To Be Argued By:
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New York Supreme Court

APPELLATE DIVISION — FIRST DEPARTMENT

ALCOR LIFE EXTENSION FOUNDATION,

Plaintiff-Appellant,

against

LARRY JOHNSON,

Defendant,

and

VANGUARD PRESS, INC. and SCOTT BALDYGA,

Defendants-Respondents.

BRIEF FOR PLAINTIFF-APPELLANT ALCOR LIFE EXTENSION FOUNDATION

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

I.

PRELIMINARY STATEMENT 1

II.

QUESTIONS PRESENTED 3

III.

BACKGROUND 5

A. Former Co-Defendant Larry Johnson is Neither "Credible" or "Reliable" 5

B. Vanguard Completely Distorted its Findings; There is a Total Absence of Support for Any of the Defamatory Statements 8

III.

LEGAL ARGUMENT 13

A. Disputed Issues of Fact Concerning Alcor's Status Should Have Precluded Summary Judgment 13

B. Alcor, Even Without the Aid of Meaningful Discovery, Respect to Whether Defendants Published False Statements with Actual Malice 17

C. Discovery into Vanguard's Review of Frozen Should Have Been Ordered by the Court pursuant to CPLR §3212 23

D. Alcor's Claims Against Vanguard for Aiding and Abetting Breach of Fiduciary Duty, Aiding and Abetting the Violation of Binding Legal Documents, and Aiding and Abetting a Violation of a Court-Entered Judgment Should Not Have Been Dismissed 29

IV. CONCLUSION 34

PRINTING SPECIFICATIONS STATEMENT 35

TABLE OF AUTHORITIES

Page

Cases

A.E. Hotchner v. Castillo-Puche, 404 F.Supp. 1041 (S.D.N.Y. 1975) 18, 19

Amico v. Melville Volunteer Fire Co. Inc., 832 N.Y.S.2d 813 (2nd Dep't 2007).....24

Cohen v. Cowles Media Co., 501 U.S. 663 (1991).....32

Goldwater v. Ginzburg, 414 F. 2d 324 (2d Cir. 1969) 18

Gross v. New York Times Co., 281 A.D. 2d 299 (1st Dep't 2001) 17

Juseinoski v. New York Hosp. Medical Center of Queens, 815 N.Y.S.2d 183 (2nd Dep't 2006) 24

Metichecchia v. Palmeri, 803 N.Y.S.2d 813 (3rd Dep't 2005).....24

Mount v. Sadik, 1980 U.S. Dist. LEXIS 10964 (S.D.N.Y. 1980) 19

New York Times v. Sullivan, 376 U.S. 254 (1964) 17

Reliance Ins. Co. v. Barron's, 442 F. Supp. 1341 (S.D.N.Y. 1977).....20

St. Amant v. Thompson, 390 U.S. 727 (1968).....18

Trails West, Inc. v. Wolff, 32 N.Y. 2d 207 (1973).....28, 29, 31

White v. Tarbell, 284 A.D. 2d 888 (3d Dep't 2001).....20

Statutes

CPLR §3212.....23

CPLR §3212(f).....23

I.

PRELIMINARY STATEMENT

Plaintiff, Alcor Life Extension Foundation, Inc. ("Alcor"), submits this memorandum in support of this appeal from the May 1, 2014 decision to grant the motions for summary judgment filed by Defendants, Vanguard Press, Inc. ("Vanguard") and Scott Baldyga ("Baldyga"). As set forth below, Alcor amply demonstrated in opposition to those motions for summary judgment, there are material issues of disputed fact concerning whether Vanguard and Baldyga published with actual malice the thirty-two (32) challenged statements contained in the book, *Frozen: A True Story, My Journey Into the World of Cryonics, Deception, and Death* ("Frozen" or the "Book"). Thus, granting summary judgment was inappropriate.

Additionally, since most of the evidence concerning these issues was within Vanguard's and Baldyga's control, and was either produced during the pendency of Defendants' summary judgment motion (thus depriving Alcor a meaningful opportunity to review and challenge), opposed by Vanguard and Baldyga (both Defendants opposed the taking of depositions and discovery to preclude Alcor from obtaining relevant and potentially helpful information), or was withheld from production in violation of the lower Court's various orders (thereby depriving Alcor the opportunity to put forth relevant facts opposing summary judgment),

Vanguard should have been required to provide the necessary discovery, and the motions for summary judgment should have been denied as premature.[1] Moreover, since Vanguard and Baldyga placed at issue in their summary judgment motions what information it claimed to know about Johnson, further inquiry by Alcor into these issues should have been ordered.

Moreover, the lower court concluded that Alcor was a limited purpose public figure and defined the scope of that limited purpose protection as matters relating to Alcor's business of cryopreservation. The lower court then applied the actual malice standard to 11 challenged statements contained in the book Frozen -- even though these statements do not pertain to Alcor's business of cryopreservation. As such, the lower court's grant of summary judgment concerning those statements was erroneous. The limited purpose public figure standard does not apply to defamatory statements which pertain to issues outside the scope of that limited purpose.

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[1] Vanguard intentionally withheld ***all*** discovery from Alcor for the entirety of this litigation. Only ***after*** Vanguard filed its motion for summary judgment did Vanguard engage in a "document dump" of over 26,000 pages of documents on Alcor. (R. 2250 ¶14). Vanguard then waited until June 28, 2013 -- just prior to the due date of this response -- to deploy another 36,000 pages of documents onto Alcor. (R. 2250 ¶15). Even then, Vanguard completely ignored two good faith inquiries by Alcor as to whether additional documents were going to be disclosed. (R. 2251 ¶16). Needless to say, the bad faith pattern of discovery conduct by Vanguard is evident by its withholding over 63,000 pages of relevant documents until after filing this motion, refusal to state whether additional relevant documents are going to be disclosed, followed by its assertions that no discovery is even necessary. In fact, this motion merely proves that additional discovery is warranted because some of the documents submitted in support of this motion beg the question of what Vanguard knew about the falsity of the Book and when it came into possession of such information. (R. 1906-84 ¶¶ 6, 11, 12, 17, 18, 21, 22, 24, 26, 38, 40, 47, 67, 68, 71, 87, 88, 89, *passim).*

Finally, the lower court improperly dismissed Alcor's claims against Vanguard and Baldyga for aiding and abetting violations of agreements between former Defendant, Larry Johnson ("Johnson"), and Alcor. The aiding and abetting claims also encompassed concerted violations of a domesticated Arizona court order barring Johnson from publishing information concerning Alcor. That decision of the lower court was erroneous because it was based upon the inaccurate premise that Alcor's aiding and abetting claims were predicated on the 32 challenged statements contained in Frozen which form the basis of Alcor's defamation claims. In fact, Alcor's aiding and abetting claims arise from the dissemination by Vanguard and Baldyga of a far greater volume of confidential, proprietary and private information (including sensitive client documentation and photographs of client remains) concerning Alcor. This is a far broader claim that the lower court presumed incorrectly, and granting summary judgment of that claim was equally improper.

II.

QUESTIONS PRESENTED

Question 1. Did the lower court err in holding that no reasonable jury could conclude that Defendants Vanguard and Baldyga acted with actual malice in connection with the publication of 32 allegedly defamatory statements?

Answer: It is respectfully submitted that this question should be answered in the affirmative; the lower court indeed erred by concluding as a matter of law that no reasonable jury could conclude that Vanguard and Baldyga acted with actual malice.

Question 2. Did the lower court, having found that Alcor is a limited purpose public figure, err in finding 11 allegedly defamatory statements contained in the book Frozen to be within the scope of Alcor's status as a limited purpose public figure, thus applying an incorrect standard of review?

Answer: It is respectfully submitted that this question should be answered in the affirmative; the lower court erred by concluding that the 11 defamatory statements not pertaining to the business of cryopreservation were subject to an actual malice standard.

Question 3. Did the lower court err in denying Alcor the opportunity to conduct relevant discovery, including the depositions of any of the relevant witnesses, to determine what Defendants actually knew prior to the publication of the alleged defamatory statements?

Answer: It is respectfully submitted that this question should be answered in the affirmative; Vanguard and Baldyga intentionally prevented access to discoverable information which would have led to information which would portend on the issue of whether Vanguard and Baldyga acted with actual malice.

Question 4. Did the lower court err in finding that Defendants are immune from liability for aiding and abetting breaches by former Defendant, Larry Johnson, of agreements between Johnson and Alcor and a violation of a court-entered judgment based strictly on standards applicable to the publication of defamatory statements?

Answer: It is respectfully submitted that this question should be answered in the affirmative; the lower court erred by presuming incorrectly that the aiding and abetting claims were based upon the publication of the defamatory statements, as opposed to being based upon the dissemination of information and stolen documents from Alcor (including publication of photographs of client remains), in violation of written agreements and court orders.

III.

BACKGROUND

A. Former Co-Defendant Larry Johnson is Neither "Credible" or "Reliable"

In 2003, Johnson, was hired by Alcor. Johnson falsely portrayed that he wanted to assist Alcor. Brian Wowk Affidavit (R. 1906-84 ¶¶14, 44 and 70). To the contrary, Johnson began an illicit campaign of stealing the property of Alcor, pilfering private client files, illegally tape recording conversations of fellow employees, breaching confidentiality agreements, posting stolen photographs of deceased Alcor clients on the Internet in exchange for money, willfully thwarting

court orders, intentionally hiding relevant materials during prior litigation, breaching confirmed settlement agreements, violating judgments, failing to pay court-ordered sanctions, registering websites in fake names and authoring a patently defamatory book with the assistance of Vanguard.[2] (R. 1906-84 ¶¶22, 23, 32, 81, 85, *passim)*; (R. 2247 ¶4). After all of this wrongful conduct was established as a matter of record, Johnson filed for bankruptcy to avoid sanctions and voluntarily confessed that the contents of the book were false.[3] (R. 1979 ¶90).

It is upon this dishonest and faithless person whom Vanguard based its defense, by suggesting that the purported truth of the outlandish representations contained in *Frozen* was somehow demonstrated by Vanguard's subjective, albeit manifestly incorrect, view that Johnson was "credible" and "reliable." Memorandum of Law of Defendant Vanguard Press, Inc. (R. 1634). Vanguard had absolutely no basis to rely on the information provided by Johnson nor his presentation, which, according to Vanguard, was either the sole or primary support for the vast majority of the challenged statements -- and more generally the contents of *Frozen*. Id. The conduct of Johnson (almost all of which was known

[2] Notwithstanding this patently inappropriate and self-confessed wrongful behavior, Vanguard and Baldyga claimed in support of summary judgment that Johnson was "reliable" and "trustworthy." The oxymoronic premise of the motions for summary judgment is faulty and indicative of an improper result given the self-confessed wrongful conduct of Johnson.

[3] Once again, it is patently false for Vanguard and Baldyga to suggest Johnson was reliable when he previously confessed to unreliable behavior and the publication of false information. Under no set of circumstances could Vanguard and Baldyga claim that confessed false statements were somehow trustworthy.

to Vanguard at the time it published Frozen because that conduct is detailed in the very manuscript provided to Vanguard) points to the exact opposite conclusion, to wit: Johnson is a confessed thief and a confessed liar, and those facts alone provided ample reason to doubt the alleged support for the challenged statements.

As more particularly described by Alcor in its submission in opposition to Defendants' motion for summary judgment, Vanguard had in its possession the underlying materials which patently contradicted the claims made by Johnson and Baldyga in the Book. (R. 1906-84 ¶¶6, 22, 30, 50, 51, 52, 53, 54, 55 and 67). Additional materials were available if Vanguard made just a cursory search of public information. (R. 1906-84 ¶¶8, 9, 19, 24, 27, 30, 32, 35, 41, 45, 47, 65, 69, 70, 79, 82 and 87). Lastly, Alcor actually handed Vanguard before sale of the Book a copy of valid and binding judgment prohibiting Johnson from writing a book about Alcor which Vanguard intentionally ignored and failed to acknowledge in its alleged "research" of the Book. (R. 2247 ¶4).

Under no circumstances could anyone trust Johnson to be credible or reliable. Johnson is an adjudicated wrongdoer. It is beyond any doubt that Vanguard knew of this misconduct because this course of dishonesty is detailed in the very book it published. (R. 1906-84 ¶¶22, 23, 32, 81 and 85). This knowledge eviscerates the argument that Vanguard acted with any reasonable basis to rely upon the claims of Johnson as "responsible." Vanguard Memorandum at p. 6.

Instead, it supports the opposite conclusion; Vanguard knew the statements of Johnson were false and Vanguard conducted itself with a reckless disregard for the truth or falsity of the statements made by Johnson in order to profit from a tome of lies. If Vanguard and Baldyga conducted a modicum of any real inquiry, they would have determined the statements of Johnson were false; alternatively, if Vanguard and Baldyga performed no inquiry, they acted with reckless disregard of the falsity of such comments. In either event, Vanguard and Baldyga cannot escape liability for defamation. At the very least, a jury could reasonably conclude that Vanguard and Baldyga acted with actual malice regarding the publication and co-authorship, respectively, of the 32 defamatory statements contained in the Book.

B. Vanguard Completely Distorted its Findings; There is a Total Absence of Support for Any of the Defamatory Statements

As demonstrated in the Affidavit of Brian Wowk, the 32 statements challenged by Alcor are manifestly false. (R. 1906-84 ¶¶6, 11, 12, 17, 18, 21, 22, 24, 26, 38, 40, 47, 67, 68, 71, *passim)*. Vanguard and Baldyga's defense to liability for publishing these false statements was that -- according to Vanguard -- it did so without knowledge of the falsity of those statements, and also without either actual malice or gross irresponsibility. In that regard, Vanguard relied almost exclusively on the affidavit of Linda Sanders, an alleged "fact checker," concerning her assertion that she vetted the many outrageous statements contained

in the Book. However, the materials allegedly reviewed by Sanders do not support in any way the defamatory statements published by Vanguard. (R. 1906-84 ¶¶6, 11, 12, 17, 18, 21, 22, 24, 26, 38, 40, 44, 47, 67, 68, 71, 85 – 95).

In fact, Ms. Sanders affidavit, as well as other documents submitted in connection with Vanguard's motion, make plain that Vanguard had in its possession prior to publishing the Book information which demonstrated the actual *falsity* of the challenged statements, as well as many others. Id. Further, Vanguard and its alleged fact checker intentionally ignored publically available information contradicting the defamatory statements. (R. 1906-84 ¶¶8, 9, 19, 24, 27, 30, 32, 35, 41, 45, 47, 65, 69, 70, 79, 82 and 87). Finally, the attempts by Ms. Sanders in her affidavit to mislead the Court by suggesting she relied on materials which in fact do not support the veracity of the statements calls into question her credibility, which at this juncture alone warranted the denial of Vanguard's motion, particularly since she and the other Vanguard witnesses had not yet been deposed (Vanguard and Baldyga opposed these depositions and the lower court would not permit the depositions to go forward).

The Affidavit of Brian Wowk submitted in opposition to Defendants' motion for summary judgment demonstrated in great detail the foregoing points. Examples of statements made in *Frozen* with respect to which Vanguard possessed information demonstrating the falsity thereof include, but are not limited to:

- Vanguard and its alleged fact-checker claims to have statements from third-parties which they suggest support the defamatory statement that Alcor had "guns, bombs, medical supplies and cryonics equipment at some off-site "fortress." However, the underlying information Vanguard and its fact-checker rely upon do not at all say that Alcor maintained guns, bombs, medical supplies and cryonics equipment. This is a complete fiction without support. (R. 1914 ¶¶12).

- Surgical notes stolen by Johnson and provided to Vanguard completely contradict the timing and description of a cryopreservation procedure falsely "documented" in the Book. (R. 1951-55 ¶¶50-55).

- Johnson and Vanguard had an entire recording of a conversation between Johnson and a fellow Alcor employee, Charles Platt, which is completely inconsistent with the description of the recording in the Book. (R. 1964 ¶67).

- Vanguard relied on an article reporting "an indictment charged Kent and Faloon with urging customers to buy drugs that hadn't been approved for sale in the U.S. from two overseas companies" to support its inflammatory statement that Alcor was involved in international illegal drug trafficking, thereby knowingly creating the false suggestion that the "illegal drug trafficking operation related to illegal narcotics", and not medicines or supplements from other countries. (R. 1908 ¶6).

- Vanguard published numerous statements concerning the cryopreservation of Ted Williams despite knowing that Johnson was not employed at Alcor at the time of Ted Williams's cryopreservation and having in its possession an email from Charles Platt to Johnson in which he points out that Johnson had fraudulently posted on his freeted.com website pictures of the remains of someone other than Ted Williams. (R. 1923 ¶22).

Additionally, Mr. Wowk detailed statements which would have been debunked by even the most cursory internet searches. These include, but are certainly not limited to:

- The "Creekside Preserve" described as a "militant cult compound cached with weapons" is actually a travel lodge along a major highway advertised with romantic "love tubs." (R. 1915 ¶14).

- The "abandoned salt mine" owned by Alcor which "weapons manufactures" often used was actually a public storage facility used by Fortune 500 companies and film makers for long-term storage. (R. 1916 ¶15).

- Despite Johnson claiming death threats, those threats were completely unsubstantiated and the only police report ever filed by Johnson in Arizona was for the theft of his motorcycle. (R. 1925 ¶24). Further, the 2009 accounts of "multiple" death threats is contradicted by Johnson himself in a 2004 deposition. (R. 1927 ¶25).

- Wrongfully stating that Alcor posted threats against Arizona State Representative Robert Stump on Cryonet.org, when a simple internet search on Cryonet reveals that no such threat was posted. (R. 1929 ¶26).

- Claiming that Representative Stump withdrew a bill based on threats received from Alcor, when a public statement from Representative Stump says the complete opposite. (R. 1931 ¶29).

- Falsely stating that Alcor was the subject of "environmental infractions," when publically available reports from the Arizona Department of Environmental Quality flatly contradicted such allegations. (R. 1936 ¶34).

The Wowk Affidavit similarly refuted the suggestions of support for each of the allegations supposedly vetted by Vanguard. Moreover, in addition to having knowledge of the falsity of the challenged statements, Vanguard had actual knowledge of an Arizona judgment entered against Johnson before sale of *Frozen* which prohibited Johnson from writing or disseminating the Book. Alcor delivered to Vanguard a copy of the judgment well in advance of the Book's release date. (R. 2247 ¶4). The injunction contained in the Arizona judgment logically would cast serious doubt on Johnson's credibility and the legitimacy of *Frozen*. And yet, nowhere did Vanguard even attempt to suggest that it explored the underlying facts of the Arizona judgment. Put simply, Vanguard and Baldyga intentionally and maliciously ignored any facts which might belie support for the defamatory statements of Johnson.

The malicious conduct was buttressed by Vanguard taking even further action to release the Book on the Friday before a Monday hearing to enjoin Vanguard and Johnson from violating a competent judgment. *Id*. Vanguard preferred to aid and abet Johnson in violation of a valid judgment in the name of profit, as opposed to conducting any research as to the Arizona judgment. If Vanguard performed any cursory review of the underlying judgment, it would have learned the judgment was entered to prevent Johnson from disseminating information "of or concerning Alcor." Id. In that sense, Vanguard should have also

questioned the alleged "credibility" or "professionalism" of a person who actively and consistently thumbed his nose at a sitting judge who competently and thoughtfully entered judgment against Johnson. It defies common sense that Vanguard or Baldyga could take the position that a person willing to intentionally violate written agreements and court orders was somehow "credible" or "professional." Moreover, Vanguard and Baldyga intentionally ignore in their motions or underlying documents knowledge of the order entered against Johnson. Both Vanguard and Baldyga distracted the lower court with false claims of "reliability," while intentionally avoiding the core issue that Johnson was a confessed wrongdoer. In effect, Vanguard and Baldyga invited error by claiming only knowledge of allegedly favorable information, while failing to address the unfavorable information which those Defendants either (1) actually knew, or (2) intentionally ignored.

III.

LEGAL ARGUMENT

A. Disputed Issues of Fact Concerning Alcor's Status Should Have Precluded Summary Judgment

The lower court determined that Alcor was a limited purpose public figure. (R. 17-18). In that regard, the lower court suggested that the appropriate scope of the limited purpose protections was matters within the scope of Alcor's "core business," to wit:, cryopreservation. (R. 19). In sweeping fashion, however, the

lower court then expanded the scope of that limited purpose to include not only that core business. Specifically, the lower court held that Alcor's public figure status extend[ed] to all matters relating to its business, including cryopreservation "*and cryonicists* associated with Alcor." (R. 19)(emphasis added). In so doing, the lower court eviscerated the limitation associated with the limited person public figure designation and committed reversible error. By extending the scope of Alcor's public figure status, the lower court heightened the applicable standard of review to the actual malice standard with respect to any statement regarding Alcor's staff, whether those statements had anything to do with cryopreservation or not. In fact, the eleven (11) challenged statements at issue were unrelated to cryopreservation. Those statements from the Second Amended Complaint are quoted below for ease of reference:

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 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 has kidnapped' people who 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 or 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."

Second Amended Complaint (R. 383-85 ¶122, A-K). These statements go well-beyond the business for which Alcor is known, i.e., cryopreservation. These statements adversely associate Alcor with alleged bad acts having nothing to do with cryopreservation. Application of the actual malice standard to those eleven

(11) statements was therefore error which, standing alone, provides a basis of reversal of the lower court's decision to grant summary judgment concerning Alcor's defamation claims arising out of those statements.

B. Alcor, Even Without the Aid of Meaningful Discovery, Demonstrated There are Disputed Issues of Fact with Respect to Whether Defendants Published False Statements with Actual Malice

Moreover, even if the lower court correctly applied the actual malice standard to all thirty-two (32) challenged statements, summary judgment should not have been entered concerning claims arising out of those statements because, as set forth below, Alcor demonstrated that a reasonable juror could conclude that there is clear and convincing evidence that Vanguard and Baldyga published at least some of the thirty-two (32) challenged statements contained in *Frozen* with actual malice. A public figure plaintiff's burden in a defamation action against a publisher is to establish with clear and convincing evidence that the publisher published the challenged statements with "actual malice". New York Times v. Sullivan, 376 U.S. 254, 279-80 (1964). The "actual malice" standard requires that a publisher has published the statements at issue "with knowledge of the falsity or with reckless disregard of whether [they were] false or not." Id.

In connection with Defendants' motion for summary judgment, Alcor's burden is to demonstrate "that a jury *could* find actual malice with convincing clarity". Gross v. New York Times Co., 281 A.D. 2d 299 (1st Dep't

2001)(emphasis added). In that regard, actual malice is measured by whether there is "sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication. Publishing with such doubts shows reckless disregard for truth or falsity and demonstrates actual malice." A.E. Hotchner v. Castillo-Puche, 404 F.Supp. 1041, 1049 (S.D.N.Y. 1975), quoting St. Amant v. Thompson, 390 U.S. 727, 731 (1968).

In the context of a summary judgment motion, summary judgment should only be entered in a public figure defamation case when "it becomes clear that a plaintiff cannot establish the "actual malice" required for recovery in defamation actions of this nature. A.E. Hotchner, 404 F. Supp. at 1050. As explained in the A.E. Hotchner decision, that standard merely tracks the usual summary judgment standard that summary judgment should be entered only where there exists no genuine issue as to any material fact. Id. The A.E. Hotchner court further stated that summary judgment was inappropriate where there existed an issue of fact regarding the defendant's "possible" actual malice, id., and noted that, "[a]lthough summary judgment in a defamation action might serve the prophylactic function of sparing authors and publishers the chilling effect of litigation, this procedural weapon is a drastic device since its prophylactic function, when exercised, cuts of a party's right to present his case to the jury." Id., citing Goldwater v. Ginzburg, 414 F. 2d 324, 337 (2d Cir. 1969).

Numerous courts have denied summary judgment with respect to defamation claims against publishers where an issue is raised as to the publisher's actual malice. For example, in A.E. Hotchner, the court denied the defendant publisher's summary judgment motion, finding that the issue of whether publication was made with 'actual malice" remained in dispute. 404 F. Supp. at 1049. The court focused on the notice provided to the publisher that the material to be published was incorrect and possibly motivated by animus. The court noted that "[a] defendant in a defamation action cannot automatically escape liability by submitting affidavits which attest to the fact that the publication was made with a belief that the statements therein contained were true." Id.

Similarly, in Mount v. Sadik, 1980 U.S. Dist. LEXIS 10964 (S.D.N.Y. 1980), the court denied summary judgment to an editor and publisher, finding that issues of fact existed as their "actual malice." In Mount, even though the defendants submitted affidavits demonstrating that the article was based on extensive research and reliance on credible sources and witness, the court found that it did not have enough information as to their state of mind with regard to conflicting evidence as to the accuracy of their information. Id. at *13-19. Simply stated, the court determined that, where a defendant has been presented with evidence that might tend to create in the mind of the defendant doubt as to the accuracy of the challenged statements, a factual issue is raised rendering summary

judgment inappropriate. Id. Significantly, the Mount court noted that the "proof of actual malice calls a defendant's state of mind into question" and "does not readily lend itself to summary disposition." Id. at *15. See also White v. Tarbell, 284 A.D. 2d 888, 890-91 (3d Dep't 2001)(summary judgment denied because issue of whether plaintiff is public figure required greater exploration of the facts); Reliance Ins. Co. v. Barron's, 442 F. Supp. 1341, 1346 (S.D.N.Y. 1977)(the determination of whether a plaintiff is a public figure is a mixed question of law and fact).

In this case, as discussed above and more fully in the Wowk Affidavit, there is ample basis for dispute with respect to the question of whether Vanguard Press entertained serious doubt concerning the accuracy of the thirty-two (32) representations published in Frozen which are at issue in this case. As such, the pending motion for summary judgment should have been denied. In its decision, however, the lower court disregarded the veritable mountain of evidence which raised the question of whether Vanguard and Baldyga operated in bad faith when reviewing the challenged assertions of Johnson. In doing so, the lower court states that "Alcor disputes relatively few of the facts alleged by Vanguard. Instead, it vigorously challenges Vanguard's characterization of the facts." (R. 12). The assertion by the court is simply incorrect; Alcor challenged mightily the veracity of the "facts" alleged by Vanguard and Baldyga. Alcor even requested a meaningful

opportunity to investigate those alleged "facts," so they could be affirmatively refuted. The lower court attempted to cite as an example of Alcor's supposed quibbling over mischaracterizations the statement contained in Frozen that "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". (R. 20). The lower court's use of that example is telling. In that regard, the lower court failed to recognize the significant difference in terms of a corporation's reputation between a statement that one of its associates has been accused of a crime and a statement that could allow for the possibility that many of its associates have been so accused. The lower court also failed to consider the fact that the person in question was not found guilty of cocaine trafficking, but merely possession. (R. 1908 ¶6. That adjudication renders meaningless the fact that the underlying charge was for a more serious offense. More to the point, Alcor absolutely challenged, questions and refuted the alleged "facts" portrayed by Vanguard and Baldyga. To the extent the lower court based its ruling on allegedly "unchallenged" fact, the ruling is inherently flawed.

That Defendants were aware of these facts and chose to allow a statement to be published that was far broader and more damning than those facts allowed is far more than a question of characterization. Instead, it suggests that Defendants were

all too happy to allow misrepresentations of fact into *Frozen*. Moreover, the lower court, in reaching for an example to support its view that the disputed issues raised by Alcor were matters of characterization, ignores the more serious misrepresentation referenced by Dr. Wowk in the very same paragraph of his affidavit. In that regard, Wowk raises the fact that Vanguard supposedly relied on an article reporting "an indictment charged [Alcor principals] Kent and Faloon with urging customers to buy drugs that hadn't been approved for sale in the U.S. from two overseas companies" to support its inflammatory statement that Alcor was involved in international illegal drug trafficking, thereby knowingly creating the false suggestion that the "illegal drug trafficking operation" related to illegal narcotics, and not medications. (R. 1908 ¶6). Again, these discrepancies are not simply matters of characterization. They are demonstrated misrepresentations of available facts, which strongly support an inference that Defendants were not guilty merely of good-faith errors, but were intentionally allowing plain misrepresentations of fact that be included in Frozen.

The discrepancies mentioned above are but one example of the comprehensive demonstration by Dr. Wowk that each of the thirty-two (32) challenged statements was the product of misrepresentation of source materials or even more egregious attempts to invent or distort facts. Alcor freely concedes that one or two of such distortions of fact may be the product of good-faith error.

Distortions, or the outright manufacturing of facts relating to each of those statements, however, raises a significant fact question as to whether Defendants were intentionally overlooking discrepancies in an effort to allow for a more sensationalized publication. Of course, to this end, a jury could conclude that Vanguard and Baldyga acted with actual malice. However, the lower court incorrectly took that decision out of the hands of a jury and concluded improperly that, as a matter of law, jury could not find Vanguard and Baldyga acted with reckless disregard for the truth. This was simply and incorrect finding of law and a misunderstanding of the facts. As such, it is respectfully suggested the decision of the lower court should be reversed.

C. Discovery into Vanguard's Review of Frozen Should Have Been Ordered by the Court pursuant to CPLR §3212

At a minimum, the lower Court should have determined that additional discovery should have been provided before the "actual malice" determination was made, and summary judgment should have been denied for that reason. C.P.L.R. §3212(f) provides that "[s]hould it appear from affidavits submitted in opposition to the motion that facts essential to justify opposition may exist but cannot then be stated, the court may deny the motion or may order a continuance to permit affidavits to be obtained or disclosure to be had and may make such other order as may be just. N.Y. C.P.L.R. §3212(f).

A summary judgment motion is properly denied as premature when the nonmoving party has not been given a reasonable time and opportunity to conduct disclosure relative to pertinent evidence that is within the exclusive knowledge of the movant. See Amico v. Melville Volunteer Fire Co. Inc., 832 N.Y.S.2d 813 (2nd Dep't 2007); Juseinoski v. New York Hosp. Medical Center of Queens, 815 N.Y.S.2d 183 (2nd Dep't 2006); Metichecchia v. Palmeri, 803 N.Y.S.2d 813 (3rd Dep't 2005).Here, Alcor was plainly not afforded an adequate opportunity to conduct discovery. As demonstrated in the Affirmation of Clifford Wolff, Vanguard was unquestionably in possession of essential evidence concerning the issue of Vanguard's actual malice. (R. 2247-50 ¶6-13).

By way of background, Alcor served relevant discovery requests upon Vanguard on January 25, 2011. (R. 2251 ¶17. Vanguard consistently objected to discovery, and refused to provide a single document to Alcor for over two years of this litigation. (R. 2251 ¶17). Even after Vanguard agreed to produce discovery in August 2012, it did not do so for nearly a year. (R. 2251 ¶17). Despite agreeing to produce documents responsive to Alcor's discovery requests, Vanguard refused to do so until after Defendants' summary judgment motions were filed. Only after the pending Motion was filed did Vanguard dump 63,000 pages of documents on Alcor. Not only did Vanguard obviously do so in an attempt to divert efforts in responding to the summary judgment motions, but Vanguard simultaneously

deprived Alcor of a meaningful opportunity to review those documents and explore derivative information. Vanguard also refused to state whether it produced all responsive documents, which suggests it did not. (R. 2251 ¶16).

Given the significant questions raised concerning Vanguard's review, Alcor was entitled to determine the entire universe of information available to Vanguard at the time it published the Book. A group of self-serving statements which merely bootstrap the assertions of Vanguard is not sufficient. As an example, Alcor was entitled to know what materials were actually reviewed by the unnamed editor of the Book. In that regard, Vanguard did not disclose what questions this unnamed editor -- or anyone else at Vanguard -- entertained regarding the veracity of the allegations in the Book. Since it was disingenuous for Vanguard to suggest it had no concerns about the veracity of a confessed thief and liar, the underpinning of this assertion needs to be explored.

Additionally, it is preposterous for Vanguard to suggest it believed the truth of all the statements made in the Book, such as Alcor being involved in an international drug cartel. The support for such a bold assertion certainly needs to be considered. Similarly, Vanguard claims an unnamed literary agent and unnamed publicist of Johnson were "reputable and credible." R. 1633). However, there is no support for this self-serving assertion, and the veracity of this averment is properly the subject of discovery.

It is simply necessary to conduct the depositions of those who evaluated the information relied upon prior to publication, including: the deposition of Roger Cooper, a former vice-president of Vanguard who provided an affidavit in support of summary judgment without examination; the deposition of Kent Yalowitz, who provided an "all clear letter" upon which Vanguard disclosed for the first time in its moving papers and upon which Vanguard based its defense; and the deposition of Linda Sanders, the alleged "fact checker" for Vanguard, to determine when her research was performed, how it was performed, and what information was provided to her. After all, it is impossible for Vanguard, Baldyga and Sanders to explain their collective ignorance of a public court order from Johnson's home state preventing him from making statements of or concerning Alcor. It is equally suspect that a "professional fact checker" did not review the underlying basis for a public order entered against the author of the very book she was charged to "fact check," i.e. a written agreement between Alcor and Johnson in which Johnson agreed not to discuss matters pertaining to Alcor. One might suspect the ignorance was intentional. Indeed, the "fact checker" had access to the author, and it is patently unfathomable that a public order entered against the person who authored the book (following well-publicized misdoings by Johnson who sold pictures of deceased individuals online) was not mentioned, discussed, or inquired.

The lower court notes that Alcor had been provided with paper discovery, without regard to Alcor's assertion that it was not given a meaningful opportunity to review those documents prior to opposing summary judgment. (R. 20). In that regard, the lower court wrongfully suggests that Alcor had in its possession Vanguard's document production eight months prior to oral argument on the summary judgment motions. That observation is irrelevant. The fact remains that, at the time it was called upon to submit papers in opposition to Defendants' motions, it had not had a meaningful opportunity to review the 63,000 pages of discovery produced just prior to that deadline. It would be improper for Alcor to have raised new evidence for the first time at oral argument, and Alcor was not afforded an opportunity to make supplemental written submissions based upon the unfair timing of Defendants' "document dump." In a similar vein, the lower court criticizes Alcor for not conducting sooner the non-party deposition of "fact-checker" Linda Sanders, claiming that she could have been subpoenaed (Vanguard was unwilling to produce its witnesses for depositions). The Sanders deposition, however, would have been pointless, since the belated document production comprised the documentation about which Sanders would have been questioned at her deposition.

The lower court also ignores the great difficulty in a case such as this of assessing the legitimacy of a defendant's assertion that it conducted a good-faith

review of facts presented to it before publication without the benefit of depositions. Indeed, one would hardly expect a publisher to memorialize in writing its desire to allow the publication of false statements.[4] Thus, the fact that Alcor was able to debunk in some fashion all thirty-two (32) of the statements at issue, without the benefit of depositions, strongly suggests that depositions should have been permitted prior to the lower court's ruling on summary judgment. Citing only Trails West, Inc. v. Wolff, 32 N.Y. 2d 207 (1973), the Court determined that further discovery on the issue of Defendants' actual malice was not warranted. In Trails West, however, the court noted that document discovery and depositions had been taken prior to the filing of the defendant's motion for summary judgment. 32 N.Y. 2d at 221-22. Moreover, the court plainly based its decision to deny the plaintiff additional discovery (including a second deposition of a witness who had been previously deposed) on the fact that there was significant evidence in the record to make clear the fact that the statements at issue were based upon reports from governmental entities whose responsibilities included investigating the very issues on which they reported. Id. at p. 219.

[4] Incredibly curious however, was the mention of attorney-client communications with Vanguard, which were apparently relied upon in support of Vanguard's decision to publish the Book, but which documents were intentionally withheld from discovery. This was one of many curiously withheld documents mentioned as privileged during the last minute document dump. It is entirely possible that any such communication might have actually warned Vanguard and Baldyga about the risks of publishing false statements. That correspondence might have also criticized the veracity of the author, thereby supporting the defamation claims of Alcor. Yet, Vanguard, Baldyga and the Court prevented access to such communications by granting summary judgment without meaningful discovery.

Plainly, as discussed above and in great detail in the Wowk Affidavit, Vanguard has not made a similar showing with respect to the thirty-two (32) challenged statements in this case. Moreover, as discussed above, the document discovery sought by Alcor is already the subject of this Court's order to produce. Moreover, unlike in Trails West, where the Plaintiffs made no showing of a question as to the state of mind of the publisher, Alcor has already raised significant questions as to whether Defendants published *Frozen* with a suspicion that some or all of the challenged statements were untrue. Thus, there was no basis for denying Alcor further discovery.

D. Alcor's Claims Against Vanguard for Aiding and Abetting Breach of Fiduciary Duty, Aiding and Abetting the Violation of Binding Legal Documents, and Aiding and Abetting a Violation of a Court-Entered Judgment Should Not Have Been Dismissed

The lower court dismissed Alcor's claims against Vanguard and Baldyga other than its defamation claim (Aiding and Abetting a Breach of Fiduciary Duty, Aiding and Abetting the Violation of Binding Legal Documents, and Aiding and Abetting the Violation of a Court-Entered Judgment. In so doing, the lower court concluded that those claims were subject to the same constitutional standards as Alcor's defamation claims. That determination was erroneous for several reasons.

First, the lower court determined that those claims are claims "brought against [Defendants] for the publication of false and harmful statements", which

the lower court determined to be subject to protections of the First Amendment." More, specifically, the lower court accepted Defendants' suggestion that these claims are "repackaged defamation claims" which arose from the publication of the thirty-two (32) challenged statements at issue in its defamation claims. (R. 1651). Simply stated, that assertion is false. Alcor's aiding and abetting claims go far beyond the thirty-two (32) statements at issue in connection with the book. Those claims relate far more broadly to Vanguard's publication of thousands of statements, most of which were entirely unrelated to the only issue for which Alcor could be said to be any sort of public figure, cryopreservation. Those claims also relate to the dissemination of confidential client information and documentation, as well as the publication of photographs of the remains of Alcor clients. Thus, the determination by the lower court that dismissal of the defamation claims concerning the thirty-two (32) challenged statements necessitated dismissal of the aforementioned claims was erroneous.

Johnson was entrusted as the acting Chief Operating Officer of Alcor with personal and professional confidential information of myriad varieties. Second Amended Complaint, (R. 369 ¶48). In that regard, he had a fiduciary obligation to safeguard the confidential information, and more generally not to act in a manner inconsistent with the interests of Alcor. (R. 370 ¶49-51). Johnson was also bound by an Employee Handbook signed by him to refrain from disclosing or using

confidential Alcor information. Id. Additionally, subsequent to his leaving Alcor, Johnson disclosed confidential Alcor information to Sports Illustrated, resulting in litigation brought by Alcor. Subsequently, Johnson was sued by Alcor. The litigation was ended through a binding settlement agreement which prohibited Johnson from making any statements "of or concerning Alcor." (R. 373-74 ¶¶72-73).

Thereafter, in 2009, Johnson attempted to publish a book similar to Frozen, which attempt resulted in Alcor filing a lawsuit against him in Maricopa County, Arizona. (R. 377-80 ¶¶91-105). Upon Johnson's default, the court entered an order barring Johnson from disclosing information "of or concerning Alcor." Well prior to the publication of Frozen, Vanguard was made aware of the court order. (R. 380 ¶105). Thus, Vanguard's publication of Frozen violated Johnson's fiduciary duty to Alcor, as well as binding legal documents and a valid court order. Vanguard aided and abetted all of those violations.

These violations relate to vast numbers of representations made in the book, some false and some admittedly true. Many of these representations were personal attacks on Alcor employees and officers' personal lives and characteristics, for the purpose of casting Alcor in a bad light and giving credence to some of the preposterous factual allegations which are the subject of Alcor's defamation claims. (R. 1907 ¶¶3-5). Others related to internal Alcor matters which were

unrelated to the supposed whistle-blowing which Vanguard trumpets as being related to matters of public concern. Moreover, the violations relate to the publication by Defendants in Frozen of confidential client information, and even the publication of photographs of the remains of Alcor clients. Thus, the assertion that these claims are "repackaged" defamation claims relating to the 32 statements at issue in connection with Alcor's defamation claims is incorrect. Thus, the lower court's reliance on that suggestion was erroneous. Additionally, as stated by the U.S. Supreme Court, publishers have "no special immunity from the application of general laws", and no "special privilege to invade the rights of others." Cohen v. Cowles Media Co., 501 U.S. 663 (1991). "Accordingly, enforcement of such general laws against the press is not subject to stricter scrutiny than would be applied to enforcement against other persons or organizations." Id.

The claims against Defendants for aiding and abetting violations of enforceable agreements and a court-entered judgment do not rely upon a determination of any statement being false. Rather, it is the underlying act of assisting Johnson with the publication of materials in violation of binding documents and orders. The veracity of the statements is not at issue. The intentional misconduct is the focus of the claim. Liability arises by simply disseminating materials in violation of a codified agreement and injunction. Vanguard improperly argued there is some defense to violating a court order which

imputes the First Amendment. This is not so. Otherwise, no court could enforce a confidentiality agreement or an injunction preventing the dissemination of information.

Moreover, even if the lower court was correct in its recitation of applicable law (which it is not), summary judgment should have been denied as to Alcor's "aiding and abetting" claims. Since those claims relate far more broadly than the 32 challenged statements at issue in connection with its defamations claim, it cannot be seriously argued that each of the statements contained in the book which were published in violation of Johnson's several obligations not to publish them related to matters of public concern, or were within the scope of Alcor's status as a limited public figure. Plainly, many did not. Nonetheless, the focus here is whether the Book should have been published at all. And, as discussed above, Alcor has demonstrated that, at a minimum, there are issues of fact which preclude at this juncture a determination that Alcor is a general public figure. Accordingly, Alcor's "aiding and abetting" claims are viable, and dismissal of those claims was erroneous.

IV.

CONCLUSION

Accordingly, for all of the reasons set forth above, this Court should reverse the decision of the lower court, which granted summary judgment to the Defendants on all claims asserted by Alcor.

Dated: March 4, 2015
New York, New York

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK
----------X
ALCOR LIFE EXTENSION FOUNDATION, INC.

Plaintiff,

-against-

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

Defendants.
----------X

Index No. 113938/2009

Civil Appeal

Pre-Argument Statement

Hon. O. Peter Sherwood

1. **Title of action**:

Plaintiff, Alcor Life Extension Foundation, Inc. ("Alcor"), against Defendants, Vanguard Press, Inc. ("Vanguard") and Scott Baldyga ("Baldyga").

2. **Changes to Title:**

Defendant, Larry Johnson was voluntarily dismissed from this action pursuant to confidential settlement agreement.

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5. **Court and County from which appeal is taken:**

Supreme Court of the State of New York, New York County

6. **Appeal is from an Order entered on:**

Orders dated May 1, 2014.

7. **Related Actions or Proceedings:**

None.

8. **The nature and object of the cause(s) of action or the special proceeding** [**briefly identify what type of claims were asserted in the case (for example, breach of contract, personal injury, reversal of agency order) and what type of relief was sought (for example, money damages, injunction, specific performance)]:**

Alcor asserted claims for defamation and aiding and abetting violation of a certain agreements and a court-entered judgment. The relief sought is economic, compensatory and punitive damages.

9. **Result reached in the court or administrative body below: [briefly describe the results of the order or judgment appealed from]:**

The Court granted the Motions for Summary Judgment filed by the Defendants, Vanguard and Baldyga.

10. **Grounds for seeking reversal, annulment, or modification [briefly state the grounds for your appeal]:**

Among other things, Alcor submits that the decision entered by the Court was erroneous in that: (1) the Court incorrectly found that, based upon the record evidence, no reasonable jury could conclude that Vanguard and/or Baldyga acted with actual malice in connection with the publication of 32 defamatory statements; (2) the Court, having found that Alcor was a limited purpose public figure, incorrectly found that 11 defamatory statements which were unrelated to Alcor's business came within the scope of Alcor's purview as a limited purpose public figure, and thus applied an incorrect standard of review; (3) the Court failed to permit Alcor to undertake relevant and necessary discovery to determine what Vanguard and Baldyga (or its/his agents and authorized representatives) actually knew and/or what materials were reviewed by Vanguard and/or Baldyga (or its/his authorized representatives) prior to publication of the defamatory statements; (4) the Court failed to find that the evidence submitted by Alcor in opposition to the Motions for Summary Judgment gave rise to an issue of fact concerning the state of mind of Vanguard and/or Baldyga when the defamatory statements were published; and (5) the Court incorrectly found that Vanguard and/or Baldyga are immune from liability for aiding and abetting a violation of a Court-entered judgment based strictly on standards applicable to the publication of false and defamatory statements.

11. **Any other pending appeals in the action or related actions:**

There is no additional appeal in this action or any related action. Copies of the Notice of Appeal and the Notices of Entry of Orders appealed from are attached as Exhibits A and B, respectively.

Dated: June 4, 2013
New York, New York

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