dept 1999]). This classification applies where there exists a particular public controversy, the plaintiff has a sufficiently central role in it and the challenged publication relates to it *(see id)*. If an entity is a limited public figure, it bears

the burden of proof of a public figure for statements that affect public concerns. Speech on matters of purely private concern is of less First Amendment concern and plaintiff may recover damages as to such speech without proving constitutional malice (*see Dun & Bradstreet, Inc. v Greenmoss Builders, Inc.*, 472 US 749, 759 [1985]).

However, where "the content of the [book] is arguably within the sphere of legitimate public concern, which is (only) reasonably related to matters warranting public exposition," plaintiff must establish "that the publisher acted in a grossly irresponsible manner without due consideration for the standards of information gathering and dissemination ordinarily followed by responsible parties" (*Chapadeau v Utica Observer–Dispatch*, 38 NY2d 196, 199 [1975]). The *Chapadeau* standard, while lower than the actual malice test, "is deferential to professional journalistic judgments. Absent clear abuse, the courts will not second-guess editorial decisions as to what constitutes matters of public concern [or] whether any particular portion of the text is 'reasonably related' to the subject of public concern" *Huggins v Moore*, 94 NY2d 296, 303 (1999).

C. Alcor as a Public Figure

Alcor concedes that it "could be viewed" as a limited purpose public figure in "cryopreservation" (Alcor Br. at 8-9). Alcor argues that it is not a general public figure. Vanguard argues that it is. In support of its position, Alcor maintains that it is not notable to the general public and did not seek to influence national debate on general issues. However, it acknowledges that it "has disseminated information publicly concerning cryopreservation but has not sought attention outside that narrow context" (*id* at 7).

The record contains substantial evidence supportive of Vanguard's view that Alcor is a public figure. Whether Alcor was initially thrust into the public sphere involuntarily twenty-five (25) years ago is not clear. However, since that time, Alcor has taken many steps to project itself into the public arena as "a perceived leader in cryonics" and as "the world's largest and most advanced provider of cryonics technology . . . the unparalleled leader in the industry " (*see* Maytal Affm, ¶2). Over twenty years ago, one of Alcor's leaders proclaimed that "cryonicists have the ear of, and

access to, the international public" *(id)*. Numerous print news articles have been written addressing Alcor's reputation, procedures, methods, operations and business as well as the debate over cryonics (*see id*, ¶4-5). Alcor also promotes its activities through a website and publication of a magazine *("Cryonics")*. Further, Alcor representatives have appeared voluntarily in the broadcast media and on the internet to defend and promote Alcor and cryonics (*see id*, ¶6-9). By its own account, the publicity received has served to legitimize the field of cryonics and fostered membership growth. Alcor has also added its voice to the public discourse regarding the cryopreservation movement by publishing articles, engaging in lobbying, and investing in public relations and outreach (*see id*, ¶12).

The court need not decide whether this proof is sufficient to qualify Alcor as a general public figure because its status as a limited public forum as to its business and matters reasonably related thereto requires dismissal of the defamation claim.

There can be no disputing that Alcor has been at least a limited public figure for many years. Alcor was embroiled in a public controversy arising out of a county coroner's investigation in 1988 following the death of an Alcor client, Dora Kent, who was decapitated for cryopreservation. Alcor was also in the public spotlight between 2002 and 2004 when the family of Ted Williams litigated the disposition of his remains and *Sports Illustrated* and other media reported extensively on Alcor and its treatment of Williams' remains. These stories, along with on-site television interviews given by Alcor, its public relations initiatives, and its lobbying efforts, intended to shape its public image and oppose regulation, all preceded publication of *Frozen* by several years. The public discussion of Alcor extended to many topics, including a homicide investigation, threats, legislative efforts, the meaning of life and death, and the limitations and promise of science. None of the public exposure relating to Alcor and its leading role in cryonics was generated by either Vanguard or Baldyga.

Vanguard argues that Alcor is public about more than the subject of cryopreservation and that it is a public entity about all of its activities. While Alcor claims to have been reluctant to step into the public sphere, the record reveals that it maintains a website, publishes a magazine, gives interviews to the press, invites film crews into its facilities, uses public relations efforts in order to shape public perceptions of Alcor and its work, lobbies government, and offers its services to the public (*see* Maytal Affm ¶2-14; Reply Maytal Affm, NYSECF Doc. No. 391, ¶ 2-14 and the

documentary evidence referenced therein). Vanguard notes (and Alcor does not dispute) that a Westlaw search provides a list of about 1300 news articles and 137 news wires about Alcor's business, facilities, and methods (*see* Maytal Affm, ¶ 2-9).

Vanguard has shown that Alcor's public figure status extends to all matters relating to its business, including cryopreservation and cryonicists associated with Alcor. Thus, in order to defeat defendants' motion for summary judgment, Alcor must show with "clear and convincing evidence" that defendants acted with "actual malice" (*Huggins*, 94 NY2d at 301-02). All of the statements alleged to be defamatory, including those identified in TAC ¶122 A through K, are subject to the "actual malice" standard.

D. Actual Malice

Actual malice is proven by showing the speaker either knew the statements were false, or had "reckless disregard of whether or not they were false" (*New York Times Co. v Sullivan*, 376 US 254, 279–80 [1964]). Reckless disregard requires "a high degree of awareness of probable falsity" (*Rivera v Time Warner Inc.* 56 AD3d 198, 298 [1st Dept 2008] *citing Gertz*, 418 US at 332). "Actual malice cannot be inferred from factual allegations merely suggesting that [the defendant] had reason to question the accuracy of the information at issue" (*id. citing Harte–Hanks Communications v Connaughton*, 491 US 657, 688 [1989]). It cannot be founded on a misinterpretation of a source or the resolution of an ambiguity adversely to the plaintiff (*see Time, Inc v Pape*, 401 US 279, 290 [1971]). A failure to investigate does not amount to a purposeful avoidance of the truth absent evidence that the inaction not to acquire knowledge of facts that might confirm the probable falsity of the published statement was deliberate (*see Sweeney v Prisoner's Legal Servs.*, 84 NY2d 786, 793 [1995]; *Gross v New York Times Co.*, 281 AD2d 299 [1st Dept 2001]). However, comment on the private conduct of a public figure which is not relevant to his or her field may not be within the protection of the *Times* rule (*see New York Times, Co. supra; Gilberg v Goffi*, 21 AD2d 517, 527 [1st Dept 1964]). Also, a newspaper may be denied summary judgment against a police officer plaintiff, a public figure as matter of law, where there is a factual question as to whether the article was published with reckless disregard for its truth when the plaintiff claimed

the reporter had misidentified her as the person who "spewed obscenities" about a particular federal judge and where the reporter did not attempt to verify the officer's identity, but named her based on a dim recollection of having had the officer pointed out to her years ago (*see Scacchetti v Gannett Co., Inc.*, 123 AD2d 497 [4th Dep't 1986]).

Alcor argues that Johnson was not a credible source (*see* Alcor Br. at 2-3). As evidence, Alcor points to Johnson's conduct documented in *Frozen* as that of "a confessed thief and profiteer from gross and unprofessional violations of patient privacy" (Affidavit of Brian Wowk, NYSECF Doc. No. 291, at ¶ 90) ("Wowk Affd, ¶___"), including taking Alcor client files, recording conversations with fellow Alcor employees, breaching confidentiality agreements, stealing photos of deceased Alcor clients and posting them online in exchange for money, violating court orders, failing to produce relevant material in the previous litigation, and failing to comply with prior settlements and court orders (*see* Alcor Br. at 2). It asserts that once Vanguard knew of the Arizona judgment was entered against Johnson, Vanguard should have had serious doubts about the veracity of Johnson's statements.

Alcor also claims that the work of the fact checker, Linda Sanders, was faulty and that some of the source materials she used did not support the disputed statements in *Frozen*. It points out that the challenged statements in *Frozen* do not match up precisely with certain of the source materials and claims that some inferences in the book are incorrect and defamatory. For example, the book stated "people associated with Alcor had been arrested for cocaine smuggling," while the cited reference article reveals that only one person associated with Alcor had been arrested and that individual was charged with cocaine "trafficking", not cocaine "smuggling" (Wowk Aff. ¶ 6).[2]

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[2]Alcor further complains that it has not yet deposed Sanders, or other Vanguard witnesses, which makes the summary judgment motions inappropriate at this time. However, Alcor does not explain why it has not done so, in this case which was filed in 2009. Moreover, Alcor has not given an evidentiary basis indicating that the depositions it belatedly seeks may lead to relevant evidence (*see Hairiri v Amper*, 51 AD3d 146, 151 [1st Dept 2008]). Alcor possesses all of Larry Johnson's documents and all of Vanguard's non-privileged responsive documents, including Sander's materials (*see* Maytal Reply ¶¶ 18-19). Alcor also complains that Vanguard did "dump" 63,000 pages of documents on it after the motion for summary judgment was filed. Despite having possession of these documents for eight (8) months prior to the date of

While Alcor has alleged that statements in *Frozen* are incorrect, Alcor has provided no evidence of either "reckless disregard" of the truth, or "actual malice."

These assertions are insufficient to permit denial of defendants' motions because the gross irresponsibility standard demands no more than that defendant utilize methods of verification that are reasonably calculated to produce an accurate publication (*see Karaduman v Newsday, Inc.*, 51 NY2d 531, 549 [1980]; *Cottrell v Berkshire Hathaway, Inc.*, 26 AD3d 786 [4th Dept 2006]). The decision to choose one source over another is an editorial judgment in which the courts and juries have no proper function (*see Balderman v American Broadcasting Co., Inc.*, 292 AD2d 67, 75 [1st Dept 2002]).

The undisputed record reveals that Vanguard accepted the work of an credentialed author who was represented by a well respected literary agent and who it had no reason to believe was unreliable. *Frozen* was based on information provided by Johnson, a high-ranking former Alcor employee and whistle blower. Vanguard notes that prior to the publication of *Frozen*, Alcor had never sued Johnson (or anyone else) for defamation arising out well publicized stories about Alcor and the cryopreservation of Ted Williams.[3] Prior to publication, the manuscript was reviewed by an experienced editor, was subjected to a thorough legal review by experienced outside counsel,[4] and

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oral argument Alcor has not identified evidence of actual malice (*see* Transcript of Oral Argument dated March 4, 2014 at pp. 24-30). In any event, the additional discovery Alcor seeks would not enable Alcor to overcome Vanguard's showing that it employed methods of verification that were reasonably calculated to produce an accurate publication (*see*, pp. 14-15).

[3]Alcor's repeated charge that Vanguard had "no basis" to rely on information provided by Johnson, an "adjudicated wrongdoer", glosses over the fact that the issue that was "adjudicated" was breach of Johnson's employment agreement. Thus the inference Alcor seeks to draw from the default judgement it obtained in Arizona (*i.e.* that Vanguard should have had serious doubts about the veracity of Johnson's statements) do not withstand scrutiny. While there is no doubt that whistleblowers, like Johnson, are often guilty of theft of employer information (or other serious infractions), the information that becomes public through their unlawful acts does not thereby become unreliable.

[4]Alcor seeks discovery from Vanguard's counsel, but has not shown that the attorney client privilege has been waived. As Vanguard argues, it has not placed privileged material at issue and thus there is no waiver (*see Am. Re-Ins. Co. v U.S. Fid. & Guar. Co.*, 40 AD 3d 486,

was fact-checked by an experienced researcher who confirmed support for factual statements challenged by Alcor through a variety of sources, including previously published articles and books.

The issue here is the sincerity of the fact-checking, not its efficacy. Alcor has identified a small number of facts the truth of which are disputed. It has not shown by admissible evidence that Vanguard had "a high degree of awareness of probable falsity" of the disputed statements. The same can be said of the claims against Baldyga. While Alcor seeks additional discovery of the details of Vanguard's and Baldyga's research, it provides no indication of what it expects to find, or how additional discovery would be helpful to its case. Alcor has not shown that either Vanguard or Baldyga withheld evidence within their exclusive control or that such evidence, if it exists, is likely to contain "facts essential to justify opposition" (CPLR 3212[f]). Further, Alcor has had ample opportunity to conduct discovery and is in possession of substantial amounts of relevant material(*see*, e.g. Wowk Affm). Alcor's speculation that by conducting depositions it might expose errors made by Baldyga and Sanders or that through effective cross-examination it will uncover something that might somehow contribute to it's case, is insufficient to require denial of the motions for summary judgment in view of Vanguard's showing that it utilized methods of verification that were reasonably calculated to produce an accurate publication (*see Trails West, Inc. v Wolff*, 32 NY 2d 207, 221 [1973]).

E. Non-Defamation Claims

Alcor additionally asserts that, by publishing *Frozen*, Johnson violated fiduciary duties and agreements included in a signed Employee Handbook and a settlement from a prior litigation, and that Vanguard is therefore liable for aiding and abetting Johnson's conduct (*see* Alcor Br., at 19). Vanguard argues that these other claims, based on the same alleged defamatory conduct by Vanguard, cannot survive dismissal of the defamation claim. Alcor disagrees and attempts to distinguish these claims from the defamation claim by noting that Johnson violated his duties and

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492 [1st Dept. 2007]). Here Vanguard merely states the fact of a consultation which is no basis for a waiver as to the contents of the consultation (*see AMBAC Indem. Corp. v Bankers Trust Co.*, 151 Misc 2d 334, 341 [Sup Ct NY Co 1991]). Alcor does not explain how such information would not be privileged, since Vanguard is not asserting an advice of counsel defense.

support Alcor's claim (*see id* at 19-20). However, Alcor fails to identify any authority or precedent for separating such claims from the defamation claim.

The Supreme Court has held that a claim other than defamation brought against the press for the publication of false and harmful statements is subject to protections of the First Amendment (*see Hustler Magazine v Falwell*, 485 US 46, 50-51 [1988][holding that a public figure may not recover for intentional infliction of emotional distress caused by offensive parody without also showing the parody made a false statement of fact with actual malice]). This is especially true where tort claims could reduce "the free flow of ideas and opinions on matters of public interest and concern," by restricting the press *(id)*. Accordingly, because summary judgment must be granted on the defamation claim, the aiding and abetting claim cannot survive.

F. Baldyga

In his motion for summary judgement, Baldyga relies on Vanguard's submission. Baldyga also provided an affidavit describing his research which was based largely on documents provided by Johnson, (which documents were subsequently returned to Johnson) and work with Vanguard. He states, *intra alia*, that he harbored no "actual malice" in co-writing *Frozen*. He states that he "did [his] own research and found corroboration for [Johnson's] story"; "found corroboration in interviews of persons with first-hand knowledge of Alcor, cryonics and/or the Ted Williams' cryopreservation and through [his] review of confirmed source statements, previously published news article or books, scientific publications, among other things [sic]" (Baldyga Affd, NYSECF Doc. No. 367 at ¶ 3). Baldyga also describes working with Vanguard's fact-checker. In its response, Alcor relies on the Wowk affidavit provided in opposition to Vanguard's motion. Alcor highlights some distinctions between the cited source material and specific statements in *Frozen*. Alcor does not, however, offer any admissible evidence that Baldyga did not do the research he claims to have done or that he co-wrote *Frozen* with "a high degree of awareness of [the] probable falsity" of the statements in that book.

Accordingly, the motions for summary judgment must be granted and the complaint dismissed. It is hereby

ORDERED that the motion for summary judgment of defendant, Vanguard Press, Inc. to dismiss the complaint (motion sequence number 009) is GRANTED; and it is further

ORDERED that the motion for summary judgment of defendant, Scott Baldyga to dismiss the complaint (motion sequence number 011) is GRANTED; and it is further

ORDERED that the Clerk of the Court is directed to enter judgment dismissing the entire complaint against plaintiff, Alcor Life Extension Foundation, and in favor of defendants, Vanguard Press, Inc. and Scott Baldyga, together with costs and disbursements upon presentation of proper bills of costs.

This constitutes the decision and order of the court.

DATED: May 1, 2014

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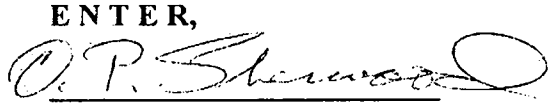

O. PETER SHERWOOD
J.S.C.