To Be Argued By:
Clifford A. Wolff

New York County Clerk's Index No. 113938/09

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.

REPLY BRIEF FOR PLAINTIFF-APPELLANT ALCOR LIFE EXTENSION FOUNDATION

THE WOLFF LAW FIRM
250 Park Avenue South
New York, New York 10177
212-991-8130
CWolff@WolffLawFirm.com

and

LAW OFFICES OF VINCENT E. BAUER
112 Madison Avenue, 5th Floor
New York, New York 10016
212-575-1517
VBauer@VbauerLaw.com

Attorneys for Plaintiff-Appellant Alcor Life Extension Foundation

Of Counsel:
Clifford A. Wolff

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

I.

PRELIMINARY STATEMENT 1

II.

LEGAL ARGUMENT 3

A. Alcor is Simply Not a General Purpose Public Figure 3

B. Alcor is a Limited Purpose Public Figure Only Respecting its Core Business of Cryopreservation 6

C. Alcor, Even Without the Aid of Meaningful Discovery, Respect to Whether Defendants Published False Statements with Actual Malice 9

D. Alcor Has Presented Ample Evidence of Gross Irresponsibility as to 11 Statements At-Issue, and Those Statements Do Not Relate to Matters of Public Concern 14

E. Discovery into Vanguard's Review of Frozen Should Have Been Ordered by the Court Pursuant to CPLR §3212 16

F. 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 21

G. Vanguard Improperly Attempts to Defend its Wrongful Conduct by Ignoring Blatant Inconsistencies and Promoting Self-Serving Materials Which Vanguard Refuses to Let AlcorChallenge 25

IV.

CONCLUSION 30

PRINTING SPECIFICATIONS STATEMENT 31

TABLE OF AUTHORITIES

Page

Cases

A.E. Hotchner v. Castillo-Puche,
404 F.Supp. 1041 (S.D.N.Y. 1975).....10, 21

Amico v. Melville Volunteer Fire Co. Inc.,
832 N.Y.S.2d 813 (2nd Dep't 2007).....16

Cohen v. Cowles Media Co.,
501 U.S. 663 (1991).....23, 24

Goldwater v. Ginzburg,
414 F. 2d 324 (2d Cir. 1969).....10

Gross v. New York Times Co.,
281 A.D. 2d 299 (1st Dep't 2001) 9, 21

Hustler Magazine, Inc. v. Falwell,
485 U.S. 46, 99 L. Ed. 2d 41, 108 S. Ct. 876 (1988).....24

In La Luna Enters. v. CBS Corp.,
74 F. Supp. 2d 384 (S.D.N.Y. 1999).....23, 24

Juseinoski v. New York Hosp. Medical Center of Queens,
815 N.Y.S.2d 183 (2nd Dep't 2006).....16

Metichecchia v. Palmeri,
803 N.Y.S.2d 813 (3rd Dep't 2005) 16

New York Times v. Sullivan,
376 U.S. 254 (1964).....9

St. Amant v. Thompson,
390 U.S. 727 (1968).....10

Statutes

CPLR §3212.....16

CPLR §3212(f).....16

I.

PRELIMINARY STATEMENT

Plaintiff-Appellant, Alcor Life Extension Foundation, Inc. ("Alcor"), submits this Reply Brief in support of its appeal from the May 1, 2014 decision of the Court below to grant the motions for summary judgment filed by Defendants-Respondents Vanguard Press, Inc. ("Vanguard") and Scott Baldyga ("Baldyga").[1] As set forth in the Initial Brief, Alcor amply demonstrated in opposition to those motions for summary judgment that there are material issues of disputed fact concerning whether Vanguard and Baldyga published with actual malice the 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, summary judgment was inappropriate, and this Court should reverse the decision of the lower Court with instructions to permit the requested discovery and to allow the matter to proceed in the trial court.

Moreover, the Court below 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 Court below then applied improperly the actual malice standard to 11 challenged statements contained in

[1] Baldyga did not file an opposition brief in connection with this appeal. It is respectfully submitted that Alcor's appeal, as it relates to Baldyga, is unopposed and judgment in favor of Baldyga reversed.

Frozen, even though these statements were not made with respect to the core business of Alcor, i.e., cryopreservation. As such, the below Court's granting of summary judgment concerning those 11 statements was erroneous. The limited purpose public figure standard simply does not apply to the defamatory statements of which pertain to issues outside the scope of that limited business activity.

Additionally, the Court below 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. As it pertains to summary judgment entered on this additional cause of action against Vanguard and Baldyga, the decision of the Court below was erroneous because it was based upon the incorrect premise that Alcor's aiding and abetting claims were predicated on simply the 32 challenged statements contained in Frozen which form the basis of Alcor's defamation claims. In fact, the 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 the remains of Alcor clients). The Answer Brief of Vanguard misses the mark again and fails to even acknowledge the gravamen of the aiding and abetting claims. Vanguard would have this Court

improperly believe that claim relates to only the dissemination of defamatory statements regarding Alcor.

Finally, since most of the evidence concerning these issues was within Vanguard's and Baldyga's control, and was either produced during the pendency of the motions for summary judgment (thus depriving Alcor a meaningful opportunity to review), opposed by Vanguard and Baldyga (both Defendants opposed the taking of depositions and discovery to preclude Alcor from obtain relevant and potentially helpful information), or was withheld from production in violation of the lower Court's various orders, Vanguard should have been required to provide the necessary discovery, and the motions for summary judgment should have been denied as premature. As set forth below, Vanguard, in its appellate opposition papers, in no way undercuts or undermines the foregoing conclusions. As such, it is respectfully requested this Court reverse the judgments entered by the Court below.

II.

LEGAL ARGUMENT

A. Alcor is Simply Not a General Purpose Public Figure

Vanguard, in its Answer Brief, attempts to argue that Alcor is a general purpose public figure. Brief for Defendant-Respondent, Vanguard ("VBr.") 25-28. In so doing, Vanguard conveniently forgets that, in its summary judgment moving

papers, Vanguard admitted that Alcor could be deemed a private figure. Record ("R.")1623, pp 19-22.

That said, both at the time of the publication of *Frozen* and now, Alcor cannot be classified as a general purpose public figure. Alcor was not notable to the general public, and Alcor did not seek to influence national debate on general issues. R.1906, ¶74-78. But for the undesired actions of Johnson, Alcor would likely have been almost entirely unknown. Id. This is because Alcor does not willfully insert itself into a place of public prominence, nor does Alcor attempt to influence the public debate on general issues. Id. Alcor has disseminated information publicly concerning cryopreservation, but has not sought attention outside of that narrow context. Id. It has participated in interviews over the years, but again, solely within the narrow context of clinical cryopreservation. Id. To the extent that, prior to the publication of *Frozen*, and Johnson's whirlwind publicity tour, Alcor had any degree of notoriety, it was the result of the 2003 *Sports Illustrated* article unilaterally prompted by Mr. Johnson. R.2378-79. By no means does this unwanted and uninvited act of Johnson transform Alcor into a general purpose public figure.

Vanguard's arguments on this issue are unavailing. First, Vanguard argues that Alcor concedes it is a general purpose public figure because it has touted itself as a "world leader" and "pioneer" in cryonics. VBr.26. Of course, that

representation is no such admission because it does not speak to Alcor's levels of notoriety or influence in the community-at-large. Vanguard also suggests that Alcor could be considered a general purpose public figure because, according to Vanguard, a 2010 Google News search yielded 1550 hits for Alcor between 2000 and 2009, when Frozen was published. However, Vanguard neglects to mention that, after excluding references to Ted Williams and Larry Johnson, only 100 hits (many of them republications of the same articles by different outlets) resulted, hardly the level of exposure attributable to an organization alleged by Vanguard to occupy a position of such persuasive power and influence that it is deemed a public figures for all purposes. R.1906. Indeed, Vanguard does not even attempt to demonstrate that Alcor has actual notoriety or persuasive power. Instead, Vanguard trumpets Alcor's participation in interviews with the media. VBr26. Those sporadic interviews, however, related to the issue of cryopreservation, and thus in no way give rise to the belief that Alcor sought notoriety outside that narrow scope. See e.g. R.972, R.1906, ¶80. Similarly, Alcor's attempts at limited promotion were targeted towards its core business of cryopreservation, and do not support in the least an argument that Alcor is a general purpose public figure. R. 339-358. Indeed, hundreds of thousands of businesses advertise in this country, and the vast majority of them are not known to the general public and certainly are not general purpose public figures. Neither should Alcor be deemed a general

purpose public figure based on its limited promotion of its core and only business, the provision of cryopreservation services. For this reason, the argument of Vanguard falls flat, and Vanguard cannot escape liability for its clear wrongdoing. VBr. 25-28.

B. Alcor is a Limited Purpose Public Figure Only Respecting its Core Business of Cryopreservation

The Court below determined that Alcor was a limited purpose public figure. R. 17-18. In that regard, the Court below suggested that the appropriate scope of Alcor's limited purpose public figure status was matters solely within the scope of Alcor's "core business," i.e., cryopreservation. R.19. In a sweeping manner, the Court below then expanded the scope of that limited purpose to include not only the core business of cryopreservation, but other matters as well. Specifically, the Court below held that Alcor's limited public figure status extends to all matters relating in any way to its business, including cryopreservation "*and cryonicists* associated with Alcor." R.19 [emphasis added]. In so doing, the Court below eviscerated the definitional limitations associated with a *limited purpose* public figure designation. Id.

By improperly extending the scope of Alcor's limited purpose public figure status, the lower court incorrectly heightened the applicable standard of review to the "actual malice" standard with respect to any and all statements regarding Alcor's staff, individuals who might self-associate themselves with Alcor, as well

as any other person or activity which might somehow have an attenuated relationship with Alcor. In point of fact, 11 of the challenged statements are unrelated to cryopreservation, instead relating to cocaine smuggling, underground "bunkers," kidnapping of teenagers and runaways, death threats, and the like. Third Amended Complaint, R.383-85, ¶122, A-K. Naturally, Vanguard completely ignores in its brief the specific wording of these 11 statements, which go well beyond the business of cryopreservation. Application of the "actual malice" standard to those 11 statements was therefore error which, standing alone, provides a basis of reversal of the lower Court's decision.

Vanguard argues that Alcor can be considered a limited purpose public figure as to the 11 statements. In that regard, Vanguard claims that Alcor, by virtue of its claims that the 11 statements were "of and concerning Alcor," and damaged its business interests, has defined those statements as being within the scope of the limited purpose protections. VBr.21-24. That argument is nonsensical. It is plain that an entity's reputation can be harmed where, as here, defamatory statements are written about it which are entirely unrelated to the issues with respect to which the entity holds limited public figure status. Thus, it is of no significance in terms of determining the scope of Alcor's limited public figure status that Alcor has claimed to have been damaged in terms of its reputation by statements which are irrelevant to its business, with respect to which

it has such limited public figure status. Thus, Vanguard's argument should be rejected.

Here, it is beyond dispute that Alcor did not thrust itself into the public spotlight with respect to any alleged drug activities, alleged kidnappings, or any of the other issues related to the 11 statements at issue. R.1906, ¶¶3-4. Indeed, Vanguard and Baldyga do not even attempt to argue to the contrary. Moreover, there was no extant public controversy involving Alcor concerning any of those scandalous allegations. Although Vanguard suggests that these issues were subject to media coverage about Alcor, Vanguard conveniently fails to mention that such coverage was archaic, fleeting, uninvited, and excludes several defamatory allegations never covered by any media. R.1906. For example, the allegation that Alcor was involved in kidnapping teenagers and homeless people and burying them in the desert was invented in "Frozen" out of whole cloth, with no previous suggestion of such a thing anywhere. R.1906, ¶¶3-4. Thus, those activities are not appropriately within the scope of Alcor's limited purpose public figure status. Therefore, Vanguard has done nothing to undercut the notion that the 11 statements are outside the scope of Alcor's limited purpose public figure status. Accordingly, the lower Court's application of the actual malice standard to the 11 statements was error.

C. 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 Court below correctly applied the actual malice standard to all 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 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 person or entity publish 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 was to simply 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). Obviously, this is factually driven analysis involving discovery of the facts, and an evaluation of those facts by the trier of fact.

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). The argument of Vanguard that summary judgment should be liberally granted in the context of libel claims, R.6, is simply false.

In this case, as discussed more fully in Alcor's Brief and in the Wowk Affidavit, R.1906-84, there is ample basis for dispute with respect to the question of whether Vanguard entertained serious doubt concerning the accuracy of the 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 doubts of whether Vanguard and Baldyga operated in good faith when reviewing the challenged assertions of Johnson. For instance, there is no support for the false statements that Alcor was "kidnapping people," or "experimenting on them until they die." R.1919. These and other statements mentioned in the initial brief of Alcor are complete fictions.

While Vanguard attempts to gloss over these incredible discrepancies in its brief, VBr.41, it nonetheless concedes the errors of its alleged fact-checker could be "faulty," "contain[sic] errors," or may have even been "false." Id. These collective errors created a situation in which the defamatory statements within *Frozen* were published with knowledge of being false and with "reckless falsity" -- as Vanguard characterizes the misconduct. Id. For this reason, a jury could have easily found Vanguard and Baldyga liable for defamation, and summary judgment should be reversed.

That Vanguard and Baldyga were aware of these facts and chose to allow statements to be published that were far broader and more damning than those facts allowed is much more than a question of characterization. Instead, it suggests that Defendants were all too happy to allow misrepresentations of fact into *Frozen*. R.1908, ¶6. And to be clear, many of 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 to be included in *Frozen* for pecuniary gain.

Vanguard argues that its failures to investigate the truth of the challenged statements, omissions of contradictory information, factual mistakes, and misinterpretations of recorded conversations do not give rise to a disputed issue of fact concerning Vanguard acted with actual malice. VBr.29. In so doing, Vanguard cites to cases in which courts granted summary judgment despite allegations by plaintiffs of one or more of these factors. None of those cases, however, speak to the issue presented here, whether a publisher's representation that it followed responsible and diligent editorial publishing procedures aimed at confirming support for the facts is undercut by a mountain of evidence that numerous errors, omissions, and mischaracterizations of available evidence occurred with respect to the challenged statements. R.1906-54. Simply put, that mountain of adverse

evidence gives rise to a fact question as to the issue of actual malice because it demonstrates that the representations of Vanguard's witnesses concerning their state of mind cannot be true. In fact, Dr. Wowk comprehensively demonstrated that each of the 32 challenged statements was the product of misrepresentation of source materials or even more egregious attempts to invent or distort facts. R.1906-54. Alcor freely concedes that one error of fact might be the product of a good-faith error. But, distortions and the outright manufacturing of facts to bootstrap wrongdoing and relating to each of the challenged statements, raises a significant fact question as to whether Vanguard and Baldyga were intentionally overlooking discrepancies in an effort to allow for a more sensationalized publication for sale. Of course, to this end, a jury could conclude that Vanguard and Baldyga acted with actual malice. However, the Court below 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 an incorrect finding of law and a misunderstanding of the facts.

Vanguard also argues that Dr. Wowk's affidavit is inadmissible, claiming that it is not based upon his first-hand knowledge. VBr.36 In fact, as a careful review will reveal, all of that affidavit is based upon Dr. Wowk's first-hand knowledge, both as a Director and technical advisor to Alcor, and reviewer of publicly-available materials contradicting the content of "Frozen." R.1906-54.

Although Dr. Wowk was not present for Vanguard's fact-checking process, Dr. Wowk does speak with knowledge of the documentation he references in his affidavit, and he details the multitude of discrepancies between the challenged statements and the source materials on which Vanguard's witnesses claimed to have relied in connection with their "fact-checking" procedures. Id. Thus, Vanguard's argument is unavailing at best.

D. Alcor Has Presented Ample Evidence of Gross Irresponsibility as to 11 Statements At-Issue, and Those Statements Do Not Relate to Matters of Public Concern

In support of its argument that summary judgment was appropriate with respect to the 11 statements, Vanguard weakly argues that *Frozen* was a matter of public concern, and Alcor has not presented evidence of Vanguard's gross irresponsibility in fact-checking its contents. VBr.13-14. Both of those assertions are unavailing. First, Vanguard is incorrect to suggest that whether *Frozen* is a matter of public concern is the operative question. Instead, the appropriate inquiry is whether the 11 statements relate to matters of public concern. Indeed, those statements are not a matter of public concern. As discussed above, those statements are unrelated to cryopreservation by Alcor, which is the only arguable matter of public concern contained in *Frozen*. Instead, as discussed above, the 11 statements are personal attacks on Alcor personnel, accusing them of drug trafficking, kidnapping and the like, all of which are unrelated to cryopreservation.

R.1907, ¶3, R.1912-13, ¶10, R.1917-18, ¶16. The attacks were plainly included in Frozen for the purpose of increasing the salacious value (and increasing sales) of *Frozen.* Thus, the gross irresponsibility standard does not apply to those statements.

Additionally, as discussed above, through the Wowk Affidavit, Alcor has demonstrated numerous inaccuracies, distortions and misrepresentations, relating to the 32 challenged statements. R.1909-1954. Vanguard's tired refrain, "trust us, we did a good job and we didn't suspect falsity despite all the challenges to accuracy" has been seriously debunked. More specifically, Vanguard asserts that it used "methods of verification that are reasonably calculated to produce accurate copy", which Vanguard claims is all the gross irresponsibility standard requires. VBr.14, 18 and 20. Simply stated, it is implausible that -- had Vanguard's fact-checkers engaged in the verification methods it claims to have undertaken, or any reasonable verification efforts -- the mountain of inaccuracies, false statements, unsupported statements, and mischaracterizations of available evidence would have been included in *Frozen.* It is this disconnect that creates a material issue of disputed fact concerning the issue of Vanguard's gross irresponsibility. Thus, summary judgment on that issue was improper.

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

As discussed in Alcor's Appellate Brief, at a minimum, the lower Court should have determined that additional discovery was warranted 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. Vanguard does not address

this position in the least. Instead, Vanguard attempts to suggest the time lag they created between document requests and ultimate document production somehow warrants a denial of discovery and granting of summary judgment.

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. It is incomprehensible that Vanguard would engage in such improper litigation tactics at the Court below, and then attempt to suggest to this Court that the very same tactics warrant affirmation of summary judgment without discovery.

Both Vanguard and the Court below note 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 Court below wrongfully suggested 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. Vanguard had over two full years to amass, review and cull the documents for production. But, Vanguard made the calculated decision to engage in a "document dump" only after filings its moving papers for summary judgment.

Vanguard suggests that that lack of fair opportunity was somehow cured by the fact that Alcor's counsel was asked by the lower court at oral argument to identify documents which demonstrated actual malice. VBr.51-52. That suggestion is false; Alcor was given no opportunity to respond in a formal manner concerning the documents produced by Vanguard. Had it been given such an opportunity, it could have set forth how the many glaring omissions from Vanguard's production, most particularly the lack of meaningful notes from the editors concerning their

review, buttressed the many discrepancies raised in the Wowk Affidavit concerning the review process.

Vanguard also distorts the record as it relates to oral argument on Vanguard's motion for summary judgment, claiming that Alcor could not identify documents which demonstrated actual malice on the part of Vanguard. In fact, the Wowk Affidavit, which was discussed at length in Alcor's opposition papers and during oral argument, sets forth the very significant amount of documentation which raises questions concerning the legitimacy of Vanguard's assertions that it was unaware of reasons to doubt the veracity of the contents of Frozen. R.1906-54.

The lower court also 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). In a similar vein, Vanguard argues that Alcor should have conducted the depositions of five of the six relevant witnesses concerning Vanguard's review of Frozen. VBr.55-56. The Sanders deposition, as well of those of the other witnesses, however, would have been pointless, since the belated document production comprised the documentation about which those purported deponents would have been questioned at their depositions. Plainly, those documents would have been critically necessary to a meaningful deposition of each of those witnesses. This Court should see through the transparent and inappropriate litigation tactics of

Vanguard; Vanguard is claiming remarkably that Alcor should have taken depositions of witnesses without the benefit of the very documents Vanguard intentionally withhold for three years which pertain to those witnesses. Id. This is the most unusual -- and frankly unacceptable -- argument made by Vanguard in its entire brief.

Moreover, Vanguard ignores the fact that, in opposition to Vanguard's summary judgment motion, Alcor requested the opportunity to depose the witnesses at issue. R.2256, 2299. At that time, Alcor had not been provided with any document discovery. Given the fact that Vanguard's motion was pending, it is unrealistic to expect Alcor to have, upon receiving Vanguard's document production, subpoenaed witnesses without the benefit of the requested order from the lower court authorizing the depositions. Thus, the criticisms of Alcor in this regard are entirely unfounded.

Vanguard cites case law for the proposition that summary judgment is appropriate to determine that a plaintiff cannot demonstrate requisite liability, without permitting additional discovery. VBr.29-30. Vanguard ignores, however, that, in its cited cases, the plaintiffs at issue make no showing of a question as to the state of mind of the publisher and, in each case, the plaintiff relies upon a singular alleged basis for establishing actual malice. Id. In contrast, Alcor has already raised significant questions as to whether Vanguard 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.[2]

F. 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 Court below also dismissed Alcor's claims against Vanguard and Baldyga other than its defamation claim, to wit: "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." R.7 In so doing, the Court below concluded that those claims were subject to the same constitutional standards as Alcor's defamation claims. As discussed in Alcor's Brief, that determination was erroneous for several reasons. First, the Court below determined that those claims are claims "brought against [Defendants] for the publication of false and harmful statements," which the lower court determined to

[2] Vanguard's attempts to distinguish the case law cited by Alcor in its Initial Brief are unavailing. VBr.30-31. In that regard, the decisions in Gross and Reliance Ins. Co. were cited for very general principles of defamation law which are unchallenged by Vanguard. Id. Thus, the unrelated distinctions drawn by Vanguard concerning those cases are irrelevant. Also irrelevant is the fact that in Hotchner, a case in which summary judgment was denied, a subsequent jury verdict in that case was overturned by the Second Circuit. That development in no way speaks to the question before the Court, the propriety of entering summary judgment on the issue of malice. Vanguard's attempt to distinguish the decision in the Mount case is also unavailing. In Mount, just as here, summary judgment was denied where the publisher in question did not, in support of its summary judgment motion, adequately explain the discrepancies associated with its version of events. As discussed above, there are numerous discrepancies concerning Vanguard's representations of innocence that are as yet unspoken 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 32 challenged statements at issue in its defamation claims. R.1651. However, these conclusions are incorrect.

Alcor's aiding and abetting claims go far beyond the 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. Most significantly, those claims 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 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. R.369, ¶48. In that regard, Johnson 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 against Johnson. 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 December 2008, 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." Id. Well before 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 knowingly aided and abetted these violations.

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 cases cited by Vanguard support this view. In La Luna Enters. v. CBS Corp., 74 F. Supp. 2d 384 (S.D.N.Y. 1999), for example, the court, relying on the

Cohen decision, refused to dismiss trespass claims against a news agency that allegedly trespassed on the plaintiff's premises in connection with obtaining a story that was arguably defamatory. In so doing, the court noted that, "where a plaintiff brings a tort claim other than defamation to impose liability on the press for the publication of allegedly false and harmful statements, these claims may be subject to the strictures of the First Amendment." 74 F. Supp. 2d at 392, citing Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 56, 99 L. Ed. 2d 41, 108 S. Ct. 876 (1988).

Significantly, with full recognition of these principles, the La Luna court denied summary judgement concerning the trespass claim, concluding that the claim was not a re-packaged defamation claim, since it arose out of independent wrongdoing. Here, Alcor's aiding and abetting claims arise out of wrongs completely independent of its defamation claims. The claims against Defendants 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. Liability arises by simply disseminating materials in violation of a codified agreement and order. Vanguard improperly argued there is some defense to violating a court order which imputes the First Amendment. VBr.46-48. The argument of Vanguard is entirely fallacious.

Accordingly, Alcor's "aiding and abetting" claims are viable, and dismissal of those claims was erroneous.

G. Vanguard Improperly Attempts to Defend its Wrongful Conduct by Ignoring Blatant Inconsistencies and Promoting Self-Serving Materials Which Vanguard Refuses to Let Alcor Challenge

Vanguard goes to great lengths in its brief to suggest it did not know certain statements were false "...when Vanguard published *Frozen* in 2009." VBr.37. However, this qualification is telling. Even if this Court believes that Vanguard did not doubt the contents of *Frozen* *in 2009* (which Alcor posits is untrue and requested discovery to uncover what Vanguard really knew), there is no question that Alcor has since been able to provide manifest evidence that the contents of *Frozen* were in fact untrue and should have been known before 2009. R.1906-2243. Surely, Vanguard no longer doubts the falsity of the statements. Objectively speaking, a reasonable jury could infer that Vanguard is either not being forthright about its knowledge in 2009, or perhaps Vanguard willfully turned a blind eye toward the falsity of *Frozen* and ignored the information available *before 2009*, thereby acting with reckless falsity. Vanguard hides behind various self-serving and unchallenged affidavits to support its own proposition of "good faith." This is entirely inappropriate and completely ignores the comprehensive

materials provided by Dr. Wowk in opposition to the motions for summary judgment, upon which Alcor relies in connection with this appeal. Id.[3]

It is equally unconscionable that Vanguard states that Johnson was "credible," VBr.38, and had "first-hand accounts." VBr.20. Vanguard completely ignores the undisputed fact that Johnson worked at Alcor for only eight months, *and he was not even employed during the most sensationalized and falsified event contained in the Book,* relating to the cryopreservation of a Hall of Fame baseball player. R.1496. The suggestion by Vanguard that Johnson was "credible" and had "first-hand accounts" of events in the book is plainly false. It is equally false to suggest Johnson was a "whistleblower." A "credible" whistleblower does not steal confidential photographs of deceased patients and sell those photographs on a pay-per-view website for personal profit -- as Johnson did following his admitted theft of those photographs. R.1935-36. While Alcor indeed describes Johnson as a "thief," that badge is well-earned not based on the supposition of Alcor, but rather the self-admitted conduct of Johnson. Amended and Supplemental Record ("ASR.")2506, pp. 271, 282 (where Johnson admitted stealing a computer hard drive and advising an Alcor lawyer to "stick it up his ass" next to a gag order

[3] It should be noted that Baldyga does not put forth not put forth any information or evidence on appeal that he was unaware of the falsity of the information contained in *Frozen*. Thus, summary judgment should be reversed as it pertains to Baldyga.

which was also entered against Johnson).[4] Johnson then attempted to profit from the sale of the Book, which contained again stolen photographs of deceased Alcor patients. ASR.2506, between pp. 182-183 [unnumbered photo pages]. The self-serving conclusion that Johnson was a somehow a "credible thief" is oxymoronic. As such, the suggestion that Vanguard acted in good faith is simply wrong. At the very least, this point is worthy of exploration is discovery -- something Vanguard avoids. In any event, the argument of Vanguard is flawed and summary judgment should be reversed.

Similarly, Vanguard attempts to minimize the errors uncovered by Alcor in connection with the "vetting" process of the Book. Vanguard argues that Alcor takes exception with only two of the many errors in the process. VBr.39. This is a colossal misrepresentation of the challenges Alcor posed to the work of Sanders. Alcor debunks conclusively though Dr. Wowk over twenty (20) substantive statements made by Sanders in her affidavit. R.1906-84, not including the ninety-nine (99) substantively supported challenges posed to the contents of the Book

[4] The entire brief of Vanguard ignores the self-admitted, wrongful conduct of Johnson, as contained in the very Book it "reviewed" and published. It is beyond question that Vanguard knew that Johnson was a law breaker and a ne'er-do-well with blatant contempt of the law. It is equally certain that Vanguard knew of the "gag order" entered against Johnson long before publication of *Frozen.* After all, *reference is made to the Court order in the Book.* It is disingenuous for Vanguard to suggest this is a "red herring" issue, VBr.32, FN14, and simultaneous ignore the contents of that Order adverse to Johnson based on his wrongful conduct -- all the while describing Johnson as "credible." Such arguments create obviously question as to the credibility of not just Johnson, but also Vanguard. After all, interestingly, Vanguard never makes reference of having received a copy of this Court Order before Alcor provided a copy to prevent publication.

itself and the outright falsehoods of Johnson. It is enigmatic at best that Vanguard would attempt to minimize the actual number of challenges posed by Alcor to the findings of Sanders. Yet, as a factual and legal matter, Alcor has more than proven that the work of Sanders was slipshod and unsupportive of the proposition that Vanguard could have reasonably relied upon such work. More likely than not, the work of Sanders turned up questions and gross inconsistencies which Vanguard recklessly ignored, in similar fashion to the manner in which Vanguard ignores the multitude of challenges by Alcor to the work of Sanders.

Vanguard ignores in one aspect of its brief, VBr.42-46, its very own logic in another aspect of its brief. VBr.3. That is, Vanguard argues in the latter portion of its brief that it did not suggest "guns," "bombs" and "illegal drug trafficking" were of or concerning Alcor. VBr.42-46. Instead, Vanguard argues that it was referring to other persons who were simply affiliated with Alcor. Id. However, in the former portions of the Vanguard brief, Vanguard goes to great lengths to suggest that Alcor and its "Alcorians" are one and the same for the purposes of creating a heightened standard of required malice before proving libel. V.Br.3, 23-24. While the record is clear that indeed Vanguard was referring to Alcor, R.1907, ¶3; ASR. 2506, pp. 153, 332, it is nonetheless disingenuous for Vanguard to take liberties with its arguments when it suits their piecemeal purpose. Either Vanguard should distinguish between Alcor and "Alcorians" for the purpose of the applicable

standard of malice, or Vanguard should accept that its defamatory remarks regarding Alcor and Alcorians are interchangeable.

Vanguard also improperly suggests Alcor mischaracterizes the operating notes from the cryopreservation of a Hall of Fame baseball player. VBr.42. This argument is absolutely incorrect. As an initial matter, Johnson did not even work at Alcor during the cryopreservation of the Hall of Fame baseball player. R.1496. Johnson instead pilfered some operating notes and Vanguard published those notes in its attempt to support facts which were simply untrue. As set forth conclusively in the affidavit of Dr. Wowk, R.1933-34, the cryopreservation of that patient was "successful," The surgical notes underlying the cryopreservation prove unequivocally that the cryopreservation was successful, and the false characterization in *Frozen* otherwise appears to be a pure fiction created to sell books. Nonetheless, the argument of Vanguard that the operative notes are consistent with its false statements is simply wrong.[5] The operative notes are not at all consistent with those falsities. Id. For these reasons, the judgment entered by the Court below should be reversed.

[5] The self-serving argument of Vanguard that Sanders "heard no inconsistency" between the illegally obtained audio recording provided by Johnson and the elliptical transcript quoted in the book is baffling. VBr.42-43. Vanguard attempts to put forth the unchallenged state of mind of an agent -- which is improper -- and fails to affirmatively state that the recording was "consistent" with the elliptical transcript. Vanguard also intentionally fails to discuss whether that recording even pertains to the subject matter for which it was presented. This is the typical argument by omission of Vanguard which improperly prevents Alcor from challenging the positions undertaken by Vanguard.

IV.

CONCLUSION

Accordingly, for all of the reasons set forth above, this Court should reverse the decision of the lower court to enter summary judgment concerning Alcor's claims.

Dated: August 28, 2015
New York, New York

ss/ CLIFFORD A. WOLFF
By: Clifford A. Wolff
THE WOLFF LAW FIRM
250 Park Avenue, 7th Floor
New York, New York 10177
Phone: (212) 991-8130
Email: CWolff@WolffLawFirm.com

Law Offices of Vincent E. Bauer
By: Vincent E. Bauer
112 Madison Avenue, 5th Floor
New York, New York 10016
Phone: (212) 575-1517
Email: VBauer@VBauerLaw.com

Attorneys for Plaintiff-Appellant, ALCOR LIFE EXTENSION FOUNDATION, INC.

PRINTING SPECIFICATIONS STATEMENT

Pursuant to 22 NYCRR §600.10 that the foregoing brief was prepared on a computer.

Type: A proportionally spaced typeface was used as follows:

Name of typeface: Times New Roman

Point size: 14

Line spacing: Double

Word Count: The total number of words in the brief, inclusive of point headings and footnotes and exclusive of pages containing the table of contents, table of authorities, proof of service, printing specifications statement, or any authorized addendum containing statutes, rules, regulations, etc. is 6,930.