APPENDIX

APPENDIX

TABLE OF CONTENTS

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 18-12999

D.C. Docket No. 5:14-cv-00684-MHH

[Filed February 7, 2020]

JUDSON A. LOVINGOOD,	)
	)
Plaintiff-Appellant,	)
	)
versus	)
	)
DISCOVERY COMMUNICATIONS, INC., SCIENCE CHANNEL, THE, DISCOVERY CHANNEL, THE, BBC FILMS, KATE GARTSIDE,	)
	)
Defendants-Appellees,	)
	)
OPEN UNIVERSITY, THE,	)
	)
Defendant,	)
	)
DISCOVERY COMMUNICATIONS, LLC,	)
	)
Interested Party-Appellee.	)

App. 2

[DO NOT PUBLISH]
Non-Argument Calendar

Appeal from the United States District Court for the Northern District of Alabama

(February 7, 2020)

Before WILSON, BRANCH, and JULIE CARNES, Circuit Judges.

PER CURIAM:

More than thirty years after the seven *Challenger* astronauts "'slipped the surly bonds of Earth' to 'touch the face of God,'"[1] a former NASA manager seeks $14 million in damages after he was depicted in a made-for-TV movie about the *Challenger* investigation. Because we decline to carve out an exception to well-established defamation law for this claim, and because the plaintiff has failed to overcome the broadcaster's First Amendment rights in the film, we affirm the district court's grant of summary judgment against him.

I

The space shuttle *Challenger* broke apart 73 seconds after it launched on January 28, 1986, killing all seven astronauts on board. A presidential commission was convened to investigate the cause of the disaster and recommend corrective action. The

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[1] President Ronald W. Reagan, Address to the Nation (Jan. 28, 1986) (quoting John Gillespie Magee, Jr., "High Flight," *in Respectfully Quoted: A Dictionary of Quotations Requested from the Congressional Research Service* 117 (1989)).

commission's investigation, which included televised public hearings, would reveal that the disaster was caused by a rubber O-ring that, because of low ambient air temperatures at the time of launch, failed to seal a joint in the shuttle's solid-fuel rocket booster. More fundamentally, the investigation highlighted problems with risk assessment and decision-making at NASA, particularly after it emerged that outside contractors had recommended delaying the shuttle launch due to concerns about the effect of the cold weather on the rocket booster seals.

In 2012, the British Broadcasting Corporation ("BBC"), Discovery Communications, Inc. ("Discovery"), and The Open University co-produced a made-for-TV film about the *Challenger* investigation titled *The Challenger Disaster*. The film centers on Richard Feynman, Ph.D., the well-known Nobel laureate physicist who served on the presidential commission. Although the film uses some historical video footage, most of the film involves actors portraying the people and events of the *Challenger* investigation, and the film is shot in a dramatic, rather than documentary, style.

The film was based in part on Feynman's posthumously published memoir, *"What Do* You *Care What Other People Think?": Further Adventures of a Curious Character*, and in part on the book *Truth, Lies, and O-Rings* by space shuttle engineer Allan McDonald. The film was executive produced, researched, and written in the United Kingdom by the BBC, and it was filmed in South Africa in late 2012. The BBC broadcast the film in the United Kingdom in March 2013. Discovery had a master agreement with

the BBC that granted Discovery the option to co-produce and rebroadcast BBC programming in the United States, though the BBC would retain final artistic and editorial control over the programming. Discovery had contributed 40% of the production cost of *The Challenger Disaster* and received the license to rebroadcast the film in the United States. It rebroadcast the film, very slightly modified, on the Discovery Channel and the Science Channel on November 16, 2013.

The film opens with historical video and audio from the moments before *Challenger*'s launch, with the following title cards interspersed:

"This is a true story."

"It is based on the book 'What Do You Care What Other People Think?' by Richard and Gweneth Feynman and Ralph Leighton and on interviews with key individuals."

"Some scenes have been created for dramatic purposes."

The plaintiff–appellant, Judson Lovingood, Ph.D., was the deputy manager of the space shuttle projects office at NASA's Marshall Space Flight Center in 1986. In the film, he appears in one short scene near the end. In that pivotal scene, Lovingood and two other NASA managers testify in the commission's televised hearing after being sworn. One of the managers is reciting dry, technical information when Feynman, visibly dismayed

that they are getting nowhere, interjects.[2] "I have a question. Can you remind me what NASA calculates the probability of shuttle failure to be? Failure meaning the loss of the vehicle and the deaths of the entire crew."

Another commission member directs the question. "Dr. Lovingood?"

"Certainly. Uh, that would be—one in ten to the power of five," Lovingood calmly replies.

"Really," Feynman says, incredulous. "Would you explain that?"

"Yes, that the probability of mission success is one hundred percent. Minus epsilon."

"Epsilon, that's a pretty fancy word," muses Feynman. "Well, let's put all that you've said there into English. So that's, um, that's one failure in every 100,000 flights. So you claim that the shuttle would fly every day for 300 years before there would be a single failure. That's crazy, I mean, how would you ever even test that?"

"NASA arrived at that figure because it was a manned flight," Lovingood explains.

"Because there were people on board. But that's not a scientific calculation; that's—that's—a wish." Feynman is picking up steam now. "And interesting that the figure is very different from that of NASA's

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[2] This and other transcriptions of the U.S.-aired copy of the film in the record are our own.

own engineers. Based on their direct experience and observation of many known component problems, some of NASA's engineers calculate the probability of *success* as only 99.4 percent. In other words, that's roughly one flight in every 200 will fail." The room dissolves into murmurs as Feynman unfolds a handwritten note that reads "We Think Ivory Soap (99.4%)."

Following this scene, other characters congratulate Feynman on revealing NASA's errors in judgment and risk assessment. Feynman then performs for the television cameras his famous demonstration of ice water rendering an O-ring inelastic, which serves as the film's climax as Feynman finally reveals to the nation the truth about what caused the *Challenger* disaster.

Undisputedly, Lovingood's testimony scene is a fictionalization. Although Lovingood twice testified before the commission, his testimony covered only technical background on the shuttle's propulsion systems and their preflight testing and discussed the conference calls that took place the day before launch. That testimony was not depicted in the film. The discrepancies in failure probabilities at NASA were not the subject of commission testimony, instead appearing in Feynman's Appendix F ("Personal Observations on the Reliability of the Shuttle") to the commission's final report.

Feynman learned the 1-in-200 and 1-in-10^5 figures in two different meetings that he conducted at the Marshall Space Flight Center in Huntsville. According to Feynman's memoir, NASA range safety officer Louis Ullian told him that NASA had given him a probability

of space shuttle failure of 1 in 10^5, prompting Feynman's response of "crazy!" and his observation that the shuttle could undertake a flight every day for 300 years between accidents. On another occasion, Feynman recounted meeting with three NASA engineers and their boss, Lovingood.[3] Feynman asked them each to write down "the probability that a flight would be uncompleted due to a failure in this [main] engine." One engineer wrote "$99\text{-}^{44}/_{100}\%$ pure," one wrote something amounting to 1 in 200, and one wrote "1 in 300." Lovingood wrote, "Cannot quantify." When Feynman accused him of weaseling, Lovingood clarified that he meant "100 percent . . . minus epsilon," with epsilon being 10^{-5}. Lovingood later sent Feynman the NASA report about failure probabilities for launches of plutonium-powered space probes, which had calculated the 1-in-100,000 odds that Feynman found fantastical.

The film dramatizes that second meeting early on, but with Lovingood absent from the scene. Feynman sits down to a meal in the Marshall cafeteria and asks two NASA engineers sitting nearby the probability of "an accident on any single launch." The engineers are reluctant to reply out loud and Feynman suggests that they write their response on a piece of paper, but we do not see either engineer doing so. We see Feynman contemplating the "We Think Ivory Soap" note in two mid-film scenes; we don't know where it came from, and Feynman doesn't know what it means. Later, when

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[3] In his 2016 deposition, Lovingood noted that Feynman's recollection of this meeting was so good that he thought he must have had a tape recorder, although he disputed that he ever said "100 percent."

Mrs. Feynman sees the note and absentmindedly misrecites the old Ivory Soap slogan as "99.4% pure," Feynman makes the connection. As the testimony scene finally confirms, the engineers in the Marshall cafeteria were the source of Feynman's climactic 99.4% figure.

II

Lovingood filed this suit against Discovery Communications, Inc., the Science Channel, the Discovery Channel, BBC Films, the Open University, screenwriter Kate Gartside, and several unnamed defendants in Alabama state court in 2014, alleging defamation and invasion of privacy–false light stemming from his negative portrayal in the film. He sought $7 million in compensatory damages and $7 million in punitive damages, invoking the memory of the seven deceased *Challenger* astronauts. Compl. ¶ 11. Discovery removed to federal court; several defendants were dismissed; and Discovery eventually moved for summary judgment.

In 2017, the district court granted summary judgment against both of Lovingood's claims and dismissed his complaint with prejudice. *Lovingood v. Discovery Comm'ns, Inc.*, 275 F. Supp. 3d 1301 (N.D. Ala. 2017). On the defamation claim, the court found that Lovingood was a public official, *id.* at 1309, and that he failed to show that Discovery acted with actual malice, *id.* at 1314. On the invasion of privacy claim, the court found that Lovingood similarly failed to show that Discovery acted recklessly. *Id.* Lovingood now appeals the grant of summary judgment against his defamation claim.

III

We review the district court's grant of summary judgment de novo "and will affirm if the evidence, 'viewed in the light most favorable to the nonmoving party, presents no genuine issue of fact and compels judgment as a matter of law.'" *Douglas Asphalt Co. v. QORE, Inc.*, 657 F.3d 1146, 1153 (11th Cir. 2011) (quoting *Swisher Int'l, Inc. v. Schafer*, 550 F.3d 1046, 1050 (11th Cir. 2008)).

Alabama law generally allows a plaintiff to recover damages for defamation against a publisher who negligently publishes a false and defamatory statement about the plaintiff. *See Nelson v. Lapeyrouse Grain Corp.*, 534 So. 2d 1085, 1091 (Ala. 1988).[4] However, the Supreme Court has explained that the First Amendment's protections of the right to criticize the government operate to limit state defamation law when the plaintiff is a "public official." A plaintiff who is a "public official" must overcome the First Amendment by proving that a false statement relating to his official conduct "was made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not." *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 279–80 (1964).[5]

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[4] According to the Restatement (Second) of Torts, upon which the Alabama Supreme Court relied in *Nelson*, a defendant who merely republishes the work of another can be every bit as liable as the original publisher. Restatement (Second) of Torts § 578 (1977); *see also Age-Herald Publ'g Co. v. Waterman*, 66 So. 16, 21 (Ala. 1913).

[5] "Actual malice under the *New York Times* standard should not be confused with the concept of malice as an evil intent or a motive

Initially, Lovingood briefly disputes the finding of the district court that he is a "public official" for purposes of this First Amendment analysis. He asserts in passing that he was merely a "public employee," without addressing the detailed analysis of the district court on that issue.[6] We affirm the conclusion of the district court that Lovingood is a public official for purposes of this litigation. "[T]he 'public official' designation applies at the very least to those among the hierarchy of government employees who have, or appear to the public to have, substantial responsibility for or control over the conduct of governmental affairs." *Rosenblatt v. Baer*, 383 U.S. 75, 85 (1966). We agree with the district court that serving as a NASA deputy manager with substantial responsibility for the shuttle's propulsion systems amounted to control over the conduct of governmental affairs.

We also note that NASA held out Lovingood as a public official when it asked him to testify about the shuttle before the presidential commission. In his 2016 deposition, Lovingood explained that he was chosen because Marshall considered him to be the "'corporate memory' about the space shuttle" and "the person who knew the most about the space shuttle, all three elements." Apart from contemporary press coverage of the *Challenger* investigation, the record also contains

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arising from spite or ill will." *Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496, 510 (1991).

[6] In accordance with his main argument—discussed below—that we should disregard settled case law in this area, Lovingood argues that his allegations should be considered libel *per se*, regardless of whether he is a public official.

many news articles from the 1980s in which Lovingood was quoted by local and national media as an authoritative source about the space shuttle program. Lovingood also continued to hold himself out as one with substantial responsibility for government affairs following his retirement from NASA. He has continued to give retrospective interviews about *Challenger* and appeared in two separate television documentaries about the disaster. For purposes of the First Amendment's protection of speech about the *Challenger* tragedy, then, Lovingood was a public official.

With that threshold question resolved, we turn to Lovingood's main contention on appeal. Lovingood invites us to create an exception to the well-established *New York Times* standard for situations involving the fictionalization of sworn testimony. He urges us, in view of the sanctity of the testimonial oath and its centrality to our legal system, to find that the "actual malice" standard articulated by the Supreme Court does not apply in the context of depictions of perjury.

We are not free to accept Lovingood's invitation. As the Supreme Court has instructed, "If a precedent of this Court has direct application in a case . . . the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions." *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484 (1989). And indeed, that Court has steadfastly refused to create new exceptions in defamation law for the last fifty years. *See, e.g.*, *Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496, 516 (1991) (declining to create an exception for inaccurate quotations); *Milkovich v.*

Lorain Journal Co., 497 U.S. 1, 18 (1990) (declining "to create a wholesale defamation exemption" for opinions).

The *Masson* decision in particular merits closer examination, for Lovingood relies heavily upon it. The case involved a journalistic magazine article that printed quotations attributed to the plaintiff that undisputedly differed from his audiorecorded interviews with the author. *Masson*, 501 U.S. at 501–08. The Court held that some of the alterations were evidence of falsity for purposes of the *New York Times* standard because they "result[ed] in a material change in the meaning conveyed by the statement." *Id.* at 517. In so holding, the Court explained that the appropriate inquiry when examining possibly defamatory quotations is an objective one: would a reader "reasonably understand the quotations to indicate reproduction of a conversation that took place"? *Id.* at 512.

Significantly for our purposes here, the Court explained that, in some contexts, the answer to that question is *no*. "In other instances, an acknowledgment that the work is so-called docudrama or historical fiction . . . might indicate that the quotations should not be interpreted as the actual statements of the speaker to whom they are attributed." *Id.* at 512–13. Thus, our "actual malice" inquiry must take into account how a reasonable viewer would understand the contents of the scene. We acknowledge that there is some dispute over how this film's genre should be formally characterized. Discovery's corporate representative described it as a docudrama or a

historical drama but distanced himself from a Science Channel press release's label of "fictional drama." But the perspective of the reasonable viewer encompasses more than a one- or two-word label; it looks to the film itself. Within the film, Discovery emphasizes the last of the three title cards displayed in the first minute of the film: "Some scenes have been created for dramatic purposes." Lovingood, by contrast, emphasizes the first of those title cards: "This is a true story."[7]

We find most telling, however, the overall format, tone, and direction of the film. A reasonable viewer would understand within the first two minutes that he is not watching a documentary film that consists mainly of historical footage and interviews with the historical figures. He would recognize the parts of the film that do use historical footage and understand that they are meant to depict literal history, and he would understand that most of the film uses actors to portray historical events with some amount of artistic license. He would also understand that condensing the entire *Challenger* investigation into a 90-minute dramatic film required the selective editing of real history not only for time but also for clarity, flow, and emotional impact. Finally, and most importantly, he would understand that the film presents the *Challenger* story not as a disinterested, objective narrative but through

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[7] In Lovingood's complaint, he reprints this text in all capitals ("THIS IS A TRUE STORY"), and it may have appeared that way in the BBC-broadcast version of the film shown in the United Kingdom. In the Discovery-broadcast version shown in the United States, which is the only version at issue in this appeal, the title text appears in upper- and lowercase as we have transcribed it.

a single critical perspective—that of Feynman, who is sympathetically portrayed by a recognizable actor and who appears in nearly every scene. Overall, a reasonable viewer would understand the film as generally not purporting to present verbatim dialogue from the pages of history.

Thus, as we determine whether Discovery acted with actual malice when it republished the Lovingood scene, the mere fact that the film contains altered historical dialogue is not, in itself, evidence that Discovery made statements with knowledge that they were false, for purposes of the *New York Times* standard. We will not apply a novel libel-per-se rule for depictions of sworn testimony, nor are we invoking an invincible shield of protection for all works characterized as docudrama or historical fiction. Rather, we will apply the actual malice standard that the Supreme Court first articulated in *New York Times* and has applied for more than fifty years, as did the district court.

But before we may determine whether the "defamatory falsehood relating to his official conduct . . . was made with 'actual malice,'" *N.Y. Times*, 376 U.S. at 279–80, we pause to identify what, exactly, is the defamatory falsehood about Lovingood that Discovery is alleged to have republished. According to the complaint, it is "that Lovingood had lied about the probability of *total failure* being 1 in 100,000 when NASA's own engineers had said it was 1 in 200." Compl. ¶ 7. In other words, Lovingood argues, the film falsely depicts him committing the crime of perjury.

Discovery insists that the scene does not depict perjury because nothing in the film suggests that Lovingood's character lied or deliberately misled the committee while under oath. With this characterization we agree. Although the entire film, through Feynman's dialogue and demeanor, is critical of NASA's management and decision-making in general and the 10^{-5} figure in particular, the film does not paint Lovingood as a liar. Nor does it imply any intent to mislead; the Lovingood character's demeanor as a witness is calm, direct, and frank. And Feynman responds to Lovingood's testimony not with an accusation or even a suggestion that he lied about NASA's calculation, but instead with incredulity regarding the calculation itself.

Of course, Lovingood admits that he did in fact report NASA's 1-in-100,000 figure to Feynman in a private meeting at Marshall. His objection is that the film changed the context of that 10^{-5} figure from "the probability that a flight would be uncompleted due to a failure in this [main] engine" to the probability of "the loss of the vehicle and the deaths of the entire crew." He asserts that those are two very different situations given the possibility of aborting a launch and saving the crew in the event of a main engine failure. He argues that this alteration means that, because NASA never actually calculated the probability of the deaths of the entire crew as 10^{-5}, his character necessarily committed perjury when he answered the commission's question about crew deaths.[8] The problem with this

[8] Lovingood also objects to the film's moving the 10^{-5} discussion to his character's sworn committee testimony, arguing that sworn

argument, though, is that a viewer of the film does not know what NASA did or did not actually calculate. Without any basis for believing the calculation to be false, the reasonable viewer would not perceive this scene as depicting perjury.

Nonetheless, Lovingood's broader point about altering the meaning of the 10^{-5} figure has merit. Discovery responds by downplaying the significance of conflating the failure of the main engine with the deaths of the entire crew. It notes that, under NASA's own criticality assessment, main engine failure was classified as causing catastrophic loss of life or vehicle. And even Feynman seems to conflate or equate these two situations in his Appendix F to the commission's report. Nonetheless, for purposes of our summary judgment review, we view the record in the light most favorable to Lovingood and assume that there is a meaningful difference between what he actually told Feynman in reality and what his character testified in the film.[9]

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testimony should be sacrosanct and must never be altered from historical reality. We have already rejected this argument about the sanctity of the testimonial oath, declining to make a new per se rule that would put dramatic depictions of sworn testimony outside the reach of the First Amendment.

[9] Of course, "[t]ruth is an absolute defense to defamation," *Liberty Loan Corp. of Gadsden v. Mizell*, 410 So. 2d 45, 49 (Ala. 1982), and Discovery also argues that the scene was "substantially true" and not defamatory because it was constructed from accurate historical sources. *See Masson*, 501 U.S. at 516 (defamation law "concentrates upon substantial truth"). But we will assume for the

Thus, we will assume that Lovingood has alleged that a false and defamatory statement was republished by Discovery. As a public official speaking on a matter of public concern, then, Lovingood must show that Discovery acted with knowledge that the statements about him were false, or with reckless disregard for whether they were false. *N.Y. Times*, 376 U.S. at 279–80. We consider each of these bases for liability in turn.

The first basis is straightforward. The record contains no evidence at all that Discovery knew that the lines spoken by the Lovingood character in the film were false. This situation is not like *Masson*, where the journalist herself conducted and tape-recorded interviews with the plaintiff that she later quoted in her article. *Cf.* 501 U.S. at 502. The BBC writer here, by contrast, relied on 25-year-old historical materials, including the commission's hearing transcripts and

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purposes of our review that Lovingood has alleged enough of a departure from the historical record to get him to the next step of our analysis.

We do not, however, endorse Lovingood's out-of-context quotation of the Supreme Court's observation that "there is no constitutional value in false statements of fact." *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340 (1974). Importantly, the Court went on: "Although the erroneous statement of fact is not worthy of constitutional protection, it is nevertheless inevitable in free debate." *Id.* Thus, in order to avoid the chilling of valuable speech, "[t]he First Amendment requires that we protect some falsehood in order to protect speech that matters." *Id.* at 341. It is in view of this tension between truth and liberty that the Supreme Court in *New York Times* articulated the "actual malice" standard for falsehoods involving public officials, and it is that test that we here apply.

Feynman's book, when she wrote the film's screenplay. Lovingood himself concedes that Discovery's executive producer on the film, Rocky Collins, realized only years after the film was broadcast that there was a "discrepancy" between the book's and the film's characterization of the 10^{-5} probability. The "actual knowledge" basis for actual malice therefore fails.

Lovingood argues instead that Discovery acted with reckless disregard for whether the statements about him were false. He insists that Collins should have read the hearing transcripts and Feynman's book more closely and that he should have been more aggressive in his pursuit of the BBC's research notes. To be sure, we acknowledge that the record contains some discrepancies about what Discovery subjectively believed its responsibility was for fact-checking the script of *The Challenger Disaster*. Discovery's corporate representative repeatedly asserted that the BBC had sole responsibility for fact-checking and avoiding defamation because it actually produced the film. Under its master agreement with Discovery, the BBC had warranted that "no Co-Produced Programme will defame any individual or entity" and that "all statements of fact contained in each Co-Produced Programme shall, to the best of BBCW's knowledge and belief having undertaken diligent research in keeping with generally accepted standards for first class documentary film makers, be true and accurate." Collins testified, however, that, although he mainly relied on the BBC to get the facts right, his job "was to make sure that they [were] doing it." He admitted, though, that he personally only skimmed Feynman's book. Because we view the record in the light most

favorable to Lovingood, we will assume for purposes of our review that Discovery retained some responsibility for fact-checking the film.

But even if we accept Lovingood's view of what fact-checking Discovery should reasonably have done, the standard for reckless disregard is still higher. "[F]ailure to investigate before publishing, even when a reasonably prudent person would have done so, is not sufficient to establish reckless disregard." *Harte-Hanks Comm'ns, Inc. v. Connaughton*, 491 U.S. 657, 688 (1989). Because actual malice is not an objective standard, arguments about what a reasonable producer should have done will not avail. Rather, to show reckless disregard that amounts to actual malice, a defamation plaintiff must point to evidence that the defendant had real, subjective suspicions about the veracity of the statement in question. "There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication," *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968), or that he acted with a "high degree of awareness of . . . probable falsity," *Garrison v. Louisiana*, 379 U.S. 64, 74 (1964). Lovingood has identified no such evidence showing that anyone at Discovery had actual doubts about the scene or real awareness that the scene might be problematic. To the contrary, the sole Discovery employee who purported to have even a modicum of responsibility for the content of the film affirmed his complete satisfaction with the BBC's fact-checking. "Every time I had any question, they gave me satisfactory answers. Every time I said what—have you had lawyers look at this, yes. Every single—I had absolutely no reason to believe that they

did not do their job. . . . I had no reason to—to suspect that they weren't doing their job."

Instead of pointing to evidence of reckless disregard, then, Lovingood argues that Discovery should be liable because it was willfully blind to the falseness of the scene. "The doctrine of willful blindness," which provides culpability equivalent to actual knowledge, "is well established in criminal law." *Global-Tech Appliances, Inc. v. SEB S.A.*, 563 U.S. 754, 766 (2011). But neither the Supreme Court nor our Circuit has ever applied that doctrine in the civil context of defamation, and Lovingood cites no case doing so. *Cf. Hard Rock Cafe Licensing Corp. v. Concession Servs.*, 955 F.2d 1143, 1149 (7th Cir. 1992) (equating willful blindness with actual knowledge for purposes of Lanham Act trademark violations). We need not decide, however, whether to do so here because Lovingood has presented no evidence that Discovery acted with willful blindness to the falsity of the statements. Willful blindness is an even higher standard than recklessness, involving "deliberate actions to avoid confirming a high probability of wrongdoing" and nearly amounting to "actually know[ing] the critical facts." *Global-Tech*, 563 U.S. at 769. If Lovingood cannot point to evidence of recklessness as actual malice, he necessarily cannot establish willful blindness.

Thus, we conclude that Lovingood has not established a genuine issue of material fact about whether Discovery acted with actual malice. Discovery is therefore entitled to the protection of the First

Amendment, and the district court's grant of summary judgment in favor of Discovery is

AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA NORTHEASTERN DIVISION

Case No. 5:14-cv-00684-MHH

[Filed July 9, 2018]

JUDSON A. LOVINGOOD,	)
	)
Plaintiff,	)
	)
v.	)
	)
DISCOVERY COMMUNICATIONS, INC., et al.,	)
	)
Defendants.	)
	)

ORDER

This matter is before the Court on Dr. Lovingood's Rule 59 motions to alter, amend, or vacate the Court's order granting summary judgment in favor of the Discovery defendants. (Doc. 76; Doc. 77). Under Federal Rule of Civil Procedure 59(e), a party may file a motion to alter or amend a judgment within 28 days after the entry of the judgment. FED. R. CIV. P. 59(e). "'The only grounds for granting [a Rule 59] motion are newly-discovered evidence or manifest errors of law or

fact.'" *Arthur v. King*, 500 F.3d 1335, 1343 (11th Cir. 2007) (quoting *In re Kellogg*, 197 F.3d 1116, 1119 (11th Cir. 1999) (alteration in *Arthur*)). "'A Rule 59(e) motion cannot be used to relitigate old matters, raise [new] argument, or present evidence that could have been raised before the entry of judgment.'" *Jacobs v. Tempur-Pedic Int'l., Inc.*, 626 F.3d 1327, 1344 (11th Cir. 2010) (quoting *Arthur*, 500 F.3d at 1343) (alterations in original omitted). A litigant's remedy if he thinks a "district court['s] ruling [is] wrong, [is] to appeal." 626 F.3d at 1344.

In his motions to alter or amend judgment, Dr. Lovingood does not contend that new evidence has become available, and he has not brought to the Court's attention a change in controlling law. Instead, Dr. Lovingood argues that the Court committed manifest errors of law and fact. (Doc. 76, pp. 12-13; Doc. 77, pp. 5-6). Counsel for Dr. Lovingood states:

> Plaintiff firmly contends that the Court was in manifest error in both law and fact by concluding that no reasonable jury could find support for any legitimate inferences from the evidence that Plaintiff could satisfy "the elusive constitutional standard for actual malice." (See Doc. 74 at p. 22). The initial error which Plaintiff encourages the Court to thoughtfully and honestly reconsider is that a reasonable jury, hearing appropriate legal instruction, could determine there is sufficient evidence to legitimately infer actual malice by willful blindness to the falsity of this film. Such purposeful avoidance meets the legal test for

> submission of the case to the jury. The court cannot, under the law, ignore or massage the testimony in the record on this critical issue by leaning towards one legitimate inference over and above any other.

(Doc. 79, p. 3). Challenging the Court for what Dr. Lovingood's counsel apparently sees as a derogation of this Court's obligations under the law, counsel instructs:

> Plaintiff asserts that this Court should honestly and earnestly reconsider whether the lenses used by the Court in viewing the record and the law were distorted or improper for the initial consideration of summary judgment. … Therefore, we urge this honorable court to ignore any human propensity to simply adhere to the status quo and take the easy path of denying Plaintiff's motions.

(Doc. 79, pp. 4-5).

True, the Court entered judgment for the defendants on Dr. Lovingood's defamation and false light claims, but a plain reading of this Court's opinion reveals that the Court applied the correct summary judgment standard and presented the evidence in the record in the light most favorable to Dr. Lovingood. (*See* Doc. 74, p. 3 (stating that the Court "must view the evidence in the record in the light most favorable to the non-moving party and draw reasonable inferences in favor of the non-moving party")). In fact, Dr. Lovingood's motion for relief from summary judgment rests in large part on the Court's favorable

interpretations of the evidence, such as the Court's recognition that Mr. Collins did not read Dr. Feynman's book (Doc. 76, p. 5); that Mr. Collins had available to him two resources that he could have used to verify the accuracy of the two scenes at issue in the *Challenger* film (Doc. 76, p. 7; Doc. 79, p. 4); and that "Mr. Collins made virtually no independent effort to determine whether the BBC accurately portrayed Dr. Lovingood in the docudrama." (Doc. 76, pp. 7-8 (quoting Doc. 74, p. 21)); Doc. 79, p. 4). The Court is hard-pressed to imagine how to give greater credit to the evidence that favors Dr. Lovingood. Dr. Lovingood's assertion that the Court "massaged" the facts in favor of the defendants finds no support in the record.

Dr. Lovingood's true concern is not the evidence; his quarrel is with the actual malice standard that applies to his claim against the Discovery defendants who republished the BBC's production. This is the legal instruction regarding actual malice that jurors likely would hear if this case were to go to trial:

> Dr. Lovingood must prove by clear and convincing evidence that when Discovery republished the statement at issue, it knew the statement was false or it republished the statement with reckless disregard to whether the statement was false or not.
>
> Discovery acted with reckless disregard if, at the time it republished the statement, it had a serious doubt that the statement was true, or it had a high degree of awareness that the statement was false. Thus, you have to determine Discovery's state of mind when it

> republished the statement. Dr. Lovingood must prove that Discovery actually had a serious doubt that the statement was true.
>
> To determine whether Discovery acted with reckless disregard, you must not consider whether a reasonably prudent person would have republished the statement. You must not consider whether a reasonably prudent person would have investigated before republishing the statement. But, if Discovery failed to investigate because it intended to avoid the truth, this is evidence that Discovery either knew the statement was false or acted with reckless disregard to whether the statement was false or not.
>
> Clear and convincing proof requires a degree of belief greater than proof to your reasonable satisfaction from the evidence. It is proof that establishes it is highly probable that when Discovery republished the statement, it knew it was false or acted with reckless disregard to whether it was false or not.

Alabama Pattern Jury Instruction (Civil) 23.03 (3d ed. 2015).

Dr. Lovingood has offered no evidence that Discovery, acting through Mr. Collins, knew that information regarding Dr. Lovingood in the *Challenger* film was false. Therefore, at trial, Dr. Lovingood would have to be able to prove to a jury that it was highly probable that when Discovery republished the *Challenger* docudrama, with its two scenes that

describe estimates of mission failure (a calculation that neither Dr. Lovingood nor any other NASA engineer made) rather than main engine failure (a statistic that NASA's engineers could calculate and guard against), Discovery, through Mr. Collins, failed to investigate the distinction because Discovery intended to avoid the truth.

The Court, viewing the evidence in the light most favorable to Dr. Lovingood, concluded that a reasonable jury, hearing Alabama's actual malice pattern jury instruction (tweaked slightly to incorporate references to republishing rather than publishing), could not determine there is sufficient evidence to legitimately infer actual malice. The Court held:

> there is nothing so improbable in the scene of Dr. Lovingood's testimony before the Presidential Commission that would have prompted Mr. Collins to obtain a transcript of the hearing to investigate the accuracy of the scene. Although it is abundantly clear to Dr. Lovingood and to his colleagues from NASA that the scene contains false information, there is nothing that would prompt an observer lacking Dr. Lovingood's expertise to recognize the significant engineering distinction between main engine failure and mission failure. The analysis is not altered by the fact that Mr. Collins now acknowledges in retrospect and in light of this litigation that the statements attributed to Dr. Lovingood in the *Challenger* film are inaccurate because the record contains no evidence that indicates that the distinction was discernible

> when Mr. Collins first reviewed the movie. And unlike the evidence in *Harte-Hanks Commc'ns* and *Hunt* that suggested that the reporters' sources were unreliable, there is no evidence in the record here that the BBC is not a reputable producer of television programs and movies. Therefore, there is no evidence from which jurors could reasonably infer that the Discovery defendants had reason to doubt the accuracy of the scenes in the *Challenger* film or that the defendants' failure to do more to investigate the accuracy of the two scenes at issue evidences "an intent to avoid the truth." *See* p. 17, above. The evidence in the record may rise to the level of negligence, but it does not go further.

(Doc. 74, pp. 23-24).

The Court observed that the *Challenger* film is not a newspaper article. It is not even an editorial. It is a docudrama, drama being the operative term. The Court noted that the initial frames of the film state: "This is a true story" (Doc. 60-26, 1:36), and explain that: "Some scenes have been created for dramatic purposes" (Doc. 60-26, 2:06). The fact that Mr. Collins knew that scenes within the movie were created for dramatic purpose significantly reduces the likelihood that he would feel the need to investigate a statement about mission failure because of concern that the scene should have pertained to main engine failure instead, assuming he would notice and appreciate the distinction. There is nothing so facially implausible about the disputed calculation that non-scientists, such as the people charged with producing the film, would suspect that

the film stated something untrue in the course of its dramatized depictions of real events.

In reaching this conclusion, the Court appreciates how painful the Challenger disaster was for Dr. Lovingood and his colleagues, and the Court understands the importance of the context of the scene involving Dr. Lovingood's sworn statements to the Presidential Commission. The Court has read articles that recount the grief that NASA engineers still experience 30 years after the loss. As a result, the Court understands why the distinction between mission failure and main engine failure is so significant to Dr. Lovingood and his colleagues. The Court simply does not believe that Alabama law provides a remedy for Dr. Lovingood on the record before the Court. For the reasons explained in its memorandum opinion granting Discovery's motion for summary judgment (Doc. 74), the Court finds that the Discovery defendants are entitled to judgment in their favor on Dr. Lovingood's claims.

Citing *Lane v. Franks*, 134 S. Ct. 2369 (2014), Dr. Lovingood argues in his Rule 59 submissions that he was private citizen when he testified before the Presidential Commission examining the Challenger disaster, and therefore, the actual malice standard does not apply. (Doc. 77, pp. 2-4). "A motion for reconsideration should not be used to present authorities available at the time of the first decision or to reiterate arguments previously made." *Z.K. Marine, Inc. v. Archigetis*, 808 F. Supp. 1561, 1563 (S.D. Fla. 1992). The *Lane* decision was available to Dr. Lovingood when he filed his opposition to the

defendants' motion for summary judgment, so the Court need not consider that authority now.

Had Dr. Lovingood cited *Lane* in his opposition to the defendants' summary judgment motion, the Court still would have concluded that Dr. Lovingood is a public official for purposes of his claims against the defendants. This is because *Lane* and the proposition which Dr. Lovingood extracts from the opinion are not applicable to this case. Dr. Lovingood cites *Lane* to argue that when he "gave sworn testimony to the Commission, he did so as a citizen not a public official." (Doc. 77, p. 3). But here, the issue is not Dr. Lovingood's First Amendment right to provide testimony without fear of his employer's retaliation, as it was for Edward Lane; it is the extent to which the First Amendment protects the defendants' republication of an inaccurate version of Dr. Lovingood's testimony. The possibility that Dr. Lovingood may have testified as a citizen, rather than a NASA employee, when he appeared before the Presidential Commission, does not prevent him from being a public official for purposes of his defamation and false light claims.[1] Dr. Lovingood provides no reason why the Court must limit its inquiry into his status to the single instance in which he testified at the commission hearing. Alabama law instructs courts to examine the general responsibilities of the plaintiff's position or employment when determining whether the

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[1] The Court notes that if Dr. Lovingood was subpoenaed to speak before the commission as a representative of his employer, NASA, he would not necessarily have testified simply as a private citizen. *See Lane*, 134 S. Ct. at 2384–85.

heightened First Amendment standard governs a plaintiff's defamation claim. Accordingly, the Court, in its memorandum opinion, looked to the status conferred on Dr. Lovingood by virtue of his position with NASA and determined that he was a public official. This conclusion is not undermined by the possibility that Dr. Lovingood's sworn testimony before the commission was outside the scope of his employment.

Dr. Lovingood bases much of his argument in his Rule 59 submissions on obligations arising out of the contract between BBC and Discovery. For example, he argues that the agreement between those entities "affixed and confirmed the voluntary agreement of Discovery to a non-delegable duty to assure the accuracy of such a film and prevent any false, defamatory content." (Doc. 76, pp. 4-5) (emphasis in Doc. 76). Dr. Lovingood posits that the Court "cannot reconstruct or massage the negotiated and accepted duty . . . ." (Doc. 76, p. 5). The Court accepts that such a contractual duty may exist between BBC and Discovery, and Dr. Lovingood, if he had chosen, could have asserted that he is a third-party beneficiary of that contractual obligation such that he is entitled to damages for an alleged breach of that duty. Had he asserted such a claim, the substantial evidence standard would apply, not the clear and convincing standard that governs Dr. Lovingood's defamation claim, and such a third-party beneficiary claim might survive summary judgment on the record before the Court. The issue is moot because Dr. Lovingood did not

assert a third-party beneficiary breach of contract claim.[2]

Accordingly, the Court denies Dr. Lovingood's motions to alter or amend the Court's order entering judgment for the Discovery defendants on Dr. Lovingood's claims. (Doc. 76; Doc. 77).

DONE and **ORDERED** this 9th Day of July, 2018.

s/_____
MADELINE HUGHES HAIKALA
UNITED STATES DISTRICT JUDGE

[2] Much of Dr. Lovingood's argument about Discovery's breach of its contractual obligation concerns Mr. Collins's testimony that he had an obligation to double check the BBC's work. Dr. Lovingood devotes pages of his request for relief to his characterization of Mr. Collins's testimony. (Doc. 76, pp. 4-7; Doc. 79, pp. 3-4). Dr. Lovingood takes Mr. Collins's testimony out of context and suggests that the Court should ignore that context so as to view the evidence in the light most favorable to Dr. Lovingood. That is not a proper summary judgment standard. Viewing the evidence in the evidence in the light most favorable to the non-moving party is not synonymous with cherry-picking phrases and disregarding the portions of testimony that do not serve the non-movant's purpose.

APPENDIX C

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA NORTHEASTERN DIVISION

Case No. 5:14-cv-00684-MHH

[Filed August 1, 2017]

JUDSON A. LOVINGOOD,)
)
Plaintiff,)
)
v.)
)
DISCOVERY)
COMMUNICATIONS, INC., et al.,)
)
Defendants.)

MEMORANDUM OPINION

In 2013, The Discovery Channel broadcast a film that the British Broadcasting Corporation made regarding the Challenger shuttle disaster. Launched in 1986, the Space Shuttle Challenger came apart shortly after takeoff. The shuttle crashed, killing the shuttle's seven crew members. The BBC film entitled "The Challenger Disaster" recounts the investigation following the crash through the eyes of Dr. Richard P.

Feynman, a physics professor who was involved in the investigation. (Doc. 60-6, p. 13).

The plaintiff in this action, Dr. Judson A. Lovingood, became involved in NASA's shuttle program in 1969 when NASA instituted the program. (Doc. 60-6, p. 64). In 1986, Dr. Lovingood was the deputy manager of the shuttle projects office at Marshall Space Flight Center, and he was partially responsible for overseeing the development and operation of the propulsion systems for the Challenger shuttle. (Doc. 60-6, pp. 14–15). When President Ronald Reagan established a Presidential Commission to investigate the cause of the Challenger accident, NASA tapped Dr. Lovingood to testify before the Commission because of the depth of his knowledge regarding the shuttle's design. (Doc. 60-6, p. 64). In this lawsuit, Dr. Lovingood contends that the BBC film that the Discovery defendants broadcast in the United States defames him and places him in a false light. (Doc. 1-1).[1]

The scene in the Challenger film that concerns Dr. Lovingood is short but poignant, especially to Dr. Lovingood. The scene depicts Dr. Lovingood testifying before the Presidential Commission. The actor who

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[1] Dr. Lovingood asserts his claims against three related defendants: Discovery Communications, Inc., The Discovery Channel, and The Science Channel. (Doc. 1-1). For convenience, the Court refers to the defendants as "Discovery Channel" or "the Discovery defendants." Dr. Lovingood also named the British Broadcasting Corporation, The Open University, and writer Kate Gartside as defendants in this action. (Doc. 1-1). The Court previously dismissed Dr. Lovingood's claims against these defendants. (Docs. 30, 36).

portrays Dr. Lovingood represents to the Commission that NASA engineers had calculated, and therefore were aware of, the probability of complete mission failure and the deaths of the members of the Challenger crew. (Doc. 60-26). It is undisputed that there never was such a calculation, and Dr. Lovingood never gave such testimony before the Presidential Commission. Dr. Lovingood contends that the Discovery Channel should have detected the false information in the film and refused to broadcast the film with the defamatory content.

Pursuant to Federal Rule of Civil Procedure 56, the Discovery defendants ask the Court to enter judgment in their favor on Dr. Lovingood's claims. The defendants argue that Dr. Lovingood was a public official and that his status as a public official requires him to prove by clear and convincing evidence that Discovery acted with actual malice when it broadcast the BBC film containing the false testimony. (Doc. 63, pp. 12–14, 17–20). The defendants contend that on the record before the Court, Dr. Lovingood cannot carry this burden. For the reasons stated below, the Court grants the Discovery defendants' motion for summary judgment.

I. SUMMARY JUDGMENT STANDARD

"The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." FED. R. CIV. P. 56(a). To demonstrate that there is a genuine dispute as to a material fact that precludes summary judgment, a party opposing a motion for summary judgment must

cite "to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials." FED. R. CIV. P. 56(c)(1)(A). "The court need consider only the cited materials, but it may consider other materials in the record." FED. R. CIV. P. 56(c)(3). When considering a summary judgment motion, the Court must view the evidence in the record in the light most favorable to the nonmoving party and draw reasonable inferences in favor of the non-moving party. *White v. Beltram Edge Tool Supply, Inc.*, 789 F.3d 1188, 1191 (11th Cir. 2015).

II. BACKGROUND

When the Challenger accident occurred in 1986, Dr. Lovingood was working as the deputy manager of the space shuttle projects office at NASA's Marshall Space Flight Center. (Doc. 60-6, p. 14). Dr. Lovingood had distinguished himself as the individual at NASA who had the greatest institutional knowledge of the shuttle. (Doc. 60-6, p. 64). Dr. Lovingood also was one of the few people at NASA who could discuss the shuttle's main engine, the solid booster, and the external tank. Other engineers could address only one of the three components. (Doc. 60-6, pp. 63–64). Given his breadth of knowledge, it comes as no surprise that NASA designated Dr. Lovingood to testify before the Presidential Commission that investigated the crash of the Challenger shuttle.

Dr. Feynman, a Nobel Laureate and physics professor at Caltech, was a member of the Presidential

Commission. He wrote a book about his experience on the commission. The book is entitled *What Do You Care What Other People Think?*. (Doc. 60-6, p. 13; *see also* Doc. 63, p. 10; Doc. 65, p. 4). The BBC's film entitled "The Challenger Disaster" is based on Dr. Feynman's book. The BBC licensed Discovery to broadcast the film in the United States. (Doc. 60-1, pp. 2–4; Doc. 63, ¶¶ 17–18; *see also* Doc. 60-9). The film premiered on The Discovery Channel and The Science Channel on November 16, 2013. (Doc. 1-1, ¶ 3).

"The Challenger Disaster" film begins with the following message displayed in white letters on a black screen: "This is a true story."[2] (Doc. 60-26, 1:36).[3] The text then indicates that the film is based on Dr. Feynman's book "and on interviews with key individuals." (Doc. 60-26, 1:48). A final line of text states: "Some scenes have been created for dramatic purposes." (Doc. 60-26, 2:06). All three messages appear in white against a black screen, in the same

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[2] In his complaint, Dr. Lovingood alleges that the statement, "This is a true story" appears in the opening moments of the film in all caps like this: "THIS IS A TRUE STORY." (Doc. 1-1, ¶ 4). In its opinion denying the Discovery defendants' motion to dismiss, the Court accepted Dr. Lovingood's allegation and stated that the film "begins with the following message displayed in bold print: 'THIS IS A TRUE STORY.' (Doc. 1-1, ¶ 4)." When it reviewed the film to evaluate the defendants' motion for summary judgment, the Court learned that the film does not emphasize the text as Dr. Lovingood alleges.

[3] Doc. 60-26 is a DVD of "The Challenger Disaster" film that the Discovery defendants filed with the Court. Citations to specific time signatures are approximate.

font, and all three are approximately the same size. (Doc. 60-26, 1:36–2:10).

The film, which the Discovery defendants describe as a "docudrama," centers on Dr. Feynman's efforts to identify the cause of the Challenger disaster. (*See generally* Doc. 60-26).[4] Along the way, Dr. Feynman encounters resistance and secrecy from other members of the Commission and from individuals associated with NASA and the United States government. (*See generally* Doc. 60-26). Dr. Feynman persists, and ultimately he leads the Commission to discover that an improperly sealed "O-ring" on the right solid rocket booster caused the crash. (*See, e.g.*, Doc. 60-26, 1:21:50–1:25:01; *see also* Doc. 1-1, ¶ 2; Doc. 60-6, p. 12). In the film, during the course of his investigation, Dr. Feynman reveals that NASA knew of significant risks associated with the O-rings but chose to launch the shuttle anyway. (*See generally* Doc. 60-26).

Dr. Lovingood's claims relate to two scenes in the film. In the first scene, Dr. Feynman eats lunch with two NASA engineers in a cafeteria. Dr. Feynman introduces himself to the engineers and states that he is "on the Commission." (Doc. 60-26, 21:37). One of the engineers replies, "I got nothing to hide." (Doc. 60-26, 21:28). Dr. Feynman then asks, "If I was to ask you engineers—never mind what the managers say, but you guys—given all your experience, what you thought

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[4] According to the Discovery defendants, a docudrama "is a scripted film that uses actors to portray historical events." (*See* Doc. 63, ¶ 22; *see also* Doc. 60-8, p. 39). Rocky Collins, Discovery's executive producer of "The Challenger Disaster," referred to the film as a "fictional drama" in his deposition. (Doc. 64-12, p. 6).

the probability was of an accident on any single launch, what would you say?" (Doc. 60-26, 21:45). The engineers avoid Dr. Feynman's eye. Dr. Feynman says, "If you don't want to say out loud, perhaps you could write down on a piece of paper." (Doc. 60-26, 21:54). The engineers exchange uneasy glances, and the scene cuts away. Later, Dr. Feynman discovers a handwritten note in his coat pocket that reads, "We think Ivory Soap." (Doc. 60-26, 31:50). The audience later learns that "We think Ivory Soap" is a reference to a 19th-century advertising slogan for Proctor & Gamble's "Ivory" soap. (Doc. 60-26, 1:07:44–1:08:14). The slogan touted Ivory soap as 99.44% pure. (*See* Doc. 60-26, 1:07:46).

The second scene portrays Dr. Lovingood and NASA shuttle program manager Lawrence Mulloy testifying before the Presidential Commission. In the scene, Dr. Feynman asks Dr. Lovingood and Mr. Mulloy, "Can you remind me what NASA calculates the probability of shuttle failure to be? Failure meaning the loss of the vehicle and the deaths of the entire crew." (Doc. 60-26, 1:19:05). The chairman of the Commission invites Dr. Lovingood to answer, and Dr. Lovingood reads from a stack of paper: "Certainly, that would be 1 in 10 to the power of 5." (Doc. 60-26, 1:19:10). The scene proceeds as follows.

> Dr. Feynman: "Really? Would you explain that?"
>
> Dr. Lovingood: "Yes, the probability of mission success is 100%, minus epsilon."
>
> Dr. Feynman: "Epsilon, that's a pretty fancy word. Let's put all that you said there into English. So

> that's, um, that's one failure in every 100,000 flights. So you claim that the shuttle would fly every day for 300 years before there would be a single failure. That's crazy, I mean, how would you ever even test that?"
>
> Dr. Lovingood: "NASA arrived at that figure because it was a manned flight."
>
> Dr. Feynman: "Because there were people on board, but that is not a scientific calculation, that's a wish. And interesting that the figure is very different from that of NASA's own engineers based on their direct experience and observation of many known component problems, some of NASA's engineers calculate the probability of success as only 99.4%, in other words that's roughly one flight in every 200 will fail."

(Doc. 60-26, 1:19:17–1:20:23).[5]

Both scenes are fabrications. (*See* Doc. 65, pp. 5–11). In reality, the meeting portrayed in the film in the cafeteria took place in a conference room at Marshall Space Flight Cente, and Dr. Lovingood was present. (Doc. 60-6, p. 62). At the meeting, Dr. Feynman did not ask what "the probability was of an accident on any single launch." (*See* Doc. 60-6, pp. 62, 66; p. 6, above). Rather, Dr. Feynman asked the engineers to write down the probability of the Challenger mission not being completed because of a failure of the main engine. (Doc. 60-6, p. 66; Doc. 63, ¶6; Doc. 64-1, p. 5;

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[5] Other than in this scene, Dr. Lovingood appears only for a few brief moments in the film.

Doc. 65, p. 5). From an engineering perspective, the distinction is significant. Dr. Lovingood testified that, because of a series of safety redundancies that were designed to activate upon a failure of the main engine, the likelihood that a malfunction of the main engine would cause the mission to fail was low. (*See* Doc. 60-6, pp. 44–45). Indeed, the Commission concluded that the main engine functioned properly during the Challenger flight and did not contribute to the crash. (Doc. 60-6, pp. 21–22). In a nod to the Ivory soap slogan, one of the engineers wrote 99.44/100% pure, which Dr. Lovingood "thought was silly," and another engineer wrote 1 in 300. (Doc. 60-6, p. 67; Doc. 64-1, p. 4). Dr. Lovingood provided Dr. Feynman with "the official NASA number," 1 in 100,000. (Doc. 60-6, pp. 72–73).[6]

Like the cafeteria scene, the scene that depicts Dr. Lovingood testifying before the Presidential Commission "never took place in reality and truth." (Doc. 65, p. 11). Dr. Lovingood did not testify "that the probability of total mission failure was 1 in 100,000," and "[n]o engineer ever said it was 1 in 200." (Doc. 1-1, ¶ 7). The probability of such an event, says Dr. Lovingood, was "[n]ever addressed at all by NASA or any of the engineers." (Doc. 60-6, pp. 346–47; *see also* Doc. 65, pp. 10–11).

In short, Dr. Lovingood did provide Dr. Feynman with a 1-in-100,000 estimate, but he provided the

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[6] Dr. Lovingood testified that he provided Dr. Feynman with the official NASA report that contained the basis for the 1-in-100,000 estimate after the meeting at Marshall Space Flight Center. (Doc. 60-6, p. 73).

estimate at Marshall Space Flight Center, not before the Presidential Commission, and the estimate was of the probability that a main-engine malfunction would cause the Challenger mission to fail, not of the probability of "the loss of the vehicle and the deaths of the entire crew." In addition, NASA engineers did provide Dr. Feynman with a 1-in-200 estimate, but the estimate, like Dr. Lovingood's, was of the probability that a main-engine malfunction would cause the mission to fail, not of the probability of "an accident on any single launch." *See* pp. 6, 8, above. Mr. Collins, the executive producer of the Challenger film for the Discovery defendants, has acknowledged that "[t]he exact dialogue that you see in the film . . . was not actually spoken by Lovingood [or anyone else] in front of the Commission." (Doc. 64-12, p. 8; Doc. 65, pp. 4–5).

The suggestion of the film as a whole, and of these two scenes in particular, according to Dr. Lovingood, is that Dr. Lovingood ignored significant risks associated with the Challenger mission, lied under oath regarding NASA's knowledge of the risks, and participated in NASA's efforts to conceal the cause of the crash. (*See* Doc. 60-6, pp. 44–45). It is fair to say that the tone of the film is not complimentary of NASA. Dr. Lovingood asserts that the film defames him and places him in a false light, and he asks the Court to award him compensatory and punitive damages. (Doc. 1-1, p. 74).

III. DISCUSSION

A. Dr. Lovingood's defamation claim

To establish a prima facie case of defamation under Alabama law, a plaintiff must show: "[1] that the

defendant was at least negligent [2] in publishing [3] a false and defamatory statement to another [4] concerning the plaintiff, [5] which is either actionable without having to prove special harm (actionable per se) or actionable upon allegations and proof of special harm (actionable per quod)." *Ex parte Bole*, 103 So. 3d 40, 51 (Ala. 2012) (quoting *Ex parte Crawford Broad. Co.*, 904 So. 2d 221, 225 (Ala. 2004)) (emphasis and internal quotation marks omitted). If a court determines that a plaintiff in a defamation action is "a public official, public figure, or limited-purpose public figure," then the plaintiff must establish by clear and convincing evidence "that the defamatory statement was made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard to whether it was false or not." *Cottrell v. Nat'l Collegiate Athletic Ass'n*, 975 So. 2d 306, 333 (Ala. 2007) (citing *New York Times, Co. v. Sullivan*, 376 U.S. 254, 280 (1964)); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 342 (1974); *Curtis Publ'g Co. v. Butts*, 388 U.S. 130, 162–164 (1967) (internal quotation marks omitted).

This case concerns Discovery's republication of false information concerning Dr. Lovingood and the engineers who worked on the Challenger mission. "[O]ne who repeats or otherwise republishes defamatory matter is subject to liability as if he had originally published it." Restatement (Second) of Torts § 578. "[T]he republisher of a defamatory statement made by another remains subject to liability (Restatement (Second) of Torts § 578 (1977)), but he cannot be held liable unless he himself knew at the time when the statement was published that it was

false, or acted in reckless disregard for its truth or falsity." *Schwartz v. Am. Coll. of Emergency Physicians*, 215 F.3d 1140, 1145 (10th Cir. 2000) (quoting *Catalano v. Pechous*, 419 N.E.2d 350, 361 (Ill. 1980)) (internal quotation marks omitted).[7]

The Discovery defendants argue that they are entitled to judgment as a matter of law on Dr. Lovingood's defamation claim because Dr. Lovingood is a public official, and he cannot prove by clear and convincing evidence that the Discovery defendants acted with actual malice when they broadcast the film that contains false information about Dr. Lovingood. (Doc. 63). On the record in this case, the Court agrees that the defendants are entitled to judgment on Dr. Lovingood's claims.[8]

1. Dr. Lovingood's status

Whether Dr. Lovingood is a public official, a public figure, or a private individual is a question of law for the trial judge. *See Ex parte Rudder*, 507 So. 2d 411,

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[7] The Court has located no Alabama Supreme Court or Alabama Court of Civil Appeals decisions concerning republication of defamatory material; however, the Alabama Supreme Court follows the Restatement (Second) of Torts in defamation cases, and many states have adopted the Restatement standard regarding republication. *See, e.g., Hillman v. Yarbrough*, 936 So. 2d 1056 (Ala. 2006); *Larrimore v. Dubose*, 827 So. 2d 60, 61 (Ala. 2001); *Catalano v. Pechous*, 419 N.E.2d 350 (Ill. 1980).

[8] Because the Court finds that the Discovery defendants are entitled to summary judgment for the reasons stated below, the Court does not discuss the defendants' alternative arguments in favor of their motion for summary judgment.

416 (Ala. 1987); *see also Rosenblatt v. Baer*, 383 U.S. 75, 88 (1966); *Barnett v. Mobile Cty. Personnel Bd.*, 536 So. 2d 46, 54 (Ala. 1988). The record in this case, viewed in the light most favorable to Dr. Lovingood, demonstrates that Dr. Lovingood is a public official.

Although it is not clear "'how far down into the lower ranks of government employees the 'public official' designation'" extends, the United States Supreme Court has held that the designation "applies at the very least to those among the hierarchy of government employees who have, or appear to the public to have, substantial responsibility for or control over the conduct of governmental affairs." *Rosenblatt*, 383 U.S. at 85 (quoting *New York Times*, 376 U.S. at 283 n. 23). "Where a position [] has such apparent importance that the public has an independent interest in the qualifications and performance of the person who holds it, beyond the general public interest in the qualifications and performance of all government employees, . . . the *New York Times* malice standards apply." *Rosenblatt*, 383 U.S. at 86. According to the Alabama Supreme Court, "[a] 'public official' must hold a position that would invite public scrutiny of the person holding it, apart from the scrutiny and discussion occasioned by the allegedly defamatory remarks." *Barnett*, 536 So. 2d at 54.

In *Barnett*, the Alabama Supreme Court ascribed public official status to a former town clerk who "had the primary responsibility for organizing and issuing the payroll for the town." 536 So. 2d at 47, 54. Citing *Rosenblatt*, the Court based its determination on the town clerk's role as "a governmental employee who had

substantial responsibility for, or control over, the conduct of governmental affairs." *Id.* (citing *Rosenblatt*, 383 U.S. at 85). In *Warren v. Birmingham Board of Education*, the Alabama Court of Civil Appeals found that the principal of an elementary school was a public official, "similar to the . . . town clerk in *Barnett*." 739 So. 2d 1125, 1129, 1133 (Ala. Civ. App. 1999). In *Stewart v. Town of Zolfo Springs, Florida*, the United States District Court for the Middle District of Florida found that a municipal police officer was a public official and applied the *New York Times* actual malice standard to its analysis of the officer's defamation claim. 1997 WL 689448, *3 (M.D. Fla. Aug. 27, 1997).

Courts outside the Eleventh Circuit also have attributed public official status to positions within the "lower ranks of government employees." *Rosenblatt*, 383 U.S. at 85; *see, e.g.*, *Zerangue v. TSP Newspapers, Inc.*, 814 F.2d 1066, 1069 (5th Cir. 1987) (attributing public official status to county law enforcement officers); *Price v. Viking Penguin, Inc.*, 676 F. Supp. 1501 (D. Minn. 1988) (attributing public official status to an FBI agent); *see also* L. Tribe, *American Constitutional Law* 866 (2d ed. 1988) ("[T]he term 'public official' now embraces virtually all persons affiliated with the government, such as most ordinary civil servants, including public school teachers and policemen.").

There is no doubt that NASA's space program is a matter of public interest, and NASA employees involved in the design of NASA's space shuttles invite public scrutiny of their work, particularly with respect to the shuttles' ability to provide safe passage to the

members of the shuttles' crews. As the deputy manager of the space shuttle projects office at Marshall Space Flight Center, Dr. Lovingood was partially responsible for overseeing the development and operation of the propulsion systems for the Challenger shuttle. (Doc. 60-6, pp. 14–15). After the crash, Dr. Lovingood was "the Marshall lead man in briefing the Presidential Commission on the space shuttle main engine, the solid booster, and the external tank." (Doc. 60-6, p. 63). Dr. Lovingood testified that he "was considered to be the person who knew the most about the space shuttle." (Doc. 60-6, p. 64).

Thus, Dr. Lovingood was a government employee who had "substantial responsibility for or control over the conduct of governmental affairs." *Rosenblatt*, 383 U.S. at 85. Dr. Lovingood's roles in the Challenger mission and in the Commission's subsequent investigation were of particular importance, such that "the public has an independent interest in [Dr. Lovingood's] qualifications and performance." *Rosenblatt*, 383 U.S. at 86; *see also Barnett*, 536 So. 2d at 54.[9]

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[9] Dr. Lovingood retired from NASA in 1988. (Doc. 60-6, p. 222; *see generally* Doc. 60-6, pp. 222–225). For purposes of this litigation, he did not lose his status as a public official when he retired. *See Zarangue v. TSP Newspapers, Inc.*, 814 F.2d 1066, 1069 (5th Cir. 1987) (explaining that the court of appeals located "no cases holding that public official status erodes with the passage of time" and that "[o]ther courts have held that ex-public officials must prove that 'actual malice' prompted speech concerning their in-office activities. *See, e.g., Rosenblatt v. Baer,* 383 U.S. 75, 87 n. 14, 86 S.Ct. 669, 677 n. 14, 15 L.Ed.2d 597 (1966); *Pierce v. Capital Cities Communications, Inc.,* 576 F.2d 495 (3d Cir.), *cert.*

Consequently, the Court finds as a matter of law that Dr. Lovingood is a public official.[10]

2. Actual malice

Because he is a public official for purposes of this litigation, to survive the Discovery defendants' summary judgment motion, Dr. Lovingood must be able to show by clear and convincing evidence that the Discovery defendants acted with actual malice when they broadcast in the United States a BBC film that falsely portrays Dr. Lovingood's testimony before the Presidential Commission and NASA engineers' conversation with Dr. Feynman at Marshall Space Flight Center. *Harte-Hanks Commc'ns v. Connaughton*, 491 U.S. 657, 666 (1989).

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denied, 439 U.S. 861, 99 S.Ct. 181, 58 L.Ed.2d 170 (1978); *Arnheiter v. Random House, Inc.,* 578 F.2d 804 (9th Cir.1978).").

[10] Dr. Lovingood argues that he is a private citizen rather than a public figure or a limited purpose public figure, but Dr. Lovingood does not address Discovery's arguments that he is a public official. (*See* Doc. 63, pp. 12–14; Doc. 65, pp. 19–23, 30; Doc. 67, pp. 3–4). "In defamation actions, a plaintiff is [] a private person, a public official, or a public figure, either in general or for the limited purpose of a particular controversy." *Cottrell v. Nat'l Collegiate Athletic Ass'n*, 975 So.2d 306, 333 (Ala. 2007). Public officials hold governmental office, whereas public figures "seek the public's attention" or gain it "by reason of the notoriety of their achievements." *See Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 342 (1974); *see also Curtis Publ'g Co. v. Butts*, 388 U.S. 130, 155 (1967) (distinguishing between a public official and a public figure and extending *New York Times* protection to the latter). Dr. Lovingood's arguments that he is not a public figure do not diminish his role as a public official.

"[T]he actual malice standard is not satisfied merely through a showing of ill will or 'malice' in the ordinary sense of the term." *Harte-Hanks Commc'ns*, 491 U.S. at 666. Instead, in a defamation action concerning a public official, the public official must be able to prove by clear and convincing evidence that the defendant acted with reckless disregard of the truth. *Id.*; *see also Cottrell*, 975 So. 2d at 333 (citing *New York Times*, 376 U.S. at 280). A defendant acts with reckless disregard for the falsity of allegedly defamatory remarks when the defendant "in fact entertained serious doubts as to the truth of [its] publication . . . or acted with a 'high degree of awareness of . . . probable falsity.'" *Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496, 510 (1991) (quoting *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968) and *Garrison v. Louisiana*, 379 U.S. 64, 74 (1964)). "The meaning of terms such as 'actual malice'-and, more particularly, 'reckless disregard'" are "not readily captured in one infallible definition." *Harte-Hanks Commc'ns*, 491 U.S. at 686 (some internal quotation marks and citation omitted). "Rather, only through the course of case-by-case adjudication" may a court "give content to these otherwise elusive constitutional standards." *Id.*

The United States Supreme Court and the Alabama Supreme Court have provided some guidance regarding the nature of the evidence that a public official must present to prove by clear and convincing evidence that the defendant knew that information that the defendant republished about a public official was false or that the defendant republished the information about the official in reckless disregard for the truth or falsity of the information. Extending the rationale of

Cottrell to republication, to create a jury question, a public official must present sufficient evidence that the defendant knew that the republished information was fabricated, realized that the information was "so inherently improbable that only a reckless man would have put [it] in circulation," or recognized that the information came from "a source that the defendant had obvious reasons to doubt, such as an unverified anonymous telephone call." *Cottrell*, 975 So. 2d at 349 (citations, internal quotation marks, and emphasis omitted). Per *Harte-Hanks Commc'ns*, the evidence upon which a public official relies must show "more than a departure from reasonably prudent conduct." *Harte-Hanks Commc'ns*, 491 U.S. at 688. Instead, there must be evidence that indicates that the defendant "'entertained serious doubts as to the truth of [the] publication.'" *Harte-Hanks Commc'ns*, 491 U.S. at 688 (quoting *St. Amant*, 390 U.S. at 731). The standard is subjective. *Harte-Hanks Commc'ns*, 491 U.S. at 688; *Cottrell*, 975 So. 2d at 349.

When, as in this case, the public official's claim rests on a failure to investigate theory, the "failure to investigate before publishing, even when a reasonably prudent person would have done so, is not sufficient to establish reckless disregard." *Harte-Hanks Commc'ns*, 491 U.S. at 688. Instead, the official must show that the defendant "purposeful[ly] avoid[ed] [] the truth." *Id.* at 692; *see also Cottrell*, 975 So. 2d at 349 ("[T]he failure to investigate does not constitute malice, unless the failure evidences purposeful avoidance, that is, an intent to avoid the truth.") (citations and internal quotation marks omitted).

In *Harte-Hanks Commc'ns*, the United States Supreme Court found that evidence of conduct that amounted to willful ignorance of objective information that contradicted a source's charges about a judicial candidate supported a jury verdict for the candidate and against the defendant newspaper that published an article maligning the candidate. The article stated that the candidate offered jobs and a trip to Florida to certain individuals who were in a position to discredit the candidate's opponent. *See Harte-Hanks Commc'ns*, 491 U.S. at 660. The Supreme Court found that evidence that "no one at the newspaper took the time to listen" to interview tapes that were available to the newspaper and undermined the source's charges against the candidate supported a finding that "the newspaper's inaction was a product of a deliberate decision not to acquire knowledge of facts that might confirm the probable falsity of [the source's] charges." *Id.* at 692.

In *Harte-Hanks Commc'ns*, the Supreme Court likened the situation before it to the circumstances that supported a finding of actual malice in *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967). The Supreme Court explained:

> In *Butts* the evidence showed that the Saturday Evening Post had published an accurate account of an unreliable informant's false description of the Georgia athletic director's purported agreement to "fix" a college football game. Although there was reason to question the informant's veracity, . . . the editors did not interview a witness who had the same access to

> the facts as the informant and did not look at films that revealed what actually happened at the game in question. This evidence of an intent to avoid the truth was not only sufficient to convince the plurality that there had been an extreme departure from professional publishing standards, but it was also sufficient to satisfy the more demanding *New York Times* [actual malice] standard . . . .

Harte-Hanks Commc'ns, 491 U.S. at 692–93. As the Eleventh Circuit Court of Appeals held in *Hunt v. Liberty Lobby*, 720 F.2d 631 (11th Cir. 1983), when a party has reason to question the neutrality of the source of its information yet publishes information that is not "'hot news,' that is, information that must be printed immediately or it will lose its newsworthy value," without taking the time to examine available resources that would permit verification of the information being published, a jury question exits regarding the publisher's intent. 720 F.2d at 645.

Here, there is nothing in the *Challenger* film that is "hot news." The film portrays events that occurred more than two decades before the BBC made the film. The evidence, viewed in the light most favorable to Dr. Lovingood, shows that The Discovery Channel knew that in the *Challenger* film, the BBC embellished or perhaps even fabricated aspects of the actual events for the film because the film was a docudrama. Rocky Collins, the executive producer of the film for The Discovery Channel, watched the film before Discovery aired the film in the United States. (Doc. 60-7, p. 74). The first few frames of the film contain the statement,

"Some scenes have been created for dramatic purposes." (Doc. 60-26, 2:06).

Discovery Channel obtained the film from the BBC via a five-year "Master First Look, Co-Production and Licence [*sic*] Agreement" pursuant to which Discovery Channel agreed to pay the BBC $22 million annually to co-produce programming. (Doc. 60-9; *see also* Doc. 60-1, ¶ 7; Doc. 63, pp. 18–19 n. 1). Although the agreement gave the BBC "final artistic and editorial control" of each co-produced program, and although the BBC expressly warranted that, "to the best of its knowledge and belief (having exercised due diligence in its enquiries)," no co-produced program would "defame any individual or entity," the agreement also required Discovery Channel and the BBC to consult "on the form and content" and "all creative aspects" of each program, "throughout all phases of production," and "tak[e] into account the requirements of [Discovery's] audience." (Doc. 60-9, p. 20, ¶ 15.1; p. 28, ¶ 20.1.8). In addition, the agreement gave Discovery Channel the limited right to edit a program before publishing the program in the United States, and the agreement prohibited Discovery from using any program produced pursuant to the agreement "in any manner . . . which is defamatory or invades the privacy of any person." (Doc. 60-9, pp. 20-21, ¶¶ 15.5–15.8).

Mr. Collins testified that he relied on the BBC "to undertake [] diligent research in keeping with the best standards and [he] relied on them and expected them to do all of their work." (Doc. 64-12, p. 17). Yet, Mr. Collins recognized that as the executive producer of Discovery's version of the film, it was his job "to make

sure" that the BBC was performing its due diligence. (*See* Doc. 64-12, p. 17). According to Mr. Collins, the BBC had "satisfactory answers" every time he asked about the potential legal consequences of a given aspect of the film. (*See* Doc. 64-12, p. 17). Mr. Collins testified that he "had absolutely no reason to believe that the [BBC] did not do [its] job." (Doc. 64-12, p. 17).[11]

Nevertheless, it is undisputed that Mr. Collins had available to him two resources that he could have used to verify the accuracy of scenes in the film. He could have consulted Dr. Feynman's book. Doing so would have revealed that engineers gave Dr. Feynman the Ivory soap estimate of success at Marshall Space Flight Center, not in a cafeteria; Dr. Lovingood participated in the conversation; and the discussion concerned the possibility of main engine failure (a statistic that NASA's engineers could calculate and guard against), not mission failure. Mr. Collins never questioned the BBC about the scene involving Dr. Lovingood. (Doc. 60-7, pp. 144–45). Mr. Collins only skimmed Dr. Feynman's book, so he did not realize that the

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[11] Discovery Channel argues that Mr. Collins's efforts were adequate, and the company offered testimony from James Hirsch to prove the point. Mr. Hirsch testified that it was customary in the entertainment industry for Discovery Channel to "rely[] on the [BBC] to 'get it right,' both legally and creatively." (Doc. 60-28, p. 5). Mr. Hirsch's professional biography is located at Doc. 60-28, pp. 11–14. Dr. Lovingood filed a motion to exclude Mr. Hirsch's testimony on grounds that the testimony does not satisfy the requirements of Federal Rule of Evidence 702. (Doc. 50). Because the Court has not relied on Mr. Hirsh's opinion in reaching its decision, the Court denies Dr. Lovingood's motion to strike because the motion is moot.

discussion between Dr. Lovingood and Dr. Feynman about the probability of a main engine malfunction took place at Marshall Space Flight Center in Huntsville rather than before the Presidential Commission. (Doc. 60-7, pp. 146–49). After reading the book, Mr. Collins acknowledged that there was a "substantial difference" between the book's depiction of the encounter between Dr. Feynman and Dr. Lovingood and the film's depiction of the event. (Doc. 60-7, pp. 148–49). There is a transcript of Dr. Lovingood's testimony before the Presidential Commission. (Doc. 60-6, pp. 91–92). There is no evidence that Mr. Collins reviewed that transcript to determine whether the BBC's portrayal of Dr. Lovingood's testimony was accurate. In short, Mr. Collins made virtually no independent effort to determine whether the BBC accurately portrayed Dr. Lovingood in the docudrama.

Although Discovery Channel clearly had the means and the opportunity to be more proactive in its monitoring of the content of the Challenger film, and a jury potentially could infer from the evidence that Discovery Channel willfully avoided the opportunity, the Court finds on the record in this particular case that the evidence that Dr. Lovingood has offered does not satisfy the "elusive constitutional standard" for actual malice. A number of circumstances compel the Court's conclusion.

First, unlike *Harte-Hanks Commc'ns* and *Hunt*, cases in which the United States Supreme Court and the Eleventh Circuit Court of Appeals found that trial courts properly allowed juries to resolve factual disputes concerning the defendant publisher's intent,

this case does not involve a newspaper article and a reporter's potentially unreliable sources. This case concerns a docudrama. The "drama" aspect of the film presupposes that aspects of the historical event are fictionalized in the film for entertainment purposes. *See Davis v. Costa-Gavras*, 654 F.Supp. 653, 658 (S.D.N.Y. 1987) (explaining that the docudrama genre "utilize[s] simulated dialogue, composite characters, and a telescoping of events occurring over a period into a composite scene or scenes" whereas a documentary is "a nonfictional story or series of historical events portrayed in their actual location; a film of real people and real events as they occur. A documentary maintains strict fidelity to fact."). Thus, changing the location in which a conversation took place and reducing the number of people involved in the conversation is not the sort of false information that a docudrama's co-producer would be expected to detect and identify as potentially libelous material.

The falsification of sworn testimony is another matter. Such conduct has a significant potential to damage the reputation of the individual depicted in the historical dramatization. Under certain circumstances, a jury question concerning actual malice could exist where a defendant published—or republished—a false reenactment of sworn testimony where the defendant had available to it the means to verify the accuracy of the dramatic depiction of the testimony but willfully or recklessly disregarded the opportunity.

In this case though, there is nothing so improbable in the scene of Dr. Lovingood's testimony before the Presidential Commission that would have prompted

Mr. Collins to obtain a transcript of the hearing to investigate the accuracy of the scene. Although it is abundantly clear to Dr. Lovingood and to his colleagues from NASA that the scene contains false information, there is nothing that would prompt an observer lacking Dr. Lovingood's expertise to recognize the significant engineering distinction between main engine failure and mission failure. The analysis is not altered by the fact that Mr. Collins now acknowledges in retrospect and in light of this litigation that the statements attributed to Dr. Lovingood in the *Challenger* film are inaccurate because the record contains no evidence that indicates that the distinction was discernible when Mr. Collins first reviewed the movie. And unlike the evidence in *Harte-Hanks Commc'ns* and *Hunt* that suggested that the reporters' sources were unreliable, there is no evidence in the record here that the BBC is not a reputable producer of television programs and movies. Therefore, there is no evidence from which jurors could reasonably infer that the Discovery defendants had reason to doubt the accuracy of the scenes in the *Challenger* film or that the defendants' failure to do more to investigate the accuracy of the two scenes at issue evidences "an intent to avoid the truth." *See* p. 17, above. The evidence in the record may rise to the level of negligence, but it does not go further.

Consequently, the Discovery defendants are entitled to judgment as a matter of law on Dr. Lovingood's defamation claim.

B. Dr. Lovingood's false light invasion of privacy claim

To be subject to liability for the tort of false light invasion of privacy, a defendant must have "knowledge of or act[] in reckless disregard as to the falsity of the publicized matter and the false light in which the other would be placed." *Ex parte Bole*, 103 So. 3d at 51 (citations and internal quotation marks omitted). Because, as discussed above, Dr. Lovingood has not provided evidence that shows that Discovery acted recklessly when it broadcast "The Challenger Disaster," Discovery is entitled to judgment as a matter of law on Dr. Lovingood's false light invasion of privacy claim. *See Smith v. Huntsville Times, Co., Inc.*, 888 So. 2d 492, 496 n. 1 (Ala. 2004) (explaining that the "same standard applies to all of [the plaintiff's] claims, regardless of whether they are stated as 'defamation' or 'false light invasion of privacy").

IV. CONCLUSION

For the reasons discussed above, the Court **GRANTS** the Discovery defendants' motion for summary judgment with respect to Dr. Lovingood's claims for defamation and false light invasion of privacy. (Doc. 62). The Court will enter a separate order consistent with this memorandum opinion.

DONE and **ORDERED** this August 1, 2017.

s/_____
MADELINE HUGHES HAIKALA
UNITED STATES DISTRICT JUDGE

APPENDIX D

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA NORTHEASTERN DIVISION

Case No. 5:14-cv-00684-MHH

[Filed August 1, 2017]

JUDSON A. LOVINGOOD,	)
	)
Plaintiff,	)
	)
v.	)
	)
DISCOVERY COMMUNICATIONS, INC., et al.,	)
	)
Defendants.	)
	)

ORDER

In accordance with the memorandum opinion entered contemporaneously with this order (Doc. 74), the Court **DISMISSES WITH PREJUDICE** Dr. Lovingood's complaint. (Doc. 1-1). The Court asks the Clerk to please close the file.

DONE and **ORDERED** this August 1, 2017.

s/_____
MADELINE HUGHES HAIKALA
UNITED STATES DISTRICT JUDGE

APPENDIX E

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA NORTHEASTERN DIVISION

Case No. 5:14-cv-00684-MHH

[Filed September 30, 2015]

JUDSON A. LOVINGOOD,	)
	)
Plaintiff,	)
	)
v.	)
	)
DISCOVERY COMMUNICATIONS, INC., et al.,	)
	)
Defendants.	)
	)

MEMORANDUM OPINION

"The Challenger Disaster," a popular 2013 film, chronicled the events leading up to the tragic crash that destroyed The Challenger spacecraft in 1986 and killed its entire crew. A scene in the film depicts Judson Lovingood, a NASA engineer, testifying in front of the Presidential Commission that investigated the disaster. Mr. Lovingood contends that the film defames him and paints him in a false light. Mr. Lovingood brought this defamation lawsuit against the defendants

Discovery Communications Inc., The Science Channel, The Discovery Channel, the British Broadcasting Corporation, The Open University, and Kate Gartside for their roles in writing, producing, and broadcasting the film.[1] The Discovery Channel, Discovery Communications, Inc., and the Science Channel (hereinafter "Discovery") have jointly filed a motion to dismiss the complaint for failure to state a claim. (Doc. 6). BBC has filed a motion to dismiss for lack of personal jurisdiction and failure to state a claim (Doc. 14), and Kate Gartside has filed a motion to dismiss for lack of personal jurisdiction and insufficient service of process (Doc. 32). For the reasons discussed, the Court denies Discovery's motion to dismiss, grants BBC's motion to dismiss, and grants Ms. Gartside's motion to dismiss.

I. STANDARDS OF REVIEW

A. 12(b)(6)

Rule 12(b)(6) enables a defendant to move to dismiss a complaint for "failure to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). Pursuant to Rule 8(a)(2), a complaint must contain, "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). "Generally, to survive a [Rule 12(b)(6)] motion to dismiss and meet the requirement of Fed. R. Civ. P. 8(a)(2), a complaint need not contain 'detailed factual

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[1] During the oral argument on defendant The Open University's motion to dismiss, the plaintiff conceded that The Open University was due to be stricken as a defendant in this action, and the Court granted The Open University's motion to dismiss. (Doc. 30).

allegations,' but rather 'only enough facts to state a claim to relief that is plausible on its face.'" *Maledy v. City of Enterprise*, 2012 WL 1028176, at *1 (M.D. Ala. Mar. 26, 2012) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555, 570 (2007)). "Specific facts are not necessary; the statement needs only 'give the defendant fair notice of what the . . . claim is and the grounds upon which it rests.'" *Erickson v. Pardus*, 551 U.S. 89, 93 (2007) (quoting *Twombly*, 550 U.S. at 555).

In deciding a Rule 12(b)(6) motion to dismiss, a court must view the allegations in a complaint in the light most favorable to the non-moving party. *Watts v. Fla. Int'l Univ.*, 495 F.3d 1289, 1295 (11th Cir. 2007). A court must accept well-pleaded facts as true. *Grossman v. Nationsbank, N.A.*, 225 F.3d 1228, 1231 (11th Cir. 2000).

B. 12(b)(2)

"A plaintiff seeking to establish personal jurisdiction over a nonresident defendant 'bears the initial burden of alleging in the complaint sufficient facts to make out a prima facie case of jurisdiction.'" *Louis Vuitton Malletier, S.A. v. Mosseri*, 736 F.3d 1339, 1355 (11th Cir. 2013) (quoting *United Techs. Corp. v. Mazer*, 556 F.3d 1260, 1274 (11th Cir. 2009)). "Where, as here, the defendant challenges jurisdiction by submitting affidavit evidence in support of its position, the burden traditionally shifts back to the plaintiff to produce evidence supporting jurisdiction." *Mazer*, 556 F.3d at 1274 (internal quotation marks and citations omitted). To survive a motion to dismiss for lack of personal jurisdiction, the non-moving party must "present[] enough evidence to withstand a motion for a

directed verdict." *Stubbs v. Wyndham Nassau Resort & Crystal Palace Casino*, 447 F.3d 1357, 1360 (11th Cir. 2006). A motion for a directed verdict must be denied where "there is substantial evidence opposed to the motion such that reasonable people, in the exercise of impartial judgment, might reach differing conclusions." *Carter v. City of Miami*, 870 F.2d 578, 581 (11th Cir. 1989). Although defendants may submit affidavits in support of 12(b)(2) motions, the Court must construe all reasonable inferences and factual conflicts in favor of the non-moving party. *Stubbs*, 447 F.3d at 1360.

II. FACTUAL AND PROCEDURAL BACKGROUND

Launched in 1986, the Space Shuttle Challenger came apart shortly after takeoff in a crash that killed the shuttle's seven crew members. (Doc. 1-1, ¶ 2). Plaintiff Judson Lovingood was working as the NASA-MSFC Shuttle Projects Office Deputy Manager when the Challenger disaster occurred. (Doc. 1-1, ¶ 1). President Ronald Reagan established a Presidential Commission to investigate the accident. (Doc. 1-1, ¶ 2). The Commission completed its investigation and released a report in June 1986. (Doc. 1-1, ¶ 2). Dr. Richard P. Feynman, a Nobel Laureate and Cal Tech physics professor, served on the Commission. (Doc. 1-1, ¶ 2). Dr. Feynman wrote a book about the experience entitled "What Do You Care What Other People Think" that was published in 1988. (Doc. 1-1, ¶ 2).

Dr. Feynman's book provided the basis for a film entitled "The Challenger Disaster." The film debuted on The Science Channel and The Discovery Channel in the United States in 2013. (Doc. 1-1, ¶¶ 3-4). The film

was broadcast to approximately 2 million "premiere viewers" and 5 million "unique viewers," making it one of the most watched programs in the history of the Science Channel. (Doc. 1-1, ¶ 3). The film begins with the following message displayed in bold print: "THIS IS A TRUE STORY." (Doc. 1-1, ¶ 4). The introductory text indicates that the film is based on Dr. Feynman's book. (*Id.*). Like the book, the film concerns the events leading up to the Challenger disaster. (Doc. 1-1, ¶¶ 2, 4). The film features actors playing the roles of Dr. Feynman and Judson Lovingood. (Doc. 1-1, ¶ 3).

In his complaint, Mr. Lovingood alleges that "[p]ertinent and significant aspects of [the film] are not true . . . and are, in fact, false and defamatory." (Doc. 1-1, ¶ 4). Mr. Lovingood asserts that the writers and producers of The Challenger Disaster sacrificed the truth and defamed Mr. Lovingood in an effort to make a more dramatic film. (Doc. 1-1, ¶ 4). The film shows NASA engineers assessing the probability of total mission failure and loss of the entire crew, when in reality, the engineers had assessed failure probabilities only with respect to "the separate components of [the] complex shuttle." (Doc. 1-1, ¶ 6). The film "failed to make the very significant distinction among probability estimates for [the various components] . . . and twisted evaluations that NASA had determined for the components into a false picture of probability of total mission failure with loss of life to the crew." (Doc. 1-1, ¶ 6).

One sequence of The Challenger Disaster shows the actor playing Mr. Lovingood and another NASA employee testifying before the Presidential

Commission. (Doc. 1-1, ¶ 7). Dr. Feynman asks the other NASA employee: "Can you remind me what NASA calculates the probability of shuttle failure to be? Failure meaning the loss of vehicle and the death of the entire crew." (Doc. 1-1, ¶ 7). After Dr. Feynman's question, an actor playing another member of the Presidential Commission asks Mr. Lovingood to answer the question, and Mr. Lovingood responds that the probability is 1 in 100,000. (Doc. 1-1, ¶ 7). Dr. Feynman responds, stating that Mr. Lovingood's calculation is "a wish," rather than a true estimate, and that NASA's own engineers estimated the probability of failure to be close to 1 in 200. (Doc. 1-1, ¶ 7). The sequence's "clear statement and depiction was that Lovingood had lied about the probability of total failure being 1 in 100,000 when NASA's own engineers had said it was 1 in 200." (Doc. 1-1, ¶ 7, p. 7).

Mr. Lovingood alleges that he never testified in person before the Commission or offered Dr. Feynamn an estimate of total shuttle failure. (Doc. 1-1, ¶ 7). Mr. Lovingood also alleges that no engineer ever calculated the probability of total shuttle failure at 1 in 200 and that Dr. Feynman's book correctly described an engineer offering a 1-in-200 probability assessment when asked about the failure of a particular component. (Doc. 1-1, ¶ 7). Mr. Lovingood contends that the film paints him in a false light because the film suggests that "NASA and Lovingood knew this made-up [1-in-200] calculation before th[e] terrible Challenger disaster and ignored it" (Doc. 1-1, ¶ 7, p. 9), "present[ing] a danger to the astronauts who were not told of such a high probability of failure." (Doc. 1-1, ¶ 7, p. 8).

Mr. Lovingood alleges that Discovery Communications, Inc. and BBC Films jointly produced The Challenger Disaster, Kate Gartside wrote the script for the film, and The Discovery Channel and The Science Channel later broadcast the film. (Doc. 1-1, ¶ 8). Mr. Lovingood asserts defamation and invasion of privacy claims against all of the defendants. (Doc. 1-1, ¶ 10). All of the defendants ask the Court to dismiss Mr. Lovingood's claims. (Docs. 6, 14, 32). The parties have briefed the motions. (Docs. 7, 10, 12, 15, 21, 29, 33). On this record, the Court considers the defendants' motions.

III. ANALYSIS

A. Discovery's 12(b)(6) Motion to Dismiss

1. Defamation Claim

To establish a prima facie case of defamation under Alabama law, "a plaintiff must show: [1] that the defendant was at least negligent [2] in publishing [3] a false and defamatory statement to another [4] concerning the plaintiff, [5] which is either actionable without having to prove special harm (actionable per se) or actionable upon allegations and proof of special harm (actionable per quod)." *Ex Parte Bole*, 103 So. 3d 40, 51 (Ala. 2012) (quoting *Ex parte Crawford Broad. Co.*, 904 So. 2d 221. 225 (Ala. 2004) (emphasis and internal quotation marks omitted)).

Discovery argues that Mr. Lovingood's complaint fails to state a defamation claim because: (1) the statements made in the film are not "of and concerning" Mr. Lovingood; (2) the statements are

substantially true; (3) the statements are not defamatory as a matter of law; and (4) Mr. Lovingood did not plead special damages. (Doc. 7, pp. 6, 11, 19, 22). Discovery also argues that Mr. Lovingood's claim for punitive damages is barred because he failed to send a written demand for a retraction before filing this lawsuit. (Doc. 7, p. 24). The Court addresses these arguments in turn.

i.

With respect to Discovery's argument that statements in the film are not "of and concerning" Mr. Lovingood, the Challenger Disaster film depicted Mr. Lovingood testifying under oath before the Presidential Commission. The film identifies Mr. Lovingood by name. That Mr. Lovingood testified about NASA's work does not mean the statements in the film concern only NASA. The film suggests that Mr. Lovingood lied or attempted to cover up a "high probability [of] failure by giving a 1 in 100,000 probability of total mission failure." (Doc. 1-1, p. 8). The suggestion that Mr. Lovingood lied or at least grossly understated the probability-of-failure estimate impugns not only the organization for which Mr. Lovingood worked. The statements concern Mr. Lovingood as an individual.

Discovery relies on *New York Times v. Sullivan*, 376 U.S. 254 (1964) and *Rosenblatt v. Baer*, 383 U.S. 75 (1966) to argue that the statements in the film concern only NASA as an organization, not Mr. Lovingood (Doc. 7, p. 8); however, those cases suggest the opposite result. In *Sullivan*, the Supreme Court held that a city commissioner could not recover under a defamation theory when the allegedly defamatory statements were

made solely about the police department that the city commissioner helped oversee. 376 U.S. at 292. The alleged defamation in *Rosenblatt* concerned criticism of a government agency and included no specific reference to the plaintiff. 383 U.S. at 80-83. Discovery's reliance on these cases is unpersuasive because the publications at issue in *Sullivan* and *Rosenblatt* allegedly defamed the plaintiff organizations and did not identify the plaintiffs by name.

In this case, the alleged defamation is personal to Mr. Lovingood. Mr. Lovingood has pleaded that the statements in the film were "of and concerning" him. The film portrays Mr. Lovingood—identified by name while under oath—underrepresenting NASA's probability-of-failure estimates for the Challenger mission, thereby suggesting that Mr. Lovingood attempted to manipulate the Commission's investigation. (Doc. 7-2, pp. 22-23). Viewing the allegations in the complaint in the light most favorable to Mr. Lovingood, the Court finds that Mr. Lovingood has alleged adequately that the statements at issue concerned him.

ii.

As for Discovery's argument that the statements at issue are substantially true, "[t]ruth is a 'complete and absolute defense' to defamation." *Ex Parte Bole*, 103 So. 3d at 51 (quoting *Battles v. Ford Motor Credit Co.*, 597 So. 2d 688, 692 (Ala. 1992)). A "statement is not considered false unless it 'would have a different effect on the mind of the reader from that which the pleaded truth would have produced.'" *Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496, 516 (1991). Statements

that are "substantially correct," meaning that they are true in all material respects, are not actionable. *Drill Parts & Service Co. v. Joy Mfg. Co.*, 619 So. 2d 1280, 1290 (Ala. 1993); *Kirkpatrick v. Journal Pub. Co.*, 97 So. 58, 59 (Ala. 1923). "In actions for libel or slander, the defendant ultimately bears the burden of showing that the defamatory words are true." *Crutcher v. Wendy's of North Alabama, Inc.*, 857 So. 2d 82, 95 (Ala. 2003) (citing *Brothers v. Brothers*, 94 So. 175 (Ala. 1922)).

Mr. Lovingood alleges in his complaint that the statements in the film are not substantially true. Mr. Lovingood asserts that he did not make the statements attributed to him in the film and that the statements were not substantially true in material respects—namely, that he never lowballed the probability of total-mission failure to the Commission or to NASA engineers. (Doc. 1-1, p. 9). The film, however, depicts Mr. Lovingood doing just that. (*See* Doc. 7-2, pp. 22-23). The cases cited by Discovery—in which courts upheld grants of summary judgment to various defendants on the "substantial truth" issue—are unpersuasive, particularly with respect to the pending 12(b)(6) motion. In context, the statements that Mr. Lovingood describes in his complaint contain more than a minor inaccuracy. Rather, the statements suggest that Mr. Lovingood misled the Presidential Commission, officials at NASA, and the astronauts aboard the Challenger about the risks involved in the mission. Thus, the Court finds that Mr. Lovingood has adequately pled that the statements at issue are not substantially true.

iii.

Turning to Discovery's argument that the statements at issue are not defamatory as a matter of law, the Court must consider whether the statements are "reasonably capable of defamatory meaning." *Clark v. America's First Credit Union*, 585 So. 2d 1367, 1370 (Ala. 1991) (citing *Harris v. School Annual Pub. Co.*, 466 So. 2d 963, 964-65 (Ala. 1985)). A communication is defamatory if it "'[so] harms the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him.'" *Clark*, 585 So. 2d at 1370 (quoting *Harris*, 466 So. 2d at 964).

The statements in question are reasonably capable of defamatory meaning. Mr. Lovingood states in his complaint: "As a proximate consequence [of the statements], Plaintiff has had his character and reputation impaired and made the subject of ridicule, contempt and scorn in the scientific community, his own community, and among the viewers of the movie throughout the United States and abroad due to the tragic disaster of the Challenger and the false characterization of Plaintiff as a weak, uninformed, manager who callously ignored engineers reports at NASA that endangered the lives of astronauts in the shuttle program." (Doc. 1-1, p. 11). While the disputed portion of the film might be susceptible to multiple meanings, the defamatory meaning that Mr. Lovingood ascribes to The Challenger Disaster film is a reasonable, plausible one. Taking the alleged statements in the light most favorable to Mr.

Lovingood, the Court finds that the statements are reasonably capable of a defamatory meaning

iv.

Discovery argues that because the published statements require additional facts to understand why they might be defamatory, Mr. Lovingood's failure to plead special damages is fatal. Mr. Lovingood counters by arguing that the statements are actionable per se and that Alabama law presumes damages for false, defamatory statements. (Doc. 10, p. 21).

"In cases of libel, if the language used exposes the plaintiff to public ridicule or contempt, though it does not embody an accusation of crime, the law presumes damage to the reputation, and pronounces it actionable per se." *Butler v. Town of Argo*, 871 So. 2d 1, 16 (Ala. 2003) (quoting *Ceravolo v. Brown*, 364 So. 2d 1155, 1156-57 (Ala. 1978)). A statement that is libelous per quod is not libelous on its face and instead is actionable only by reference to "extrinsic facts showing circumstances under which" the statement was published. *Cottrell v. Nat'l Coll. Athletic Ass'n*, 975 So. 2d 306, 346 (Ala. 2007). "In the absence of language that is defamatory per se, a plaintiff must allege and prove special damages resulting from the defamation." *Clark v. America's First Credit Union*, 585 So. 2d 1367, 1371 (Ala. 1991).

Mr. Lovingood has adequately pleaded that the statements in question were libelous per se, and thus, he does not have to plead special damages. The film depicts Mr. Lovingood giving false, sworn testimony to a Presidential Commission regarding the probability of

a total-launch failure. As stated in the complaint, such statements have directly exposed Mr. Lovingood to public ridicule. Additionally, viewing the alleged facts in the light most favorable to Mr. Lovingood, the depicted false, sworn testimony to the Commission is tantamount to the accusation of a crime—namely, perjury. The context of the statements in the film provides additional support for this view. In the film, a member of the Presidential Commission, responded to Mr. Lovingood's assessment by stating: "One in two hundred. Wow. That's not what the astronauts were aware of." (Doc. 7-2, p. 23). No extrinsic information or inferences are necessary to understand the defamatory nature of these statements.

Because the film's statements expose Mr. Lovingood to public ridicule and contempt and are tantamount to an accusation of crime, Mr. Lovingood has pleaded libel per se. Thus, Mr. Lovingood is not required to plead special damages.

v.

Discovery argues that Mr. Lovingood is barred from recovering punitive damages because he failed to allege that he sent Discovery a request for a retraction. Alabama Code § 6-5-186 provides that:

> punitive damages shall not be recovered in any action for libel on account of any publication unless . . . (2) it shall be proved that five days before the commencement of the action the plaintiff shall have made written demand upon the defendant for a public retraction of the charge or matter published; and the defendant

> shall have failed or refused to publish within five days, in as prominent and public a place or manner as the charge or matter published occupied, a full and fair retraction of such charge or matter.

Mr. Lovingood states in the complaint: "Plaintiff wrote the Science Channel on November 19, 2013, to complain about the falsehoods in the movie. No response was made to this letter." (Doc. 1-1, ¶ 11). During discovery, facts may come to light that establish that Mr. Lovingood failed to comply with the requirements of section 6-5-186; but construing the complaint in the light most favorable to Mr. Lovingood, the complaint indicates that he complied. Mr. Lovingood's complaint "about the falsehoods in the movie" plausibly may have included a demand for public retraction. That Discovery did not respond to Mr. Lovingood's letter suggests that Discovery did not publish a retraction. If evidence reveals that Mr. Lovingood failed to send the retraction letter, then he will not be able to recover punitive damages. For now, however, Mr. Lovingood has pleaded sufficient facts for his punitive damages claim to go forward.

2. "False Light" Invasion of Privacy

Alabama has adopted the following definition for "false light" invasion of privacy:

> One who gives publicity to a matter concerning another that places the other before the public in a false light is subject to liability to the other for invasion of his privacy, if (a) the false light in which the other was placed would be highly

> offensive to a reasonable person, and (b) the actor had knowledge of or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the other would be placed.

Butler, 871 So. 2d at 12 (quoting Restatement (Second) of Torts § 652E (1977)). "[U]nlike defamation, truth is not an affirmative defense to a false-light claim; rather, 'falsity' is an element of the plaintiff's claim, on which the plaintiff bears the burden of proof." *Regions Bank v. Plott*, 897 So. 2d 239, 244 (Ala. 2004) (emphasis omitted).

Discovery contends that the Court should dismiss Mr. Lovingood's false light claim because the statements in the film were substantially true and did not concern Mr. Lovingood. (Doc. 7, pp. 25-26). The Court already has ruled with respect to Mr. Lovingood's defamation claim that Mr. Lovingood has adequately pleaded falsity and that the alleged defamatory statements concern Mr. Lovingood. Mr. Lovingood's complaint also satisfies the remaining elements of false light. The false light in which Mr. Lovingood was placed—that is, misrepresenting crucial facts to the Commission and appearing to cover up details of the launch that could have saved the crew members' lives—would certainly be highly offensive to a reasonable person. Additionally, the allegations in the complaint, if proven, establish that Discovery was aware of both the publicized matter's false nature and the false light in which Mr. Lovingood would be placed. Thus, the Court denies Discovery's motion to dismiss the false light claim.

B. BBC's and Kate Gartside's 12(b)(2) Motions to Dismiss for Lack of Personal Jurisdiction

In determining whether to exercise personal jurisdiction over a foreign defendant, a federal court must consider (1) whether the exercise of jurisdiction is permitted by the state long-arm statute, and (2) whether the exercise of jurisdiction would violate the Due Process Clause of the Fourteenth Amendment to the United States Constitution. *Mazer*, 556 F.3d at 1274. Here, the two inquiries merge because "Alabama's long-arm statute permits service of process to the fullest extent constitutionally permissible." *Sloss Indus. Corp. v. Eurison*, 488 F.3d 922, 925 (11th Cir. 2007) (citing Ala. R. Civ. P. 4.2(b)).

For a court to satisfy due process in exercising personal jurisdiction over an out-of-state defendant, the defendant must have "certain minimum contacts with the [forum] State such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice." *Daimler AG v. Bauman*, 134 S. Ct. 746, 754 (2014) (quoting *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945)) (internal quotation marks omitted). *International Shoe*'s conception of "fair play and substantial justice" gave rise to two categories of personal jurisdiction: (1) general jurisdiction, and (2) specific jurisdiction. *Daimler*, 134 S. Ct. at 754. General jurisdiction "refers to the power of a court in the forum to adjudicate any cause of action involving a particular defendant, irrespective of where the cause of action arose." *Oldfield v. Pueblo De Bahia Lora, S.A.*, 558 F.3d 1210,

1220 n.27 (11th Cir. 2009). Specific jurisdiction "refers to jurisdiction over causes of action arising from or related to a defendant's actions within the forum." *Id.*

1. General Jurisdiction

"A court may assert general jurisdiction over foreign (sister-state or foreign-country) corporations to hear any and all claims against them when their affiliations with the State are so 'continuous and systematic' as to render them essentially at home in the forum State." *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S. Ct. 2846, 2851 (2011). Outside of exceptional cases, a corporation is considered "at home" in either its place of incorporation or its principal place of business. *Daimler*, 134 S. Ct. at 760, 761 n. 19. "For an individual, the paradigm forum for the exercise of general jurisdiction is the individual's domicile." *Goodyear*, 131 S. Ct. at 2853.

2. Specific Jurisdiction

In specific jurisdiction cases, the Eleventh Circuit applies a "three-part due process test, which examines: "(1) whether the plaintiff's claims 'arise out of or relate to' at least one of the defendant's contacts with the forum; (2) whether the nonresident defendant 'purposefully availed' himself of the privilege of conducting activities within the forum state, thus invoking the benefit of the forum state's laws; and (3) whether the exercise of personal jurisdiction comports with 'traditional notions of fair play and substantial justice.'" *Louis Vuitton*, 736 F.3d at 1355 (citations omitted). The plaintiff bears the burden of establishing the first two prongs, after which the

burden shifts to the defendant to make a "compelling case" that the exercise of jurisdiction would violate traditional notions of fair play and substantial justice. *Id.* (quoting *Diamond Crystal Brands, Inc. v. Food Movers Int'l, Inc.*, 593 F.3d 1249, 1267 (11th Cir. 2010)).

As to the first prong, the Court's "inquiry must focus on the direct causal relationship between the defendant, the forum, and the litigation." *Louis Vuitton*, 736 F.3d at 1355-56. As to the second prong, the Eleventh Circuit has two applicable tests in intentional tort cases. *Id.* at 1356. First, the Eleventh Circuit may apply the "effects test," which the Supreme Court articulated in *Calder v. Jones*, 465 U.S. 783 (1984). Under the effects test, a single tortious act can establish purposeful availment, without regard to whether the defendant had any other contacts with the forum state, if the tort "(1) was intentional; (2) was aimed at the forum state; and (3) caused harm that the defendant should have anticipated would be suffered in the forum state." *Id.* at 1356 (internal quotation marks omitted). Second, the Eleventh Circuit may apply the traditional minimum contacts test for purposeful availment, which asks whether the defendant's contacts: "(1) are related to the plaintiff's cause of action; (2) involve some act by which the defendant purposefully availed himself of the privileges of doing business within the forum; and (3) are such that the defendant should reasonably anticipate being haled into court in the forum." *Id.* at 1357-58 (citing *S.E.C. v. Carillo*, 115 F.3d 1540, 1542 (11th Cir. 1997)).

3. BBC's Motion to Dismiss

Mr. Lovingood's complaint does not allege sufficient facts to make out a prima facie case of personal jurisdiction over BBC. The complaint's only references to BBC state that BBC helped produce, and retained the copyright for, the film at issue. (Doc. 1-1, pp. 10-11). The complaint contains no facts suggesting that BBC is "essentially at home" in Alabama or that BBC has had any contacts with Alabama, let alone "minimum" contacts. Notwithstanding Mr. Lovingood's failure to meet his initial burden of establishing jurisdiction over BBC, BBC has submitted affidavit evidence in support of its position. (Docs. 15-1, 15-2). Mr. Lovingood has not submitted evidence in response to BBC's affidavits.

The Court may not exercise general personal jurisdiction over BBC. BBC is not incorporated in Alabama, and it does not have its principal place of business in Alabama. (Doc. 15-1, ¶¶ 2, 4). In fact, BBC does not have any business offices in Alabama. (Doc. 15-1, ¶ 5). Mr. Lovingood's basis for asking the Court to exercise general jurisdiction over BBC is that BBC distributes its World Service radio station over the SiriusXM Satellite Radio service. (Doc. 21, p. 3 n.2). Mr. Lovingood explains that "it would not be unreasonable to assume that SiriusXM has tens of thousands of subscribers in Alabama alone." (Doc. 21, p. 3 n.2). However, broadcasting a program over satellite radio is not a sufficient contact to render BBC "essentially at home" in a state that is neither its place of incorporation nor its principal place of business. The Supreme Court has made clear that "continuous activity of some sorts within a state is not enough to

support the demand that the corporation be amenable to suits unrelated to that activity." *Daimler*, 134 S. Ct. at 757 (quoting *International Shoe*, 326 U.S. at 318). To hold such would subject BBC to general jurisdiction in all fifty states, which is incompatible with the Supreme Court's decisions in the area of general jurisdiction. *See, e.g.*, *Goodyear*, 131 S. Ct. at 2856-57. Because BBC's contacts with Alabama are not so "continuous and systematic" so as to render it "essentially at home" in Alabama, the Court may not exercise general personal jurisdiction over BBC.

Additionally, the Court may not exercise specific personal jurisdiction over BBC. BBC has not purposefully availed itself of the privilege of conducting activities in Alabama. Applying the effects test, Mr. Lovingood fails to establish the second and third factors because BBC's alleged torts were not directed at Alabama and did not cause a harm that BBC should have anticipated would be suffered in Alabama. The record indicates that BBC did not broadcast the film in the United States; rather, BBC's television broadcast of the film aired only in the United Kingdom. (Doc. 15-1, ¶¶ 13-14). If BBC's broadcast of the film did reach viewers in the United States—or more specifically, in Alabama—it was not the product of any purposeful or intentional act on BBC's part.

Mr. Lovingood also fails to satisfy the minimum contacts test. BBC made two phone calls to individuals in Alabama during the production of The Challenger Disaster film to "obtain some background information from [The Marshall Space Flight Center]." (Doc. 15-2, ¶ 4). The two phone calls—both of which were

unrelated to Mr. Lovingood—are too attenuated to warrant the exercise of specific jurisdiction. *See, e.g.*, *Walden*, 134 S. Ct. at 1123 ("Due process requires that a defendant be haled into court in a forum State based on his own affiliation with the State, not based on the random, fortuitous, or attenuated contacts he makes by interacting with other persons affiliated with the State.") (internal quotation marks omitted).

Relying on *Calder*, Mr. Lovingood argues that BBC's intentional torts occurred in Alabama, giving BBC fair notice that it might be haled into an Alabama court. (Doc. 21, p. 8). However, the defendants' contacts with the forum state in *Calder* were far greater than BBC's contacts with Alabama. In *Calder*, the defendants made multiple phone calls to California sources while writing a story about a California citizen's activities in California. 465 U.S. at 788-89. In *Calder*, "California [was] the focal point both of the story and of the harm suffered." *Id.* at 789. Alabama was in no sense a focal point of BBC's part in writing the script for and producing the film. The film depicts activities that occurred almost entirely outside of Alabama, including the statements in controversy. As BBC points out, BBC had no reason to know that any of the persons depicted in the film live or work in Alabama. (Doc. 29, p. 11). BBC did not avail itself of any privileges of doing business within Alabama; and in fact, the record indicates that BBC did not do any business within Alabama. Given the lack of evidence indicating that BBC purposefully directed activity toward Alabama, the Court may not exercise specific jurisdiction over BBC. The Court will grant BBC's motion to dismiss.

4. Kate Gartside's Motion to Dismiss

Ms. Gartside argues that the Court does not have personal jurisdiction over her because she lacks sufficient contacts with Alabama. (Doc. 33). According to Ms. Gartside's affidavit, Ms. Gartside is a resident of London, England, and she has had no direct contact with Alabama while writing the script for the film or otherwise. (Doc. 33-1, pp. 2-4). Mr. Lovingood did not file a response to Ms. Gartside's motion, much less provide substantial evidence that could withstand a motion for a directed verdict. *See, e.g.*, *Carter*, 870 F.2d at 581. Therefore, the Court will dismiss Ms. Gartside for lack of personal jurisdiction. *See, e.g.*, *Cox Enters., Inc. v. Holt*, 678 F.2d 936, 938-39 (11th Cir. 1982) (holding that the court did not have personal jurisdiction over a defendant writer in a libel action by an in-state plaintiff when the writer had never travelled to or contacted anyone in the forum state and therefore had not "purposefully direct[ed]" activities toward the state).

IV. CONCLUSION

For the reasons stated above, the Court **DENIES** Discovery's motion to dismiss for failure to state a claim upon which relief can be granted. (Doc. 6). The Court **GRANTS** BBC's motion to dismiss for lack of personal jurisdiction (Doc. 14) and **GRANTS** Kate Gartside's motion to dismiss for lack of personal jurisdiction (Doc. 32). The Court requests that the remaining parties please file a notice containing an amended proposed scheduling order.

DONE and **ORDERED** this September 30, 2015.

s/_____
MADELINE HUGHES HAIKALA
UNITED STATES DISTRICT JUDGE

APPENDIX F

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT
CASE NO. 18-12999-JJ

JUDSON LOVINGOOD

Appellant

vs.

DISCOVERY COMMUNICATIONS, INC. and
DISCOVERY COMMUNICATIONS, LLC

Appellees

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE NORTHERN
DISTRICT OF ALABAMA NORTHEASTERN
DIVISION

Civil Action No. 5:14-CV-00684-MHH

BRIEF OF APPELLANT

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CERTIFICATE OF INTERESTED PERSONS

Pursuant to 11th Cir.R.26.1-2, Appellant, Judson Lovingood, submits the following Certificate of Interested Persons:

1. Bradley Arant Boult Cummings, LLP (Attorneys for Appellees)
2. Brown, Jeffrey S. Esq. (Attorney for Appellant)
3. Discovery Communications, Inc. (Appellee and Defendant in the case before the United States District Court for the Northern District of Alabama, Civil Action No. 5:14-cv-00684 MHH)
4. Discovery Communications, LLC (Appellee and Defendant in the case before the United States District Court for the Northern District of Alabama, Civil Action No. 5:14-cv-00684 MHH)
5. Haikala, Honorable Madeline Hughes (Judge for the U.S. District Court for the Northern District of Alabama)
6. Heninger Garrison Davis, LLC (Attorneys for Appellant)
7. Heninger, Stephen D., Esq. (Attorney for Appellant)
8. Kaufmann, Daniel, Esq. (Attorney for Appellee)

9. Lovingood, Judson A. (Appellant and Plaintiff in the case before the United States District Court for the Northern District of Alabama, Civil Action No. 5:14-cv-00684 MHH)

10. Martin, Kimberly Bessiere, Esq. (Attorney for Appellee)

No publicly traded entity has any interest in this case or appeal.

STATEMENT REGARDING ORAL ARGUMENT

This case presents a unique and potentially important issue of first impression for the law of defamation. Therefore, Appellant respectfully requests an opportunity for oral argument on whether a totally false fabrication and alteration of sworn, transcribed testimony is entitled to First Amendment protection.

[*Table of Contents and Authorities Omitted from this Appendix*]

JURISDICTIONAL STATEMENT

It is undisputed that the District Court had original jurisdiction of this case by virtue of complete diversity. 28 U.S.C. § 1332(c) The trial court entered a final Order disposing of the entire case after denying Plaintiffs Rule 59 Motion to Alter, Amend or Vacate its granting of summary judgment on July 9, 2018. (Doc. 80) A timely Notice of Appeal from this final Order was filed with the District Court pursuant to Rules 3 & 4 Federal Rules of Appellate Procedure on July 17, 2018.

(Doc. 81) The appeal is from a final Order that disposes of all parties' claims.

ISSUES PRESENTED FOR REVIEW

I. WHETHER THE TOTAL FALSE FABRICATION OF ACTUAL, OFFICIAL, SWORN AND TRANSCRIBED TESTIMONY FOR SIMPLE ARTISTIC PURPOSES IN A PURPORTED DOCUDRAMA IS PROTECTED SPEECH UNDER THE FIRST AMENDMENT IN ANY CLAIM OF DEFAMATION?

II. WHETHER AN ACCEPTED AND ACKNOWLEDGED DUTY TO DOUBLE CHECK FOR HINTS OF FALSITY AND EVIDENCE/REASONABLE INFERENCES OF PURPOSEFUL AND RECKLESS AVOIDANCE OF THE TRUTH BY NEVER REVIEWING THE SOURCE BOOK AND OFFICIAL TRANSCRIPT OF TESTIMONY TO READILY DETERMINE FALSITY PUBLISHED SUPPORTS A JURY QUESTION ON ACTUAL MALICE BY PURPOSEFUL AVOIDANCE OF THE TRUTH.

III. WHETHER LOVINGOOD WAS A PUBLIC OFFICIAL FOR PURPOSES "ENTIRELY APART" FROM THE MOVIE SCENE AT ISSUE AND WHETHER THAT IS OF ANY DIFFERENCE WHEN FALSE TESTIMONY IS PUT IN HIS MOUTH THAT WAS UNDISPUTED IN ITS FALSITY.

CASE HISTORY

This defamation and invasion of privacy (false light) case was filed on February 28, 2014, in state court in Huntsville, Alabama. The case was removed to the Northern District of Alabama on April 14, 2014, based upon diversity of citizenship. (Doc. 1) After protracted discovery, the trial court granted summary judgment for the Defendants finding insufficient evidence/inferences of actual malice to support a jury trial on August 1, 2017. (Doc. 74) Plaintiff filed a Motion to Alter, Amend or Vacate that Order on August 9, 2017. (Doc. 76) which was supplemented on August 11, 2017. (Doc. 77) Defendants filed a Response in Opposition to that motion on September 13, 2017. (Doc. 78) Plaintiff filed a reply to that response on September 26, 2017. (Doc. 79) The trial court entered its final order denying Plaintiffs Motion to Alter, Amend or Vacate on July 9, 2018. (Doc. 80) Plaintiff filed a timely and proper Notice of Appeal on July 17, 2018. (Doc. 81)

SUMMARY OF THE ARGUMENT

Appellant maintains that the trial court erred in its initial granting of the Defendant's Motion for Summary Judgment and then its refusal to alter, amend or vacate that Order after an appropriate Rule 59(e) F.R.C.P. motion.

This case involves a film entitled "The Challenger Disaster" which was aired by Defendants on November 16, 2013 by broadcast on The Science Channel and the Discovery Channel in the United States. The film, which was announced at its beginning

as: "This is a true story" constructed a totally fabricated and false scene depicting Dr. Lovingood testifying under oath before the Presidential Commission investigating the cause of this terrible disaster in 1986 that took the lives of 7 astronauts. There is no dispute that the movie put personal, sworn and false testimony in the named mouth of Dr. Lovingood that made it appear that he and NASA had recklessly ignored calculations of failure probability that never took place in reality.

The trial court concluded that Lovingood met the definition of a public official and was thereby required to show actual malice. (Doc. 74) Appellant disputes this categorization because such a status/scrutiny must exist separate and distinct from the movie at issue and satisfy more general scrutiny purposes.

The trial court concluded that the facts showed: "It is undisputed that there never was such a calculation, and Dr. Lovingood never gave such testimony before the Presidential Commission." (Doc. 74 p. 2) "Both scenes are fabrication." (Doc. 74 p. 7) The trial court further noted: "A jury potentially could infer from the evidence that Discovery Channel willfully avoided the opportunity ... " to know of this false depiction. (Doc. 74 p. 22) However, the trial court determined, as a matter of law, that this was the use of a dramatic fictionalization and that the engineering falsities that were created as actual, sworn testimony from Lovingood were not capable of the audience recognizing the difference. (Doc. 74 p. 22-23)

Placing false and fabricated sworn testimony in the mouth of a witness should not be protected speech

under the First Amendment under any circumstances. The integrity and vitality of the oath must be recognized as hallowed ground in our system of law. This movie portrayed Lovingood as testifying to facts and calculations that never occurred and were the direct reversal of his actual, transcribed testimony. It was also at odds with the book that was used as a source for the announced "true story" that has been characterized as a docudrama. Docudrama may be used to look at actual, true testimony and inject dramatic questioning, interpretation or opinion on that actual testimony but there is no place for the embracing of protection for reckless/malicious creation of a false rendition of that recorded testimony under the guise that this artistic license makes the story false BUT MORE ENTERTAINING at the expense of the reputation of a sworn witness.

The facts of this case reveal the firm foundation of a jury question on whether this specific case shows purposeful avoidance of the truth so that the trial court should not have concluded, as a matter of law, there was no possibility that a reasonable juror could find such reckless and purposeful avoidance of the truth. Even the trial court's denial of the Rule 59(e) motion explained that the jury charge would state, in pertinent part:

"But, if Discovery failed to investigate because it intended to avoid the truth, this is evidence that Discovery either knew the statement was false or acted with reckless disregard to whether the statement was false or not." (Doc. 80 p. 4)

There should be a legal distinction between what is simply a "false statement" and what is created as "false, sworn testimony" where actual testimony is concrete and transcribed but reversed and falsified for a purported dramatic purpose. The Supreme Court has recognized that alteration of quotes as a rhetorical device can present a jury question on actual malice. *Masson v. New Yorker Magazine*, 501 U.S. 496, 513 (1991) If just altering quotations from a presentation or interview gets this respect, quotes from sworn testimony must be accorded an even more protected status especially where the publisher introduces its film – "This is a true story." To our knowledge, this is a case of first impression based on the unique facts in this case involving transcribed, sworn testimony.

The evidence shows that these Defendants assumed a contractual duty (even above the common law) to assure there was no defamation. This could not be delegated back to be solely borne by the contracting party BBC. The executive Director of Defendant testified he was required to "double check" and "look for hints" BBC was not properly researching the film for accuracy. (Doc. 64-12 p. 167-68) He even warned BBC "not to fictionalize an accusation against NASA." (Doc. 64-12 (Exhibit 5)) He asked for their research notes because he felt "like a backseat driver without a map." (Doc. 64-12 p. 110-11) He never received them and did not follow up so he could "double check" for 10 months before publication. He never read any part of the testimony transcript and only skimmed the source book. (Doc. 64-12 p. 128) There was substantial evidence and room for reasonable inferences to support a jury issue.

The Order of the trial court was in error in deciding these issues as a matter of law. The case should be reversed and remanded for further proceedings.

ARGUMENT

I. THE PUBLICATION OF FALSE STATEMENTS OF KNOWN RECORDED, SWORN TESTIMONY IS EVIDENCE OF RECKLESS DISREGARD OF THE TRUTH THAT PRESENTS A JURY QUESTION ON ACTUAL MALICE.

Even if the trial court was correct in determining that Dr. Lovingood was a public official, the evidence in this record supports, if not demands, submission of the issue of actual malice to a jury. The elementary concern which is the backbone of the requirement for clear and convincing evidence of malice in such cases is the federal concern of whether sending a particular libel case to the jury would "constitute a forbidden intrusion on the field of free expression." *New York Times Co. v. Sullivan*, 376 U.S. 254, 285 (1964)

> "Whether such conduct is merely negligent or rises to the level of recklessness is an issue for the jury." *Hammer v. Slater*, 20 F.3d 1137, 1143 (11th Cir. 1994) (Finding that the Plaintiff had presented the required "colorable evidence" that invoked a jury's determination)
>
> ****
>
> "There is no constitutional value in false statements of fact... neither the intentional lie nor the careless error materially advances society's interest in uninhibited, robust and

> wide-open debate on public issues." *Dun & Bradstreet v. Greenmoss Builders*, 472 U.S. 749, 767 (1985) (Justice White, concurring) (The main opinion noted: "We have long recognized that not all speech is of equal First Amendment importance" 472 U.S. at 758)
>
> ****
>
> "...there are categories of communication and certain utterances to which the majestic protection of the First Amendment does not extend because they are no essential part of any exposition of ideas and are of such slight social value as a step to the truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality." *Bose Corp. v. Consumers Union*, 466 U.S. 485, 504 (1984)
>
> ****
>
> "Calculated falsehood falls into that class of utterances which are no essential part of any exposition of ideas and are of such slight social value as a step to the truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality." *Garrison v. Louisiana*, 379 U.S. 64, 75 (1964) [emphasis added]

There is clearly a balancing interest that is required even where a public figure is involved. The Supreme Court has emphatically rejected the adoption of a "public controversy" characterization to replace that of a public figure. *Time, Inc. v. Firestone*, 424 U.S. 448 (1976) In doing so, the Court stated: "... we sought a

more appropriate accommodation between the public's interest in an uninhibited press and its equally compelling need for judicial redress of libelous utterances." 424 U.S. at 456.

Proof of actual malice includes "purposeful avoidance" of the truth. *Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657, 659 (1989) It includes an intent to avoid the truth. *Smith v. Huntsville Times Co., Inc.*, 888 So.2d 492, 500 (Ala. 2004) "There is no constitutional value in false statements of fact." *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340 (1974) The test for actual malice is focused upon alternative questions of whether the Defendant made the alleged defamatory publication "with knowledge that it was false or with reckless disregard of whether it was false or not." *New York Times Co. v. Sullivan*, 376 U.S. 254, 279-80; *Curtis Publishing v. Butts*, 388 U.S. 130, 164 (1967) Willful blindness is the equivalent of actual knowledge. *Hard Rock Café Licensing Corp. v. Concession Services*, 955 F.2d 1143, 1149 (7th Cir. 1992) The inquiry "is both subjective and time sensitive, turning on the Defendant's state of mind at the time of the publication." *Sindhi v. El-Moslimany*, 2018 U.S. App. Lexis 18857 (1st Cir. 2018) This Circuit has agreed that the inquiry is subjective. *Silvester v. American Broadcasting Companies*, 839 F.2d 1491, 1498 (11th Cir. 1988) This means that it is not a reasonable man objective standard but must be examined on a case by case basis with emphasis upon the particular facts and circumstances/duty with respect to this specific publication. "Reckless disregard, it is true, cannot be fully encompassed in one infallible definition.

Inevitably, its outer limits will be marked out through case by case adjudication..." *St. Amant v. Thompson*, 390 U.S. 727, 730 (1968) This subjective analysis is not simply left to the assertions or contentions of the Defendant but must be examined in a holistic manner. The Court's job "is not to scrutinize each allegation in isolation but to assess all the allegations holistically." *Tellabs, Inc. v. Makar Issues & Rights, Ltd.*, 551 U.S. 308 (2007) Indeed, the Court in *St. Amant v. Thompson*, took pains to instruct:

> "The Defendant in a defamation action by a public official cannot, however, automatically insure a favorable verdict by testifying that he published with a belief that the statements were true. The finder of fact must determine whether the publication was indeed made in good faith. Professions of good faith will be unlikely to prove persuasive, for example, where a story is fabricated by the defendant, is the product of his imagination, or is based wholly on an unverified anonymous phone call. Nor will they be likely to prevail when the publisher's allegations are so inherently improbable that only a reckless man would have put them in circulation. Likewise, recklessness may be found where there are obvious reasons to doubt the veracity of the informant or his reports. 390 U.S. at 732 [emphasis added]

This case involves the falsification, of sworn and transcribed testimony by Dr. Lovingood before the Presidential Commission charged with investigating the Challenger disaster. This was not simply a

tweaking or modification, it was total falsification of sworn testimony on a crucial matter in this investigation. There was a verbatim transcript of this testimony. There is absolutely no evidence that anyone at the BBC or Discovery Channel ever read any part of the transcript of this crucial testimony. In fact, the movie begins with three rolling title cards:

A) "This is a true story."

B) "Based on the book "What Do You Care What Other People Think" by Richard and Gweneth Feynman and Ralph Leighton and interviews with key individuals"

C) "Some scenes have been created for dramatic purposes."

There is no reference to the official, available and published transcript of the actual testimony. Yet, the critical scene in question was of sworn testimony given before the Commission. While some might contend that "some scenes" may be recreated for dramatic purposes, that license cannot be extended to changing and falsifying actual sworn testimony just for dramatic purposes. The representation was made that this was the testimony of Dr. Lovingood. It was totally fabricated, reversed and falsified according to the actual transcript and, in fact, even Dr. Feynman's book. It had no support anywhere and yet was depicted as actual testimony. Dramatic effect cannot be allowed to trump truth for entertainment purposes when it deals with such a concrete and verifiable truth that is contained in both the official transcript and the book. Therefore, this case squarely confronts this crucial,

legal question: "Can any media or publisher falsify and manipulate actual recorded, sworn testimony for any purpose that is protected by the First Amendment? "If the answer to that question is "yes" there is no protection to witnesses and our legal system in its charge to reveal and record sworn testimony. It should not matter in such an inquiry whether the witness is a public official, an expert or a common lay witness. The oath is common and essential to all. That oath cannot be tainted, falsified or thrown about like a football at the whim, agenda or fantasy of the publisher for any purpose he desires. One might accurately quote the transcribed and official, sworn testimony and then make comments on its interpretation or effect but no one has the liberty to change and falsify the testimony itself. This is sacred ground not only to the witness but also our system. Recreating and fabricating sworn testimony is a falsification of fact. As the Supreme Court has emphatically stated: "There is no constitutional value in false statements of fact." *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340 (1974) The oath must be protected for its revelation of the truth or punished for its intentional falsehood in our system. As this Court stated in *Price v. Time, Inc.*, 416 F.3d 1327 (11th Cir. 2005):

> "The object of requiring an oath is to instill in the witness an awareness of the seriousness of the obligation to tell the truth, or to affect the conscience of the witness and thus compel the witness to speak the truth, and also to lay the witness open to punishment for perjury in case the witness willfully falsifies." 416 F.3d at 1347.

While "reckless disregard" may be incapable of being encapsulated in one infallible definition as the Supreme Court stated in *St. Amant v. Thompson*, 390 U.S. at 730, its outer limits cannot embrace willful blindness or avoidance of the truth in fabricating sworn testimony when both the transcript and the book about the situation clearly reveal the facts and their truth. This case is unique and critical to the recognition that such fabrication or willful blindness/avoidance of the truth cannot be endorsed and elevated to First Amendment protection (especially as a matter of law) whether the Plaintiff is a public official or not.

A. FACTS SUPPORTING ACTUAL MALICE

In the book by Dr. Feynman, there is a scene that takes place in a meeting at Marshall Space Flight Center where Dr. Lovingood gave Feynman a briefing on the main engine of the shuttle vehicle. The book (which the movie claimed was the basis of the story) describes this meeting with Lovingood and three others as follows:

> "(Feynman) all right "I said, here's a piece of paper each. Please write on your paper the answers to this question: What do you think is the probability that a flight would be uncompleted due to a failure in this engine? They write down their answers and hand in their papers. One guy wrote 99.44% pure.: (copying the Ivory Soap slogan) measuring about 1 in 200. Another guy wrote something very technical and highly quantative in the standard statistical way, carefully defining everything that I had to translate – which also meant about

1 in 200. The third guy wrote, simply, "1 in 200. The third guy wrote, simply, "1 in 300." Mr. Lovingood's paper, however, said, cannot quantify, quality control in manufacturing, engineering judgment.

> "Well," I said, "I've got four answers and one of them weaseled." I turned to Mr. Lovingood: "I think you weaseled."
>
> "I don't think I weaseled."
>
> "You didn't tell me what your confidence was sir, you told me how you determined it, what was it?
>
> "He says "100 percent" – the engineers' jaws drop, my jaws drop; I look at him, everybody looks at him – "uh, uh, minus epsilon."
>
> So I say, "Well, yes; that's fine. Now the only problem is, WHAT IS EPSILON?"
>
> He says "10-5." It was the same number that Mr. Ulian had told us about: 1 in 100,000.
>
> I showed Mr. Lovingood the other answers and said, "You'll be interested to know that there is a difference between engineers and management here – a factor of more than 300."
>
> He says, "Sir, I'll be glad to send you the document that contains this estimate, so you can understand it." (See Doc. 64-1 (Exhibit 1) which is pages 181-83 of the book.) [emphasis added]

Dr. Lovingood has testified by deposition that what the passage in the book states is pretty much what happened in this informal meeting. (Doc. 64-13 – Deposition of Lovingood at p. 66; 88-89) Dr. Lovingood then handed the actual report he referred to above to Dr. Feynman later that day. (Doc. 64-13 – Deposition of Lovingood at p. 72) Dr. Feynman had asked a very specific engineering question to these men: "What do you think is the probability that a flight would be uncompleted due to a failure in this (main) engine? [emphasis added] This specific engineering estimate question was limited to a failure of the main engine. It asked what was the probability that a failure of that engine would cause a flight to be "uncompleted." That would include aborting the flight at any point and relying on the manned flight to return to earth with no damage by using alternative engines. The answer to that specific question was developed by the same engineers at Marshall (not management) to be 1 in 100,000 because this was a manned flight with alternative engines and redundancies. (Doc. 64.13 – Deposition of Lovingood at p. 86-87) What was the probability that a main engine failure would cause a flight to be uncompleted? That was the full extent and context of the dialogue as recorded in the book. Moreover, Feynman's book unequivocally states that this main engine did exactly as Lovingood explained and shutdown and worked perfectly on the occasion of this disaster and had nothing to do with the Challenger disaster! (Doc. 64-2 (Exhibit 2) which is page 225 of the book.) The explosion was determined to have been caused by the low temperature exposure to O-rings that became brittle and failed on this cold day and that Morton-Thiokol should not have recommended launch

under these circumstances. It is undisputed that the subject of Dr. Feynman's probability question on main engine failure had NOTHING to do with this disaster.

In the movie at issue, this scene was substantially changed and falsified. Instead of just a meeting, as described in the book, Feynman is shown in a cafeteria eating lunch with some engineers at Marshall. In this movie scene, Lovingood is not even present. Feynman says to the engineers:

> "If I was to ask you engineers, never mind what the managers say, but you guys, given all your experience what you thought the probability was of an accident on any single launch...
>
> A mass hesitation. The shutters have come down again. Feynman (cont'd)
>
> "If you don't want to say out loud...perhaps write down a figure?"
>
> But no one will meet his eye. (Doc. 64-3 (Exhibit 3) Movie script) [emphasis added]

The specific question in the book about the main engine failure has been changed to "the probability of an accident on any single launch" This is much broader – any accident or failure – even if it didn't result in an uncompleted flight. Additionally, the movie scene alters the book by having Dr. Feynman say he was asking these engineers to separate their informal opinions and "never mind what the managers say, but you guys" – making it appear there was a difference that management would cover up. This never took place in the meeting presented in the book. While this

is a fabrication that is clearly and materially different from the book, it was not sworn testimony and one could argue it was a material falsification of the very basis of the book but was done for dramatic effect because it was not sworn testimony. However, this falsity was used as foreplay for the malicious fabrication that was to follow and to set up the scene where Dr. Lovingood was actually testifying before the Presidential Commission. False testimony that made it seem that NASA managers were covering up probability calculations that never took place.

The later scene at the Commission hearing shows NASA's representatives, Mulloy, Hardy, Lovingood and Reinartz being sworn in – it actually shows THE OATH being administered. (Doc. 64-3 (Exhibit 3) p. 82) (Important Note: In the script, this scene did not even include Lovingood but was altered later to insert him. (Doc. 64-12 – Deposition of Rocky Collins p. 160-61) The Chairman of the Commission is speaking:

> "Rogers: Dr. Lovingood?
>
> Lovingood: There was no idea that the flight could fail. Ice water and opaque glasses are being passed along. Feynman has been waiting for this moment. He raises a hand.
>
> Feynman (cont'd)
>
> "Could you remind me what NASA overall calculates the probability of shuttle failure to be? Failure meaning the loss of the vehicle and the deaths of the entire crew." [emphasis added]

Lovingood

"Certainly, that would be..."

Lovingood takes a moment to rifle through papers.

Feynman takes a sip of water, Lovingood finds the paper he's looking for.

Lovingood

"One in ten to the power of five"

Feynman

"Really? Could you explain that?

Lovingood

"Yes, that the probability of mission success is one hundred percent. Minus Epsilon.

Feynman

"Epsilon"? Pretty fancy word...Let's pull all you've said there into English...that's one failure in one hundred thousand flights. So you claim the shuttle would fly every day for THREE HUNDRED YEARS before there would be a single failure. That's crazy. (laughing)

How would you ever test that?

Lovingood hides his discomfort in pulling out more paperwork.

Lovingood

"NASA arrived at that figure because it is a manned flight."

Feynman

"Just because there are people on board! That's not a scientific calculation – that is a "wish"

A buzz of baffled consternation throughout the room.

Feynman

"And interesting that the figure is very different from that of NASA's own engineers."

He picks up small piece of paper in front of him. It says "We think Ivory Soap" on which is added "99.4%. In other words, roughly one flight in every two hundred will fail...

Sally Ride

"One in two hundred. Wow. Not what the astronauts are aware of - that's a potential disaster every three and half years. (Doc. 64-3 (Exhibit 3) at pages 84-86) [emphasis added]

Thus we see that the true, undisputed facts from the source book which is the undisputed and announced foundation for the movie is as follows:

1) The book asks the engineers what is the probability of a main engine failure causing a flight to be "uncompleted" in any manner.

2) The altered first scene in the movie has the engineers being asked what they think "the probability is of an accident on any single launch."

3) The sworn testimony of Dr. Lovingood has him being asked "...what NASA overall calculates the probability of shuttle failure to be? Failure meaning the loss of the vehicle and death of the entire crew." [emphasis added]

We go from a truthful probability of main engine failure causing a flight to be "uncompleted" which NASA did, in fact, clearly calculate to be 1 in 100,000 because of a manned flight if the main engine failed since there are redundancies for the crew to use in that event. We transition to a fabrication that the statistical probability is really 1 in 200 that the vehicle will blow up and kill the entire crew. This conclusion (in the movie) is announced by Feynman using the 1 in 200 uncompleted probability with main engine failure to be the incredible transposition of "roughly one flight in every two hundred will fail" (Doc. 64-3 (Exhibit 3) p. 86) "Failure meaning the loss of the vehicle and the deaths of the entire crew." (Doc. 64-3 (Exhibit 3) p. 85)

Dr. Lovingood did, in fact, testify before the Commission. He testified on the fail-safe features of the main engine so "it would not cause loss of the shuttle vehicle and death of the entire crew." (Doc. 64-13 – Deposition of Lovingood at p. 43-44) There is a transcript of that testimony. This movie scene depicts and portrays him as committing perjury in front of the Commission. (Doc. 64-13 – Deposition of Lovingood at

p. 104) The factual truth in the book dealt with a discussion at the Marshall Space Flight Center concerning probability of failure of the main engine not allowing the flight to be completed, "Nothing about human life." (Doc. 64-13 – Deposition of Lovingood at p. 175) The question before the Commission as shown in the movie was never asked of him. (Doc. 64-13 – Deposition of Lovingood at p. 360) NASA had never made any calculations as addressed in this scene. (Doc. 64-13 – Deposition of Lovingood at p. 361) None of the NASA engineers had ever done any such calculations on the probability question fabricated and falsified in this movie scene... (Doc. 64-13 – Deposition of Lovingood at p. 361) Indeed, the trial court noted in its order granting summary judgment:

> "It is undisputed that there never was such a calculation, and Dr. Lovingood never gave such testimony before the Presidential Commission." (Doc. 74, p. 2)... both scenes are fabrication." (Doc. 74, p. 7)

The contract between the British Broadcasting Company (BBC) and the Discovery Defendants placed obligations on Discovery not to authorize or use the film if it were defamatory or invaded the privacy of any person. (Doc. 64-4 (Exhibit 4). Discovery's Executive Producer (Rocky Collins) testified that it was his job to make sure BBC was diligent in its research to support accurate depictions in the movie. (Doc. 64-12 – Deposition of Rocky Collins at p. 143)

> "I have a lot of obligations to make sure that it is true and the way I do that is to encourage, double check, remind them, look for hints that

> they might not be doing their job and that is what I did." (Doc. 64-12 – Deposition of Rocky Collins at p. 168) [emphasis added]
>
> ****
>
> "... all I am obligated to do is to double check – you know, to just double check that they are doing their job and look for hints that they might not be." (Doc. 64-12 – Deposition of Rocky Collins at p. 167) [emphasis added]

Mr. Collins testified that he did not appreciate or recognize that this sworn testimony scene had just been created for dramatic purpose. (Doc. 64-12 – Deposition of Rocky Collins at p. 143-44) He had only skimmed part of the book and didn't recall the scene of Feynman's conversation with engineers at Marshall. (Doc. 64-12 – Deposition of Rocky Collins at p. 146) He agreed that Discovery had an obligation not to publish a false statement that was defamatory. (Doc. 64-12 – Deposition of Rocky Collins at p. 63) Ten months before this film was aired by Discovery in the United States, he wrote an email to the BBC after watching it and asking to see their notes on research – doing his "double check"; "looking for hints that they might not be doing their job." (set forth above) The email stated: "I feel like a backseat driver without a map." (Doc. 64-12 – Deposition of Rocky Collins at p. 110-11) He never received any of the notes he was requesting to do his job and none were ever produced in discovery requests. He never read any of the official transcript of the sworn testimony this defamatory scene fabricated. (Doc. 64-12 – Deposition of Rocky Collins at p. 128) He was totally unaware of the conclusion that it was an O-ring problem that Morton Thiokol had created by

launching on an unusually cold day and that it was Dr. Lovingood who was actually the one who demanded a conference call with them to address that critical issue before launch. (Doc. 64-12 – Deposition of Rocky Collins at p. 128) Lovingood testified that was the critical mistake to launch the Challenger under those circumstances - not any main engine failure. (Doc. 64.13 - Deposition of Lovingood at p. 157-58) He was the one who wanted the pre-launch conference call and Thiokol recommended the tragic launch. (Doc. 64-13 - Deposition of Lovingood at p. 229-30) The temperature was the mistake. (ibid at p. 367-68) Collins even wrote BBC to "Be very careful not to fictionalize an accusation against NASA." (Doc. 64-5 (Exhibit 5) – Bates Stamp 01566) Yet this critical and false sworn testimony scene was clearly fabricated to look like NASA and Lovingood had lied about calculations of failure probability that never took place. The effect was not just "dramatic", it was a lie that made Lovingood look like the liar and 7 people were killed as a result.

Discovery's Executive Producer admitted that the scene in the book was obviously changed to the sworn testimony at the hearing that never happened and that there was a "disconnect" between the two. (Doc. 64-12 – Deposition of Rocky Collins at p. 91-92) He went on to say:

> If I were aware of the discrepancy, I would have asked the BBC to explain the discrepancy and I would ask - - and I would seek a legal opinion about whether that - - that discrepancy was actionable." (Doc. 64-12 – Deposition of Rocky Collins at p. 92)

This is the executive whose admitted obligation was to double check and look for hints on such discrepancies. Even a cursory familiarity with the book and the fabricated sworn testimony scene would show the defamatory nature of putting sworn words in Lovingood's mouth that were false. He never followed up the "notes" he said were essential. This willful blindness and avoidance of the truth, was established by recognizing and accepting that he was "feeling like a backseat driver without a map." (Doc. 64-12 – Deposition of Rocky Collis at p. 110-11) For ten months he never followed up on getting the notes or research by BBC to assure accuracy! This was his admitted job!

Even the Defendant's expert has acknowledged the Commission testimony scene never took place in reality and truth. (Doc. 64-14 – Deposition of Hirsch at p. 52)

> "Q. Well, it is obvious the question was changed from main engine failure to total loss of mission and 1 death of the entire crew, wasn't it?
>
> A. There is no question that the wording was changed." (Doc. 64-14 – Deposition of Hirsch at p. 55)
>
> ****
>
> Q. Well, let us look at the circumstances. The scene that we are about in this case was Dr. Lovingood testifying under oath before the Commission, depicts his testifying under oath, doesn't it?
>
> A. It does.

Q. It puts words in his mouth under oath, doesn't it?

A. It does.

Q. That testimony, in fact, never occurred, did it?

A. That testimony did not occur. That distinction is important in my opinion." (Doc. 64-14- Deposition of Hirsch at p. 62)

****

Q. Did anyone from NASA ever make a report or statement that they had calculated the probability of shuttle mission failure with loss of vehicle and death to the entire crew to be 1 in 100,000?

A. Not to my knowledge.

Q. Yet the movie shows Dr. Lovingood testifying to that, doesn't it?

A. Yes, it does." (Doc. 64-14 - Deposition of Hirsch at p. 76-77)

As Lovingood testified at his deposition, NASA could not test or calculate for the question posed in the movie. It was impossible to calculate such a hypothetical. Thus, there had been no such calculation and testifying there was such a calculation as shown would be a lie. (Doc. 64-13 - Deposition of Lovingood at p. 385-88)

Therefore, Discovery showed Lovingood committing perjury by fabricating that he testified there was such a calculation. (See 18 U.S.C. § 1621 which defines perjury before any "competent tribunal.") This Court has held that testimony can be perjury even if it is inherently improbable or "too fantastic to be believed" because it is a taint on the oath. *United States v. Burks*, 402 Fed. Appx. 486, 491 (11th Cir. 2010)

B. DRAMATIC PURPOSE IS NO SHIELD FOR FALSIFYING AND FABRICATING SWORN AND RECORDED TESTIMONY

Defendants contend that the movie only "slightly rephrased" the question in the book to what it was at the Commission hearing. (Doc. 63 at p. 17) Such a characterization is more than an advocate's understatement or spin as shown in the preceding details of this brief. Defendants go so far as to say: "A review of pertinent sections of the sources for this scene reveals that the scene is substantially true." (Doc. 63 at p. 22) They say the distinction between shuttle failure (the scene says with death of the entire crew) as opposed to "engine failure" is a distinction "without a difference to the reasonable viewer watching the broadcast." (Doc. 63 at p. 24) Really? No difference between an uncompleted flight due to some glitch that allows the pilot to return and a failure that explodes – destroying the vehicle and death to the entire crew? If there is no difference, why was the scene of sworn testimony changed at all? The answer is clear. The falsification created a conspiracy between managers like Lovingood to hide the calculations of engineers. Calculations that the book and the official transcript

show NEVER took place and were created by this movie by mixing unrelated calculations.

Defendants further contend this was a "docudrama" and "deviations from or embellishments" are allowed "to recount and popularize an historic event." (Doc. 63 at p. 25-26) We are not dealing here with a deviation or embellishment of a conversation or relationship for dramatic purpose. This was the falsification and fabrication of sworn testimony by Dr. Lovingood, identified by name in the movie. It is undisputed that this testimony never took place and that the scene put these false words in Dr. Lovingood's mouth which was a lie. The Supreme Court has held that altering quotes can be actionable for libel. *Masson v. New Yorker Magazine*, 501 U.S. 496 (1991) just altering quotes – not to mention falsely fabricating sworn and transcribed testimony!

> "The work at issue here, however, as with much journalistic writing, provides the reader no clue that the quotations are being used as a rhetorical device or to paraphrase the speaker's actual statements. To the contrary, the work purports to be non-fiction, the result of numerous interviews. At least a trier of fact could so conclude." 501 U.S. at 513. [emphasis added]

The *Masson* court opined that it would not adopt the argued rational interpretation standard posed by the publisher because, in effect, "...we could give journalists the freedom to place statements in their subjects' mouths without fear of liability." 501 U.S. at 520.

The Defendants have not cited nor has Plaintiff found any case law that supports changing and falsifying transcribed, sworn testimony as a protected form of speech. This Court should not be the one that embraces such a terrible and dangerous precedent as simply being an entertaining effort for "dramatic purpose." How can the Defendants earnestly depart from the above quoted statements in *Masson* when their own media expert testified:

> "Q. It puts words in his mouth under oath, doesn't it?
>
> A. It does." (Doc. 64-14 - Deposition of Hirsch at p. 62)

II. DR. LOVINGOOD WAS NOT PROPERLY CATEGORIZED AS A PUBLIC OFFICIAL FOR PURPOSES OF THIS LIBEL ACTION

It should not matter whether a public official, expert or common witness is falsely depicted as committing perjury under oath in a movie or a writing. Such a gross and malicious act should be libel *per se* where there are such clear facts as those of this case. However, for purposes of this appeal, we feel it necessary to address this status because of the *New York Times v. Sullivan* requirement of sufficient proof or inference of actual malice.

Dr. Lovingood was clearly a public employee. Public official status does not extend to all public employees. *Hutchison v. Proxmire*, 443 U.S. 111, 119 N.8 (1979) State law standards of public officials do not apply to the analysis. *Rosenblatt v. Baer*, 383 U.S. 75, 84 (1966) Moreover, the *Rosenblatt* court observed: "The

employee's position must be one which would invite public scrutiny and discussion of the person holding it, entirely apart from the scrutiny and discussions occasioned by the particular charges in controversy." 383 U.S. at F.N. 13. The reason for such "public official" concerns is the allowance of criticism for those in positions of control for public policy and decisions. Falsifying and fabricating sworn testimony has no connection to the right to scrutinize or criticize public officials. It fabricates false scrutiny. Therefore, that concept should not apply to this case especially because this falsehood was not "entirely apart from the scrutiny and discussion occasioned by the particular charges in controversy." (*supra*) Discovery published made-up sworn testimony and created this scrutiny. They should not be allowed to use their own methods of falsehood to cloak Lovingood as a public official under the particular facts of this case. He was only one of many NASA witnesses before the Commission and his emphasis was on the safety redundancies of a manned flight. He was a scientist who gave truthful and calculated support to the proper analysis of his department only to be recreated as a liar with cavalier rejection of fabricated engineering concerns that never took place.

CONCLUSION

For the foregoing reasons and to protect the Appellant's reputation and integrity of testimony under oath, Appellant urges this Court to reverse the Order of the trial court and remand this case for trial on the merits.

[*Certificates of Compliance and Service Omitted from this Appendix*]

APPENDIX G

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT
CASE NO. 18-12999-JJ

JUDSON LOVINGOOD

Appellant

vs.

DISCOVERY COMMUNICATIONS, INC. and
DISCOVERY COMMUNICATIONS, LLC

Appellees

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE NORTHERN
DISTRICT OF ALABAMA NORTHEASTERN
DIVISION

Civil Action No. 5:14-CV-00684-MHH

APPELLANT'S REPLY BRIEF

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[*Table of Contents and Authorities Omitted from this Appendix*]

INTRODUCTION

The film made the subject of this litigation is "The Challenger Disaster" which was the subject of a "Co-Production Agreement" between the British Broadcasting Company (BBC) and Discovery. BBC would air a version of their choosing in Great Britain while Discovery "shall only be able to exploit the Programme in the United States." (Appellee's Appendix Vol. 8 part 1 at paragraph 11.1.) "Discovery "DCL" shall have the right to edit its version of the Programme (DCL version)." *(ibid* at paragraph 11.3) Discovery also agreed "not to use or authorize the Co-Produced Programme to be used in any manner likely to bring either party into disrepute or which is defamatory or invades the privacy of any person." (Appellee's Appendix Vol. 8 part 1 at paragraph 15.5) [emphasis added]

The signed Co-Production Agreement has a section called Programme Outline for the film about this Challenger Disaster which shows how the film will be aimed. It states, in pertinent part, that this disaster "was the most shocking event in the history of American spaceflight" and goes on to state:

> "But what was even more shocking was that the cause of the disaster might never have been uncovered. Too many powerful individuals in the Shuttle Programme were implicated in the fateful decision to launch, the cover up was

> quick and convincing, and the Commission charged with investigating the disaster was slow and bureaucratic. It was (sic) simply wasn't equipped to dig out the truth. Into the conspiracy was thrown the physicist Richard Feynman ... revealing deception and cover up in the heart of the Space Programme." (Appellee's Appendix Vol. 8 part 1 at paragraph 9.1)

There is no dispute that Dr. Judson Lovingood testified at the Commission hearings. There is no dispute that he was sworn in as a witness at this hearing:

> "(The Clerk) "Do you swear the testimony you will give before this Commission will be the truth, the whole truth and nothing but the truth, so help you God?
>
> Lovingood: I do." (Appellee's Appendix Vol. 9, Ex. 69 p. 58-59 of actual transcript.

There is no dispute that the film shows Lovingood being sworn and testifying to facts that were never asked or answered to by Lovingood in an effort to falsely create a malevolent intent to cover up and ignore reports that never existed at NASA but made it appear Lovingood and his management colleagues ignored risk reports by engineers that never existed. The trial court acknowledged this undisputed difference in the sworn testimony that was altered and in fact, fabricated for the film. "Dr. Lovingood did not testify that "the probability of total mission failure was 1 in 100,000" and "no engineer ever said it was 1 in 200." (Doc. 74 at p. 8) "... it is undisputed that there

never was such a calculation and Dr. Lovingood never gave such testimony before the Presidential Commission." (Doc. 74 at p. 2) "...both scenes are fabrications." (Doc. 74 at p. 7)

The precise issue before this Court is plain and very significant. The U.S. Supreme Court has stated: "There is no constitutional value in false statements of fact." *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340 (1974) This is the distilled issue in this important case:

> "Issue: Can the media take the sworn, transcribed testimony of a witness to an important issue of public concern like this shuttle disaster and, instead of depicting the actual testimony, create and falsely fabricate testimony in the mouth of that witness for the purposes of making a represented "true story" more dramatic and malevolent or exciting?"

Should this court or any tribunal amend the oath that is taken by witnesses to read this way:

> "Do you swear the testimony you will give in this matter will be the truth, the whole truth and nothing but the truth, so help you God - but with the understanding that if any media chooses to alter it or create different testimony by you to be more dramatic, even if false, they may do that under the First Amendment?"

Would any witness or our legal system accept such an invidious oath? In the *Gertz* quotation set forth above rendered impotent and inapplicable where a film producer wants to make a film more entertaining by creating false and unstated testimony on a matter of

immense public concern? These are not rhetorical questions. They are at the very undisputed heart of this case.

It must also be pointed out in this introduction that Appellee's Brief cited material or evidence which was never submitted to the trial court or made a part of the records.

Indeed, Appellees frankly admit "Discovery did not submit a copy of the report below." (Appellees' Brief at F.N. 3 on page 21) Appellees cite a quote from that source from Chapter 3. Of course, such a reference to evidence not in the record is inappropriate. However (under the evidentiary rule of curative admissibility when improper evidence is submitted by an opponent) what Appellees failed to cite from that same Chapter is the support for Lovingood's actual testimony that NASA had not and could not quantify the probability of total mission failure resulting in loss of the vehicle and death of the entire crew as fabricated in this film: "It is the consensus of the NSTS [National Space Transportation System] that the approach of determining when a vehicle is safe to fly based on a well-evaluated and documented program with attention to details is superior to relying on a reliability number derived from an insufficient data base in which only minimum confidence levels can be established for its flight and ground hardware and software." (Report cited by Appellees at p. 385) Appellant urges this Court to either disregard this improper cite by Appellees or consider the context shown above in addition thereto.

I. THE FIRST AMENDMENT DOES NOT PROTECT FABRICATED, FALSE STATEMENTS PUT INTO THE "HISTORICAL" MOUTH OF A WITNESS WHOSE SWORN TESTIMONY HAS BEEN FALSIFIED FOR ENTERTAINMENT.

Discovery (Appellee) has taken the position in its brief that: "The First Amendment does not categorically exclude artistic editing of sworn testimony in a film." (Appellee's brief at p. 45) Discovery says that "Film's design to "entertain as well as inform" does not mitigate its significance within the public discourse." (Appellee's' brief at p. 45) This case does not involve any "artistic editing" of sworn testimony. It involves the clearly established, bold and naked falsification of sworn testimony with no cosmetic adornment of "artistic editing." It is false and never took place. It was "created" not edited. This film does not put the proverbial lipstick on a pig – it actually creates the pig so the stark ugliness of the created pig can engender disgust and condemnation in the viewers for entertainment at the expense of sacrificing truth.

The film itself begins with the declaration in writing: "This is a true story." (R-7(1)-2; R-60 (26)-01:36) The viewers (over 5 million by records produced) were never advised that this was actually planned as Discovery's first attempt at "fictional drama." (See Doc 64 p. 45-46) This is different than a docudrama. The victim of that "fiction" which departed from recorded testimonial proof was Dr. Judson Lovingood. He was the pig that was falsely created as committing perjury

to make the film more entertaining. Here is why we say that:

1. During the preparation of this film, Discovery corresponded with BBC about their joint plan for ways to show NASA management was "covering up their actions." As Plaintiff discussed in his brief opposing summary judgment, a crucial email from Discovery to BBC stated: "We will witness unexplained behavior by characters, initially anonymous but when we later identify as *Mulloy, et al*. and we will over hear the strategic advice of anonymous attorneys, building a feeling of malevolent intent that we gradually reveal is aimed at suppression of the truth at all costs." (Doc. 64-6 attached to Doc 65 of Plaintiffs brief at summary judgment) In fact, they went so far as to suggest using "faked" news clips or even addressing a theme of sabotage. Discovery said to BBC that with regard to the sabotage ideas: "We prefer to lose this from the U.S. version." (Doc. 65 at p. 24)

   The strategy was clear – look for a way to depict someone inside NASA as "suppressing the truth at all costs." This would be the emotional hook for the film. But how do they get it?

2. The undisputed truth is that NASA had never calculated any probability of shuttle failure where failure with the loss of the vehicle and death to the entire crew could occur as it did with this Challenger disaster. Lovingood testified to this fact of no such calculation at the Presidential Commission and in his deposition

(Doc. 64-13 – Deposition of Lovingood at p. 43-44; 361) Lovingood actually testified to the Commission on the fail-safe features of the main engine so "it would not cause loss of the shuttle vehicle and death of the entire crew." (Doc. 65 at p. 8)[1] There had never been any such calculation and it could not be done – testifying that there had been such a calculation would be a lie. (Doc. 65 at p. 8)

3. In Dr. Feynman's book, there was a section that dealt with a conversation he had with Lovingood and three other engineers at Marshall Space Flight Center. In that book, Feynman gives a piece of paper to each of them and asks them to write their answers to this question: "What do you think is the probability that a flight would be uncompleted due to a failure in this (main) engine?" Two engineers wrote 1 in 200, one engineer said 1 in 300; Lovingood said 10-5 minus epsilon or 1 in 100,000 which he showed by giving a copy of a NASA report to Feynman. (Doc. 64-1 (Ex. 1) which was pages 181-83 of the book)

   The specific question deals with "uncompletion" of a shuttle flight due to main engine failure alone. Nothing about total loss of the shuttle and death to the entire crew for any possible scenario. Uncompletion could be an aborted

[1] For ease of reference, citations are made to Appellant's brief opposing summary judgment which contains the documentary references given here.

mission, a return to earth or any number of possibilities. Moreover, none of these engineers had ever submitted or participated in any analysis or report on this question before – they were simply responding to Dr. Feynman's request at lunch in the cafeteria. Yet the film will be shown to use this section of the book to make it seem like engineers had made reports that NASA managers like Lovingood had ignored and then sugar coated to make the probabilities of death much less than the on-line engineers – 1 in 100,000. The book does not say that and it never happened.

4. In the film scene where Lovingood is identified and named as testifying before the Presidential Commission, the question to the engineers is changed by the actor playing Dr. Feynman:

> "Could you remind me what NASA overall calculates the probability of shuttle failure to be? Failure meaning the loss of the vehicle and the deaths of the entire crew." Lovingood is shown testifying: "One in ten to the power of five...Yes, that the probability of mission success is one hundred percent. Minus Epsilon." Then Dr. Feynman says "and interesting that the figure is very different from that of NASA's own engineers... In other words, roughly one flight in every two hundred will fail..." Then the astronaut, Sally Ride, says: "One in two hundred. Wow. Not what the astronauts are aware of –

> that's a potential disaster every three and a half years." (Doc. 64-3 (Exhibit 3) at pages 84-86) [emphasis added]

5. This is the hook to show Lovingood and his management colleagues will be shown to have the planned storyline of "malevolent intent...at suppression of the truth at all costs." (Doc. 65 at p. 24) This was not accidental, inadvertent or just the purported "artistic editing" of sworn testimony. It never happened! NASA never made and was incapable of making any probability calculations of total shuttle failure with loss of the vehicle and the deaths of the entire crew. No engineer ever said that the probability of that was 1 in 200. No reports were made by engineers on that question that Lovingood and his colleagues ignored or tried to avoid "at all costs." Three engineers had simply answered an informal question of what they thought the probability of any "uncompleted" flight might be if the specific main engine failed. Yet the film made it appear that these engineers were telling NASA there was a 1 in 200 probability of a total failure of a shuttle in flight that would result in loss of the vehicle and deaths of the entire crew but management and Lovingood said their calculation was 1 in 100,000. No such calculation had ever been made for this question and the undisputed evidence shows it could not be done. Instead, the film mixes these questions to produce the desired, dramatic effect of malicious intent with Lovingood lying and saying there were

calculations and a report that never existed. This is not "artistic editing" or historic drama. It is falsehood and deception.

6. The trial court stated in its Order: "Dr. Lovingood did not testify "that the probability of total mission failure was 1 in 100,000 and "no engineer ever said it was 1 in 200." (Doc. 74 at p.8)

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"it is undisputed that there never was such a calculation and Dr. Lovingood never gave such testimony before the Presidential Commission." (Doc. 74 at p.2) "...both scenes are fabrications." (Doc. 74, at p. 7)

7. The media expert for Discovery, James G. Hirsch, testified:

> "Q. Well, let us look at the circumstances. The scene that we are about in this case was Dr. Lovingood testifying under oath before the Commission, depicts his testifying under oath, doesn't it?
>
> A. It does.
>
> Q. It puts words in his mouth under oath, doesn't it?
>
> A. It does.
>
> Q. That testimony, in fact, never occurred, did it?

A. That testimony did not occur. That distinction is important in my opinion." (Doc. 64-14 – Deposition of Hirsch at p. 62)

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Q. Did anyone from NASA ever make a report or statement that they had calculated the probability of shuttle mission failure with loss of vehicle and death to the entire crew to be 1 in 100,000?

A. Not to my knowledge.

Q. Yet the movie shows Dr. Lovingood testifying to that, doesn't it?

A. Yes, it does." (Doc. 64-14 – Deposition of Hirsch at p. 76-77)

8. Discovery's Executive Producer testified that in this joint venture with the BBC, it was his job to make sure BBC was diligent and truthful in its research to support accurate depictions in the movie. (Doc. 64-12 – Deposition of Rocky Collins at p. 143) He specifically stated his job was "to just double check that they are doing their job and look for hints that they might not be." (Doc. 64-12 – Deposition of Collins at p. 167) The contract between BBC and Discovery squarely placed the obligation on Discovery not to authorize or use the film if it were defamatory or invaded the privacy of any person under American law. (Doc. 64-4 Exhibit 4)

9. The main engine question that Feynman posed to Lovingood and the 3 engineers in the cafeteria was stated by Feynman in his book to actually have "worked perfectly" in this disaster. In fact, he says in the movie to his wife: "I goofed. Thought I had the answer. I was way wrong." (See Complaint Doc. 1, p. 5 and the film submitted by Discovery with its brief.)

Despite this clear fabrication and putting false testimony that is designed to show malevolence and covering up by Lovingood, Discovery continues to characterize this as simple "artistic editing." Discovery says this was only "slight editing" with minor inaccuracies. (Appellee's brief at p. 39) This assault on the oath and the content of sworn testimony is of great concern and in need of recognition by this court that fabricating such testimony is not protected speech. The U.S. Supreme Court stated in *Lane v. Franks*, ___vs.___, 134 S. Ct. 2369 (2014):

> "Anyone who testifies in Court bears an obligation, to the court and society at large, to tell the truth. (See e.g. 18. U.S.C. § 1623 criminalizing false statements under oath in all judicial proceedings.) (citations omitted) 134 S. Ct. at 2379 (See also the 11th Circuit opinion in *Price v. Time, Inc.*, 416 F.3d 1327, 1347 (11th Cir. 2005) (as the trial court noted in its ruling on the motion to dismiss this action filed by Discovery: "... the depicted false, sworn testimony to the Commission is tantamount to the accusation of a crime – namely perjury." (Doc. 36 at p. 13)

The actual malice standard from *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964) has been expanded to include "purposeful avoidance" of the truth. *Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657, 659 (1989) Reckless disregard of whether the statement published is true or not is proof of actual malice. *New York Times v. Sullivan*, 376 U.S. 254, 279-80 (1964) Willful blindness is the legal equivalent of actual knowledge. *Hard Rock Café Licensing Corp. v. Concession Services*, 955 F.2d 1143, 1149 (7th Cir. 1992) As the Supreme Court stated in *St. Amant v. Thompson*, 390 U.S. 727 (1968); "Reckless disregard, it is true, cannot be fully encompassed in one infallible definition. Inevitably, its outer limits will be marked out through case by case adjudication." 390 U.S. at 730. [emphasis added] This case is a necessary marker for such boundaries. Indeed, the United States Supreme Court pre-saged this very situation in *Dun & Bradstreet v. Greenhouse Builders*, 472 U.S. 749 (1985) where it explained how the falsehood presented here serves to impugn public officials in a false way that ends up actually contaminating the purpose of the First Amendment:

> "Criticism and assessment of the performance of public officials and government in general are not subject to penalties imposed by law. But these First Amendment values are not at all served by circulating false statements of fact about public officials. On the contrary, erroneous information frustrates these values. They are even more disserved when the statements falsely impugn the honesty of those men and

> women and hence lessens the confidence in government." 472 U.S. at 767.

This is precisely what Discovery aimed to do by creating false testimony to create a malevolence in this Plaintiff and his NASA government colleagues to make the audience perceive things not true and lessen confidence in the space program.

Discovery contends that what it terms "artistic editing" of sworn testimony is beyond those limits of reckless disregard. The integrity of the oath and recorded sworn testimony is in severe jeopardy if writers or film makers can make up false testimony and put it in the mouth of a witness who is being used to create a dramatic, entertaining story on an important story which is represented as true but is, in fact, false. We are unaware of any case that has directly confronted this issue of actual fabrication of false testimony and this case cries out for a marking of boundaries for reckless disregard. It takes little imagination to envision what can be set loose if such fabrication is embraced in a written opinion. Entertainment which is not based on simple creative fiction but seeks to fictionalize real, historic events by making up sworn testimony to support a plan of showing a pre-conceived notion of dramatizing a malevolent intent of an action in that event cannot be endorsed as protected speech. "Freedom of speech, has its limits; it does not embrace certain categories of speech, including defamation, incitement, obscenity and pornography produced with real children." *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 245-46 (2002) [emphasis added]

II. APPELLANT HAS NOT FORFEITED HIS ARGUMENT THAT FALSIFYING ACTUAL SWORN TESTIMONY IN A FILM FALLS OUTSIDE THE FIRST AMENDMENT.

Discovery has argued in its brief that Lovingood did not present his argument that the media cannot edit sworn testimony and that it was raised for the first time in this appeal. (Appellee's brief at p. 44) This argument is without merit. In Lovingood's Motion to Alter, Amend or Vacate the following was set forth:

> "This Court has essentially held that showing false and perjured testimony is acceptable to put in the mouth of a real person if it was done for dramatic affect in a docudrama. Is that really what the law allows? We think not. Neither public officials nor private persons should be put to such risk just to satisfy a desire for "dramatic effect." As the *Bose* court stated above [*Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 503 (1984)] such a false, made up portrayal of sworn testimony may be dramatic but that desired effect for entertainment is outweighed by the moral insistence of truth. There is sufficient evidence in this case to support a reasonable jury to infer actual malice by purposeful avoidance of the truth by clear and convincing evidence." (Doc. 76 at p. 11-12)

Then, in a supplemental filing, Lovingood stated:

> "His day to day job is not under oath but can be under the opinionated scrutiny of the media or the public at large in an open

> ended, constitutionally protected expression. The oath and his sworn testimony is elevated outside the performance of his duties of employment/office. He is now sworn to an oath to tell the truth on any matters examined. This makes him an ordinary citizen in this forum regardless of his status as an official or a public figure. He is now simply a WITNESS. No witness can be exposed to having fabricated/fake testimony that did not take place put in his mouth when it did not occur in the actual transcript. There are no levels of status that alter that indisputable duty to any citizen testifying under oath. "(Doc. 77 at p. 4)

There is no merit to contending this argument was not raised in the trial court. It is clear this argument was raised in the trial court.

III. DISCOVERY WAS NOT A PASSIVE PARTICIPANT IN THE PUBLICATION OF FALSE AND DEFAMATORY SWORN TESTIMONY OF APPELLANT AND THERE IS SUBSTANTIAL EVIDENCE OF RECKLESS DISREGARD AND WLLFUL BLINDESS.

Discovery's brief in this matter focuses on the argument that there is no direct proof that it had a "high degree of awareness of probable falsity" citing *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968) (Appellee' s brief at p. 35) Discovery contends it had no knowledge of the differences in what was depicted in the film and the true facts. There is a conspicuous

reluctance to acknowledge that the test for actual malice has two prongs: "... with knowledge that it was false or reckless disregard of whether it was false or not. "*New York, Times Co. v. Sullivan*, 376 U.S. 254, 279-80 (1967) [emphasis added]; *St. Amant v. Thompson*, 390 U.S. 727, 730 (1968)

Discovery and the BBC were co-producers in this joint venture. Discovery warranted that it would exercise "due diligence in its enquiries" to assure "none of the versions will defame any individual or entity." (Appellee's Appendix Vol. 8, Tab 60(9) at p. 27) BBC and Discovery further agreed to indemnify each other regarding any third-party claims. (*ibid* at p. 28) BBC warrants that the film will be produced "in keeping with generally accepted standards for first class documentary film makers, be true and accurate." (*ibid* at p. 25) (Note: not docudrama but the higher standard for a factual documentary!)

Discovery takes the position that it passively relied upon BBC for accuracy and truth because BBC is the "gold standard" for such accuracy. (Appellee's brief at p. 22) Yet, we know that Discovery assumed duties to consult with BBC and exercise due diligence to assure nothing defamatory under American law would be used or authorized for publication in the United States as described above. Discovery's Executive Producer testified that he had the obligation "to double check – you know, to just double check that they (BBC) are doing their job and look for hints that they might not be." (Appellee's Appendix Vol. 7 Tab 60(7) p. 167)

"I have a lot of obligations to make sure that it is true and the way I do that is to encourage, double

check, remind them, look for hints that they might not be doing their job and that is what I did." (*ibid* at p. 168) Discovery sent many comments to BBC including notes by the Discovery General Manager, Debbie Myers, talking about "drama treatment." (Doc 64-6 attached to Doc 65 brief) The Executive Producer of Discovery also sent emails to BBC about reviewing such treatment and commenting on changes. (*ibid* at p. 75) One of those emails discussed the plan for how the producers wanted the film to crescendo:

> "We will witness unexplained behavior by characters, initially anonymous but when we later identify as *Mulloy, et al.* and we will overhear the strategic advice of anonymous attorneys, building a feeling of malevolent intent that we gradually reveal is aimed at suppression of the truth at all costs." (Doc. 64-6 attached to Plaintiffs S.J. brief Doc. 65) [emphasis added]

Thus, we know that the plan was to make Lovingood and the NASA managers look like the villains in hiding probabilities of a disaster like this. It didn't "reveal" suppression of the truth, it fabricated it. This was a joint plan. This led to the mixing of the scenes and false testimony depiction because that departure would have more dramatic impact than the truth. Discovery says in its brief that the questions of probability of "uncompleted flight due to main engine failure were understood to be "interchangeable" with the probability of loss of vehicle and human life. (Appellee's brief at p. 28) In fact, Discovery's Executive Produced testified: "I don't think he (Feynman) would have considered the statements interchangeable..."

(Appellee's Appendix Vol 7 Tab 60(7) at p. 102) They were not, but the calculations were mixed and falsified to accomplish a reckless, desired effect by disregard of the truth. This was not simply the change of a scene from an interview at Marshall Space Flight Center to the Commission hearing as Appellees contend. It changed the question from 1) "main engine failure" to any failure; 2) uncompleted flight for main engine failure to total loss of vehicle and death of the entire crew due to anything imaginable; 3) informal responses to official engineer reports that never existed; and 4) fabricated false, never occurring testimony by Lovingood based on those bold and false changes. It didn't take a sophisticated, engineering schooled audience to see these changes represented as a "true story" as a clear indictment on the truthfulness of Dr. Lovingood. That is exactly what the producers wanted. The irony is that rather than proving that Lovingood and his management colleagues were "aimed at suppression of the truth at all costs" (Doc.64-6; Ex. 6 at p. 3 attached to Appellants S.J. Brief); it was these producers who were aiming to suppress the actual, testified truth at all costs for "dramatic effect."

Ten months before this film was aired by Discovery in the United States, the Executive Producer wrote BBC asking to see their notes on research and embarking on his obligation to "double check" for truth and accuracy. The email stated, "I feel like a backseat driver without a map." (Appellee's Appendix Vol. 7 Tab 60(7) at p. 110-111) When asked if he ever received those requested notes so he could double check, he stated "I don't recall." (*ibid* at p. 111) None were ever produced in discovery so the clear conclusion is that he

did not. This was not further pursued and shows a reckless disregard of whether the depiction was false. If BBC is the "gold standard," why would this Executive Producer have the admitted obligation to "double check" then and "look for hints that they (BBC) might not be doing their job?" (*ibid* at p. 167-68) The answer is clear. Just like the shuttle needed redundancies for safety, the research and review for truth and accuracy needed that same approach to avoid falsehood and defamation under American law. The contract required that redundancy, the Executive Producer acknowledged it but the facts show there was a reckless disregard of whether the testimony scene was totally false or not. This was not the simple failure to further investigate under some objective industry standards. It was the wholly subjective mindset of Discovery to be willfully blind and not upset the planned apple cart of showing Lovingood and his management colleagues to be malevolent and ignoring engineering calculations which, in fact, never existed as shown above in in this brief. Apples were not just mixed with oranges; apples were turned into oranges by film sorcerers falsifying questions and answers that were "not interchangeable" but explicitly falsified for the malevolent image desired. More than 5 million viewers saw this movie showing Lovingood testifying falsely on a critical question making him look malevolent and suppressing engineer reports that never existed.

The Executive Producer testified that he "skimmed" the Feynman book. (*ibid* at p. 69) If he were totally relying on BBC there would be no need to do that but he knew he had the obligation set forth above for the

U.S. version under American law. Discovery was not a passive co-producer but obviously decided to sit back and willfully enjoy being a "backseat driver without a map." Consider this testimony from the Executive Producer:

"Q. Discovery, through you and others, collaborated with BBC in the finalization of the product known as "The Challenger Disaster," true?

A. Yes.

Q. You had some role to play in how scenes were depicted, the length of the film, fonts used on title cards, things of that nature, right?

A. Yes." (*ibid* at p. 66) [emphasis added]

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"Q. You at Discovery not only had the power to make suggestions about deletions or changes to scenes, you had the obligation under the contract if something were false to make that observation, didn't you?

A. I - - I cannot honestly speak to the contract but I would take that obligation seriously, nonetheless." (*ibid* at p. 77)

In fact, Discovery made BBC delete or "lose" any hints of sabotage from the U.S. version of the film. (Doc. 64-7 (Exhibit 7) p. 3) It was done as requested. Indeed, Discovery even advised the BBC "Be very careful not to fictionalize an accusation against NASA."

(Doc. 64-5 filed with Plaintiffs brief Doc. 65) Yet the coordinated plan as set out above was just that – "building a feeling of malevolent intent that we gradually reveal is aimed at suppression of the truth at all costs." (Doc. 64-6 at p. 3) That goal was met by showing Lovingood as the poster boy of this malevolent intent by creating false testimony given by him about calculations of risks that were never made by NASA and contrasting it with field engineer calculations that never happened. Their informal answers to uncompleted missions due to main engine failure was made to look like formal reports on total failures and death by any hypothetical failure of any component. The desired effect was indeed dramatic by showing Lovingood and his management colleagues as suppressing these risks from the astronauts who died in this tragedy. Remember, Sally Ride is shown at this false scene having false testimony that was never given and saying: "One in two hundred. Wow. That's not what the astronauts were aware of. That's a potential disaster every 3 ½ years." (R.-7(2)-23; R-60(26)-1:20:45) This was the climax of the film, and if the court watches the movie it will see they accomplished their plan. Wouldn't Discovery at the very least look at any scenes specifically created "for dramatic purpose" to assure no defamation by falsehood?

Discovery and BBC were joint tort feasors in this matter. *Johnson Publishing Co. v. Davis*, 271 Ala. 474, 124 So.2d 441, 445 (1960) "Joint tort feasors are those who act together in committing a wrong or where acts independent of each other unite in causing a single injury." *Ex Parte Barnett*, 978 So.2d 729, 733 (Ala. 2007) Each tort feasor may be held liable for the

entire resulting harm. *Nelson Bros. Inc. v. Busby*, 513 So.2d 1015, 1017 (Ala. 1987) It matters not that BBC is not here personally because of being dismissed for lack of jurisdiction in Alabama. Each joint tort feasor is liable and, as shown above, the contract provides for indemnification of each other.

> "Although failure to investigate will not alone support a finding of actual malice see *St. Amant*, 390 U.S. at 731, 733, 885 S. Ct. at 1325, 1326, the purposeful avoidance of the truth is a different category." *Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657, 692 (1989) [emphasis added]

This falsification and creation of sworn testimony is not simply failure to investigate. It was recklessly done to avoid the truth because these defendants did not care what the true facts were. They put false testimony in the mouth of Lovingood to purposefully reveal the effect they planned – to show a malevolent intent to suppress calculations of risk that sounded terrible but never happened. This is not protected speech necessary for robust debate. It is the deliberate, reckless disregard of actual recorded testimony falsified to create a nefarious effect and Lovingood was the vehicle.

Discovery cites the case of *Street v. National Broad Co.*, 645 F.2d 1227 (6th Cir. 1981) for support of alteration of sworn testimony. (Appellee's brief at p. 47) In fact, *Street*, set forth the order of Judge Horton in its entirety where he stated about the Plaintiff and her testimony in the Scottsboro incident: "...proof tends strongly to show she knowingly testified falsely in many material aspects of the case." 645 F.2d at 1244.

That case did not involve any alteration or editing of sworn testimony. Instead, the Court observed "the derogatory portrayal of Price in the movie is based in all material respects on the findings of Judge Horton at the trial." 645 F.2d at 1237.

CONCLUSION

For the foregoing reasons and those set forth in Appellant's initial brief and the necessity of protecting this Appellant's reputation and the integrity of sworn testimony in our legal system, Appellant urges this Court to reverse the Order of the trial court granting summary judgment and remand this case for trial by jury on the merits. The record shows sufficient evidence and reasonable inferences for a jury to find actual malice under the law.

s/_____
Stephen D. Heninger

s/_____
STEPHEN D. HENINGER

[*Certificates of Compliance and Service Omitted from this Appendix*]