SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 2

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CELIA FARBER,

Index No.: 106399/2009

Plaintiff,

-against- DECISION/ORDER

RICHARD JEFFERYS, KEVIN D. KURITSKY,
JAMES J. MURTAUGH M.D.,

Defendants

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LOUIS B. YORK, J.S.C.:

In this lawsuit, journalist Celia Farber sues three defendants – Richard Jefferys, Kevin D. Kuritsky, and James J. Murtaugh M.D. – for defamation. Defendant Richard Jefferys made a pre-Answer motion to dismiss on several grounds; Farber opposed the motion. In an earlier decision, the Court converted the motion to one for summary judgment, and afforded the parties the opportunity to submit additional papers and argue the converted motion. Now, after careful consideration, the Court grants the motion and dismisses the action as it applies to Jefferys.

Background

I. AIDS and HIV.

In the 1980s, doctors in the United States, France and elsewhere became aware of what we now refer to as AIDS, as an illness of unknown origin which broke down the immune system and had an extremely high fatality rate. Ultimately, those affected did not die of AIDS but of infectious illnesses such as Kaposi's sarcoma ("ks") and pneumocystis carinii pneumonia ("pcp"), which their compromised immune systems could not fight. Because the illness causing the immunodeficiency could not be identified, doctors had no known way to fight it. In the

United States the condition initially spread predominantly through the gay male community in California and New York, causing some medical researchers in this country to suspect that it was a virus which spread, at least in part, through sexual intercourse. Subsequently it was discovered that the condition had affected some hemophiliacs who took Factor VIII, which helped their blood to clot and was culled from a variety of anonymous blood donors. By this time, there were also reports of similar symptoms among the Haitian immigrant community in the United States, intravenous drug users and the infant children of affected mothers. Moreover, the condition was also reported in other countries, where it was spreading among different sections of the population. This increased the belief of many that they were dealing with a virus.

Ultimately, prominent researchers at the Pasteur Institute in France and the National Cancer Institute ("NCI") in the United States announced that the condition, by then called AIDS, was caused by an infectious virus – in particular, a retrovirus which they dubbed human immunodeficiency virus ("HIV"). [1] A retrovirus, which contains viral RNA, transcribes itself into the host's DNA, enabling the viral RNA to become DNA and take up residence in the host's genetic material. In the case of HIV, the retrovirus transcribes itself within the CD4 positive T cells ("T cells"), white blood cells responsible for the immune system; once transformed into

[1] The discovery of HIV also was fraught with controversy. In 1983 Drs. Luc Montagnier and Francois Barre-Sinoussi of the Pasteur Institute in Paris isolated HIV. The following year, Dr. Robert Gallo of NCI publicly identified HIV as the virus that caused AIDS. Gallo claimed to have discovered the virus, a contention which launched a bitter dispute between the French and American scientists. Finally, United States President Ronald Reagan and French President Francois Mitterrand negotiated a solution. The Pasteur Institute was credited with the discovery of HIV, and Gallo's laboratory was credited with linking HIV to AIDS. Only Montagnier and his colleague Barre-Sinoussi received the 2008 Nobel Prize for the discovery of HIV.

DNA, the virus creates more virus instead of normal T cells and thus begins to break down the immune system. Not only that, but researchers concluded that HIV was a type of retrovirus called a lentivirus, which lies dormant in an infected person's system for a while before it becomes active. Because of their long incubation period lentiviruses can deliver more genetic material into the DNA and can also replicate in non-dividing cells.

Over the years, numerous AIDS-related organizations have emerged which educate people about AIDS and provide support services and other resources to HIV positive individuals. Two of these entities are especially relevant here. First is the Elizabeth Glaser Pediatric Aids Foundation ("Pediatric AIDS Foundation") (www.pedaids.org), which has the stated goal of preventing pediatric infection and eradicating pediatric AIDS by advocacy and by research, prevention and treatment programs. Pediatric AIDS Foundation supports the use of antiretroviral medications by HIV positive women during their pregnancy and by both the mothers and children after the pregnancy. The second organization is Treatment Action Group ("TAG") (www.treatmentactiongroup.org), a nonprofit foundation based in New York with which defendant Jefferys is affiliated. In 1992, several members of the activist organization ACT UP formed this spin off organization to advocate for and evaluate the quality of medical research and the efficacy of treatments. TAG describes one of its primary focuses as the development of vaccines against HIV and better antiretroviral treatments for HIV. Another important goal of TAG is to enable greater access to treatments aimed toward stabilizing or curing those with HIV/AIDS. [2] Pharmaceutical companies which manufacture these antiretroviral medications donate money and/or medications to both organizations.

[2] The information about TAG comes from various portions of its website.

Defendant Jefferys, now at TAG, has long been involved in HIV/AIDS related advocacy work. Initially he volunteered at the AIDS Treatment Data Network ("the Network"), where he prepared a study on State and Medicaid programs and the extent to which they enabled greater access to HIV/AIDS treatments. He also studied experimental treatments and treatment trials in the publications Treatment Guide and The Treatment Review. Before joining TAG, he worked on projects, from an advocacy and evaluative perspective, which related to treatment access and to the development of an AIDS vaccine. Today, as the Coordinator of TAG's Michael Palm Basic Science, Vaccine and Prevention Project, defendant Jefferys critiques vaccine and treatment interruption research and also writes about issues related to this and other issues which he has studied. Among these and other responsibilities, he has testified about relevant topics at FDA committee hearings and he served on the Track A committee for the international AIDS Conference in Toronto in 2006.

As Jefferys points out in his affidavit, an important part of AIDS research relates to the reduction of mother-to-child transmission of HIV. A 1994 study, the results of which are documented in a New England Journal of Medicine article which Jefferys annexes to his papers, indicated that the use of zidovudine, or azidodeozythymidine (more commonly known as AZT) during pregnancy reduced the risk of transmission of the virus to the baby by 67%. A 1999 study, which Jefferys also annexes, concluded that the drug nevirapine also is successful in preventing mother-to-child transmission of HIV.[3]

II. The HIV Dissenters and Peter Duesberg

[3] A single use dosage ultimately was found to be most effective and safe for both the mother and in utero child.

By far the largest segment of the established medical, scientific and advocacy community has embraced the idea that HIV is an infectious lentivirus which causes AIDS and also accepts that the medications used to treat HIV-positive patients and prevent mother-to-child transmission are, to date, the most effective approaches to managing HIV and AIDS.[4] Among those who hold to this belief are governmental agencies in the United States such as the National Institute of Health ("NIH") and the CDC, Nobel Prize winners in the relevant fields of study, and the overwhelming majority of AIDS-related organizations both here and abroad. However, there have always been HIV dissenters[5] who have questioned the premise that AIDS is caused by a virus. Some of these dissenters contend that individuals afflicted with AIDS have impaired immune systems due to their lifestyle choices – in particular, the promiscuous sexual habits of gay men who visited unsanitary bathhouses; and the use of recreational drugs such as heroin, accounting for the spread of AIDS among intravenous drug users, and poppers, or amyl nitrates, which allegedly enhanced sexual pleasure but had the potential to cause neurological damage or other problems when overused – or to malnutrition or unsanitary living conditions. They claim

[4] In his affidavit, Jefferys criticizes the Court for not acknowledging in its interim order that HIV unarguably is the cause of AIDS. See Jefferys Aff. at ¶ 20. However, in making this comment, he misunderstands the purpose of a motion to dismiss under CPLR § 3211. For the purpose of that earlier motion the Court was bound to accept the allegations in the complaint as true, without regard to medical or scientific findings outside its borders. See CPLR § 3211.

[5] Their detractors call these individuals "AIDS Denialists," a pejorative expression which suggests that this group denies the existence of AIDS. Some, but not all, of the dissenters, are denialists. Some analogous pejoratives are the phrases "AIDS Vigilantes" and "so-called AIDS activists," which Farber and others use to denote Duesberg's detractors. This Court uses the more neutral expressions "the traditional HIV-AIDS community" for those who share Jefferys' point of view, and "HIV dissenters," which was used in a study of Dr. Duesberg's theories not cited by the parties, for those who support Duesberg and Farber's position. Cohen, Jon. "The Duesberg Phenomenon," Science, Vol. 266, 1642-49 (9 Dec 1994).

that, at worst, HIV is a harmless passenger virus. Moreover, they often espouse the belief that the toxic drugs used to treat HIV and AIDs – including AZT and the anti-retroviral "cocktails" which consist of more than one HIV medication – themselves break down the immune system and in some cases actually cause AIDS.

Though the medical establishment dismisses most of these individuals as fanatics or conspiracy theorists, some HIV dissenters have better pedigrees. Among the most prominent is Peter Duesberg, Ph.D., a Professor of Cellular and Molecular Biology at the University of California at Berkeley. Though not a party to this lawsuit, Dr. Duesberg ("Duesberg") is inextricably intertwined with it. Prior to 1987, Duesberg was a rising luminary much admired in his field. In the 1970s, he conducted groundbreaking research on oncogenes and cancer. As a result, he received a prestigious seven-year Outstanding Investigator Grant ("OIG") from NIH in 1985 and in 1986, at the age of 50, became one of the youngest scientists to be inducted into the National Academy of Sciences.

Shortly thereafter, in 1987, Duesberg published a 22-page article in the publication Cancer Research in which he criticized the cancer research community and its ideas on retroviruses, including ideas he had helped introduce into the mainstream years earlier. In the course of that article he stated that HIV was a benign passenger viruses incapable of causing AIDS. Over the years, he has frequently and publicly reiterated this belief, and has applied for numerous research grants to investigate his theory. In large part due to his statements about HIV and AIDS, Duesberg's reputation has ebbed considerably over the years. His OIG grant was not renewed and he has had difficulty obtaining other grants to test his theory. He also has had difficulties getting his writings published in academic journals, which require peer reviews.

In addition, Duesberg has inspired rage among many in the HIV/AIDS community. Among other reasons, in 2000 Duesberg and other scientists and medical researchers visited Thabo Mbecki, then the President of South Africa, in an advisory capacity. At the conference, Duesberg encouraged Mbecki to declare that HIV does not cause AIDS and that AIDS was not a problem in South Africa, and to turn away humanitarian organizations which offered antiretroviral medications to those in his country who lacked access to them. As Jefferys notes, a study conducted by the Harvard School of Public Health estimated that 300,000 or more lives were lost between 2000 and 2005 due to Mbeki's decision, and that approximately 35,000 babies were born with HIV due to the decision to restrict the availability of nevirapine to pregnant HIV positive women between June 2000 and December 2002. Around the time of this controversy, 5,000 scientists, researchers and others drafted and signed the Durban Declaration, which states, among other things, that "evidence that AIDS is caused by [HIV] is clear-cut, exhaustive and unambiguous" and that AIDS patients, "regardless of where they live, are infected with HIV." The Durban Declaration (annexed as Exh. D to Jefferys affidavit).

III. "Out of Control"

One journalist who has covered Duesberg with unabashed admiration is plaintiff Celia Farber. Farber began her career in journalism in the 1980s as a reporter for Spin. From 1986 to 1994, she wrote a column for Spin about the emerging specter of AIDS which she called "Words from the Front." Complt ¶ 10. It was while writing this column that Farber first interviewed Duesberg. According to the complaint, she was the second journalist in the United States to interview him. Compt ¶ 10. Over the years she has continued to cover Duesberg's theories and to write about problems with antriretroviral drug studies. Though Farber has

written about high profile subjects other than HIV and AIDS for national and international journals, see Complt ¶¶ 12-13, she is best known for her sympathetic coverage of Duesberg and the HIV dissenters. In 1994 she participated in a panel discussion on the subject at the American Association for the Advancement of Science, with Dr. Kary Mullis and others.[6] Complt ¶ 13. She has lectured around the world, and her writings are used in college media and science courses. Complt ¶ 13.

Due to her coverage of Duesberg and his positions, Farber has incurred the wrath of many in the traditional AIDS medical, scientific, academic and activist community, who associate her with the dissenters. Farber claims that she is neutral, but that what she calls "the HIV theory" has been accepted without question and the problems with HIV treatment minimized. As a result, she states, other credible theories, such as Duesberg's, have been ignored. She views it as her job as a journalist to report the alternative point of view. However, as Jefferys states, the traditional HIV/AIDS community contends "there is no . . . controversy within the worldwide scientific community. HIV is accepted to be the causative agent of AIDS." Jefferys Aff. at ¶ 20. Because she contends there is a legitimate alternative viewpoint, in the eyes of the traditional HIV/AIDS community Farber also is a dissenter whose ideas are dangerous.

Similarly, Farber shows no love for the traditional HIV/AIDS community. Her writing regularly discusses its members with disparagement even as she writes about Duesberg with enormous respect. For example, at one point in the Harper's article which this Court describes

[6] Mullis won the 1993 Nobel Prize for Chemistry along with Professor Michael Smith for their independent work in developing the polymerase chain reaction.

below, Farber refers to members of Pediatric Aids Foundation and others as "so-called community AIDS activists" who "were sprung like cuckoo birds from grandfather clocks . . . ." Later, she refers to the "embarrassments" of the "HIV *hypothesis*" (emphasis supplied) which she alleges that Duesberg has carefully exposed in his papers and his trade book.

In March 2006, Farber wrote an article for Harper's magazine entitled "Out of Control: AIDS and the Corruption of Medical Science" ("Out of Control"). According to Farber, the article was meticulously fact-checked by Harper's staff prior to its publication. She states that she originally proposed an article about Duesberg's cancer research "and the abuses he has suffered as a scientist." Complt. ¶ 15. However, the published article includes two other sections which precede the third section, which is a significantly condensed version of her original story.[7] At the core of this lawsuit are the reactions to an award Farber and Duesberg received as a result of the article, and comments that defendants made about Farber in response to the decision to give her the award. Therefore a discussion of the article is appropriate.

[7]http://deanesmay.com/wp-content/uploads/2010/07/The_Passion_of_Peter_Duesbergoriginal1.pdf.

"Out of Control" starts with the tragic story of Joyce Ann Hafford, a HIV-positive pregnant woman who was prescribed nevirapine to reduce the risk of transmission of HIV to her child. The clear suggestion is that, in their eagerness to recruit her for a nevirapine trial at the University of Tennessee Medical Group Ms. Hafford's doctors may not have investigated her medical condition, including her HIV status, fully. Ms. Hafford's health deteriorated precipitously under the nevirapine treatment regimen, yet she was not taken off the drug until four days before she gave birth. Ms. Hafford gave birth to an HIV-negative son, Sterling, on July 29, 2003. However, she died a few days later. Farber alleges that the study in which Ms. Hafford participated ultimately was suspended because of its multiple instances of gross toxicity – one of Farber's many statements deemed erroneous by the article's detractors.[8] Farber also questions Ms. Hafford's HIV diagnosis, stating that a positive test result is often wrong. This, too, is deemed erroneous by the article's detractors.

In the next section of the article, Farber compares the study which included Ms. Hafford – a United States-based study of long term treatment with nevirapine – to the Ugandan drug trials of single dose nevirapine as a means of preventing mother-to-child transmission. In Uganda, Farber claims, there were numerous record keeping errors. Among other things, the records did not always note who took nevirapine and who took AZT, the baseline drug. Farber further criticizes the use of AZT as a baseline drug, arguing that a placebo would have given the researchers a more objective measurement.[9] She states that in their rush to find new HIV

[8]These detractors claim the incident was a demonstration of gross medical negligence in the treatment of Ms. Hafford, and is not dispositive of the effectiveness of nevirapine, the connection between HIV and AIDS, or the success of drug trials on a general level

[9] The article's detractors note that because the use of medication is crucial to the well

treatments, pharmaceutical companies cut corners and commit record keeping errors which the government overlooks due to the strength of the pharmaceutical lobby. She suggests that Pediatric AIDS Foundation, which has supported the distribution of single dose nevirapine in Africa, overlooks these problems because of its relationship with pharmaceutical companies.

In this section "Out of Control" recounts the story of a NIAIDS (National Institute of Health's Division of Allergy and Infectious Diseases) employee, Jonathan Fishbein, who refused to reprimand an NIH Division of AIDS (DAIDS) branch chief who attempted to revise a safety report on Ugandan nevirapine trial to reflect alleged deficiencies in and problems with the trial. Ultimately, Fishbein feared his job was in jeopardy and sought whistleblower protection. The article suggests that DAID's efforts to push through approval of nevirapine despite any problems with the drug trial is typical of the government's approach to HIV and AIDS related treatments.

Then, Farber's article shifts to the final and most criticized portion of her article. This section, in expanded form, was the subject of the original piece; she states that Harper's included the abridged and edited version "[t]o illustrate the punitive culture of NIH. . . ." Complt ¶15. Here, she writes admiringly of Duesberg and discusses his belief that HIV does not cause AIDS. Duesberg, she avers, has pointed out legitimate problems with the HIV "theory." However, she states, his work has been ignored and he himself marginalized almost to obscurity in his field because to consider his theories would threaten the profitability of pharmaceutical companies, to which AIDS groups and the government are beholden. She suggests that HIV is a fabricated illness, too profitable to the pharmaceutical companies to be discarded.

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being of HIV positive patients, it would be unethical to prescribe a placebo and thus deprive the patients of necessary treatment. Accordingly, AZT rather than a placebo was used.

IV. The Response to "Out of Control"

Not surprisingly, Farber's article generated a storm of outrage among the traditional HIV/AIDS community. The fact that "Out of Control" was published in Harper's, a well respected magazine, was especially upsetting to the media. Columbia Journalism Review criticized Harper's decision to give "so much legitimacy . . . to such an illegitimate and discredited idea." (Beckerman, Gail. "Harper's Races Right Over the Edge of a Cliff." Columbia Journalism Review March 8, 2006.) Richard Kim of The Nation stated, "It's a shame that a magazine as well respected as Harper's has shirked its duty to report on [important issues relating to AIDS] and instead published Farber's article." (Kim, Richard. "Harper's Publishes AIDS Denialist." The Nation, blogsite, posted 03/02/06). Kim also quoted Healthgap, an AIDS and human rights organization based in the United States, which called the article inaccurate and decried Harper's for stooping to a new low by publishing it. As a New York Times' article annexed to Jefferys' original motion papers noted, some readers on Poz magazine's website contained rebuttals to the article (Miller, Lia. "An Article in Harper's Ignites a Controversy Over H.I.V." New York Times March 13, 2006); the rebuttals, among other things, accused Farber of (1) lying, quite possibly for racist reasons (2) stealing the name ACT UP, participating in offensive demonstrations against people with AIDS and having anti-gay motives for her writings and (3) using the wrenching story of medical negligence against Ms. Hafford as a launching pad for her "crackpot" theories. The Times article also noted that many scientists found that the article was poorly fact-checked and that, as a result, included glaring errors. (Id.) Gregg Gonsalves, who was then director of the Gay Men's Health Crisis, compared the decision to publish Farber's article to "giving the folks at the

Discovery Institute a place to expound upon the 'science' of intelligent design, Charles Davenport a venue to educate us about the racial inferiority of the Negro or Lyndon LaRouche a platform to warn us about aliens, bio-duplication, and nudity." (Quoted in Beckerman, Gail. "Harper's Races Right Over the Edge of a Cliff." Columbia Journalism Review March 8, 2006).

Not long after Farber's article appeared, "56 Errors," or "Errors in Celia Farber's March 2006 article in Harper's Magazine" ("56 Errors") was made available on the internet and was disseminated in other ways as well. See Complt ¶ 16. The authors included Dr. Robert Gallo, see supra p.2 n1; Nathan Geffen of the South Africa-based Treatment Action Campaign; Gregg Gonsalves; Dr. Daniel R. Kuritzkes, Director of AIDS Research at Brigham and Women's Hospital and at the time an associate professor at Harvard Medical School[10]; Bruce Mirken of the Marijuana Policy Project; John P. Moore, Ph.D., a microbiology and immunology professor at the Weill Medical College of Cornell University; Jeffrey T. Safrit, Ph.D., of Pediatric AIDS Foundation; and defendant Jefferys. The document explained and provided support for the contention that the article contained false, misleading, unfair and biased statements.

According to Farber, not simply "56 Errors" but the attacks on her article in general were

> made "by a group of AIDS activists and researchers who were associated with . . . [Jefferys' organization] TAG . . . ." Complt ¶ 16. TAG, she states, "has engaged in vicious and relentless attack on anyone who highlights the toxicities of the . . . drugs that are the basis of its business operations in the United States and around the world, particularly the

[10] Today, Dr. Kuritzkes is listed on Harvard's website as a full professor.

developing world." Id. She also states that TAG holds itself out as an independent research and policy group but actually is "funded by pharmaceutical companies profiting from the sale of drugs for HIV." Id. According to Farber, nine scientists and doctors "not working in the AIDS industry" determined that "56 Errors" was "absurdly biased" and full of "character assassination" and in other respects without merit. Complt ¶ 17. Her current papers include a document by the group Rethinking AIDS which responds to "56 Errors" and other criticisms of the Harper's article. The complaint also attacks Dr. Gallo although he is not a party to this action. See Complt ¶ 18.

V. The Semmelweiss Society International and the Clean Hands Award, and Jefferys Allegedly Libelous Statements.

The Semmelwiess Society International (www.semmelweiss.org)("SSI") is an organization formed to support physicans, academicians, and health care providers who are falsely accused of misconduct based on their status as whistleblowers. In 2008, SSI announced that during "Whistleblower Week in Washington" the week of May 11-14, 2008, it was going to bestow Clean Hands awards to Farber and Duesberg for their stance as HIV dissenters, which put them at odds with the medical establishment. The complaint states that the basis of the award was the Harper's article. Complt ¶ 19.[11]

According to the complaint, at this point, the three defendants all engaged in defamatory

[11] Farber's current affidavit indicates that initially she and Dr. Fishbein were to receive the award but that, when Fishbein declined, SSI decided to give the second award to Duesberg instead.

conduct in an effort to prevent Farber from getting the award. In particular, as is relevant to this motion, around May 12, 2008, Jefferys sent an email to Walter Fauntroy, a coordinator of testimony for Whistleblower Week. The complaint identifies Jefferys as a "TAG operative." Complt ¶ 21. The email stated:

> It is my understanding that you have accepted Celia Farber and Peter Duesberg to give testimony at your tribunal. These individuals are not whistleblowers, they are simply liars who for many years have used fraud to argue for Duesberg's long-discredited theory that drug use and malnutrition – not HIV – cause AIDS. I can provide many, many examples, including their altering of quotes from the scientific literature, false representations of published papers, etc. They use instances of genuine medical malpractice simply as ammunition to support their erroneous ideas about HIV and AIDS (which Duesberg has said is "caused by a lifestyle that was criminal twenty years ago"). The inclusion of these individuals will, regrettably, discredit and demean your efforts to support the very real issues of recrimination against legitimate whistleblowers.
>
> Sincerely,
>
> Richard Jefferys

(quoted in complaint at ¶ 21)(emphasis removed). According to the complaint, the letter was circulated to members of Congress and to the media, among others.

These statements by Jefferys, according to Farber, are libelous because they falsely accuse her of being a liar and of fraud, of altering quotes from scientific literature, and of falsely representing published works on the topic. The complaint asserts that the statements are false and are defamatory per se as injurious to her reputation as a journalist. She states that because a member of Congress circulated the email to the organizations coordinating Whistleblowers Week, she was dropped from the list of those scheduled to testify at Whistleblowers Week. Also, SSI gave her the Clean Hands Award in a private setting instead of at a public ceremony.

Analysis

I. Defamation

"Defamation is defined as the making of a false statement of fact which tends to expose the plaintiff to public contempt, ridicule, aversion or disgrace." Sandals Resorts Int'l, Ltd. v. Google, Inc., 86 A.D.3d 32, 38, 925 N.Y.S.2d 407, 412 (1st Dept. 2011). Though a cause of action for defamation exists whenever this allegedly occurs, constitutional restrictions apply if the plaintiff is a public official or a public figure, if the defendant is a member of the media, or if the statement relates to a matter of public concern. See Huggins v. Moore, 94 N.Y.2d 296, 301, 704 N.Y.S.2d 904, 907 (1999). Though the defamation cases which raise these constitutional issues and trigger a heightened level of scrutiny usually involve media defendants, the First Department also has applied the higher standard where private defendants are involved, reasoning that "[t]here is no reason . . . why the Constitution should . . . provide greater protection to the media in defamation suits than to others exercising their freedom of speech . . . ." McGill v. Parker, 179 A.D.2d 98, 109, 582 N.Y.S.2d 91, 97 (1st Dept. 1992); see, e.g., Gross v. New York Times, 281 A.D.2d 299, 300, 724 N.Y.S.2d 16, 17 (1st Dept.)(applying malice standard to both media and nonmedia defendants), lv denied, 96 N.Y.2d 716, N.Y.S.2d (2001). To prevail in a defamation action a public figure must establish, under a clear and convincing evidence standard, that the defendant made the defamatory publication with knowledge of the falsity of the claims or reckless disregard for the truth. Suson v. NYP Holdings, Inc., Index No. 300605TSN2006 (Civ. Ct. N.Y. March 31, 2008) (avail at 2008 WL 927985, at *8)(citing New York Times v. Sullivan, 376 U.S.254, 280 (1964)). If the statement relates to an issue of public concern, the plaintiff must show "gross irresponsibility" under this standard. See Cottrell v.

Berkshire-Hathaway, Inc., 26 A.D.3d 786, 786, 809 N.Y.S.2d 714, 715 (4th Dept. 2006).

Moreover, although perhaps Jefferys overstates the impulse of the courts to summarily dispose of defamation claims at the summary judgment phase – as Farber points out, parties with meritorious claims should have their day in court – he is correct that, in many instances, the matter is appropriate for early resolution. Courts deny summary judgment when there are triable issues of fact, as Farber notes, but the general principles governing summary judgment are viewed through the lens of the heightened standard, and heavy burden, a plaintiff bears in a defamation action in which a public figure or a matter of public concern is involved. In addition, in libel cases summary judgment is especially useful because "the threat of being put ot the defense of [such] a lawsuit . . . may be chilling to the exercise of First Amendment freedoms as fear of the outcome of the lawsuit itself." McGill, 179 A.D.2d at 106, 582 N.Y.S.2d at 96.

II. Limited Purpose Public Figure and Matter of Public Concern

Jefferys argues that a higher level of scrutiny applies here for two primary reasons. He first argues that Farber is either a public figure or a limited purpose public figure and, as such, she must show that he acted with actual malice. See Huggins, 94 N.Y.2d at 301, 704 N.Y.S.2d at 907. Her failure to do so, he states, mandates dismissal of the claims against him. Farber counters that she is not a limited purpose public figure – or that, at best, Jefferys has not established her status as a public figure of any sort in his motion papers.

Two classes of individuals are considered "public figures" in defamation law. Individuals with sufficient power and influence are public figures for all purposes. These individuals are generally quite renowned. See Farrakhan v. N.Y.P. Holdings, Inc., 168 Misc. 2d 536, 539, 638 N.Y.S.2d 1002, 1006 (Sup. Ct. N.Y. County 1995). A limited purpose public

figure, on the other hand, "has thrust [herself] to the forefront of particular public controversies in order to influence the issues involved." Huggins, 94 N.Y.2d at 301-02, 704 N.Y.S.2d at 907. A person also can be deemed a limited purpose public figure with respect to a particular controversy, if she has become an influential voice on this single issue. Horowitz v. Mannoia, 10 Misc. 3d 467, 470, 802 N.Y.S.2d 917, 921 (Sup. Ct. Nassau County 2005). Moreover, "where the facts are not in dispute, the issue of whether a plaintiff, in a defamation action, is a public figure is one for the court to determine." O'Neil v. Peekskill Faculty Ass'n, 120 A.D.2d 36, 43, 507 N.Y.S.2d 173, 179 (2nd Dept. 1986), lv dismissed, 69 N.Y.2d 984, 516 N.Y.S.2d 1027 (1987); see Krauss v. Globe Intern Inc., 251 A.D.2d 191, 674 N.Y.S.2d 662 (1st Dept. 1998).

Despite Farber's widespread reputation, the Court does not find that she is a public figure for all purposes. However, the Court does find that she is a limited purpose public figure. To reach this conclusion, the Court evaluates "whether there was a particular public controversy that gave rise to the alleged defamation, the nature and extent of the plaintiff's participation in that controversy, and the relation of the alleged defamation to the controversy." Horowitz, 10 Misc. 3d at 470, 802 N.Y.S.2d at 921. Thus, real estate sponsors and developers involved in a controversial local decision to construct clubhouses in a residential community were deemed limited purpose public figures because, among other things, they appeared at a meeting of the residents to answer questions about the issue and the alleged defamation related to their handling of the controversy. Id. at 470-71; 802 N.Y.S.2d at 921. A plaintiff who failed to report a past conviction on an application to operate a solid waste facility also was considered a limited purpose public figure because he engaged in business activities of public concern and therefore

"thrust himself into the forefront of a public controversy." Cholowsky v. Civiletti, 69 A.D.3d 110, 115-16, 887 N.Y.S.2d 592, 597 (2nd Dept. 2009).

As described in greater detail above, the complaint in this action states that Farber is a journalist who has covered AIDS for various publications since the 1980s – most notably for Spin, in her column "Words from the Front" between 1986 and 1994. Complt ¶¶ 10. She further indicates that her reputation is widespread enough that she speaks at schools and conferences, that her work is used in courses, and that she has participated in panels with prize winning scientists on this very subject. Complt ¶ 13. Also, as her brief in opposition to the converted motion notes, a former website which attacked the HIV dissenters prominently featured a photograph of Farber which had been splattered in blood; she annexes a copy of the photograph to her opposition papers. Although her purpose is to show the animus of the traditional HIV/AIDS community and impugn defendants' motives in making their statements against her, it also illustrates dramatically that, to AIDS activists angry at the dissenters, Farber has a celebrity status and notoriety.

Finally, Farber acknowledges that the article "Out of Control" appeared in Harper's magazine, which has a widespread reputation; that the publication of "Out of Control" generated enormous attention and publicity not only for the article but for her as its author, resulting in a series of articles about both; that internationally known members of the traditional HIV/AIDS community felt compelled to publish a lengthy document refuting the contentions in "Out of Control." Complt ¶¶ 16-17. Moreover, and very significantly, Farber was at the center of the particular public controversy which gave rise to the alleged defamation – the issuance by an international organization of its Clean Hands Award to her and Duesberg during National

Whistleblowers' Week in Washington, D.C.. Complt ¶¶ 19-20. The complaint acknowledges that the Week itself involved current and former members of Congress and members of several coordinating organizations. Complt ¶ 20. Furthermore, the complaint acknowledges that the decision to issue the award to her was significant enough that Jefferys' email made its way to, among others, a member of Congress, major newspapers including the Washington Post, and the organizers of Whistleblowers' Week. Complt ¶ 22. Thus, Farber's own complaint and the papers she submits in opposition to this motion establish that, in the limited context of issues surrounding AIDS and HIV dissenters and the question of whether HIV causes AIDS, she is a public figure.

Jefferys' second argument for applying a heightened level of scrutiny is that the alleged defamation involves a matter of public concern. Where a matter of public concern is involved, courts have the central goal of "assuring full and vigorous exposition and expression of opinion." Immuno AG. v. Moor-Jankowski, 77 N.Y.2d 235, 255, 566 N.Y.S.2d 906, 917 (1991). To determine whether the content is "within the sphere of legitimate public concern" a court must consider "the context of the writing as a whole" and examine its "content, form and context." Huggins, 94 N.Y.2d at 302, 704 N.Y.S.2d at 908. As indicated earlier, if a matter is one of public concern even a private figure must show "that the publisher of the allegedly defamatory statement 'acted in a grossly irresponsible manner without due consideration for the standards of information gathering and dissemination gather ordinarily followed by responsible parties.'" Cottrell, 26 A.D.3d at 786, 809 N.Y.S.2d at 715 (quoting Chapadeau v. Utica Observer-Dispatch, 38 N.Y.2d 196, 199, 379 N.Y.S.2d 61, 64 (1975)); see Porcari v. Gannett Satellite Information Network, Inc., 50 A.D.3d 993, 856 N.Y.S.2d 217 (2nd Dept. 2008). A

higher level of scrutiny applies because, though it is important to protect to a party's reputation from defamatory statements, Courts must be "vigilant about the potential 'chilling effect' the threat of defamation actions can have on public debate." 600 West 115th Str. Corp. v. Von Gutfeld, 80 N.Y.2d 130, 137, 589 N.Y.S.2d 825, 828 (1992).

Finally on this point, the Court notes that letters to the editor have a "public forum function . . . closely related in spirit to the marketplace of ideas. . . ." Immuno AG. v. Moor-Jankowski, 77 N.Y.2d at 255, 566 N.Y.S.2d at 917. The values of this system "are best effectuated by according defendant some latitude to publish a letter . . . on a matter of legitimate public concern-the letter's author, affiliation, bias and premises fully disclosed, rebuttal openly invited-free of defamation litigation." Id. Here, where public discourse about the Clean Hands Award was invited, where the Award itself and the issues discussed in the article are of public concern, and where Jefferys simply participated in this discourse, the Court concludes that similar values are at stake.

It does not appear that Farber challenges the contention that the matters at hand are of public concern. Moreover, it does not appear that she can in good faith assert that the issues to which she has devoted the majority of her career as a journalist are not issues of public concern and/ importance. Questions concerning the cause of and treatment for AIDS, which has caused an international health crisis for the past few decades, are clearly of public concern. The huge fallout from Farber's article shows the public nature of the controversy, as it generated articles in several well known magazines and newspapers and resulted in the highly publicized "56 Errors" document. The Semmelweiss Society's Award, the national attention afforded to Whistleblower's Week, and the fact that members of Congress were involved and had input

regarding the event – all of this show that the award, too, was a matter of public concern. Given this, even if Farber were deemed a private rather than a public figure, at the very least she must show that Jefferys acted in a grossly negligent manner.

B. Malice or Gross Negligence

Because the Court concludes she is a public figure in the context of this issue, Farber bears the burden upon Jeffery's converted summary judgment motion to produce evidence not only showing the purported falsity of the statement but showing that Jefferys made those false statements with actual malice. See Roche v. Hearst Corp., 53 N.Y.2d 767, 769, 439 N.Y.S.2d 352, 353 (1981). In this converted summary judgment motion, Jefferys persuasively claims that plaintiff cannot raise an issue of fact as to malice. For the purpose of a defamation claim, it is insufficient to show that a defendant disliked the plaintiff and harbored ill will against her. Farrakhan v. N.Y.P. Holdings, Inc., 168 Misc. 2d 536, 543-4, 638 N.Y.S.2d 1002, 1009 (Sup. Ct. N.Y. County 1995). Indeed, even "spite, hostility or deliberate intention to harm" is insufficient to show malice. Greenbelt Cooperative Pub. Ass'n v. Bresler, 398 U.S. 6, 10-11 (1970) (concluding that jury charge to the contrary was error of constitutional magnitude); see Kipper v. NYP Holdings Co., Inc., 12 N.Y.3d 348, 355 n4, 884 N.Y.S.2d 194, 198 n4 (2009). For actual malice to exist a defendant must have "published the false information about plaintiff with knowledge that it was false or with reckless disregard of whether it was false or not." Sweeney v. Prisoners' Legal Serv. of New York, Inc., 84 N.Y.2d 786, 792-93, 622 N.Y.S.2d 896, 899 (1995).

Moreover, this Court has "a constitutional duty to exercise independent judgment and determine whether the record establishes actual malice with convincing clarity." Freeman v.

Johnston, 84 N.Y.2d 52, 56, 614 N.Y.S.2d 377, 379 (1994)(citations and internal quotation marks omitted). This standard applies even in the context of a motion for summary judgment. Id. at 57, 614 N.Y.S.2d at 379. Indeed, before a court allows a case to proceed to trial, it must find "sufficient evidence favoring the moving party for a jury to return a verdict for that party. . . . If the evidence is merely colorable . . . or is not significantly probative . . . , summary judgment may be granted." Id. (citations and internal quotation marks omitted). The fact that this burden is considered daunting does not lessen it. See Gross v. New York Times Co., 281 A.D.2d 299, 299, 724 N.Y.S.2d 16, 17 (1st Dept.), lv denied, 96 N.Y.2d 716, 730 N.Y.S.2d 790 (2001).

Here, Jefferys argues that (1) his statements about Farber's inaccuracies as a reporter are true, (2) he did not act with reckless disregard of the truth, and (3) he was not grossly negligent in sending the email at issue. In support, Jefferys relies on his extensive background researching HIV and AIDS related issues, which this Court sets forth in the background section of this decision. See supra at pp. 3-4. In addition, he submits a plethora of materials to support his claims. Among other things, he annexes "56 Errors," to which he was a signatory along with several eminent researchers in the field. See supra at p. 13. Not only does "56 Errors" state that many of the statements in the Harper's article are misleading, false, unfair or biased, but it is heavily annotated with sources for these numerous refutations. In addition, Jefferys annexes The Durban Declaration, which states that HIV indisputably causes AIDS; the declaration was signed by over 5000 respected members of the traditional HIV/AIDS community when it first was generated in 2000. There are articles from publications as prestigious in the field as The New England Journal of Medicine, the Morbidity and Mortality Weekly Report, and the Journal

of the American Medical Association, among others. In particular he submits articles which support the conclusion that nevirapine and other medications reduce the risk of transmission of HIV from pregnant women to their children in utero. In his current affidavit, Jefferys uses these documents to refute statements contained in "Out of Control" and other of Farber's writings. In particular, he quotes articles of Farber's which purportedly report the results of various studies, and then quotes the medical journals and studies themselves in an effort to show eight inaccuracies and/or misleading statements in Farber's articles ("the eight inaccuracies").

Farber clearly disputes the definitiveness of these studies; as stated, one of her goals as a journalist is to show these studies are not definitive and to raise questions which hopefully lead to further exploration. However, "so long as the [defendant] relied on at least one authoritative source and had no good reason to doubt the veracity of that source or the accuracy of the information he or she provided, even if that information ultimately proved to be incorrect or false, the publisher has appropriately discharged its duty." Visentin v. Haldane Cent. School Dist., 4 Misc.3d 918, 922, 782 N.Y.S.2d 517, 520 (Sup. Ct. Putnam County 2004). Here, Jefferys relied on numerous reliable sources. Thus, Jefferys did not exhibit constitutional malice or gross irresponsibility when he relied on them and on his own prior professional research to reach his conclusions about Farber's work as a journalist in "Out of Control" and her other writings. See also Cottrell, 26 A.D.3d at 786-87, 809 N.Y.S.2d at 715 (reliance on court pleadings was not grossly irresponsible). For similar reasons, Farber's attempts to show that Jefferys is guilty of committing these inaccuracies – that he "spun" or misunderstood the documents he accuses her of "spinning" or misunderstanding – are inadequate to show that his reliance on these authorities constitutes constitutional malice or manifests gross irresponsibility.

Also for similar reasons, Farber cannot show that Jefferys exhibited gross negligence or malice when he relied on his research and experience. See Crucey v. Jackall, 275 A.D.2d 258, 258-59, 713 N.Y.S.2d 20, 20 (1st Dept. 2000).

Moreover, the parts of Farber's affidavit which criticize Jefferys' critique of her research contain comments which actually militate in favor of dismissal of the claims against Jefferys. She states that he "makes very tall mountains out of nothing or tiny anthills," Farber Aff. at ¶ 20; that he "takes issue" with statements in her articles, id. at ¶ 26; that he "gives his own opinion" about efficacy of AZT, id. at ¶ 29; that he counters her accurate assessment of the results of a long term study with the results of a short term study – an implicit contention that he misunderstood or conflated the data, see id. at ¶¶ 37-39; and that he quibbles and misses the larger point of one of her statements, id. at ¶ 40. Together, this suggests that, if Farber were correct, Jefferys is wrong or confused about her writings or else expressing his opinion about them. This is not sufficient to show malice or gross negligence.

C. Rhetoric

Farber objects particularly to Jefferys' use of the term "liar" and his claim that she has twisted facts and distorted the truth. She states that, as she is a journalist, these contentions are especially damaging to her. For all the reasons stated above, the Court finds that Jefferys was not grossly negligent or malicious in the context of defamation law when he asserted that Farber twisted the facts and data and presented a version of the facts that lacked credibility. As for the word "liar," it is a much closer call; it is one thing for Jefferys to legitimately believe, and publicly state in impassioned terms that Farber spreads inaccurate information about AIDS recklessly, often misunderstanding or distorting the medical and scientific evidence. To call her

a liar, however, is different; as she states, her reputation as a journalist can be damaged by this contention. See, e.g., Brach v. Congregation Yetev Lev D'Satmar, Inc., 265 A.D.2d 360, 696 N.Y.S.2d 496 (2nd Dept. 1999). However, while Jefferys does not argue that his email consists of unprovable statements of opinion – in fact, he declares the opposite – in the brief on his pre-converted motion he notes the greater leeway his speech has where, as here, a matter of public concern. Furthermore, he states that in the context of the heated public debate on this issue, his use of the words "liars" and "frauds" are nonactionable opinion.

After careful consideration, the Court agrees with defendant Jefferys. The First Department recently noted that "[e]ven apparent statements of fact may assume the character of statements of opinion, and thus be privileged, when made in public debate, heated labor dispute, or other circumstances in which an audience may anticipate [the use] of epithets, fiery rhetoric or hyperbole." Sandals, 86 A.D.3d at 41-42, 925 N.Y.S.2d 407, 414 (quoting Steinhilber v. Alphonse, 68 N.Y.2d 283, 294, 508 N.Y.S.2d 901 [1986]). Hyperbolic rhetoric which intends to discredit a rival also is not actionable. Joyce v. Thompson, Wigdor and Gilly LLP, No. 06 Civ. 15315(RLC)(GWG)(S.D.N.Y. June 3, 2008)(avail at 2329227, at *10). Thus, in the aftermath of a bitter labor dispute the use of the word "scab" was deemed rhetoric and not actionable. Steinhilber, 68 N.Y.2d 283, 508 N.Y.S.2d 901. In another action involving a public and heated fight between various parties, the First Department found that both the use of the word "criminal" and the accusation that the plaintiff intended to destroy the beaches in the community were nonactionable rhetoric. Galasso v. Saltzman, 42 A.D.3d 310, 839 N.Y.S.2d 731 (1st Dept. 2007).

"The infinite variety of meanings conveyed by words – depending on the words

themselves and their purpose, the circumstances surrounding their use, and the manner, tone and style with which they are used – rules out . . . a formulistic approach." Steinhilber, 68 N.Y.2d at 291, 508 N.Y.S.2d at 905. Courts therefore are accorded the discretion and flexibility to consider all relevant factors in reaching a conclusion on the issue of whether a particular word is defamatory in a given instance. See id. at 291-92, 508 N.Y.S.2d at 905. Thus, although at times it has been deemed actionable under the defamation laws, the use of the word "liar" also has been considered rhetoric when uttered in the context of some heated public debates. See e.g., Present v. Avon Products, Inc., 253 A.D.2d 183, 687 N.Y.S.2d 330 (1st Dept. 1999); Ram v. Moritt, 205 A.D.2d 516, 517, 612 N.Y.S.2d 671, 672 (2nd Dept. 1994).

In the case at hand, all the documents, including Farber's complaint, contains dramatic, heated and frequently pejorative language. Farber herself describes Jefferys as an "operative" in her complaint and in her affidavit. See Complt at ¶; Farber Aff. at ¶ 17. Through the various references to him and other "so-called activists" in the Harper's piece, she strongly suggests that Jefferys and others lie, twist facts or hide data in order to remain in the good graces of the pharmaceutical companies which support them financially. She also accuses him of lying about whether there is a debate as to the cause of AIDS. See Farber Aff. at ¶ 43. Indeed, in her affidavit in support of her opposition, Farber hurls accusations at Jefferys which are strikingly similar to those he has hurled at her. Moreover, as described already in detail, the language in the complaint, in the Farber and Jefferys affidavits, and in the email which forms the basis of Farber's complaint are typical examples of the accusations which some of the dissenters and some members of the traditional HIV/AIDS community trade back and forth. Therefore, the Court finds the language at issue nonactionable, and it does not find Farber's well-crafted

arguments to the contrary persuasive.

D. The Peters Affidavit

As part of her opposition to the converted motion, Farber submits the affidavit of Clark Peters, founder and principal investigator of The Office of Medical & Scientific Justice (OMSJ)(http://www.omsj.org/). Peters has an honorable background in the Marine Corps and the Los Angeles Police Department. However, his affidavit does not further Farber's arguments. Peters holds himself out as an expert in evaluating Farber's integrity based on his "more than 2500 interviews and physical examinations of heroin, cocaine and methamphetamine addicts," adding – incorrectly and in a conclusory fashion – that courts generally "take judicial notice that drug addicts are pathological liars." Peters Aff. at ¶ 5. He also points to the fact that he is a licensed commercial pilot and scuba diver as evidence of his general acumen. Id. at ¶ 6. None of these qualifications makes him particularly suited to evaluate the issues at hand.

Peters' comments about medical and scientific corruption are not directly pertinent to the issue of whether Jefferys acted with constitutional malice or gross irresponsibility when he sent the email in question. That is, Peters presents no evidence which connects the alleged medical or scientific corruption to Jefferys. His observation of Farber, which led him to conclude that she has not manipulated evidence, has no bearing on whether Jefferys defamed her. His comments about the allegedly defamatory claims and nefarious conduct of the non-moving defendants are not pertinent to Jefferys.

Apparently in an attempt to show Jefferys' malice against Farber, Peters sets forth comments Jefferys allegedly posted about Farber's award on various websites – which, for the sake of argument, the Court accepts as accurate depictions of Jefferys' postings and emails. For

example, in encouraging people to protest the decision to bestow the Clean Hands Award upon Farber, Jefferys allegedly stated that "the simplest talking points are that Farber and Duesberg aren't whistleblowers, they're liars. The examples are many, the quote about stopping ART saving lives is probably the most egregious." Though this and the other quoted comments demonstrate a genuine desire to keep Farber from getting the Clean Hands Award, Jefferys acknowledges that he did not want Farber to receive the award. This goal does not show malice in a constitutional sense unless Jefferys also demonstrated reckless disregard for or gross indifference to the truth. The quotes Peters ascribes to Jefferys in his affidavit, if accurate, suggest that Jefferys sincerely believed in the truth of what he was saying. Peters has not presented any data which supports his claim that "Jefferys' intent was . . . part of a sustained and coordinated effort among the pharmaceutically-funded activists . . ." to silence Farber and Duesberg although he knew he was uttering lies about them. Id. at ¶ 75. Other comments by Peters also do nothing to enhance Farber's argument.

Conclusion

Finally, Farber points out that often there has been discovery at the time that a court determines a summary judgment motion even in the context of a defamation case. On this basis, she contends summary judgment is premature. However, it is permissible for a court to convert a preanswer motion to dismiss to one for summary judgment on notice to the parties where the parties have ample evidentiary support in support of their contentions. See Four Seasons Hotels Ltd. v. Vinnik, 127 A.D.2d 310, 318, 515 N.Y.S.2d 1, 6-7 (1st Dept. 1987). In this instance the parties have assembled volumes of data relating to the issues at hand – both in preparation for this motion and during the course of their careers studying HIV and AIDS and the medications

used to treat them. The materials they have submitted to the Court, along with Jefferys' longstanding and public positions on the relevant issues – which, moreover, he has established through the annexed documents and references to various websites – are sufficient to enable the Court to determine as a matter of law that Jefferys has not been grossly negligent and has not acted with constitutional malice.

For the reasons above, the Court concludes that Farber is a limited purpose public figure, and thus she must raise a triable issue as to Jefferys actual malice. As she cannot do so, the Court dismisses all claims asserted against him. Alternatively, the Court notes that the questions at issue are of great public concern and, in light of the overwhelming amount of academic, scientific and medical evidence on which Jefferys relies, Farber cannot show he made his statements with gross irresponsibility even though she vigorously disagrees with him. As the Court resolves the motion on these bases, it does not reach Jefferys' argument that his statements were not defamatory because they are true; at any rate, this issue is best addressed by experts in the medical and scientific community. The Court notes that it has considered all the other parties' contentions although it does not include every single point in this discussion.

Accordingly, for the reasons above, it is

ORDERED that the motion for summary judgment is granted and the claims as asserted against defendant Jefferys are severed and dismissed.

ORDERED:

DATED: November 2, 2011 Louis B. York, J.S.C.