

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2004-022669

02/14/2006

HONORABLE PAUL J. MCMURDIE

CLERK OF THE COURT
C.I. Miller
Deputy

FILED: 02/16/2006

K D RIVERVIEW 1178 INC, et al.

DON C FLETCHER

v.

DAVID MOLINA, et al.

THOMAS K IRVINE

RULING MINUTE ENTRY

The court has before it (1) Whether or Not the Plaintiffs Are, Public Figures; (2) Plaintiffs' Motion to Compel Production of Electronic Data Pursuant to Subpoena Duces Tecum and Motion to Compel Answers to Deposition Questions; (3) Defendants' Joint Motion for Protective Order and Stay of Discovery and Disclosure; and (4) Defendants' Motion to Dismiss, which has previously been designated by this court as a motion for summary judgment.

The court has considered all of the pleadings and the attached exhibits. Based on the following analysis, the court grants Defendants' motion for summary judgment and awards Defendants its costs and attorneys' fees.

Motion for summary judgment in defamation cases

In *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986), the United States Supreme Court defined the process of summary judgment screening for actual malice in a constitutional defamation case. The Supreme Court held that "in ruling on a motion for summary judgment, the judge must view the evidence presented through the prism of the substantive evidentiary burden." *Anderson*, 477 U.S. at 254; *Scottsdale Publishing, Inc. v. Superior Court*, 159 Ariz. 72, 83 (App., 1988). The court contrasted weighing the evidence to "determine the truth of the matter," a jury function, with screening the evidence to determine "whether there is a genuine issue for trial," a judicial function. 477 U.S. at 249; *Scottsdale Publishing, supra*. The court concluded:

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Consequently, where the *New York Times* "clear and convincing" evidence requirement applies, the trial judge's summary judgment inquiry as to whether a genuine issue exists will be whether the evidence presented is such that a jury applying that evidentiary standard could reasonably find for either the plaintiff or the defendant. Thus, where the factual dispute concerns actual malice, clearly a material issue in a *New York Times* case, the appropriate summary judgment question will be whether the evidence in the record could support a reasonable jury finding either that the plaintiff has shown actual malice by clear and convincing evidence or that the plaintiff has not.

477 U.S. at 255-56; *Dombey v. Phoenix Newspapers, Inc.*, 150 Ariz. 476, 485-86 (1986); *Scottsdale Publishing, Inc. v. Superior Court*, 159 Ariz. at 83; *Heuisler v. Phoenix Newspapers, Inc.*, 168 Ariz. 278, 281 (App., 1991). The court will apply this standard in ruling on the competing motions.

Are Plaintiffs Public Figures?

The first amendment has been interpreted since *New York Times v. Sullivan*, 376 U.S. 254 (1964), to extend first amendment protection to those who exercise their right of free speech toward public figures differently than statements or comments about private figures. In an action arising from a publication addressing a matter of public concern, a private figure may recover compensatory damages upon proof by preponderant evidence that he has been negligently defamed. *Dombey*, 150 Ariz. at 481; *Scottsdale Publishing*, 159 Ariz. at 75. A public figure, by contrast, "may recover for injury to reputation only on clear and convincing proof that the defamatory falsehood was made with knowledge of its falsity or with reckless disregard for the truth." *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 342 (1974); *Scottsdale Publishing*, 159 Ariz. at 75. Proving knowledge of falsity or reckless disregard for truth is defined in legal shorthand as proving "actual malice." *New York Times v. Sullivan*, 376 U.S. at 279; *Scottsdale Publishing*. Proof of actual malice requires clear and convincing evidence that permits the "conclusion that the defendant in fact entertained serious doubts as to the truth of his publication." *Dombey*, 150 Ariz. at 487 (quoting *St. Amant v. Thompson*, 390 U.S. 727, 731-32 (1968)); *Heuisler*, 168 Ariz. at 281.

After some short-lived experimentation, the court ultimately settled on a defamation model that ties the constitutionally required showing in a defamation action to the plaintiff's status. *Pendleton v. City of Haverhill*, 156 F.3d 57, 67 (1st Cir., 1998). The United States Supreme Court requires that that "public figure" status arise in one of two ways: (1) when persons "assume[] roles of especial prominence in the affairs of society," perhaps by occupying positions of "persuasive power and influence," or (2) when persons "thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved." *Gertz*, 418 U.S. at 345; *Pendleton v. City of Haverhill*, 156 F.3d at 67. The court has

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noted, however, that not all public figures are equal: an individual who achieves "pervasive fame or notoriety," or otherwise comes within the first category, is deemed a public figure for all purposes, whereas an individual who dives headfirst into troubled waters, or otherwise comes within the second category, "becomes a public figure only for a limited range of issues." *Id.* at 351. That range is identified "by looking to the nature and extent of an individual's participation in the particular controversy giving rise to the defamation." *Id.* at 352; *Pendleton v. City of Haverhill*, 156 F.3d at 67. There is no dispute that if Plaintiffs are public figures it would be for the limited range of issues surrounding the Riverview project in Mesa.

Plaintiffs argue that this court should not rule on the issue of whether they are a public figure as there is a genuine issue of fact that should be submitted to the jury. The court disagrees with Plaintiffs on both the contention that there is a dispute regarding the salient facts, and that the public figure issue is to be decided by the jury in the first instance.

The court in *Rosenblatt v. Baer*, 383 U.S. 75, 88 (1966), declared that "it is for the trial judge in the first instance to determine whether the proofs show [the plaintiff] to be a 'public official,'" and explained that ceding this responsibility to the bench reduced the chance that jurors might "use the cloak of a general verdict to punish unpopular ideas or speakers," *Id.* at 88 n. 15; *Pendleton v. City of Haverhill*, 156 F.3d at 67. Most federal courts have therefore treated the First Amendment public figure status determinations as a question for the court, not the jury. *Pendleton v. City of Haverhill*, 156 F.3d at 67; *Lundell Mfg. Co. v. American Broad. Cos.*, 98 F.3d 351, 362 (8th Cir., 1996); *Reuber v. Food Chem. News, Inc.*, 925 F.2d 703, 708 (4th Cir., 1991); *Marcone v. Penthouse Int'l Mag. for Men*, 754 F.2d 1072, 1081 n. 4 (3d Cir., 1985); *Rebozo v. Washington Post Co.*, 637 F.2d 375, 379 (5th Cir., 1981); *Waldbaum v. Fairchild Publications, Inc.*, 627 F.2d 1287, 1293 n. 12 (D.C.Cir., 1980); *Penobscot Indian Nation v. Key Bank*, 112 F.3d 538, 561 (1st Cir., 1997) (describing "public figure status" as presenting "a question of law," notwithstanding that it "necessitates a detailed fact-sensitive determination"). The court finds that this approach is consistent with Arizona case law cited on the issue of public figure.

There are several factors a court must consider in determining if someone is a public figure. An individual may become a public figure if he "thrust[s] himself or his views into public controversy to influence others." *Hutchinson v. Proxmire*, 443 U.S. 111, 135 (1979). However, the media cannot create a public figure defense by raising an issue and naming the plaintiff. *Wolston v. Reader's Digest*, 443 U.S. 157, 167-68 (1979). As the Arizona Supreme Court has noted, the simple fact that events attract media attention "is not conclusive of the public-figure issue." *Dombey*, 150 Ariz. at 483. The issue revolves around whether the figure was drawn into the controversy against its will. *Wolston* 443 U.S. at 168-69, *Time, Inc. v. Firestone*, 424 U.S. 448 (1976); *Dombey*, 150 Ariz. at 483-84.

Another factor to consider in determining public figure status is whether the individual's position with respect to matters of public concern gives them access to the media on a regular and continuing basis. *Hutchinson v. Proxmire*, 443 U.S. at 135; *Dombey*, 150 Ariz. at 483.

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Those who have such access possess the means to preserve their reputations by rebutting the charges made against them.

Also, the cases indicate that doing business with the government, being swept up in a controversy over an issue of public interest or concern, being named in articles creating a public controversy, and defending oneself against charges leveled in the media are all factors to consider in deciding if a private entity has transformed itself into a public one. *Dombey*, 150 Ariz. at 485 (one who engages in public activities "cannot complain that the spotlight eventually turned on him.")

Dombey is particularly informative. *Dombey* sought, received, accepted and struggled to keep appointments as the designated insurance agent of record for a county and administrator of deferred compensation programs for its employees. While he was not employed by and received no direct benefits from the public body, he did receive significant and valuable benefits because of his position. He made recommendations resulting in substantial expenditures from the public for health and life insurance programs and of private funds obtained by payroll deductions from public employees for the deferred compensation program. *Dombey*, 150 Ariz. at 484.

The Arizona Supreme Court concluded that by assuming the position that he held, *Dombey* invited public scrutiny and should have expected that the manner in which he performed his duties would be a legitimate matter of public concern, exposing him to public and media attention. *Dombey*, 150 Ariz. at 484. The court cautioned, however, that "not . . . every provider of goods and services to the government becomes a public figure." *Dombey*, 150 Ariz. at 484. The court noted that on the continuum, those that provide more technical and substantive goods would be held to be public figures.

We believe that no bright line can be drawn. A person who sells legal pads to the judicial department may legitimately expect to retain almost complete anonymity. Those responsible for providing rockets for the space program may not legitimately enjoy the same expectations. *Dombey* is at neither pole, but we believe that by assuming the positions of agent of record and administrator for the deferred compensation plans, he surrendered any legitimate expectation of anonymity with regard to the manner in which he performed in his positions, his relationship with executives of the governmental agencies and the other matters with which the articles were concerned.

Dombey, 150 Ariz. at 484. See also, *McDowell v. Paiewonsky*, 769 F.2d 942 (3rd Cir.1985) (an architect who occasionally worked on public building projects had undertaken "a course of conduct" that invited attention and scrutiny making him a public figure even though he neither sought nor desired public attention); *Dameron v. Washington Magazine, Inc.*, 779 F.2d 736 (D.C.Cir.1985) (air traffic controller was public figure with regard to public controversy over crash which occurred while he was on duty); *Kaufman v. Fidelity Federal Savings & Loan Assn.*,

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140 Cal.App.3d 913, 189 Cal.Rptr. 818 (1983) (bank president who sought to influence governmental officials in charge of zoning was a public figure).

The court finds that Plaintiffs "can be considered to have voluntarily assumed a position that invited attention." *McDowell v. Paiewonsky*, 769 F.2d at 950. The material facts on this point are not in dispute and come from Plaintiffs. "Riverview" refers to a proposed commercial development in Mesa, Arizona near Dobson Road and State route 202. (Plaintiff's supplemental brief regarding "public figure" status at 2.) Plaintiffs are the developers of the Riverview project. On November 1, 2004, after required public hearings, public study sessions, and other public meetings, the Mesa City Council passed a resolution and two ordinances the effect of which was to change the zoning of the Riverview property. (*Id.*) Under the Riverview project the City would advance up to nearly 80 million dollars to Plaintiffs.¹ In response, Defendants applied for three separate referendum petitions to refer the City's zoning decisions to the voters.

Plaintiffs have "assume[d] special prominence in the resolution of [a] public question." *Dameron*, 779 F.2d at 742; *Dombey*, 150 Ariz. at 484-85 ("Whatever requirement there might be to 'thrust' oneself into a public controversy . . . [is] satisfied by . . . [one's] voluntary participation in activity calculated to lead to public scrutiny."); *Coronado Credit Union v. KOAT Television, Inc.*, 656 P.2d 896, 903-04 (N.M.App., 1982) ("corporations that have the requisite level of dealings with government agencies may be 'public figures' for that reason alone.") Most courts that have addressed the issue have found that those that seek zoning variances qualify as limited public figures regarding the debate that surrounds the sought after variance. *Greenbelt Coop. Publ'g Ass'n v. Bresler*, 398 U.S. 6, 9 (1970) (applicant for zoning variance "clearly fell within even the most restrictive definition of a 'public figure'"); *Okun v. Super. Ct.*, 629 P.2d 1369, 1374 (Cal., 1981).

Plaintiffs cannot request a zoning variance and a massive subsidy from the government, and then claim that they are a non-public figure for the public debate surrounding the variance and subsidy they sought. Plaintiffs are not a private figure drawn into the controversy against its will; they voluntarily entered the debate by negotiating with the City for a variance and subsidies/incentives. *Wolston*, 443 U.S. at 168-69; *Time, Inc. v. Firestone*, 424 U.S. 448 (1976); *Dombey*, 150 Ariz. at 483-84. Plaintiffs are a limited public figure for the debate that surrounded the referendum on their requested variance.

¹ The original flyers circulated by Defendants and the Mesa City Counsel fact sheet listed the subsidy/incentives in the 40 million dollar range. Final news reports surrounding the referendum vote listed the final subsidy in the 80 million dollar range. Regardless whether the final actual subsidy/incentive amount is 40 or 80 million dollars, it is a lot of money that would be of public concern no matter where and to whom it was going.

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Have Plaintiffs met their burden by coming forward with sufficient evidence to show the court that reasonable jurors could conclude that Defendants defamed Plaintiffs and prove they did so with actual malice by clear and convincing evidence?

Having determined that Plaintiffs are limited public figures for the public interest that surrounded their zoning variance and subsidy/incentive request, the First Amendment requires that the court review their claims before allowing the case to go forward. *Yetman v. English*, 168 Ariz. 71, 75-76 (1991); *Turner v. Devlin*, 174 Ariz. 201, 203-04 (1993).

“To be defamatory, a publication must be false and must bring the defamed person into disrepute, contempt, or ridicule, or must impeach plaintiff’s honesty, integrity, virtue, or reputation.” *Turner v. Devlin*, 174 Ariz. at 203-04 (citing *Godbehere v. Phoenix Newspapers, Inc.*, 162 Ariz. 335, 341 (1989)). The Arizona Supreme Court has outlined how speech regarding a matter of concern must be analyzed, and by whom. In *Yetman v. English*, 168 Ariz. 71, 75-76 (1991), the court found that “a statement on matters of public concern must be provable as false before there can be liability under state defamation law.”

The court noted that the First Amendment malice requirements provided additional protections on “matters of public concern that reasonably imply false and defamatory facts about public figures or officials.” *Id.*; *Turner*, 174 Ariz. at 204. In *Turner*, the court noted that in the final analysis it is not just that statements are false, but that they convey a defamatory meaning—actual or implied.

[T]he disputed facts are not defamatory, nor do they imply the existence of undisclosed defamatory facts. Therefore, even assuming that the asserted facts were false, they are not actionable by themselves.

174 Ariz. at 206; *accord, Hustler Magazine v. Falwell*, 485 U.S. 46, 50 (1988) (First Amendment precluded recovery for emotional distress for advertisement parody that “could not reasonably have been interpreted as stating actual facts about the public figure involved.”)

In *Yetman*, the court held that the “trial court should determine whether a statement is an actionable factual assertion . . . of defamatory content.” 168 Ariz. at 79.

The trial court decides in the first instance, whether, under all the circumstances, a statement is capable of bearing a defamatory meaning. The jury then decides whether the defamatory meaning of the statement was in fact conveyed.

Id. (citation omitted.) In making this determination, the trial court must consider the “actual damage to reputation in the real world by measuring the defamatory aspect of a publication by its natural and probable effect on the mind of the average recipient.” *Id.* 168 Ariz. at 77; *Phoenix Newspapers, Inc. v. Church*, 103 Ariz. 582, 587 (1968).

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In their opposition to Defendants' joint motion for protective order and stay of discovery and disclosure, Plaintiffs set out three basic claims that constitute the basis for the defamation action. First, Plaintiffs believe that "Defendant falsely endeavor[ed] to (a) inflame racist fears by stating that the project will be anchored by a 'Spanish-language theatre;' (b) assert that Plaintiffs have developed the project illegally by failing to comply with Arizona open meeting laws; and (c) assert that the project will cause an increase in City utility rates." (Opposition at 3 [document is not numbered]).

The first claim, that Riverview will have a Spanish-language theatre, relates to the following language that appeared on a flyer handed out by petition circulators that stated:

A movie theater company that has never done a project in Arizona has made it known it plans to put Spanish language theaters in the project. Forty-two million for Spanish-language theaters?

(Motion to Dismiss, Exhibit A.) Plaintiffs claim that the statement was false as the company—Cinemark—did not intend to operate a Spanish-language theater at the Riverview project. Defendants maintain that at the time they circulated the flyer that contained the "Spanish-language theater" language, they believed Cinemark was going to operate such a theater.

Cinemark does own Spanish-language theaters. Defendant Molina testified at his deposition that he was told about the Spanish-language theaters from Mesa City Councilman Whalen. Defendant Molina further testified that someone told him that Jeff Groscost had heard that Cinemark issued a press release wherein it indicated they were going to operate Spanish-language theaters in Riverview.

Defendant Molina further testified that he spoke with Marty DeRito on November 17 and was shown "a brochure for Cinemark." Molina asked DeRito if they, Cinemark, were going to "put a Spanish-language theater" in Riverview and DeRito said "no." (See Molina depo., pp. 39-43.) Molina also testified that he received a call from Blake Herzog of the East Valley Tribune, who told him that Cinemark was not going to operate a Spanish-language theater. (*Id.* at 62-63.) Molina testified that based on this information, Molina told his circulators to use a new flyer that had no reference to the Spanish-language theater.

Plaintiffs have failed to set forth a claim for defamation.² For the analysis on this issue, the court will assume that Plaintiffs have demonstrated that the statement that Cinemark "plan[ned] to put Spanish language theaters in the project" was false. As noted above, the inquiry is not just that a statement is false, but is the false statement capable of bearing a defamatory meaning. To be more precise, did the false publication "bring the defamed person

² Below the court will discuss whether Plaintiffs have submitted sufficient evidence to show that jurors could find by clear and convincing evidence that Defendants acted with actual malice if this court were to assume that Plaintiffs had presented a viable claim for defamation.

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into disrepute, contempt, or ridicule, or [did it] impeach plaintiff's honesty, integrity, virtue, or reputation." *Turner v. Devlin*, 174 Ariz. at 203-04.

It must be noted the test is not whether the statement made it more difficult for Plaintiffs to win the referendum elections. The test focuses on the reputation of the Plaintiffs. The statement itself does not even reference Plaintiffs. The statement references a company—Cinemark—and claims that they are going to operate Spanish-language theaters in Riverview. That this false statement may have had the intended consequences of playing to the racial fears of some segments in the community, does not infer that Cinemark is racist. More importantly, it does not infer that Plaintiffs are racist in dealing with Cinemark.

The court has considered the "actual damage to reputation in the real world by measuring the defamatory aspect of a publication by its natural and probable effect on the mind of the average recipient," and concludes there is none. Plaintiffs have failed to set forth a valid claim for defamation of a limited public figure, and Defendants are entitled to summary judgment on this claim.

The second claim, that Plaintiffs did not comply with the open meeting laws in obtaining the zoning variance and the subsidies/incentives, is based on a series of statements contained in the circulators' petitions. The flyer stated as follows:

We believe you have a right to vote on the massive subsidy to rich developers. The developers and their cronies at City Hall want to make sure you don't even see the deal.

Mesa has announced a \$42 million subsidy for "The Riverview at Dobson." But the public still doesn't know what is hidden in that deal. Unprecedented, up-front money? Interest payments on the debt? Will they issue city bonds? Will they be backed by a property tax? And at what cost? We think the public deserves answers.

Secret deals are dangerous. Forty-two million could VERY quickly become A LOT more and poses a HUGE risk to taxpayers. It could end up being hundreds of millions when interest payments are factored in.

They will tell you they have to negotiate in secret because they can't allow the public to jeopardize the deal. Of course not. The last thing they want the public to know is just how much they are really giving away. Don't be fooled. It is not *their* money they are giving away. It's *yours*. They like spending *other peoples'* money.

(Motion to Dismiss, Exhibit C, emphasis in original.) Defendants argue that their claims were factual as the details of the deal between Mesa and Plaintiffs were not released to the public. They cite to the City of Mesa fact sheet regarding the "incentive package for proposed retail development," and a letter from the City of Mesa to Defendant Molina that stated as follows:

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In response to your public records request dated November 15, 2004, Mesa is providing a documented titled "City of Mesa Incentive Package for Proposed Retail Development." This document was provided to the public at the August 19, 2004 study session.

All other documents responsive to your request are confidential and not subject to disclosure at this time. A.R.S.39-121; *Board of Regents v. Phoenix Newspapers, Inc.*, 1167 Ariz. 254, 806 P.2d 348 (1991). As you know, the City is engaged in negotiations with the developer to finalize development agreements for this project. These development agreements, upon completion, will be presented to the City Council for discussion and consideration. Mesa will make the agreements available to the public for review and comment before consideration by the City Council.

You have requested an index of records or categories of records withheld pursuant to A.R.S. 39-121(D)(2). Categories of documents withheld would include drafts of the development agreements currently under negotiations, financial projections for the project; and anticipated costs for public improvements to be completed.

(Motion to Dismiss, Exhibit A.) The letter was signed by Debbie Spinner, Mesa City Attorney.

During the time the language in the flyer was being circulated by Defendants, the City freely admitted to the Defendants that the City and Plaintiffs were involved in on-going confidential negotiations related to the details of the subsidies/incentives to be provided to Plaintiffs. The court finds as a matter of law that Plaintiffs have failed to set forth a claim regarding confidential negotiations that jurors could find by clear and convincing evidence that Plaintiffs were defamed by the statements published, or that Defendants did so with actual malice. There were confidential or secret negotiations that were on going while the flyers were distributed. The flyer does not claim that these negotiations were illegal, only that they should be subject to public scrutiny. Such comment is fair game regarding issues of public concern. The court grants the motion for summary judgment regarding this claim.

The last claim is that the flyer indicates that the subsidies/incentives would cause a raise in the utility rates. The contested language is as follows:

How can the city justify shoveling tens of millions of dollars of taxpayer incentives into the pockets of rich developers-at the same time they are gouging residents with fifty to eighty million a year in utility over-charges? The answer is they can't. They claim citizens should never have any say in utility rate hikes. Now they want to rush the rezoning first and give away the taxpayer's money later-after it is too late to stop them. Pretty slick, huh?

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(Motion to Dismiss, Exhibit C.) There is nothing that would indicate that Defendants were arguing that the City intended to raise utility rates to pay for the Riverview project. The clear language of the flyer is how can the city justify giving the types of incentives involved in the Riverview project at the same time the city is over charging for utilities. There is nothing before the court that would indicate that the overcharge allegation was false, or that if it was false it in anyway defamed Plaintiffs. The court further finds that on this issue Plaintiffs have failed to show that jurors could find by clear and convincing evidence that Defendants acted with actual malice. Defendants are entitled to summary judgment on this claim as well.

Have Plaintiffs met their burden by coming forward with sufficient evidence to show the court that reasonable jurors could conclude by clear and convincing evidence that Defendants acted with actual malice regarding the Spanish-language theater claim?

So the record is clear, the court does not find that the Spanish-language allegation is defamatory. However, even if it was, Plaintiffs have failed to show that Defendants acted with actual malice.

The question is, have Plaintiffs satisfied their burden of showing sufficient evidence exists that would allow jurors to find that the Defendants either knowingly published the false information or that they entertained serious doubts as to the truth of the information, but proceeded in conscious disregard of such doubts. *St. Amant v. Thompson*, 390 U.S. at 731-32; *Dombey*, 150 Ariz. at 487; *Scottsdale Publishing*, 159 Ariz. at 83. The court finds that no jury applying the "clear and convincing" evidentiary standard could reasonably find actual malice from the evidence presented to the court.

Defendant Molina testified why he thought Cinemark was going to operate a Spanish-language theater in Riverview. He also explained how he learned that it was not Cinemark's intent to operate a Spanish-language theater. When he learned this, Defendant Molina discontinued the use by circulators of the flyer that had the Spanish-language assertion in it.

The declarations by those responsible for the publication are not, of course, conclusive. The elements of actual malice may be inferred from objective facts. *Bose v. Consumers Union*, 692 F.2d 189 (1st Cir.1982), aff'd 466 U.S. 485. The Arizona Supreme Court stated in *Selby v. Savard*, 134 Ariz. 222, 225 (1982), "[A] defamation defendant cannot escape liability merely by alleging subjective belief in the truth of the matter published. '[P]roof of the necessary state of mind could be in the form of objective circumstances from which the ultimate fact could be inferred.'" *Scottsdale Publishing*, 159 Ariz. at 84. The determination whether a defendant "in fact entertained serious doubts as to the truth of the statement may be proved by inference, as it would be rare for a defendant to admit such doubts." *Bose*, 692 F.2d at 196; *Scottsdale Publishing*.

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Plaintiffs have failed to come forward with any evidence, objective or otherwise, that would call Defendant Molina's assertions into question. Plaintiffs have requested for more discovery on the issue. However, the discovery Plaintiffs have requested focuses not on whether Defendant Molina got the information as he describes, but whether he was tardy in retracting the flyer once he learned that the flyer was false. As the court finds the latter would not help Plaintiffs establish actual malice the request for additional discovery is denied.³

There has been no evidence presented that the Defendant Molina had an "obvious reason to doubt . . . the accuracy of" the idea that Cinemark would operate a Spanish-language theater. *St. Amant*, 390 U.S. at 732; *Scottsdale Publishing*, 159 Ariz. at 85. Cinemark does operate Spanish-language theaters. Also, the fact Defendants discontinued the use of the claim in their flyer lends support to Defendants' claim that the original publication of the flyer with the claim was not done with malice. *Heuisler*, 168 Ariz. at 283. Plaintiff has failed "to present 'significant probative evidence' which would support a finding that defendant published even though it entertained a subjective doubt of truth." *Dombey*, 150 Ariz. at 488 (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256-57 (1986) (quoting *Bose Corp.*, 466 U.S. at 512)).

Plaintiff also argues that malice can be inferred from other evidence such as the financial motivation from those who contributed to Defendants campaign. The fact that Defendants, or perhaps their contributors, had a financial incentive to stop Plaintiffs' project does not go to the actual malice test for a limited public figure concerning a matter of public concern. *Heuisler*, 168 Ariz. at 282 ("bad motives or personal ill-will," does not establish actual malice).

Plaintiffs, having failed to overcome the *New York Times* test to protect Defendants' First Amendment rights, cannot proceed on the remaining claims. Therefore,

IT IS ORDERED granting Defendants' motion for summary judgment and denying Plaintiff's cross-motion for partial summary judgment.

Defendants have requested attorneys' fees under Rule 11 and A.R.S. § 12-349 claiming that the action was not brought in good faith, but to harass Defendants from going forward with the referendum election. After reviewing the claims, and for the reasons set forth above, the court does not find a good faith basis for the filing of this action. Therefore,

³ A court must always be cognizant of the oppressive impact that litigation can have in First Amendment cases and deny discovery beyond that necessary to rule on a pending dispositive motion. *Herbert v. Lando*, 441 U.S. 153, 178 (1978)(J. Powell, concurring)("[I]n supervising discovery in a libel suit by a public figure, a district court has a duty to consider First Amendment interest as well as the private interests of the plaintiff."); *McBride v. Merrell Dow & Pharm., Inc.*, 717 F.2d 1460, 1466-67 (D.C.Cir., 1983)(in a defamation action it is "appropriate that discovery be limited initially to the extent feasible to those questions that may sustain summary judgment"); *Cervantes v. Time, Inc.*, 464 F.2d 989 (8th Cir., 1972)(affirming summary judgment without discovery because the record was sufficient to decide the motion.)

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IT IS ORDERED granting Defendants attorneys' fees and costs. Counsel for Defendants shall submit an itemization of costs and an application of fees with a *China Doll* affidavit within twenty (20) days of the filing of this order. Any response or reply should be filed in due course.