13-1217-cv

United States Court of Appeals

for the

Second Circuit

WING F. CHAU, HARDING ADVISORY LLC,

Plaintiffs-Appellants,

– v. –

MICHAEL LEWIS, STEVEN EISMAN, W.W. NORTON & COMPANY, INC.,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

FINAL FORM BRIEF FOR DEFENDANTS-APPELLEES MICHAEL LEWIS AND W.W. NORTON & COMPANY, INC. (PUBLIC VERSION)

COOLEY LLP
Attorneys for Defendants-Appellees Michael Lewis and W.W. Norton & Company, Inc.
1114 Avenue of the Americas
New York, New York 10036
(212) 479-6000

Of Counsel:
CELIA GOLDWAG BARENHOLTZ
GABRIEL RAUTERBERG
ANNIKA GOLDMAN

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, appellee W.W. Norton & Company, Inc. (a private non-governmental party) certifies that it has no parent corporation and no publicly held corporation owns 10% or more of its stock.

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PRELIMINARY STATEMENT

In the wake of the worst financial crisis since the Great Depression, award-winning journalist and author Michael Lewis set out to probe its causes. The result was *The Big Short: Inside the Doomsday Machine* ("*The Big Short*" or the "Book"), an insightful, opinionated account of the role played by the subprime mortgage industry and complex derivatives called collateralized debt obligations ("CDOs") in bringing the nation's economy to the brink. The Book follows a small group of iconoclasts who defied the conventional wisdom, and "shorted" (or took a financial position against) subprime mortgage-backed assets. Those individuals include one of Lewis's many sources, hedge fund manager Steven Eisman, who is a co-defendant in this action.

Plaintiffs are Harding Advisory LLC ("Harding"), once one of the world's largest CDO managers, and its president and 99% owner, Wing Chau. Plaintiffs are featured in Chapter 6 of the Book, which follows Eisman to a conference in Las Vegas where he has a conversation with Chau over dinner.

Plaintiffs claim the depiction of that conversation in the Book defames them, but do not deny that Chau was there, and spoke to Eisman about the CDO business. Although Chau denies making a number of the statements attributed to him, he has virtually no memory of the conversation, which he regarded as unmemorable. By contrast, the conversation was an important event for Eisman. As a direct result of

the encounter, Eisman increased his firm's short position against the subprime market by roughly $250 million and shorted CDOs for the first time.

The Big Short accurately reports Eisman's recollection of the conversation, and the impression it had on Eisman. Lewis interviewed three other people who were at the dinner, all of whom corroborated Eisman's account, and provided support for other portions of Chapter 6. Lewis wanted to interview Chau, and made *six* attempts to talk to him. Unfortunately, Chau declined to respond.

Judge Daniels correctly found that the few factual statements challenged by plaintiffs[1] are substantially true, and that the rest are opinions, not susceptible of a defamatory meaning, or are not "of and concerning" plaintiffs (or some combination thereof). The district court's determination that plaintiffs cannot sustain their burden of proving that Lewis and his publisher W.W. Norton & Company, Inc. ("Norton") acted with actual malice (the standard applicable to public figures) or gross irresponsibility (the standard applicable to matters of public concern) is also correct. Accordingly, the decision below should be affirmed.

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[1] Defendants' interrogatories asked plaintiffs to specify the statements in *The Big Short* they allege are false and defamatory and of and concerning them and to specify for each what is false about the statement, and how it injured plaintiffs' reputation. Plaintiffs identified 26 numbered statements (the "Challenged Statements"). A copy of the relevant pages of Chapter 6, with the Challenged Statements marked, was provided to the district court by Lewis and Norton, and has been submitted to this Court as SPA.24-34.

ISSUES PRESENTED FOR REVIEW

(1) Was the district court correct in ruling that the Challenged Statements are opinions, substantially true, not reasonably susceptible of a defamatory meaning, or are not "of and concerning" plaintiffs?

(2) Was the district court correct in ruling that plaintiffs cannot prove fault under either an actual malice or gross irresponsibility standard?

STATEMENT OF FACTS

Plaintiffs and the Collapse of the Subprime Market

In late 2007, a real estate bubble that had developed over years burst, triggering a devastating financial crisis.[2] CDOs played a significant part in that crisis.[3] As the FCIC put it, CDOs "became the engine that powered the mortgage

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[2] *See generally The Financial Crisis Inquiry Report: Final Report of the National Commission on the Causes of the Financial and Economic Crisis in the United States* ("*FCIC Report*") (2011). Available at http://fcic-static.law.stanford.edu/cdn_media/fcic-reports/fcic_final_report_full.pdf, and discussed at JA.675-79 ¶¶ 22-23. Congress created the Financial Crisis Inquiry Commission ("FCIC") in 2009 to investigate the causes of the financial crisis. The FCIC interviewed over 700 people, including Chau. Chapter 8 of the *FCIC Report*, entitled "The CDO Machine," is devoted entirely to CDOs. JA.675-79 ¶¶ 22-23

[3] A bond created by pooling the cash flows from home loans is known as a "residential mortgage-backed security" or RMBS. *FCIC Report* at 73; *see also* JA.537 ¶ 11 & n.2. CDOs are complex debt securities created by pooling tranches of mortgage bonds. *FCIC Report* at 128; JA.537 ¶ 11 & n.2. CDOs collateralized mainly by either the BBB-rated tranches of subprime mortgage bonds or other CDOs backed by such bonds are called "mezzanine CDOs." JA.537 ¶ 11 & n.2. A

supply chain" and were "some of the most ill-fated assets in the financial crisis." JA.675-79 ¶ 23, quoting *FCIC Report* at 127-29.

Among the key participants in the CDO industry were CDO managers, who selected the assets for CDOs and managed their performance over time. JA.22 ¶ 18. Chau became a CDO manager in 2004 when he joined the Maxim Group to start a CDO management business under the name Maxim Advisory LLC ("Maxim"). JA.1917 ¶ 81. Prior to joining Maxim, Chau had never managed a CDO. JA.1917 ¶ 80.

Chau's career as a CDO manager was intimately tied to Merrill Lynch's CDO business. JA.1925-26 ¶¶ 130-135. Chau knew Christopher Ricciardi (who ran Merrill Lynch's CDO business until 2006) from their days at Prudential. JA.1381 at 14:24-15:9. Chau also knew Kenneth Margolis, another top executive in Merrill Lynch's CDO business; indeed, it was Margolis who advised Chau to become a CDO manager. JA.1380 at 12:10-13:15. Merrill Lynch underwrote more than half of plaintiffs' CDOs, including the first seven CDOs Chau brought

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CDO backed primarily by CDOs is called a "CDO squared." *FCIC Report* at 132; JA.537 ¶ 11 & n.2. A credit default swap ("CDS") is a set of opposing bets on the performance of a particular mortgage bond. *FCIC Report* at 50; JA.538-41 ¶ 14; JA.575-76 ¶ 104. Every CDS requires a long investor willing to bet a particular mortgage bond will perform and a short investor willing to bet it will not. To create a synthetic CDO, a CDO manager takes the long side of a set of CDS and assembles them into a CDO. A synthetic CDO thus replicates the performance of a set of RMBS, but is not backed by actual home loans, and the revenue stream (if any) comes from the short investors. *FCIC Report* at 144.

to market. JA.1925-26 ¶¶ 135, 131. [redacted]

In July 2006, Chau started his own CDO management firm, Harding, and took the four CDOs he had launched under the Maxim name with him. JA.1917 ¶¶ 82, 85; JA.919. Harding would go on to manage 17 additional CDOs.[4] JA.1080. CDO management proved to be a lucrative business for Harding. Over the course of just three years, from 2006 to 2008, Harding earned over [redacted] in fees. JA.1918-19 ¶ 89. Some of those fees were upfront fees and thus entirely independent of the performance of the CDO involved. [redacted]

Plaintiffs aggressively marketed themselves and their CDOs, and their business grew rapidly as they traveled across the world promoting themselves and the merits of their CDOs at road shows and industry events. JA.1922-23 ¶¶ 114-122; JA.1928-29 ¶¶ 147-53; JA.663-65 ¶¶ 18-19. The marketing materials for Harding CDOs lauded Harding and Chau, and touted the merits of investing in CDOs. *See, e.g.*, JA.663 ¶ 17 ("A CDO-Squared transaction is an excellent way, in our view, to capture attractive opportunities in the rapidly growing CDO market.");

[4] Two of those 17 CDOs closed while Chau was at Maxim, but their governing documents contemplated Harding as their eventual manager. JA.1080; JA. 1917 ¶¶ 82, 85.

id. ("RMBS . . . in the past few years has demonstrated high ratings stability and upgrade tendencies compared to other structured finance securities."). *See generally* JA.1917 ¶¶ 83-84; JA.1926-28 ¶¶ 136-146.

Standard & Poor's ("S&P") ranked Harding the seventh largest asset-backed securities ("ABS") CDO manager in 2006, and the second largest in 2007.[5] JA.1923 ¶¶ 120-121. As debate about the subprime mortgage market intensified, JA 1937-39 ¶¶ 188-89, JA.669-72 ¶ 20(s)-(jj), Harding grew to its largest size, issuing and marketing new CDOs. JA.1080; JA.1923 ¶¶ 117, 120-22. For the last nine months before the subprime market completely collapsed, Harding became the world's largest ABS CDO manager. JA. 1923 ¶ 122.

When the bubble burst, Harding had 21 CDOs representing $23 billion in assets under management ("AUM"). JA.1920 ¶ 99. Plaintiffs' CDOs turned out to be poor investments. By early 2010 – before the publication of the Book – every CDO originated under Harding had either defaulted or been liquidated. JA.1921 ¶¶ 105, 106. The six surviving CDOs (originated under Maxim) were rated by the

[5] Documents produced by plaintiffs in discovery show instances in which S&P contacted Harding in connection with gathering information for reports ranking CDO managers, and plaintiffs provided information for inclusion. JA.1937 ¶ 182; JA.661 ¶ 11. In addition to issuing ratings, the ratings agencies published reports on a wide range of topics concerning CDOs, including Harding and the Harding CDOs, and plaintiffs regularly communicated with the ratings agencies about their business. JA.1936 ¶¶ 174, 176-182; JA.657-61 ¶¶ 5-11.

rating agencies as speculative/junk grade (*i.e.*, below BBB). *See* JA.700-805 (as of May 2010).

The rise and fall of plaintiffs' CDO business attracted considerable media attention.[6] JA.1930 ¶ 156; JA.1935 ¶ 173. Prior to the publication of *The Big Short*, plaintiffs were mentioned in over 200 press releases, JA.1936 ¶ 175, and over 45 articles and publications. JA.1930 ¶ 156. *See, e.g.*, *Creditflux*, February 12, 2007 (JA.155-56) (Harding plans to join the "small power circle of CDO managers" with its first CDO-squared, to be backed by at least 90% CDO collateral and arranged by Merrill Lynch); *Bloomberg*, July 12, 2007 (JA.157-58) (plaintiffs' CDOs "are now at risk of having their credit ratings slashed because

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[6] Although plaintiffs claim they shunned contact with the media, Appellants' Opening Brief ("Br.") 16, they spoke to the press when it suited them. *Bloomberg* business reporter Jody Shenn routinely sent Chau emails seeking comment on industry matters, JA.1934 ¶ 163, and interviewed Chau at least twice. JA.1931-33 ¶¶ 159, 162. Chau spoke to and exchanged emails with *Wall Street Journal* reporter Carrick Mollenkamp in connection with at least one *Journal* article. *Id.* Following an exchange of emails with Chau about what he should say, JA.1933 ¶ 161, [redacted] Chau was interviewed in connection with at least three other articles prior to the publication of the Book. JA.1931-32 ¶ 159; JA.1934 ¶ 164.

Plaintiffs monitored the media and took aggressive measures to protect themselves from adverse coverage. JA.1935 ¶ 172; *see also* JA.1930-31 ¶¶ 157-58. In January 2008, for example, Shenn interviewed Chau for a story. JA.1931-32 ¶ 159. After the interview, plaintiffs' counsel wrote to *Bloomberg*, agreeing to "further interviews or explanations," but threatening *Bloomberg* with legal action if it reported that Harding had shorted its own CDOs. JA.1933 ¶ 162.

they are backed by some of the worst-performing subprime mortgage bonds."); *The Wall Street Journal*, August 3, 2007 (JA.159-61) (Harding is "leading the manager pack" of those at risk to suffer enormous losses.); *Bloomberg,* January 4, 2008 (JA.162-63) (Harding, whose president is Wing Chau, and one other CDO manager manage five failing deals, "the most" of any CDO manager); *Bloomberg*, July 2, 2008 (JA.166-67) ("Money managers including . . . Harding . . . that topped the list of firms behind the most toxic mortgage securities" have raised funds to invest in home-loan debt; "'CDO managers may be seen as guys who created garbage and now want more money to sort out their own junk . . .'").

Lewis, Eisman, and *The End*

As Lewis explains in the Prologue to *The Big Short*, in 2007, he began thinking of writing a new book on Wall Street.[7] In March 2008, Lewis interviewed financial analyst Meredith Whitney. Later, he asked her if she knew anyone who had foreseen the subprime mortgage cataclysm. JA.542 ¶ 19. Whitney introduced Lewis to Eisman, who managed a large hedge fund called FrontPoint Partners LLC

[7] Plaintiffs allege that Lewis has a limited understanding of the financial world because he has not worked on Wall Street since he left Salomon Brothers to write *Liar's Poker*. JA.20 ¶¶ 6-7. In fact, Lewis has written numerous books and articles on business issues, JA.1893-94 ¶¶ 17-20, and has an extremely sophisticated understanding of the bond market. JA.1523 at 45:9-25, JA.1515-18 at 14:4-25:5.

("FrontPoint"), and had made a fortune for FrontPoint by shorting RMBS and CDOs.[8] JA.542 ¶¶ 19-20; JA.1110 ¶ 13.

Eisman told Lewis that a pivotal event in the evolution of his understanding of the subprime market occurred in January 2007, when he attended a dinner hosted by Greg Lippmann, an important Deutsche Bank mortgage bond trader, at the American Securitization Forum ("ASF") conference in Las Vegas. JA.1891-92 ¶¶ 1, 3, 9, 13. Lippmann arranged the dinner to introduce Deutsche Bank clients like Eisman, who were concerned about their short positions, to investors who were long, believing that talking to longs would reassure them about their short positions. JA.1891 ¶ 6. Lippmann sat Eisman next to Chau, whom Lippmann had known for many years, and the two discussed the subprime mortgage market. JA.1891-92 ¶¶ 7, 8. FrontPoint's chief trader, Daniel Moses, and FrontPoint senior analyst Vincent Daniel sat across the table from Eisman and Chau, observed their discussion, and heard Eisman describe it immediately afterwards. JA.1891 ¶¶ 4, 5; JA.1897 ¶ 26.

In October 2008, Lewis wrote an article called *The End of Wall Street's Boom* ("*The End*"), which was published in *Portfolio* magazine. JA.1894 ¶ 21.

[8] Eisman graduated from Harvard Law School, clerked for a federal judge and briefly worked at a law firm before moving to the financial sector. He had over 20 years' experience in the financial industry when Lewis interviewed him. JA.546 ¶ 36.

The End depicts a number of the persons and events that feature in *The Big Short*, including the dinner conversation between Eisman and Chau (who is not mentioned by name). JA.1894 ¶ 23. *Portfolio* quote-checked Eisman's statements in *The End*, and Eisman confirmed them.[9] As a result, all the assertions attributed to Chau in Chapter 6 were confirmed by Eisman well before *The Big Short* was published. JA.1897-98 ¶¶ 27-28; JA.1067-69.

While writing *The End*, Lewis realized that he had the makings of a book, and gave Starling Lawrence, his long-time Norton editor, a draft of the article. JA.543 ¶ 23. Lawrence agreed that *The End* could be expanded into a book. JA.64 ¶ 26. On October 28, 2008, Lewis and Norton entered into a contract for *The Big Short*. JA.1899 ¶ 34.

The Big Short

The Big Short explores the causes of the financial crisis by focusing on how Eisman and a small group of other investors came to the decision to short the subprime mortgage bond market. Throughout the Book these individuals ask themselves questions like: What is a mortgage-backed bond? What kinds of home loans go into mortgage-backed bonds? What is a CDO? Why does a CDO made up of tranches of RMBS get a higher credit rating than the tranches themselves? In

[9] The only Eisman quotes that were not confirmed were Statements 1 and 18 which are not in *The End*. Moses and Daniel also confirmed their quotes in *The End*. JA.1898 ¶ 29.

Lewis's hands, these questions become a device to educate readers about the complicated financial products that fueled the financial crisis. As the Book unfolds, and Lewis's subjects develop a greater understanding of the subprime industry, they start asking themselves deeper questions like: Are longs "fools" who do not understand the market, or are they "criminals," who know a collapse is inevitable? *The Big Short* does not answer those questions, leaving it to the reader to make such judgments. JA.536-37 ¶ 10-12.

In addition to Eisman, the principal subjects of *The Big Short* are Michael Burry, who founded Scion Capital LLC, and Jamie Mai and Charles Ledley, who founded Cornwall Capital, Inc. ("Cornwall"). JA.538 ¶ 13. Eisman is introduced early in the Book, and the reader learns about subprime lending largely through Eisman and the work he did with Daniel and Moses to investigate the home loans underlying RMBS. In later chapters, Eisman meets Lippmann, who built a large short position for Deutsche Bank. JA.538-41 ¶ 14. While the Challenged Statements concern CDOs, Chau is not the "villain" of the Book, which is critical of a host of financial industry players. *See* n.21 *infra*.

Throughout the Book, Lewis weaves general information and commentary about Wall Street into the narrative of his subjects' immediate experiences. The Book also reports Lewis's impressions and interpretations, and other subjective matters such as his subjects' mental processes and opinions. JA.542 ¶ 15.

The Big Short is meant for the average reader – one who is not familiar with the workings of Wall Street. Accordingly, Lewis uses figures of speech and other literary devices to make complex financial products like CDOs understandable. For example, he uses the concept of "betting" to explain what it means to be short and long. He does not mean that a person who takes a short position is literally placing a bet, and the reader understands that fact. Lewis's colorful style signals to his readers that they are encountering value judgments and opinions as well as matters of fact. JA.536-42 ¶¶ 10-17; JA.61-62 ¶ 18.

The Challenged Statements

The Challenged Statements appear near the beginning of Chapter 6, which follows Eisman and other subjects of the Book to the 2007 ASF conference, the premier securitization industry event, where his dinner with Chau took place. As of the dinner, Eisman had purchased CDSs against subprime RMBS, but not CDOs. JA.1892 ¶ 9.

Eisman, who is portrayed in the Book as exceedingly blunt, challenged Chau on the wisdom of Chau's long position, saying: "You must be having a hard time." Chau countered that he was doing quite well, explaining that he was paid on the size of his AUM, and did not have equity exposure to his CDOs: "I've sold everything out." Chau told Eisman that he wanted to grow his business, and that he needed shorts, like Eisman, to create his synthetic CDOs: "The more excited

you get that you're right, the more trades you'll do, and the more trades you do, the more product for me."[10]

Eisman was shocked to learn it was legal for a CDO manager not to have exposure to his CDOs. After the dinner, Eisman told Lippmann "Whatever that guy [Chau] is buying, I want to short it." Thereafter, Eisman dramatically increased FrontPoint's short position, including shorting CDOs for the first time.[11] JA.1892 ¶¶ 9, 13.

Despite plaintiffs' chorus of complaints, the factual material in Chapter 6 is substantially correct. For example:

- The dinner occurred. Eisman and Chau sat together and discussed the subprime derivatives market. JA.1891-92 ¶¶ 1-8.
- [redacted]
- [redacted]

[10] As discussed above, for every CDS there is an investor who is long, and an investor who is short. *See* pp. 3-4 n.3 *supra*; *see also FCIC Report* at 8.

[11] Statements 25 and 26 say Eisman went on to short Chau's CDOs. While Eisman intended to short Chau's CDOs, unbeknownst to Lewis, he ultimately shorted similar "equally bad" CDOs. JA.1892 ¶¶ 10-12. Lewis corrected the Book when he learned of this error through discovery. JA.578-79 ¶¶ 109-111 & n.44; *see also* p. 50 & n.44 *infra.*

- Chau told Eisman his goal was to increase the size of his CDO business. JA.1397 at 79:5-80:3; *see also* JA.1917 ¶ 84; JA.821 (Harding's AUM "is forecasted to approximately double in 5 years from $24.5 billion to slightly under $50 billion").
- [redacted] Today, most of plaintiffs' CDOs are no longer performing; the few that still exist are all rated below BBB. JA.1921 ¶¶ 104-106.
- Synthetic CDOs consist of CDS which require short and long positions. Plaintiffs purchased a substantial number of CDS for their CDOs, and managed seven synthetic CDOs. JA.700-805. Thus, plaintiffs needed shorts in order to have product for their CDOs.
- Merrill was the first underwriter to use Chau as a CDO manager, and underwrote his first six CDOs. JA.1080; JA.1925 ¶ 131. [redacted]
- At the height of the CDO market, Harding ranked among the top CDO managers, JA.1923 ¶ 117; it became the world's largest CDO manager in the months preceding the collapse of the CDO market. JA.1923 ¶ 122.

– CDO management was far more lucrative than Chau's work for New York Life. JA.1918-19 ¶¶ 89-91.

Chau has virtually no memory of the dinner. He testified that it was "unremarkable," "a typical business dinner," and could recall virtually no specifics about it. JA.1398 at 82:6-17. The few specifics Chau recalled at his deposition were consistent with the Book's depiction of the dinner. JA.1397-98 at 79:5-82: 5.

Lewis's Research for the Book

As the district court noted, *The Big Short* "was a product of sixteen months of extensive research and investigation, during which Lewis interviewed over one hundred sources," SPA.2; JA.1908-09 ¶¶ 60-61, and collected over 20,000 pages of hardcopy materials. JA.1909 ¶ 62. Lewis interviewed senior executives in the CDO groups of major investment banks; traders like [redacted] who made a market in these instruments; investors who shorted subprime mortgage vehicles, and investors who had been long; and CDO managers. He spoke to well-known analysts and commentators, and studied their reports. And he had extensive discussions with the principals of Cornwall, who conducted an investigation of CDOs and CDO managers before deciding to short CDOs, and who provided

Lewis with documents from their investigation.[12] *See generally* JA.1908-09 ¶¶ 61-62; JA.546-49 ¶¶ 36-39.

Lewis carefully vetted his primary sources, and checked or "triangulated" the information they provided. He interviewed Eisman and [redacted] numerous times, and investigated them to confirm their credibility.[13] JA.1913-14 ¶¶ 73-75; *see also* JA.546-48 ¶ 36; JA.554-55 ¶¶ 58-62. [redacted]

Lewis interviewed Eisman, Daniel, Moses and [redacted] about the dinner. Eisman confirmed the accuracy of every quote attributed to him or Chau. JA.1916

[12] Plaintiffs attempt to smear Lewis by attacking Brandon Adams and Anna Katherine Barnett-Hart. Br. 13. Lewis did not employ either Adams, a Harvard Ph.D. candidate who volunteered to have his Harvard students do some work on topics relating to CDOs, or Barnett-Hart, one of Adams' students, who wrote a prize-winning thesis on CDOs as an undergraduate. JA.546-48 ¶ 36. Further, the information Adams provided is not a source for any Challenged Statement. JA.560 ¶ 69 n.27.

[13] Lewis found no indication that either Eisman or [redacted] is unreliable. To the contrary, he learned that while they can be obnoxious and quirky, they are very honest. JA.1914-16 ¶¶ 76-77; JA.555 ¶¶ 59-62. Lewis had no knowledge of the grudge Chau claimed that [redacted] harbored against him. JA.555 ¶ 61 n.21.

¶ 78. Moses and Daniel confirmed that Lewis accurately depicted their statements and impressions. JA.1897 ¶ 26. [redacted], who heard portions of Eisman and Chau's conversation, corroborated Eisman's account.[14] JA.1896 ¶ 25.

There was only one more person Lewis could interview – Chau himself. Lewis telephoned Harding and left Chau a voice message indicating he would be in New York and would like to speak to him. JA.1404 at 107:3-9. Lewis sent Chau four electronic messages advising that he was writing about the financial crisis, that Chau would likely appear in his book, and that Chau could speak with him "on or off the record." JA.1910-11 ¶ 66. Lewis also attempted to contact Chau through Margolis and Lippmann. JA.1911-12 ¶¶ 67-70. Chau responded to none of these overtures, even though he knew why Lewis was attempting to contact him, and what Lewis intended to say.[15] JA.1912-13 ¶¶ 71-72

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[14] Plaintiffs observe that Eisman and [redacted] described somewhat differently in their depositions their recollection of what they heard Chau say about preferring to have $50 billion in CDOs rather than none (Statement 23). Br. 14. [redacted] Eisman testified that the word "crappy" was his, and that he recalled hearing Chau say "he was at 15 billion and he wanted to go to 50." Eisman also testified that he interpreted Chau to mean exactly what appears in Statement 23. JA.1683-84 at 292:4-293:6. *See also* JA.1913-14 ¶¶ 73-74; JA.1916 ¶ 78. There is no meaningful difference between Eisman and [redacted] recollection.

[15] Plaintiffs admit Lewis attempted to contact Chau through Lippmann, and that Chau was told that Lewis's book would likely include an account of the dinner

Norton

Norton is the oldest and largest employee-owned publishing house in America. JA.58 ¶ 6. Starling Lawrence has edited every Lewis book published by Norton, including *Liar's Poker*, *Moneyball*, and *The Blind Side*. Lawrence believes Lewis to have the utmost integrity, and has complete confidence in the honesty and accuracy of Lewis's work. JA.1898-99 ¶¶ 31-33.

Norton subjected *The Big Short* to its normal editing process. Lawrence edited each chapter as Lewis delivered it for style and "sense-checking," reviewing the drafts for coherence and consistency. JA.1900 ¶¶ 40-41. As Lewis originally included the portion of the Book that contains the Challenged Statements in Chapter 5, and then moved it to Chapter 6, Lawrence edited the account of the dinner twice. JA.1901 ¶ 42; JA.67 ¶ 38. Janet Byrne, an experienced and able copy-editor, copy-edited the Book. JA.1901 ¶¶ 43-44. Lawrence and Byrne then reviewed the manuscript again. JA.1901-02 ¶ 45.

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described in *The End*. JA.1911-12 ¶¶ 67-69. Although Chau had read *The End*, he did not contact Lewis. JA.1911 ¶ 68; JA.1510 at 476:15-22. [redacted]

Norton's outside counsel, who has reviewed hundreds of manuscripts for Norton and other publishers, reviewed *The Big Short* for legal issues, including libel, prior to its publication. After her review, she advised Lawrence that there was no reason that Norton could not publish the Book. JA.1902-04 ¶¶ 48-50.

The Big Short was published on March 15, 2010. JA.1907 ¶ 56; JA.60 ¶ 13. Until the complaint in this action was filed, neither Norton nor Lewis had received any complaint about the Book's accuracy. JA.1904-07 ¶¶ 52-55, 57.

The Summary Judgment Motion

Defendants moved for summary judgment on the grounds that the Challenged Statements were opinions, not defamatory, not "of and concerning" plaintiffs, or true. Defendants also asserted that plaintiffs could not meet their burden of proving fault, as the Book was the product of exhaustive research, and neither Lewis nor Norton had any doubts as to its accuracy when it was published. Although plaintiffs' brief dwells on the harm to their reputations allegedly caused by *The Big Short*, defendants did not move for summary judgment on the issue of damages, recognizing that whether the Book – as opposed to the abysmal performance of plaintiffs' CDOs – damaged plaintiffs' business prospects is a fact issue.

The District Court's Opinion

The district court held that: (1) every challenged statement lacked one or many of the elements necessary to be actionable as defamation; and (2) that it need not "mak[e] any determination as to whether Plaintiffs are public figures . . . or private figures . . . since Plaintiffs cannot prevail under either analysis" of fault. SPA.8.

Opinion – As required by New York law, the district court considered the context of the Challenged Statements, noting that the Book "does not purport to serve as a definitive history . . . nor does it read as such," and that the average reader would understand that it reflects the opinions of Eisman and Lewis. SPA.11-12. The court concluded that Statements 1-7, 9-13, 15, 17-19, 21-22, and 25 are opinion, because "no reasonable reader would interpret [them] to be more than opinionated criticism" and "[s]uch statements have no way of being verified as true or false." SPA.15.

Truth –The district court found that Statements 6, 8, 14-16, 18, 20, and 23-24 are completely or substantially true.[16] For instance, it found that "[p]laintiffs had only nominal equity in their CDOs," with the result that "the gist of Statement 18 that they had very little exposure to the CDOs, is true." SPA.14, n.4. Likewise,

[16] There is a typographical error in the first caption on SPA.17 but the text makes clear that the court found Statement 23 (not 25) to be completely true.

it found that a significant portion of Plaintiffs' collateral in its CDOs was rated triple-B. SPA.15 n.5. The district court also found the assertions that Chau's goal "was to maximize the dollars in his care," that Chau "was paid mostly on volume," and that he was for a time "the world's biggest subprime CDO manager" true and undisputed. SPA.17.

Not Defamatory – The district court concluded that Statements 1, 8, 14, 16, 20, and 23-26 were not susceptible to the defamatory meaning alleged by plaintiffs. SPA.19. For instance, as to Statement 20, in which Chau expresses his appreciation for those who short the subprime market, the court noted "[n]o part of this statement, even in the context of the rest of the chapter, accuses Chau of any despicable conduct." SPA.21. Likewise, the district court found that Chau's preference for managing mezzanine CDOs, even if Eisman thought them of low-quality, "hardly casts aspersion on [Chau's] character." *Id*. As Judge Daniels noted in closing:

> Chau was one of the largest CDO managers of sub-prime mortgage-backed securities. Many now view investments in subprime mortgage bonds, and their subsequent disastrous default, as significantly responsible for the greatest economic crisis since the Great Depression. . . . Chau's attempt to shift blame for the negative image now publically ascribed to that activity, and those who engaged in it, to the author and his source in the form of a libel suit, is unsupported by law or fact.

SPA.22.

"Of and Concerning" – The district court found that Statements 1, 9-13, and 21 are not "of and concerning" plaintiffs, rejecting plaintiffs' argument that any statement in the Book that discussed CDO managers refers to plaintiffs. "Plaintiffs cannot . . . merely allege that every unflattering comment made about CDO managers in *The Big Short* is a personal libelous accusation concerning Chau." SPA.19.

Fault – Contrary to plaintiffs' assertion that Judge Daniels assumed that defendants acted with the requisite fault, Br. 18, the district court determined it "need not address the issue of fault by making any determination as to whether Plaintiffs are public figures . . . or private figures . . . since Plaintiffs cannot prevail under either analysis." SPA.8 n.3.

SUMMARY OF ARGUMENT

A. The reader of *The Big Short* grasps that it is a non-fiction work that weaves Lewis's opinions and those of his subjects into depictions of factual events. Opinions are absolutely privileged under New York law.

B. Discovery revealed the substantial truth of every factual assertion in the Challenged Statements that plaintiffs alleged in their complaint to be false.

C. Read in full and in context – and not in the truncated sound-bites peppered throughout plaintiffs' brief – by a reasonable reader, the Challenged Statements cannot be interpreted as comments on plaintiffs' integrity or

competence. While Chapter 6 expresses a negative view of the CDO industry, it says nothing about plaintiffs' performance as CDO managers.

D. The "of and concerning" requirement bars claims based on statements that concern CDO managers generally.

E. Plaintiffs failed to sustain their burden of proving fault as to Lewis or Norton.

ARGUMENT

The Supreme Court has erected safeguards around free speech "necessary to give adequate 'breathing space' to the freedoms protected by the First Amendment." *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 56 (1988). Those strict standards may sometimes yield harsh results "[b]ut excessive self-censorship by publishing houses would be a more dangerous evil. Protection and encouragement of writing and publishing, however controversial, is of prime importance to the enjoyment of first amendment freedoms." *Hotchner v. Castillo-Puche*, 551 F.2d 910, 913 (2d Cir. 1977); *see also Reliance Ins. Co. v. Barron's*, 442 F.Supp.1341, 1352 (S.D.N.Y. 1977) (if authors and publishers "had to fear libel suits when expressing dislike of certain persons or firms, or of business or other practices, the self-censorship that would inevitably occur would have a stifling if not smothering effect on the functioning of a free press.").

The New York Constitution is even more protective of speech than the First Amendment. *See, e.g.*, *Immuno AG. v. Moor-Jankowski*, 77 N.Y.2d 235, 246 (1991) (hereinafter "*Immuno II*"). In an action governed by New York law, courts must be guided by New York's "consistent tradition" of affording "the broadest possible protection to 'the sensitive role of gathering and disseminating news of public events.'" *Id*. (quoting *O'Neill v. Oakgrove Constr.*, 71 N.Y.2d 521, 529 (1988)).

For these reasons, summary judgment is "particularly favored" in defamation cases. *Khan v. N.Y. Times Co., Inc.*, 269 A.D.2d 74, 77-78 (1st Dep't 2000). "[W]ithout judicious use of summary judgment to dispose of libel suits, 'the threat of being put to the defense of a lawsuit . . . may be as chilling to the exercise of First Amendment freedoms as fear of the outcome of the lawsuit itself.'" *Church of Scientology Int'l v. Time Warner, Inc.*, 903 F.Supp.637, 640 (S.D.N.Y. 1995) (quoting *Immuno AG. v. Moor-Jankowski*, 74 N.Y.2d 548, 561 (1989) (hereinafter "*Immuno I*")), *aff'd* 238 F.3d 168 (2d Cir. 2001).

Following extensive discovery, defendants demonstrated that there are no material issues of disputed fact. Plaintiffs in a defamation case cannot "defeat a defendant's properly supported motion for summary judgment . . . without offering any concrete evidence from which a reasonable juror could return a verdict in [their] favor." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256-57 (1986). As

plaintiffs did not sustain their heavy burden, the district court properly granted defendants' motion.

I.

THE DISTRICT COURT CORRECTLY RULED THAT THE CHALLENGED STATEMENTS ARE NOT ACTIONABLE

A. Statements 1-7, 9-13, 15, 17-19, 21-22, and 25 Are Opinions

"[T]he New York Constitution provides for absolute protection of opinions." *Celle v. Filipino Reporter Enters. Inc.*, 209 F.3d 163, 178 (2d Cir. 2000). Thus, to the extent plaintiffs are attempting to suggest that the inquiry under New York law is the same as under the First Amendment, Br. 48, they are wrong. New York "has embraced a test for determining what constitutes a nonactionable statement of opinion that is more flexible and is decidedly more protective of 'the cherished constitutional guarantee of free speech.'" *Gross v. New York Times Co.*, 82 N.Y.2d 146, 152 (1993) (quoting *Immuno II*). Under New York law, expressions of opinion, no matter how offensive, cannot be the subject of an action for defamation. *Mann v. Abel*, 10 N.Y.3d 271, 276 (2008).

Whether a statement is an opinion is a question of law to be decided by the court. *Id.* In aid of this task, the New York Court of Appeals has directed courts to consider: (1) whether the language at issue has a precise meaning; (2) whether the statements are capable of being proven true or false; and (3) whether the full

context of the communication or the broader social context and surrounding circumstances signal that what is being read is likely to be opinion, not fact. *Id.*

Thus, in reviewing the Challenged Statements, the district court properly considered the fact that they appear in a book written "in a narrative style" in which Lewis makes "liberal use of . . . analogies and figurative speech." The court correctly concluded that an "average reader" would "easily determine that [the Book] represents Lewis's one-sided view" of people and events, and that the criticisms made by Lewis's subjects are their own "personal perspective." SPA.12.

While plaintiffs claim the opinion Statements impugn their competence and integrity, for the most part, the opinion Statements comment on the CDO industry, not plaintiffs. To the extent they comment on plaintiffs, they do not question their abilities, but rather their involvement in the creation of CDOs. In any event, under New York law, opinions are not actionable regardless of their subject matter. A statement maligning a plaintiff's competence can be an opinion, and if it is an opinion, it is not actionable. *See, e.g.*, *Silverman v. Clark*, 35 A.D.3d 1, 14-16 (1st Dep't 2006) (finding statements questioning attorney's competence and integrity to be opinions).

As we discuss next, the district court correctly ruled that Statements 1-7, 9-13, 15, 17-19, 21-22 and 25 are opinions, and not actionable.[17]

Statement 2 reflects Lewis's impression of Chau's career. The district court rightly rejected plaintiffs' contention that where Chau spent most of his career is inherently factual, holding that an average reader would not interpret Statement 2 literally, as it is "clearly meant to contrast [Chau's] prior experience unrelated to his current job as a CDO manager," and that, in context, it "merely reflects Lewis's opinion of Chau's prior employment experience."[18] SPA.13; *see also Chandok v. Klessig*, 648 F.Supp.2d 449, 456-57 (N.D.N.Y. 2009), *aff'd* 632 F.3d 803 (2d Cir. 2011) ("[T]he allegedly defamatory statements must be construed as they would be by the average reader, not with the exacting precision one would expect from a lawyer or judge.").

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[17] Plaintiffs do not make any arguments regarding Statements 1, 7, or 21, and have therefore abandoned claims based on these statements. *See Tolbert v. Queens College*, 242 F.3d 58, 75-76 (2d Cir. 2001).

[18] Although the court below did not reach the issue, there is nothing defamatory about asserting that a financial professional spent most of his career at insurance companies. Insurance is a legitimate profession. *See*, *e.g.*, *Sabharwal & Finkel, LLC v. Sorrell*, 2013 N.Y. Slip Op. 31054(U), *13 (N.Y. Sup. Ct. 2013) (not disparaging to describe a New York law firm that specializes in commercial law as a Florida firm that specializes in restaurant law). "[A]n appellate court may affirm the judgment of the district court on any ground appearing in the record." *Shumway v. United Parcel Service, Inc.*, 118 F.3d 60, 63 (2d Cir. 1997). Defendants contend that the decision below can also be sustained on the ground that Statements 14 and 23 are opinion, Statements 25 and 26 are substantially true, and Statements 2, 6, and 15 are not defamatory.

Statements 3 and 4 describe Daniel and Moses's thoughts at the start of the dinner. At this point in the narrative, Daniel and Moses hold "longs" in contempt, and think to themselves that Eisman is sitting next to a "fool" or a "sucker." JA.563 ¶ 79. As the district court held, hyperbole and epithets are opinions, no matter how offensive, vituperative or unreasonable they may be.[19] SPA.13.

Statements 5 and 6 recount Eisman's understanding of a mezzanine CDO. As the district court held, value judgments such as "worst of the worst" and "dog shit" are opinions. SPA.14-15.

Read in full, and in context, the point Lewis is making in *Statement 9* is that given what large institutional investors cared about – AAA ratings – the function of the CDO manager was not especially significant. As Judge Daniels observed, whether a CDO manager does "much of anything" cannot be verified as true or false, and is therefore opinion. SPA.15; *see also Joyce v. Thompson Wigdor &*

[19] Plaintiffs argue that these epithets are transformed into factual statements because they are in a work of non-fiction, citing *Gross*, 82 N.Y.2d 146, and *Flamm v. Am. Ass'n of Univ. Women*, 201 F.3d 144 (2d Cir. 2000). Br. 51-52. But, as the district court observed, there is more than one kind of non-fiction. SPA.11-12. In *Gross*, the statements appeared in an exposé in the news section of *The New York Times*. Given their context, the Court concluded that some of them could be viewed as factual assertions, but made clear that in other contexts the same assertions could be opinions. *Gross*, 82 N.Y.2d at 154-55; *see also Brian v. Richardson*, 87 N.Y.2d 46, 53 (1995) (readers are more likely to expect opinions on the op-ed page of a newspaper than in the news section). *Flamm* involved a directory of attorneys published by the AAUW, a highly respected professional organization. *The Big Short* is not a directory or newspaper, and its overall tone makes clear that it includes opinions.

Gilly LLP, No. 06-Civ-15315, 2008 WL 2329227, at *7 (S.D.N.Y. June 3, 2008) (statement that employee did "nothing" was opinion).

Statement 10 – "Two guys and a Bloomberg terminal in New Jersey" – is a figure of speech, and not meant to be taken literally.[20] No reasonable reader would understand Lewis to be saying that Chau managed $23 billion dollars with one employee and one Bloomberg terminal. SPA.15.

Statements 11, 12, and 13 say that big Wall Street firms preferred "less mentally alert" CDO managers; that CDOs served to "launder" subprime mortgage market risk; and that the CDO manager was a "double agent." These are all opinions. SPA.15; *see also Mann*, 10 N.Y.3d at 276-77 (statements describing plaintiff as a "political hatchet Man[]," "one of the biggest powers behind the throne," "pull[ing] the strings," and as potentially "leading the Town . . . to destruction" are opinions).

Statement 15 – Chau's "job was to be the CDO 'expert,' but he actually didn't spend a lot of time worrying about what was in CDOs" – reflects Eisman's sense that Chau did not seem to spend much time thinking about the home loans

20 [redacted]

that ultimately backed up his CDOs. Eisman's impression of Chau's attitude is non-actionable opinion. SPA.13-14.

In *Statement 18*, Eisman expresses outrage that a CDO manager can manage a portfolio without an equity interest in it, and thinks to himself that a CDO manager like Chau without exposure to his CDOs is a "prick" who does not "give a fuck about the investors." As Eisman's crude, passionate language signals, Eisman's beliefs are opinions. SPA.13-14.

Statement 17 describes Harding as "the go-to buyer for Merrill Lynch's awesome CDO machine," and observes that Merrill produced CDOs that were "industrial waste." *Statement 19* describes Chau as "a new kind of front-man," noting that "investors felt better buying a Merrill Lynch CDO if it didn't appear to be run by Merrill Lynch." As the district court held, Lewis's views on the relationship between CDO managers and CDO underwriters, and the quality of Merrill's CDOs are opinions. SPA.14.

Statement 22 reflects Lippmann's opinion of "longs" as either "crooks" or "morons," and Lewis's opinion about the success of Lippmann's strategy in orchestrating the dinner. Read in context – similar language appears throughout the Book[21] – it is clear that "crooks" and "morons" are not meant literally, and are

[21] *See, e.g.*, JA.316-320 (excerpts from Book) at 111 ("[Cornwall] decided that Capital One probably did have better tools for making subprime loans. That left only one question: Was it run by crooks?"), 112 ("They asked . . . if they might

opinions. *See, e.g.*, *Greenbelt Coop. Publ'g Ass'n v. Bresler*, 398 U.S. 6, 14 (1970) ("[E]ven the most careless reader must have perceived that [defendant's reference to plaintiff's negotiating position as 'blackmail'] was no more than rhetorical hyperbole, a vigorous epithet used by those who considered [plaintiff's position] extremely unreasonable."); *Galasso v. Saltzman*, 42 A.D.3d 310, 311 (1st Dep't 2007) (finding "engaged in criminal conduct" and "committed crimes" to be opinions).

In *Statement 25*, Eisman stopped Lippmann after the dinner and said "Whatever that guy is buying, I want to short it." Statement 25 reflects Eisman's opinion that if he were to short a Harding CDO, the CDO would eventually default and Eisman would come out ahead. Predictions about the market are opinions. SPA.15-16. *See also Compuware Corp. v. Moody's Investors Servs.*, 499 F.3d 520, 528-29 (6th Cir. 2007) (credit rating is a subjective, predictive opinion, and does not communicate facts).

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visit him, to ask a few questions . . . 'All we really wanted to do," said Charlie, "was to see if he seemed like a crook."); 96 ([Daniel and Moses] performed the sort of nitty-gritty credit analysis on the mortgage loans that should have been done before the loans were made in the first place. Then they went hunting for crooks and fools."); 172 ("'With all due respect, sir,' said Vinny deferentially, as they left, 'you're delusional.' . . . [Moody's] CEO was being told he was either a fool or a crook").

Plaintiffs argue that even if the certain Challenged Statements are opinions, they are nonetheless actionable as "mixed opinions." Br. 53-56. A mixed opinion is a statement of opinion that implies the author is in possession of certain facts, unknown to reader, which support his opinion and are detrimental to the person about whom he is speaking. *Gross*, 82 N.Y.2d at 153-54; *Steinhilber v. Alphonse*, 68 N.Y.2d 283, 290 (1986) (the actionable element of a mixed opinion is not the opinion itself but the implication that the speaker knows detrimental facts, unknown to his audience, which support his opinion); SPA.10.

Nothing in the opinion Statements suggests that they are premised on undisclosed facts.[22] The Book makes clear that Eisman, Moses and Daniel's impressions of Chau (Statements 3-4, 6, 15, 18, 25) are based on the fact that he is long, and on what he tells Eisman, all of which is detailed in Chapter 6. Indeed, because Eisman and Daniel are encountering Chau for the first time, their opinions could not be premised on anything else. The basis for "worst of the worst," "industrial waste," and "three levels of dog shit lower than the original bonds" (Statements 5, 17, 6) is laid out in Chapter 6, which explains how CDOs were

[22] Plaintiffs cite *Steinhilber* for the proposition that readers will assume that Lewis knows of undisclosed detrimental facts for any opinion which is not accompanied by a basis because *The Big Short* is non-fiction. Br. 54-55. *Steinhilber* says no such thing. Moreover, there are many cases in which courts have found statements in non-fiction works to be pure opinions. *See*, *e.g.*, *Balderman v. Am. Broad. Cos.*, 292 A.D.2d 67, 72-73 (4th Dep't 2002) (statements in exposé of New York State study on cardiac surgery were "'pure opinion.'") (citation omitted).

created from the BBB tranches of mortgage bonds.[23] Chapter 6 fully explains the basis for the opinion that a CDO manager is a "front man" or a "double agent" (Statements 19 and 13). Because CDO managers were hired by the CDO underwriter,[24] were paid on volume, and did not have personal exposure to their CDOs, they seemed to be more aligned with the underwriters who hired them than investors.[25]

B. The District Court Correctly Ruled that Statements 6, 8, 14-16, 18, 20, and 23-24 Are True

A statement is not defamatory if its "gist" or "substance" is true, or "if the published statement could have produced no worse an effect on the mind of a reader than the truth." *Guccione v. Hustler Magazine, Inc.*, 800 F.2d 298, 302 (2d

[23] Plaintiffs contend that Statements 5, 6 and 17 are based on the allegedly false factual predicate that Chau "controlled roughly $15 billion invested in nothing but CDOs backed by the triple-B tranche of a mortgage bond." Br. 54. A simple reading of these Statements shows that they concern the way Wall Street repackaged RMBS into CDOs, not the collateral underlying plaintiffs' CDOs.

[24] [redacted]

[25] Plaintiffs' reliance on *Chalpin v. Amordian Press, Inc.*, 128 A.D.2d 81 (1st Dep't 1987) is misplaced. In that case, a mixed opinion was found actionable because the article disclosed the basis for that opinion, and it was absolutely false. *Id.* at 85-87. Unlike *Chalpin*, the factual basis for the opinions in Chapter 6 is accurate. For example, regardless of whether Chau told Eisman that he had "sold everything out," plaintiffs did not have exposure to their CDOs as of January 28, 2007. *See* JA.1921-22 ¶¶ 107-113. Thus, to the extent Eisman's opinions are based on plaintiffs' lack of equity in their CDOs, they are not based on distorted or misrepresented facts.

Cir. 1986); *see also Printers II, Inc. v. Prof'ls Publ'g, Inc.*, 784 F.2d 141, 146-47 (2d Cir. 1986); *Fleckenstein v. Friedman*, 266 N.Y.19, 23 (1934) (a defamation plaintiff must demonstrate *more* than technical inaccuracies or imprecise or inarticulate statements to show falsity); *Holy Spirit Ass'n for Unification of World Christianity v. New York Times Co.*, 68 A.D.2d 833, 833(1st Dep't 1979) ("recovery in libel cannot rest on 'fine and shaded distinctions' or on 'form exalted over substance'") (internal citations omitted). Plaintiffs "bear the burden of showing falsity" in a defamation action. It is not defendants' burden to prove truth. *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 775-76 (1986) (even a private figure on an issue of public concern bears the burden of proving falsity).[26]

Statement 6 – In arguing that Statement 6 is false, plaintiffs indulge in "hypertechnical parsing . . . [that] loses sight of the objective of the entire exercise, which is to assure that . . . the cherished constitutional guarantee of free speech is preserved." *Immuno I*, 74 N.Y.2d at 561. Plaintiffs concede that the [redacted] but nonetheless assert that Statement 6 is false because their non-prime assets were not necessarily BBB-

[26] Public figure plaintiffs must prove falsity with convincing clarity. *See DiBella v. Hopkins*, 403 F.3d 102, 115 (2d Cir. 2005).

rated.[27] Br. 43-44. Plaintiffs' quibble does not change the fact that "the gist of Statement 6, that Plaintiffs had . . . billions of dollars invested in CDOs backed by the triple-B tranche of a mortgage bond, is true."[28] SPA.17. Moreover, the disastrous performance of plaintiffs' CDOs demonstrates that they were actually less creditworthy than a BBB rating suggests. Almost all of Harding's CDOs have defaulted or been liquidated. The surviving six have a speculative/junk grade quality rating (*i.e.*, below BBB). *See* pp. 6-7 *supra*.

While plaintiffs stress that they also managed corporate and high-grade CDOs, Br. 5-6, 43, Statement 6 does not say otherwise. It merely describes how much of plaintiffs' portfolio was BBB, and says nothing about the rest of plaintiffs' portfolio.[29] In any event, [redacted] and plaintiffs' few extant CDOs are all rated below BBB. *See* pp. 6-7 *supra*.

[27] As *The Big Short* explains, these terms are not precise. "Mezzanine" or "subprime" were commonly understood to refer to the lower-rated tranches of bonds, but views differed, and market participants came up with lingo to make non-prime assets look better than they really were. JA.565-66 ¶ 84 & n. 33.

[28] [redacted]

[29] Even if Statement 6 could be read to say plaintiffs only managed mezzanine CDOs, it is not defamatory. [redacted]

Statements 8, 14, and 18 – In Statement 8, Chau says "I've sold everything out," which Eisman understands to mean that Chau did not have equity in his CDOs. Statements 14 and 18 reiterate that notion.[30] The complaint alleges these statements are false because plaintiffs "had a significant stake in several of the CDOs they managed." JA.26-27 ¶ 34; *see also* JA.35 ¶ 63. [redacted]

Relying on *Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496 (1991), plaintiffs assert that there is a dispute as to whether these Statements are true because Chau denies uttering these particular words. Br. 40-41. *Masson* was decided under California's defamation law.[31] The portion of *Masson* on which

[30] Statement 14's reference to "almost giddily" highlights that it is an opinion reflecting Eisman's impression of Chau's demeanor and words. *See* pp. 29-30 *supra*.

[31] Unlike New York, California does not extend greater protection to libel defendants than the First Amendment requires. *Brown v. Kelly Broadcasting Co.*, 48 Cal.3d 711, 746 (1989).

plaintiffs rely has not been adopted by the New York Court of Appeals, which has often noted that the New York Constitution is especially protective of the media. *Jewell v. NYP Holdings, Inc.*, 23 F.Supp.2d 348, 391-92 (S.D.N.Y. 1998) (distinguishing *Masson* when discussing the incremental harm doctrine because "New York has consistently chosen to provide libel defendants with greater protection than that afforded by federal law").

Under New York law, a statement attributed to a plaintiff may be substantially true even if the plaintiff denies saying it. As Judge Dearie explained in *Corporate Training Unlimited, Inc. v. Nat'l Broad. Co.*, 981 F.Supp.112, 120 (E.D.N.Y. 1997) (citation omitted), "a defamatory quotation is not necessarily actionable simply because it is not an exact reproduction (or even if it is a deliberate alteration) of the subject's statement. Rather, the alteration must 'result in a material change in the meaning conveyed,' and the *difference* must potentially injure the subject's reputation." *See also James v. Gannett Co.*, 40 N.Y.2d 415, 420 (1976) (dismissing claim based on quotation plaintiff claimed she did not make because it was not reasonably susceptible of a defamatory meaning).

Regardless of the words Chau uttered to Eisman, plaintiffs did not meet their burden of demonstrating the substantial falsity of Statements 8, 14 and 18. Had the Book stated "But Chau wasn't having a hard time. He'd sold everything out," the effect on the reader would have been the same as "No," Wing Chau said, "I've sold

everything out." Thus, the district court correctly held that "[a]lthough whether or not Chau actually said this may be in dispute, the statement itself communicates the undisputed statement that Chau had little personal exposure to the CDOs he managed." SPA.17.

Statement 15 – Statement 15 contrasts Chau making $140,000 a year managing a portfolio for New York Life with taking home $26 million in one year as a CDO manager. Chau's "best guess" as to what he earned at New York Life was [redacted] per year. JA.1919 ¶ 91. In 2007, Harding, 99% owned by Chau and 1% by Chau's wife, JA.1917 ¶ 86, made [redacted] JA.1919 ¶ 90. Chau personally made [redacted]. JA.1959. The district court correctly held that the "overall gist of these assertions, that Chau was making significantly more money as a CDO manager than he did as an insurance company portfolio manger with a previous employer, is an undisputed fact."[32] SPA.18.

Statement 16 – Chau admitted that his "goal . . . was to maximize the dollars in his care," testifying that the "motivation of all investment managers is increasing AUM," and that he told Eisman "that we would like to grow the CDO business." JA.1917 ¶ 84; JA.1397 at 79:21-80:3. From January 2007 until the market crashed in September, Harding was the world's biggest subprime CDO manager. JA.1923

[32] Although the district court did not reach the issue, the observation that Chau made far more as a CDO manager than he did while at New York Life could not expose him to hatred or obloquy.

¶ 122 (*citing* S&P report ranking Harding as the world's largest ABS CDO manager by volume of issuance between January 1, 2007 and September 30, 2007).

Statement 23 – [redacted] SPA.3 n.1. [redacted]

Statements 20 and 24 – Statements 20 and 24 concern Chau's need for "shorts" in order to be able to assemble synthetic CDOs. Chau admits discussing the substance of these Statements with Eisman at the dinner, and that their substance is correct. JA.1892 ¶ 8. It is plaintiffs' burden to prove the challenged statements substantially false, and they utterly failed to make such a showing.

C. Statements 1, 8, 14, 16, 20, and 23-26 Are Not Susceptible of a Defamatory Meaning

Whether a statement is reasonably susceptible of a defamatory meaning is a threshold question of law for the court. *Aronson v. Wiersma*, 65 N.Y.2d 592, 593-94 (1985). In answering this question, a court must consider the publication as a whole and look to its effect upon the average reader. *James*, 40 N.Y.2d at 419-20. A statement is defamatory only if it "tend[s] to expose a person to hatred, contempt or aversion, or to induce an evil or unsavory opinion of him in the minds of a

substantial number in the community." *Levin v. McPhee*, 119 F.3d 189, 195 (2d Cir. 1997) (internal quotation marks and citation omitted); Robert D. Sack, *Sack on Defamation: Libel, Slander & Related Problems* § 2:4:1 (4th Ed. 2012) ("[A] communication that is merely unflattering, annoying, irksome, or embarrassing, or that hurts only the plaintiff's feelings, is not actionable.").

While the Book does not have a high opinion of the CDO industry, it does not disparage plaintiffs' particular abilities as CDO managers or accuse them of dereliction of their duties. The Challenged Statements merely describe plaintiffs as a CDO manager – no better or worse than any other CDO manager. The district court correctly concluded that such statements are not defamatory.

The Dinner Statements (Statements 8, 14, 16, 20, and 23-24)

Relying on *Masson*, plaintiffs argue that the dinner Statements are defamatory because Chau – who cannot recount what he actually said – denies making them.[33] Br. 29-31. Even if *Masson* were applicable, this case bears no relationship to *Masson*, in which a reporter tape-recorded a series of interviews, then wrote a story containing long quotations from the plaintiff, some of which she

[33] As discussed above, the issue of defamatory meaning in *Masson* was a question of California law. *See* pp. 36-37 *supra*. The constitutional issue in *Masson* was whether an author's deliberate alteration of a quotation was enough to establish actual malice. The Court held it was not. *Masson*, 501 U.S. at 517 ("a deliberate alteration of the words uttered by a plaintiff does not equate with knowledge of falsity . . . unless the alteration results in a material change in the meaning conveyed by the statement.").

had deliberately altered. The reader of *The Big Short* understands that Eisman is recounting his memory of the dinner long after the fact, and that Eisman may not have reproduced Chau's words exactly, even where quoted. *Cf. Masson*, 501 U.S. at 512-13 ("quotations do not always convey that the speaker actually said or wrote the quoted material. . . . [A]n acknowledgment that the work . . . recreates conversations from memory, not from recordings, might indicate that the quotations should not be interpreted as the actual statements of the speaker to whom they are attributed.").[34]

Moreover, Statements 8 and 20 – the only dinner Statements to which *Masson* could conceivably apply because they are the only ones that quote Chau – are not defamatory. Statement 8 quotes Chau as saying that he had "sold everything out." From the full context of Chapter 6 – particularly, Eisman's reaction to Chau's lack of equity exposure in Statements 14 and 18 – it is clear that Eisman understands Chau to be saying that Chau had been able to sell his CDOs without retaining any equity.[35] This is not an admission of misconduct. [redacted]

[34] *Mahoney v. Adirondack Publ'g Co.*, 71 N.Y.2d 31 (1987), Br. 30, presents an entirely different situation than the case at bar, as it involved an accusation that a high school coach swore at a student during a game, which would be unprofessional conduct if true.

[35] Plaintiffs' complaint asserted that they had equity in their CDOs, and that defendants maligned them by reporting that Chau said otherwise. [redacted] Plaintiffs then adopted the conceit that Statement 8 suggests plaintiffs purchased equity and

[redacted] Thus, reporting that Chau said he did not have equity cannot be defamatory.

Statement 20 also quotes Chau describing his business in an accurate way. As the district court observed, no part of Statement 20 "accuses Chau of any despicable conduct." SPA.21. Even if Chau did not express affection for shorts – or say that without them, he had nothing to buy – he could not have created Harding's synthetic CDOs without short investors. *See* pp. 3-4 n.3 *supra*. If the fact that Chau was willing to manage synthetic CDOs seems unflattering today, it is because we now understand the havoc these complex derivatives wreaked on our economy, not because words were put into Chau's mouth.

The district court's ruling with respect to the rest of the dinner Statements (*i.e.*, those that do not quote Chau) is also correct.

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later sold it, which they say is defamatory. Given the context of Chapter 6, the district court properly rejected plaintiffs' construction. SPA.20-21. "Courts will not strain to find a defamatory inference where none exists." *Fairley v. Peekskill Star Corp.*, 83 A.D.2d 294, 296 (2d Dep't 1981) (internal quotation marks and citation omitted).

Statement 14 expresses the same notion as Statement 8, and Statement 24 expresses the same notion as Statement 20. These statements are not defamatory for the reasons discussed above.

In Statement 16, Chau explains his goal "was to maximize the dollars in his care." Chau acknowledged that the "motivation of all investment managers is increasing AUM." JA.1917 ¶ 84. By plaintiffs' own admission, Statement 16 is not defamatory.

Statement 23 reflects Eisman's impression of his conversation with Chau, *i.e.*, that Chau "would rather have $50 billion in crappy CDOs than none at all, as he was paid mainly on volume." The only portion of Statement 23 Chau can take issue with is "crappy," but Eisman's view that mezzanine CDOs are "crappy" does not defame the plaintiffs and is, in any event, an opinion. *See Millus v. Newsday, Inc.*, 89 N.Y.2d 840, 842-43 (1996) (read in context, statement that plaintiff political candidate "admits he doesn't expect to win and is relieved by the prospect" was an interpretation of his words and therefore opinion).

Plaintiffs' analogy to a lawyer who expresses a desire to bring frivolous lawsuits rather than none at all, Br. 31-32, is inapt because there is no suggestion in the Book that plaintiffs' CDOs were not legitimate investment vehicles, or that Chau did not act legitimately in managing his CDOs. A better analogy would be to a lawyer who says "I'd rather bring 100 foreclosure cases than none at all, as I get

paid based on the number of cases I bring." There is nothing defamatory about attributing to a lawyer who makes his living filing foreclosure cases the desire to increase the size of his docket, and there is nothing defamatory about attributing to a manager of mezzanine CDOs the desire to manage more of them.

Statements 25 and 26

Statements 25 and 26 concern the aftermath of the dinner, when Eisman announced his intent to short Chau CDOs.[36] When a trader says I want to short IBM, he is not slandering IBM or its management. Traders short securities for all sorts of reasons, including reasons having nothing to do with management's competence or even the quality of the security. That a financial professional shorted an asset does not hold its manager up to degradation or scorn.[37] SPA.21.

Defamation By Implication

[36] Plaintiffs assertion that the Book's title is based on Eisman's trade after the dinner and that it was for $250 million is wrong. Br. 34-35. The title refers to the short positions taken by *all* of Lewis's short subjects, not just FrontPoint. The Book never specifies the size of FrontPoint's short of plaintiffs' CDOs.

[37] Although the district court did not reach the issue, Statements 25 and 26 are also substantially true. Eisman told Lippmann he wanted to short Chau's CDOs after the dinner, and contacted Deutsche Bank to make the trade. JA.1892 ¶ 10. Eisman's trader explained that Chau's CDOs were expensive to short because other investors were already shorting them, JA.1892 ¶ 12, so Eisman asked for other "equally bad" CDOs "equivalent to Chau's" to short instead. JA.1892 ¶ 11; JA.1117 ¶¶ 36-37. The gist of Statements 25 and 26 is thus correct: Eisman wanted to short Chau's CDOs but did not do so because he learned that similar CDOs could be shorted less expensively. *Cf. Cholowsky v. Civiletti*, 69 A.D.2d 110, 114-16 (2d Dep't 2009) (party planned to dump hazardous materials but did not do so; statement that he in fact did so was substantially correct).

Plaintiffs make the last-ditch argument that, taken together, the Challenged Statements create the defamatory impression that Chau was an incompetent CDO manager.[38] Br. 35-37. Apparently, plaintiffs are attempting to resuscitate their claim of defamation by implication, which they abandoned when they conceded below that the alleged implications stated no claim above and beyond the Challenged Statements themselves.[39] Plaintiffs' Memorandum in Opposition 31 n.10.

The Big Short does not imply anything about plaintiffs' competence as CDO managers, and Lewis did not intend for it to convey anything about their competence as CDO managers. JA.1916 ¶ 79. *Cf. Vinas v. Chubb Corp.*, 499 F.Supp.2d 427, 437 (S.D.N.Y. 2007) (under New York law, defendants must have affirmatively intended the implication); *Ello v. Singh*, 531 F.Supp.2d 552, 580 (S.D.N.Y. 2007); *Rappaport v. VV Publ'g Corp.*, 618 N.Y.S.2d 746, 748 (N.Y. Sup. Ct. 1994). Accordingly, even if plaintiffs did not waive their implication claim, it is without merit.

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[38] The district court was required to consider each statement separately, and did so. *See Chandok*, 648 F.Supp.2d at 456. In making that analysis, however, Judge Daniels clearly considered the overall context of the Statements. SPA.11-12.

[39] "'Defamation by implication' is premised not on direct statements but on false suggestions, impressions and implications arising from otherwise truthful statements." *Armstrong v. Simon & Schuster, Inc.*, 85 N.Y.2d 373, 380-81 (1995).

D. Statements 1, 9-13, 21 Are Not "Of and Concerning" Plaintiffs

The statements the district court found to be not "of and concerning" plaintiffs refer to CDO managers as a group. The "of and concerning" requirement precludes defamation claims based on statements that reference a profession or industry, or a plaintiff solely as a member of that profession. *Abramson v. Pataki*, 278 F.3d 93, 102 (2d Cir. 2002). There is no dispute that there were a plethora of CDO managers. [redacted]

Throughout *The Big Short*, Lewis interweaves observations about individuals with general information about the securitization industry. The reader can tell when Lewis is referring to an individual, and when he is referring to a group. Plaintiffs make much of the fact that Statement 9 references Chau by name. Read in full – as opposed to plaintiffs' truncated quotation, Br. 45-46 – the only portion of Statement 9 that is arguably defamatory concerns CDO managers generally. SPA.19. Where a statement addresses an entire group, no member may maintain a claim, "even though the language used is inclusive," *Neiman-Marcus v. Lait*, 13 F.R.D. 311, 315 (S.D.N.Y. 1952), or the plaintiff is named elsewhere in the work. *Church of Scientology Int'l v. Time Warner, Inc.*, 806 F.Supp.1157, l160-61 (S.D.N.Y. 1992), *aff'd* 238 F.3d 168 (2d Cir. 2001).

II.

THE DISTRICT COURT CORRECTLY RULED THAT PLAINTIFFS CANNOT SUSTAIN THEIR BURDEN OF PROVING FAULT

Where a public figure is concerned, the plaintiff must establish that the defendant acted with actual malice. *See, e.g., Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 335-37 (1974). The "decidedly high standard" of actual malice requires that plaintiffs prove by clear and convincing evidence that the defendants actually knew a Challenged Statement was false or actually entertained serious doubts about its truth and published it anyway. *Kipper v. NYP Holdings Co.*, 12 N.Y.3d 348, 354 (2009) (actual malice not established where defendants' only source *contradicted* defendants' report).

Where the plaintiff is not a public figure, but the publication relates to a matter of public concern, the New York Constitution requires the plaintiff to prove that the defendant "acted in a grossly irresponsible manner without due consideration for the standards of information gathering and dissemination ordinarily followed by responsible parties." *Chapadeau v. Utica Observer-Dispatch*, 38 N.Y.2d 196, 199 (1975).

The district court declined to reach the issue of whether plaintiffs are public figures, holding "[p]laintiffs cannot prevail under either" the actual malice standard applicable to public figures, or the gross irresponsibility standard applicable to reporting on a matter of public concern. SPA.8 n.3. The district court was right.

Regardless of the applicable standard, plaintiffs failed to carry their burden of showing a triable issue on the element of fault.[40]

A. Plaintiffs Cannot Carry Their Burden of Proving Fault as to Lewis

Lewis made a detailed showing of what he did to research *The Big Short*, and explained why he believed every word of what he wrote was true. Contrary to plaintiffs' rhetoric, there is not an iota of evidence that Lewis fabricated any conversations. Lewis had one or more sources for each of the Challenged Statements, JA.1909-10 ¶ 63, and four sources for the dinner conversation. JA.1894-98 ¶¶ 24-29; JA.1916 ¶ 78. Those sources confirmed the accuracy of Lewis's depiction of the dinner. *Id.* The only other person who was privy to the conversation was Chau, who would not speak to Lewis.[41] JA.1910-1913 ¶¶ 66-72.

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[40] Plaintiffs voluntarily injected themselves into the public controversy about CDOs and the subprime mortgage bond market and are therefore limited purpose public figures under the First Amendment and under the New York State Constitution, which treats persons engaged in businesses in areas of public concern as limited purpose public figures. *See generally* Lewis and Norton's Moving Brief for Summary Judgment 37-48; Lewis and Norton's Reply Brief for Summary Judgment 11-18. As argued below by Eisman, plaintiffs are also involuntary public figures. Lewis and Norton joined in Eisman's argument below, and join in his appellate brief to the extent not inconsistent with their arguments herein.

[41] There is no evidence [redacted] conveyed Chau's denial to Lewis, but even if he had, it would not establish actual malice or gross irresponsibility. *See Edwards v. Nat'l Audubon Soc'y, Inc.*, 556 F.2d 113, 121 (2d Cir. 1977) ("such denials are so commonplace . . . they hardly alert the conscientious reporter to the likelihood of error"); *Balderman*, 292 A.D.2d at 75 (no finding of gross irresponsibility when reporter made editorial choice not to credit statements contrary to report).

That Chau now says he disagrees with Eisman's recollection of the dinner hardly establishes fault on Lewis's part.

Plaintiffs failed to come forward with "sufficient evidence . . . for a jury to return a verdict" for them. *Freeman v. Johnston*, 84 N.Y.2d 52, 57 (1994). While plaintiffs cited passages from the Book to argue that Eisman's memory is unreliable, Br. 9, 14, they ignored the key passage which explains that Eisman was intensely focused on Chau during the dinner. JA.555-56 ¶ 63. Plaintiffs claimed that Eisman has a "history" of fabricating conversations based on a disagreement between Eisman and S&P about a meeting concerning an S&P model, Br. 14, but ignored Lewis's testimony that he did not believe Eisman was incorrect about that or any other conversation. JA.556 ¶ 64, JA.1914-16 ¶¶ 76-77.

Plaintiffs asserted below that Lewis could have done more to research Statement 2, but Lewis had no reason to believe his information on Chau's employment history was incomplete.[42] In any event, the failure to investigate does not establish actual malice, which is a subjective standard. *See, e.g., St. Amant v. Thompson*, 390 U.S. 727, 731-33 (1968) ("reckless conduct is not measured by

[42] Lewis discussed Chau's career with [redacted], and researched Chau's work history using Bloomberg and news articles. JA.1913-14 ¶ 73; JA.1720-21 at 128:21-129:5. Although Lewis received a 195-page offering circular which included biographical information on Chau, he believed it to be an uninformative legal document, and did not read it. JA.562 ¶ 77 n.30.

whether a reasonably prudent man . . . would have investigated before publishing.").[43]

Finally, plaintiffs relied on the fact that Statements 25 and 26 contain a mistake, but neither mistakes nor possession of contradictory evidence establish actual malice. *See, e.g., Kipper*, 12 N.Y.3d at 357-60; *Reliance Ins. Co. v. Barron's*, 442 F.Supp.1341, 1350-52 (S.D.N.Y. 1977) ("Even if there were a dozen errors in this article, mistakes or bad judgment will not substitute for" actual malice).[44]

The *Chapadeau* standard is objective, focusing on the *process* by which a publication's accuracy is confirmed, not the outcome of the reporting. *Greenberg v. CBS*, 69 A.D.2d 693, 710 (2d Dep't 1979). As long as an author relies on sources he has reason to believe are accurate, he is not grossly irresponsible. "[A]ccepted standards of journalism require neither exhaustive research nor

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[43] Plaintiffs pointed to spreadsheets sent to Lewis by Barnett-Hart and Adams, and asserted that they show that some of the collateral in Chau's portfolio was highly rated. Br. 15-16. This is a complete red herring, as the Book does not claim that Chau's portfolio did not include AAA collateral, and there is no evidence that Lewis reviewed these spreadsheets. *See* pp. 34-35 *supra*.

[44] Lewis explained he had a solid basis for Statements 25 and 26, and did not understand spreadsheets provided to him by Moses to contradict his understanding. JA.578-79 ¶¶ 109-11 & n.44. There is no evidence that Moses told Lewis that FrontPoint did not short Harding CDOs, but even if he had, it would not establish actual malice absent evidence that Lewis could not have misunderstood Moses. *See, e.g.*, *Mahoney v. Adirondack Publ'g Co.*, 71 N.Y.2d 31, 39-40 (1987).

painstaking judgments." *Med-Sales Assocs., Inc. v. Lebhar-Friedman, Inc.*, 663 F.Supp.908, 913 (S.D.N.Y. 1987) (internal citation and quote omitted). Journalists "have the right to be wrong so long as they are not guilty of not checking their facts at all, making gross distortions of the record or jumping to totally unwarranted conclusions." *Id.*; *see also Gaeta v. New York News*, 62 N.Y.2d 340, 351 (1984) (reporter not grossly irresponsible "in not making further inquiry" when "[t]here was no reason to doubt the veracity of the information received from [the source], and indeed good reason to believe it was accurate"); *Robart v. Post-Standard*, 74 A.D.2d 963, 964 (3d Dep't 1980), *aff'd* 52 N.Y.2d 843 (1981) (reporter not grossly irresponsible when he relied on information received from reliable sources and there was "no reason to doubt the accuracy of the information supplied"). Lewis had one or more sources for each factual assertion contained in the Challenged Statements and had ample reason to trust his sources, whom he vetted extensively. Lewis's process, which he described in detail in his declaration, far surpassed what *Chapadeau* requires.[45]

[45] Chau asserts that it is not plausible that he would have made statements to a stranger at an industry dinner accusing himself of misconduct. Br. 25. But the Challenged Statements do not accuse Chau of misconduct. Moreover, Lewis, who spent a substantial amount of time with Eisman, had no difficulty picturing Eisman engaging Chau in an argument that led Chau to boast that he would not suffer if Eisman's dire views came true because "he'd sold everything out," and to brag about how much money he expected to make because he was paid on volume. JA.561 ¶ 74.

That leaves plaintiffs' journalism professor, who opined that Lewis did not meet the Code of Ethics of the Society of Professional Journalists. The Code is an aspirational document and has nothing to do with *Chapadeau*'s "gross negligence" standard. *Greenberg*, 69 A.D.2d at 710. *Cf. Parsi v. Daioleslam*, 852 F.Supp.2d 82, 89-90 (D.D.C. 2012) (excluding expert report based on the Code of Ethics).

Gross irresponsibility is a legal standard that does not depend on expert testimony. *Greenberg*, 69 A.D.2d at 710 ("Professional journalistic principles are well known and courts have frequently applied these principles in conjunction with the constitutionally mandated standard in order to establish the parameters of recoverable libel."). Summary judgment can be granted to a libel defendant notwithstanding expert testimony if that testimony does not suggest a violation of the gross irresponsibility standard in light of the case law developed under *Chapadeau*. *See, e.g.*, *Chaiken v. VV Publ'g Corp.*, 119 F.3d 1018, 1032-33 (2d Cir. 1997) (given the case law, expert opinion that reporter should have used a tape-recorder did not raise a fact issue sufficient to defeat summary judgment).

In any event, plaintiffs' quibbles about Lewis's interviewing techniques are beside the point. Lewis's sources testified that he accurately reported what they told him. JA.1894-97 ¶¶ 24-26. Plaintiffs' real gripe is that all four of Lewis's

sources for the dinner conversation lied, and Lewis should have somehow divined that fact.[46]

Chapadeau does not require an author to interview every possible witness,[47] or write a book without errors.[48] All *Chapadeau* requires for a matter of public concern is that an author exercise reasonable methods to produce an accurate publication. *Chapadeau*, 38 N.Y.2d at 200. Lewis did more than enough to meet that relatively undemanding standard.

B. Plaintiffs Cannot Carry Their Burden of Proving Fault as to Norton

Norton did not have any doubts about the accuracy of *The Big Short*, and justifiably relied on Lewis, an acclaimed financial journalist with an unblemished track record.[49] JA.1893 ¶¶ 14-19; JA.1902 ¶ 46, JA.1904-08 ¶¶ 52-59. While the

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[46] Plaintiffs grossly distort Lewis's views on fact-checkers. Br. 13. Lewis does not use a third-party fact-checker because he does all his own research. Further, having worked with fact-checkers, Lewis believes they can tempt an author to rely on the fact-checker, and take less responsibility himself. JA.559-60 ¶¶ 68-71.

[47] Although the professor opines that Lewis should have done more to persuade Chau to talk to him, Lewis did not need to contact Chau *at all*. *See Weiner v. Doubleday & Co.*, 142 A.D.2d 100, 107 (1st Dep't 1988), *aff'd* 74 N.Y.2d 586 (1989).

[48] Mistakes are inevitable and do not establish gross irresponsibility. *See, e.g., Naantaanbuu v. Abernathy*, 816 F.Supp. 218, 229-30 (S.D.N.Y. 1993); *Robare v. Plattsburgh Publ'g Co.*, 257 A.D.2d 892, 893-94 (3d Dep't 1999).

[49] Norton has received only a handful of minor complaints about books authored by Lewis over the years – remarkable for a non-fiction writer whose books have sold over 6.8 million copies. JA.1907-08 ¶ 59.

complaint alleges *The Big Short* was rushed into publication, Norton gave Lewis all the time he needed to complete the Book. JA.1899-00 ¶¶ 36-39. It subjected the Book to its normal editing process, and had it reviewed for libel by an outside lawyer experienced in publishing matters.[50] Indeed, Norton had an additional reason to rely on Lewis's work: *The Big Short* arose out of *The End*, an article that was widely read, and highly praised. JA.1894 ¶ 22; JA.1898 ¶ 30.

Plaintiffs maintain Norton should have fact-checked the Book, but publishers are entitled to rely on the reputation and experience of an established writer, and have no obligation to conduct an independent fact-check. *Stern v. Cosby*, 645 F.Supp.2d 258, 284 (S.D.N.Y. 2009). *Cf. Crescenz v. Penguin Group (USA) Inc.*, No. 11-0493, 2012 WL 6761817, at *6 (D.N.J. Dec. 31, 2012) (publishers do not typically fact-check books, and the failure to do so does not establish fault).[51]

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[50] Plaintiffs complained below that Lewis did not complete Norton's Author's Questionnaire, but it would have been ridiculous for Lawrence, who read *The End* and knows Lewis well, to have asked Lewis to fill out a form that asked questions like "What were the circumstances that led to the writing of the book?", "Are you married?" JA.1899 ¶¶ 32-33; JA.61 ¶ 17; JA.68 ¶ 40 n. 20; JA.529-533.

[51] Plaintiffs' expert claims no experience in the field of book publishing, *see* JA.1804-1838, and is not competent to opine on publishing industry practices. Moreover, his opinions are at odds with the law which recognizes that requiring publishers to fact-check their authors' works would "produce just such a chilling effect on the free flow of ideas as First Amendment jurisprudence has sought to avoid." *Stern*, 645 F.Supp.2d at 284 (quoting *Geiger v. Dell Publ'g Co.*, 719 F.2d 515, 518 (1st Cir. 1983)).

The district court rightly held that plaintiffs could establish neither actual malice nor gross irresponsibility with respect to Norton. A publisher who relies upon the integrity of a reputable author and has no "'substantial reasons' to doubt the accuracy of the material or the trustworthiness of the author" cannot be found to be grossly irresponsible, even if the work is later shown to be false. *Weiner*, 74 N.Y.2d at 595-96 (1989) (internal citation omitted); *Chaiken*, 119 F.3d at 1032; *Naantaanbuu*, 816 F.Supp. at 226-28.

CONCLUSION

For the reasons set forth above, this Court should affirm the district court's order granting summary judgment to the defendants.

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Respectfully submitted,

COOLEY LLP

/s/ Celia Goldwag Barenholtz

Celia Goldwag Barenholtz
Gabriel Rauterberg
Annika Goldman

1114 Avenue of the Americas
New York, New York 10036
(212) 479-6000

Attorneys for Defendants-Appellees Michael Lewis and W.W. Norton & Company, Inc.

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