[PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 19-10315

SHKELZEN BERISHA,

Plaintiff - Appellant,

versus

GUY LAWSON,
ALEXANDER PODRIZKI,
SIMON & SCHUSTER, INC.,
RECORDED BOOKS, INC.,

Defendants - Appellees.

On Appeal from the United States District Court
for the Southern District of Florida

(September 2, 2020)

Before MARTIN, NEWSOM, and O'SCANNLAIN,* Circuit Judges.

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* Honorable Diarmuid F. O'Scannlain, United States Circuit Judge for the Ninth Circuit, sitting by designation.

O'SCANNLAIN, Circuit Judge:

We must decide whether the son of the former Prime Minister of Albania, who alleges that he was defamed in a book that accused him of being involved in an elaborate arms-dealing scandal in the early 2000s, may succeed in his defamation action against the book's author and its publisher.

I

This case arises out of brief references to Shkelzen Berisha—the son of the former Prime Minister of Albania, Sali Berisha—in Guy Lawson's 2015 book *Arms and the Dudes: How Three Stoners from Miami Beach Became the Most Unlikely Gunrunners in History.* The book tells the supposedly true story of Efraim Diveroli, David Packouz, and Alex Podrizki, three young Miami, Florida, men who became international arms dealers during the early 2000s.

A

We recount the tale as it is presented in Lawson's book. According to the book, in the early 2000s, Diveroli, a teenager in Miami, came up with a plan to open a business specializing in arms trading in order to fulfill defense contracts with the United States government. At that time, private companies were permitted to bid on large military contracts through a website operated by the federal government, FedBizOpps.com. Diveroli was originally inspired to enter the trade after working for his uncle's arms company while living with him for a few years in Los Angeles. After a falling out

with his uncle, Diveroli returned to Miami and convinced his father to sell him an unused shell company to build his own arms-trading enterprise: AEY, Inc. Diveroli had significant early success bidding on small contracts unlikely to attract the attention of major arms dealers, and he quickly grew both his business's capital and his own connections with arms vendors. Eager to see his operation expand, Diveroli later brought on his childhood friend David Packouz to help him run the business.

Much of the book, and Berisha's alleged involvement in the operation, revolves around AEY's biggest procurement deal: a roughly $300 million contract that AEY won in the summer of 2006 to equip Afghan security forces fighting the Taliban. The contract required AEY to ship 100-million rounds of AK-47 ammunition to Afghanistan. At the time, AEY had a deal with a Swiss middleman, Heinrich Thomet, who had access to surplus ammunition in Albania that AEY could purchase at low prices. Thomet had purchased the ammunition through the Military Export Import Company ("MEICO"), an Albanian state-owned arms-dealing company. Packouz hired another childhood friend, Alex Podrizki, to travel to Albania, to collect the ammunition, and to load it onto planes to Afghanistan.

In Albania, Podrizki inspected the ammunition and found it packed in Chinese crates—potentially raising a significant issue, because federal regulations barred AEY from fulfilling the contract with Chinese ammunition. Packouz and Diveroli decided to use the ammunition anyway, with a plan to repackage the

rounds to conceal their Chinese origin. AEY hired Albanian businessman Kosta Trebicka to coordinate the repackaging job. In the course of his work, Trebicka discovered that Thomet—the middleman between AEY and the Albanian state-owned MEICO—had charged AEY nearly twice the price he paid to MEICO for the ammunition.

According to Lawson's book, in May 2007, after Trebicka told Diveroli of the overcharges, Diveroli flew to Albania to renegotiate the price and to attempt to remove Thomet from the deal. Diveroli's supposed trip to Albania in 2007 is the subject of significant dispute by the parties here. According to the book, Diveroli and Podrizki met with Ylli Pinari, the director of MEICO, who drove the pair to an abandoned, half-completed building in Tirana, where he introduced them to Mihail Delijorgji. Delijorgji is described in the book as a "hard-looking" man who offered to lower the AEY's price if his own company were paid to repackage it instead of Trebicka's. As Lawson tells it, the Americans also saw another man, who appeared to be in his mid-20s, who was never introduced and who remained silent throughout. According to the book, Diveroli and Podrizki would later learn that this man was Berisha and that the entire operation was involved in organized crime. The relevant passages in the book read (with emphasis to the portions relating to Berisha added):

> Ylli Pinari escorted Diveroli and Podrizki to . . . an abandoned construction site for a partially completed office building. Pinari led

> the pair up a set of stairs and along a corridor until they reached a door. Stepping inside, they found . . . a hard-looking man—a real thug, Podrizki thought, fear rising. . . .
>
> This was Mihail Delijorgji. *Diveroli and Podrizki then turned to see a young man around their age sitting in the corner. Dressed in a baseball cap and a sweater, he had dark hair, a soft chin, and sharklike eyes. He wasn't introduced. This was Shkelzen Berisha, the son of the prime minister of Albania, they would later be told by Pinari. Shkelzen was part of what was known in Albania as "the family," the tight-knit and extremely dangerous group that surrounded and lived at the beneficence of the prime minister, Sali Berisha. . . .*
>
> Delijorgji said that if Diveroli wanted a discount he would have to change the arrangements for the repackaging operation . . . by giving the contract to repack to Delijorgji's company. *The son of the prime minister remained silent. . . .*
>
> Diveroli and Podrizki departed.
>
> "That guy looked stupid enough to be dangerous," Diveroli said of Delijorgji.
>
> "*Did we just get out of a meeting with the Albanian mafia?" Podrizki joked.*
>
> *"Absolutely. Absofuckinglutely."*

Ultimately, the group brokered a deal to purchase the ammunition at a discount, cutting Trebicka out of

the scheme in favor of Delijorgji. Angered at being removed from the deal, Trebicka sought to blow the whistle on kickbacks that he believed Diveroli and AEY were paying to Albanian officials. Hoping to substantiate his claims, Trebicka recorded a telephone call with Diveroli, in which Diveroli told him that he could not help bring Trebicka back into the scheme because the corruption "went up higher, to the prime minister, to his son."

Trebicka's allegations—and his recorded conversation with Diverolibecame the source of a number of public reports about AEY's illegal scheme. Most notably, on March 27, 2008, the *New York Times* published a front-page story, which reported the allegations that AEY had illegally trafficked in Chinese ammunition and paid kickbacks to Albanian officials, including Pinari and Minister of Defense Fatmir Mediu. The story quoted Diveroli's statements that the scheme "went up higher to the prime minister and his son" and that Berisha was part of "this mafia." The article also reported on another recent matter Trebicka had blown the whistle on (and accused Berisha of being involved in): the tragic explosion of an Albanian munitions stockpile, which had killed 26 people in the village of Gerdec and for which Delijorgji and Pinari had been arrested. Several months later, the *New York Times* ran another article that reported the supposedly accidental death of Trebicka, and detailed suspicions that Trebicka had actually been murdered—perhaps with the involvement of the Berisha family—to prevent him from testifying about the AEY and Gerdec matters.

Once again, the *Times* story quoted Diveroli's statement about the corruption going "all the way up" to Berisha.

At the same time, federal agents were investigating AEY for violating the embargo against shipping Chinese ammunition. On August 23, 2007, federal investigators raided AEY's offices in Miami while Podrizki was still abroad in Albania. In 2008, federal prosecutors charged Diveroli, Packouz, and Podrizki with defrauding the United States government. All three pled guilty and were convicted; Podrizki and Packouz were sentenced to house arrest, while Diveroli was sentenced to four years in prison.

B

Lawson first published an account of the AEY saga in a March 2011 feature article in *Rolling Stone*, entitled "Arms and The Dudes: How Two Stoner Kids from Miami Beach Became Big Time Arms Dealers—Until the Pentagon Turned on Them." It was told largely from "the dudes' perspective, whom Lawson found to be quite unlike the "hardened criminals" that the *New York Times* coverage and federal government had portrayed them to be. Relevant here, like the *New York Times* story, Lawson's article reported that AEY's deal to purchase ammunition from MEICO was structured to pay kickbacks to Albanian government officials and quoted Diveroli's statement that the scheme went "up higher to the prime minister and his son." Lawson's article also reported that the repackaging job was

transferred to "a friend of the president's son." Though he was aware of the article, Berisha never sued Lawson or *Rolling Stone* for anything printed in the article.

Following the success of the article, Simon & Schuster, Inc., entered into a publishing agreement with Lawson to expand the story into a non-fiction book. After four years of additional research, including interviews with Podrizki and Packouz (who were paid life rights for the story), Lawson published his full account of the saga in his June 2015 book. He also sold the movie rights to Warner Brothers, which turned the story into the 2016 major motion picture *War Dogs*, starring Jonah Hill and Miles Teller.

C

On June 8, 2017, Berisha sued Lawson, Diveroli,[1] Podrizki, Packouz, and Simon & Schuster, and also named Recorded Books, Inc., which was responsible for producing the audio version of Lawson's book. The complaint alleges that Berisha was defamed by a few scattered references to him in Lawson's book. In addition to the passage about the 2007 meeting in Tirana quoted above—which, as Berisha emphasizes on appeal, is the core of his allegations—the complaint also takes exception with the following references:

- On page 150, the book states that "Diveroli had agreed to cut Trebicka out of the repacking job, which was now being done by a

[1] Diveroli was later dismissed from the lawsuit following a settlement.

company called Alb-Demil, an entity seemingly controlled by the prime minister's son and Mihail Delijorgji."

- On page 160, the book quotes the conversation that Trebicka recorded with Diveroli, and which was featured in the 2008 *New York Times* article. In that conversation, Diveroli said, "The more it went up higher, to the prime minister, to his son—this Mafia is too strong for me. I can't fight this Mafia. It got too big. The animals got too out of control."
- The book features a photo of Berisha with the caption: "Also involved, the dudes discovered, was the prime minister's son, Shkelzen Berisha."

Over the next year, the parties conducted extensive discovery, in which the defendants assert they produced nearly 20,000 documents, including all of the research relied upon by Lawson in writing his book and nearly all communications relevant to the book's editorial process. On July 13, 2018, however, Berisha moved to compel production of additional communications that were exchanged between Lawson and Simon & Schuster's attorneys as part of the publishing house's legal pre-publication review. A magistrate judge denied that motion, finding the materials to be privileged after viewing the defendants' privilege log and viewing some of the documents in camera.

D

Following discovery (which was twice extended),[2] the defendants moved for summary judgment, arguing that there was not sufficient evidence to allow a reasonable juror to conclude that Lawson or the other defendants had defamed Berisha. The district court agreed and granted summary judgment against Berisha.

Berisha timely appealed.

II

Berisha first challenges the district court's findings as to the merits of his claims. Specifically, the court found that Berisha is a "limited public figure for purposes of the controversy at issue in this case," and that he therefore can prevail only by demonstrating that the defendants acted with "actual malice" against him. The court then granted summary judgment against Berisha, finding that the evidence in the record could not reasonably support the conclusion that the defendants had acted with such malice.

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[2] The district court extended the discovery deadline (once on a joint motion and once at Berisha's request) a total of two months—from June 1, 2018, ultimately to August 1, 2018. Two weeks before discovery was set to close (and three weeks before summary judgment motions were due), Berisha sought even more time to take discovery. The court denied the motion but permitted the parties to "agree to conduct discovery beyond the discovery deadline."

Berisha argues that the district court erred both: (1) in requiring him to show actual malice in the first place and, even if that were the correct standard to apply, (2) in concluding that the record evidence could not support such a finding.

A

We first ask: is Berisha a public figure for purposes of his defamation suit?

Because of the expressive freedom guaranteed by the First Amendment, a defendant may not be held liable for defaming a public figure about a matter of public concern unless he is shown to have "acted with actual malice." *Silvester v. Am. Broad. Cos.*, 839 F.2d 1491, 1493 (11th Cir. 1988); *see generally N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270-83 (1964). Berisha does not dispute that Lawson's book concerned matters of public interest; the only question is whether the district court erred in finding him to be a "public figure." An individual may qualify as a public figure either generally—that is one with such fame and notoriety that he will be a public figure in any case—or for only "limited" purposes, where the individual has thrust himself into a particular public controversy and thus must prove actual malice in regard to certain issues. *Turner v. Wells*, 879 F.3d 1254, 1272 (11th Cir. 2018). Here, the district court found that Berisha fell within the second category—a public figure at least for the limited purpose of this lawsuit.

We apply a two-part test to determine whether someone is a limited public figure: "First, [we] must determine whether the individual played a central role in the controversy. Second, [we] must determine whether the alleged defamation was germane to the individual's role in the controversy." *Id.* at 1273 (citations omitted). Two "fundamental" criteria help draw the line between public and private figures: (1) "public figures usually have greater access to the media which gives them a more realistic opportunity to counteract false statements than private individuals normally enjoy"; and, more importantly, (2) public figures typically "voluntarily expose themselves to increased risk of injury from defamatory falsehoods." *Silvester*, 839 F.2d at 1494 (internal quotation marks omitted).

Lawson suggests that Berisha—who according to one survey in our record had one hundred percent name recognition in Albania—might qualify as a public figure generally. Putting that question aside, we agree with the district court that he at least is a public figure for the limited purpose of this lawsuit. As described above, the lawsuit concerns whether Berisha was defamed in Lawson's description of AEY's involvement in a corrupt scheme to defraud the United States in conjunction with certain Albanian government officials and an Albanian "mafia." Berisha's purported role in that scheme was covered by news media in both Albania and the United States—including in two *New York Times* stories reporting Berisha's supposed connections to the AEY deal and to a so-called Albanian mafia. These same matters were also addressed in a

television documentary produced by Al Jazeera, which covered, among other things, Berisha's supposed role in corrupt arms dealing and in the Gerdec explosion.

Berisha contends that he cannot be a public figure because he did not *voluntarily* insert himself into the publicity surrounding these affairs. But the record shows that Berisha did indeed place himself in the public eye regarding the Albanian arms-dealing scandal. Of course, if the many press reports about his involvement in that affair are true, then there can be no doubt he entered into the matter voluntarily. But even putting aside the truth of such reports, Berisha undoubtedly forced himself into the *public debate* over his supposed involvement in these activities. First, he admits that he privately met with Kosta Trebicka in an effort to convince him that he was not involved in the AEY matter—and that shortly thereafter Trebicka produced a statement "to the media" retracting his allegations against Berisha. Berisha also admits that he contacted a group of "media representatives" to request that they publish a statement presenting what he called the "truth [of] the accusations against me," which explicitly "encourage[d] the press to follow this story to the end and investigate it." We have recently held that an individual may insert himself into a controversy—and thus become a public figure with respect to that controversy—by encouraging third parties to make public statements in his defense and by inviting further public attention in an effort to influence the debate. *See Turner*, 879 F.3d at 1273.

Moreover, even if Berisha never voluntarily sought public attention, federal courts have long made clear that one may occasionally become a public figure even if "one doesn't choose to be." *Rosanova v. Playboy Enters., Inc.*, 580 F.2d 859, 861 (5th Cir. 1978); *see also*, *e.g.*, *Turner*, 879 F.3d at 1273 (citing approvingly the statement that "[i]t may be possible for someone to become a public figure through no purposeful action of their own" (internal quotation marks omitted)). As this circuit[3] once put it, the "purpose served by [the public figure standard] would often be frustrated if the subject of publication could choose whether or not he would be a public figure. Comment upon people and activities of legitimate public concern often illuminates that which yearns for shadow." *Rosanova*, 580 F.2d at 861; *see also Silvester*, 839 F.3d at 1496 (where a person "involuntarily and, against his will, assumes a prominent position" in the outcome of a public controversy, will be treated as a public figure "[u]nless he rejects any role in the debate"). Berisha argues cases of involuntary public figures must be kept "exceedingly rare," *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 345 (1974), and refers us to a decision from the Fourth Circuit in this regard. *See Wells v. Liddy*, 186 F.3d 505, 539 (4th Cir. 1999) ("[B]ecause the usual and natural conception of a public figure encompasses a sense of voluntary participation in the public debate, . . . the class of involuntary public figures must be a narrow one. . . .").

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[3] *Rosanova* is a Fifth Circuit case from shortly before that circuit was divided, making it precedential for today's Eleventh Circuit. *See Bonner v. City of Pritchard*, 661 F.2d 1206 (11th Cir. 1981) (en banc).

But Berisha's is exactly the rare case in which courts recognize involuntary public-figure status. The purposes underlying the public figure doctrine apply unequivocally to Berisha: he was widely known to the public, he had been publicly linked to a number of high-profile scandals of public interest, he availed himself of privileged access to the Albanian media in an effort to present his own side of the story, and he was in close proximity to those in power. Even under the Fourth Circuit case that he invokes, Berisha would still be regarded as a public figure. *See id.* (individual may be involuntary public figure where she has "sought to publicize her views on the relevant controversy" or "has taken some action . . . in circumstances in which a reasonable person would understand that publicity would likely inhere").

The district court was correct to apply the heightened defamation standard for claims brought by public figures.

B

Next, did the district court err in finding that there was insufficient evidence to support Berisha's claim that the defendants acted with actual malice?

Because Berisha is a public figure, he cannot prevail in this suit unless he shows, by clear and convincing evidence, that the defendants acted with actual malice toward him. *Harte-Hanks Commc'ns, Inc. v. Connaughton*, 491 U.S. 657, 659 (1989). That is, he must be able to show—well beyond a preponderance

of the evidence—that the defendants published a defamatory statement either with actual knowledge of its falsity or with a "high degree of awareness" of its "probable falsity." *Garrison v. Louisiana*, 379 U.S. 64, 74 (1964). It is a subjective test, which asks whether the publisher "*in fact* entertained serious doubts as to the truth of his publication." *Silvester*, 839 F.2d at 1498 (emphasis added) (internal quotation marks omitted); *see also St. Amant v. Thompson*, 390 U.S. 727, 731 (1968) (standard "is not measured by whether a reasonably prudent man would have published, or would have investigated before publishing"). Even an "extreme departure from professional [publishing] standards" does not necessarily rise to the level of actual malice. *Harte-Hanks*, 491 U.S. at 665.

Thus, the question here is whether the record could allow a reasonable juror to conclude (clearly and convincingly) that Lawson held serious doubts about the truth of the book's portrayal of Berisha as involved in the AEY scheme.

1

Although Berisha has little evidence to suggest Lawson knowingly published falsehoods about him, Berisha argues that a juror could reasonably find that Lawson at least held serious doubts about his portrayal of Berisha, because he knew better than to trust his firsthand sources for that account: primarily the three "dudes." For his part, Lawson testified that he *did* believe his sources, and that in particular he found

Podrizki and Packouz to be "extremely reliable," with information that consistently matched the other evidence available. But, as Berisha points out, these were not the most dependable individuals. They had been convicted of fraud, Packouz and Podrizki were self-interested in providing Lawson with a profitable story, and, in the book, Lawson himself describes Diveroli as "a liar . . . [who] misled directly, indirectly, compulsively." Thus, Berisha argues, evidence of Lawson's awareness of these many credibility flaws could clearly show that Lawson must have doubted what they said about Berisha. Berisha, however, greatly overstates the significance of such evidence.

a

First, though factors like those Berisha identifies might undermine a source's credibility, they do not show that a publisher necessarily acted with malice by relying on the source. *See, e.g.*, *Spacecon Specialty Contractors, LLC v. Bensinger*, 713 F.3d 1028, 1045 (10th Cir. 2013) ("That Bensinger knew Wilson . . . may have been biased . . . is not evidence Bensinger had obvious reasons to doubt Wilson's veracity or the accuracy of his report"); *Cobb v. Time, Inc.*, 278 F.3d 629, 638 (6th Cir. 2002) (publisher could rely on paid source who was a drug user with a "criminal background"); *Reuber v. Food Chem. News, Inc.*, 925 F.2d 703, 715 (4th Cir. 1991) ("Actual malice cannot be proven simply because a source of information might also have provided the information to further the source's self-interest."). Further, Lawson's book explicitly informed the reader of

these supposed problems with the men's credibility, describing them as young partiers who drank, used drugs, and committed a major international fraud. With regard to Diveroli, the book explicitly described his penchant for lying in order to further his own interests. In other words, the book makes clear that the account offered by these men might be dubious. As we have recently recognized, where a publisher in this manner "inform[s] its audience that its primary source [is] not an unimpeachable source of information, it serve[s] to undermine claims showing that the report was issued with actual malice." *Michel v. NYP Holdings, Inc.*, 816 F.3d 686, 703 (11th Cir. 2016) (internal quotation marks omitted).

b

Second, whatever one might say about the "dudes' credibility, Lawson did not rely solely on their assertions about Berisha but rather found their stories corroborated by several other sources.

Most obviously, Lawson relied on the many prior published reports that had similarly accused Berisha of being involved in the AEY fraud and in an Albanian criminal underworld. These include: at least four published news articles, including two in the *New York Times*, two separate books (one published in the United States and one in Albania), leaked diplomatic

cables published on WikiLeaks,[4] and the investigative report by Al Jazeera. The law is clear that individuals are entitled to rely on "previously published reports" from "reputable sources" such as many of these. *Liberty Lobby, Inc. v. Dow Jones & Co.*, 838 F.2d 1287, 1297 (D.C. Cir. 1988). Thus, as the district court recognized, Lawson's reliance on these many independent sources, alone, should defeat any claim of actual malice. *See Rosanova*, 580 F.2d at 862 ("[S]ubjective awareness of probable falsity . . . *cannot be found* where, as here, the publisher's allegations are supported by a multitude of previous reports upon which the publisher reasonably relied." (emphasis added)).

Further, Lawson interviewed several additional sources who corroborated the claims about Berisha. For example, Erion Veliaj, the mayor of Tirana, told Lawson that the Berisha family was like a "wolf pack" that used individuals like Delijorgji to protect Shkelzen and that he was not surprised to hear that Berisha was involved in the AEY deal. Likewise, Trebicka's daughter told Lawson that she believed her father had been removed from the AEY deal in order to make way for "Berisha's son" and that she considered Berisha to be a suspect in her father's mysterious death. Finally, Andy Belliu, a former worker at the Gerdec factory, called Berisha the "shadow" behind the factory and implicated him in "mafia" dealings.

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[4] These leaked cables purport to show John Withers, the then-U.S. Ambassador to Albania, reporting allegations that Berisha had personally been involved in the Gerdec matter.

Berisha contends that these additional sources had their own credibility problems, for example suggesting that the prior publications themselves all trace back to Diveroli or that the other individuals were biased against him and his father. But even if that is so, it was not Lawson's (perhaps impossible) duty to find only pure, unimpeachable sources of information. Even if Berisha might nitpick each source for one reason or another, this wealth of evidence considered altogether does not permit a reasonable juror to find clear and convincing proof that Lawson held serious doubts about the depiction of Berisha in his book.

2

In addition to his attacks on the credibility of Lawson's sources, Berisha argues that he can show Lawson exhibited a general pattern of dishonesty in his book, which—when considered "in the aggregate"—undermines the notion that Lawson actually believed his portrayal of Berisha. Again, Berisha overstates the significance of such evidence, which is largely irrelevant to the truth of the claims made about him in the book.

a

First, Berisha asserts that evidence shows that Lawson was determined to publish a preconceived story about him, regardless whether it could be supported. He quotes Lawson as boasting at various times that his forthcoming book might "bring down the Prime Minister of Albania." But each of these quoted

emails was sent by Lawson *after* he had done substantial work on the book. In other words, such statements do nothing to show that Lawson *began* with an unfounded plan to take down Berisha and his father, but rather reflect only that *after* Lawson had reported and begun writing the book he believed that the story he had discovered might do so. Accordingly, this evidence offers no reason to doubt the sincerity of Lawson's belief in the many sources that corroborated his depiction of Berisha.

b

Second, Berisha argues that evidence shows that Lawson intentionally fabricated at least two details in the book. But even if that were true, neither minor detail would reasonably cast doubt on whether Lawson harbored serious doubts about his broader depiction of Berisha.

i

First, Berisha claims that Lawson made up the fact that specifically Ylli Pinari told Podrizki and Diveroli that Berisha was present at their Tirana meeting. The passage in question reads (with emphasis added):

> Diveroli and Podrizki then turned to see a young man around their age sitting in the corner. Dressed in a baseball cap and a sweater, he had dark hair, a soft chin, and sharklike eyes. He wasn't introduced. This was Shkelzen

> Berisha, the son of the prime minister of Albania, *they would later be told by Pinari.*

Berisha argues that the Pinari attribution is not sourced to anyone other than Diveroli (whom, again, he casts as utterly unreliable). He points out that, at least according to Podrizki, Berisha was identified to them by Trebicka, not Pinari. And because Lawson himself admitted that Trebicka would not have known whether Berisha attended the Tirana meeting, Berisha argues that a "reasonable jury could conclude that Lawson manufactured the provenance of his information (*i.e.*, Pinari) to hide the unreliability of his actual 'sourcing' "—i.e., Diveroli.

Even if we assume that Lawson did fabricate the Pinari detail,[5] that still would not be enough to demonstrate he acted with actual malice. As the district court recognized, under applicable Florida law,[6] the key question in a defamation case is whether the "gist or sting" of the challenged statements was defamatory. *Levan v. Capital Cities/ABC, Inc.*, 190 F.3d 1230, 1240 (11th Cir. 1999). The "gist" and "sting" of Lawson's depiction of Berisha was that he was involved in the

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[5] Lawson of course disputes this, and the record certainly does not prove that Lawson *did* fabricate the attribution of the identification by Pinari. Lawson argues that the attribution to Pinari was his own conclusion as the most likely source following his research.

[6] Florida law governs the merits of Berisha's defamation action, though standards for public figures and "actual malice" derive from the First Amendment and thus, as discussed above, are matters of federal law. *See, e.g.*, *Nelson Auto Ctr., Inc. v. Multimedia Holdings Corp.*, 951 F.3d 952, 956 (8th Cir. 2020).

ammunition repackaging fraud and, more broadly, with an Albanian criminal underworld. The gist does not include which of the many individuals involved in the scheme first identified Berisha's presence to the Americans. Indeed, as written, the book still conveys the undisputed truth that Diveroli and Podrizki said they were told secondhand that Berisha was present at their meeting. At worst, the book misidentifies where *they* claimed to have received such information.

The general irrelevance of this minor detail is apparent when considered in context. The sentence in the book with which Berisha takes issue reads: "This was Shkelzen Berisha, the son of the prime minister of Albania, [Diveroli and Podrizki] *would later be told by Pinari*." We agree with the district court that the overall "gist" of the book's depiction of Berisha would not materially change if instead that sentence simply read: "This was Shkelzen Berisha, the son of the prime minister of Albania, Diveroli and Podrizki *would later be told*.'"[7]

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[7] Along similar lines, Berisha makes much of the fact that Lawson originally hoped to include the following sentence in his description of a meeting between *New York Times* journalist Nicholas Wood and Kosta Trebicka: "The head of MEICO Ylli Pinari had told Trebicka that the Prime Minister's son was involved in the AEY contract. . . ." At one point, Lawson shared that passage with Wood, out of concern that the claim "might be a slight stretch," depending on what Trebicka discussed with Wood. No response to that email is included in the record, but in the final version of the book, Lawson omits any reference to Pinari and instead simply says that "Trebicka had heard the allegation that the prime minister's son was involved in the AEY contract."

Second, Berisha claims that Lawson "deliberately falsified" an interview between Albanian Defense Minister Fatmir Mediu and *New York Times* reporter Nicholas Wood, in an effort to "reinforce his claim of Berisha's involvement with AEY." The passage in question details an interview during which Wood prodded Mediu with questions about, among other things, Albanian officials' involvement in the AEY scandal. At one point, according to Wood, Mediu burst out in anger after Wood asked a question about Mediu's previous conviction on drug charges. In the book, Lawson presents Mediu as lashing out in response to a different question "describing how Albanian officials were allegedly being paid kickbacks on AEY's contract, including Diveroli's recorded description of the Albanian 'Mafia' and the prime minister's son." Berisha argues that Lawson changed the timing of Mediu's outburst to imply that Mediu knew Diveroli's accusations about Berisha were true.

Berisha's insinuations about Lawson's depiction of this interview are misguided. Berisha does not dispute that Wood *did* interview Mediu about accusations of Albanian governmental involvement in the AEY

Berisha suggests that Lawson's hope to include a "stretched" reference to Pinari shows that Lawson planned to put "dramatic effect" before "the truth." But, as Lawson points out, the fact that he ran this passage by Wood *before* publishing—and then subsequently edited it—shows exactly the opposite. This sort of fact checking is exactly what Berisha suggests Lawson should have done.

scheme. And the record includes an email in which Wood told Lawson that, after the interview, Mediu threatened both the cameraman filming the interview and one of Wood's sources for the AEY allegations (Trebicka). Thus, even if Mediu's outburst was directly prompted by a question about his drug conviction, the record of this conversation supports Lawson's broader narrative that Mediu was angered by the interview and by Trebicka's accusations of an Albanian-government conspiracy with AEY. As Lawson testified in his deposition, "Nick Wood made it clear that [Mediu's outburst] was a cumulative thing but that it definitely included AEY. And the accusations about AEY were infuriating to him." Lawson further said that Wood reviewed that passage in the book and did not object to it.

Even if Lawson did somewhat misrepresent Mediu's outburst, this again is a relatively immaterial detail in the context of the book overall. The overall effect of any change is minimal when it remains true that: (1) Wood confronted Mediu with accusations that Albanian officials were involved in the AEY scheme and (2) Mediu was upset by his interview with Wood, to the point that he threatened Wood's cameraman and a source for the AEY accusations. Whether or not Lawson had included the additional detail of Wood discussing Mediu's unrelated drug conviction in the book, the "gist" remains the same: a reporter from the *New York Times* attempted to discuss the AEY matter with Mediu and in the end received only anger and threats as a result.

c

Finally, Berisha makes much of the fact that early drafts of Lawson's book included passages discussing various issues that arguably could not be verified. In support, he cites an email from an editor at Simon & Schuster, who contended that Lawson's early manuscript focused too much on the Pentagon's supposed involvement in the AEY scheme, which she believed "put[ ] the book on shaky ground—both from a narrative stance and in terms of credibility (to take down the Pentagon you need armor-proof evidence)." He also cites an email from C.J. Chivers, a writer from the *New York Times*, whom Lawson had contacted to clarify certain details that Lawson wanted to print regarding the supposed inferior quality of the ammunition AEY provided (which were related to a photo that had been included in Chivers's reporting). In response, Chivers wrote angrily that Lawson's questions suggested that his book would misrepresent Chivers's reporting and indicated that Lawson had "written a factually unsupportable tale and hope[d] that it might stick."

But, in the final book, Lawson substantially cut back the Pentagon narrative, he independently researched and verified his claims related to the photo of the AEY ammunition, and—even more to the point—neither of these matters had anything do with Lawson's depiction of Berisha's involvement with AEY. Even if it were true that Lawson had at one point attempted to pursue unsupported details about unrelated matters, that would not show that he clearly

harbored serious doubts about the well-sourced assertion of Berisha's connection to the AEY fraud.

In sum, none of Berisha's various attacks on other portions of Lawson's book can reasonably be viewed to undermine his reliance on a variety of sources to support the book's core claims about Berisha.[8]

III

Next, Berisha contends that the district court abused its discretion in denying his motion to compel production of certain communications between Lawson

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[8] Because the evidence is insufficient to support a conclusion that Lawson himself acted with actual malice, Berisha's claims against the remaining defendants—Simon & Schuster, Recorded Books, Packouz, and Podrizki—fail as well. Though Berisha broadly asserts that Simon & Schuster "was aware of Lawson's . . . tendency to put his narrative before the facts," he does not identify evidence which could show "clearly and convincingly" this to be true. Indeed, the only evidence he identifies in support of such a claim is Lawson's early inclusion of the under-sourced Pentagon-conspiracy storyline, which *after feedback from Simon & Schuster*, Lawson largely removed from the book. Berisha has no evidence that anyone at Simon & Schuster actually harbored doubts—let alone *serious* doubts—about the accuracy of Lawson's depictions of Berisha, which again were corroborated by various sources.

Second, Berisha does not identify evidence to support his conclusory assertion that Packouz or Podrizki "fabricated Berisha's involvement with AEY" in order make money from Lawson. Regardless whether these two might have had such *motives* to lie, Berisha offers no evidentiary support for the notion that they indeed did lie.

Finally, Berisha acknowledges that there is no evidence on which to prove that Record Books acted with actual malice.

and Simon & Schuster's attorneys. *See Bogle v. McClure*, 332 F.3d 1347, 1358 (11th Cir. 2003). The district court found that the communications were protected from disclosure by, among other things, the attorney-client privilege. We consider whether, under New York law,[9] that is correct.

The attorney-client privilege protects from disclosure confidential communications between an attorney and his or her client made to solicit or to provide legal advice. *Ambac Assurance Corp. v. Countrywide Home Loans, Inc.*, 57 N.E.3d 30, 34 (N.Y. 2016). The communications at issue here concern Lawson's interaction with Simon & Schuster's lawyer, as the lawyer conducted a pre-publication legal review of the contents of the book. Berisha does not seriously dispute that, if Lawson were the lawyer's client—for example if he were a representative of Simon & Schuster—then the communications would be properly shielded. *See, e.g.*, *Liberty Lobby*, 838 F.2d at 1302 ("Pre-publication

[9] Florida choice-of-law principles determine which forum's privilege law applies. *See Manuel v. Convergys Corp.*, 430 F.3d 1132, 1139 (11th Cir. 2005). In many areas, Florida follows "a flexible test to determine which state has the most significant relationships" to the matter, though in matters of contract Florida has rejected this in favor of a more traditional "lex loci" application of the law of the place of contracting. *See State Farm Mut. Auto. Ins. Co. v. Roach*, 945 So. 2d 1160, 1163-64 (Fla. 2006). Though it is not readily apparent what approach Florida courts would apply to resolve a conflict over the claim of privilege here, we need not decide that question, because (as the parties agree) New York law would likely apply under either approach given that the publishing contract was entered in New York, both Simon & Schuster and Lawson are New York residents, and the communications took place in New York.

discussions between libel counsel and editors or reporters would seem to come squarely within the scope of the privilege. . . ."). He argues, however, that because Lawson was merely a third-party contractor of the publishing house, his communications are not swept within the privilege. Lawson responds that, at least for purposes of the legal pre-clearance review, he was, as a practical matter, effectively a Simon & Schuster employee, and is therefore covered by the privilege.

A

The disagreement between the parties asks us to consider the "employee equivalent" doctrine—an extension of the Supreme Court's seminal decision in *Upjohn Co. v. United States*, 449 U.S. 383 (1981). In *Upjohn*, the Supreme Court held that, where an attorney represents a corporation, the corporation's attorney-client privilege extends beyond individuals who "control" the corporation to include other employees with whom the lawyer must consult in order to advise the company. *See id.* at 391-92. New York courts have incorporated the *Upjohn* rule into the state's own attorney-client privilege law. *Cf. Niesig v. Team I*, 558 N.E.2d 1030, 1033-34 (N.Y. 1990) (discussing *Upjohn*).

Led by the Eighth Circuit, some courts have since held that the principles announced in *Upjohn* suggest that even a non-employee like a contractor or consultant may be covered by the attorney-client privilege where he or she acts as *the functional equivalent* of an employee for the relevant matter. In *In re Bieter Co.*,

16 F.3d 929, 937 (8th Cir. 1994), the Eighth Circuit held that, for purposes of the *Upjohn* rule, "it is inappropriate to distinguish between those on the client's payroll and those who are instead, and for whatever reason, employed as independent contractors." The court emphasized that the very point of *Upjohn* is to ensure that the lawyer may consult with knowledgeable employees to "know all that relates to the client's reasons for seeking representation [so that] the professional mission [can] be carried out." *Id.* (quoting *Upjohn*, 449 U.S. at 389). To this end, the court observed there "undoubtedly are situations . . . in which too narrow a definition of 'representative of the client' will lead attorneys not being able to confer confidentially with nonemployees who, due to their relationship to the client, possess the very sort of information that the privilege envisions flowing most freely." *Id.* at 937-38. Thus, in order to vindicate the concerns of *Upjohn*, the privilege must be afforded to certain "nonemployees who possess a significant relationship to the client and the client's involvement in the transaction that is the subject of the legal services." *Id.* at 938 (alterations and internal quotation marks omitted).

Several courts—including courts in New York—have followed the Eighth Circuit's lead. *See, e.g.*, *United States v. Graf*, 610 F.3d 1148, 1158-59 (9th Cir. 2010) (adopting *Bieter* and collecting cases in lower courts doing the same); *Alliance Constr. Solutions, Inc. v. Dep't of Corrs.*, 54 P.3d 861, 869 (Colo. 2002) (adopting *Bieter* into Colorado law); *Frank v. Morgans Hotel Grp. Mgmt. LLC*, 116 N.Y.S.3d 889, 891-93 (N.Y. Sup. Ct. 2020)

(applying *Bieter* under New York law); *Sieger v. Zak*, No. 19978/05, 2008 WL 598344, at *9 (N.Y. Sup. Ct. Feb. 21, 2008) (same); *Waste Admin. Servs., Inc. v. Krystal Co.*, No. E2017-01094-COAR9-CV, 2018 WL 4673616, at *4-5 (Tenn. Ct. App. Sept. 27, 2018) (applying *Bieter* under Tennessee law). Indeed, Berisha does not seriously dispute that New York would embrace an "employee equivalent" extension of the *Upjohn* doctrine.

B

Berisha argues, however, that this doctrine is too narrow to apply in this case. In Berisha's telling, the doctrine applies only where an individual "looks, acts, and smells like a company employee," such as where the individual exercises authority on behalf of the company or falls within its chain of command. Because Lawson did not have "control over Simon & Schuster's decision to publish the [blook," Berisha argues that he was not, in any meaningful sense, the "equivalent" of a Simon & Schuster employee. Berisha's argument essentially rests on the premise that, for purposes of New York's attorney-client privilege law, the scope of the "employee-equivalent" doctrine is to be understood similarly to the definition of an "employee" in the context of agency or employment law. *Cf. In re Vega*, 35 N.Y. 3d 131,145-51 (2020) (Rivera, J., concurring) (discussing difference between employees and independent contractors under New York law).

Berisha's argument might seem reasonable on its face, and indeed, in some cases the employee-equivalent

doctrine has been applied to individuals who have effectively "assumed the functions and duties of a full-time employee." *Frank*, 116 N.Y.S.3d at 892 (alterations and internal quotation marks omitted); *see also id.* (citing cases). However, Berisha's suggestion that the employee-equivalent doctrine must be limited *only* to such cases misconceives the purposes underlying the doctrine. As expressed in *Upjohn*, an overly restrictive view of the individuals who qualify as representatives of an attorney's corporate client threatens to frustrate the attorney's efforts to formulate sound legal advice based on information possessed by those directly involved in the matter. *See generally Upjohn*, 449 U.S. at 391-92. *Bieter* extended this logic with the recognition that "there undoubtedly are situations . . . [where even] nonemployees . . . , due to their relationship with the client, possess the very sort of information that the privilege envisions flowing most freely." *Bieter*, 16 F.3d at 938. *Bieter's* core holding is thus that the privilege must extend to cover "nonemployees who possess a significant relationship to the client and the client's involvement in the transaction that is the subject of legal services," and who therefore "have the relevant information needed by corporate counsel" to advise the client. *Id.* (internal quotation marks and alterations omitted). By its very nature, this includes individuals whom we might not—for other purposes in the law—consider to behave as "employees" of the corporation. *Cf. Alliance Constr. Solutions*, 54 P.3d at 869 ("[W]e agree with the *Bieter* court that a formal distinction between an employee and an independent contractor conflicts with the purposes

supporting the privilege. An independent contractor with a meaningful relationship to the [corporation] may possess important information needed by the attorney to provide effective representation."). Thus, while factors like those referenced by Berisha are useful in evaluating the nonemployee's "relationship to the client," an absence of such factors does not necessarily destroy the application of the doctrine. *See generally Bieter*, 16 F.3d at 938.

C

We are mindful that an overly broad employee-equivalent rule might threaten to sweep within the privilege conversations between a lawyer and various individuals who have not previously been considered to fall within the ambit of the privilege—for example mere third-party witnesses. Here, fortunately, we need not probe the outer limits of the doctrine. Regardless of his employment status, Lawson's "relationship" to Simon & Schuster and his "involvement in the transaction" that was the subject of the legal services—i.e., Simon & Schuster's legal review of the contents of the book *he wrote* for publication by the company—could hardly be more significant. As the president of the Adult Publishing group at Simon & Schuster stated in an affidavit, because "the author is the sole proprietor of the sourcing and background information that went into the manuscript, the author's cooperation is essential to the pre-publication legal review process." It would, in his words, "be impossible to conduct a

meaningful pre-publication legal review without the author."

And, while their working relationship may not bear many of the hallmarks of a traditional employer-employee relationship, it is hardly the case (as Berisha is eager to suggest) that Lawson was utterly disconnected from Simon & Schuster—as if he were simply a witness or passerby to the company's activities. If it were not apparent from the nature of the work itself, the publishing contract makes clear that Lawson and Simon & Schuster were indeed engaged in a *joint* effort to produce a published book to their mutual satisfaction and for their mutual benefit. Among other things, that contract specified that the company would pay Lawson an advance for his work toward producing a publishable book, laid out a process by which they would mutually attempt to work through editorial changes requested by the company prior to publication, and detailed how the parties would split royalties and various rights to the continuing use and publication of the work after it was completed.

D

For these reasons, some courts—including at least one applying New York law—have found individuals in nearly identical circumstances to Lawson to be covered by the attorney-client privilege. For example, in *Davis v. Costa-Gavras*, 580 F. Supp. 1082, 1098 (S.D.N.Y. 1984), the court (applying New York law) found that the attorney-client privilege applied to

conversations between lawyers for a movie studio and the author of the book that had served as the basis for a film's screenplay. Even though the author "was not a Universal employee and did not participate in the production of the film," the court found that "his participation in the [legal preclearance] meeting was functionally equivalent to that of an author of a magazine or newspaper article who submits his work to in-house counsel for prepublication libel review and should thus come within the rule of *Upjohn*." *Id.* The same should be said for Lawson here.

More recently, in another case out of the Southern District of New York, the court found that the privilege applied to conversations between a movie studio's attorney and the film's director and script writer, both of whom were independent contractors. *See Twentieth Century Fox Film Corp. v. Marvel Enters.*, No. 01 Civ. 3016, 2002 WL 31556383 (S.D.N.Y. Nov. 15, 2002). The court explained that, given their roles in making the movie, the director and writer were "the functional equivalent of employees" of the studio that would produce it. *Id.* at *2. In a passage that could easily describe the book industry, the court elaborated:

> Fox's determination to conduct its business through the use of independent contractors is a result of the sporadic nature of employment in the motion picture industry; for a wide variety of reasons, producers, directors and actors generally do not 'turn out' movies with the same mechanical regularity with which most tangible products are produced. The fact

> that the nature of the industry dictates the use of independent contractors over employees should not, without more, create greater limitations on the scope of the attorney-client privilege.

Id. At least one court outside of New York has reached a similar conclusion. *See, e.g.*, *Tyne v. Time Warner Entm't Co.*, 212 F.R.D. 596, 600-01 (M.D. Fla. 2002) (disclosure of in-house legal advice from one movie studio to another involved in the joint production of a film did not waive attorney client privilege). And Berisha has not cited a single case in which a court disagreed that the employee-equivalent doctrine would apply in circumstances like these.

For the reasons elaborated above, we agree that the employee-equivalent doctrine would likely shield from discovery the communications at issue here. The district court did not abuse its discretion in denying Berisha's motion to compel.[10]

IV

Finally, Berisha briefly asserts that "summary judgment was premature" because the district court

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[10] Because we conclude that the communications were protected under the attorney-client privilege, we do not consider the defendants' assertions of other privileges.

Likewise, because the district court did not err in finding the communications to be privileged (and thus protected from production), we do not consider Berisha's argument that it was premature to grant summary judgment without allowing additional time for these materials to be produced.

denied his July 17, 2018, motion to extend further discovery so that he could depose four of Lawson's foreign sources. Berisha suggests that he would have liked this additional evidence but does not explain why exactly it would be critical to this case. More importantly, he presents no argument as to how the district court's failure to extend discovery for a third time was legally erroneous. At that point (only two weeks before discovery was set to end) Berisha had been given substantial opportunity to initiate such discovery, the district had twice extended the discovery deadline, and the court had explicitly allowed him "to conduct discovery beyond the discovery deadline," if he so chose. Yet, Berisha did not bother to take even the first step in securing these depositions (filing the requisite letters of issue) until June 27, 2018—even though he supposedly had known he wanted to take those depositions for months.

In short, Berisha presents no grounds upon which we could conclude that the district court abused its discretion in denying him an additional and last-minute extension of the discovery deadline. *See, e.g.*, *Quiet Tech. DC-8, Inc. v. Hurel-Dubois UK Ltd.*, 326 F.3d 1333, 1351-52 (11th Cir. 2003) (no abuse of discretion where district court denied a third extension of the discovery deadline).

V

The judgment of the district court is **AFFIRMED**.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 17-22144-Civ-COOKE/LOUIS

SHKELZEN BERISHA,

Plaintiff,

vs.

GUY LAWSON, *et al.*,

Defendants. /

ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

(Filed Dec. 21, 2018)

THIS MATTER is before me on the Motion for Summary Judgment (ECF No. 138) filed by Defendants Guy Lawson, Alexander Podrizki, David Packouz, Simon & Schuster, Inc. ("S&S") and Recorded Books, Inc. Defendants' motion is fully briefed and ripe for review. For the reasons set forth herein, the motion is granted.

I. BACKGROUND

Plaintiff Shkelzen Berisha is the son of Sali Berisha, the former Prime Minister (and before that the President) of Albania. *Defs.' Stmt. of Facts*, ECF No. 139 ("*DSOF*"), at ¶ 3. In this defamation action, Plaintiff challenges statements made about him by Defendant Lawson, principally in Lawson's book entitled "Arms & The Dudes: How Three Stoners from Miami

Beach Became the Most Unlikely Gunrunners in History," published by Defendant S&S in June 2015. *Id.* at ¶ 1. The book tells the "unlikely" story of Efraim Diveroli,[1] Defendant Packouz and Defendant Podrizki, Florida residents and childhood friends who became international arms dealers.[2] *Id.* at ¶ 2. The challenged statements are all to the effect that Plaintiff was involved in corrupt arms dealing, and that he was affiliated with the Albanian mafia. *Id.* at ¶ 3.

A. The Albanian Deal and Its Aftermath

In 2005, Defendant Packouz began working for AEY, Inc., a company run by his childhood friend Diveroli. *DSOF* at ¶ 4. AEY made its money by bidding on and satisfying arms procurement contracts posted online by the United States military. *Id.* In 2006, AEY won a contract to provide equipment to the Afghan military, a deal worth approximately $300 million. *Id.* at ¶¶ 5–6. The largest component of the deal was the delivery of 100 million rounds of AK-47 ammunition to Afghanistan. *Id.* at ¶ 7.

Using a middleman, AEY found a trove of the required ammunition in Albania, at what appeared to be a bargain price. *Id.* at ¶ 8. AEY's plan was for its

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[1] Diveroli was originally named as a Defendant in this action. *Compl.*, ECF No. 1. By Order dated May 9, 2018, the Court dismissed the claims against Diveroli, as well as those against Incarcerated Entertainment, LLC, and terminated both Defendants from the case. *Order*, ECF No. 70.

[2] Cinema fans will recognize this plot from the 2016 film *War Dogs*, which was adapted from Lawson's book.

middleman to use a shell company to buy the ammunition from Albania's Military Export Import Company ("MEICO"), a state-owned company tasked with disposing of the immense stockpiles of weapons left over from the Cold War. *Id.* at ¶¶ 9, 12. The middleman would then sell the ammunition to AEY. *Id.* at ¶ 9. Realizing that AEY needed someone "on the ground" in Albania, Packouz enlisted another childhood friend, Defendant Podrizki. *Id.* at ¶ 10. Packouz chose Podrizki because of the latter's familiarity with firearms and, evidently, with illicit trafficking. *Id.*; *Pl.'s Stmt. of Facts*, ECF No. 154 ("*PSOF*"), at ¶ 10.

Podrizki traveled to Albania and met Ylli Pinari, the head of MEICO. *DSOF* at ¶ 11. Pinari showed the supply of Cold War-era ammunition to Podrizki, who determined that it was of good quality despite its age. *Id.* at ¶ 2. However, Podrizki noticed that some of the ammunition's packaging bore Chinese markings, a potential deal-breaker given that there was an embargo barring American companies from selling Chinese-made ammunition. *Id.* at ¶ 13. Podrizki told Packouz about the markings, but AEY decided to try to conceal the ammunition's Chinese origin and ship it in contravention of the embargo. *Id.*

To that end, Podrizki engaged an Albanian businessman, Kosta Trebicka, to remove the ammunition from its original packaging and place it into nondescript plastic bags and cardboard boxes. *Id.* at ¶ 14. Once on the job, Trebicka discovered that AEY's middleman was selling the ammunition to AEY at nearly double the price he was paying to MEICO. *Id.* at ¶ 15.

Packouz speculated that the price differential was being funneled into "kickbacks" for Albanian officials, perhaps including Pinari. *Id.* at ¶ 16.

In May 2007, Diveroli learned about the situation and flew to Albania to negotiate directly with MEICO. *Id.* at ¶ 17. Diveroli and Podrizki met with Pinari in Tirana, the Albanian capital. *Id.* at ¶ 18. They also met[3] with Pinari's business associate, Mihail Delijorgji, and another individual, about the same age as Podrizki, who remained silent and was not introduced. *Id.* at ¶¶ 19–22. Diveroli was informed that AEY could have a price reduction on the ammunition if the contract for the repackaging was taken away from Trebicka and given to a company controlled by Delijorgji. *Id.* at ¶ 20. Later, Diveroli and Trebicka told Podrizki that the silent, unidentified man at the meeting was the son of the Albanian Prime Minister. *Id.* at ¶ 23.

Per the new arrangement reached at the meeting, Delijorgji's company was given the repackaging deal. *Id.* at ¶ 24. Trebicka, having been cut out, started communicating with journalists, including at the *New York Times*, in an effort to expose those involved in the AEY deal. *Id.* at ¶¶ 24–25. In an effort to collect incriminating evidence, Trebicka recorded one of his telephone calls with Diveroli. *Id.* at ¶ 26. During that recorded call, Diveroli told Trebicka that he could not bring him back into the deal because the corruption surrounding

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[3] Whether there was only one meeting with all the parties, or an initial meeting with Pinari followed by a second meeting, is not clear. *See DSOF* at ¶¶ 18–19; *Diveroli Decl.*, ECF No. 152-36, at ¶¶ 13–14.

it "went up higher to the prime minister and his son." *Id.* at ¶ 27. "I can't fight this mafia," Diveroli told Trebicka, adding: "It got too big. The animals just got out of control." *Id.*

On August 23, 2007, AEY's office in Miami Beach was raided by federal investigators. *Id.* at ¶ 28. Throughout the ensuing investigation, both Packouz and Podrizki cooperated with law enforcement. *Id.* at ¶ 29. Diveroli, Packouz and Podrizki were all ultimately indicted and entered guilty pleas. *Id.* at ¶¶ 42–43. Packouz and Podrizki were sentenced to house arrest, while Diveroli received a four-year prison sentence. *Id.* at ¶ 44.

B. The Gerdec Explosion

On March 15, 2008, a factory where workers were dismantling ammunition for scrap exploded in the Albanian town of Gerdec. *DSOF* at ¶ 30. The explosion killed 26 people and injured hundreds of others. *Id.* The Gerdec disaster, dubbed a "Political Hiroshima" by the local press, grew into a major scandal. *Id.* at ¶ 114. It led to the arrests and convictions of MEICO chief Pinari and his associate Delijorgji, who were found to have been involved in the corrupt dealings that resulted in stockpiles of heavy munitions being dismantled by untrained civilians in the middle of a residential area. *Id.* at ¶ 31; *Ex. 8 to Lawson Decl.* News reports suggested that both Plaintiff and the Albanian Defense Minister were involved as well, but neither individual was prosecuted. *DSOF* at ¶ 32.

C. The *New York Times* Articles

On March 27, 2008, while AEY was still in business, the *New York Times* published a front-page article about the company under the headline "Supplier Under Scrutiny on Arms for Afghans." *DSOF* at ¶ 34; *Ex. 2 to Lawson Decl.*, ECF No. 126-2, at p. 1. Quoting the recording that Trebicka had made of Diveroli, including the latter's statement that "the prime minister and his son" were involved in "mafia" dealings, the article stated that the "secretly recorded" conversation "suggested corruption" in AEY's Albanian deal. *Ex. 2 to Lawson Decl.*, ECF No. 126-2, at pp. 2, 12.

Plaintiff was aware of the *Times* article shortly after it was published, but never sued the *Times* or asked it to issue a correction. *DSOF* at ¶¶ 38–39. To this day, the article remains available in its original form. *Id.* at ¶ 40.

On October 8, 2008, the *Times* reported that Trebicka had been "found dead . . . on a rural roadside near his car." *Ex. 6 to Lawson Decl.*, ECF No. 126-6, at p. 2. The article noted that Trebicka had been a witness in the investigation into the Gerdec explosion and, while the police had ruled his cause of death to be a car crash, that finding was being "strongly questioned" by the Albanian media, with some suspecting a "more sinister" cause. *Id.* Paraphrasing the contents of Trebicka's recorded call with Diveroli, the article stated that "Mr. Diveroli [had] said the corruption went all the way up to the Albanian prime minister, Sali Berisha, and his son." *Id.* at p. 4.

D. Lawson's *Rolling Stone* Article

On March 16, 2011, *Rolling Stone* magazine published an article about AEY written by Defendant Lawson, an investigative journalist. *DSOF* at ¶¶ 45–46. The article was entitled "Arms & The Dudes: How Two Stoner Kids from Miami Beach Became Big-Time Arms Dealers—Until the Pentagon Turned on Them." *Id.* at ¶ 46. In researching the article, Lawson relied on court records, news articles and information and documents that he had obtained from Packouz. *Id.* at ¶ 47. Lawson has stated that he found Packouz to be "smart, credible and reliable." *Id. Rolling Stone* subjected Lawson's article to fact-checking prior to publication. *Id.* at ¶ 48.

Lawson's article reported that AEY's Albanian deal had been structured to pay kickbacks to local officials, and it quoted the now-familiar recorded call in which Diveroli had stated that the corruption in Albania "went up higher, to the prime minister and his son." *Id.* at ¶ 49. The article also reported that the deal to repackage the ammunition had been taken away from Trebicka so that it could be given to Mihail Delijorgji, "a friend of the prime minister's son." *Id.* at ¶ 50.

Lawson's article received a "huge" amount of attention and was nominated for the 2012 Best Feature Prize awarded by the American Society of Magazine Editors. *Id.* at ¶ 51. As with the original *New York Times* article, Plaintiff was aware of the *Rolling Stone* article around the time it was published. *Id.* at ¶ 52. Plaintiff claims that he sent Lawson and his *Rolling*

Stone editor an email in response to the article, but Lawson denies having received it, and no such email has been produced in this action. *Id.* at ¶ 53–56; *PSOF* at ¶ 74. As with the *Times* article, the *Rolling Stone* article is still available in its original form. *DSOF* at ¶ 53.

E. Additional Reporting on AEY, Gerdec and Plaintiff

In addition to the *New York Times* and *Rolling Stone* articles discussed above, the events and allegations at issue in this case were reported on by various media sources over the course of several years.

On February 5, 2009, the *Broward Palm Beach New Times* published an article discussing Trebicka's "mysterious[]" death, noting that "Trebicka had recorded a tape . . . in which Diveroli said corruption in [Albania] 'went up . . . to the prime minister and his son.'" *DSOF* at ¶ 86; *Ex. 7 to Lawson Decl.*, ECF No. 126-7, at p. 2. This article is still available in its original form. *DSOF* at ¶ 87.

In May 2009, a book entitled "The Gerdec Disaster: Its Causes, Culprits, and Victims," by Ardian Klosi, was published in Albania. *Ex. 10 to Lawson Decl.*, ECF No. 12610, at pp. 6–7. Klosi wrote in the book that "the prime minister's son" had reportedly been present at an arms-dealing meeting with Pinari and Delijorgji. *Id.* at p. 89.

In 2010, Al Jazeera broadcast a half-hour investigative report about the Gerdec explosion, called "Bullets and Bucks." *DSOF* at ¶ 88; *Ex. 8 to Lawson Decl.*[4] The report sought to answer the question: "Why was a dangerous ammunition facility ever sited in the middle of a residential area?" *Ex. 8 to Lawson Decl.* The answer, it said, lay in a "corrupt scheme" in the "murky depths of Albanian politics." *Id.* The report stated that "the Prime Minister's son"—Plaintiff—"was allegedly involved with the company behind the Gerdec factory right from the start." *Id.* The report featured debates from the floor of the Albanian parliament, with legislators demanding to know the identity of the mysterious "Shkelzen" referred to documents related to the Gerdec project. *Id.* It also tied the disaster to the AEY affair, stating that those who were "behind the scenes at Gerdec" were "the same people" allegedly "involved in the [AEY] scam." *Id.* Finally, the report stated that despite these allegations Plaintiff had not been questioned by investigators, something for which the Gerdec inquiry had been "widely criticized." *Id.*

In his deposition, Plaintiff acknowledged that the Al Jazeera report was "damaging." *DSOF* at ¶ 90. Plaintiff states that he "informed Al Jazeera of the falsity of [the report's] allegations," but that he did not file suit "in deference to his father's wishes." *PSOF* at ¶ 91. The report remains online to this day. *DSOF* at ¶ 91.

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[4] A copy of the video report was conventionally filed and has been reviewed by the Court.

In 2011, a book entitled "The Shadow World: Inside the Global Arms Trade," by Andrew Feinstein, was published in the United States. *Ex. 15 to Lawson Decl.*, ECF No. 12616, at pp. 3–4. In his discussion of AEY's Albanian deal, Feinstein wrote: "Importantly, the son of Sali Berisha, the Prime Minister, was alleged to have been involved in at least one meeting with Delijorgji and Pinari, leading to speculation that he too was in on the deal." *Id.* at p. 10.

Also in 2011, classified cables written by John Withers, the former U.S. Ambassador to Albania, were disseminated by WikiLeaks. *Id.* at ¶ 92. In one cable, Ambassador Withers reported that the former head of the Albanian army had approached him out of fear for his safety, stating that Plaintiff had put him under "direct pressure" to continue delivering "high caliber ammunition to Gerdec and to do so without delay." *Id.* The army chief later denied making those statements. *PSOF* at ¶ 92. In a second cable, Ambassador Withers noted that Albanian news organizations had been reporting on evidence, leaked from the Gerdec investigation, that implicated Plaintiff in corrupt arms dealing. *DSOF* at ¶ 93.

On October 29, 2012, the *New Republic* published an article repeating the original *New York Times* reporting that, "[i]n 2008, on a secretly recorded phone call, an American arms dealer [had] complained that his scheme to sell illegal ammo from Albanian junkyards to the U.S. Army had become entangled in an Albanian 'mafia' involving Berisha and his son." *Id.* at ¶ 97; *Ex. 16 to Lawson Decl.*, ECF No. 126-17, at

p. 6. The article was never corrected and is still available. *DSOF* at ¶ 98.

Plaintiff has made other news in Albania as well. Local media have reported that he was involved in corruption related to an energy utility company and the country's lottery. *Id.* at ¶ 115. Plaintiff receives attention through his relationship with Armina Mevlani, a former Miss World contestant with approximately one million social media followers. *Id.* at ¶ 121; *Ex. 68 to McNamara Decl.*, ECF No. 140, at p. 41. Plaintiff maintains an email list of Albanian journalists, to whom he sends comments about their reporting, and those comments are often published. *DSOF* at ¶¶ 118–19. Plaintiff's Facebook posts are similarly picked up and published by media outlets. *Id.* at ¶ 120. And Plaintiff has filed at least ten libel claims against Albanian news organizations in the last seven years, which lawsuits are themselves the subject of press releases put out by his attorneys. *Id.* at ¶ 116; *Ex. 68 to McNamara Decl.*, ECF No. 140, at p. 44. The result of all this media contact is reflected in a survey produced by Plaintiff, which shows that he has a remarkable "100%" name recognition among the population of Albania. *Ex. A to Suppl. McNamara Decl.*, ECF No. 1672, at p. 7 (out of 1,000 respondents, all 1,000 answered "Yes" to the question: "Do you know who Shkelzen Berisha is?").

F. Lawson's Research for the Book

On June 28, 2011, Lawson entered into a publishing agreement with S&S to expand his *Rolling Stone*

article into a book. *DSOF* at ¶ 57. Under the agreement, Lawson assumed sole responsibility for ensuring that the book was factually accurate. *Id.* at ¶ 58. Neither S&S nor Recorded Books, which purchased the right to record an audio version of the book, performed any fact-checking on it. *Id.* at ¶ 59–60.

Lawson spent four years conducting interviews and reviewing tens of thousands of pages of documentary evidence, including the two *New York Times* articles, the *Broward Palm Beach New Times* article, the *New Republic* article, the leaked diplomatic cables, the Klosi and Feinstein books and the Al Jazeera broadcast referenced above. *Id.* at ¶ 62, 82–100.

Lawson also entered into "life rights" agreements with Packouz and Podrizki. *Id.* at ¶ 63. Under those agreements, Packouz and Podrizki provided Lawson with interviews, access to documents and other services, while Lawson retained exclusive editorial control over the book's content. *Id.* at ¶ 64. As with Packouz, Lawson states that he found Podrizki to be an "extremely reliable source[]." *Id.* at ¶ 65. Packouz and Podrizki, for their part, maintain that they "told Lawson the truth to the best of their ability." *Id.* at ¶ 66.

To flesh out the details of the Tirana meeting allegedly attended by Plaintiff, Lawson relied on the account given him by Podrizki, as well as the latter's identification of Plaintiff from a photograph Lawson provided. *Id.* at ¶ 101. While Podrizki had previously been unable to identify Plaintiff during an interview

with law enforcement, the photograph used in that earlier attempt had been of poor quality. *Id.*

Lawson also interviewed Erion Veliaj, a political opponent of Plaintiff's father and the current mayor of Tirana, who told Lawson that in Albania the Berishas were known simply as "the family," and that they were the "chief fixers in th[e] country." *Lawson Decl.*, ECF No. 126, at ¶¶ 70–71. Veliaj told Lawson that he suspected "that Plaintiff was involved in the corrupt AEY deal[.]" *Id.*

Lawson interviewed Andi Belliu, a former worker at the Gerdec munitions facility, who called Plaintiff the "shadow" behind that ill-fated project. *DSOF* at ¶ 104. Belliu wrote in a follow-up email that MEICO was "an albanian style mafia company [*sic*]" that was "backed up by Shkelzen Berisha." *Id.* at ¶ 104.

Lawson also communicated with the late Kosta Trebicka's daughter, who told him that she considered Plaintiff a suspect in her father's mysterious death. *Id.* at ¶ 106. She told Lawson that her father had said he was removed from the AEY repackaging deal because "Berisha's son . . . wanted it for himself." *Id.* at ¶ 107.

G. Plaintiff's Complaint

Plaintiff brought this action against Defendants in June 2017, alleging one count of defamation and one count of defamation *per se. Compl.*, ECF No. 1, at

¶¶ 143–67. In the Complaint, Plaintiff challenges five specific statements made about him by Lawson.[5]

First, a scene in Lawson's book describes the meeting in Tirana attended by Diveroli, Packouz, Podrizki, Pinari, Delijorgji and "a young man . . . sitting in the corner." *Compl.*, ECF No. 1, at ¶ 87. The book states: "Dressed in a baseball cap and a sweater, [the young man] had dark hair, a soft chin, and sharklike eyes. He wasn't introduced. This was Shkelzen Berisha, the son of the prime minister of Albania, they would later be told by Pinari. Shkelzen was part of what was known in Albania as 'the family,' the tight-knit and extremely dangerous group that surrounded and lived at the beneficence of the prime minister. . . . The son of the prime minister remained silent. . . . Diveroli and Podrizki departed. . . . 'Did we just get out of a meeting with the Albanian mafia?' Podrizki joked. 'Absolutely. Absofuckinglutely.'" *Id.*

Later, the book states that "Diveroli had agreed to cut Trebicka out of the repacking job, which was now being done by a company . . . seemingly controlled by the prime minister's son and Mihail Delijorgji." *Id.* at ¶ 103.

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[5] Plaintiff also challenges statements that do not refer to him, but rather refer to the Albanian Prime Minister or to "Albanian mobsters" in the abstract. *Compl.*, ECF No. 1, at ¶¶ 101–02, 107. This Order does not address those statements, which, in any event, can only have the same thrust as the statements listed here—namely, that Plaintiff has ties to the mafia and has engaged in arms dealing.

The book also quotes the recorded conversation between Diveroli and Trebicka that was printed in the original *New York Times* article, in which Diveroli said: "[The corruption] went up higher to the prime minister and his son. I can't fight this mafia. It got too big. The animals just got out of control." *DSOF* at ¶ 27; *see also Compl.*, ECF No. 1, at ¶ 105.

In the book's photograph section, Plaintiff's image appears with the caption: "Also involved, the dudes[6] discovered, was the prime minister's son, Shkelzen Berisha." *Compl.*, ECF No. 1, at ¶ 104.

Finally, in a 2016 interview on Albanian television, Lawson stated: "[T]he ex-prime-minister's son met with the Dudes when they were in Albania to arrange the delivery and repackaging of these munitions at . . . twice the price that the Albanian government was getting. . . . So what happened to all that money? Well, the implication is clear that the prime minister's son, . . . and other officials, were profiteers and the money was shipped off to a Cyprus holding company and then vanished." *Id.* at ¶ 108.

Plaintiff contends that these statements "demonstrate malice, egregious defamation, and grave insult." *Id.* at ¶ 169. Plaintiff seeks a court order requiring that the statements referring to him be "remove[d]" from

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[6] Per the book's title, Diveroli, Packouz and Podrizki are referred to as "the dudes" throughout the record and the Parties' motion papers.

Lawson's book, as well as compensatory damages of $60 million and additional, punitive damages. *Id.*

II. LEGAL STANDARDS

A. Summary Judgment

"A party may move for summary judgment, identifying each claim or defense—or the part of each claim or defense—on which summary judgment is sought." Fed. R. Civ. P. 56(a). "The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." *Id.* In reviewing a motion for summary judgment, the court is "required to view the evidence and all factual inferences therefrom in the light most favorable to the non-moving party, and resolve all reasonable doubts about the facts in favor of the non-movant." *Feliciano v. City of Miami Beach*, 707 F.3d 1244, 1247 (11th Cir. 2013) (quoting *Skop v. City of Atlanta*, 485 F.3d 1130, 1143 (11th Cir. 2007)).

B. Defamation Claims

Under Florida law, a plaintiff alleging defamation must prove five elements: "(1) publication; (2) falsity; (3) the statement was made with knowledge or reckless disregard as to the falsity on a matter concerning a public official, or at least negligently on a matter concerning a private person; (4) actual damages; and (5) the statement must be defamatory." *Turner v. Wells*, 879 F.3d 1254, 1262 (11th Cir. 2018) (citing *Jews For*

Jesus, Inc. v. Rapp, 997 So. 2d 1098, 1106 (Fla. 2008)). An otherwise false and defamatory statement is considered defamatory *per se*, obviating the need to prove special damages, if "it charges that a person has committed an infamous crime . . . [or] it tends to injure one in his trade or profession." *Klayman v. Judicial Watch, Inc.*, 22 F. Supp. 3d 1240, 1247 (S.D. Fla. 2014) (quoting *Richard v. Gray*, 62 So. 2d 597, 598 (Fla. 1953)).

"The test for determining liability in a defamation case turns on whether the libeled party is a public or private figure and on whether the defamatory publication addresses a public or private concern." *Silvester v. Am. Broad. Cos.*, 839 F.2d 1491, 1493 (11th Cir. 1988). "If the injured party is a public figure or official and the defamatory material involves issues of legitimate public concern, the plaintiff must prove that the defendant acted with actual malice to establish liability." *Id.* (citations omitted). Issues of legitimate public concern include "all matters of corruption." *Id.*; *see also Rosanova v. Playboy Enters.*, 580 F.2d 859, 861 (5th Cir. 1978) ("The nature of [plaintiff's] reported associations and activities concerning organized crime, are, without dispute, subjects of legitimate public concern.").

As to whether a plaintiff is a public figure, that "is a question of law to be determined by the court[.]" *Turner*, 879 F.3d at 1271 (quoting *Mile Marker, Inc. v. Petersen Publ'g, LLC*, 811 So. 2d 841, 845 (Fla. Dist. Ct. App. 2002)). In making that determination, the court must be guided by two "fundamental" criteria. *Silvester*, 839 F.2d at 1494. "First, public figures usually have greater access to the media which gives them 'a

more realistic opportunity to counteract false statements than private individuals normally enjoy.'" *Id.* (quoting *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 344 (1974)). Second, public figures "voluntarily expose themselves to increased risk of injury from defamatory falsehoods concerning them." *Silvester*, 839 F.2d at 1494 (quoting *Gertz*, 418 U.S. at 345). Although the second factor has been labeled the "more important[]" of the two, *id.*, it is nevertheless "possible for someone to become a public figure through no purposeful action of their own." *Turner*, 879 F.3d at 1273 (quoting *Friedgood v. Peters Publ'g Co.*, 521 So. 2d 236, 239 (Fla. Dist. Ct. App. 1988)); *see also Rosanova*, 580 F.2d at 861 ("It is no answer to the assertion that one is a public figure to say, truthfully, that one doesn't choose to be.").

The court must also determine "which type of public figure" a plaintiff is. *Turner*, 879 F.3d at 1272. "[T]he Supreme Court has identified two types of public figures in this context." *Tobinick v. Novella*, 848 F.3d 935, 945 n.9 (11th Cir. 2017), *cert. denied*, 138 S. Ct. 449 (2017). General public figures are those who "occup[y] positions of such persuasive power and influence that they are deemed public figures for all purposes." *Id.* (quoting *Silvester*, 839 F.2d at 1494). "A limited public figure, by contrast, 'ha[s] thrust [himself] to the forefront of particular public controversies in order to influence the resolution of the issues involved.'" *Tobinick*, 848 F.3d at 945 n.9 (quoting *Silvester*, 839 F.2d at 1494). "If the existence of a public controversy is established, . . . the court must apply a two-part test to determine if a specific individual is a limited public

figure for the purpose of that controversy." *Turner*, 879 F.3d at 1272–73. "First, the court must determine whether the individual played a central role in the controversy." *Id.* at 1273. "Second, it must determine whether the alleged defamation was germane to the individual's role in the controversy." *Id.*

Both general and limited public figures must prove by clear and convincing evidence "that the defamatory statements were made with actual malice." *Tobinick*, 848 F.3d at 945 & n.9. "This is a subjective test," requiring proof "that the false statement was made 'with knowledge that it was false or with reckless disregard of whether it was false or not.'" *Turner*, 879 F.3d at 1273 (quoting *Michel v. NYP Holdings*, 816 F.3d 686, 702 (11th Cir. 2016)). This is also a stringent test: It is not enough to show the "existence of a false statement," the "failure to conduct a thorough and objective investigation," or even "ill will" on the part of a defendant. *Tobinick*, 848 F.3d at 946–47. Indeed, even an "extreme departure from professional [journalistic] standards" is "plainly" insufficient to sustain a finding of actual malice. *Harte-Hanks Commc'ns, Inc. v. Connaughton*, 491 U.S. 657, 665 (1989). What is required is proof that "the defendant 'actually entertained serious doubts as to the veracity of the published account, or was highly aware that the account was probably false.' *Turner*, 879 F.3d at 1273 (quoting *Michel*, 816 F.3d at 702–03).

III. DISCUSSION

Defendants move for summary judgment on both counts of the Complaint. *Defs.' Mot. for Summ. J.*, ECF No. 138, at p. 1. Defendants argue that Plaintiff is, if not a general public figure, at least a limited public figure for purposes of the AEY arms-dealing controversy recounted in Lawson's book. *Id.* at pp. 13–17. As a public figure, they say, Plaintiff must prove by clear and convincing evidence that Defendants acted with actual malice in publishing the challenged statements.[7] *Id.* at p. 17. Defendants argue that Plaintiff cannot make that showing where the statements were based on a wealth of evidence, including multiple prior reports from reputable news organizations, all with the same import: that Plaintiff was involved in corrupt arms dealing in Albania. *Id.* at pp. 17–18. For the reasons set forth below, the Court agrees with Defendants in each respect.[8]

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[7] For purposes of their motion for summary judgment, Defendants assume *arguendo* that the challenged statements are false. *Defs.' Mot. for Summ. J.*, ECF No. 138, at p. 13 n.6. This Order proceeds on the same assumption.

[8] Defendants have also filed a motion pursuant to Section 768.295 of the Florida Statutes ("the SLAPP Statute"). *Defs.' SLAPP Mot.*, ECF No. 134. In that motion, Defendants ask the Court to hold a hearing on and resolve their summary judgment motion on "an expedited basis," and to award them attorneys' fees. *Id.* at p. 3. However, the cases Defendants cite in support of their request do not establish that the SLAPP Statute must be applied here. *See, e.g.*, *Tobinick*, 848 F.3d at 944 (holding that plaintiffs had "waived their challenge to the district court's application of California's anti-SLAPP statute"). Nor does the Statute provide for attorneys' fees incurred in the "defense against an

A. A. Plaintiff's Public Figure Status

"The test for determining liability in a defamation case turns on whether the libeled party is a public or private figure and on whether the defamatory publication addresses a public or private concern." *Silvester*, 839 F.2d at 1493. The challenged statements in this case describe corruption in the Albanian government and in the sale of arms to the United States for use in the war in Afghanistan. As the Parties do not dispute, these are matters of public concern. *See, e.g.*, *id.* ("The public is legitimately interested in all matters of corruption[.]").

The critical question, then, is whether Plaintiff is a public figure. This is a question of law, *Turner*, 879 F.3d at 1271, and in answering it the Court must be guided by two "fundamental" criteria. *Silvester*, 839 F.2d at 1494. "First, public figures usually have greater access to the media which gives them 'a more realistic opportunity to counteract false statements than private individuals normally enjoy.'" *Id.* (quoting *Gertz*,

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action that was filed in violation" of the Statute, as Defendants contend. *Defs.' SLAPP Mot.*, ECF No. 134, at p. 2. Rather, the Statute provides only for "attorney fees and costs incurred in connection with *a claim that* an action was filed in violation of this section"—in other words, fees and costs incurred in connection with the SLAPP motion itself. Fla. Stat. § 768.295(4) (emphasis added). It further appears that such fees and costs can only be awarded after a hearing. *See id.* The Court finds that the stated purpose of the SLAPP Statute—the "expeditious resolution" of certain defamation claims, *id.*—would not be furthered by holding a hearing at this juncture. Accordingly, Defendants' SLAPP motion is, along with all other pending motions in this matter, denied as moot.

418 U.S. at 344). Second, public figures "voluntarily expose themselves to increased risk of injury from defamatory falsehoods concerning them." *Silvester*, 839 F.2d at 1494 (quoting *Gertz*, 418 U.S. at 345).

Here, Plaintiff is the son of Sali Berisha, who has been both the President and the Prime Minister of Albania. *DSOF* at ¶ 3. As is undisputed, Plaintiff is alleged to have been at the epicenter of not one but two major arms-dealing scandals. *Id.* at ¶ 114. The first was the AEY Albanian deal that was the subject of Lawson's book. *Id.* The second was the Gerdec disaster, which resulted in 26 deaths, hundreds of injuries and the conviction of Ylli Pinari, the head of Albania's state-run Military Export Import Company. *Id.* The Gerdec disaster has been likened to a "Political Hiroshima" in the Albanian press. *Id.* Plaintiff is also alleged to have been involved in corruption surrounding the privatization of an energy utility company and Albania's national lottery. *Id.* at ¶ 115. Not all of the press has been negative: Plaintiff also receives attention through his relationship with Armina Mevlani, an Albanian celebrity who has approximately one million social media followers. *Id.* at ¶ 121; *Ex. 68 to McNamara Decl.*, ECF No. 140, at p. 41. Nevertheless, for better or worse, Plaintiff has attained a level of "fame or notoriety in [his] community" that few other figures could likely match. *Turner*, 879 F.3d at 1272. Indeed, a survey produced by Plaintiff shows that he has an astonishing 100 percent name recognition among Albanians. *Ex. A to Suppl. McNamara Decl.*, ECF No. 167-2, at p. 7.

Plaintiff argues that all of the above may be true, but it is despite his best efforts. In other words, Plaintiff argues that he has not "voluntarily expose[d]" himself to the public spotlight and its attendant "risk of injury from defamatory falsehoods." *Silvester*, 839 F.2d at 1494 (quoting *Gertz*, 418 U.S. at 345). Plaintiff insists that, although he is the son of Albania's former national leader, he "has attempted to lead a private life." *PSOF* at ¶ 139. If Plaintiff has ever had to interact with the press, he says, it was only "in response to false allegations manufactured by opponents of [his] father." *Id.* Apart from that, Plaintiff claims that he "has never voluntarily sought media attention," and he "has never had[ ] privileged access" to the press. *Id.* Indeed, Plaintiff states that he has "specifically requested that [Ms. Mevlani] limit the posting of photographs that include" him on social media. *Id.*

Plaintiff's claim that he "has never had[] privileged access to the media" is difficult to square with the fact that he is in direct email contact with numerous Albanian journalists and editors, as well as the fact that his Facebook posts have been published in news articles. *DSOF* at ¶¶ 118–20. But, even if the Court credits Plaintiff's assertions, "the status of public figure *vel non* does not depend upon the desires of an individual." *Rosanova*, 580 F.2d at 861. Plaintiff did not choose to be the former Albanian Prime Minister's son, but that is what he is, and other "children of famous parents" have been held to be public figures on no wider grounds than that. *Meeropol v. Nizer*, 381 F. Supp. 29, 34 (S.D.N.Y. 1974) (finding that the

children of Julius and Ethel Rosenberg were public figures despite having "renounced the public spotlight" as adults), *aff'd*, 560 F.2d 1061 (2d Cir. 1977).

Moreover, Plaintiff's claim that he has not voluntarily sought attention is "no answer to the assertion that [he] is a public figure" where, as here, Plaintiff "has been the subject of published newspaper and other media reports" connecting him with "organized crime." *Rosanova*, 580 F.2d at 861. In *Rosanova*, as in this case, plaintiff sued for defamation based on defendant's printed reference to him "as a 'mobster.' " 580 F.2d at 860. There, as here, plaintiff "assert[ed] that he ha[d] never sought" to be a public figure, "and that, in truth, he ought not have become one." *Id.* at 861. The Fifth Circuit rejected this argument and found plaintiff to be a public figure. *Id.* As is the case here, the court noted that there had been "widespread media reports" about plaintiff's alleged "associations and activities concerning organized crime," which were, "without dispute, subjects of legitimate public concern." *Id.* "Comment upon people and activities of legitimate public concern," the court observed, "often illuminates that which yearns for shadow." *Id.*

The Florida state court case of *Friedgood v. Peters Publishing Co.* is also instructive. In *Friedgood*, the District Court of Appeal noted that in some defamation cases "the issues of truth [of defendant's statement] and voluntariness [of plaintiff's entry into the controversy] are the same and are in dispute[.]" 521 So. 2d at 240. The instant case falls within that category. Here, Plaintiff contends that he is a "private citizen" who has

been dragged into a public controversy through Defendants' "elaborate deceptions." *Pl.'s Mem. in Opp'n*, ECF No. 153, at pp. 1, 20. If Defendants' statements about him were in fact deceptions, then Plaintiff's participation in the controversy "would be involuntary." *Friedgood*, 521 So. 2d at 240. If, on the other hand, the Prime Minister's son was involved in organized crime and arms trafficking, then it would have to be said that he had "voluntarily engaged in a course that was bound to invite attention and comment." *Rosanova*, 580 F.2d at 861. *Friedgood*'s solution is simple: Where the issues of truth and voluntariness are so entangled, a plaintiff can be deemed a public figure "without regard to whether . . . [he] initially thrust [him]self into the case." 521 So. 2d at 240. Instead, "the other factors, prominence and access to media, alone may be examined to determine public figure status." *Id.*

Judged by the standards set forth above, it is clear that Plaintiff is a public figure in Albania. His proximity to power, his access to the media and his alleged presence at the center of multiple corruption scandals all compel that finding.

The harder question is one the Parties have not briefed. That question is whether it matters *where* Plaintiff is a public figure. The Parties have focused on Plaintiff's status in Albania, including his universal public awareness there. But Lawson's book was not published solely for an Albanian audience. And while Plaintiff has not pointed to any surveys showing his name recognition in, say, the United States, it is safe to assume that the figure is less than 100 percent. To be

sure, Plaintiff would feel any defamatory "sting" less sharply in a country where he is not a household name, but he would also have fewer means to defend himself there. *See Gertz*, 418 U.S. at 344 (1974) ("[P]ublic figures usually enjoy significantly greater access to the channels of effective communication and hence have a more realistic opportunity to counteract false statements[.]").

As noted, Plaintiff has failed to make any arguments in this connection. Even if the Court were to reach the issue, however, the case law shows that Plaintiff should be deemed at least a "limited" public figure for purposes of the AEY controversy. For example, in *Lluberes v. Uncommon Productions, LLC*, the First Circuit Court of Appeals expressly rejected plaintiffs' "geographic" argument that they were not "public figures in the United States." 663 F.3d 6, 20 (1st Cir. 2011). Plaintiffs in that case were the owners of sugarcane plantations in the Dominican Republic, who sued over their depiction in a film exposé called "The Price of Sugar." *Id.* at 10. The First Circuit noted that a limited public figure is "defined . . . not in terms of geography but in terms of the controversy that he has stepped into." *Id.* at 20. In that case, the controversy in which plaintiffs were involved "was not confined to the shores of the Dominican Republic," but "resounded in the United States." *Id.* at 21. The court therefore upheld their designation as "public figures in the United States for purposes of this lawsuit." *Id.*

The Fifth Circuit Court of Appeals reached similar conclusions in two cases, *Trotter v. Jack Anderson*

Enterprises and *Time, Inc. v. McLaney.* In *Trotter*, plaintiff was an American lawyer "who was president of a Guatemalan soft drink bottling company." 818 F.2d 431, 432 (5th Cir. 1987). He sued for defamation based on articles in the United States describing him as an "orchestrator[]" of "anti-union violence" at a bottling plant in Guatemala. *Id.* The Fifth Circuit, noting that what happens in foreign countries can be of "domestic concern," affirmed the district court's finding that plaintiff was a limited public figure, notwithstanding his "low public profile" in the United States. *Id.* at 433–36. Similarly, in *McLaney*, plaintiff was a "professional gambler" who sued based on a *Lift* magazine article linking him to the political machinations of "mobsters" in the Bahamas. 406 F.2d 565, 567–70 (5th Cir. 1969). The court held that plaintiff was a public figure, noting that allegations of corruption "in a small foreign country" were a "proper subject of inquiry and of public interest" in the United States. *Id.* at 573.

In this case, Plaintiff is widely reported to have been involved in several distinct corruption scandals in his home country of Albania. *DSOF* at ¶¶ 114–15. One of those was the AEY controversy at issue here, a controversy that involved an American defense contractor selling Chinese ammunition, acquired in Albania, to the United States military for use in the war in Afghanistan. *Id.* at ¶ 114. This was a matter of public interest in the United States, and no doubt in much of the rest of the world as well. While the Court presumes that Plaintiff does not enjoy the same prominence and access to media in this country as he does in his own—

and, again, Plaintiff has not made this point himself—Plaintiff nevertheless has significant resources at his disposal, and certainly no less than were available to the "professional gambler" in *McLaney*. 406 F.2d at 570.

Finally, the Court finds that Plaintiff meets the "two-part test" used "to determine if a specific individual is a limited public figure for the purpose of [a public] controversy." *Turner*, 879 F.3d at 1272–73. First, Plaintiff's role in the AEY controversy was "central." *Id.* at 1273. Plaintiff was alleged to have been personally present at the 2007 meeting in Tirana along with Diveroli, Pinari and others, and to have been positioned at the "high[]" end of Albania's corruption ladder. *DSOF* at ¶¶ 19–22, 27. Second, "the alleged defamation" was "germane" to Plaintiff's role in the AEY controversy—indeed, that Plaintiff was centrally involved in the controversy *was* the alleged defamation. *Id.*

Accordingly, the Court finds that Plaintiff is a limited public figure for purposes of the controversy at issue in this case. As a public figure, Plaintiff must demonstrate actual malice to prevail in his defamation claim.

B. Actual Malice

In his response to Defendants' motion for summary judgment, Plaintiff has made clear what his argument for actual malice would be if this case went to trial. Plaintiff's theory is that Diveroli, Defendant

Packouz and Defendant Podrizki "conspired" in order "to fabricate [Plaintiff's] involvement" in AEY's Albanian deal. *Pl.'s Mem. in Opp'n*, ECF No. 153, at p. 15. Plaintiff contends that the "dudes" did so in order to scare off Kosta Trebicka, whom they had decided to remove from his role in repackaging the ammunition. *Id.* at pp. 3, 15, 17. Years later, when Defendant Lawson was writing his book, Packouz and Podrizki recognized that it was "in [Lawson's] interest—financially and professionally—to tell a new, bigger story," and they obligingly told him "what he wanted to hear." *Id.* at pp. 3–4. Packouz and Podrizki gave Lawson a 'good' story" about "Albanian corruption," which Lawson used to sell copies of his book. *Id.* at pp. 4–5. In return, Lawson paid Packouz and Podrizki for their "life rights," and provided them with "reputational rehabilitation" by portraying them positively in the book. *Id.* at p. 3.

Plaintiff's conspiracy theory falls far short of establishing actual malice by clear and convincing evidence. *See Gertz*, 418 U.S. at 342. In order to meet that standard, Plaintiff must prove that Defendants "actually entertained serious doubts as to the veracity of the published account, or [were] highly aware that the account was probably false." *Turner*, 879 F.3d at 1273 (quoting *Michel*, 816 F.3d at 702–03). Here, Lawson and his publishers were no doubt motivated by the desire to sell books—but that motive is "immaterial" in this context. *New York Times Co. v. Sullivan*, 376 U.S. 254, 266 (1964). Likewise, the fact that Packouz and Podrizki were paid as part of "life rights" agreements, which are "standard" in the book publishing industry,

does not establish actual malice on their part or on Lawson's. *DSOF* at 63; *cf. Silvester*, 839 F.2d at 1498 & n.5 (rejecting plaintiff's actual malice claim where one of the sources for the allegedly defamatory news report was hired and paid as a "consultant"). As for the effect of Lawson's book on Packouz's and Podrizki's reputations, that can only be guessed.

Set against Plaintiff's insinuations is the critical fact that, by the time Lawson's book was published in 2015, Plaintiff's alleged involvement in arms dealing was already the subject of "widespread media reports." *Rosanova*, 580 F.2d at 861. First, in 2008, the *New York Times* published a front-page article about AEY. *DSOF* at ¶ 34; *Ex. 2 to Lawson Decl.*, ECF No. 126-2, at p. 1. The *Times* article quoted Trebicka's "secretly recorded" call with Diveroli, in which the latter stated that the "prime minister and his son" were involved in "mafia" dealings. *Ex. 2 to Lawson Decl.*, ECF No. 126-2, at pp. 2, 12. Later the same year, the *Times* published a second article reporting that Trebicka had been "found dead . . . on a rural roadside." *Ex. 6 to Lawson Decl.*, ECF No. 126-6, at p. 2. The article again noted Trebicka's recorded call with Diveroli, stating that "Mr. Diveroli [had] said the corruption went all the way up to the Albanian prime minister, Sali Berisha, and his son." *Id.* at p. 4.

Later articles in the *Broward Palm Beach New Times* and the *New Republic* repeated this information about Plaintiff's alleged involvement in the AEY deal. *DSOF* at ¶¶ 86, 97; *Ex. 7 to Lawson Decl.*, ECF No. 126-7, at p. 2; *Ex. 16 to Lawson Decl.*, ECF No. 126-17, at

p. 6. Indeed, it was not only in articles that this claim appeared but also in two books published prior to Lawson's—one in the United States and one in Albania. *Ex. 10 to Lawson Decl.*, ECF No. 126-10, at pp. 6–7; *Ex. 15 to Lawson Decl.*, ECF No. 126-16, at pp. 3–4.

Plaintiff argues that all of the publications that followed the original *Times* article were merely repeating what that first article had said, and that article, in turn, was based solely on Diveroli's comments in the recorded call with Trebicka. *Pl.'s Mem. in Opp'n*, ECF No. 153, at p. 19. Thus, rather than representing the independent investigations of so many news sources, all of these stories boiled down to a single comment made by Diveroli, whom Plaintiff more than once describes as a "pathological liar." *Id.* at pp. 10, 19, 27.

There are several problems with this argument. First, it is well established that "[t]he failure to conduct a thorough and objective investigation, standing alone, does not prove actual malice[.]" *Tobinick*, 848 F.3d at 947. The *New York Times* article that first broke the AEY story presented Diveroli's "secretly recorded" comments as news fit to print, *Ex. 2 to Lawson Decl.*, ECF No. 126-2, at p. 2, and Lawson was entitled to rely on that "previously published report[ ]" from a "reputable source[ ]." *Liberty Lobby, Inc. v. Dow Jones & Co.*, 838 F.2d 1287, 1297 (D.C. Cir. 1988); *see also*, *e.g.*, *Fodor v. Berglas*, 1995 WL 505522, at *5 (S.D.N.Y. Aug. 24, 1995) (no actual malice where defendant "bas[ed] his conclusions on only one source, namely an article previously published in *New York* Magazine").

In any event, Lawson *did* conduct his own investigation, which included interviews with sources who corroborated Diveroli's claim. First, and critically, Lawson relied on the account given to him by Podrizki, who identified Plaintiff as being at the Tirana meeting. *DSOF* at ¶ 101. Lawson also interviewed Erion Veliaj, the mayor of Tirana, who told Lawson that he believed "Plaintiff was involved in the corrupt AEY deal[.]" *Lawson Decl.*, ECF No. 126, at ¶¶ 70–71. Lawson interviewed Andi Belliu, a former worker at the Gerdec factory, who called Plaintiff the "shadow" behind the factory and implicated him in "mafia" dealings. *DSOF* at ¶ 104. Finally, Lawson spoke with Trebicka's daughter, who said that her father had been removed from the AEY deal in order to make way for "Berisha's son." *Id.* at ¶¶ 106–07. Trebicka's daughter also told Lawson that she considered Plaintiff a suspect in her father's death. *Id.* at ¶ 106.

Still another problem with Plaintiff's argument is that the *New York Times* article was not the only original reporting available about Plaintiff's alleged "mafia" ties. In fact, there was an entire body of reporting about Plaintiff's alleged involvement in the Gerdec disaster, not the least of which was the half-hour Al Jazeera segment entitled "Bullets and Bucks," which Plaintiff himself concedes was "damning." *Id.* at ¶ 90. Diveroli's recorded comments were not the only evidence underlying this reporting, as Plaintiff appears to have been explicitly referred to in documents tied to the Gerdec project. *See Ex. 8 to Lawson Decl.* There were also the cables of the former U.S. Ambassador to

Albania, disseminated by WikiLeaks in 2011. *DSOF* at ¶ 92. In one of those cables, the Ambassador reported that the former head of the Albanian army had come to him out of fear for his own safety, stating that Plaintiff had put him under "direct pressure" to continue delivering "high caliber ammunition to Gerdec and to do so without delay." *Id.*

As Defendants note, a critical consideration in any defamation case under Florida law is the "gist or sting" of the challenged statements. *Levan v. Capital Cities/ABC, Inc.*, 190 F.3d 1230, 1240 (11th Cir. 1999). Here, the gist of Lawson's book about AEY and the gist of the reporting on Gerdec were the same, insofar as they related to Plaintiff. The gist of both stories was that Plaintiff had been involved in corrupt dealings surrounding Albania's vast, largely defunct, but still dangerous Cold War arsenals. Thus, it was not Lawson who broke the story about Plaintiff—as Defendants put it, by the time Lawson's book came out in 2015, these allegations were already "old news." *Defs.' Mot. for Summ. J.*, ECF No. 138, at p. 2. Lawson merely incorporated the story into his book, and in doing so he was entitled to rely on the "multitude of previous reports" implicating Plaintiff in arms-related scandals. *Rosanova*, 580 F.2d at 862.

Plaintiff argues that Lawson cannot "feign[] reliance" on those prior reports because Lawson knew more than the other reporters knew—in particular, he knew that Diveroli, Packouz and Podrizki were all "liars and criminals." *Pl.'s Mem. in Opp'n*, ECF No. 153, at pp. 1–2. Plaintiff emphasizes that Defendants

Packouz and Podrizki, Lawson's "primary sources" for the book, had both defrauded the government, forged documents and used false identities, in addition to "many other misdeeds." *Id.* However, while Lawson asserts that he found Packouz and Podrizki to be reliable sources, *DSOF* at ¶¶ 48, 65, he hardly presented them to his readers as unassailable witnesses—indeed, the book ends with both of them being convicted of fraud. *Id.* at ¶¶ 42–44; *Cf. Michel*, 816 F.3d at 703 ("[W]here a news report inform[s] its audience that its primary source [is] 'not an unimpeachable source of information,' it serve[s] to undermine claims showing that the report was issued with actual malice." (quoting *Silvester*, 839 F.2d at 1498)).

As for Diveroli, who is no longer a party to this case, Plaintiff characterizes him as a "pathological liar" unworthy of belief—except, that is, when Plaintiff is citing Diveroli as a witness. *Pl.'s Mem. in Opp'n*, ECF No. 153, at p. 10 & n.1 ("Diveroli admits that he made-up [*sic*] the story about Plaintiff's involvement[.]"). To be sure, Diveroli, whose recorded call with Trebicka was the source of the original *Times* article, now denies that Plaintiff was involved in AEY's Albanian deal. *Id.* at p. 10 n.1. So does the former head of MEICO [sic], Ylli Pinari, who was deposed and convicted following the Gerdec disaster. *Id.* And so did Trebicka himself, before he was "found dead . . . on a rural roadside" in eastern Albania. *Ex. 6 to Lawson Decl.*, ECF No. 126-6, at p. 2. But that does not mean that Diveroli, Pinari and Trebicka are the ones who must be believed. A review of the record in this case indicates that arms

dealing has at times been a shady business. Here, Lawson, an experienced investigative journalist reporting on the AEY controversy, had to rely on the witnesses to the story whom he found to be most credible. Lawson concluded that Packouz and Podrizki were those witnesses, and the Court declines to second guess him.

The remainder of Plaintiff's response papers is devoted to cataloguing examples of Defendants' "elaborate deceptions" and "slipshod, bad-faith reporting." *Pl.'s Mem. in Opp'n*, ECF No. 153, at p. 1. Several of these examples have nothing to do with Plaintiff himself, and some never made it into Lawson's book. *See id.* at pp. 5–6, 11–12. Among the examples that have more direct bearing on the case, the key one Plaintiff focuses on is the scene in Lawson's book describing the 2007 meeting in Tirana. *See id.* at p. 9. Plaintiff argues that Lawson distorted the evidence to bolster his claim that Plaintiff was the silent young man sitting in the corner at the meeting. *Id.* Ultimately, however, Plaintiff's defamation claim does not turn on this narrow point. Rather, Plaintiff's claim turns on whether "the 'gist' or 'sting' of the [challenged] statement[s] is defamatory." *Levan*, 190 F.3d at 1240. Here, the "gist" of Lawson's reporting, and of myriad other reports by reputable news organizations for several years running, was that Plaintiff had his hands in the corrupt management of Albania's aging weapons stockpiles. That Plaintiff attended a specific meeting on that subject was not, as he claims, a "fundamentally different" allegation from those that had long been "swirling in the . . . media." *Stern v. Cosby*, 645 F. Supp. 2d 258, 271

(S.D.N.Y. 2009); *Cf. Ex. 8 to Lawson Decl.* (Al Jazeera reporting that Plaintiff attended "almost daily meetings" regarding the corrupt Gerdec project).

For all of these reasons, Plaintiff has failed to show that Defendants "actually entertained serious doubts as to the veracity of the[ir] published account, or [were] highly aware that the account was probably false." *Turner*, 879 F.3d at 1273 (quoting *Michel*, 816 F.3d at 702–03). Defendants' motion for summary judgment must therefore be granted, and this case must be dismissed.

IV. CONCLUSION

Accordingly, it is hereby **ORDERED and ADJUDGED** that Defendants' Motion for Summary Judgment (ECF No. 138) is **GRANTED**. The Clerk shall **CLOSE** this case. All pending motions are **DENIED *as moot***. A separate judgment will issue pursuant to Rule 58 of the Federal Rules of Civil Procedure.

DONE and ORDERED in Chambers in Miami, Florida, this 21st day of December 2018.

/s/ Marcia G. Cooke
MARCIA G. COOKE
United States District Judge

Copies provided to:
Lauren Louis, U.S. Magistrate Judge
Counsel of Record

19-10315

IN THE

United States Court of Appeals
FOR THE ELEVENTH CIRCUIT

SHKELZEN BERISHA,

Plaintiff-Appellant,

-v.-

GUY LAWSON, ALEXANDER PODRIZKI, DAVID PACKOUZ, SIMON & SCHUSTER, INC., RECORDED BOOKS, INC.,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA

BRIEF FOR DEFENDANTS-APPELLEES

(Filed Jul. 2, 2019)

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CERTIFICATE OF INTERESTED PERSONS

Pursuant to Federal Rule of Appellate Procedure 26.1 and Eleventh Circuit Rules 26.1-1 through 26.1-5, undersigned counsel for Defendants-Appellees Simon & Schuster, Inc., Recorded Books, Inc., Guy Lawson, Alexander Podrizki and David Packouz hereby certify that the following corporations have an interest in the outcome of this appeal:

1. Akerman LLP (Counsel for Defendants-Appellants Guy Lawson, Alexander Podrizki, David Packouz, Simon & Schuster, Inc. and Recorded Books, Inc.)
2. AIG Claims, Inc. (an affiliate of American International Group Inc.; ticker "AIG")
3. AT&T (stock symbol: T) (Owner of Warner Media, LLC; Warner Bros. Pictures is a division of Warner Media, LLC)
4. AXS Law Group, PLLC (Counsel for Plaintiff-Appellant Shkelzen Berisha)
5. Berisha, Shkelzen (Plaintiff-Appellant)

6. Browning, John M. (Counsel for Defendants-Appellants Guy Lawson, Alexander Podrizki, David Packouz, Simon & Schuster, Inc. and Recorded Books, Inc.)

7. CBS Corporation (stock symbol: CBS) (Holder of more than 10% of the stock of Simon & Schuster, Inc.)

8. CBS Operations, Inc.

9. Cooke, Marcia G. (U.S. District Judge)

10. Davis Wright Tremaine LLP (Counsel for Defendants Appellants Guy Lawson, Alexander Podrizki, David Packouz, Simon & Schuster, Inc. and Recorded Books, Inc.) 9.

11. Diveroli, Efraim (Former Defendant)

12. Florida Mediation Group, Inc. (Court-Appointed Mediator)

13. French Street Management LLC

14. Frost & Fire Consulting, SH.P.K. (Counsel for Plaintiff Shkelzen Berisha)

15. Goodman, Jonathan (U.S. Magistrate Judge)

16. Gutchess, Jeffrey W. (Counsel for Plaintiff-Appellant Shkelzen Berisha)

17. Houston, Mary Ruth (Counsel for Attempted Intervenor Warner Bros. Pictures)

18. Incarcerated Entertainment, LLC (Former Defendant)

19. Kelliçi, Reshard (Counsel for Plaintiff-Appellant Shkelzen Berisha)

20. Kline, Matthew (Counsel for Attempted Intervenor Warner Bros. Pictures)

21. Lawson, Guy (Defendant-Appellee)

22. Louis, Lauren Fleischer (U.S. Magistrate Judge)

23. Marsh, Michael Constantine (Counsel for Defendants Appellants Guy Lawson, Alexander Podrizki, David Packouz, Simon & Schuster, Inc. and Recorded Books, Inc.)

24. McNamara, Elizabeth A. (Counsel for Defendants-Appellants Guy Lawson, Alexander Podrizki, David Packouz, Simon & Schuster, Inc. and Recorded Books, Inc.)

25. National Amusements, Inc.

26. Nicholson, Allene D. (Court-Appointed Mediator)

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28. Packouz, David (Defendant-Appellee)

29. Podrizki, Alexander (Defendant-Appellee)

30. Reaves, Taaj M. (Counsel for Defendants-Appellants Guy Lawson, Alexander Podrizki, David Packouz, Simon & Schuster, Inc. and Recorded Books, Inc.)

31. Recorded Books Holdings, Inc.

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34. Rose, Brandon P. (Counsel for Plaintiff-Appellant Shkelzen Berisha)

35. Shutts & Bowen LLP (Counsel for Attempted Intervenor Warner Bros. Pictures)

36. Simon & Schuster, Inc. (Defendant-Appellee)

37. Spahia, Rezart (Counsel for Plaintiff-Appellant Shkelzen Berisha)

38. Summerscales, Joanna E. (Counsel for Defendants-Appellants Guy Lawson, Alexander Podrizki, David Packouz, Simon & Schuster, Inc. and Recorded Books, Inc.)

39. Teurbe-Tolon, Jose Javier (Counsel for Former Defendants Incarcerated Entertainment, LLC and Efraim Diveroli)

40. Warner Bros. Pictures (Intervenor)

41. Zoladz, Jason M. (Counsel for Plaintiff-Appellant Shkelzen Berisha)

CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1 and Eleventh Circuit Rules 26.1, counsel for Defendant-Appellee Simon and Schuster, Inc. ("S&S"), a non-governmental party, states that S&S's direct and indirect parent entities are French Street Management LLC, CBS Operations, Inc. and CBS Corporation. CBS Corporation ("CBS Corp."; ticker: CBS) is a publicly held corporation. National Amusements, Inc., a privately held company, beneficially owns the majority of the Class A voting stock of CBS Corp. CBS Corp. is not aware of any other

ownership of the Class A voting stock of CBS Corporation in the amount of 10% or more.

Counsel for Defendant-Appellee Recorded Books, Inc. ("Recorded Books"), a non-governmental entity, certifies that it is 100% owned by Recorded Books Holdings, Inc. and that no publicly held corporation owns 10% or more of Recorded Books' stock.

STATEMENT REGARDING ORAL ARGUMENT

Defendants-Appellees Guy Lawson ("Lawson"), Alexander Podrizki, David Packouz, Simon & Schuster, Inc. ("S&S") and Recorded Books, Inc. ("Recorded Books") do not oppose the request of Plaintiff-Appellant Shkelzen Berisha for oral argument.

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[1] **COUNTERSTATEMENT OF ISSUES**

1. Whether the trial court correctly dismissed Berisha's defamation claims because the evidence conclusively demonstrates the absence of actual malice, which Berisha must prove by clear and convincing evidence to satisfy the First Amendment.

2. Whether the trial court correctly held that Berisha is a public figure because of his prominence, enhanced access to the media and central role in multiple arms dealing scandals.

3. Whether the trial court abused its discretion by denying Berisha's motion to compel production of communications exchanged by Lawson and the S&S attorney engaged to conduct a pre-publication legal review for the Book because those communications are protected by the attorney-client and the common interest privileges.

4. Whether the trial court abused its discretion by denying Berisha's requests for more time to complete discovery.

STATEMENT OF THE CASE

This defamation action arises out of the brief appearance of plaintiff Shkelzen Berisha's ("Berisha") – the son of the former Prime Minister of Albania – in a non-fiction book, *Arms and the Dudes: How Three Stoners from Miami Beach Became the Most Unlikely Gunrunners in History* (the "Book"). The book [2] tells the incredible true story of three 20-something "stoner dudes," who became major international arms dealers. *See* D.E.126-1, *passim*. The handful of statements in the Book that concern Berisha state or imply the same thing – that he was involved in corrupt arms dealing and mafia activity. Berisha filed this libel suit against the Book's author (Lawson), publisher (S&S), two of the titular "dudes" (Packouz and Podrizki) and the audio book publisher (Recorded Books) (collectively, "Defendants").

The fatal flaw in Berisha's claim is that his role at the center of multiple arms dealing scandals was "old news" by the time the Book was published: for nearly a decade before the Book was published, his involvement in corrupt arms deals had been reported in the *New York Times* (the "*Times*"), *Rolling Stone, New Republic, Al Jazeera*, two books and other reliable sources. Berisha cannot – and does not – deny that Defendants relied on these reports. As the lower court correctly recognized, Defendants were "entitled to rely on 'the multitude of previous reports' implicating [Berisha] in arms-related scandal" and there can be no actual malice as a result. D.E.193(p.20) (quoting *Rosanova v. Playboy Enters., Inc.*, 580 F.2d 859, 862

(5th Cir. 1978)). Berisha lacks any evidence of actual malice – let alone the clear and convincing evidence required – and summary dismissal should be affirmed.

[3] This Court should also reject Berisha's entreaties to compel production of privileged documents and reopen discovery. Since Berisha had full discovery on actual malice – including nearly 20,000 documents and depositions from all Defendants – there is no legitimate reason to revive his constitutionally defective claim.

STATEMENT OF FACTS

Berisha refers the Court to his Complaint for "background context," but makes no serious effort to provide a coherent statement of facts based on record evidence. Appellant's Opening Brief ("Br.") 6.[1] Defendants set forth the following material facts to correct Berisha's partial and misleading presentation of the record:

A. AEY and the Albanian Deal

In the early-to-mid-2000's, Efraim Diveroli was a teenager in Miami who fulfilled arms procurement contracts for the U.S. Government through his company, AEY. D.E.125(¶¶4-5). At that time, private

[1] Berisha also rejected Defendants request to collaborate on a Joint Appendix and omitted most of the evidence favorable to Defendants in his unilateral Appellants' Appendix. As instructed by the Court Clerk, Defendants will file a Supplemental Appendix containing all materials in support of their arguments.

companies (including AEY) were permitted to bid on large military contracts through a free website called FedBizOpps.com. *Id.*(¶4). Diveroli made millions of dollars by brokering [4] deals to supply munitions to the government and, as he sought to grow the business, enlisted the help of his childhood friend David Packouz. *Id.* Packouz' role was to identify opportunities on FedBizOpps.com, bid on suitable contracts and (if successful) work with arms dealers to fulfil the contract as cheaply as possible. *Id.*

In the summer of 2006, AEY won a $300 million contract to equip the Afghan security forces to fight the Taliban during the U.S. War on Terror (the "Afghan Contract"). *Id.*(¶¶5-7). The Afghan Contract required AEY to ship 100-million rounds of AK-47 ammunition to Afghanistan. *Id.* AEY had an exclusive deal with a Swiss middleman, Heinrich Thomet, who had earmarked stockpiles of surplus AK-47 ammunition in Albania that AEY could purchase at an extremely low price. *Id.*(¶8).

Packouz realized that he needed someone on the ground in Albania to collect the ammunition from various Soviet-era bunkers and put it on planes to Afghanistan. *Id.*(¶10). To perform this task, Packouz hired another childhood friend, Alex Podrizki. *Id.* Podrizki travelled to Tirana, the Albanian capital, in late-April 2007, while Packouz remained in Miami to oversee global logistics. *Id.*(¶11).

In Tirana, Podrizki met Ylli Pinari, who was head of MEICO, the state-owned company created to take

over and dispose of Albania's vast weapons [5] stockpiles left over from the Cold War. *Id.* Thomet bought the ammunition from MEICO through a Cyprus-shell company and resold it to AEY. *Id.*(¶¶7-9). Unbeknownst to AEY, Thomet sold the ammunition to AEY for double the price he paid MEICO. D.E.130(¶14). The large markup provided Thomet with money to bribe local officials like Pinari, which is common practice in Albania and the world of arms dealing. D.E.126-2(p.415);D.E.125(¶16);126-1(p.71).

Meanwhile, Podrizki inspected the Albanian AK-47 ammunition to determine whether it was serviceable. D.E.125(¶12). Although the ammunition was very old, it seemed to work properly when Podrizki test-fired it. *Id.* But Podrizki noticed Chinese markings on the crates and metal canisters in which the ammunition was packed, which created a problem because American companies like AEY are prohibited from dealing Chinese ammunition. *Id.*(¶13).

After Podrizki told Diveroli and Packouz about the Chinese markings, the U.S. Government confirmed that AEY could not fulfil the Afghan Contract with Chinese-made ammunition. *Id.* Diveroli and Packouz decided to use MEICO's ammunition anyway and devised a plan to conceal the Chinese markings on the crates and canisters by repackaging the 100-million rounds required to fulfil the order. *Id.*(¶¶13-14). AEY engaged local businessman Kosta Trebicka to provide boxes and labor to accomplish the task of unpacking and repacking each canister of ammunition. *Id.*

[6] Soon after the repackaging commenced, Trebicka discovered that Thomet charged AEY double the price he paid MEICO for ammunition. *Id.*(¶15). Trebicka told Diveroli, who flew to Albania to renegotiate the purchase price, preferably in a way that would remove Thomet from the deal. *Id.*(¶17). Diveroli and Podrizki met Pinari at his office in the Albanian Ministry of Defense in Tirana. *Id.* (¶19). At that meeting, Diveroli tried to negotiate a lower price by showing Pinari documents forged by Packouz to make it look like AEY could buy cheaper ammunition elsewhere. *Id.*(¶¶18-19);D.E.126-1(p.138). Pinari recognized the documents as fakes and, having reached an impasse, suggested meeting someone else to discuss price reductions. *Id.*

Pinari took Diveroli and Podrizki to a half-completed building and introduced them to a thuggish-looking man named Mihail Delijorgji. D.E.131(¶10). Delijorgji offered to lower the price of the ammunition if his company was paid to do the repackaging job. *Id.* Also present in the room was a man who looked to be in his mid-20s, who was not introduced and remained silent throughout. *Id.*(¶11). After the meeting (the "Tirana Meeting"), Podrizki and Diveroli felt like they had just met with dangerous individuals, associated with the Albanian mafia, and Diveroli asked Podrizki to sleep in his hotel room for security. D.E.126-19(p.8).

[7] The next day, Podrizki met Diveroli and Trebicka at the hotel where Diveroli was staying. D.E.125(¶23). Podrizki learned from Trebicka and Diveroli that the unidentified man at the meeting was

Berisha, the son of Albania's Prime Minister. *Id.* Diveroli eventually struck a deal to purchase MEICO's ammunition at a discount and he left Albania. *Id.*(¶24). The new deal cut Trebicka out of the repackaging job and awarded the contract to Delijorgji instead. *Id.*

Angered at being squeezed out and seeking to recover money he was owed, Trebicka tried to blow the whistle on the kickbacks he believed AEY was indirectly paying Albanian officials. *Id.*(¶25). In an effort to back up his corruption claims, Trebicka recorded a telephone call with Diveroli. *Id.*(¶26). In that call, Diveroli told Trebicka to bribe Pinari with $20,000, but lamented that he could not help Trebicka with the repackaging deal because the corruption "went up higher, to the prime minister, and his son (i.e. Berisha)," adding "this Mafia is too strong for me." *Id.*(¶27);D.E.126-1(p.160). Trebicka also contacted reporters from the *Times* (as well as Albanian news outlets), who obtained a copy of the recorded phone call. D.E.125(¶¶25-26,35).

Meanwhile, federal agents were investigating AEY for violating the embargo against shipping Chinese ammunition and, on August 23, 2007, they raided AEY's offices. *Id.*(¶28). By that time, Packouz had fallen out with Diveroli and left AEY, but he found out about the raid and alerted Podrizki (who was still in [8] Albania). D.E.131(¶14). Podrizki called AEY's office in Miami, but an AEY employee lied to him in an effort to conceal the raid. D.E.125(¶28). Fearing that he was being set up by Diveroli, Podrizki left Albania by boat and, on his journey to Italy, dropped his AEY laptop

into the Adriatic Sea (although he had previously saved his correspondence to hand over to investigators). *Id.* Packouz and Podrizki cooperated fully with investigators in the hope of avoiding an indictment. D.E.125(¶29).

B. The Press Reports that Berisha Was Involved AEY Corruption

In March 2008, while the criminal investigation into AEY was ongoing, the *Times* published a lengthy front-page article, which reported that AEY illegally trafficked Chinese ammunition and paid kickbacks to Albanian officials, including Pinari and then-Minister of Defense Fatmir Mediu (the "*Times* Article"). D.E.126-2. In the context of describing "corruption in [AEY's] dealings in Albania," the *Times* Article quoted Diveroli's recorded statement to Trebicka that the graft "went up higher to the prime minister and his son" and that Berisha was part of "this mafia." *Id.*(p.11). Berisha never obtained a correction of the *Times* Article, which remains available to this day, and never filed suit to challenge its reporting. D.E.125(139-40).

The *Times* Article also reported on a tragic explosion that destroyed the Albanian village of Gerdec days earlier. D.E.126-2(p.8). On March 15, 2008, [9] workers employed by Delijorgji – the same man who had taken over the AEY repackaging job – were dismantling stockpiles of artillery shells owned by MEICO – the company that sold AEY Chinese ammunition – when

the ammunition exploded, killing 26 people and injuring hundreds. D.E.125(¶30). The Gerdec explosion was a major scandal in Albania; Pinari and Delijorgji were jailed for their involvement, while Defense Minister Mediu avoided prison by hiding behind parliamentary immunity. D.E.125(¶¶31-32).

Despite compelling evidence that Berisha was involved in MEICO arms dealing – including records of phone calls he made to Delijorgji and Mediu immediately after the blast – Berisha was never charged in connection with AEY or Gerdec. D.E.125(¶32);D.E.126-8. Berisha admits that he was acquainted with Delijorgji and close with Mediu; he also admits making the telephone calls on the day of the explosion, but denies involvement. D.E.133-3(pp.9-10);D.E.151(¶¶20-23). Many Albanians have asserted that Berisha's role in the Gerdec explosion and the corrupt AEY deal was covered up by his father, who was the Albanian Prime Minister at that time. D.E.125(¶33).

Back in the United States, the *Times* Article created a backlash against AEY. Prosecutors charged Diveroli, Packouz and Podrizki with multiple charges of fraud. D.E.125(¶42). All three pled guilty to defrauding the U.S. Government. [10] *Id.*(¶43). Packouz and Podrizki were given house arrest, while Diveroli was sentenced to four years in prison. *Id.*(¶44).

C. The Book and Berisha's Complaint

The Book was published in June 2015 after nearly five years of painstaking work by its author, Guy

Lawson, a highly-experienced, award-winning investigative journalist. *Id.* (¶¶45,71).

The Book started out as a March 2011 feature article about AEY that Lawson wrote for *Rolling Stone*, entitled *Arms & The Dudes: How Two Stoner Kids from Miami Beach Became Big Time Arms Dealers* (the "RS Article"). *Id.*(¶¶45-48);D.E.126-4. Like the *Times* Article that preceded it, the RS Article reported that AEY's deal to purchase ammunition from MEICO was structured to pay kickbacks to Albanian officials and quoted Diveroli's statement that this corruption went "all the way to the prime minister and his son." D.E.125(¶49);D.E.126-4(pp.11-12). The RS Article also reported that the ammunition "repackaging job" was transferred to "a friend of the prime minister's son, Mihail Delijorgji." D.E.125(¶50);D.E.126-4(pp.11).

The RS Article was a huge success. Warner Bros. acquired the movie rights and turned it into the major motion picture *War Dogs*, starring Jonah Hill and [11] Bradley Cooper. D.E.126(¶20).[2] Berisha became aware of the RS Article around the time it was published – including the statements implicating him in corrupt arms dealing and "mafia" activity – but he never disputed the accuracy of Lawson's reporting or requested a correction. D.E.125(¶52). The RS Article was never corrected or retracted and it remains available to this day. *Id.*(¶¶52-53). On June 28, 2011, Lawson entered

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[2] A paperback version of the Book was published in July 2016 to tie in with the release of the Book's movie adaptation. D.E.125(¶71).

into a publishing agreement with S&S to expand the RS Article into a book (the "Publishing Agreement"). *Id.*(¶57). Recorded Books purchased an exclusive license to record the audio version of the Book. *Id.*(¶61).

Lawson spent four years researching his Book, during which time he reviewed tens of thousands of pages of documentary evidence and interviewed scores of people. *Id.*(¶62). Lawson also entered into life-rights agreements with Packouz and Podrizki – which are common in the book publishing world – under which Lawson paid for exclusive access to documents, interviews and the benefit of their firsthand experiences working for AEY. *Id.*(¶¶63-64). When the Book was published, Defendants all believed it to be true and accurate. *Id.*(¶¶72-73).

On June 8, 2017 – almost two years after the Book was published and mere days before the longest possible statute of limitations expired – Berisha filed this [12] libel action against Defendants. D.E.1.[3] The Complaint alleges that Berisha was defamed by the handful of statements about him in the Book, which amount to approximately two paragraphs out of 244 pages. D.E.1(¶¶87,99-105). Specifically, the Complaint identifies four statements that refer to Berisha:

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[3] Berisha also sued Diveroli and his production company, but voluntarily withdrew his claims against them on June 9, 2018. *See* D.E.70.

i. On page 150, the Book reports that "Diveroli had agreed to cut Trebicka out of the repacking job, which was now being done by a company called Alb-Demil, an entity seemingly controlled by the prime minister's son and Mihail Delijorgji;"

ii. In the Photograph section of the Book, a photo of Plaintiff appears with the caption: "Also involved, the dudes discovered, was the prime minister's son, Shkelzen Berisha;"

iii. On page 160, the Book quotes the recorded conversation between Diveroli and Trebicka that was featured in the *Times* Article, in which Diveroli said, "The more it went up higher, to the prime minister, to his son—this Mafia is too strong for me . . . I can't fight this Mafia. It got too big. The animals got too out of control;" and

iv. On pages 139-40, the Book describes the 2007 Tirana Meeting between Podrizki, Packouz, Pinari, Delijorgji, and "a young man around their age sitting in the corner . . . He wasn't introduced. This was Shkelzen Berisha, the son of the prime minister of Albania, they would later be told by Pinari. Shkelzen was part of what was known in Albania as 'the family,' the tight-knit and extremely dangerous group that surrounded and lived at the beneficence of the prime minister, Sali Berisha. . . . Delijorgji said that if Diveroli wanted a discount he would have to change the arrangements for the repacking [13] operation

> at the airport . . . The son of the prime minister remained silent."

Id. (the "Statements").[4]

D. Evidence Substantiating the Statements about Berisha's Involvement in Corrupt Arms Dealing and Mafia Activity

At the time the Book was published, Defendants were all familiar with the reporting in the *Times* and RS Articles that AEY's corruption "went all the way up to" Berisha and that he was part of a dangerous "mafia." D.E.125(¶¶81-82).[5]

Lawson's research provided additional corroboration for the Statements through additional news reporting, books, leaked diplomatic cables and interviews with sources. *Id.*(¶¶80-113). For instance, Lawson read a second *Times* article, published several months after the *Times* Article broke the AEY story in 2008, which reported that Trebicka had died in a suspicious car accident. *Id.*(¶83);D.E.126-6. An official

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[4] The Complaint also challenged two references in the Book to "Albanian mobsters" and "an Albanian Mafioso," but those statements refer to Delijorgji, not Berisha. *Id.*(¶¶101-02). Apart from the Book, the Complaint identified two statements Lawson made to the media, although one refers to the "prime minister of Albania" (not Berisha) and the other merely recaps the gist of what was said in the Book *(i.e.*, that Berisha was involved in the corrupt AEY arms deal). *Id.*(¶¶107-08).

[5] Recorded Books was not aware of the *Times* Article, but its Chief Content Officer had read the RS Article before licensing the rights to produce the audio version of the Book. *Id.*

investigation concluded that Trebicka died in an accident. D.E.126-6(p.1). But the article laid out evidence to support local [14] suspicions that the Berisha family staged the crash to prevent Trebicka from testifying about Berisha's involvement in corrupt arms dealing, including local reports "that a former bodyguard of [Berisha's father] played a major role in the investigation." *Id.*(p.3). For a second time, the *Times* quoted Diveroli's statement "that the corruption went all the way up to the Albanian prime minister . . . and his son." *Id.* Again, Berisha did not challenge or take action against the *Times*. D.E.125(¶85).

Lawson also watched – and took detailed notes on – an October 6, 2010 Al Jazeera documentary by the prominent investigative journalist Ilva Tare, which focused on Berisha's role in corrupt arms dealing (the "Tare Documentary"). D.E.125(¶¶88,90);D.E.126-8;D.E.126-9. Berisha admitted that the Tare Documentary was "damning" and "damaging." D.E.125(¶90);D.E.126-68(Tr.90:16-91:21). In a detailed and well-documented presentation, the Tare Documentary reports that Berisha was at the center of both the Gerdec and AEY scandals. D.E.125(¶89);D.E.126-8. The incriminating evidence tying Berisha to arms dealing included a draft bill to enable weapons decommissioning at Gerdec that was faxed to Berisha's attention at the Ministry of Defense, calendar entries showing that Berisha had visited Defense Minister Mediu on a near daily basis while the legislation was being drafted, records of Berisha's 56 phone calls with Delijorgji in the months leading up to the blast (including a call 35 minutes

after [15] the event), interviews with survivors who "criticized [prosecutors] for not questioning the Prime Minister's son, Shkelzen Berisha," and most compelling, footage from heated debates in the Albanian Parliament denouncing Berisha's involvement. *Id.*

But the *Times* articles and the Tare Documentary were not the only evidence relied on by Lawson. He also reviewed a February 5, 2009 profile of Diveroli in the *Broward Beach Palm Times*, which reported that "Trebicka had recorded a tape . . . in which Diveroli said corruption in that country 'went up . . . to the prime minister and his son'" and that the cause of the Gerdec disaster "may be hard to prove" because of Trebicka's death. D.E.125(¶86);D.E.126-7(pp.1-2). Lawson also relied on an October 29, 2012 *New Republic* profile of Mitt Romney's then-campaign advisor, who had worked for Berisha's father. D.E.125(¶¶96-97);D.E.126-17(p.6). As an example of the father's corruption, the article relied on the "secretly recorded phone call" in which "an American arms dealer complained that his scheme to sell illegal ammo . . . had become entangled in an Albanian 'mafia' involving Berisha and his son." *Id.*

And Lawson also reviewed two books that reported that Berisha was involved in corrupt arms dealing and had attended the Tirana Meeting. First, Lawson read a 2009 book about Gerdec by Albanian author Ardian Klosi, which reported that "all those involved in the affair of the bullets for Afghanistan were in [16] a fever" because "[a]mong other people, the prime minister's son was mentioned as

present at a meeting with Pinari and Delijorgji." D.E.125(¶100);D.E.126-11(pp.85-86). The American journalist Andrew Feinstein also wrote that "the son of Sali Berisha, the Prime Minister, was alleged to have been involved in at least one meeting with Delijorgji and Pinari leading to speculation that he too was in on the deal." D.E.125(¶100);D.E.126-16(p.347).

Perhaps most revealing were leaked diplomatic cables from the former U.S. Ambassador to Albania, John Withers, which Lawson relied on. D.E.125¶¶92-94. One of these remarkable dispatches reports that during the fall-out of the Gerdec investigation, the former head of the Albanian Army had come to the U.S. Embassy in fear for his life after Berisha had personally pressured him to deliver heavy munitions to the disaster-site. D.E.126-13(pp.1-2). Another cable discussed a media and "political circus" surrounding revelations of Berisha's involvement in the Gerdec scandal, including a "seized note[] from [Ministry of Defense] secretaries reveal[ing] that . . . Shkelzen allegedly urged Mediu to increase the tempo of the provision of munitions to Gerdec." D.E.126-15(pp.1-4).

Just as he failed to sue over the *Times* or RS Articles, Berisha never sued any of the entities or individuals that accused him of engaging in corrupt arms dealing, mafia activity and high-level cover-ups, even though these claims were repeated over the course of a decade by several of the world's most prominent [17] news organizations. D.E.125(¶¶91,95). None of this reporting was ever corrected or retracted and it remains available to this date. D.E.125(¶¶39,52,91,95,98).

In addition to the prior reporting listed above, Lawson also relied on interviews he carried out with knowledgeable sources. Podrizki provided Lawson with his eyewitness account of the Tirana Meeting through interviews, emails and written statements. D.E.125(¶101);D.E.126(160-66). In the course of their correspondence, Lawson asked Podrizki to review a photograph of Berisha and confirm he was the unidentified young man in the meeting, which he did. *Id.* Podrizki also reviewed drafts of the Book to ensure accuracy. D.E.126(¶¶67-69).

Lawson interviewed Erion Veliaj, the future mayor of Tirana, who stated that Berisha's family was referred to as "the family" and – judging from "the family's" prominent role in Albanian corruption – that he was unsurprised to learn that Berisha had been accused of attending the Tirana Meeting. D.E.125(¶103);D.E.126(170-72).

A former worker at the Gerdec decommissioning site, Andi Belliu, told Lawson that he considered Berisha the "shadow" responsible for the Gerdec disaster and wrote Lawson an email stating that MEICO was "an albanian [sic] style mafia company" that was "backed up by Shkelzen Berisha." D.E.125(¶104); D.E.126-31(p.2);D.E.126-32(p.2).

[18] Lawson also communicated with Kosta Trebicka's daughter, Genta, who remembered her father telling her that he was removed from the AEY packaging deal because "Berisha's son . . . wanted it for himself." D.E.125(¶107);D.E.126-35(p.3). Genta also

told Lawson that she believes Berisha may have caused her father's untimely death. D.E.125(¶106); D.E.126(¶75);D.E.125-34(p.2).

Finally, Lawson obtained additional details through interviews and email correspondence with *Times* journalist Nick Wood, who provided reporting for the *Times* Article from Albania, including information about conversations he had with Trebicka before his death. D.E.125(¶105).

In sum, Lawson relied on multiple news articles, a half hour documentary and two books – none of which Berisha ever challenged – as well as leaked diplomatic cables and multiple interviews, including one with an eyewitness who placed Berisha at the Tirana meeting. Given the wealth of evidence confirming Berisha's involvement in corrupt arms dealing and Lawson's firm belief that Berisha was intent on covering-up his involvement, Lawson did not seek comment from Berisha prior to the Book's publication. D.E.125(¶¶111-13).

PROCEDURAL HISTORY

A. Order Granting Defendants' Motion for Summary Judgment

On December 21, 2018, Judge Cooke granted Defendants' motion for summary judgment and dismissed Berisha's defamation claims in their entirety. [19] D.E.193 (the "SJ Order"). The lower court held that Berisha "is a limited public figure for the purposes

of the controversy at issue in this case" and "must demonstrate actual malice to prevail in his defamation claim." *Id.*(p.17). *See also* Section II, *infra.* Next, the Court reviewed the uncontroverted evidence substantiating the Statements and held that Berisha could not establish actual malice because he "failed to show that Defendants 'actually entertained serious doubts as to the veracity of the[ir] published account, or [were] highly aware that the account was probably false.' " SJ Order, 22 (quoting *Turner*, 879 F.3d at 1273). Because Berisha could not prove actual malice by clear and convincing evidence, the lower court dismissed his libel claims against all Defendants. *Id.*, 22.

B. Orders Denying Berisha's Motions for an Extension of the Discovery Deadline

On April 2, 2018, the parties filed a joint motion seeking a four-and-a-half month extension of the time for discovery and, in response, the Court extended the deadline by two months. *See* D.E.53;D.E.74;D.E.85; D.E.87. In the final weeks before Defendants' summary judgment motion was due, Plaintiff filed three unilateral motions requesting additional time to take discovery. D.E.102;D.E.112; D.E.123. The lower court declined to modify the case schedule, but permitted Berisha "to conduct discovery beyond the discovery deadline." D.E.104;D.E.117;D.E.135. ("Discovery Deadline Orders").

[20] By close of discovery, Defendants produced nearly 20,000 documents – including all the research

relied upon by Lawson for the Book and virtually all communications relevant to editorial process for the Book – and Berisha had deposed each Defendant together with every non-foreign witness he elected to depose.

C. Order Denying Berisha's Motion to Compel Privileged Documents

On July 13, 2018, Berisha moved to compel production of privileged communications that were exchanged during the pre-publication legal review for the Book. D.E.100. Apart from this limited category of documents, Berisha has not raised any issues with the sufficiency of Defendants' production. On August 3, 2018, Magistrate Judge Louis issued an order denying Berisha's motion to compel on the grounds that the communications at issue were protected by the attorney-client and common defense privileges. D.E.121 (the "Privilege Order"). Berisha filed objections to the Privilege Order on August 7, 2018, which Defendants opposed. D.E.145;D.E.168. Judge Cooke dismissed this action without addressing Berisha's objections to the Privilege Order. SJ Order, 22.

On January 17, 2019, Berisha filed a notice of appeal seeking to challenge the SJ Order, the Discovery Deadline Orders and Privilege Order. D.E.¶197.

[21] STANDARD OF REVIEW

The SJ Order is subject to *de novo* review. *See Tobinick v. Novella*, 848 F.3d 935, 943 (11th Cir. 2017), *cert. denied*, 138 S. Ct. 449 (2017). For the reasons set forth more fully below, abuse of discretion is the correct standard of review for the Privilege Order and Discovery Deadline Orders. *See* Sections III, IV, *infra*.

SUMMARY OF ARGUMENT

The SJ Order should be affirmed because Defendants' "good faith reliance on previously published reports in reputable sources" – all of which reported on Berisha's involvement in corrupt arms deals and mafia activity – "precludes a finding of actual malice as a matter of law." *Liberty Lobby, Inc. v. Dow Jones & Co.*, 838 F.2d 1287, 1297 (D.C. Cir. 1988). Largely ignoring this undisputed and dispositive evidence, Berisha makes a number of scattershot arguments that all fail because he lacks *any* evidence of actual malice – let alone the clear and convincing evidence required.

The SJ Order's holding that Berisha is a public figure should be affirmed because the evidence establishes that he is a household name in Albania (with 100% name recognition), had ready access to the media, enjoys prominence as the son of the former Albanian Prime Minister and "played a central role in [two arms-dealing] controvers[ies]." *Turner v. Wells*, 879 F.3d 1254, 1273 (11th Cir. 2018).

[22] The Privilege Order should also be affirmed. Berisha had full and fair discovery of Defendants' editorial process and overreaches by demanding communications exchanged between Lawson and counsel for S&S in the course of the pre-publication legal review for the Book. As Magistrate Judge Louis correctly held in her well-reasoned decision, these communications are protected by attorney-client privilege because they were essential to the "rendition of legal services" S&S engaged its lawyer to provide. *Tyne v. Time Warner Entm't Co. LP*, 212 F.R.D. 596, 599-600 (M.D. Fla. 2002). The common interest privilege provides another legitimate ground for withholding these communications, as the lower court correctly recognized.

Finally, the Discovery Deadline Orders should also be affirmed because it was well within the lower court's discretion to deny Berisha more time to take foreign depositions, especially since Berisha's inability to obtain this evidence was his own fault.

ARGUMENT

Because the First Amendment guarantees our "profound national commitment to the principle that debate on public issues should be uninhibited, robust and wide-open," *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964), public figures like Berisha "must prove that the defendant acted with actual malice [23] to establish liability." *Silvester v. American Broad. Cos.*, 839 F.2d 1491, 1493 (11th Cir. 1988).

The constitutional standard imposed on Berisha is "daunting." *McFarland v. Esquire Magazine*, 74 F.3d 1296, 1308 (D.C. Cir. 1996)). A public figure libel plaintiff "must show that [a defendant] acted with knowledge that [the defamatory statement] was false," *Silvester*, 839 F.2d at 1498 (internal quotation marks omitted), or that a defendant published a defamatory statement despite a "high degree of awareness" of its "probable falsity." *Garrison v. Louisiana*, 379 U.S. 64, 74-75 (1964). Actual malice requires a *strictly subjective* test, which asks whether the publisher actually believed that the statement in suit was false or very likely to be false at the time of publication, but published it anyway. *Silvester*, 839 F.2d at 1498 (citing *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968)); *see also Bose Corp. v. Consumer Union of U.S., Inc.*, 466 U.S. 485, 512 (1984).

While courts sometimes use the phrase "reckless disregard" as a shorthand for the high degree of awareness of probable falsity required to establish actual malice, "recklessness" in this context "is not measured by whether a reasonably prudent man would have published, or would have investigated before publishing." *St. Amant*, 390 U.S. at 731. In other words, reckless conduct – or even an "extreme departure from professional standards" – does not rise to the level of actual malice. *Harte-Hanks Commc'ns, Inc. v. Connaughton*, 491 U.S. 657, 665 [24] (1989). Instead, "[t]here must be sufficient evidence to permit the conclusion that defendant *in fact* entertained serious doubts as to the

truth of his publication." *St. Amant*, 390 U.S. at 731 (emphasis added).

The actual malice requirement is also daunting because the First Amendment requires "clear and convincing evidence" that the publisher actually knew the statement at issue was false or likely to be false. *Levan v. Capital Cities/ABC, Inc.*, 190 F.3d 1230, 1239 (11th Cir. 1999) (citing *Gertz v. Robert Welch*, 418 U.S. 323, 342 (1974)); *see also Klayman v. City Pages*, 650 F. App'x 744, 752 (11th Cir. 2016). This standard of proof imposes "a heavy burden [on plaintiffs] far in excess of the preponderance sufficient for most civil litigation." *Eastwood v. National Enquirer, Inc.*, 123 F.3d 1249, 1252 (9th Cir. 1997) (citation omitted).

Last, actual malice is a constitutional requirement that stands separate and apart from the requirement that a plaintiff must establish the falsity of the challenged statements. Simply put, "[t]he mere existence of a false statement does not, on its own, demonstrate . . . knowledge of its falsity." *Tobinick*, 848 F.3d at 946. In other words, even a demonstrably false statement about a public figure is not actionable so long as the publisher believed it to be true at the time of publication.

[25] **I. DEFENDANTS' RELIANCE ON PRIOR NEWS REPORTS FROM REPUTABLE SOURCES PRECLUDES A FINDING OF ACTUAL MALICE**

The actual malice analysis begins and ends with the undisputed evidence that Defendants relied upon

reports of Berisha's involvement in corrupt arms dealing at the time when the Statements – repeating virtually identical charges – were published. In short, Berisha is precluded from establishing actual malice by a decades-old precept of defamation law: "[t]he subjective awareness of probable falsity required [to prove actual malice] cannot be found where, as here, the publisher's allegations are supported by a multitude of prior reports upon which the publisher reasonably relied." *Rosanova*, 580 F.2d at 862 (internal citation omitted).

A. The Defamatory Gist of the Statements Is that Berisha Was Involved in Corrupt Arms Dealing and Was Associated with a Dangerous Mafia

As this Court has recognized, the "first job" in the actual malice analysis "is to determine the gist or sting" of the Statements at issue. *Levan*, 190 F.3d at 1240. In other words, courts "determine what the report, taken as a whole, is actually alleging about [Berisha], and then determine if [Defendants published] that meaning with actual malice." *Id.* at 1240 n.28. "The gist of any statement within a publication or broadcast is found only by reference to the entire context" and, "[i]f [26] the gist is substantially true, then minor inaccuracies are insufficient to prove actual malice." *Id.* at 1240.

Berisha attempts to avoid this common-sense approach by arguing that the 'gist' or 'sting' analysis" is

part of the substantial truth defense and has "nothing whatsoever to do with" actual malice (Br. 36), but this claim is flatly rejected by the *Levan* decision that he cites. As that Court explained, "[i]n using the term 'gist' we do not mean to confuse the issues at hand." *Levan*, 190 F.3d at 1240 n.28. While "'[g]ist' is a term typically associated with the common law defense of substantial truth," it is used in this context as a "shorthand for [the] concept" that courts should "ask what is the 'effect on the mind of the reader' of a given statement before deciding whether the statement was published with reckless disregard for the truth. *Id.*

Berisha also argues that the "district court's 'gist' or 'sting' analysis makes no sense given its professed assumption 'that the challenged statements are false'" (Br. 36), but the *Levan* decision expressly rejects this contention as well: it is the court's "job" to determine the gist of a publication because "ascertaining the gist does not depend on resolving credibility issues, which are better left to the factfinder." *Levan*, 190 F.3d at 1240 n.29.

As the district court correctly recognized, the gist of the Book's reporting is that Berisha "had been involved in corrupt dealings surrounding Albania's vast, [27] largely defunct, but still dangerous Cold War arsenals." SJ Order, 22. Berisha does not dispute this conclusion. Nor could he, since the Complaint interpret the Statements to mean that Berisha "receiv[ed] illegal kickbacks in connection with illicit arms dealing[]" and was "part of an extremely dangerous group" or "mafia." D.E.1(¶99). Moreover, Berisha conceded that

the Book's description of the Tirana Meeting is defamatory because "it implicates [Berisha] in the AEY deal, possible corruption and it associates [Berisha] with a dangerous mafia." D.E.131-1(Tr.16:16-18:16). Berisha further testified that the *Times* Article's quotation of Diveroli (used in the Book) defamed him because it "implicated [him] in the AEY deal which may have involved illegal influence" and stated that he was "connected to a mafia." *Id.*(Tr.19:15-23:3).

Because Berisha has conceded that the gist of the Statements is that he was involved in corrupt arms dealing and mafia activity, the burden is on him to come forward with clear and convincing evidence that Defendants knew that Berisha was falsely accused or "entertained serious doubts [about the] thrust" of the Book's reporting on Berisha's corruption and mafia ties. *Levan*, 190 F.3d at 1241.

B. There Can Be No Actual Malice Because Defendants Were All Aware of Reliable Prior Reports that Berisha Was Involved in Corrupt Arms Dealing and Mafia Activity

The lower court correctly held that the Statements were not published with actual malice because "by the time Lawson's book came out in 2015, these [28] allegations were already 'old news' and Defendants "were entitled to rely on the 'multitude of previous reports' implicating [Berisha] in arms-related scandals." SJ Order, 20 (quoting *Rosanova*, 580 F.2d at 862).

Time and again, this Court has affirmed the basic principle underlying the SJ Order, which is that "good faith reliance on previously published reports in reputable sources . . . precludes a finding of actual malice as a matter of law." *Liberty Lobby*, 838 F.2d at 1297. Just last year, this Court held that a publisher's reliance on "trustworthy sources[ ] demonstrates his lack of subjective belief that the [allegedly defamatory] articles [in suit] contained false statements." *Tobinick*, 848 F.3d at 947 (holding that the author of an article about "quack clinics" and "health fraud" did not publish with actual malice because he had "consulted [a] Los Angeles Times article" about disciplinary action taken against the plaintiff-doctor for "unprofessional conduct"). Similarly, this Court found no actual malice when journalists relied on "other news media who were investigating" the same subject as the allegedly defamatory broadcast in suit and "came up with much of the same allegations and support." *Silvester*, 839 F.2d at 1498. This Court (in its former incarnation as the Fifth Circuit) also held that a publisher could not be held liable for referring to a libel plaintiff as a "mobster" because the "[t]here is no dispute that [the plaintiff] has been the subject of published newspaper and other media reports of his [alleged mafia] activities." *Rosanova*, 580 F.2d at 862. *See* [29] *also Salazar v. Telemundo Network Grp., LLC*, No. 03-15272 CA 23, 2006 WL 1650723, at *3 (Fla. Cir. Ct. May 30, 2006) (no actual malice when journalists relied on foreign coverage of

the plaintiff because "[t]he Peruvian media is a reliable source of the information that was broadcast").[6]

Faced with this mountain of precedent, Berisha claims that "a prior report is just another source" and there is no "authority holding that the actual malice analysis ends simply because other media outlets have reported something similar." Br. at 36. But the established law is to the contrary. Reliance on even a single, credible report (much less than the multitude of prior reports relied on here) is sufficient to prove the absence of actual malice. *See*, *e.g.*, *Fodor v. Berglas*, No. 95 Civ. 1153 (SAS), 1995 WL 505522, at *6 (S.D.N.Y. Aug. 24, 1995) (no actual malice where book author relied on single New Yorker article); *Associated Fin.* [30] *Corp. v. Fin. Servs. Info. Co.*, No. CV-88-6636 SVW (Sx), 1989 U.S. Dist. LEXIS 16263, at *20-23 (C.D. Cal. July 27, 1989) (no actual malice where publisher relied on a single, twelve-year-old article in Forbes).

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[6] The list of decisions dismissing libel claims because the defendant relied on earlier news reporting goes on and on. *See*, *e.g.*, *Friedgood v. Peters Publ'g Co.*, 521 So. 2d 236, 242 (Fla. Dist. Ct. App. 1988) (holding that there was no actual malice when the allegedly defamatory statements "were hardly more than a restatement of the news reports" previously published about plaintiff); *Meisler v. Gannett Co*, 12 F.3d 1026, 1030 (11th Cir. 1994) (no actual malice where reporter relied in good faith on factually incorrect Associated Press wire item); *Secord v. Cockburn*, 747 F. Supp. 779, 792 (D.D.C. 1990) (dismissing defamation claim because the reporter relied on news articles from the *Times, Miami Herald* and the *Christian Science Monitor*); *Liberty Lobby*, 838 F.2d at 1296-97 (no actual malice where author relied on an article in *The National Review*, a newsletter, and a handful of other publications).

Here, it is undisputed that *all* Defendants (save Recorded Books) read the *Times* Article and *all* Defendants read the RS Article. D.E.125(¶¶81-82). Accordingly, there can be no dispute that Defendants relied on news articles reporting that the corruption in the AEY deal went "higher to the prime minister and his son," that the AEY "repackaging job" was given to "a friend of the prime minister's son" and that Berisha was part of "this *mafia." Id.* As the district court correctly held, Berisha cannot possibly establish actual malice because Defendants were "entitled to rely on 'previously published reports' from . . . 'reputable sources.'" SJ Order, 19 (quoting *Liberty Lobby, Inc. v. Dow Jones & Co.*, 838 F.2d at 1297).

The actual malice analysis ends there, but Berisha persists in making irrelevant arguments. First, he argues that Defendants should not have relied on the *Times* or RS Articles because their reporting on Berisha's involvement in corrupt arms dealing "merely recounted the recorded statement of Diveroli." Br. 36. But these Articles did not "merely recount" Diveroli's statements; they credited and published them as evidence of Berisha's role in the "corruption in [AEY's] purchase of more than 100 million ageing rounds in Albania." D.E.126-[31]2(p.1). As the lower court put it, the *Times* Article "that first broke the AEY story presented Diveroli's 'secretly recorded' comments as news fit to print." (SJ Order, 19) and, as precedent amply demonstrates, Defendants were entitled to rely on articles publishing Diveroli's accusations against Berisha as news. Moreover, *Rolling Stone*, the *New Republic* and the *Broward*

Beach New Times all quoted Diveroli's recorded statements as evidence of Berisha's involvement in corrupt arms dealing, without any challenge from Berisha, and this strongly supports the veracity of the pre-existing reporting. D.E.125(¶¶49,86,96).

Next, Berisha asserts that "Lawson had obvious reason to doubt – based upon his own research and interviews in the intervening years – the veracity of the prior reporting, which he knew was based on the word of Diveroli." Br. 36. But there is no evidence to back up Berisha's claims that Diveroli provided "the sole 'evidence' Lawson had linking Berisha to AEY's scheme" (Br. 20) or that "Lawson had obvious reasons . . . to doubt the veracity of Diveroli's recorded statement." Br. 40. To the contrary, the evidence establishes that Lawson's research went far beyond Diveroli's recorded statements and confirmed (rather than challenged) his belief that Berisha engaged in corrupt arms dealing.

For instance, Lawson relied on the *Times'* reporting that Trebicka may have been killed to prevent him from incriminating Berisha. D.E.126(136-40). He also read two books, which reported that Berisha attended the Tirana Meeting with [32] Pinari and Delijorgji (a detail not divulged in Diveroli's recorded call). *Id.*(¶¶46-47,55). Most significantly, Lawson relied on the Tare Documentary, which painted an admittedly "damning" portrait of Berisha based on a wide range of evidence connecting Berisha to the AEY and Gerdec scandals, including government documents tying Berisha to the arms deal that precipitated the Gerdec explosion, phone records showing that Berisha made

multiple calls to Delijorgji on the day of the explosion and interviews with Albanians expressing their indignation over the apparent cover up of Berisha's corruption, all of which was the subject of widespread reporting in Albania and even sparked debates on the floor or the Albania parliament. *Id.*(¶¶43-45).

Lawson's good faith belief in the Tare Documentary – and other prior reports of Berisha's corrupt arms dealing – was cemented when Berisha failed to sue the publishers of any of these reports and did not obtain a single correction. D.E.126(¶59). This "left . . . no doubt as to the accuracy of the central allegation that Plaintiff inexplicably only now challenges in this action." *Id.* Thus, unlike the publishers in the inapposite cases cited by Berisha who "knew the news reports were wrong" (Br. 37 (quoting *Flowers v. Carville*, 310 F.3d 1118, 1129 (9th Cir. 2002))), there is no evidence that remotely suggests that Lawson doubted (or had any reason to doubt) the wealth of prior reporting on Berisha's involvement in corrupt arms dealing and mafia activity.

[33] Berisha's only rejoinder to the insurmountable body of reporting on his corruption is to argue "even if Berisha was involved in the Gerdec matter . . . that does not justify Lawson's allegations of corruption in the AEY scheme." Br. 41. As a threshold matter, this argument fails because it ignores all the evidence of Berisha's involvement in corrupt arms dealing outside of Gerdec. But more fundamentally, this argument defies common sense and basic journalistic principles. Facts and events do not "occur in a vacuum but as part

of a series of ongoing events." *See*, *e.g.*, *Dunn v. Air Line Pilots Ass'n*, 193 F.3d 1185, 1200 (11th Cir. 1999). *See also* D.E.126(129-30) ("[N]o fact or event exists in a vacuum . . . Based on the totality of the information I reviewed, the only reasonable conclusion to draw was that Plaintiff was involved in corrupt arms dealing."). Simply put, evidence showing that Berisha participated in one corrupt arms deal that led to Gerdec makes it more likely that he also participated in another corrupt arms deal, the AEY deal, especially since the two scandals involved the same major players (MEICO, Mediu, Delijogji, Pinari) and occurred around the same time.[7]

[34] Finally, there is no evidence to support the argument that Lawson discovered information that might have caused him to "doubt" the prior reporting. Br. 40. As the evidence shows, Lawson "conduct[ed] his own investigation" and independently "corroborated Diveroli's claim" that Berisha participated in corrupt arms dealing. SJ Decision, 19. For instance, Podrizki provided Lawson with an eyewitness account of the Tirana Meeting and positively identified Berisha from a photograph. D.E.126(¶¶65-66). Lawson also interviewed other witnesses who confirmed the corruption that had surrounded Berisha and his father's

[7] Unsurprisingly, the Tare Documentary drew the same obvious connection between AEY and Gerdec when it reported that "several senior Albanian officials, including Defense Minister Mediu and Pinari from the MEICO arms company were involved in the [AEY] scam, along with the Prime Minister's son Shkelzen Berisha, *the same people allegedly involved behind the scenes at Gerdec*." D.E.126(¶44.e) (emphasis added).

government, including Erion Veliaj, Andi Belliu, and Genta Trebicka. *Id.*(¶70-76). Lawson even obtained highly-incriminating cables written by the U.S. Ambassador to Albania, who wrote that the former head of the Albanian army came to the U.S. Embassy out of fear for his safety because Berisha had put him under "direct pressure" to continue delivering "high caliber ammunition to Gerdec and to do so without delay." *Id.*(¶¶48-54). All of the information Lawson obtained in the course of his independent research thus backed-up the Statements. Conversely, Berisha does not identify *any* evidence known to Lawson at the time the Book was published that could possibly cause him to doubt Berisha's involvement in corrupt arms dealing.

In sum, Defendants' reliance on previously published reports from reputable publications – and Lawson's additional research confirming these reports – [35] "precludes a finding of actual malice as a matter of law." *Liberty Lobby*, 838 F.2d at 1297.

C. The Book's Description of the Tirana Meeting Does Not Support a Finding of Actual Malice

Because Berisha cannot seriously dispute that reports of his corrupt arms dealing were widely published well before the Book, he fixates on Lawson's description of the Tirana Meeting and argues that Lawson should not have relied on Podrizki or Diveroli as sources for that scene. *See* Br. 13-17, 20-21, 45-49. This argument fails to recognize that the Book's

reporting on Berisha's appearance at the Tirana Meeting – which simply states that he sat "silent[ly]" throughout – does not add anything beyond the gist of the Statements (*i.e.*, that Berisha was involved in corrupt arms dealing). For the reasons set forth above, this gist was amply supported and published without actual malice. Moreover, even if details in the Book's account of the Tirana Meeting were false, this would still not amount to actual malice because, "[i]f the gist is substantially true, then minor inaccuracies are insufficient to prove actual malice." *Levan*, 190 F.3d at 1240.

Hoping to muddy the waters, Berisha argues that Lawson relied exclusively on Podrizki and Diveroli for the Book's description of "Berisha's attendance" at the Tirana Meeting and did so with actual malice because he had "obvious reasons to doubt the veracity of those sources." Br. at 14. There are a number of fatal flaws in this argument. First, Berisha ignores that Lawson also read two books [36] which both reported (independently of Diveroli or Podrizki) that Berisha attended at least one arms deal meeting with Pinari and Delijorgji, key players in the AEY scandal. D.E.125(¶100). But even if Lawson relied exclusively on Podrizki to provide "color" (*e.g.*, where the meeting took place, what people wore, who said what), Lawson never had any reason to "entertain[ ] serious doubts [about the] thrust" of Podrizki's account because it was perfectly consistent with the prior reports that Berisha was involved in corrupt arms deals and associated with "thugs" like Delijorgji. *Levan*, 190 F.3d at 1241.

See also Levesque v. Doocy, 560 F.3d 82, 91 (1st Cir. 2009) (finding no actual malice even though the allegedly defamatory statements were false because the "article presented them within larger, accurate comments that could be corroborated with" prior reporting).

Next, Berisha argues that Lawson had obvious reason to doubt his sources because there were supposed "red flags in Podrizki's accounts concerning the May 2007 meeting." Br. 29. But Berisha's *post hoc* critique of Lawson's journalistic techniques are not evidence of actual malice. For instance, Berisha criticizes Lawson for asking Podrizki to identify Berisha from "a link to an internet article about Berisha that (presumably) included a photo of him." Br. 30. But even if this process was "deliberately suggest[ive]," as Berisha suggests, the law is clear [37] thateven an "extreme departure from professional standards" does not rise to the level of actual malice. *Harte-Hanks*, 491 U.S. at 665.[8]

Similarly, Berisha faults Lawson for being "aware that Podrizki had failed to identify Berisha [during a law enforcement interview], but chose not to ask Podrizki about it." Br. 46. Even if this could be considered a "failure to investigate" as Berisha seems to believe, "[f]ailure to investigate does not in itself establish"

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[8] There is no evidence that Lawson actually doubted Podrizki's identification. Indeed, Lawson's belief in Podrizki was bolstered when Lawson asked him to identify another man – who had ties to Berisha and organized crime – as attending the meeting and Podrizki truthfully replied that he did not know who it was; if Podrizki was telling Lawson what he wanted to here, he would have feigned recognition. D.E.126(¶66);D.E.126-25(p.1-2).

actual malice. *St. Amant*, 390 U.S. at 732-33. Berisha also asserts that it was unreasonable for Lawson to rely on Podrizki in light of purported inconsistencies in details unrelated to the Statements. Br. 31-32. But Berisha's second-guessing is not evidence of actual malice and does not diminish the evidence that Lawson subjectively believed Podrizki to be an "extremely reliable source[]" (not least because the information he provided consistently matched up with the other evidence available). D.E.126(¶24).

Finally, Berisha fixates on a single word in a single clause – "they would later be told by *Pinari*" – and speculates that this was a "purposeful[] misrepresent[ation]" because "Podrizki never told Lawson that he (or Diveroli) [38] learned [about Plaintiff's attendance at the Tirana Meeting] from Pinari." Br. at 21-22. Contrary to Berisha's fevered speculation, the words "they would later be told by Pinari" are not evidence that Lawson "manufactured the provenance of his information . . . to hide the unreliability of his actual sourcing." Br. 21. As Lawson explained, he concluded (after discussions with Podrizki) that Pinari must have been the ultimate source of the information because Trebicka was not at the Tirana Meeting and Diveroli would not recognize Berisha, since he had no reason to know who Berisha was before he was pointed out. D.E.126(¶68). But even if Lawson was incorrect and Pinari was *not* the ultimate source of this information, this error no way changes the defamatory import of the Book's description of the meeting and – because the gist of that description is amply supported by prior

reports – Berisha cannot use the Tirana meeting to create actual malice where none exists. *Tobinick*, 848 F.3d at 946.

In sum, actual malice is an exacting standard, which Berisha cannot begin to meet because the gist of the Statements – including the description of the Tirana Meeting – was perfectly consistent with prior reports (which Berisha failed to challenge) and was corroborated by Lawson's own research.

D. Berisha's Remaining Actual Malice Arguments Are Not Supported by Evidence and Have No Merit

Since actual malice is precluded as a matter of law, this Court need not go any further to affirm dismissal. But in a transparent effort to create the impression [39] of complexity where none exists, Berisha throws up a bevy of random actual malice arguments. These arguments – which virtually all assert that Lawson's reporting was not "adequate" or "reasonable" – fail because the actual malice inquiry has nothing to do with objective reasonableness. *See Meisler*, 12 F.3d at 1030 ("Negligence is not the appropriate standard for proving actual malice."). Applying the correct test, there is no evidence to show Defendants harbored subjective doubts about the Statements.

i. There Is No Evidence that Lawson Acted with Actual Malice

Berisha's various arguments attacking the sufficiency of Lawson's investigative reporting and the conclusions he reached should be given short shrift.

First, Berisha asserts that Lawson acted with actual malice by failing "to even attempt to contact multiple individuals with personal knowledge" about Berisha's involvement in corrupt arms dealing, including Berisha. Br. 33-34. But if the actual malice "caselaw is clear on any point it is that an author is under no duty to divulge the contents of a book prior to publication in order to provide the subject an opportunity to reply." *Secord*, 747 F. Supp. at 788. *See also D.A.R.E. Am. v. Rolling Stone Magazine*, 101 F. Supp. 2d 1270, 1284 n.3 (C.D. Cal. 2000) ("Plaintiffs' suggestion that Defendants' failure to contact [plaintiff] before publishing [the] article evidences actual malice is . . . legally misguided. [40] Defendants were not required to contact the subjects of the article before publication."), *aff'd*, 270 F.3d 793 (9th Cir. 2001).

Here, the evidence shows that Lawson was well aware that the *Times* had reached out to Prime Minister Berisha and his Defense Minister Mediu – but apparently not Plaintiff – for comment before the *Times* Article ran and received only threats in response. D.E.125(¶112). Not only would it have been futile to seek comment, it was also unnecessary; given the staggering amount of readily available sourcing demonstrating that Plaintiff was involved in corrupt arms

dealing, Lawson "was not required to continue [his] investigation until [he] found *somebody* who would stand up for [Plaintiff]." *Levan*, 190 F.3d at 1243 (rejecting argument that failure to speak with source favorable to plaintiff constituted actual malice).[9]

Second, Berisha repeats *ad nauseam* the argument that Lawson should not have relied on Podrizki, Packouz or Diveroli because he knew they were convicted felons and "fraudsters." *See*, *e.g.*, Br. at 15, 16, 44. But it would have been [41] impossible to write the Book without the "dudes," since the entire Book was about their criminal enterprise. In any event, the law is settled that "[t]he use of convicted felons" as sources "cannot alone constitute a fact of actual malice." *Secord*, 747 F. Supp. at 794. *See also Cobb v. Time, Inc.*, 278 F.3d 629, 638 (6th Cir. 2002) (no actual malice where journalist relied on "paid" source who was a drug user with "criminal background"). Moreover, as the district court properly recognized, when a publisher "inform[s] its audience that its primary source [is] 'not an unimpeachable source of information,' it serve[s] to undermine claims showing that the report was issued with actual malice." *Michel v. NYP*

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[9] There is also no evidence that Lawson was aware of any statement issued by Berisha denying involvement in AEY arms dealing or other corruption. D.E.125(¶22). But even assuming *arguendo* that Lawson was aware of such a denial, "[a] reporter is not 'required to accept denials of wrongdoing as conclusive' and a decision not to include "detailed refutations" does not establish actual malice. *Silvester v. American Broad. Co.*, 650 F. Supp. 766, 780 (S.D. Fla. 1986) (citation omitted), *aff'd*, 839 F.2d 1491, 1493 (11th Cir. 1988).

Holdings, Inc., 816 F.3d 686, 703 (11th Cir. 2016). Here, it cannot be seriously disputed that Lawson presented the "dudes" for what they were, since the Book clearly identifies instances in which they lied or shaded the truth, labels Diveroli "a liar . . . [who] misled directly, indirectly, compulsively" and ends with Packouz, Podrizki and Diveroli being convicted of fraud. D.E.126-1(pp.38,109,138,142,236). *See Turner*, 879 F.3d at 1274 (holding that the inclusion of "information cut[ting] against [] Defendants' general conclusions" makes "any allegation of actual malice less plausible.").[10]

[42] *Third*, Berisha makes breathless claims that Lawson "fabricated evidence," "doctored quot[ations]" and "manufactured intricate scenes." Br. 20-29. But none of the supposedly improper edits are remotely relevant to the Statements and, more to the point, none

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[10] Berisha also criticizes Lawson for crediting Veliaj and other sources because they were "political opponent[s] of Berisha's father with an obvious bias against the Berisha family," or because they did not have "any personal knowledge about Berisha," or because he failed to credit that Berisha was prosecuted in connection with the Gerdec scandal. Br. at 17, 42, 47. But the law is clear that "the mere possibility that a source may be biased in some way . . . does not, without more, create obvious reasons to doubt a source's accuracy or establish actual malice." *Montgomery v. Risen*, 197 F. Supp. 3d 219, 263 (D.D.C. 2016) (citing *St Amant*, 390 U.S. at 731, 733), *aff'd*, 875 F.3d 709 (D.C. Cir. 2017). And Lawson was not obligated to interpret facts in the light most favorable to Berisha, particularly when, as the Tare Documentary reported, it was believed that Berisha avoided prosecution because his father helped to cover up his involvement. D.E.126-8. Further, these witnesses all shared "personal knowledge" about Berisha, despite Berisha's claim to the contrary. D.E.126(¶¶70-76).

of the allegations of fabrication stand up to scrutiny. Berisha cries actual malice because Lawson deleted two passages from early drafts of the Book (Br. 26-28), but this is evidence of good journalism because it shows that Lawson checked drafts with sources and, when those sources corrected him, declined to publish incorrect information. *See* D.E.126(¶26) (explaining "iterative" editing process "where drafts were written, tested and sometimes discarded before [Lawson] could gather enough evidence to be confident that [his] reporting on any given subject was accurate.").

Next, Berisha claims that Lawson published "deliberately misrepresented" and "falsified" meetings that the *Times* journalist Nicholas Wood had with Defense Minister Mediu and Trebicka, respectively. Br. 22-26. Berisha does not dispute [43] that these meetings happened as the Book described, but instead criticizes Lawson for omitting or conflating certain minor details. But the choices made by Lawson to streamline his narrative were "at heart . . . editorial decision[s]," not actual malice. *Levan*, 190 F.3d at 1230.

Next, Berisha claims that Lawson "conceived a story line in advance of an investigation and then consciously set out to make the evidence confirm to the preconceived story." Br. 13 (quoting *Eramo v. Rolling Stone, LLC*, 209 F. Supp. 3d 862, 872 (W.D. Va. 2016)). This argument fails for the simple reason that Lawson had no need to manufacture a narrative: he was aware of Berisha's involvement in corrupt arms dealing before he started writing the Book – from the *Times* Article and other reliable sources – and everything he

learned since that time confirmed his conclusion. In a desperate attempt to save his "preconceived narrative" argument, Berisha misleadingly cites an email from an S&S editor stating that the "time and effort" Lawson had expended on "researching a Pentagon 'conspiracy' . . . puts the book on shaky ground." Br. at 13. Most importantly, the email does not remotely suggest anyone believed there was anything "shaky" about the Book's reporting on Berisha. But Berisha also fails to mention that Lawson took this editorial guidance and cut back on the "Pentagon conspiracy" (because it was a distraction from the "dudes' " story). D.E.125(¶67). In a similar vein, Berisha points to an email from a *Times* reporter, C.J. Chivers, complaining that [44] Lawson had "written a factually unsupportable tale" concerning his use of a photograph in the *Times* Article and suggests that it this is "evidence of Lawson putting his agenda ahead of the facts." Br. 29. But, again, Berisha ignores that the undisputed evidence shows that Lawson responded to Chivers' email by conducting additional research into the photograph until he was able to locate the photographer and independently verify his characterization. D.E.126(¶¶88-89);D.E.126-37;D.E.126-38. This is responsible journalism, not actual malice.

Finally, Berisha makes an oblique reference to a declaration in which Diveroli attested that he "manufactured" Berisha's involvement in the AEY scheme "to discourage Trebicka . . . from exposing the illegal repackaging." Br. at 14. But, this declaration was obtained *after* the Book was published and could not

conceivably inform an inquiry into Defendants' subjective thoughts *at the time of publication*. *See Biro v. Conde Nast*, 807 F.3d 541, 546 (2d Cir. 2015) (holding that "events that occurred after publication . . . cannot be relevant" to actual malice analysis) (internal quotation omitted). Further, there is no evidence that Diveroli ever told any of the Defendants that he fabricated Berisha's involvement nor does the declaration suggest that he involved Packouz or Podrizki in the scheme. D.E.152-36. There is also no reason to credit Diveroli's highly suspicious declaration – which he signed in return for being dismissed as a defendant from this action, a decade after his statements were first reported in the *Times*; as the [45] court below pointedly noted, Berisha "characterizes [Diveroli] as a 'pathological liar' unworthy of belief – except that is, when . . . citing Diveroli as a witness." SJ Order, 21.

In the end, "[e]ven taking [Berisha's] flawed evidentiary assertions together, no reasonable jury could find by clear and convincing evidence that [Lawson] acted with actual malice" since what Berisha fails to provide is any evidence that Lawson had "serious doubts about the truth of the Statements. *Jankovic v. Int'l Crisis Grp.*, 822 F.3d 576, 597 (D.C. Cir. 2016).

ii. There Is No Evidence that S&S Acted with Actual Malice

It is well established that book publishers are "entitled as a matter of law" to rely on an author's "reputation[] and experience," and there will be no finding

of actual malice where, as here, they published a work written by an author they believe to be reliable. *McManus v. Doubleday & Co.*, 513 F. Supp. 1383, 1390 (S.D.N.Y. 1981); *see also Rinaldi v. Holt, Rinehart & Winston, Inc.*, 42 N.Y.2d 369, 382-83 (1977) (granting summary judgment for publisher where it "placed its reliance upon [the author's] reportorial abilities"); *Fodor*, 1995 WL 505522, at *5. Since Lawson had twenty years of experience as an investigative reporter before he [46] started the Book and was nominated for a prestigious national prize for the RS Article, S&S were clearly entitled to rely on his expertise. D.E.125(¶¶45,51).[11]

Berisha does not seriously dispute this conclusion. In the single sentence devoted to S&S on appeal, Berisha asserts that S&S "was aware of Lawson's grandiose agenda . . . and his tendency to put his narrative before the facts." Br. 49. It is unclear how this could possibly constitute clear and convincing evidence of actual malice and the only evidence offered are bare citations to the Chivers claim letter and a handful of references to routine editorial decisions. Br. 24, 49. But Berisha once again ignores the evidence, which shows that Chivers' concern was resolved to the satisfaction

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[11] Lawson also warranted in his publishing agreement that the Book does not "contain any matter libelous . . . of any third persons," an undertaking that the publisher is entitled to rely on. (D.E.125(¶57);D.E.40). *See Murray v. Bailey*, 613 F. Supp. 1276, 1280-81 (N.D. Cal. 1985) (publisher did not act unreasonably where, among other things, author represented and warranted in contract that book was not libelous); *Crescenz v. Penguin Grp. (USA), Inc.*, 561 F. App'x 173, 179 (3d Cir. 2014).

of S&S's editors once "Guy did additional reporting to prove his story" and "took the opportunity to address that in his manuscript." D.E.152-30(Tr.109:7-117:11). Nor has Plaintiff adduced any evidence that S&S harbored "actual, subjective doubt" as to any of Lawson's reporting, since its editors uniformly testified that they had no doubt as to the accuracy of the Statements and had full confidence in Lawson's reporting. D.E.125(¶73). [47] Accordingly, the dismissal of Berisha's defamation claims against S&S should be affirmed.[12]

iii. There Is No Evidence that Packouz or Podrizki Acted with Actual Malice

Berisha chides the lower court for failing to "explain its . . . reasoning" for dismissing the defamation claims against Podrizki and Packouz (Br. 49), but the lower court actually did address the threadbare argument Lawson makes on appeal and correctly rejected it. As with S&S, Berisha expends a single sentence on Packouz and Podrizki, in which he argues that "Podrizki and Packouz fabricated Berisha's involvement with AEY" in order to intimidate Trebicka, make money from Lawson and/or rehabilitate their reputations. Br. 49. The lower court correctly rejected this argument as a "conspiracy theory" lacking any evidentiary support. SJ Order, 18. The lower court also correctly held that "the fact that Packouz and Podrizki

[12] Berisha has conceded his defamation claim against Recorded Books because "there is insufficient evidence that Recorded Books acted with actual malice." Br. 49.

were paid as part of 'life rights' agreements, which are standard in the book publishing industry, does not establish actual malice on their part or on Lawson's." *Id.* at 18. *See Silvester*, 839 F.2d at 1498 n.5 (no actual malice even though producers of news broadcast paid source "a total of $3,000, [48] plus expenses"); *Cobb v. Time, Inc.*, 278 F.3d 629, 633 (6th Cir. 2002) (offer to pay source $15,000 to contribute first person account to article not actual malice).

Since Berisha has failed to identify any other grounds for a finding of actual malice against Packouz or Podrizki – and since both "dudes" indisputably relied on the prior reporting on Berisha in the *Times* and RS Articles – Berisha's remaining defamation claims should be dismissed.[13]

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In sum, "there is persuasive evidence" that Defendants firmly believed the Statements were entirely accurate, "and the cumulative force of the evidence to the contrary is very weak" (if any evidence exists at all). *McFarlane v. Sheridan Square Press*, 91 F.3d 1501, 1514 (D.C. Cir. 1996). Since there is no clear and convincing evidence that Defendants published any

[13] The defamation claim against Packouz should be dismissed for the independent reason that there is no evidence that Packouz was a source for or ever uttered any of the Statements. D.E.139(¶19). *See*, *e.g.*, *Mawk v Kaplan Univ.*, No. 6:13-CV-1469-ORL-22, 2015 WL 4694055, at *4 (M.D. Fla. Aug. 6, 2015) (defamation claim failed because plaintiff failed to establish the essential element of publication of a defamatory statement to third party).

Statement with actual malice, this Court should affirm the SJ Order dismissing this action.

[49] II. BERISHA IS UNQUESTIONABLY A PUBLIC FIGURE SUBJECT TO THE ACTUAL MALICE STANDARD

Essentially conceding his public figure status, Berisha makes an abrupt, highly generalized argument at the very end of his brief that he is a private figure because he never did anything to seek out notoriety. Br. 78. But Berisha's *ipse dixit* assertion that he never wanted to be a public figure does not overcome the indisputable evidence of his public figure statues, including Berisha's central role in multiple corruption scandals, his exceptional prominence in Albania (where he enjoys 100% name recognition), and his privileged access to the media, which all confirm his status as a public figure.

When a libel plaintiff "is a public figure or official and the defamatory material involves issues of legitimate public concern, the plaintiff must prove that the defendant acted with actual malice to establish liability." *Silvester*, 839 F.2d at 1493. There are two types of public figure. General public figures are "individuals who, by reason of fame or notoriety in a community, will in all cases be required to prove actual malice." *Turner*, 879 F.3d at 1272. "Limited public figures, on the other hand, are individuals who have thrust themselves forward in a particular public controversy and are therefore required to prove actual malice only in

regard to certain issues." *Id.* This Court applies a two-part test for limited public figures: "First, the court must determine whether the individual played a central role in the controversy. Second, it must determine whether the alleged [50] defamation was germane to the individual's role in the controversy." *Id.* at 1273. Contrary to Berisha's suggestion that it is "the role of the fact finder" to decide whether a plaintiff is a public figure (Br. 75), the Eleventh Circuit recently affirmed that "public figure status is a question of law to be determined by the court." *Turner*, 879 F.3d at 1271 (citation and internal quotation marks omitted).

The evidence in this case is clear that Berisha is, at a minimum, a limited public figure. Berisha concedes that the Statements involve quintessential issues of legitimate public concern because they "describe corruption in the Albanian government and in the sale of arms to the United States for use in the war in Afghanistan." SJ Order, 13. *See also Silvester*, 839 F.2d at 1493 ("The public is legitimately interested in all matters of corruption. . . ."); *Rosanova*, 580 F.2d at 861 ("[R]eported associations and activities concerning organized crime are, without dispute, subjects of legitimate public concern").

Next, Berisha does not deny that news organizations had previously reported that his "role in the AEY controversy was 'central' and must concede that the Statements were "germane" to that controversy. SJ Order, 17. Nor could he, since Berisha's role in the AEY and Gerdec scandals was front page news in Albania, generating the headline "Political Hiroshima."

D.E.125(¶¶114-15). Berisha was so central to the "political circus" that ensued in the media after the Gerdec scandal broke that the U.S. Ambassador to Albania felt compelled to write about Berisha's [51] reported involvement in official cables. D.E.126-15(pp.1-5). Berisha's connection to an "Albanian" mafia was also reported in the *Times* (twice), was re-reported in other articles and was the subject of the in-depth Tare Documentary that concluded Berisha used his political connections to evade criminal charges for his role in the Gerdec disaster. D.E.125(¶¶34,46,83,96,114,115). In short, Berisha cannot seriously dispute his public figure status "given that [he] has been the subject of more than a decade of media coverage" on topics related to his involvement in corrupt arms dealing and mafia activity. *Deripaska v. Associated Press*, 282 F. Supp. 3d 133, 142 (D.D.C. 2017).[14]

Berisha's main argument on appeal is that he cannot be a public figure because he "has taken no voluntary action to expose himself to the risk of defamation" (Br. 76), but there is no factual or legal support for this claim. Factually, Berisha ignores the powerful evidence that he injected himself into various corruption scandals, including the AEY fiasco. Berisha admits that he filed no less than ten lawsuits in seven years against Albanian journalists and politicians for speaking out over his alleged obstruction of an energy project,

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[14] On the basis of this evidence alone, this Court could easily find that Berisha is a general purpose public figure in addition to being a limited public figure as to any reporting on his involvement in corrupt arms dealing and mafia activity.

mismanagement of the Albanian Lottery and failure to pay taxes (although he [52] tellingly never filed a lawsuit against any of the news organizations that reported on his corrupt arms dealing). D.E.125(¶¶116-18).

Berisha "never disputed that he has associated with various personalities" – like Delijorgji and Mediu (D.E.151(120,23)) – with ties to corrupt arms deals and organized crime, which is also strong evidence that Berisha "voluntarily engaged in a course that was bound to invite attention and comment." *Rosanova*, 580 F.2d at 861. Berisha also admits that he attended a meeting with Kosta Trebicka in a car belonging to a mutual acquaintance, from which he extracted (and sought to publicize) a highly suspicious affidavit from Trebicka stating that Berisha had "no involvement in AEY whatsoever." D.E.151(¶¶13,15).[15] As per a recent decision from this Court, Berisha thus "insert[ed] himself into the controversy" by "pushing" Trebicka "to make a statement to the press defending" him against negative allegations. *Turner*, 879 F.3d at 1273.

Next, Berisha claims that he is not a voluntary public figure because he never "held a position from which he could be expected to influence the AEY controversy" (Br. 77), but once again ignores the evidence of his own "prominence and access to media." *Friedgood*, 521 So. 2d at 240. Berisha was born into prominence because his father is the former President

[15] Lawson was not aware of Trebicka's affidavit at the time the Book was published. D.E.126(¶86).

and Prime Minister of [53] Albania, but he also earned notoriety in his own right as a central player in the AEY and Gerdec scandals. D.E.125(9). In short, Berisha is a household name in Albania, who "has an astonishing 100 percent name recognition among Albanians." SJ Order, 14;D.E.167-2(p.7). That Berisha "has attained a level of 'fame or notoriety in a community' that few other figures could likely match" leads to the inescapable conclusion that he is a public figure. SJ Order, 14 (quoting *Turner*, 879 F.3d at 1272).

Berisha's limited public figure status is further cemented because, when the Book was published in 2015, he "had long had ready access to the media." *Silvester*, 839 F.2d at 1494, 1498 ("[P]ublic figures usually have greater access to the media which gives them 'a more realistic opportunity to counteract false statements than private individuals normally enjoy.") (citation omitted). Berisha claims that "it is highly contested that [he] has greater access to the media" (Br. 75), but this assertion cannot be taken seriously in light of the evidence. For instance, it is undisputed that Berisha has a "group of email addresses from media representatives" – including editors at major Albanian news organizations – that he uses to disseminate comments and press releases in response to negative coverage. D.E.125 mill 8-19);D.E.133-6(pp.2-7). While Berisha demurs that "sometimes his responses are published and sometimes they are not" (Br. 75), he indisputably has a direct line to all the major news editors in Albania and that proves that he has [54] greater access to the media than the general public. Berisha also

neglects to mention that he is so famous in Albania that newspapers sometimes publish his Facebook posts, even on topics as mundane as the Kosovar soccer team joining the European Football Association. D.E.125(¶¶120-21);D.E.133-9(pp.2-6).

The only scrap of "evidence" Berisha has mustered to support his claim to be a "quintessential private figure" (D.E.1(¶133)) is his *ipse dixit* claim that he "never voluntarily sought media attention" (D.E.150(¶139)), but this is legally insufficient. As the court below correctly noted, "even if the Court credits Berisha's assertion[]" – which is highly dubious given his exalted position in Albanian society – 'the status of a public figure vel non does not depend upon the desires of an individual.'" SJ Decision, 14 (quoting *Rosanova*, 580 F.2d at 861). While Berisha "did not choose to be the former Albanian Prime Ministers son, . . . that is what he is, and other 'children of famous parents' have been held to be public figures on no wider grounds that that." SJ Decision, 15 (quoting *Meeropol v. Nizer*, 381 F. Supp. 29, 34 (S.D.N.Y. 1974) (holding that the children of Julius and Ethel Rosenberg were public figures despite having "renounced the public spotlight" as adults)).

More fundamentally, courts have rejected precisely the argument Berisha attempts to make here because "[i]t is no answer to the assertion that one is a public figure to say, truthfully, that one does not choose to be." *Rosanova*, 580 [55] F.2d at 861. It would be particularly inappropriate to Berisha to self-identify as a private figure in light of the "published newspaper and other media reports" connecting him with "organized

crime" and his apparent determination to conceal his activities. *Id.* As the court noted in *Rosanova*:

> The purpose served by limited protection to the publisher of comment upon a public figure would often be frustrated if the subject of the publication could choose whether or not he would be a public figure. Comment upon people and activities of legitimate public concern often illuminates that which yearns for shadow.

Id. See also Friedgood, 521 So. 2d at 240 ("[P]ublic figure status may be determined without regard to whether the individual had initially thrust herself into the case."). In other words, the law does not permit Berisha to evade public figure status by asserting that he took "no voluntary action" to influence the controversy because he did not commit the crimes he was accused of. Br. 79. If this were the law (and it is not), any powerful figure suspected of criminal activity would be deemed a private figure simply by denying the charges against them. For obvious reasons, this would encourage cover-ups and eviscerate the First Amendment protections for the investigative journalists seeking to expose secret crimes.[16]

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[16] Berisha's final gambit is to ask the Court to eliminate "involuntary public figure" status, but this argument misses the point on multiple levels. Br. 78-80 (citing *Wells v. Liddy*, 186 F.3d 505, 538 (4th Cir. 1999)). First, in this Circuit "[i]t may be possible for someone to become a public figure through no purposeful action of their own." *Turner*, 879 F.3d at 1273 (quoting *Friedgood*, 521 So. 2d at 239). Next, the Fourth Circuit decision he urges this Court to adopt did not abolish the "involuntary public figure"

[56] In sum, this Court should affirm the district court's holding that Berisha is a public figure by virtue of his "proximity to power, his access to the media and his alleged presence at the center of multiple corruption scandals." SJ Order, 16.

III. THE PRE-PUBLICATION LEGAL REVIEW COMMUNICATIONS BERISHA SEEKS ARE PRIVILEGED

Berisha's privilege argument rests on a series of misapprehensions, which need to be addressed as a threshold matter. First, Berisha implies that he was deprived of any evidence on "what Lawson and [S&S] knew about the accuracy of Lawson's allegations about Mr. Berisha" (Br. 73), but this is not true given Defendants produced virtually all the documents relevant to the research and publication of the Statements.

Next, Berisha suggests that this Court should vacate the SJ Order because the district court failed to rule on his objections to the Magistrate Judge's Privilege Order. Br. 53 (*quoting Snook v. Tr. Co. of Georgia Bank of Savannah*, 859 F.2d 865, 871 (11th Cir. 1998)).

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category but merely held that "[t]he involuntary public figure must be recognized as a central figure" in the controversy at issue. *Wells*, 186 F.3d at 540. Even under this standard, Berisha is a public figure due to the central role he played in the AEY and Gerdec arms dealing scandals. Finally, Berisha cannot seriously argue that his public figure status is a result of "sheer bad luck," since he obtained his privileged status from his powerful father and took voluntary steps that enmeshed him in multiple arms dealing controversies.

But unlike the case upon which Berisha relies – where summary judgment was granted before any decision was made on plaintiff's motion to compel (*id.* at 868) – the lower court considered and rejected Berisha's [57] application. To the extent that Judge Cooke erred by not addressing Berisha's "appeal" of the Privilege Decision (Br. 52), that error was harmless and there are no jurisdictional issues that preclude this Court from reviewing the Privilege Order. *See*, *e.g.*, *Haynes v. McCalla Raymer, LLC*, 793 F.3d 1246, 1249 (11th Cir. 2015) ("[E]ven if the objections were not considered . . . any failure to review them would have been harmless error" because the "arguments were repetitive" and without merit).[17]

Finally, while Berisha claims that Defendants are trying to create a novel "book-publisher/book-author privilege" (Br. 70), the privilege issues raised here are subject to well-established and generally applicable rules of attorney-client and common defense privilege. For the reasons set forth below, the lower court correctly held that S&S "did not waive attorney-client privilege when it permitted its attorney . . . to communicate with Lawson for the purpose of a pre-publication legal review of the Book" and that "Defendants have advanced sufficient evidence to substantiate

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[17] Indeed, it would be a waste of judicial resources to remand this case to the district court for the sole purpose of ruling on Berisha's objections. No doubt, any decision rendered by Judge Cooke would be appealed back to this Court, which would be obliged to make a second ruling based on the same record it already has before it.

their assertion of common interest privilege." Privilege Order, 9, 14.

[58] **A. Factual Background**

The Publishing Agreement for the Book, executed on June 28, 2011, set forth the terms upon which S&S agreed to publish Lawson's work. D.E.125(¶57); D.E.127-3(p.9). A material term in the Publishing Agreement – which is standard in book publishing contracts – expressly obligated Lawson to participate in the prepublication legal review for the Book: "If the Publisher in its sole reasonable discretion determines to submit the manuscript to a legal review, the Author shall cooperate with the Publisher or Publisher's counsel in such review." D.E.127-3(p.9).

The Publishing Agreement also contains another standard clause, which amounts to a prospective joint defense agreement. Under those terms, Lawson warranted that his Book "does not . . . contain any matter libelous . . . of any third person." *Id.*(p.14). In the event of any "suit, proceeding, claim or demand" arising out of the Book's publication, the Publishing Agreement states that Lawson "shall be insured" under S&S' liability policy and requires S&S to "retain counsel" to jointly represent itself and Lawson. *Id.*(pp.15-16). In return for coverage, the Publishing Agreement requires Lawson to allow S&S to "control the defense of such claims" and "cooperate fully with . . . counsel in such defense." *Id.*

Lawson and S&S received a claim letter before the pre-publication libel review commenced. On June 14, 2014, *Times* reporter C.J. Chivers sent an email [59] to Lawson and the Book's editor, Emily Graff (who was an S&S employee). D.E.125(¶68). This email, which copies "the newspaper's in-house lawyer," asserts (without identifying specific examples) that the Book was "riddled with unsupported surmises, factual errors, and misleading conclusions" and instructs Lawson to explain to S&S's "legal counsel the basis for any claims" criticizing Chivers' reporting. D.E.126-37(pp.2-3). On October 9, 2014, S&S received a separate claim letter from Diveroli's lawyer, which contended (without providing any specific examples) that the Book would "defame [Diveroli], or at the very least, have serious misstatements of fact." D.E.127-8(pp.2).[18]

The receipt of Chivers' claim letter caused Graff to formally request a prepublication legal review for the Book and S&S retained a lawyer, Elisa Rivlin, for this purpose. D.E.109-1(W-8). Book publishers do not engage in fact checking – since they rely on authors to ensure the factual accuracy of their work – and Rivlin was not engaged to fact check the book. *Id.*(¶¶9-10). Rather, the purpose of Rivlin's pre-publication review was to identify and advise on potentially actionable content in Lawson's manuscript. *Id.*(¶11). In practical terms, Rivlin addressed a number of overlapping legal

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[18] Ultimately, neither Diveroli nor Chivers sued over the Book and, by the time the Book was published, any issues raised by their claim letters were resolved to the satisfaction of S&S and Lawson. D.E.125(¶69).

risks, including specific responses to claims made in [60] the Chivers and Diveroli claim letters, as well as general advice concerning potentially defamatory content. *Id.*(¶¶15-16). Since defamation only arises out of false statements, Rivlin's legal analysis on whether particular statements might be actionable began with collecting the facts to support the claim. *Id.*(¶12) In this case, extensive communications with Lawson were necessary because he was the sole proprietor of the facts and sourcing that Rivlin needed to assess the defamation risks posed by his reporting. *Id.*(¶13). It was equally necessary for Rivlin to communicate her legal advice back to Lawson (as well as S&S's editorial staff, including Graff) so that questions could be answered and changes implemented in subsequent drafts. *Id.*(¶17).

Rivlin commenced her pre-publication legal review of the manuscript in June 2014 and completed it by April 2015 – in time for the publication of the Book's first edition. *Id.*(¶8). Rivlin continued to correspond with Lawson about pre-publication issues relating to the paperback issues of the Book, which was released in 2016. *Id.*(¶18). All of the privileged communications sought by Berisha were exchanged during this time period, while the pre-publication legal review was taking place. *See* Appellants' Appendix A0543-79.

The pre-publication legal review process described above (in which the publisher's attorney communicates extensively with an author to provide prepublication legal advice on a manuscript) is standard in the book publishing [61] industry. D.E.103-1(¶¶2,13).

Thousands of non-fiction books have been subjected to pre-publication legal review, with the justifiable understanding that communications exchanged between the author and publisher's lawyer are privileged.

B. Procedural History

On July 19, 2019, Magistrate Judge Louis held oral argument on Berisha's motion to compel the pre-publication legal review communications. D.E.106. At that hearing, Judge Louis asked the parties to provide supplemental briefing – which they did – and requested a representative sample of documents for *in camera* review, including four documents discussed at the hearing and five additional documents selected by Berisha. D.E.109(pp.5-6) Defendants made these documents available to the Court. *Id.* (pp.8-9);D.E.103-1(¶16). Defendants also submitted a revised privilege log, which provided additional information about the nature of each document for which privilege was claimed. Appellants' Appendix A0543-79.

Having considered the oral arguments advanced by the parties, two rounds of briefing, record evidence (including witness testimony), privilege logs and communications produced for *in camera* review, the lower court denied Berisha's motion to compel. Privilege Order, 1-16.

[62] **C. Standard of Review**

Abuse of discretion is the correct standard of review for the Privilege Order. It is well-established that this Court "review[s] . . . evidentiary rulings for abuse of discretion." *Bogle v. McClure*, 332 F.3d 1347, 1358 (11th Cir. 2003). This Court routinely applies the abuse of discretion standard to appeals involving lower court decisions based on the attorney-client privilege. *See*, *e.g.*, *id.* (reviewing lower court's privilege decision under abuse of discretion standard), *Watkins v. Broward Sheriff's Office*, ___ F. App'x ___, 2019 WL 1962071, at *6 (11th Cir. May 2, 2019) ("We review a district court's decision to sustain an objection which invokes [the attorney-client] privilege for an abuse of discretion."); *Vantage View, Inc. v. QBE Ins. Corp.*, 400 F. App'x 420, 421 (11th Cir. 2010) (per curiam).

Berisha asserts in conclusory fashion that the Privilege Order is subject to *de novo* review because it "may involve mixed questions of law and fact" (Br. 8), but the cases he cites in passing do not support this conclusion. In *Bivens*, this Court was forced to decide the privilege issue *de novo* because the plaintiff "did not raise his arguments about the attorney-client privilege before the district court." *Bivens v. Stein*, 759 F. App'x 777, 782-83 (11th Cir. 2018). And *Cox* raised a genuinely mixed issue of law and fact, specifically whether the court-made "*Garner* doctrine applies to a union's assertion of the attorney-client privilege against its members." *Cox v. Administrator U.S. Steel & Carnegie*, 17 F.3d 1386, 1414 (11th Cir. 1994).

[63] Here, by contrast, Berisha's appeal turns on whether the lower court correctly held that Defendants shouldered their evidentiary "burden of proving that an attorney-client relationship existed and that the particular communications were confidential." *Bogle*, 332 F.3d at 1358 (citation omitted). This fact-driven analysis – which turns in part on documents reviewed by the lower court *in camera* that are not part of the appellate record – is a routine exercise of the trial court's considerable discretion in controlling discovery and should be reviewed as such.

Under any standard of review, the Privilege Order should be affirmed.

D. The Communications Are Protected by Attorney-Client Privilege

It is undisputed that "information is protected from disclosure by the attorney-client privilege when it is a communication between a lawyer and client not intended to be disclosed to third persons *other than those to whom disclosure is in furtherance of the rendition of legal services*, or those reasonably necessary for the transmission of the communication." *Tyne*, 212 F.R.D. at 598-600 (citing Fla. Stat. § 90.502(1)(c)) (emphasis added).[19] Courts applying this rule have

[19] Defendants have reserved the issue of whether Florida or New York law applies to this case, but the ultimate choice of law has no impact on this appeal since the laws of both states are in accord for these privilege issues.

held that the attorney-client privilege does not automatically disappear when a lawyer representing a corporation communicates with a non-employee. Rather, the attorney-client relationship survives "when an attorney needs to be able to confer [64] confidentially with 'nonemployees who, due to their relationship to the client, possess the very sort of information that the privilege envisions flowing most freely.'" *Every Penny Counts, Inc. v. American Exp. Co.*, No. 8:07-cv-1255, 2008 WL 2074407, at *2 (M.D. Fla. May 15, 2008) (quoting *In re Bieter Co.*, 16 F.3d 929 (8th Cir. 1994)). *See also Office Depot, Inc. v. Nat'l Union Fire Ins. Co.*, No. 09-80554-CIV, 2010 WL 11505167, at *4 (S.D. Fla. Aug. 17, 2010) (attorney-client privilege protects "communications with agents and representatives of the client when those communications further the rendition of legal services.").

These established principles have been applied in three cases involving facts virtually identical to the facts at issue here. In *Tyne*, the court held that the attorney-client privilege protected against disclosure of communications between Warner Bros. and employees of two co-defendant studios, who were involved in legal clearances for the movie *A Perfect Storm*. *Tyne*, 212 F.R.D. at 600-01. Explaining its reasoning, the court wrote that, while "employees [of the two studios] may not be clients of the Warner Bros. legal department, Warner Bros. required their cooperation with regard to the production of *A Perfect Storm* in order to protect Warner Bros.' legal interests." *Id.* at 600. In other words, the privilege applied because "[t]he advice of

the Warner Bros. legal department would be useless to Warner Bros. if the advice could not be disseminated to the few key individuals who were intimately involved in the joint production of *The Perfect* [65] *Storm*." *Id.* Unable to find a legitimate ground for distinguishing *Tyne*, Berisha sniffs that it is "vague" and "in error" (Br. 67), but his evasiveness merely confirms that *Tyne* strongly supports the application of privilege to Defendants.

Similarly, in *Davis*, a New York court held that communications between lawyers for a movie studio and the author of the book that served as the basis for a screenplay were privileged. Notwithstanding that the author was not a studio "employee and did not participate in the production of the film," the court held that "his participation in [the] meeting was functionally equivalent to that of an author of a magazine or newspaper article who submits his work to in-house counsel for prepublication libel review and should thus come within the rule of *Upjohn* . . . , protecting communications between corporate employees and the corporation's attorney seeking to 'ensure their client's compliance with the law.'" *Davis v. Costa-Gavras*, 580 F. Supp. 1082, 1098 (S.D.N.Y. 1984) (citing and quoting *Upjohn Co. v. United States*, 449 U.S. 383, 392 (1981). Berisha's rejoinder that the author was "a lawyer . . . paid for 'legal consultation'" (Br. 68) is highly misleading – and should be rejected – because the ultimate decision to apply privilege was based on his role as a source of information necessary for the prepublication

legal review and had nothing to do with his incidental status as a lawyer. *See Davis*, 580 F. Supp. 1098-99.

[66] In a decision in the context of print journalism, the D.C. Circuit held that "[p]re-publication discussions between libel counsel and editors or reporters would seem to come squarely within the scope of the privilege as defined in *Upjohn*." *Liberty Lobby*, 838 F.2d at 1302. As Berisha notes, *Liberty Lobby* involved communications between editorial employees of a newspaper and that company's libel counsel. Br. 67. But the central holding of the case – that pre-publication libel review falls within the ambit of privileged communications – clearly supports the application of privilege here, where the only difference is that the journalist is not an employee of the publisher.

Taken together, these three cases demonstrate that the communications between counsel and a third party author in the course of pre-publication legal review of editorial content are precisely the sort of communications "that the privilege envisions flowing most freely.'" *Every Penny Counts, Inc.*, 2008 WL 2074407, at *2.

Applying this principle, Magistrate Judge Louis held that Defendants had provided sufficient evidence to "substantiat[e] their burden to demonstrate that communications between counsel for the publisher, Rivlin, and author of the book, Lawson, fall within the scope of attorney-client privilege." Privilege Order, 5. In reaching this decision, the lower court credited testimony from S&S that "because Lawson was 'the sole

proprietor of the sourcing and background information that [67] went into the manuscript,' it would have been 'impossible to conduct a meaningful pre-publication legal review without him.'" *Id.* (quoting D.E.109(p.6)). Magistrate Judge Louis also found that the clause in the Publishing Agreement requiring Lawson to "cooperate with the Publisher or Publisher's counsel" evidenced S&S' "need to involve Lawson in communications involving the prepublication legal review." Privilege Order, 5-6. Critically, the court below did not just adopt this testimony – which it clearly could have since it was undisputed – but it also engaged in an *in camera* review of the evidence. Based on this review, the Magistrate found that "it is clear from the Court's *in camera* review [of sample documents] that Rivlin's communications fell within the scope of her representation and were necessary for her engagement." *Id.* at 9. Finally, the lower court accepted the sufficiency of Defendants' supplemental privilege log. *Id.* at 11 n.4. Since this evidence proved that a legal review would be "useless" without Lawson's participation, the lower court correctly held that S&S "did not waive attorney-client privilege when it permitted its attorney . . . to communicate with Lawson for the purpose of a pre-publication legal review of the Book." *Id.* at 6, 9.[20]

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[20] The lower court also held that withheld communications between Lawson and his S&S editor Graff were privileged because the privilege applies "to information gathered by non-attorneys for transmission to an attorney for the attorney to provide legal advice on an issue or to provide legal advice regarding the document or information gathered." *In re Abilifi, (Aripiprazole)*

[68] Berisha makes no real effort to engage with the evidence underpinning the Privilege Order, but throws up a few random arguments instead. First, he argues – without any support – that only "communication[s] between lawyer and client" can be privileged. Br. 55. But he offers no cases to support his novel interpretation and no explanation why all the cases cited in the Privilege Opinion held communications between lawyers and non-clients, like Lawson, to be privileged. It cannot be (as Berisha seems to suggest) that the many courts who considered this "tricky" issue are all wrong, but Berisha is right.

Similarly, Berisha proposes a formalistic "require[ment] that the third-party be an agent of the client" for privilege to apply. Br. 57. The cases Berisha cites – only some of which actually involve "agents" – do not support this proposition. As the lower court explained, "the fact that attorney-client privilege protects intermediaries and agents of corporations does not mean that the privilege is exclusively limited to the same" and Berisha's cases do "not support such a narrow reading." Privilege Order, 7. In short, regardless of the label applied to Lawson, the "necessary" role he played in the pre-publication review process triggers

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Prods. Liability Litig., No. 3:16-md-2734, 2017 WL 6757558, at *7 (N.D. Fla. Dec. 29, 2017) (citations omitted). Crediting the evidence presented, Magistrate Judge Louis held that "the communications between Graff and Lawson were integral to Rivlin's ability to properly advise [S&S] and as such remain privileged." Privilege Order, 9.

the [69] application of the attorney client privilege and the Privilege Order should be affirmed.

E. The Communications Are Protected by the Common Interest Privilege

Lawson's communications with S&S after Chivers sent his June 2014 claim letter are independently privileged under the common interest doctrine. The common interest or joint defense doctrine is an exception to the ordinary rule of third party waiver that "allows parties facing a common litigation opponent to exchange privileged communications and attorney work product in order to prepare a common defense without waiving either privilege. The doctrine is not limited to cases of actual co-defendants, rather it may apply to cases of 'potential' litigation as well." *Fojtasek v. NCL (Bahamas) Ltd.*, 262 F.R.D. 650, 654 (S.D. Fla. 2009) (internal citations omitted). In determining whether the common interest doctrine applies, courts look to whether the information exchanged was "for the limited purpose of assisting in their common cause." *Visual Scene, Inc. v. Pilkington Bros., plc*, 508 So.2d 437, 441 (Fla. DCA 3rd) (citation omitted). One New York case has indicated that the parties must also be "engaged in or reasonably anticipate litigation" for the doctrine to apply. *Ambac Assurance Corp. v. Countrywide Home Loans, Inc.*, 57 N.E.3d 30, 37-38 (N.Y. 2016).

In determining that the common interest privilege applied, the lower court relied on "three critical pieces

of evidence." Privilege Order, 12. First, the [70] Publishing Agreement was strong evidence of an agreement to pursue a common legal strategy since it "prospectively require[d] cooperation in a joint defense." *Id.* at 14. Next, the claim letters from Chivers and Diveroli demonstrated that "Defendants reasonably perceived a credible threat of litigation arising from publication of the Book." *Id.* Based on this evidence, the lower court correctly held that "Defendants have advanced sufficient evidence to substantiate their assertion of common interest privilege." *Id.* The *Tyne* and *Davis* decisions both buttress this holding. *See Davis*, 580 F. Supp. at 1098-99 (common interest doctrine applied because the author "was a potential codefendant and thus the meeting was a pooling of information for joint defense"); *Tyne*, 212 F.R.D. at 600 (communications between production studio and employees of other companies "who have a common legal interest" in the legal review of clearances for an upcoming movie do "not constitute a waiver of privilege).

Once again, Berisha's response to an adverse decision is to ride roughshod over the evidence. First, Lawson claims that the Publishing Agreement "is not evidence of agreement between Lawson and [S&S] to cooperate in a common legal strategy to defend against 'claims' by Chivers, Diveroli, or anyone else." Br. 63. This interpretation is not tenable because the Publishing Agreement, on its face, states that "Publisher shall retain counsel to represent Publisher and Author in any proceeding brought with respect to all such claims and shall control the defense of [71] such claims, and

Author shall cooperate fully with Publisher and said counsel in such defense." D.E.40(¶25(d)). It defies basic comprehension to read this clause as anything other than what it is: a joint defense agreement.

Next, Berisha devotes several pages to attempting to diminish the impact of the Chivers and Diveroli claim letters. Br. 63-66. The crux of Berisha's argument is that pre-publication legal review communications "do not fall within the common legal interest exception" to the extent that they involved issues unrelated to the claim letters. Br. 65. The problem with this argument is that the prepublication legal review triggered by the claim letters necessarily covered the entire Book. It would be absurd – and a huge waste of judicial resources – to force the lower court to sift through these communications to make arbitrary distinctions about which advice related to Diveroli or Chivers, as Berisha apparently demands. Br. 66. As the lower court correctly observed, the common interest privilege applies to Lawson's pre-publication legal review communications with Rivlin because they "postdate the Chivers letter" and were thus generated at a time when "when Lawson and [S&S] had a common legal interest against a common opponent with regard to a specific claim." Privilege Order, 14.

Finally, Berisha resorts to making up a new rule, asserting that the "common legal interest exception may not be invoked unless each party is represented by separate counsel." Br. 59. But the cases he misleadingly cites – which happen to [72] involve multiple clients with separate attorneys – do not stand for the

proposition that the common interest privilege is inapplicable unless every client is represented by their own attorney. Indeed, Berisha fails to identify a single case declining to apply the common interest privilege simply because one of the parties to the joint defense was not represented by independent counsel, which is unsurprising given that "[c]ourts having considered the issue in this District previously have not recognized the restriction that Plaintiff would have this Court impose." Privilege Order, 14 (citing *Royal Bahamian Ass'n, Inc. v. QBE Ins. Corp.*, No. 10-21511-CIV-GOODMAN, 2010 WL 3637958, at *4 (S.D. Fla. Sept. 20, 2010); *Fojtasek*, 262 F.R.D. at 656).

In sum, this Court should affirm the Privilege Order because the lower court clearly did not abuse its discretion by holding that Defendants produced sufficient evidence to meet their burden of establishing the attorney-client and common interest privileges.

IV. BERISHA HAS NO GROUNDS FOR REOPENING DISCOVERY

In a last ditch effort, Berisha asks this Court to reopen discovery pursuant to Rule 56(d). Br. 70-73. Despite his contention to the contrary (Br. 9), this Court reviews "both the denial of a motion for extension of time and the denial of a motion seeking discovery under the abuse-of-discretion standard." *Barrett v.* [73] *Walker Cty. Sch. Dist.*, 872 F.3d 1209, 1230 (11th Cir. 2017). Whatever the standard of review, the Discovery Deadline Orders should be affirmed.

First, Berisha argues that the lower court should have given him more time to "compel production" of Defendants' privileged communications "and allow additional time for discovery concerning those communications." Br. 73. The obvious problem with this argument is that those privileged documents were properly withheld as per the Privilege Order. Because there are no grounds to overrule the Privilege Order, there is no harm to redress and Berisha must accept that he is not entitled to the discovery he desires.

Second, Berisha requests more time "to depose four of Lawson's supposed 'sources,'" who live abroad. Br. 73. None of these witnesses have any bearing on the dispositive actual malice analysis in this case and it was within the district court's discretion to deny Berisha additional time for this purpose. And this argument ignores that Judge Cooke actually *allowed* him "to conduct discovery beyond the discovery deadline" so that he could take these depositions and he *still* failed to do so. D.E.104. Berisha also neglects to mention that he did even take the first step in securing his foreign depositions (*i.e.*, filing letters of issue) until June 27, 2018 – even though he knew he wanted to take foreign depositions since at least February of that year. In other words, if Berisha feels like he ran out of time to complete discovery, he only has himself to blame.

[74] **CONCLUSION**

For the reasons set forth above, Defendants respectfully request that the Court affirm the Discovery Deadline Orders, the Privilege Order and the SJ Order granting Defendants' motion for summary judgment and dismissing Berisha's defamation claims with prejudice.

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[75] **CERTIFICATE OF COMPLIANCE**

As counsel of record to Defendants-Appellees Simon & Schuster, Inc., Guy Lawson, Alexander Podrizki, David Packouz and Recorded Books, Inc., I hereby certify that this brief complies with the type-volume limitations forth in

Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure and 11th Cir. R. 28-1(m) – as extended by order of this Court on April 29, 2019. I am relying upon the word count of the word-processing system (Microsoft Word) used to prepare the brief, which indicates that 16,995 words appear in the brief, except for the portions excluded from the word count pursuant to Federal Rule of Appellate Procedure 32(f). This brief is in 14-point Times New Roman proportional font.

s/ Elizabeth A. McNamara
Elizabeth A. McNamara

[76] **CERTIFICATE OF SERVICE**

I hereby certify that on June 2, 2019 I electronically filed this document with the Clerk of Court using the CM/ECF system, which will serve this document on all counsel of record.

By: /s/ Elizabeth A. McNamara
Elizabeth A. McNamara

UNITED STATES DISTRICT COURT FOR SOUTHERN DISTRICT OF FLORIDA

CASE NO. 17-cv-22144-COOKE-LOUIS

SHKELZEN BERISHA,

Plaintiff,

vs.

GUY LAWSON, EFRAIM DIVEROLI, ALEXANDER PODRIZKI, DAVID PACKOUZ, SIMON & SCHUSTER, INC., RECORDED BOOKS, INC., AND INCARCERATED ENTERTAINMENT, LLC,

Defendants. /

DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AND INCORPORATED MEMORANDUM OF LAW

(Filed Aug. 8, 2018)

Pursuant to Federal Rule of Civil Procedure 56(a) and Southern District of Florida Local Rule 56.1, Defendants Guy Lawson ("Lawson"), Alexander Podrizki, David Packouz, Simon & Schuster, Inc. ("S&S") and Recorded Books, Inc. ("Recorded Books") (collectively "Defendants") move for summary judgment against

plaintiff Shkelzen Berisha ("Plaintiff") as to both of the two counts of the Complaint [ECF No. 1].[1]

PRELIMINARY STATEMENT

This defamation action is a transparent effort to stifle legitimate reporting on Plaintiff's widely publicized involvement in corrupt arms dealing and should be summarily dismissed pursuant to the actual malice standard imposed by the First Amendment. Plaintiff is the son of the former Prime Minister of Albania and he has sued Defendants for defamation based on his brief appearance in a 234-page non-fiction book, *Arms & the Dudes: How Three Stoners from Miami Beach Became the Most Unlikely Gunrunners in History*, written by Guy Lawson and published by S&S (the "Book"). As its title suggests, the Book reports the true story of three young men – Efraim Diveroli, David Packouz and Alexander Podrizki – who fulfilled procurement contracts worth hundreds of millions of dollars for the U.S. Military and became embroiled in an audacious scheme to ship 100 million rounds of surplus ammunition from Albania to Afghanistan, for use in the War on Terror. The three "dudes' adventure came to an end when they were convicted of fraud for their role in shipping the Albanian ammunition.

In this action, Plaintiff challenges a handful of the Book's statements, which together all state or imply

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[1] Pursuant to Florida Statute Section 768.295 (the "SLAPP Law"), Defendants have filed a concurrent motion for expeditious resolution of their summary judgment motion.

the same thing: that Plaintiff was involved in the dudes' Albanian deal, including corruption and kickbacks, and that he was associated with a dangerous Albanian "mafia." Yet, the record establishes that starting in 2008, and consistently for years thereafter, widespread press reports had implicated Plaintiff in corrupt arms deals and associated him with "thugs" or "mafia." Indeed, these contentions were originally published in a 2008 front page *New York Times* article, then repeated over and over in the Albanian press with fresh and incriminating details, including a highly damning 2010 news broadcast by a prominent Albanian investigative journalist, stated on the floor of the Albanian Parliament, and even found their way into diplomatic cables written by the U.S. Ambassador to Albania that were leaked to the press in 2011. Then, these same allegations were included in Lawson's 2011 *Rolling Stone* article that was expanded into the 2015 Book. In short, by the time the Book was published, the fact that Plaintiff was involved in corrupt arms deals, or consorted with "mafia," was "old news." And it was news that during this entire period Plaintiff never challenged in litigation, and he never obtained any correction or retraction of these myriad prior reports. That is, until he brought this action, almost two years to the day after the Book was originally published.

The First Amendment ensures that meritless defamation actions should be dismissed at summary judgment. Because of his prominence, ready access to the media and widely reported involvement in corruption, Plaintiff is, at least, a limited purpose public figure.

(POINT I, *infra.*) As a public figure, Plaintiff must come forward with clear and convincing evidence that each Defendant published the statements about him with actual malice (*i.e.*, that Defendants subjectively knew the statements were false or harbored serious doubts about the accuracy of the reporting). Yet even after a year of extensive discovery, during which Defendants have produced nearly 20,000 documents and have all submitted to depositions, Plaintiff has failed to find a single scrap of evidence that any Defendant doubted the accuracy of the Book's reporting on Plaintiff's involvement in corrupt arms dealing. To the contrary, the evidentiary record shows that Defendants reasonably relied on the enormous volume of prior reporting that Plaintiff was not only involved in corrupt dealing with the dudes but also played a role in a corrupt arms deal that led to the deaths of 26 people in Gerdec, Albania. (POINT II, *infra*).

The law is clear and dispositive. Plaintiff cannot establish that any Defendant published the Book with actual malice when the same claims of corruption and mafia activity had been published for nearly a decade without retraction or repudiation. Simply put, "[t]he subjective awareness of probable falsity required [] cannot be found where, as here, the publisher's allegations are supported by a multitude of previous reports upon which the publisher reasonably relied." *Rosanova v. Playboy Enters.*, 580 F.2d 859, 862 (5th Cir. 1978). Since Plaintiff cannot establish a necessary element of his defamation claim as a matter of settled law,

summary judgment should be awarded in favor of Defendants.

STATEMENT OF FACTS

A. AEY and the Albanian Deal[2]

In the early-to-mid-2000s, while he was still in his teens, Efraim Diveroli ran a company called AEY that fulfilled procurement contracts for the U.S. Government, specializing in weapons and ammunition. SOF ¶4-5. Diveroli was able to enter and thrive in this business as a teenager because, at that time, the Government permitted any private company to bid on large government contracts (including contracts for supplying weapons to the military) via a free website called FedBizOpps.gov ("FedBizOpps") with relatively little oversight. *Id.* ¶4.

In late 2005, after Diveroli had already made millions of dollars from FedBizOpps, he enlisted the help of his childhood friend, David Packouz ("Packouz"), to expand the business. *Id.* ¶4. Packouz's role was to locate suitable munitions contracts, bid on them and (assuming AEY won) to work with arms dealers and others to deliver the weapons to the U.S. Government as cheaply as possible. *Id.* ¶4. In the summer of 2006, AEY bid on its biggest contract to date – a $300 million

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[2] The material facts underlying this Motion are set forth in full in Defendants' Statement of Undisputed Facts ("SOF"), which is filed concurrently herewith. Unless otherwise indicated, all of the facts about AEY set forth below are reported in the Book and are indisputably true.

contract to arm the Afghan security forces so that they could fight the Taliban as part of the United States' War on Terror (the "Afghan Contract"). *Id.* ¶5-6. The single largest component of this order was a provision requiring 100-million rounds of AK-47 ammunition. *Id.* ¶7. AEY was able to source this ammunition from a Swiss middleman, Heinrich Thomet, who was able to obtain the whole order from surplus stockpiles in Albania and offer an extremely competitive price. *Id.* ¶8. Based in large part on its exclusive opportunity to buy Albanian ammunition cheaply, AEY beat out much more established competitors and won the Afghan Contract. *Id.* ¶6.

Packouz set to work trying to handle the logistics of the various components of the Afghan Contract, including how to transport 100-million rounds of ammunition scattered around Soviet-era bunkers in Albania to U.S. Army bases in Afghanistan. *Id.* ¶7. Quickly realizing that he needed someone on the ground in Albania, he enlisted his childhood friend Alex Podrizki ("Podrizki"), who had some international experience from time spent in France working for the French military. *Id.* ¶10. While Packouz stayed in Miami to handle the global logistics, Podrizki travelled to Tirana, the Albanian capital, in May 2007. *Id.* ¶11.

In Tirana, Podrizki met Ylli Pinari, the head of MEICO – a state-owned company created by the Albanian government to dispose of the immense stockpiles of weapons left over from the Cold War. *Id.* ¶11-12. AEY was set to purchase AK-47 ammunition from MEICO on the following terms: a Cyprus shell company run by

Swiss middleman Thomet would buy the ammunition from MEICO and then sell it to AEY. *Id.* ¶7-9. Unbeknownst to AEY, Thomet bought ammunition from MEICO for about half the price at which he resold it to AEY. *Id.* ¶7-9, 15. It was understood that Thomet used the difference in price to bribe Albanian officials like Pinari, which is not uncommon in the world of arms dealing. *Id.* ¶16.

In his role as Logistics Coordinator, Podrizki started inspecting the Albanian ammunition to ensure that it was serviceable (*i.e.*, would fire correctly). *Id.* ¶12. Although the ammunition was very old, it seemed to work properly when Podrizki tested it. *Id.* However, Podrizki discovered Chinese markings on the crates and metal cans in which the ammunition was packed. *Id.* ¶13. This posed a problem for AEY since there was a long-standing embargo barring American companies from selling Chinese made ammunition. *Id.* AEY confirmed with the U.S. Government that it could not ship Chinese ammunition under the Afghan Contract. *Id.*

Diveroli and Packouz decided to ship the ammunition anyway and worked to conceal the Chinese marking through repacking. In order to accomplish the considerable work of repacking 100 million rounds of ammunition, Podrizki engaged local Albanian businessman Kosta Trebicka, who agreed to provide enough boxes and labor to handle the job. *Id.* ¶13-14.

Soon after the repackaging project began, Trebicka discovered that Thomet was marking up the price of the ammunition he was purchasing from

MEICO and told Diveroli. *Id.* ¶15. Feeling cheated, Diveroli travelled to Albania personally in late May 2007 to meet with Pinari and renegotiate the price (preferably in a way that would remove Thomet from the deal). *Id.* ¶17. Soon after he arrived, Diveroli and Podrizki met Pinari at his office in the Albanian Ministry of Defense. *Id.* ¶18. Diveroli tried to renegotiate the price using documents forged by Packouz to make it look like AEY had cheaper offers elsewhere, but Pinari recognized that the documents were fake. *Id.* After the meeting reached an impasse, Pinari suggested that they meet with someone else to discuss the price. *Id.* ¶19.

After travelling to another office in a half-constructed building, Pinari introduced Diveroli and Podrizki to a thuggish-looking man named Mihail Delijorgji. *Id.* Delijorgji offered to give Diveroli a discount on the price of the ammunition in return for cutting Trebicka out of the repackaging deal and paying Delijorgji's company to do the job instead. *Id.* ¶20. Also present in the meeting was a young man, who looked to be in his mid-20s (like Podrizki). *Id.* ¶21. The young man was not introduced and did not say anything. *Id.* ¶22. After the meeting ended, Podrizki and Diveroli felt like they had just met with dangerous individuals, associated with an Albanian mafia. *Id.* ¶101.

The next day, Podrizki met Diveroli and Trebicka at the hotel where Diveroli was staying. *Id.* ¶22. Diveroli and Trebicka told Podrizki that the unidentified man at the meeting was plaintiff Shkelzen Berisha, the son of the Albanian prime minister – with Diveroli

indicating that he had learned this from Pinari and Trebicka indicating that he had learned it from a source in the Albanian government. *Id.* ¶23. Although Podrizki stayed in Albania to supervise the ammunition deliveries, Diveroli left Albania soon after, having decided to cut Trebicka out of the repackaging deal in order to get a discount on the Albanian ammunition. *Id.* ¶24. Delijorgji took over the repackaging project soon thereafter. *Id.*

Angered by the sudden reversal in fortune, Trebicka started to look for ways to expose the kickbacks he believed were going to Albanian officials as part of the AEY deal. *Id.* ¶25. He began speaking with reporters from Albanian publications and the *New York Times*. *Id.* In an effort to incriminate Diveroli and create a record of his corruption, Trebicka recorded one of their phone calls. *Id.* ¶26. In that call, Diveroli told Trebicka to bribe Pinari with $20,000, but he lamented that his hands were tied with regard to the repackaging deal because the corruption "went up higher, to the prime minister, and his son," adding "this Mafia is too strong for me." *Id.* ¶27.

Meanwhile, federal agents were investigating AEY over its shipments of Chinese ammunition. *Id.* ¶28. On August 23, 2007, they raided AEY's offices. *Id.* By that time, Packouz had left AEY – after falling out with Diveroli – but Podrizki was still in Albania and had managed to deliver more than 30 million rounds of repacked ammunition to Afghanistan. *Id.* ¶101. Packouz found out about the raid and relayed the information to Podrizki. *Id.* Podrizki called AEY and one

of its employees lied to him in an attempt to conceal the truth about the raid. *Id.* Fearing that he was being set up, Podrizki decided to leave Albania via a boat to Italy. *Id.* ¶28. On the boat ride, Podrizki dropped his company laptop into the Adriatic for fear that Diveroli had planted something incriminating on it (although he saved all of his correspondence to hand over to investigators). *Id.* ¶28.

Packouz and Podrizki cooperated fully with investigators in the hopes of avoiding an indictment. *Id.* ¶28-29. However, in March 2008, the *New York Times* published a lengthy front page article about AEY, reporting that it was involved in a kickback scheme to pay off Albanian officials, including Pinari and Minister of Defense Fatmir Mediu (the "NYT Article"). *Id.* ¶3234. In reporting on the corruption involved in AEY's deal, the *Times* quoted Diveroli's recorded statement to Trebicka that "it went up higher to the prime minister and his son," suggesting that Plaintiff was part of a "mafia." *Id.* ¶35. The NYT Article also reported that a terrible explosion had occurred days earlier, killing 26 people in a small Albanian town called Gerdec, where munitions previously owned by MEICO were being dismantled ("Gerdec").[3] *Id.* ¶30. Gerdec was an enormous scandal in Albania. *Id.* Pinari and Delijorgji were eventually jailed for their involvement in the events that led to Gerdec. *Id.* ¶31. Mediu evaded

[3] Although AEY was not directly involved in Gerdec, the two scandals were linked in numerous reports because the people and entities involved overlapped (*i.e.*, MEICO, Pinari, Delijorgji, Defense Minister Mediu and Plaintiff).

justice by hiding behind parliamentary immunity. *Id.* ¶32. Despite compelling evidence that Plaintiff was involved – including phone records indicating that he spoke with Delijorgi and Mediu on the day of the blast – Plaintiff was never even questioned as part of the investigation. *Id.* ¶30-33.

Back in the United States, the NYT Article created a backlash against AEY. *Id.* ¶42. Packouz and Podrizki were indicted on multiple fraud counts, together with Diveroli. *Id.* Ultimately, Packouz, Podrizki and Diveroli pleaded guilty to defrauding the U.S. Government. *Id.* ¶43. Packouz and Podrizki received house arrest, while Diveroli was sentenced to four years in prison. *Id.* ¶44.

B. The Book and the Complaint

The Book at issue in this defamation action grew out of a March 16, 2011 feature article that Lawson wrote about AEY for *Rolling Stone* magazine, entitled *Aims & The Dudes: How Two Stoner Kids from Miami Beach Became Big-Time Arms Dealers* (the "RS Article"). *Id.* ¶45-48. Like the NYT Article, the RS Article reported that the AEY deal was structured to pay Albanian officials kickbacks and quoted the recorded tape of Diveroli saying that the corruption went "all the way to the prime minister and his son." *Id.* ¶49. Lawson also reported that the "repackaging job" was transferred to "a friend of the prime minister's son, Mihail Delijorgji." *Id.* ¶50. In order to write the RS Article, Lawson contacted and began collaborating with Packouz, who provided documentation and gave

interviews to supplement the court files and news reports that were publicly available (such as the recording of Diveroli). *Id.* ¶47. The RS Article was a huge success due to the incredible story it told about how 20-something pot smoking "dudes," Diveroli, Packouz and Podrizki, had become international arms dealers. *Id.* ¶51. Lawson sold the movie rights to the article to Warner Bros. – which turned it into the major motion picture *War Dogs* – and, on June 28, 2011, he entered into a publishing agreement with S&S to turn the RS Article into a book. *Id.* ¶57. Recorded Books licensed the right to record the audio version of the Book. *Id.* ¶61. No legal challenge, by Plaintiff or anyone else, arose out of the RS Article; nor was there any correction or retraction, despite its reporting that Plaintiff engaged in corrupt arms dealing and had "mafia" ties. *Id.* ¶52. The RS Article remains available to this day.[4] *Id.* ¶53.

Consistent with its standard procedures, S&S did not fact check the Book (as per standard industry practice) and instead relied upon Lawson's considerable journalistic reputation and his contractual warranties to ensure the Book's accuracy. *Id.* ¶59. In the four years he spent painstakingly researching the Book, Lawson

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[4] [redacted]

SOF ¶54. *See Dixon v. Bie ue*, No. 04-80827-CIV, 2005 WL 8156143, at 4 S.D. F a. Oct. 18, 2005), *red sub nom. Dixon v. Bradshaw*, 212 F. App'x 941 (11th Cir. 2007) ("In identifying genuine issues of material fact, the 'unsupported, self-serving statements of the party opposing summary judgment are insufficient to avoid summary judgment.' ").

reviewed tens of thousands of pages of documentary evidence and interviewed scores of people. *Id.* ¶62. As set forth in greater detail below (*see infra* Sections II(B)-(C)), Lawson read and compiled a wealth of news reporting and interview testimony concerning corrupt arms dealing in Albania, including many articles published in reliable publications reporting that Plaintiff was involved in the corruption. SOF ¶62. Lawson also entered into life-rights agreements with Packouz and Podrizki – which are common in the book publishing world – and in return for payment, Packouz and Podrizki provided Lawson with documents, interviews, and the benefit of their firsthand experience working for AEY. *Id.* ¶63. In June 2015, S&S published the hardcover edition of the book and published a paperback version in July 2016, retitled *War Dogs*, to tie in with the movie. *Id.* ¶71.

In the nearly five years it took Lawson to write the Book, Plaintiff never communicated with Defendants regarding the accuracy of his portrayal in Lawson's 2011 RS Article. *Id.* ¶74. On June 8, 2017 – almost two years after S&S published the work and mere days before the statute of limitations expired – Plaintiff filed this defamation action against Defendants. Plaintiff challenges the handful of statements about him in the Book, which amounts to approximately two paragraphs out of 244 pages. Specifically, Plaintiff's Complaint identifies four statements in the Book that refer to him:

a. On page 150, the Book reports that "Diveroli had agreed to cut Trebicka out

of the repacking job, which was now being done by a company called AlbDemil, an entity seemingly controlled by the prime minister's son and Mihail Delijorgji;"

b. In the Photograph section of the Book, a photo of Plaintiff appears with the caption: "Also involved, the dudes discovered, was the prime minister's son, Shkelzen Berisha;"

c. On page 160, the Book quotes the recorded conversation between Diveroli and Trebicka that was featured in the 2008 NYT Article, in which Diveroli said, "The more it went up higher, to the prime minister, to his son—this Mafia is too strong for me . . . I can't fight this Mafia. It got too big. The animals got too out of control;" and

d. On pages 139-40, the Book describes the 2007 meeting in Tirana between Podrizki, Packouz, Pinari, Delijorgji, and "a young man around their age sitting in the corner. Dressed in a baseball cap and a sweater, he had dark hair, a soft chin, and sharklike eyes. He wasn't introduced. This was Shkelzen Berisha, the son of the prime minister of Albania, they would later be told by Pinari. Shkelzen was part of what was known in Albania as 'the family,' the tight-knit and extremely dangerous group that surrounded and lived at the beneficence of the prime minister, Sali Berisha. . . . Delijorgji said that if

> Diveroli wanted a discount he would have to change the arrangements for the repacking operation at the airport . . . The son of the prime minister remained silent" (the "Tirana Meeting").[5]

Compl. ¶¶87, 99-106 (the "Statements"). Virtually everything in the Statements – and most certainly the defamatory "sting" of each Statement – was previously reported by reliable news organizations, like the *New York Times*, over the course of a decade.

C. Prior Reporting on Plaintiff's Involvement in Corrupt Arms Dealing and Dangerous Mafia Activity

As Plaintiff has conceded in his Complaint and at his deposition, the alleged defamatory gist of the Statements is that Plaintiff received "illegal kickbacks in connection with illicit arms dealings" and was "part of an extremely dangerous group" (or "mafia"). Compl. ¶¶ 99-106. But beginning in 2008 with the *New York Times*, many news organizations and reliable sources have reported precisely this information. SOF ¶¶34,

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[5] The Complaint also challenges two general references to "Albanian mobsters" or "an Albanian Mafioso" that appear in the Author's Note and Chapter One, but neither of those two references refer to Plaintiff and are instead intended to refer to Delijorgji. Compl. ¶¶ 101-102. Plaintiff also challenges two statements made to the media by Lawson concerning the Book, but one refers to the "prime minister of Albania," not Plaintiff, and the other repeats the same gist as the Statements in the Book: Plaintiff was implicated in the corruption surrounding the AEY arms deal. Compl. ¶¶ 107-108.

40, 96. After the original NYT Article broke the story of AEY, several months later, the *Times* again quoted the recorded statements made by Diveroli about Plaintiff in an article reporting on whistleblower Trebicka's highly suspicious car accident just as the investigation into Gerdec intensified. *Id.* ¶83. The clear implication was that Plaintiff and his family were suspects in Trebicka's mysterious death. *Id.* ¶83-84. In 2010, a respected Albanian journalist, Ilva Tare, released a news report on the Gerdec explosion, which presented damning evidence that Plaintiff was involved in the corrupt arms deal and the backroom dealing that precipitated Gerdec. *Id.* ¶88-89. The unmistakable conclusion of the newscast was that Plaintiff should have been prosecuted as a result of his conduct but was the beneficiary of a cover-up. *Id.* Then, as the Albanian investigation intensified – with accusations against Plaintiff made in the Albanian Parliament – leaked State Department cables written by the U.S. Ambassador revealed that the former head of the Albanian Army had come to the Embassy in fear for his life after Plaintiff had personally pressured him to deliver heavy munitions to Gerdec. *Id.* ¶92. As his declaration fully documents, Lawson relied on numerous additional news reports, books, and interviews with sources concerning Plaintiff's association with the arms deals, including Podrizki, who positively identified Plaintiff from a photograph as the unnamed man at the Tirana Meeting. *Id.* ¶101. Over the course of nearly a decade, Plaintiff failed to sue any of the news organizations or individuals that published these reports on his corruption. *Id.* ¶91, 95. Moreover, none of these reports have

been corrected or retracted in response to a claim or threat of legal action from Plaintiff. *Id.* ¶¶ 39, 52, 98, 91, 95.

For the reasons set forth below, Plaintiff cannot establish actual malice given the evidence that Defendants relied on the unchallenged prior reporting that Plaintiff was involved in corrupt arms dealing and consorted with members of a dangerous "mafia." Since Plaintiff cannot establish an essential element of his defamation claims, this action should be dismissed.

STANDARD OF REVIEW

A court "shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). "A party seeking summary judgment" must show an "absence of a genuine issue of material fact." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). "Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). "A mere 'scintilla' of evidence supporting the opposing party's position will not suffice; there must be enough of a showing that the jury could reasonably find for that party." *Brooks v. Cly. Comm'n of Jefferson Cly.*, 446 F.3d 1160, 1162 (11th Cir. 2006) (citation omitted). Ultimately, "when a claimant fails to produce 'anything more than a repetition of [her] conclusory allegations,' summary judgment for the

movant is 'not only proper but required.' *Santillana v. Fla. State Court Sys.*, No. 6:09-CV-2095, 2011 WL 722765, at *14 (M.D. Fla. Feb. 23, 2011) (quoting *Morris v. Ross*, 663 F.2d 1032, 1034 (11th Cir. 1981)), *aff'd*, 450 F. App'x 840 (11th Cir. 2012).

As the Eleventh Circuit has recognized, summary dismissal of defamation cases is particularly appropriate because "there is a powerful interest in ensuring that free speech is not unduly burdened by the necessity of defending against expensive yet groundless litigation." *Michel v. NYP Holdings*, 816 F.3d 686, 702 (11th Cir. 2016) (holding that *Iqbal/Twombly* plausibility pleading standard must be satisfied to properly allege actual malice). In other words, "because of the importance of free speech, summary judgment is the 'rule,' and not the exception, in defamation cases." *Guitar v. Westinghouse Elec. Corp.*, 396 F. Supp. 1042, 1053 (S.D.N.Y. 1975) (citing *Bon Air Hotel, Inc. v. Time, Inc.*, 426 F.2d 858 (5th Cir. 1970)), *aff'd*, 538 F.2d 309 (2d Cir. 1976); *see also Trapp v. Southeastern Newspapers*, No. CV182-251, 1984 U.S. Dist. LEXIS 24906, at *19 (S.D. Ga. June 7, 1984) ("in the First Amendment area, summary procedures are . . . even more essential [than in other areas of civil litigation]" (citing *Washington Post v. Keogh*, 365 F.2d 965, 968 (D.C. Cir. 1966)).

Under Florida law, a party alleging defamation ultimately bears the burden of proving: (1) publication of a statement to a third party; (2) falsity; (3) actual malice for public figures; (4) actual damages; and (5) that the statement was defamatory. *Turner v. Wells*, 879 F.3d 1254, 1262 (11th Cir. 2018) (citing *Jews For Jesus,*

Inc. v. Rapp, 997 So. 2d 1098, 1106 (Fla. 2008)). Where, as here, the plaintiff is a public figure, falsity does not suffice; he must also demonstrate by clear and convincing evidence that each defendant acted with "actual malice," *i.e.*, that each entertained serious doubts as to the truth of the publication or was highly aware that the published statement was false. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 334-35, 342 (1974); *see also Michel*, 816 F.3d at 702-03 (citing *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968)).

For the reasons set forth below, Plaintiff has not and cannot establish that any Defendant acted with actual malice. Therefore, this Court should grant summary judgment.

ARGUMENT: PLAINTIFF'S DEFAMATION ACTION SHOULD BE DISMISSED BECAUSE THERE IS NO EVIDENCE DEMONSTRATING ACTUAL MALICE

This defamation action should be dismissed because the evidence conclusively demonstrates the absence of actual malice, which Plaintiff is required to prove by clear and convincing evidence in order to satisfy the strict requirements of the First Amendment.

The First Amendment protects freedom of speech by imposing a heavy burden on public figures, like Plaintiff, who file defamation claims. In addition to proving that the statements at issue are false and defamatory, public figures "must prove that the defendant acted with actual malice to establish liability."

Silvester v. American Broad. Cos., 839 F.2d 1491, 1493 (11th Cir. 1988) (citing *N.Y. Times Co. v. Sullivan*, 376 U.S. 254 (1964)). In his seminal opinion deciding *Sullivan*, Justice Brennan explained that the purpose of the actual malice requirement reflects our "profound national commitment to the principle that debate on public issues should be uninhibited, robust and wide-open." *N.Y. Times*, 376 U.S. at 270. In other words, the First Amendment secures the "breathing space" that journalists, publishers and sources all require to critique powerful individuals, particularly in cases such as this where Plaintiff seeks to silence and suppress Defendants' well-founded reporting that he was involved in corrupt arms dealing and "mafia" activity. *Id.* at 272.

"The standard of actual malice is a daunting one." *Howard v. Antilla*, 294 F.3d 244, 252 (1st Cir. 2002) (quoting *McFarland v. Esquire Magazine*, 74 F.3d 1296, 1308 (D.C. Cir. 1996)). In order to establish that Defendants "acted with actual malice by publishing defamatory material," Plaintiff "must show that [Defendants] acted with knowledge that it was false or with reckless disregard of whether it was false or not." *Silvester*, 839 F.2d at 1498 (internal quotation marks omitted). This is a strictly subjective analysis focused solely on the defendant's actual state of mind "at the time of publication." *Bose Corp. v. Consumer Union of U.S., Inc.*, 466 U.S. 485, 512 (1984). Establishing "knowledge of falsity is self-explanatory" and requires proof that the defendant was *actually* aware that the statement in suit was false at the time it was

published. *Id.* Reckless disregard for the truth is determined by a different "subjective test, focusing on whether the defendant 'actually entertained serious doubts as to the veracity of the published account, or was highly aware that the account was probably false.'" *Turner*, 879 F.3d at 1273 (quoting *Michel*, 816 F.3d at 702-03).

"Negligence is not the appropriate standard for proving actual malice." *Meisler v. Gannett Co.*, 12 F.3d 1026, 1030 (11th Cir. 1994). Actual malice is thus not an objective test of whether a publisher acted reasonably with the benefit of hindsight, but instead requires a subjective inquiry into the publisher's knowledge at the time of publication:

> [R]eckless conduct is not measured by whether a reasonably prudent man would have published, or would have investigated before publishing. There must be sufficient evidence to permit the conclusion that defendant *in fact* entertained serious doubts as to the truth of his publication.

St. Amant, 390 U.S. at 731 (emphasis added). For journalists and publishers, even an "extreme departure from professional standards" does not rise to the level of actual malice. *Harte-Hanks Commc'ns, Inc. v. Connaughton*, 491 U.S. 657, 665 (1989). *See also Durando v. Nutley Sun*, 37 A.3d 449, 459 (N.J. 2012) ("[T]he actual-malice test will shield careless acts of publication that would be considered irresponsible by common journalistic standards.").

As an additional safeguard for publishers, the First Amendment requires defamation plaintiffs "to prove actual malice by clear and convincing evidence." *Levan v. Capital Cities/ABC, Inc.*, 190 F.3d 1230, 1239 (11th Cir. 1999) (citing *Gertz*, 418 U.S. at 342). This standard of proof imposes "a heavy burden [on plaintiffs] far in excess of the preponderance sufficient for most civil litigation." *Eastwood v. National Enquirer, Inc.*, 123 F.3d 1249, 1252 (9th Cir. 1997) (citation omitted). Moreover, actual malice "must be proved separately with respect to each defendant, and cannot be imputed from one defendant to another absent an employer-employee relationship giving rise to *respondeat superior*." *Secord v. Cockburn*, 747 F. Supp. 779, 787 (D.D.C. 1990) (citation omitted).

Last, actual malice is a constitutional requirement that stands separate and apart from the requirement that a plaintiff must establish the falsity of the challenged statements. Per the Eleventh Circuit, "[t]he mere existence of a false statement does not, on its own, demonstrate . . . knowledge of its falsity." *Tobinick v. Novella*, 848 F.3d 945, 946 (11th Cir.) ("*Tobinick II*), *cert denied*, 138 S. Ct. 449 (2017). *See also Secord*, 747 F. Supp. at 792 ("To argue that evidence of actual malice exists by the mere fact that subsequent events determine the falsity of a source or statement would be tantamount to conflating the actual malice and falsity elements of a libel action."). Put another way, Plaintiff is required to establish actual malice by clear and convincing evidence regardless of whether he can eventually prove that any (or all) of the Statements are

false.[6] Accordingly, courts routinely award summary judgment against defamation plaintiffs for failure to show actual malice, even after assuming for purposes of the motion that the statements at issue are false. *See*, *e.g.*, *Meisler*, 12 F.3d at 1029-30 (assuming *arguendo* that challenged article "includes false statements" and granting summary judgment because "no reasonable jury could find actual malice by clear and convincing evidence on this record").

I. PLAINTIFF IS UNQUESTIONABLY A PUBLIC FIGURE SUBJECT TO THE ACTUAL MALICE STANDARD

In a brazen effort to evade the constitutional safeguards provided by the actual malice standard, Plaintiff asserts in his Complaint that he is the "quintessential private figure." Compl. ¶133. This statement is patently untrue: Plaintiff is a household name in Albania.[7] Not only does he enjoy prominence as the son of the former prime minister (who held that position during the

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[6] Plaintiff denies any involvement with arms dealing, and specifically denies that he was present at the Tirana Meeting. Solely for purpose of this Motion, Defendants will assume the Statements are false so as to avoid any questions of fact.

[7] *See Time, Inc. v. McLaney*, 406 F.2d 565 (5th Cir. 1969) (holding plaintiff was a public figure and actual malice applied where plaintiff injected himself into an election campaign in a small foreign country, actively participated in political activity in a foreign nation, contributed substantial material aid in a foreign nation, and lent direct influence to the national government for the country, rendering himself proper subject of inquiry and public interest).

times relevant to this action), but Plaintiff also became notorious in his own right for the role he played in the AEY and Gerdec corruption scandals that shook the nation, the very subject of the challenged Statements. *See* SOF ¶114. Given his public figure status, Plaintiff must come forward with evidence sufficient to prove actual malice in order to survive summary judgment.

"The test for determining liability in a defamation case turns on whether the libeled party is a public or private figure and on whether the defamatory publication addresses a public or private concern. If the injured party is a public figure or official and the defamatory material involves issues of legitimate public concern, the plaintiff must prove that the defendant acted with actual malice to establish liability." *Silvester*, 839 F.2d at 1493. Courts must decide whether the plaintiff is a "general" or "limited" public figure. *Turner*, 879 F.3d at 1272. General public figures are "individuals who, by reason of fame or notoriety in a community, will in all cases be required to prove actual malice." *Id.* "Limited public figures, on the other hand, are individuals who have thrust themselves forward in a particular public controversy and are therefore required to prove actual malice only in regard to certain issues." *Id.* This Circuit applies a two-part test to determine limited purpose public figure status: "First, the court must determine whether the individual played a central role in the controversy. Second, it must determine whether the alleged defamation was germane to the individual's role in the controversy." *Id.* at 1273 (citing *Friedgood v. Peters Publ'g Co.*, 521 So.

2d. 236, 239 (Fla. 4th DCA 2006)). Under this test, it may be "possible for someone to become a public figure through no purposeful action of their own." *Friedgood*, 521 So. 2d at 239. "[P]ublic figure status 'is a question of law to be determined by the court.' " *Turner*, 879 F.3d at 1271 (citation omitted).

Plaintiff is, at the very least, a limited purpose public figure.[8] First, there is no serious dispute that the Statements in suit "involve[ ] issues of legitimate public concern" and are clearly "germane" to these issues of public concern. *Silvester*, 839 F.2d at 1493. Indeed, the challenged Statements all address quintessential issues of legitimate public concern: Plaintiff's involvement in corruption relating to AEY's U.S. Government contract to ship millions of dollars of Albanian ammunition to the Afghan army during a time of war, together with Plaintiff's association with "mafia" thugs associated with the deal. *See*, *e.g.*, *Silvester*, 839 F.2d at 1493 ("The public is legitimately interested in all matters of corruption . . . "); *Rosanova*, 580 F.2d at 861 (article describing plaintiff's "reported associations and activities concerning organized crime are, without dispute, subjects of legitimate public concern"). The widespread reporting on these very issues powerfully underscores that this topic is a subject of legitimate public concern – starting with the front page NYT

[8] As the son of the Prime Minister, and given Plaintiff's general notoriety in the Albanian community, with hundreds of news reports concerning him, Plaintiff should be a general purpose public figure. *See* SOF ¶¶114-121.

Article implicating Plaintiff in the corruption. SOF ¶34-35.

Next, the Court must determine "whether the individual played a central role in the controversy." Plaintiff easily clears this bar. Plaintiff found himself at the very heart of the AEY and Gerdec arms dealing scandals, which were heavily reported in the Albanian press, discussed in the Albanian Parliament, and reported on in the United States, including in the many publications relied on by Lawson. SOF ¶114. Indeed, Plaintiff's involvement in the corrupt arms deals was front page news in Albania. SOF ¶¶114-15. Likewise, Plaintiff's connection to an Albanian "mafia" was also reported twice by the *New York Times* in 2008, was re-reported in other articles and books published in the U.S., and was the subject of an in-depth newscast that concluded Plaintiff had escaped justice and was never investigated for his role in Gerdec. SOF ¶¶34, 46, 83, 96, 114, 115. Given this pervasive press documenting Plaintiff's arms dealing activities, it was not surprising that Lawson's sources had no doubt concluding that Plaintiff was involved in AEY and Gerdec. *See*, *e.g.*, SOF ¶41 (Albanian source testified that he believed widespread news reporting that MEICO was a "mafia-style company" that was "backed up by" Plaintiff). Plaintiff was so central to the "media circus" that ensued after the Gerdec explosion that the United States Ambassador to Albania felt compelled to write about Plaintiff's reported involvement in arms dealing in multiple confidential State Department cables. SOF ¶¶92-93. Simply put, Plaintiff cannot seriously dispute

his public figure status "given that [he] has been the subject of more than a decade of media coverage" on topics related to his involvement in corrupt arms dealing and mafia activity. *Deripaska v. Associated Press*, 282 F. Supp. 3d 133 (D.D.C. 2017).

Aside from playing a highly prominent role in a series of corruption scandals in Albania, Plaintiff is also a public figure because of his "prominence and access to media." *Friedgood*, 521 So. 2d at 240. Plaintiff acknowledges that he is the son of Sali Berisha, who was Albania's first President after the fall of Communism in the early 1990s and who served as the country's Prime Minister between 2005 and 2013. A person who, through his or her associations – often family relationships – plays a significant continuing role in public events may also find himself or herself classified as a public figure even though as a matter of personal choice he or she might well have chosen a private life instead. *See*, *e.g.*, *Meeropol v. Nizer*, 381 F. Supp. 29, 34 (S.D.N.Y. 1974) (holding that children of Julius and Ethel Rosenberg were public figures because, "[a]s children of [Ethel and Julius] Rosenberg[ ], the plaintiffs spent much of their early years in the public spotlight"), *aff'd*, 560 F.2d 1061 (2d Cir. 1977). Plaintiff clearly enjoyed prominence by virtue of being the son of the most powerful man in Albania and this prominence weighs heavily in favor of public figure status.[9]

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[9] *See Rosanova v. Playboy Enters.*, 411 F. Supp. 440 (S.D. Ga. 1976) (plaintiff's associations with organized crime figures made him a public figure), *aff'd*, 580 F.2d 859 (5th Cir. 1978); Robert D. Sack, 1 *Sack on Defamation*, § 5.3.11 at 5-72 (April 2018) ("The

Plaintiff's public figure status is further cemented by the fact that by the time the Book was published in 2015, Plaintiff "had long had ready access to the media." *Silvester*, 839 F.2d at 1498. *See also Turner*, 879 F.3d at 1273 (holding that plaintiff "inserted himself into the controversy even after it had made national news" when he "took advantage of his familiarity with the media by commissioning a response to [an allegedly defamatory] Report"). Here, Plaintiff admits that he had direct access to the media, and testified that he has a [redacted] SOF ¶118-19. Plaintiff even uses Facebook to disseminate his thoughts through the media. SOF ¶120.[10] Indeed, unbeknownst to Lawson, Plaintiff injected himself into the allegations concerning his connection to the AEY deal and issued a statement that certain Albanian news outlets published. SOF ¶118. In sum, because Plaintiff " 'had ready access to the media,' [he] had easily acquired limited public figure status at the time of the" Book's publication. *Colodny v. Iverson, Yoakum, Papiano & Hatch*, 936 F. Supp. 917, 922 (M.D. Fla. 1996) (citation omitted).

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spouse or child of a U.S. president is properly classified as a public figure.").

[10] Tellingly, the Albanian media frequently publishes Plaintiff's Facebook posts, even on topics as mundane as the Kosovar soccer team joining the European Football Association. SOF ¶118-120. Similarly, Plaintiff's heavily publicized relationship with an Albanian social media personality – which is breathlessly followed by the Albanian press – is yet more evidence of Plaintiff's unrestricted access to the media. SOF ¶121.

Perhaps most telling is Plaintiff's admission that he has sued the Albanian media for libel no less than ten times in the last seven years based on news reporting concerning him on topics such as Plaintiff's alleged obstruction of an energy project, his mismanagement of the Albanian National Lottery, his failure to pay taxes, *etc.*, but notably not a single suit challenged the widespread news reports connecting him to corrupt arms dealing. SOF ¶116. And Plaintiff admits that the only reason he did not bring actions before 2011, despite highly critical coverage of him, [redacted] SOF ¶116-118. Plainly, Plaintiff is a central subject of Albanian news coverage and he employs the levers of power to rebut and respond to charges, using the Albanian – and now the U.S. – court system.[11]

In sum, since Plaintiff is a public figure and the Book's reporting on his involvement in corrupt arms dealing and dangerous mafia activity is a matter of

[11] Indeed, unbeknownst to Lawson prior to the Book's publication, Plaintiff procured and apparently sought to publicize a (highly suspicious) affidavit from Trebicka that supposedly attests to Plaintiff's lack of involvement in the AEY deal. SOF ¶118. Yet, Plaintiff's attempt to leverage press on this topic suffices in and of itself to establish his public figure status. As the Eleventh Circuit recently held, a plaintiff becomes a public figure by "pushing" a source "to make a statement to the press defending" the plaintiff against negative publicity, which is exactly what Plaintiff has admitted doing here. *Turner*, 879 F.3d at 1273.

legitimate public concern, Plaintiff must prove actual malice by clear and convincing evidence.[12]

II. DEFENDANTS DID NOT ACT WITH ACTUAL MALICE BECAUSE THEY WERE ENTITLED TO RELY ON THE MANY RELIABLE NEWS REPORTS AND SOURCES STATING THAT PLAINTIFF WAS INVOLVED IN CORRUPT ARMS DEALING AND MAFIA ACTIVITY

The analysis should begin and end with the undisputed evidence showing that the defamatory "gist" of the Statements at issue was widely reported well before the publication of the Book and that such reports were reasonably relied upon by each Defendant. In short, Plaintiff's defamation claims fail, and he cannot establish actual malice, based on a decades-old fundamental principle: "[t]he subjective awareness of probable falsity required . . . cannot be found where, as here,

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[12] Plaintiff will no doubt argue that he did nothing to voluntarily inject himself into the AEY or Gerdec arms deals, but it is well established that one can "become a public figure through no purposeful action of their own." *Turner*, 879 F.3d at 1273 (quoting *Friedgood*, 521 So. 2d at 239) (plaintiff was witness in her father's murder trial); *see also Street v. National Broad. Co.*, 645 F.2d 1227, 1234 (6th Cir. 1981) (holding that rape victim, even if she had done nothing to inject herself into the initial controversy, was a public figure because the resulting trials of the Scottsboro Nine "generated widespread press and attracted public attention for several years"); *Rosanova*, 580 F.2d at 861 ("Comment upon people and activities of legitimate public concern often illuminates that which yearns for shadow. It is no answer to the assertion that one is a public figure to say, truthfully, that one doesn't choose to be.").

the publisher's allegations are supported by a multitude of prior reports upon which the publisher reasonably relied." *Rosanova*, 580 F.2d at 862. In order to reach this inevitable conclusion, the actual malice analysis requires two steps: (i) determining the "gist" of the Statements and (ii) establishing whether Defendants actually harbored serious doubts that the gist of the Statements was false at the time the Book was published.

A. The Defamatory Gist and Sting of the Statements is that Plaintiff Was Involved in Corrupt Arms Dealing and Was Associated with a Dangerous Mafia

The first step in the actual malice analysis is "to determine the gist or sting of the report." *Levan*, 190 F.3d at 1240 (footnote omitted). As the Eleventh Circuit explained, courts "must determine what the report, taken as a whole, is actually alleging about [plaintiff], and then determine if [defendant] broadcast that meaning with actual malice." *Id.* at 1240 n.28. In determining the "gist," the Court looks to "the effect on the mind of the reader" of the allegedly defamatory statements and, using "that meaning" as a starting point, *id.*, determines whether the defendant in fact "'entertained serious doubts' that the underlying thrust of the [statement] was true." *Id.* at 1240-41. Unlike other elements of a defamation claim that might require "factual findings, ascertaining the gist [for the purposes of actual malice] does not depend on resolving credibility issues, which are better left to the

factfinder." *Id.* at 1240 n.30. Therefore, it is the Court's role to determine the gist of the Statements before determining whether Defendants acted with actual malice by publishing those Statements.

Here, the undisputed "gist" of the challenged Statements is that Plaintiff was involved in corrupt arms dealing and was associated with a dangerous Albanian "mafia." Plaintiff concedes this conclusion. Compl. ¶ 99 (challenged statements imply Plaintiff received "illegal kickbacks in connection with illicit arms dealings" and was "part of an extremely dangerous group" or "mafia"). In particular, at his deposition, [redacted]

In sum, the defamatory gist and sting of the Statements, by Plaintiff's own admission, is that they implicated Plaintiff in a corrupt arms deal and associated him with a dangerous mafia. Thus, in order to establish actual malice, Plaintiff must come forward with clear and convincing evidence showing that Defendants "entertained serious doubts [about the] thrust" of the Book's reporting on Plaintiff's corruption and mafia involvement. *Levan*, 190 F.3d at 1241.

B. There Can Be No Actual Malice Because Defendants Were All Aware of Reliable Prior Reports that Plaintiff Was Involved in Corrupt Arms Dealing and Was Associated with a Dangerous Mafia

The absence of actual malice in this case is conclusively established by the fact that all the Defendants were aware at the time of the Book's publication of reliable news articles that confirmed Plaintiff's involvement in corrupt arms dealing and his relationship with a dangerous mafia.

Time and again, courts have dismissed defamation claims at the summary judgment stage because "good faith reliance on previously published reports in reputable sources . . . precludes a finding of actual malice as a matter of law." *Liberty Lobby v. Dow Jones & Co.*, 838 F.2d 1287, 1297 (D.C. Cir. 1988). Here, Defendants reasonably relied on one or more previously published news reports that Plaintiff was involved in corrupt arms dealing and consorted with dangerous thugs – including *New York Times* articles and other news reports in the U.S. and Albania, two books, and a damning investigative newscast. This undisputed fact precludes a finding of actual malice against any of the Defendants.

The Eleventh Circuit recently reaffirmed the basic principle that a publisher's reliance on "trustworthy sources demonstrates his lack of subjective belief that the [allegedly defamatory] articles [in suit] contained false statements." *Tobinick II*, 848 F.3d at 947. In that

case, defendant Novella was a doctor who published articles on a blog that examined "issues related to science and medicine." *Id.* at 940. Novella published two articles suggesting that plaintiff operated "quack clinics" and was "committing a health fraud." *Id.* at 940-41. A key source relied on by Novella was a previously published article in the *Los Angeles Times*, which reported that the claims plaintiff made about his back treatment "led to an investigation by the California Medical Board, which placed him on probation for unprofessional conduct and made him take classes in prescribing practices and ethics." *Id.* at 940.

Tobinick brought defamation claims against Novella in the Southern District of Florida, which the lower court dismissed under California's anti-SLAPP law for failure to establish a likelihood of demonstrating actual malice. *Tobinick v. Novella*, 108 F. Supp. 3d 1299 (S.D. Fla. 2015) ("*Tobinick I*"), *aff'd*, 848 F.3d 935 (11th Cir. 2017). The lower court held that Novella could not have acted with actual malice when he relied on "the *Los Angeles Times* for some points in the articles, feeling that extensive fact-checking of the *Times*, which is a reputable source, was not necessary." *Id.* at 1310. The Eleventh Circuit affirmed and held that there was no actual malice because "Dr. Novella consulted the Los Angeles Times article, many of Dr. Tobinick's case studies, the [Medical Board's] accusations and the Tobinick Appellants' own websites." *Tobinick II*, 848 F.3d at 947. As the Eleventh Circuit explained, "the evidence of Dr. Novella's investigation, in which he looked to trustworthy sources, demonstrates his lack

of subjective belief that the articles contained false statements." *Id.*

Countless decisions of the Eleventh Circuit and other courts have likewise held that there is no actual malice where the statements in suit were based upon reliable news reports. For instance, the Eleventh Circuit affirmed a judgment against a libel plaintiff for lack of actual malice where journalists relied on "other news media who were investigating" the same subject as the allegedly defamatory broadcast in suit and "came up with much of the same allegations and support, which serves to corroborate defendants' findings." *Silvester*, 839 F.2d at 1498. In another case, the Eleventh Judicial Circuit in Florida held that there was no actual malice when journalists relied on prior coverage of plaintiff in foreign media because "[t]he Peruvian media is a reliable source of the information that was broadcast." *Salazar v. Telemundo Network Grp., LLC*, No. 03-15272 CA 23, 2006 WL 1650723, at *3 (Fla. Cir. Ct. May 30, 2006). *See also Friedgood*, 521 So. 2d at 242 (holding that there was no actual malice when the allegedly defamatory statements "were hardly more than a restatement of the news reports" previously published about plaintiff); *Meisler*, 12 F.3d at 1030 (no actual malice where reporter relied in good faith on factually incorrect Associated Press wire item).

In yet another analogous case, a court granted summary judgment against a libel plaintiff because the defendant reporter had exhibited 'good faith reliance on previously published sources' as to the matters at issue." *Secord*, 747 F. Supp. at 792 (citation omitted).

As the D.C. Circuit made clear, the journalist in *Secord* was entitled to rely on previously published nonfiction books as well as news articles from the *New York Times, Miami Herald* and the *Christian Science Monitor* as the basis for her reporting that the plaintiff, a retired Major General in the U.S. Army, was "a member of a 'secret team' which had engaged in illegal drug trafficking, torture, murder and attempted assassination as part of its conspiracy to overthrow the Sandinista government." *Id.* at 781.

The list of decisions dismissing libel claims when the defendant relied on earlier news reporting goes on and on. *See*, *e.g.*, *Liberty Lobby*, 838 F.2d at 1296-97 (no actual malice where author relied on an article in *The National Review*, a newsletter, and a handful of other publications); *Montgomery v. Risen*, 197 F. Supp. 3d 219, 260 (D.D.C. 2016) (no actual malice where publisher relied on "a plethora of other news articles, court documents, and government records, pre-dating the Chapter, which align with and corroborate the Chapter's general thrust"), *aff'd*, 875 F.3d 709 (D.C. Cir. 2017); *Ryan v. Brooks*, 634 F.2d 726, 732-33 (4th Cir. 1980) (no actual malice where book author relied on *New York Times* article and published interview); *Rosanova*, 580 F.2d at 861 (no actual malice where libel plaintiff "has been the subject of published newspaper and other media reports of his activities . . . concerning organized crime").

Here, the evidence establishes that each Defendant relied on reliable news articles about Plaintiff's involvement in corrupt arms dealing and association

with thugs or "mafia." For this basic reason, Plaintiff's defamation claims against every Defendant must be dismissed. Indeed, there is no dispute that each Defendant (save Recorded Books) was familiar with the NYT Article that first reported Diveroli's taped statement that the corruption and bribery involved in the AEY deal went "higher to the prime minister and his son" and that he could not "fight this mafia." The law is clear that reliance on a single, credible report – like the NYT Article – is sufficient by itself to prove the absence of actual malice. *See*, *e.g.*, *Fodor v. Berglas*, No. 95 Civ. 1153 (SAS), 1995 WL 505522, at *6 (S.D.N.Y. Aug. 24, 1995) (no actual malice where book author relied on single *New Yorker* article); *Associated Fin. Corp. v. Fin. Servs. Info. Co.*, No. CV-88-6636 SVW (Sx), 1989 U.S. Dist. LEXIS 16263, at *20-23 (C.D. Cal. July 27, 1989) (no actual malice where publisher relied on a single, twelve-year-old article in *Forbes*).

But the evidence shows that the NYT Article was only the *beginning* of Lawson's reporting. In 2009, the media floodgates opened after the Gerdec explosions when evidence emerged of Plaintiff's highly suspicious phone calls to Defense Minister Mediu and Delijorgji on the day of the tragedy. Lawson was aware of this reporting in Albania, reviewed the roundup of this news in the classified cables written by the U.S. Ambassador to Albania (which included an allegation that an official faced pressure by Plaintiff to deliver heavy ammunition to the Gerdec explosion site), and watched (and took notes on) the 2010 Ilva Tare newscast where it was reported that Plaintiff had been involved in the

corrupt AEY and Gerdec deals, but had managed to escape justice due to political corruption orchestrated by his father. SOF ¶88-84. Tare's report – which should be watched to appreciate its full impact – goes far beyond anything even alluded to in the Book and is highly incriminating of Plaintiff. *Id.* ¶¶30-33. At his deposition, even Plaintiff conceded that Tare's report was "damning" and "damaging." *Id.* ¶90. And that is not all: Lawson reviewed multiple additional reports of Plaintiff's corruption and involvement in the AEY/Gerdec deals – a second *New York Times* article, an article in *The New Republic*, two books published by reputable publishers, the Feinstein and Klosi books, and other publications. Of particular note, the Feinstein and Klosi books even reported that Plaintiff had attended a meeting with two of the key participants, Pinari and Delijorgji. *Id.* ¶100.

Lawson's good faith belief in this wealth of prior reporting was underscored by the fact that Plaintiff, by his own admission, failed to sue *any* of these publishers over these prior reports and did not obtain a single correction. *Id.* 91, 95. Indeed, all of these reports remain freely available today and yet Plaintiff has only challenged the Book, nearly a decade after the first NYT Article. In short, "the evidence of [Lawson's] investigation, in which he looked to trustworthy sources, demonstrates his lack of subjective belief that the [Book] contained false statements" concerning Plaintiff's involvement in corrupt arms dealing and dangerous mafia activity. *Tobinick II*, 848 F.3d at 947.

Much of this prior news reporting concerning Plaintiff's involvement in the AEY deal and his association with "mafia" necessarily informed Lawson's 2011 RS Article, which again reported that Plaintiff was implicated in the corrupt AEY deal, along with Diveroli's taped "mafia" statements concerning Plaintiff. There is no dispute that the RS Article was fact checked; no dispute that a correction or litigation never arose out of the RS Article, which remains available on *Rolling Stone's* website even today. Similarly, there is no dispute that *all* Defendants read the RS Article before the Book was published and *all* Defendants were aware of the article's reporting that Plaintiff was involved in the corrupt AEY deal. *See* SOF ¶¶46-56. The law and basic common sense dictates that there was no reason to doubt the accuracy of anything in the Book when, on Plaintiff's own admission, the gist of the challenged Statements is entirely consistent with what had been reported in the NYT Article, the RS Article, and the other sourcing and prior reports that informed Lawson's RS Article. *See supra* at 18. Defendants' reliance on these previously published reports from reputable publications "precludes a finding of actual malice as a matter of law." *Liberty Lobby*, 838 F.2d at 1297.

C. The Book's Depiction of the Tirana Meeting Does Not Support a Finding of Actual Malice

Plaintiff does not – because he cannot – challenge the existence of, or Defendants' reliance on, all the

previously published reports documenting his involvement with corrupt arms dealing or association with "mafia" or "thugs." Instead, Plaintiff wants this Court to focus exclusively on the sourcing for the Book's description of the Tirana Meeting, with Pinari and Delijorgji, where Diveroli attempted to reduce the price for the AEY deal. The Book reports that Diveroli and Podrizki later learned that the "silent" man who sat in the corner at the meeting was "the son of the Prime Minister." Book, p. 139-40. As the Book recounts the meeting, Plaintiff neither says nor does anything; his mere presence reflects that he had some association with the AEY deal and/or Pinari and Delijorgji. Indeed, as Plaintiff admits, the "gist" of the Book's reporting on the meeting was that Plaintiff was involved "in the AEY deal, possible corruption" and was associated "with a dangerous mafia." SOF ¶79. In other words, the description of the Tirana Meeting did not say anything new, or different, about Plaintiff than all the other reporting in all the other press that the Defendants were relying on.

Plaintiff's fixation on the evidence concerning this meeting – to the exclusion of everything else – ignores the fundamental principle that facts and events do not "occur in a vacuum but as part of a series of ongoing events." *Dunn v. Air Line Pilots Ass 'n*, 193 F.3d 1185, 1200 (11th Cir. 1999). Lawson's primary source for the "color" of this meeting – where it took place, what people wore, and what was said – is the firsthand account of Defendant Podrizki (who identified Plaintiff from a photograph as the person in the meeting). But what

made Podrizki's account of the meeting entirely credible is the fact that there was no doubt in anyone's mind that Plaintiff *was* involved in the AEY and Gerdec arms deals and *did* associate with seeming "thugs" like Delijorgji, as the reporting that preceded the Book established. Indeed, the Book was not even the first to report the fact of the meeting – two books were published in 2010 and 2012, respectively – and each reported that Plaintiff had attended at least one arms deal meeting with the key players in the AEY and Gerdec scandals, Pinari and Delijorgji. SOF ¶100. But even assuming that the meeting scene in the Book added fresh color to the story of Plaintiff's involvement in the AEY deal, any such new "color" does not add any new or different defamatory meaning to the gist of the Statements beyond what was widely reported well before the Book was published. In other words, assuming *arguendo* that Plaintiff can establish an issue of material fact as to whether Plaintiff actually attended the Tirana Meeting, he still cannot establish actual malice because the Eleventh Circuit has squarely held that errors in "isolated statements" such as this do not give rise to an inference that the author entertained serious doubts about the gist or sting of his or her reporting. *Tobinick II*, 848 F.3d at 946 ("[In an effort to establish actual malice, libel plaintiffs] point to isolated statements, which do not pertain to the article's essential criticism of Dr. Tobinick's medical practices, as evidence that Dr. Novella recklessly included falsities in the article. But, this evidence . . . does not [rise] to the

level of reckless disregard needed to prove actual malice.").[13]

In sum, actual malice is an exacting standard that Plaintiff cannot even begin to meet given the weight of reliable reporting on Plaintiff's involvement in corrupt arms dealing that Defendants reviewed and relied upon before publishing the first edition of the Book in 2015 and subsequent versions thereafter.

D. None of the Evidence Produced in this Action Is Remotely Capable of Establishing Actual Malice by Clear and Convincing Evidence

Since actual malice is precluded as a matter of law by Defendants' justifiable reliance on the prior reporting detailing Plaintiff's participation in corrupt arms dealing and his mafia affiliation, this disposes of Plaintiff's claim and this Court need go no further. Yet even if one independently assesses the random theories for actual malice put forth by Plaintiff concerning each Defendant, the evidence does not begin to support the clear and convincing evidence required for a finding of actual malice, despite having the benefit of the nearly 20,000 documents produced by Defendants, depositions and declarations from interested parties.

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[13] *See also Levan*, 190 F.3d at 1240 n.31 ("Whether or not these statements or images convey a false message to the viewer, however, does not alter the gist of the story, which was that the deals were grossly unfair – so much so that [the author] must have known they were unfair.").

i. There Is No Evidence Capable of Supporting a Finding of Actual Malice against Lawson

Despite the overwhelming evidence of prior reporting and solid sourcing connecting Plaintiff to the kickbacks paid as part of the AEY deal and dangerous mafia activity, Plaintiff nevertheless makes a misguided effort to establish actual malice by making a number of scattershot arguments attacking various aspects of Lawson's reporting process. None of these arguments are sufficient to establish actual malice by clear and convincing evidence.

First, Plaintiff faults Lawson for not seeking comment from Plaintiff before publishing the Book. *See* Compl. ¶ 110. But if the actual malice "caselaw is clear on any point it is that an author is under no duty to divulge the contents of a book prior to publication in order to provide the subject an opportunity to reply." *Secord*, 747 F. Supp. at 788. *See also D.A.R.E. Am. v. Rolling Stone Magazine*, 101 F. Supp. 2d 1270, 1284 n.3 (C.D. Cal. 2000) ("Plaintiffs' suggestion that Defendants' failure to contact [plaintiff] before publishing [the] article evidences actual malice is . . . legally misguided. Defendants were not required to contact the subjects of the article before publication."), *aff'd*, 270 F.3d 793 (9th Cir. 2001). Here, the evidence shows that Lawson was well aware that the *New York Times* had reached out to Prime Minister Berisha and his Defense Minister Mediu – but notably not Plaintiff – for comment before the NYT Article ran and received only threats in response. SOF ¶112. Relatedly, Plaintiff

has questioned why Lawson did not attempt to contact Mediu, Pinari, or Delijorgji before publishing the Book. But given the staggering amount of readily available sourcing demonstrating that Plaintiff was involved in corrupt arms dealing, Lawson "was not required to continue [his] investigation until [he] found *somebody* who would stand up for [Plaintiff]." *Levan*, 190 F.3d at 1243 (rejecting argument that failure to speak with source favorable to plaintiff constituted actual malice).

There is also no evidence that Lawson was aware of any statement issued by Plaintiff denying involvement in AEY arms dealing or other corruption. SOF ¶122. But even assuming *arguendo* that Lawson was aware of such a denial, there is still no grounds for finding actual malice. "A reporter is not required to accept denials of wrongdoing as conclusive" and a decision not to include "detailed refutations" in his or her reporting does not establish actual malice. *Silvester v. American Broad. Co.*, 650 F. Supp. 766, 780 (S.D. Fla. 1986), *aff'd*, 839 F.2d 1491, 1493 (11th Cir. 1988). It is also telling that these denials did not stop other journalists, like the *New York Times*, Ilva Tare, the *Broward Palm Beach New Times* and *The New Republic*, from reporting Plaintiff's involvement in corrupt arms dealing and his association with "mafia" figures. In short, the fact that Lawson relied on publications detailing Plaintiff's corruption in spite of the effort to cover it up weighs heavily against a finding of actual malice.

Next, Plaintiff attacks Lawson for relying on "serial liars and convicted fraudsters" as sources (Compl. ¶ 3), but there is no evidence even hinting that Lawson

entertained any doubts about the veracity of the information Podrizki provided him regarding Plaintiff or his attendance at the AEY meeting. To the contrary, Lawson affirmed that Podrizki was an extremely reliable source because the information he provided consistently matched up with the other evidence available to Lawson. SOF ¶65, 99. Nor did Podrizki's failure to identify a photograph during an interview with law enforcement cause Lawson to doubt Podrizki's positive identification of Plaintiff from a clear photograph of Plaintiff. SOF ¶102. When Podrizki honestly told Lawson that he did not recognize a photograph of one of Plaintiff's associates who was also suspected of attending an AEY meeting, this justified Lawson's belief that Podrizki was telling the truth and not just telling him what he wanted to hear. *Id.*

Reliance on convicted felons, like Podrizki and Diveroli, does not support a finding of actual malice, particularly when, as is the case here, the Book included information to "inform the viewing audience that [Podrizki/Diveroli] was not an unimpeachable source of information." *Silvester*, 839 F.2d at 1498. *See*, *e.g.*, Compl. 11105 (quoting Book at 38) (Diveroli was "a liar . . . [who] misled directly, indirectly, compulsively")). Alerting readers to issues surrounding the dudes' credibility is evidence that cuts *against* a finding of actual malice. In *Silvester*, journalists relied on information provided by a paid source named Ziskis, whom law enforcement officers had deemed "unreliable as a source of information." 839 F.2d 1498. But the Eleventh Circuit declined to find actual malice because

the journalists "included adequate footage in the broadcast to inform the viewing audience that Ziskis was not an unimpeachable source of information." *Id.* *See also Turner*, 879 F.3d at 1274 (holding that inclusion of "information [cutting] against [] Defendants' general conclusions" allows "readers to decide for themselves what to conclude" and makes "any allegation of actual malice less plausible"). Throughout the Book, Lawson is scrupulous about indicating instances in which he believes Diveroli or any other character is lying or shading the truth.

In the context of everything else he knew, Lawson had complete faith in the accuracy of Diveroli's recorded statement implicating Plaintiff in corruption and mafia activity. SOF In80, 122. Lawson was far from alone in relying on Diveroli's taped statement that the corruption surrounding the AEY deal "went up higher to the prime minister and his son." That precise statement was previously reported in the *New York Times* (twice), the Albanian press, *The New Republic, Broward Palm Beach New Times* and Lawson's 2011 RS Article, all of which Plaintiff *never* challenged. Moreover, the law is settled that "[t]he use of convicted felons" as sources "cannot alone constitute a fact of actual malice." *Secord*, 747 F. Supp. at 794.[14]

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[14] *See also Cobb v. Time, Inc.*, 278 F.3d 629, 638 (6th Cir. 2002) (no actual malice where journalist relied on source who was a drug user with "criminal background" and who was "paid" to provide "bizarre" information). Finally, the fact that Lawson paid Podrizki for his life rights and assistance in preparing the Book also does not constitute actual malice in light of the total absence

In sum, "there is persuasive evidence" that Lawson firmly believed the Statements were entirely accurate, "and the cumulative force of the evidence to the contrary is very weak." *McFarlane v. Sheridan Square Press*, 91 F.3d 1501, 1514 (D.C. Cir. 1996). Since there is no clear and convincing evidence that Lawson published the Statements with actual malice, Plaintiff's defamation claims should be dismissed as a matter of law.

ii. There Is No Evidence Capable of Supporting a Finding of Actual Malice Against S&S or Recorded Books

It is well established that book publishers are "entitled as a matter of law" to rely on an author's "reputation [] and experience," and there will be no finding of actual malice where, as here, they published a work written by an author they believe to be reliable.[15]

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of any evidence that Lawson harbored subjective doubts about the accuracy of the information Podrizki provided. *See*, *e.g.*, *Silvester*, 839 F.2d at 1498 n.5 (no actual malice even though producers of news broadcast paid source "a total of $3,000 plus expenses"); *Cobb*, 278 F.3d at 633 (offer to pay source $15,000 to contribute information to article not actual malice).

[15] In entering into the publishing agreement with Lawson, S&S relied on Lawson's considerable experience as an investigative reporter, his track record as an author of other non-fiction books, and the fact that Lawson's reporting on this subject had been published by *Rolling Stone.* (SOF ¶¶45-57.) Moreover, Lawson represented and warranted in his publishing agreement that the book would not contain libelous material, an undertaking that the publisher is entitled to rely on. (SOF ¶57 Ex. 40); *see also Murray v. Bailey*, 613 F. Supp. 1276, 1281 (N.D. Cal. 1985) (publisher did not act unreasonably where, among other things,

McManus v. Doubleday & Co., 513 F. Supp. 1383, 1390 (S.D.N.Y. 1981); *see also Rinaldi v. Holt, Rinehart & Winston, Inc.*, 42 N.Y.2d 369, 382-83 (1977) (granting summary judgment for publisher where it "placed its reliance upon [the author's] reportorial abilities"); *Fodor*, 1995 WL 505522, at *5 (granting summary judgment for publisher on ground that "sole reliance on the experience and positive reputation of the author does not demonstrate malice"). Since Lawson had twenty years of experience as an investigative reporter before he published the Book and had been nominated for a national prize on the strength of his article for *Rolling Stone*, S&S and Recorded Books were clearly entitled to rely on his expertise.[16]

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author represented and warranted in contract that book was not libelous); *Crescenz v. Penguin Grp. (USA), Inc.*, 561 F. App'x 173, 179 (3d Cir. 2014) (affirming summary judgment in favor of defendant publisher where plaintiff provided no evidence that publishing industry norms disfavored reliance on warranties or required independent duty to investigate facts).

[16] The claims against Recorded Books, which is tantamount to a secondary publisher, also fail for the independent reason that actual malice cannot exist when a secondary publisher copies a work that has already been published. *See*, *e.g.*, *Geiger v. Dell Publ'g Co.*, 719 F.2d 515 (1st Cir. 1983) (republisher is entitled to rely on the accuracy of previously published statements "absent a showing that the republisher 'had, or should have had, substantial reasons to question the accuracy of the articles or the *bona fides* of [the] reporter") (citation omitted); *Cubby, Inc. v. CompuServe, Inc.*, 776 F. Supp. 135, 140 (S.D.N.Y. 1991) (no liability where company had "little or no editorial control" and absent showing that it either knew or had reason to know of defamation). Moreover, per industry norms, S&S provided warranty and indemnification to Recorded Books against libel claims. (SOF ¶60, Licensing Agreement ¶¶ 14-15.) Accordingly, Recorded

Plaintiff alleges that both S&S and Recorded Books acted with actual malice because they failed to perform their own independent fact checking of the Book, but it is well established that a "[f]ailure to investigate does not in itself establish bad faith." *St. Amant*, 390 U.S. at 732-33; *see also Gertz*, 418 U.S. at 331. The First Circuit explained the reason why book publishers are not required to fact check works written by reputable authors:

> To require a book publisher to check, as a matter of course, every potentially defamatory reference might raise the price of nonfiction works beyond the resources of the average man. This result would, we think, produce just such a chilling effect on the free flow of ideas as First Amendment jurisprudence has sought to avoid.

Geiger, 719 F.2d at 518. Courts have thus consistently held that a book publisher is not required to conduct its own independent factual investigation unless the publisher has actual, subjective doubts as to the accuracy of the story. *See also Crescenz*, 561 F. App'x at 180 ("[Defendant] Penguin did not have a duty to independently investigate the book's facts, relied on a reputable author, and had the book vetted by experienced outside counsel."); *Hotchner v. Castillo-Puche*, 551 F.2d 910, 914 (2d Cir. 1977) (holding that book publisher's "failure to conduct an elaborate independent

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Books had utmost confidence in S&S based on its reputation in the publishing industry and the positive, professional history between the two companies. *See* SOF ¶¶60-61.

investigation" to recreate author's research "did not constitute reckless disregard for truth"); *Stern v. Cosby*, 645 F. Supp. 2d 258, 284 (S.D.N.Y. 2009) ("The law is clear, however, that a book publisher has no independent duty to investigate an author's story unless the publisher has actual, subjective doubts as to the accuracy of the story.").

Nor has Plaintiff adduced any evidence that S&S or Recorded Books harbored "actual, subjective doubt" as to any of Lawson's reporting. The publishing Defendants uniformly testified that they had no doubt as to the accuracy of the Statements and had full confidence in Lawson's reporting. SOF ¶73. And Plaintiff's argument does not gain traction when he claims, as he did in his Complaint, that the Publisher Defendants included the statements about Plaintiff because they were "motivated to sell more books" and "they knew that allegations of kickbacks to the families of foreign leaders were likely to do just that." The facts and the law repudiate this argument. First, it is undisputed that S&S actively discouraged Lawson from pursuing the "subplot" of Albanian corruption, beyond facts that involved the Dudes and the AEY deal, because it was a diversion from the main plot. SOF ¶67. But even assuming an economic motivation existed – and there is no evidence to support that lithe law is well settled that a profit motive is "immaterial" to the application

of the "constitutional guarantees of freedom of speech and of the press." *N.Y. Times*, 376 U.S. at 265-66.[17]

In sum, since there is no clear and convincing evidence remotely capable of proving actual malice as to S&S and Recorded Books, Plaintiff's claims against these Defendants should be dismissed for these independent reasons.

iii. There Is No Evidence Capable of Supporting a Finding of Actual Malice Against Alexander Podrizki

The defamation claims against Alexander Podrizki – which arise from the statements he made to Lawson about Plaintiff during interviews – must also be dismissed because there is no evidence that Podrizki had any doubt about the identification of Plaintiff, let alone clear and convincing evidence. The record shows that Podrizki believed what he told Lawson to be true. SOF ¶101. Specifically, there is no evidence that contradicts Podrizki's recollection of the meeting with Plaintiff: Podrizki learned about Plaintiff's attendance from Diveroli and Trebicka on the morning after and he

[17] Plaintiff will no doubt argue that the claim letters S&S received from Chivers and Diveroli should have provoked doubts about the accuracy of Lawson's reporting on Plaintiff. But those letters did not mention Plaintiff. SOF ¶70. Further, S&S resolved those claims to its satisfaction prior to publishing the Book and cannot be held to have acted with actual malice simply because the claim letters were received. *See*, *e.g.*, *Readers Digest Ass'n v Superior Court*, 37 Cal. 3d 244, 260 (1984) (demand for a retraction or a threat of libel action does not establish that defendant doubted "the truthfulness of its article or its sources").

independently recognized Plaintiff from a photograph shown to him by Lawson. The fact that Podrizki could not identify a different photograph of Plaintiff during an interview with law enforcement is not evidence that Podrizki experienced serious doubts, particularly in light of Podrizki's unrebutted testimony that the photograph he was shown was extremely faded and unrecognizable. SOF ¶102.[18]

In sum, there is no admissible evidence capable of establishing that Podrizki acted with actual malice and communicated information concerning Plaintiff knowing it to be false or with serious doubts as to its accuracy.[19]

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[18] Relying entirely on inadmissible hearsay, Plaintiff argues that Podrizki received a phone call from Kosta Trebicka before he left Albania, telling him that Plaintiff was not involved. Podrizki states unequivocally that he never received such a call. McNamara Ex. 70, No. 8. Obviously, Trebicka cannot testify in court to the truth or falsity of the self-serving statement attributed to him by Plaintiff because he was killed in a mysterious car accident shortly after this meeting purportedly took place. The statement is clearly inadmissible hearsay. *See*, *e.g.*, *Herzog v. Castle Rock Entm't*, 193 F.3d 1241, 1254-55 (11th Cir. 1999) (refusing to admit hearsay statement where there was "no way for Defendants to verify the accuracy of the testimony or of the out-of-court statements that the testimony reports, and the reliability of the testimony cannot be taken for granted").

[19] Defendant Packouz has no role in this action. There is no evidence that Packouz was a source for any information in the Book concerning Plaintiff. Packouz Decl. ¶19. It is self-evident that a defamation action requires at least some evidence that the defendant made a defamatory statement about the plaintiff. *See*, *e.g.*, *Mawk v Kaplan Univ.*, No. 6:13-CV-1469-ORL-22, 2015 WL 4694055, at *4 (M.D. Fla. Aug. 6, 2015) (defamation claim failed because plaintiff did not provide any basis for holding defendant

CONCLUSION

For the foregoing reasons, Defendants respectfully request that this Court grant summary judgment in Defendants' favor and dismiss all of Plaintiff's claims and award Defendants such other and further relief as the Court deems necessary and proper, including an expedited hearing and attorneys' fees pursuant to Florida's anti-SLAPP statute as requested in Defendants' accompanying motion.

August 8, 2018

Respectfully Submitted,

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liable for allegedly defamatory statements and failed to establish the essential element of publication to third party).

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on August 8, 2018, a true and correct copy of the foregoing was served on the following via ECF:

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IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

Case No. 17-Civ-22144-COOKE

SHKËLZEN BERISHA,

Plaintiff,

vs.

GUY LAWSON, EFRAIM DIVEROLL ALEXANDER PODRIZKI, DAVID PACKOUZ, SIMON & SCHUSTER, INC., RECORDED BOOKS, INC., AND INCARCERATED ENTERTAINMENT, LLC,

Defendants.

PLAINTIFF SHKËLZEN BERISHA'S MEMORANDUM OF FACTS AND LAW IN OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

(Filed Aug. 23, 2018)

Plaintiff Shkëlzen Berisha ("Plaintiff" or "Berisha") respectfully submits this opposition to Defendants' Motion for Summary Judgment and Incorporated Memorandum of Law (Dkt. No. [INSERT]; "Defs.' Memo."). As detailed below, the Court should deny Defendants' motion.

PRELIMINARY STATEMENT

"Never let the truth get in the way of a good story"
- Mark Twain

This case arises from the elaborate deceptions of convicted con men and the slipshod, bad-faith reporting of Guy Lawson ("Lawson")—a so-called investigative journalist. As detailed herein, Mr. Lawson subverted the truth for a chance at notoriety.

In his "[redacted]" was "[redacted]." And while he knew it was perhaps a long shot, "[redacted]."

However, Lawson did not have evidence to back up his grandiose theories. Instead of reconsidering assumptions, he cut, twisted – and in some cases manufactured – "evidence" to fit within his preconceived narrative. Unfortunately, this had disastrous consequences for the Plaintiff.

Simon & Schuster's editors and lawyers indulged Lawson's extravagant theories far more than they should. The result was a book full of half-sourced quotations and half-imagined scenes. It was [redacted]" that one of Lawson's editors "[redacted]."

Now that the bill has come due for that indulgence, they wish to sidestep accountability by feigning reliance on the stale reports of others; and demanding that they be held to a lower standard by virtue of Plaintiff's parentage. In so doing, Defendants suggest that the Court excuse them from their professional obligations and ignore the fundamental underpinnings of the

actual malice standard: That a public figure—general or limited—has voluntarily exposed himself to a higher standard by virtue of his own actions.

STATEMENT OF FACTS

Given the page limits, it is not possible to both present the context and the material facts themselves. Nevertheless, context is essential to understanding the material facts here. Thus, Plaintiff refers the Court to the Complaint (Dkt. No. 1)—in particular, ¶¶ 31 through 73—for the background. Plaintiff proceeds here to address only those material facts, supported by citations to the record, that are relevant to Defendants' motion.

Lawson Knew that His Sources Were Liars and Criminals

Lawson's primary sources for the Book were Packouz and Podrizki. *See generally* Lawson Decl., Ex. 1. Lawson knew that his sources had been convicted of defrauding the United States Government. Plaintiff's Statement of Facts in Opposition ("PS") ¶ 65 (Zoladz Decl., Ex. 1 (Lawson Tr., 133:8-12)); Lawson Decl. at ¶ 24. Among many other misdeeds, Lawson knew that: Packouz had forged documents for Diveroli's use at a meeting allegedly involving Plaintiff (the "May 2007 Meeting") PS ¶ 47 (Zoladz Decl., Ex. 2); Podrizki had destroyed evidence in connection with AEY's prosecution PS ¶ 65 (Zoladz Decl., Ex. 1 (Lawson Tr., 144:24-145:16); Diveroli and Packouz hired Podrizki because

Podrizki [redacted]" PS ¶ 10 (Zoladz Decl., Ex. 3); and Podrizki bribed Albanian officials. PS ¶ 65 (Lawson Decl., Ex. 1 at 151.)

Lawson also knew of multiple instances where Diveroli had, with Packouz, used the identities of innocent people in furtherance of their fraudulent schemes. PS ¶ 138 (Zoladz Decl., Ex. 1 (Lawson Tr., 143:7-19)) ("Q. Would it surprise you that Mr. Diveroli would use the identity of someone in order to buttress a fraud that he commits? A. No. Q. And, in fact, you knew and reported that he did it on several occasions, didn't you? A. . . . He did it with – yeah. I know of occasions where that happened."); PS ¶ 135 (Lawson Decl., Ex. 1 at xvi: "I spent months paging through court transcripts."); PS ¶ 47 (Zoladz Decl., EL 1 (Lawson Tr., 143:7-19) (Lawson read the trial transcripts); PS ¶ 47 (Excerpted Testimony of Michael Mentavlos and David Packouz from the Jury Trial at 123-124, U.S. v. Merrill, Case No. 08-20574 (Nov. 30, 2010) (in the fraudulent bid, Packouz and Diveroli used the identity of a retired Israeli Army colonel, representing him as an officer of AEY)); PS ¶ 138 (Lawson Decl., Ex. 1 at 43 (Diveroli would pretend to be a colonel or general to get dirt on his competitors)).

Further, Lawson also knew that Podrizki had lied to him about events related to the May 2007 Meeting. Lawson had clear evidence that, the day after the May 2007 Meeting, Podrizki accompanied Diveroli and Trebicka to meet representatives from the U.S. Embassy in Albania. Lawson knew that Trebicka had said Podrizki was present PS ¶ 65 (Zoladz Decl., Ex. 4)

("[T]hree people of the US embassy in the meeting at Sheraton Hotel in Tirana (Robert Newsome, Vickymajer and a lady) and three of us (me, Efraim and Alex)."); and Robert Newsome ("Newsome") (from the U.S. Embassy) told U.S. law enforcement that Podrizki was there. PS ¶ 65 (Zoladz Decl., Ex. 5).

Yet Podrizki told Lawson that he was not in attendance. PS ¶ 65 (Zoladz Decl., Ex. 6). Here, a reasonable jury could conclude that Podrizki lied because he was attempting to minimize evidence of the false statements that he made to U.S. Embassy officials.

Lawson Knew that Diver Packouz and Podrizki Were Motivated to Silence Trebicka

First, Lawson admits that Diveroli lied to Trebicka about the May 2007 Meeting on the very next morning:

> **Diveroli could have told Trebicka the truth** about his encounter with Delijorgji: AEY would get a discount on the AK-47 rounds only if Delijorgji's company took over the repacking job—cutting Trebicka out of the deal. **But Diveroli did what he'd become accustomed to doing: he dissembled. Diveroli said he'd been taken to a "hidden" place and threatened. The Albanians had said he'd be killed if he didn't go along with Thomet and Evdin as the middlemen. Diveroli told Trebicka that Ylli Pinari of MEICO had warned him to**

> **keep his mouth shut because the prime minister's son had been in the meeting.**

PS ¶ 41 (Lawson Decl., Ex. 1 at 141 (emphasis added)). Second, Lawson knew that Podrizki was told by U.S. Embassy officials—weeks before the May 2007 Meeting—that AEY must allege corruption to enlist their help (PS ¶ 41 (Lawson Decl., Ex. 1 at 123)) and that, in fact, AEY did so on the day after the May 2007 Meeting (PS ¶ 41(Lawson Decl., Ex. 1 at 141-42)). Third, Lawson knew that when AEY cancelled Trebicka's repackaging contract, Trebicka "had tried to cause trouble." PS ¶ 41 (Lawson Decl., Ex. 1 at 158; *see also* Zoladz Decl., Ex. 7 (Podrizki Tr., 126:10–132:25)). Finally, Lawson received information from Gary Kokalari that, after the May 2007 Meeting, "possibly in an effort to intimidate Trebicka, [Diveroli] claims Pinari told him to keep his mouth closed because the unidentified third man was Shkelzen [sic] Berisha . . . ". PS ¶¶ 101-02 (Zoladz Decl., Ex. 8 at _000925-926).

Lawson Motivated Packouz and Podrizki With Money and the Prospect of Reputational Rehabilitation

Lawson also knew Packouz and Podrizki were motivated to say what he wanted to hear. First, Packouz and Podrizki benefited financially from the publication of the Book. Lawson entered into "life rights" agreements with them; [redacted]s (PS ¶ 123 (Zoladz Decl., Ex. 1 (Lawson Tr., at 106:22-107:18))); [redacted] (PS ¶ 123 (Zoladz Decl., Ex. 1

(Lawson Tr., at 109:20-110:16))). *See also* PS ¶ 123 (Zoladz Decl., Ex. 9). Lawson acknowledged that paying sources is "strictly forbidden" for magazine articles. PS ¶ 123 (Zoladz Decl., Ex. 1 (Lawson Tr., 31:12-22)). And for good reason: paid sources are motivated to fabricate more compelling stories.

Further, Packouz and Podrizki received in-kind compensation from Lawson: rehabilitation of their public images. Lawson obtained his access in return for portraying his sources positively—scapegoats for corruption:

- April 2012 (renegotiating his payment to Packouz, Lawson writes): [redacted]" PS ¶ 124 (Zoladz Decl., Ex. 10; emphasis added).
- October 2012 (Lawson to Packouz): "The people I want the reader to cheer for are you and Alex. So that's what I've got to develop." PS ¶ 124 (Zoladz Decl., Ex. 11).
- May 2014 (Podrizki to Lawson): [redacted]" PS ¶ 124 (Zoladz Decl., Ex. 12).
- July 2014 (Lawson): [redacted]" PS ¶ 124 (Zoladz Decl., Ex. 13).
- March 2016 (Podrizki to Lawson): "You were the first journalist to take our side of the story and we really appreciate that." PS ¶ 124 (Zoladz Decl., Ex. 14).

- March 2016 (Lawson to Packouz): "[redacted] PS ¶ 124 (Zoladz Decl., Ex. 15).
- August 2016 (regarding a request by Podrizki that Lawson speak to a reporter): "[redacted]" PS ¶ 124 (Zoladz Decl., Ex. 16).

Lawson had an Agenda Beyond Reporting the Facts

Lawson knew it was in his interest—financially and professionally—to tell a new, bigger story in the Book and to make the "dudes" sympathetic. *See*, *e.g.*, PS ¶ 125 (Zoladz Decl., Ex. 17 & 18). To that end, Lawson decided—long before he finished his research—that the Book would report a Pentagon conspiracy, State Department bribery, biased federal prosecution, and Albanian corruption:

- December 2010: [redacted]" PS ¶ 125 (Zoladz Decl., Ex. 19).
- December 2011: "The truth is that the federal government wanted gun runners and that's what they got. This book will prove that beyond any doubt . . . [Simon & Schuster] should be forewarned that very very powerful institutions are involved (DoD, DoS, DoJ, NYT) and that this book will rake muck . . . " PS ¶ 125 (Zoladz Decl., Ex. 20).

- October 2012: [redacted] PS ¶ 125 (Zoladz Decl., Ex. 21).
- November 2012: "[redacted]." PS ¶ 125 (Zoladz Decl., Ex. 22).
- March 2013: [redacted] PS ¶ 125 (Zoladz Decl., Ex. 23).

Those statements (among many others) reflect more than mere bluster about what Lawson might write if only the facts checked-out. Rather, Lawson had an agenda. *See generally* PS ¶ 125 (Zoladz Decl., Ex. 24). He intended to spin a counter-narrative that laid blame, not at the feet of his fraudster sources (Diveroli, Packouz and Podrizki), but on the "[redacted]" PS ¶ 125 (Zoladz Decl., Ex. 25).

Lawson was warned, time and again, that his conspiracy theories were not supported by the facts. *See*, *e.g.*, PS ¶ 126 (Zoladz Decl., EL 24) [redacted]"); PS ¶ 126 (Zoladz Decl., Ex. 67) ("[redacted]"); PS ¶ 126 (Zoladz Decl., Ex. 26 [redacted]")).

But Lawson would not let the facts get in the way of a "good" story. As detailed below, Lawson doctored

and outright manufactured evidence to serve his pre-selected narrative.

Lawson Manufactured Entire Scenes

There isn't enough space here to detail every example, but Lawson wrote dialogue—even entire scenes—that were the product of his imagination. These fabrications included critical scenes in Albania. Some of the made-up material made it into the Book, some did not.

Example 1: Trebicka's Threat to Kill Pinari

For example, in Chapter 8 of the published version Books, Lawson writes:

> After losing the contract, Trebicka continued to stalk Podrizki in Tirana, claiming that they were "friends," muttering about exacting revenge against Ylli Pinari, trying to find a way to get back in on the deal.
>
> Podrizki finally lost his patience and told him, "You fucked up. You overstepped your boundaries. You got what you deserved."
>
> "I'm going to kill Pinari," Trebicka said.
>
> The threat was empty, perhaps. But when Podrizki next saw Ylli Pinari, he felt obligated to warn him: "I don't want to get in the middle of this, but Trebicka's been talking about killing you."

> "Everybody says this in Albania," Pinari replied dismissively. "Trebicka is a nothing person."

PS ¶ 127 (Lawson Decl., Ex. 1 at 158-59). Yet Lawson's source for that scene, Podrizki, testified at deposition: "Q. Now, did Mr. Trebicka continue to stalk you in Tirana? A. I wouldn't use the word stalk. But he called me for a bit and then he just stopped calling. . . . Q. Do you recall Mr. Trebicka ever saying that he was going to kill Yili Pinari? A. No." PS ¶ 127 (Zoladz Decl., Ex. 7 (Podrizki Tr., 128:10-129:6)).

Example 2: Podrizki's Moral Outburst

In an apparent attempt to bolster Podrizki's credibility, Lawson manufactured a scene in which Podrizki confronted Diveroli moments after the May 2007 Meeting. 'You would destroy the world to make money?' Podrizki demanded. Diveroli didn't reply. 'You probably would,' Podrizki said, shaking his head." PS ¶ 127 (Zoladz Decl., Ex. 27 at _007973_218).

But when Lawson provided a draft of the Book to Podrizki, Podrizki told Lawson: "This never happened." (*id.*); and "Pp. 217-218 (H76): When I am having a moral outburst to Efraim. I can't say this ever happened as I basically turned off my moral compass . . . " (*id.* at _007972_001).

Example 3: U.S. Embassy Officials Travel with Plaintiff and "Assorted Thugs"

Early drafts of the Book included a whole, fantastical chapter called the "The Prime Minister's Job," alleging corruption in Albania PS ¶ 127 (Zoladz Decl., Ex. 28); a chapter that was ultimately cut from the Book. Scenes in that chapter lacked any basis in fact, including a detailed, imaginary scene reporting that the U.S. Government was complicit with Plaintiff in the corruption:

> A local named Andy Belliu had watched events in Gerdec with increasing suspicion . . . Belliu had also seen new white Ford SUVs coming and going from a military base on the outskirts of . . . Gerdec. The mysterious vehicles had diplomatic license plate numbers given to officials of the United States Embassy in Albania . . . The Americans were accompanied by the same people who'd run AEY's contract—the businessman Mihail Delijorgji, Prime Minister Sali Berisha's son, and the assorted thugs and bodyguards that escorted them. These were the men who were personally enriching themselves by looting Albania's surplus munitions . . .

Id. But Mr. Belliu never told Lawson this: "Q. Did you ever tell Guy Lawson that Shkëlzen Berisha was present at the Gërdec site at any time? A. No." (PS ¶ 127 (Zoladz Decl., Ex. 29 (Belliu Tr. 18:21-24))); "Q. Did Mr. Shkëlzen Berisha, to your knowledge, ever travel to the Gërdec site? . . . A. I never – I don't know the guy.

I never seen him. So if I've never seen him, how I can see him in this situation?" (*id.* at 36:9-17).

At deposition, when asked about the sourcing of these explosive allegations, Lawson gave an unbelievable answer: "I don't remember." PS ¶ 127 (Zoladz Decl., Ex. 1 (Lawson Tr., 256:15-260:2)).

These fabrications are important—and highly troubling—because the Book was sold as a work of non-fiction, investigative journalism. The reader's expectation is that the events described therein actually happened; and when language is set off in quotes, those words were actually said.

Indeed, both Lawson and Simon & Schuster admit that this kind of conduct is concerning. PS ¶ 127 (Zoladz Decl., Ex. 30 (Graff Tr., 61:8-23)) (it would be concerning if an author included dialogue "that he completely made up" "[b]ecause a nonfiction book is about what had happened, and what you're describing is not nonfiction."); PS ¶ 127 (Zoladz Decl., EL 1 (Lawson Tr., 72:17-24; 86:9-19)); *id.* at 89:8-11 ("I wouldn't in any context make up a scene.").

The Defamatory Material

Some of Lawson's inherently implausible material was removed from the Book, but significant statements remained about Berisha, among others:

- The first stop was Ylli Pinari's office in the Ministry of Defense. . . . The conversation was going nowhere, it seemed: Diveroli demanded a reduction,

and Pinari insisted on the agreed terms. . . . If you want to change the price, you have to meet someone else," Pinari said finally. Apparently, someone was more powerful than the minister—a strange assertion. Ylli Pinari escorted Diveroli and Podrizki to his Mercedes sedan. The pair were driven around the streets of Tirana in a seemingly deliberately confusing route, so the Americans wouldn't be able to re-create where they'd gone. Finally, they turned into an abandoned construction site for a partially completed office building. Pinari led the pair up a set of stairs and along a corridor until they reached a door. Stepping inside, they found a sleek, stylish office, like the suite of a corporate law firm in a skyscraper in Miami. . . . Instead of the kind of global businessman who might be expected to occupy such an office, there was a hard-looking man—a real thug, Podrizki thought, fear rising. . . . Diveroli and Podrizki then turned to see a young man around their age sitting in the corner. Dressed in a baseball cap and a sweater, he had dark hair, a soft chin, and shark like eyes. He wasn't introduced. This was Shkëlzen Berisha, the son of the prime minister of Albania, they would later be told by Pinari. Shkëlzen was part of what was known in Albania as "the family," the tight-knit and extremely dangerous group that surrounded and lived at the beneficence of the prime minister, Sali Berisha. . . . The son of the prime minister remained silent. . . . "Did we just get out of a meeting with the Albanian mafia?" Podrizki joked. "Absolutely. Absofuckinglutely." PS ¶ 128 (Lawson Decl., Ex. 1 at 138-40.)

- Five thousand miles away, in the Balkan city of Tirana, Albania, Packouz's friends Efraim Diveroli

and Alex Podrizki were also dealing with menacing and mysterious forces as they tried to arrange for 100 million rounds of AK-47 ammo to be transported to Kabul. Alone in a notoriously lawless country, Diveroli and Podrizki were trying to negotiate with an Albanian mafioso taking kickbacks, as well as a Swiss gun dealer running the deal through a Cyprus company seemingly as a way to grease the palms of shadowy operators allegedly associated with the prime minister of Albania. PS ¶ 128 (Lawson Decl., Ex. 1 at 2.)

- Diveroli had agreed to cut Trebicka out of the repacking job, which was now being done by a company called Alb-Demil, an entity seemingly controlled by the prime minister's son and Mihail Delijorgji. PS ¶ 128 (Lawson Decl., Ex. 1 at 150.)

- In the "Photographs" section: "Also involved, the dudes discovered, was the prime minister's son, Shkelzen [sic] Berisha." PS ¶ 128 (Zoladz Decl., Ex. 31).

- Wood took a breath and dived in, describing how Albanian officials were allegedly being paid kickbacks on AEY's contract, including Diveroli's recorded description of the Albanian "Mafia" and the prime minister's son. Media exploded. This is all lies!' he shouted. "I would like to know the details of the AEY contract," Wood said. "Especially the pricing. The allegation is that MEICO is selling the ammunition for twenty-two dollars a crate to a Cyprus company, and that the price is marked up to forty dollars for each crate when it's sold to AEY. The money is being used to pay kick-backs." Lies!" Mediu screamed, beside himself with fury,

as the videographer filmed the outburst. "Turn off the camera," Mediu hissed. PS ¶ 128 (Lawson Decl., Ex. 1 at 197.)

Further, Lawson made additional defamatory statements in radio and television interviews about Berisha as part of a promotional campaign. Specifically (among others):

- July 6, 2015 interview on Miami Public Radio: Interviewer: "So, tell us how they finally got into trouble?" Lawson: 'Well, this guy Kosta Trebicka you referred to was an Albanian businessman who was doing the repackaging for them. The nefarious repackaging. And he—they didn't tell him why they were doing it, and he grew suspicious. And then eventually, as will happen in Albania, gangsters came along and wanted the contract for themselves. These gangsters happened to be connected to the prime minister of Albania." PS ¶ 128 (Zoladz Decl., Ex. 32).

- March 16, 2016 Albanian television interview: Interviewer: [in Albanian] "The son of the prime minister is mentioned everywhere [in the book], but what facts do you have that prove his involvement in the matter?" Lawson: [in English] "That's what you need an investigation to discover, you know, the ex-prime-minister's son met with the Dudes when they were in Albania to arrange the delivery and repackaging of these munitions at a price that was, a, twice the price that the Albanian government was getting. So the Albanian government was selling the munitions for two cents a round; sold that to another company for four cents a round, and then the [inaudible] were buying it

> for eight cents a round. So what happened to all that money? Well, the implication is clear that the prime minister's son, and perhaps even the prime minister, certainly the defense minister and other officials, were profiteers and the money was shipped off to a Cyprus holding company and then vanished." PS ¶ 128 (Zoladz Decl., Ex. 33).

Lawson's Deliberate Misrepresentations About Berisha

> "They Would Later be Told by Pinari": Lawson Purposefully Misrepresented the Quality of His Sources for Berisha's Attendance at the Meeting

The primary basis for Lawson's allegation that Berisha was engaged in corruption and associated with Albanian "mafia," stems from Berisha's purported presence at the May 2007 Meeting. Yet the ultimate source for Berisha's alleged presence was Diveroli—a pathological liar whom Lawson knew had an incentive to lie to Trebicka about Berisha's alleged involvement.

He wrote: "This was Shkëlzen Berisha, the son of the Prime Minister of Albania, **they** would later be told by Pinari." Lawson Decl., Ex. 1, at 139; emphasis added. At deposition, Lawson conceded that *they* were not told; rather, Lawson assumed Diveroli was told. PS ¶ 129 (Zoladz Decl., Ex. 1 (Lawson Tr., at 136:1-4)) ("So, yes, I did not say that Mr. Diveroli was the source for Alex and that they were not both told by Mr. Pinari."). Podrizki did not tell Lawson that he was told that by Pinari, but rather Podrizki gave Lawson inconsistent

accounts of how he learned about Berisha's alleged involvement; neither account involved learning it from Pinari. PS ¶ 129 (Zoladz Decl., Exs. 34 & 27). Further, Lawson admitted that it was unlikely that Trebicka learned this from Pinari. PS ¶ 129 (Zoladz Decl., Ex. 1 (Lawson Tr., at 205:12-15) ("And then I realized that it would have to be Pinari, because Trebicka couldn't know unless Pinari told him, and he and Pinari were at odds."). Thus, Trebicka learned this from Diveroli.

Lawson claims that his basis for assuming Pinari was the source was "Alex Podrizki and common sense." PS ¶ 129 (Zoladz Decl., Ex. 1 (Lawson Tr., 254: 17-22)). Let's start with Podrizki as a source. To repeat, Podrizki never told Lawson that Pinari had told him that Berisha was at the meeting. Rather, in 2013, Podrizki told Lawson: "as far as I know, kosta told Efraim that it was barishas [sic] son at the meeting." PS ¶ 129 (Zoladz Decl., Ex. 34). In 2014, in a draft manuscript that Lawson sent to Podrizki, Podrizki tells Lawson that "I was told this by Kosta, not Pinari." PS ¶ 129 (Zoladz Decl., Ex. 27). As a result, initially, Lawson changed the manuscript to "they were later told by Trebicka." PS ¶ 129 (Zoladz Decl., Ex. 35). However, for the published Book, Lawson changed it back to Pinari. *See* PS ¶ 129 (Zoladz Decl., Ex. 1 (Lawson Tr., 206:4-7) ("I came to the conclusion, as you see in the final book, that it had to be Mr. Pinari, because Trebicka couldn't possibly have known.")).

Lawson's professed reasoning for this unsourced alteration is so-called "common sense." Without asking Diveroli PS ¶ 129 (Zoladz Decl., EL 36) or Pinari PS

¶ 129 (Zoladz Decl., Ex. 1 (Lawson Tr., 120:4-7][1], and contrary to what Podrizki had told him, Lawson wrote that Pinari told Podrizki and Diveroli—representing to the reader he had eyewitness sourcing (*i.e.*, Podrizki). A reasonable jury could conclude that Lawson knew Trebicka was not a compelling source (as Trebicka was not at the May 2007 Meeting) and deliberately fabricated the sourcing of this information to support his allegations against Berisha.

Lawson Purposefully Misrepresented Information from Nicholas Wood to Bolster His Allegations Against Berisha

First, Lawson deliberately misrepresented an interaction between Albanian Defense Minister Fatmir Mediu ("Mediu") and New York Times reporter Nicholas Wood ("Wood") to make it appear that Mediu had an emotional outburst when confronted about allegations that Plaintiff was implicated in the AEY controversy.

The Book provides:

> Wood took a breath and dived in, describing how Albanian officials were allegedly being paid kickbacks on AEY's contract, including Diveroli's recorded description of the Albanian 'Mafia' and the Prime Minister's son. Mediu exploded. 'This is all lies!' he shouted."

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[1] Pinari never told Podrizki, Trebicka, Diveroli—or anyone else—that Plaintiff was at the May 2007 Meeting. PS ¶ 129 (Zoladz Decl., Ex. 37 at ¶¶ 11-12)). And Diveroli admits that he made-up the story about Plaintiff's involvement to silence Trebicka. *Id.*; PS ¶ 129 (Zoladz Decl., Ex. 38 at ¶¶ 15-16.)

* * *

> Wood texted. "Your associates are stealing our tape from the interview. I suggest u call me. It was not in my interest to write about u but I may do so now."

PS ¶ 130 (Lawson Decl., Ex. 1, at 197.)

But an earlier draft provided:

Wood took a breath and dove in. He repeated what he'd learned from Kokolari about Medihu's past. Wood said that Medihu had been accused of drug trafficking in Italy. He'd been tried in absentia and found guilty. He then started to outline Trebicka's narrative about the AK -47 ammunition. Medihu exploded. "This is all lies," he shouted.

* * *

> Wood texted. 'Tour associates are stealing our tape from the interview. I suggest u call me. It was not in my interest to write about u and your past but I may do so now."

PS ¶ 130 (Zoladz Decl., Ex. 39; emphasis added).

Yet Documentary evidence proves that Wood told Lawson that Mediu's outburst followed an accusation of drug trafficking—not an accusation that Plaintiff was involved with AEY. Indeed, that earlier draft was more consistent with what Wood had actually told Lawson:

> When I mentioned the [drug] conviction in the interview he lost his temper ("its a lie its a lie . . ") and asked the camera to be switched off,

> and admitted there had been a conviction and tried to explain the circumstances.

PS ¶ 130 (Zoladz Decl., Ex. 40).

More worryingly, Lawson admitted at deposition that he doctored the quote provided by Wood (PS ¶ 130 (Zoladz Decl., Ex. 1 (Lawson Tr., 231:20-23)))—removing "and your past."

Second, Lawson asked Wood to endorse a falsified account of Wood's meeting with Trebicka—one that would implicate Plaintiff in corruption—for, in Lawson's words, "dramatic purposes." Lawson sent Wood the following sentence for the Book: "The head of MEICO, Ylli Pinari had told Trebicka that the Prime Minister's son was involved in the AEY contract, another even more ominous sign." PS ¶ 131 (Zoladz Decl., Ex. 41). In the e-mail accompanying that sentence, Lawson wrote:

> The only thing I can see that might be a slight stretch is how much Trebicka told you about the threats/warnings he'd received when you first met. **For dramatic purposes, it would be great if I can keep in that he was under pressure from Medihu and knew about the Prime Minister's son – even if you didn't expressly discuss this at the time. You knew about the Albanian mobster stuff, because of Trebicka's conversation with Diveroli**, so hopefully you'll see this as a very small license I've taken, and that I've worded it so I'm directly saying you two discussed those matters at that time.

> Hope this isn't splitting hairs . . . **Please keep this between us only**.

Id. (emphasis added)

Defendants have not produced a response to that email[2], but in the Book the language was replaced with: "Trebicka had heard the allegation that the prime minister's son was involved in the AEY contract, another even more worrying sign." Lawson Decl., Ex. 1, at 196. A jury could infer that Wood (or someone else) thought that the truth should come before "dramatic effect." In the abstract, Lawson professed agreement: "Q. And is it your—is it your testimony that the truth should come before any concerns for dramatic effect? A. Yes . . . like, to a comical extent." PS 131 (Zoladz Decl., Ex. 1 (Lawson Tr., 52:25 – 53:7)).

> <u>"The Family": Lawson Knew that his Source for the Book's Characterization of Plaintiff was Biased</u>

The sentence following "they would later be told by Pinari" provides that "Shkëlzen was part of what was known in Albania as 'the family,' the tight-knit and extremely dangerous group that surrounded and lived at the beneficence of the Prime Minister, Sali Berisha."

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[2] The vast majority of Lawson's communications with Wood were not produced until June 2018. Shortly thereafter, Plaintiff moved the court to issue letters of request to obtain documents and testimony from Wood, who is located in the United Kingdom. The Court granted the request, but did not extend the discovery schedule to permit Plaintiff to obtain evidence from Wood. For that reason alone, summary disposition is inappropriate at this time. *See* Fed. R. Civ. P. 56(d).

Lawson Decl., Ex. 1 at 139. Lawson admits that the source for this statement was Erion Veliaj ("Veliaj"), a political opponent of Berisha's father with an obvious bias against the Berisha family. PS ¶ 132 (Zoladz Decl., Ex. 1 (Lawson Tr., at 137:23-138:9)). Lawson further admits that he was aware of Veliaj's bias. Lawson Decl., ¶ 70.

Lawson's Purposeful Avoidance of the Truth Concerning Berisha's Lack of Involvement with AEY

In service of his preconceived narrative, Lawson deliberately ignored credible information tending to show that Berisha was not, in fact, present at any May 2007 Meeting.

Podrizki's Failure to Identify Plaintiff and Podrizki's Inconsistent Accounts

First, Lawson was aware that his only "eyewitness" source to the meeting (Podrizki), had been interviewed by U.S. criminal authorities in May 2008, and during that interview "Podrizki was shown a photo of the Prime Minister's son but could not recognize him." PS ¶ 65 (Zoladz Decl., Ex. 42). Lawson conceded that he was aware that Podrizki had failed to identify Berisha, but chose not to ask Podrizki about it. PS ¶ 65 (Zoladz Decl., Ex. 1 (Lawson Tr., 268:4-12)). Instead, in October 2012, Lawson sent Podrizki an email with Berisha's first name in the subject line ("Shekel zen [sic] again") and asked: "Do you recognize the guy in this photo? From Albania obviously." Instead of attaching a

photograph, Lawson's e-mail contained a link to an internet article about Berisha that (presumably) included a photo of him. PS ¶ 65 (Zoladz Decl., Ex. 43); PS ¶ 65 (Zoladz Decl., Ex. 1 (Lawson Tr., at 261:18-268:12)).

Lawson credits an identification he deliberately suggested—"Shekel zen [sic] again . . . From Albania obviously"—despite that it was highly implausible that Podrizki would recognize Plaintiff in 2012, after failing to recognize him in 2008. PS ¶ 65 (Zoladz Decl., Ex. 1 (Lawson Tr., at 267:7-12 ("Q. And that—and you thought that his memory, at the time in 2012, was better than his memory back in 2008, didn't you? A. No. I thought his memory in 2012—that's what I relied on."))).

Second, Podrizki provided inconsistent accounts of events related to the May 2007 Meeting. As noted above, Lawson knew that Trebicka and Newsome placed Podrizki at a key meeting on the day after the May 2007 Meeting. PS ¶ 65 (Zoladz Decl., Ex. 4; 5). But Podrizki denied being present. PS ¶ 65 (Zoladz Decl., Ex. 6). likewise, at one time, Podrizki told Lawson that he had been present with Trebicka and Diveroli at a meeting with Mediu's chief of staff to expose the alleged corruption. PS ¶ 65 (Zoladz Decl., Ex. 44). But Podrizki also told Lawson he had not been present at the same meeting. PS ¶ 65 (Zoladz Decl., Ex. 6). Lawson himself acknowledged the inconsistency. PS ¶ 65 (Zoladz Decl., Ex. 1 (Lawson Tr., at 219:12-224:2)).

Lawson Ignored Sources That Said Berisha Was Not Involved

Third, Lawson was informed that the silent attendee at the May 2007 Meeting was not, in fact, Berisha. Gary Kokalari informed Lawson it was someone else: "earlier on their [sic] was some speculation it may have been Sali Berisha's son . . . the fifth man [at the meeting] was Rahman 'Rafe' Saliu (or Sahilillari [sic]) . . . I am also told he has a[t] least one tattoo on his hand or arm and that Diveroli and/or Podrizki should be able to confirm this." PS ¶ 133 (Zoladz Decl., Ex. 45). Moreover, Lawson also knew that Trebicka had stated publicly that he did not believe Berisha was involved. PS ¶ 133 (Zoladz Decl., Ex. 1 (Lawson Tr., 187:25-188:3 (" . . . I believe, later on, Mr. Trebicka recanted . . . that Mr. Berisha was involved in it.")).

Lawson Failed to Ask People With Knowledge

Fourth, Lawson made no effort to contact multiple people who could have provided information concerning whether Berisha had attended the alleged meeting. For example, Lawson did not attempt to contact Berisha, Pinari, or Mediu. PS ¶ 134 (Lawson Decl., at ¶¶ 85-87); PS ¶ 134 (Zoladz Decl., Ex. 1 (Lawson Tr., at 120:4-7; 124:3-125:13)). He also did not ask Ralph Merrill—a co-conspirator of the dudes whom Lawson interviewed—if the dudes ever mentioned meeting with the Prime Minister's son. PS ¶ 134 (Zoladz Decl., Ex. 45, ¶¶ 5-7); PS ¶ 134 (Zoladz Decl., Ex. 1 (Lawson Tr., at 282:25 – 238:15)).

Lawson Ignored Red Flags from Packouz's Account

Finally, Lawson claims that Packouz never told him that Podrizki said that Berisha was present at the May 2007 Meeting. PS ¶ 47 (Zoladz Decl., Ex. 1 (Lawson Tr., at 167:16-170:11; 168:15-22)). It is simply not credible that Packouz and Podrizki did not discuss Berisha at the time.

Although Packouz was not in Albania, he was "very good friends" with Podrizki and intimately involved in the events surrounding the May 2007 Meeting. PS ¶ 41 (Zoladz Decl., Ex. 1 (Lawson Tr., at 13:18-25; 15:16-19)). In April and May of 2007, Packouz supervised Podrizki's acquisition and repacking of the ammunition. PS ¶ 41 (Zoladz Decl., Ex. 47 (Packouz Tr., 34:3-20); Ex. 48), and they communicated frequently, sometimes multiple times a day. PS ¶ 41 (Zoladz Decl., Ex. 47 (Packouz Tr., 16:8-17)). Podrizki informed Packouz when he had important meetings about AEY's acquisition of the ammunition. PS ¶ 41 (Zoladz Decl., Ex. 47 (Packouz Tr.,at 50:7-11)). For example, Podrizki informed Packouz when Trebicka told Podrizki the price that the Ministry of Defense was receiving for the ammunition. PS ¶ 41 (Zoladz Decl. Ex. 50.); PS ¶ 41 (Zoladz Decl., Ex. 47 (Packouz Tr., 48:1-7)). See also PS ¶ 41 (Zoladz Decl., Ex. 49; 50; 51). Packouz also communicated directly with Pinari, at times daily. PS ¶ 41 (Zoladz Decl., Ex. 47 (Packouz Tr., 32:621)).

When Diveroli traveled to Albania for the May 2007 Meeting, Packouz stayed in regular contact with

Diveroli and Podrizki. In fact, Packouz helped Diveroli and Podrizki prepare for the renegotiation with Pinari by "forg[ing] documents from other suppliers to show that we had better prices." PS ¶ 41 (Zoladz Decl., Ex. 47 (Packouz Tr., 55:1-20); Ex. 52). Indeed, Lawson knew that Packouz had falsified the documents for use at the May 2007 Meeting. PS ¶ 47 (Zoladz Decl., Ex. 53).

In addition, Podrizki provided Packouz with details of the May 2007 Meeting, including that: "Pinari was mostly ignoring Diveroli . . . and throwing the fake documents in his face which Pinari ignored and took one look at it and said, oh, that's fake." PS ¶ 41 (Zoladz Decl., Ex. 47 (Packouz Tr., at 56:7-22)). And that: "there was an agreement to lower the price a little bit in exchange for the repackaging contract to be brought over to Pinari to do as well." PS ¶ 41 (Zoladz Decl., Ex. 47 (Packouz Tr., at 57:15-22)). In connection with that agreed price reduction, on the day following the May 2007 Meeting, Packouz drafted the re-negotiated agreement that Podrizki and Diveroli discussed with Pinari. PS ¶ 41 (Zoladz Decl., Ex. 54); *See also* PS ¶ 41 (Zoladz Decl., EL 55) (discussing Trebicka after the meeting "does Kosta want to keep the job or is he scared of pinari [sic]?"); PS ¶ 41 (Zoladz Decl., EL 56 (communicating with Pinari about buying Trebicka's extra packing material)).

Yet, according to Packouz, Podrizki never told him that Berisha was present at any meeting with Pinari: "He just said that Diveroli met with Pinari, that they met with Pinari. He didn't say that anyone else was

there." PS ¶ 41 (Zoladz Decl., EL 47 (Packouz Tr., at 57:4-14)). Incredibly, Packouz claims that Podrizki never mentioned that Albanian mafia or the prime minister's son was involved in any way with AEY's acquisition of ammunition from MEICO. *Id.* at 64:2-65:6.

If Diveroli and Packouz had actually met with Albanian mafia and the prime minister's son, Podrizki would have, by Packouz's own admission, told Packouz that fact at the time. PS ¶ 41 (Zoladz Decl., Ex. 47 (Packouz Tr., at 16:8-17; 55:1-20; 64:2-65:6)). Yet Lawson completely ignores Packouz' improbable denials. Lawson also deliberately avoids the more likely conclusion; namely, Packouz conspired with Diveroli and Podrizki to fabricate Berisha's involvement in order to pressure Trebicka to remain silent. PS ¶ 41 (Zoladz Decl., Ex. 47 (Packouz Tr., at 134:14-16 [redacted].)).[3]

[3] Alternatively, a reasonable jury could reach the conclusion that Packouz did, in fact, provide information to Lawson about Berisha's purported involvement in the meeting, but that Lawson knew he was not credible, and that it was beneficial to both Lawson and Packouz to remove Packouz as a source for the defamatory allegations at issue in this lawsuit. Indeed, in this action, Lawson initially claimed Packouz as a source for his claims about Berisha. Lawson's responses to Plaintiff's interrogatories provides: "Lawson responds by providing the following list containing the names of individuals he had conversations with concerning Berisha: . . . David Packouz . Approximate Dates of Communication [:] October 2009 to present". PS ¶ 47 (Zoladz Decl., Ex. 63.)

Simon & Schuster Recklessly Published Lawson's False Allegations

Simon & Schuster was aware of the flaws in Lawson's reporting. And knew Lawson's primary sources were convicted fraudsters (*see generally* PS ¶ 72 (Lawson Decl., Ex. 1)) and had been paid for their story PS ¶ 72 (Zoladz Decl., Ex. 57).

As set forth above, Simon & Schuster knew that Lawson wanted to allege a [redacted]" (PS ¶ 67 (Zoladz Decl., Ex. 59)), [redacted] (PS ¶ 68 (Zoladz Decl., Ex. 20)), and other improbable allegations with insufficient factual support. Specifically, Simon & Schuster was also copied on an email that C.J. Chivers of the New York Times sent to Lawson stating:

> "[I]t is apparent that the writing you have submitted to Simon & Schuster, at least on The Times, is almost certainly riddled with unsupported surmises, factual errors, and misleading conclusions. We're especially concerned because your email string informs us that you have finished a book manuscript and only now, as you face a legal review at Simon & Schuster, are you trying to nail down the facts. . . . **[Y]ou have written a factually unsupportable tale and hope that it might stick and that we might help you."**

PS ¶ 125 (Zoladz Decl., Ex. 60; emphasis added.). Indeed, it is not surprising that Lawson had a reputation within Simon & Schuster as [redacted]" and [redacted],"

and that he [redacted] PS ¶ 45 (Zoladz Decl., Ex. 61).

Notably, Lawson testified that the decision to misrepresent Wood's interview with Mediu—making it appear as though Mediu's outburst concerned Plaintiff's alleged involvement with AEY—was made in consultation with Simon & Schuster. *See* PS ¶ 130 (Zoladz Decl., Ex. 1 (Lawson Tr., at 229:13-232:3)).

Most importantly, there are hundreds of communications, between Simon & Schuster and Lawson, concerning verification of Lawson's allegations, that Defendants have wrongfully withheld on grounds of privilege. *See* PS ¶ 67 (Zoladz Decl., EL 62) [redacted]"). Those communications concern "subjects such as the sourcing for factual statements" in the Book and potentially "defamatory statements about [] living and identifiable person[s]." PS ¶ 59 (Dkt. No. 109-1, Declaration of Jonathan Karp ("Karp Decl."), 11).

Lawson did not Reasonably—or Actually—Rely on Prior Reporting for His Allegations of Plaintiff's Involvement with AEY

Lawson attempts to justify his shoddy allegations of Plaintiff's involvement with AEY by disclaiming responsibility for them. *See* Lawson Decl., ¶¶ 31-59. His reckless reporting laid bare in discovery, Lawson now postulates reliance on other media sources.

Specifically, Lawson purports he relied upon: (1) The New York Times ("NYT"); (2) The New Republic; (3) so-called "widespread reporting' in Albania; (3) a book by Ardian Klosi ("Klosi"); (4) a book by Andrew Feinstein ("Feinstein"); and (5) an Al Jazeera television broadcast. Yet, as shown below, that purported reliance is neither reasonable nor sincere.

The New York Times Articles

In his declaration, Lawson disingenuously claims that two 2008 NYT articles "relying on Diveroli then under scrutiny for fraud, reported that Plaintiff was involved in corrupt deals involved in AEY's efforts to purchase Albanian ammunition . . . " Lawson Decl., ¶ 32. But those articles do not justify his allegations.

First, it is clear on the face of those articles that the NYT did not "rely" on Diveroli and, instead, referenced only that Diveroli made statements about the Plaintiff in a recorded conversation with Kosta Trebicka. That is, the NYT did not report that Diveroli's allegation was true.

Specifically, the NYT articles' only passages concerning Plaintiff state—without elaboration—that:

- "Mr. Diveroli recommended that Mr. Trebicka try to reclaim his contract by sending 'one of his girls' to have sex with Mr. Pinari. [Diveroli] suggested that money might help, too. 'Let's get him happy; maybe he gives you one more chance,' he said. 'If he gets $20,000 from you . . . ' At the end, Mr Diveroli appeared to lament his business with

> Albania. 'It went up higher to the prime minister and his son,' he said. 'I can't fight this mafia. It got too big. The animals just got too out of control.' PS ¶ 35 (Lawson Decl., Ex. 2).

- "[Trebicka] recorded a phone call with AEY's president, Efraim E. Diveroli, in which Mr. Diveroli said the corruption went all the way up to the Albanian prime minister, Sail Berisha, and his son." PS ¶ 84 (Lawson Decl., Ex. 6.).

Instead of endorsing the truth of Diveroli's statement, the NYT articles reference the recorded conversation as evidence of Diveroli's character and AEY's dealings with Trebicka. They do not elaborate on Diveroli's false allegation. Lawson himself admitted as much at deposition:

> Q. And what – what was published in the New York Times with respect to Shkëlzen Berisha, to your knowledge?
>
> A. I don't think he was mentioned by name. I just think it was by implication in the quote that Diveroli said. It's – and I – I'm going to paraphrase, unless you want to give me the document – something about it went all the way up to the prime minister and his son.

PS ¶ 35 (Zoladz Decl., EL 1 (Lawson Tr., 96:18 – 97:3)); *see also* PS ¶ 35 (Zoladz Decl., Ex. 1 (Lawson Tr., 105:3-13)).

Second, by the time the Book is published in 2015, Lawson admits—both in the book (*see* Lawson Decl., Ex. 1 at *xv-xvi*) and at his deposition (*see* PS ¶ 135

(Zoladz Decl., Ex. 1 (Lawson Tr., 100:4 – 101:8))—that he is aware of a lot more information:

> Q. But your understanding of what was reported in the New York Times was . . . simply a transcription of a portion of an audio tape conversation between . . . Efraim Diveroli and Kosta Trebicka; correct?
>
> A. I don't – I believe, at that time, I had never even heard the name of Mr. Berisha's – the junior Mr. Berisha – just that little phrase and his son. . . . **And as I came to write the book**, I grew – **I grew to know a lot more about it**.

Id. (emphasis added). As detailed *supra*, after publication of those two NYT articles, but long before the Book's release, Lawson was aware of—and deliberately chose to ignore—evidence casting serious doubts on Diveroli's taped assertion.

The New Republic Article

The entirety of that article's statement concerning Plaintiff is:

> "In 2008, on a secretly recorded phone call, an American arms dealer complained that his scheme to sell illegal ammo from Albanian junkyards to the U.S. Army had become entangled in an Albanian "mafia" involving Berisha and his son."

PS ¶ 97 (Lawson Decl., Ex. 16). Lawson's supposed reliance on this single-sentence is unreasonable for the

same reason that his purported reliance on the NYT articles was unreasonable: it merely recounts the statement of Diveroli, a fraudster that Lawson knew was motivated to lie.

"Widespread Reporting"

Both at his deposition, and via declaration, Lawson asserts that he relied on so-called "widespread reporting' in Albania for his allegations of Plaintiff's corrupt involvement with AEY. *See* PS ¶ 136 (Zoladz Decl., Ex. 1 (Lawson Tr., 151:1 – 153:16; 154:1 – 161:25)); PS ¶ 136 (Lawson Decl., ¶¶ 30, 48, & 53)). Yet Lawson demonstrated at his deposition that he had no reasonable basis for that purported reliance:

> Q. Do you know – have a knowledge of the journalistic standards applied by Albanian newspapers?
>
> A. I do not.
>
> Q. Do you have a knowledge of which Albanian newspapers are considered to be reputable and which are not?
>
> A. I do not.
>
> Q. And do you know whether Albanian newspapers that reported allegations that Mr. Berisha was involved in Gërdec were considered to be aligned with political parties opposed to Mr. Berisha's father?
>
> A. I do not.

PS ¶ 136 (Zoladz Decl., Ex. 1 (Lawson Tr., 158:5-18)).

Klosi's Book: "The Gerdec Disaster"

Lawson also claims that he relied on an English translation of Klosi's book for assertion of Plaintiff's involvement with AEY. *See* PS ¶ 100 (Zoladz Decl., Ex. 1 (Lawson Tr., 188:20-190:8)); PS ¶ 100 (Lawson Decl., ¶¶ 46-47). Yet the only "reporting' in Klosi's book concerning Plaintiff and AEY is the following.

> Some media editors, following Kosta Trebicka's tip-off and the phone calls he had sent them for examination, were calling for further investigations. . . . Among other people, the prime minister's son was mentioned as present at a meeting with Pinari and Delijorgi.

PS ¶ 100 (Lawson Decl., Ex. 10). Lawson's so-called reliance on that "reporting" is neither reasonable nor actual. First, the statement about the existence of "the [taped] phone calls [Trebicka] sent" is no different than that recounted in the NYT articles. Second, when Lawson read Klosi's book, Lawson knew that Trebicka's information about Plaintiff's alleged presence at the May 2007 Meeting came from Diveroli. *See* PS ¶ 137 (Zoladz Decl., Ex. 1 (Lawson Tr., 176:8-11; 205:12-15; 206:1-7; 132:1-133:7)); PS ¶ 137 (Lawson Decl., Ex. 1 at 141). Thus, Lawson's supposed reliance on Klosi amounts to recklessly relying on Diveroli. Third, both Lawson's interrogatory answer and deposition cast substantial doubt regarding whether Lawson actually relied on Klosi. In his answers to Plaintiff's interrogatories 7 & 8, Lawson makes no mention of Klosi's book as a source for his statements about the Plaintiff. PS

¶ 100 (Zoladz Decl., Ex. 63). At deposition, Lawson testified:

> Q. And so Mr. Podrizki, then, is the only reliable source you assert of information that Mr. Shkëlzen Berisha was present at the meeting –
>
> A. Mr. Klosi's book is a source. Mr. Feinstein's book is a source. The – again, I'm not sure if it was related to the meeting. I'm not asserting that. But there was widespread cover in Alb-Demil. All of the things taken together were convincing to me. . . .
>
> Q. . . . You just stated that you relied in part on Mr. Klosi's book; correct?
>
> A. I provided the book to my attorney. They've had it in their possession. I haven't looked at it, but very likely –
>
> Q. Sir, I asked you what you relied upon. Did you rely on Mr. Klosi's book?
>
> A. I read the book, yes.

PS ¶ 100 (Zoladz Decl., Ex. 1 (Lawson Tr., 188:20 – 190:8)).

Feinstein's Book: The Shadow World

Feinstein's book includes only the following statement concerning the Plaintiff:

> Importantly, the son of Sali Berisha, the Prime Minister, was alleged to have been involved in at least one meeting with Delijorgji

> and Pinari, leading to speculation that he too was in on the deal.

Lawson Decl., Ex. 15. But, as Lawson admits (*see* PS ¶ 100 (Lawson Decl., ¶ 55)), Feinstein footnotes Klosi as his source of that information. So, in sum, Feinstein relies on Klosi, Klosi relies on Trebicka, Trebicka relies on Diveroli, and Lawson knows that Diveroli lies "directly, indirectly, compulsively." PS ¶ 138 (Lawson Decl., Ex. 1 at 38.)

Furthermore, documentary evidence proves that Lawson did not, in fact, rely on Feinstein. Lawson wrote:

> "It happens that I am reading Shadow World at the moment. I can't speak for the rest of the book, but the section regarding AEY is filled with declarations that are incorrect and/or misleading. . . . I don't pretend to be an expert, like Chris surely is; nor will I pretend to be an expert, like Feinstein."

PS ¶ 100 (Zoladz Decl., Ex. 64). Finally, like with Klosi, Lawson makes no mention of his reliance on Feinstein's book in answer to Plaintiff's interrogatories 7 & 8. PS ¶ 100 (Zoladz Decl., Ex. 63).

Al Jazeera Broadcast: Bullets and Bucks

Lawson claims further reliance on an October 6, 2010 Al Jazeera newscast concerning an explosion at Gerdec, Albania ("Gerdec") for his reporting of Plaintiff's involvement with AEY. That program made defamatory allegations of Plaintiff's involvement in

events leading up to that explosion. PS ¶ 89 (Lawson Decl., Ex. 8). Those defamatory allegations were made by political opponents of then-prime minister, Sail Berisha. PS ¶ 90 (Berisha Decl., ¶ 38). Plaintiff informed Al Jazeera of the falsity of those allegations PS ¶ 91 (Zoladz Decl., Ex. 69), but did not ultimately sue in deference to his father's wishes. PS ¶ 91 (Zoladz Decl., Ex. 66 (Berisha Tr., 107:6-11)).

Even if that broadcast's allegations about Plaintiff's role in Gerdec were true—and they are not—the broadcast does not support Lawson's reliance upon it for allegations of Plaintiff's involvement with AEY. In fact, the only mention in that broadcast of Plaintiff's involvement with AEY was a reference to the NYT article:

> "[Trebicka], the article said, claimed that several senior Albanian officials including Defence Minister Fatmir Mediu and Ylli Pinari from the MEICO arms company were involved in the scam along with the Prime Minister's son, Shkelzen Berisha . . . "

PS ¶ 89 (Lawson Decl., Ex. 8). Lawson cannot reasonably assert that the Al Jazeera broadcast <u>about Gerdec</u> provided support for his allegations concerning Plaintiff <u>about AEY.</u>

Plaintiff is a Private Citizen

Plaintiff is the son of the former prime minister of the Republic of Albania. PS ¶ 139 (Berisha Decl, ¶ 2). He has never run for, or held, any public office. PS

¶ 139 (Berisha Decl, ¶ 9). He has attempted to lead a private life. PS ¶ 139 (Berisha Decl, ¶ 10)

Contrary to Lawson's false allegations, Berisha has never had any involvement in arms dealing and does not know anyone in the Albanian "mafia." He has most certainly has never been in a room with Diveroli or Podrizki. PS ¶ 139 (Berisha Decl, ¶ 14; Zoladz Decl., Ex. 38).

On several occasions, in response to false allegations manufactured by opponents of Plaintiff's father, Plaintiff has issued public statements. *See e.g.*, PS ¶ 139 (Zoladz Decl., Ex. 66 (Berisha Tr., 162:5 – 163:10)). Yet, Plaintiff has never voluntarily sought media attention (PS ¶ 139 (Berisha Decl, ¶ 10)) and the written statements Plaintiff sent to reporters were brief replies to false allegations. PS ¶ 139 (Zoladz Decl., Ex. 66 (Berisha Tr., 163:4 – 10)). Berisha does not have, and has never had, privileged access to the media. Some news outlets have published Plaintiff's refutations, but others have not. PS ¶ 139 (Zoladz Decl., Ex. 66 (Berisha Tr., 163:22 – 164:14)). Plaintiff's partner (Armina Mevlani) has a large social media following, Plaintiff has specifically requested that she limit the posting of photographs that include Plaintiff. PS ¶ 139 (Zoladz Decl., Ex. 66 (Berisha Tr., 154:7 – 155:2)). As a result, Ms. Mevlani has posted very few images of herself and Berisha. *Id.*

ARGUMENT

I. SUMMARY JUDGMENT STANDARD

On summary judgment, "[i]f the record presents factual issues, the Court must not decide them; it must deny the motion and proceed to trial." Schiller v. Viacom, Inc.,, 2016 WL 9280239, at *4 (S.D. Fla. Apr. 4, 2016). "[T]he dispute about a material fact is 'genuine,' . . . if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Anderson v. liberty Lobby, Inc., 477 U.S. 242, 248 (1986). "The Court must resolve all ambiguities and draw all justifiable inferences in favor of the non-moving party." Schiller, at *4.

The summary judgment standard is not different in defamation cases, as Defendants suggest. (Defs.' Memo at 10-11). See Lavin v. New York News, Inc., 757 F.2d 1416, 1419 (3d Cir. 1985) ("A substantial dispute of material fact does not disappear merely because a media defendant is being sued. . . . and plaintiff's right to a jury trial is entitled to no less respect. . . . carving out exceptions to Fed. R. Civ. P. 56 is neither permissible, nor helpful.")

For the reasons set forth herein, a reasonable jury could—and should—find that the Defendants did not meet their standard of care, and instead acted negligently, or with actual malice, in making the defamatory statements about Berisha.

II. BERISHA IS NOT A GENERAL PURPOSE PUBLIC FIGURE

General purpose public figures are persons that have "assumed roles of especial prominence in the affairs of society." See Gertz v. Robert Welch, Inc., 418 U.S. 323, 345 (1974). "[P]ublic figures have voluntarily exposed themselves to increased risk of injury from defamatory falsehood concerning them." *Id.*" No such assumption is justified with respect to a private individual [because] [h]e has not accepted public office or assumed an influential role in ordering society." Id. (internal quotes omitted); see also Partington v. Bugliosi, 825 F. Supp. 906, 917 (D. Haw. 1993), aff'd, 56 F.3d 1147 (9th Cir. 1995) ("Such persons knowingly relinquish their anonymity in return for fame or fortune [and] [i]t is thus reasonable to attribute a public character to all aspects of their lives.") (internal quotations omitted).

Defendants do not contend seriously that Berisha is a general purpose public figure; they relegate this argument to a three-line footnote. (See Defs.' Memo. at 14, n. 8.) Nonetheless, that argument is without merit because there is no evidence that Plaintiff "voluntarily exposed [himself] to increased risk of injury from defamatory falsehoods" or "assumed an influential role in ordering society." See Gertz, 418 U.S. at 345.

Plaintiff has led—and continues to lead—a private life. He does not forfeit a private person's protection from defamation simply because his father is a politician. See id.

III. BERISHA IS NOT A LIMITED PURPOSE PUBLIC FIGURE BECAUSE HE DID NOTHING TO VOLUNTARILY THRUST HIMSELF INTO THE AEY CONTROVERSY

Defendants' primary argument is that Plaintiff is a "limited-purpose public figure." Yet that designation requires proof that Plaintiff voluntarily inserted himself into the AEY controversy—a burden Defendants cannot carry.

The Supreme Court has held repeatedly that the determinative factual issue is whether a plaintiff took voluntary action to make himself a public figure. Gertz, 418 U.S. at 345 ("[T]hose classed as public figures have thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved"); Wolston v. Reader's Digest Ass'n, Inc., 443 U.S. 157, 166–68 (1979) (criminal defendant was not a limited purpose public figure because "[i]t would be more accurate to say that petitioner was dragged unwillingly into the controversy."); Time, Inc. v. Firestone, 424 U.S. 448, 454 (1976) ("Nor did respondent freely choose to publicize issues as to the propriety of her married life.") (citations omitted).

To be a limited purpose public figure "the plaintiff either (1) must 'purposely [try] to influence the outcome' of the public controversy, or (2) 'could realistically have been expected, because of his position in the controversy, to have an impact on its resolution.' In general, public figures voluntarily put themselves into a position to influence the outcome of the controversy."

Silvester v. Am. Broad. Companies, Inc., 839 F.2d 1491, 1496 (11th Cir. 1988) (citations omitted); Mitre Sports Int'l Ltd. v. Home Box Office, Inc., 22 F. Supp. 3d 240, 251 (S.D.N.Y. 2014) ("Voluntary attention-seeking, or voluntary participation in a particular controversy is a key factor in determining limited public figure status.")

Being the subject of news reports is insufficient. Id. at 251–52 ("General news reports regarding public controversy" are insufficient to make plaintiff a public figure with respect to the issue because they "fall short of meeting the requirements for a limited purpose public figure under Gertz and the line of cases that consistently require 'affirmative steps,' purposeful activity,' 'voluntary' injection, or 'invit[ing] public attention.' ") Plaintiff has done nothing to "invite attention" here.

First, Plaintiff has never held a position for which he could have expected to be at the center of the AEY controversy. That is, Plaintiff has never been involved with arms dealing in any way.

Second, Berisha has never injected himself into the AEY story. Rather, Berisha was "dragged unwillingly into the controversy" by Diveroli's lies.

Defendants claim that, despite Lawson having purportedly reviewed "tens of thousands of pages of documentary evidence and interviewed scores of people," (Defs.' Memo. at 7-8), he was not "aware of any statement issued by Plaintiff denying involvement in AEY arms dealing or other corruption." (Defs.' Memo. at 25.) Yet Defendants cannot have it both ways. They

cannot claim credibly that Plaintiff used "ready access to the media" for influence, (Defs.' Memo. at 16), and also fault him for not doing more to publicly deny false allegations. Further, as shown below, Berisha's truthful statements refuting the allegations—reasonable public replies to the false allegations made against him—do not transform him into a limited purpose public figure.

A. Plaintiff's Right to Reply does not Transform him into a Limited Purpose Public Figure

The only voluntary activity cited by Defendants is the handful of statements that Berisha made over the years responding to false allegations leveled against him. Yet Berisha's statements fall squarely within the right of a private figure to respond to serious, false allegations.

In Foretich v. Capital Cities/ABC, Inc., 37 F.3d 1541, 1559–60 (4th Cir. 1994), the Fourth Circuit held that the plaintiffs did not become limited purpose public figures by making "reasonable replies" to statements that constituted per se defamation. Id. at 1564 ("We see no good reason 'why someone dragged into a controversy should be able to speak publicly only at the expense of foregoing a private person's protection from defamation.'"). The Foretich Court found support for the right of reply in the Supreme Court's Firestone decision: "[T]he Court was not swayed by the fact that Firestone had held several press conferences 'during

the divorce proceedings in an attempt to satisfy inquiring reporters. . . ." Foretich, 37 F.3d at 1557.

Since Foretich, the right of reply has been adopted by other courts. See Lluberes v. Uncommon Prods., LLC, 663 F.3d 6, 19 (1st Cir. 2011) ("[A]n individual should not risk being branded with an unfavorable status determination merely because he defends himself publicly against accusations, especially those of a heinous character."). "Indeed, the cases have suggested that ordinarily something more than a plaintiff's short simple statement of his view of the story is required; he renders himself a public figure only if he voluntarily 'draw[s] attention to himself or uses his position in the controversy 'as a fulcrum to create public discussion.'" Clyburn, 903 F.2d 29, 32 (D.C. Cir. 1990); see also Wells v. Liddy, 186 F.3d 505, 537 (4th Cir. 1999) ("Firestone makes clear that voluntary discussion of events with the press does not per se indicate that a defamation plaintiff has 'thrust herself to the forefront of [a public] controversy.'") "Rather, when an individual has had contact with the press, the proper questions are whether he has attempted to influence the merits of a controversy, 'draw[n] attention to himself in order to invite public comment,' Wolston 443 U.S. at 168, or 'invited that degree of public attention and comment . . . essential to meet the public figure level,' Hutchinson v. Proxmire, 443 U.S. 111, 135 (1979)." Wells, 186 F.3d at 537.[4]

[4] To the extent that there are factual issues concerning whether Berisha's statements fall within the right to reply, they

B. Defendants' Position—That Accusations Connected to a Public Controversy Make Plaintiff a Public Figure—was Rejected by the Supreme Court in the 1970s

In essence, Defendants' public figure argument boils down to the assertion that by virtue of his birth and bad luck, Berisha is a public figure because he "found himself at the very heart" of a scandal that was "front page news" and a "matter of public concern." (Defs.' Memo. at 13-16.) But that statement of law hasn't been true since the 1970s. In Gertz, and multiple cases that followed, the Supreme Court expressly repudiated prior case law holding that the actual malice standard should extend to defamatory falsehoods relating to private persons if the statements involved matters of public or general concern. Gertz, 418 U.S. at 346.

Without directly saying so, Defendants would have this Court hold that Berisha is a unicorn—the "exceedingly rare" involuntary public figure. Yet the Supreme Court has never found someone to be in the category of "truly involuntary public figure," and courts and scholars alike have questioned whether such a category can exist. See Wells, 186 F.3d at 538–39; David L. Wallis, Note, The Revival of Involuntary

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are not appropriate for resolution at summary judgment. See Lluberes, 663 F.3d at 14 (the inquiry into whether someone is a limited purpose public figure "is 'inescapably fact-specific,' Mandel v. Bos. Phoenix, Inc., 456 F.3d 198, 204 (1st Cir. 2006), and does not always lend itself to summary judgment").

Limited–Purpose Public Figures–Dameron v. Washington Magazine, Inc., 1987 B.Y.U. L.Rev. 313, 323.

But as the Fourth Circuit held, such a finding would gut the holding of Gertz and mark a return to the pre-Gertz rule:

> We are hesitant to rest involuntary public figure status upon "sheer bad luck." Gertz tells us that involuntary public figures "must be exceedingly rare," and, unfortunately, bad luck is relatively common. The Dameron definition of an involuntary public figure, someone who by bad luck is an important figure in a public controversy, runs the risk of returning us to the Rosenbloom plurality's conception of defamation law. Under Rosenbloom, all defamation plaintiffs were required to prove actual malice when the allegedly defamatory statements occurred during "discussion and communication involving matters of public or general concern, without regard to whether the persons involved are famous or anonymous." The Supreme Court expressly repudiated the "public interest" test in Gertz, and further disavowed it in Wolston, ("To accept such reasoning would in effect reestablish the doctrine advanced by the plurality opinion in Rosenbloom . . . which concluded that the New York Times standard should extend to defamatory falsehoods relating to private persons if the statements involved matters of public or general concern. We repudiated this

> approach in Gertz and in Firestone, however, and we reject it again today.").

Wells, 186 F.3d at 538–39 (citations omitted).

IV. A REASONABLE JURY COULD DECIDE THAT THE DEFAMATORY STATEMENTS WERE MADE WITH ACTUAL MALICE

As a private figure, Berisha need prove only that Defendants acted negligently in publishing the defamatory statements. Rubin v. U.S. News & World Report, Inc., 271 F.3d 1305, 1308 (11th Cir. 2001) ("negligence is an element in a defamation suit by a private figure in a matter of public concern"), citing Miami Herald Publishing Co. v. Ane, 458 So.2d 239, 242 (Fla.1984). Yet, as set forth below, even if Berisha were a public figure, there is sufficient evidence from which a reasonable jury could conclude that Defendants acted with reckless disregard for the truth.

Plaintiff may rely on circumstantial evidence to show that Defendants acted with actual malice. Hunt, 720 F.2d at 643 ("Absent an admission by the defendant that he knew his material was false or that he doubted its truth, a public figure must rely upon circumstantial evidence to prove his case."); Sharon v. Time, Inc., 599 F. Supp. 538, 564 (S.D.N.Y. 1984) ("[A] plaintiff is entitled to rely on circumstantial evidence to prove that a defendant published with actual malice, including the defendant's conduct.") Actual malice "may be proved by inference, as it would be rare for a defendant to admit such doubts. A court typically will

infer actual malice from objective facts." Bose Corp. v. Consumers Union of United States, Inc., 692 F.2d 189, 196 (1st Cir.1982) (citations omitted).

The Court should consider plaintiff's evidence of actual malice in the aggregate, and not whether each individual piece of evidence by itself demonstrates reckless disregard for the truth. See Stern v. Cosby, 645 F. Supp. 2d 258, 278 (S.D.N.Y. 2009) (citing Tavoulareas v. Piro, 817 F.2d 762, 794 n. 43 (D.C. Cir. 1987) (*en banc*) ("We recognize that each individual piece of evidence cannot fairly be judged individually . . . Plaintiffs are entitled to an aggregate consideration of all their evidence to determine if their burden has been met.")); Celle v. Filipino Reporter Enterprises Inc., 209 F.3d 163, 183 (2d Cir. 2000) (citing Bose Corp., 692 F.2d at 196 ("accumulation of the evidence and appropriate inferences may support[] the existence of actual malice.'")).

"The proof of 'actual malice' calls a defendant's state of mind into question, and does not readily lend itself to summary disposition." Hutchinson, 443 U.S. at 120 n. 9 (citations omitted).

A. Lawson Had Obvious Reason to Doubt the Veracity of His Sources

A reasonable jury could discount Lawson's self-serving assertion that he believed his sources to be credible, and that he believed that the statements to be accurate, because Lawson had obvious reason to doubt the veracity of his sources. Hunt, 720 F.2d at 645

("[A]n inference of actual malice can be drawn when a defendant publishes a defamatory statement that contradicts information known to him, even when the defendant testifies that he believed that the statement was not defamatory and was consistent with the facts within his knowledge.").

As the Eleventh Circuit explained in Hunt: "[W]hen an article is not in the category of 'hot news,' that is, information that must be printed immediately or it will lose its newsworthy value, 'actual malice may be inferred when the investigation for a story . . . was grossly inadequate in the circumstances.'" Id. at 643 (citations omitted). An investigation is grossly inadequate "where there are obvious reasons to doubt the veracity of the informant or the accuracy of his reports." Id.; Gertz v. Robert Welch, Inc., 680 F.2d 527, 538 (7th Cir.1982) ("[A] publisher cannot feign ignorance or profess good faith when there are clear indications present which bring into question the truth or falsity of defamatory statements."); Connaughton v. Harte Hanks Commc'ns, Inc., 842 F.2d 825, 847 (6th Cir. 1988) ("Accordingly, this court concludes that the *Journal's* decision to rely on [source's] highly questionable and condemning allegations without first verifying those accusations through [key witness] and without independent supporting evidence constituted an extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers which demonstrated a reckless disregard as to the truth or falsity of [source's] allegations.").

Further, knowledge of a source's bias or unreliability can provide reason to doubt the veracity of the information. See Stern, 645 F. Supp. 2d at 281 ("A reasonable jury could find that [the author's] reliance on these two sources for such an explosive allegation is evidence of actual malice, because [she] was aware of their possible bias and/or unreliability. Cf. Secord v. Cockburn, 747 F.Supp. 779, 789 (D.D.C.1990) (holding that actual malice requirement met where 'author was subjectively aware that the source was unreliable')"); Hunt, 720 F.2d at 645 ("the jury could reasonably conclude that [publisher] did not follow up on his doubts about [informant's] neutrality prior to publication.").

As detailed in the Facts section above, Lawson had obvious reason to doubt the veracity of his sources because Lawson knew the following. (1) the sourcing for Berisha's presence at the May 2007 Meeting was ultimately Diveroli, a pathological liar; (2) Packouz and Podrizki had been convicted, along with Diveroli, of conspiracy to defraud the U.S Government, and had used the identities of real people to perpetuate AEY's fraudulent scheme; (3) Podrizki lied to Lawson about key events related to the May 2007 Meeting; (4) Packouz and Podrizki were motivated to tell Lawson what he wanted to hear because they had a financial interest in the Book, and wanted to rehabilitate their images; (5) Podrizki had previously failed to identify Berisha from a photograph as part of a law enforcement interview in 2008, and had provided Lawson inconsistent accounts of key events related to the May 2007 Meeting, and (6) Lawson's source for the statement that

Berisha "was part of what was known in Albania as 'the family,' the tight-knit and extremely dangerous group that surrounded and lived at the beneficence of the Prime Minister, Sail Berisha" was a political opponent of Berisha's father with an obvious bias.

B. Lawson Had an Agenda, Which Caused Him to Fabricate Certain Facts that Supported His Storyline and Discount Those that Did Not

As demonstrated above, Lawson had his own biases and agenda. Specifically, Lawson wanted to sell a Pentagon conspiracy, State Department bribery, biased federal prosecution, and Albanian corruption, while minimizing the culpability of his sources: Packouz and Podrizki.

But Lawson did not have sufficient facts to prove his counter-narratives. So instead of abandoning inadequately sourced allegations, he fabricated facts and quotes. For instance, Lawson drafted dialogue for an entire scene, portraying Podrizki in a positive light, that never happened. In another instance, Lawson asked a reporter for permission to alter facts about allegations against Berisha for "dramatic purposes." Recently, this Court found similar facts sufficient to preclude summary judgment:

> Michael Bay . . . testified that "Pain & Gain" took "certain facts in the case and we twisted them for our own benefit to make a fun movie." This evidence, when placed in the

> light most favorable to Plaintiff, demonstrates that Defendants . . entertained "serious doubts" as to the truth of their publication, thereby precluding summary judgment.

Schiller v. Viacom, Inc., 2016 WL 9280239, at *7 (S.D. Fla. Apr. 4, 2016) (record cites omitted).

Here, Lawson changed facts provided by his sources to bolster his allegations against Berisha. Despite Podrizki telling Lawson that Trebicka was the source of his belief that Berisha was the silent attendee at the May 2007 Meeting, Lawson wrote "*they* would later be told *by Pinari.*" When Podrizki pointed out the error in a draft, Lawson initially changed it to "*they* would later be told *by Trebicka*," and then changed it back to Pinari. Moreover, Lawson admits that didn't believe that "they"—meaning both Diveroli and Podrizki—were told by Pinari. Instead, he admits that he thought only Diveroli was told by Pinari. From those efforts to bolster the quality of his sourcing, a reasonable jury could find this evidence that Lawson acted with reckless disregard for the truth. See Masson v. New Yorker Magazine, Inc., 832 F. Supp. 1350, 1356–57 (N.D. Cal. 1993) ("One possible conclusion the jury might draw. . . . [is] that the quotations were changed back as a result of a conscious decision to sacrifice accuracy to creativity.")

Further, Lawson, in consultation with his editors at Simon & Schuster, intentionally misrepresented a scene (and doctored quotations) to make it appear as though Mediu responded emotionally to allegations

about Plaintiff and AEY—and not drug trafficking—to bolster Lawson's corruption claims against Plaintiff. Schiavone Const. Co. v. Time, Inc., 847 F.2d 1069, 1092 (3d Cir. 1988) ("Smith's decision to simply delete language that cast a very different and more benign light on the facts he reported, could itself serve as a basis for a jury's finding by clear and convincing evidence that Time acted with knowledge of probable falsity.")

Likewise, Lawson's bias led him to credit facts that supported his storyline, and discredit those that did not. As detailed above, Lawson purposefully avoided facts that suggested that Berisha was not involved in corruption, including. (1) not asking Podrizki about his failure to identify Berisha in 2008, and instead crediting a suggestive identification—that Lawson induced—in 2012; (2) ignoring a statement from one of his sources that another man was actually the silent attendee at the May 2007 Meeting; (3) failing to contact people who could have shed light on whether Berisha was involved in corruption, including Berisha, Pinari and Mediu; (4) failing to ask Merrill about his contemporaneous communications with the Dudes in May 2007; and (5) and ignoring red flags in Packouz' improbable account that he did not discuss Berisha with Diveroli and Podrizki in May 2007.

Again, a reasonable jury could find these facts, especially in the aggregate, to be evidence that Lawson acted with actual malice. See Sharon, 599 F. Supp. at 585 ("But a jury could find significant the fact that . . . [reporter] failed to ask any questions that would have led his source to deny the hypothesis that he had set

out to test."); id. ("The inconsistency among these statements could lead a jury to find that [editor] based his file on nothing more than speculation."); Schiavone, 847 F.2d at 1092 ("[H]is choice to credit only the portions that were damaging to Schiavone and not the portion that would have neutralized those damaging statements bears on his subjective state of mind and may point to actual malice."); id. at 1090 ('Where the defendant finds internal inconsistencies or apparently reliable information that contradicts its libelous assertions, but nevertheless publishes those statements anyway, the *New York Times* actual malice test can be met.")

C. Lawson Cannot Rely on Prior Reporting Because His Book Went Further

As set forth above, the prior reporting concerning Plaintiff and AEY cited only the recorded conversation between Diveroli and Trebicka. By contrast, the Book was qualitatively different. It was the detailed report, of an investigative journalist, that Plaintiff actually attended the May 2007 Meeting, was engaged in corruption, and associated with "mafia." See Stern, 645 F. Supp. 2d at 271 ("[T]here is a qualitative difference between comments made on a tabloid television show and written statements in a book purporting to be the product of legitimate 'investigative journalism,' written by—as appears on the cover of the Book—an 'Emmy–Award Winning Journalist.'. . . . Second, much of the conduct detailed in the Book is fundamentally

different from the conduct that was the subject of the allegations swirling in the tabloid media.")

D. Lawson Cannot Rely on Prior Reporting Since He Had Evidence to Refute It

Moreover, courts have explicitly rejected the argument that Defendants can rely on reports of reputable news organizations to the exclusion of contrary evidence. Defendants are well aware (as Defendants' counsel's law firm argued the case) that the Ninth Circuit has held:

> Defendants were not uninvolved third parties who clearly lacked access to the facts behind the published reports. If they knew that the news reports were false or had information from other sources that raised obvious doubts, then they didn't "rely" on the news stories; they simply hid behind them. What defendants actually want is a rule that purported reliance on reputable news sources cannot constitute actual malice—but that is not the law.

Flowers v. Camille, 310 F.3d 1118, 1130 (9th Cir. 2002) (emphasis in original). This is because:

> "Talebearers are as bad as talemakers," each repetition of a defamatory statement by a new person constitutes a new publication, rendering the repeater liable for that new publication. . . . The law deems the repeater to "adopt as his own" the defamatory statement. Liability for repetition of a libel may not be avoided

> by the mere expedient of adding the truthful caveat that one heard the statement from somebody else.

Id. at 1128. "Likewise, a defamatory statement isn't rendered nondefamatory merely because it relies on another defamatory statement." Id. at 1129. "[I]f someone knows that the news story is false, he can't sanitize his republication by purporting to rely on the news source. Nor can he claim immunity if he has conflicting information from another source and recklessly disregards it." Id. at 1130. See also Stern, 645 F. Supp. 2d at 270-71 (S.D.N.Y. 2009) ("That someone has been falsely called a thief in the past does not mean that he is immune from further injury if he is falsely called a thief again.").

As shown above, a reasonable jury could find that Lawson had reason to doubt the veracity of his sources, fabricated facts to fit his agenda, and discounted conflicting information. His purported reliance on prior news reports cannot sanitize statements made with actual malice.

E. Simon & Schuster Acted With Actual Malice

While Simon & Schuster did not have all the information that Lawson had, it had enough for a reasonable jury to find it acted with reckless disregard for the truth. Specifically, Simon & Schuster knew that: (1) Lawson wanted to pursue implausible storylines that put the Book on "[redacted]";

(2) Lawson's primary sources were convicted of conspiring to defraud the U.S. Government, and had been paid by Lawson for their stories; (3) one of Lawson's sources—C.J. Chivers, a New York Times Reporter—believed that the draft manuscript submitted to Simon & Schuster was "[redacted]"; and (4) that Lawson had a reputation within Simon & Schuster as [redacted]" "[redacted]," and a "[redacted]." Most significantly, there is evidence that certain of Lawson's decisions to alter facts about Berisha—specifically the decision to make it appear that Mediu was upset about being confronted with the allegations about Berisha—were made in consultation with Simon & Schuster.

Further, it would be premature to grant summary judgment here because Simon & Schuster is wrongfully withholding as privileged pre-publication communications with Lawson, that bear directly on Simon & Schuster's state of mind. See Lluberes, 663 F.3d at 26 (overturning summary judgment where district court's erroneous privilege holding prevented Plaintiff showing actual malice); see also Fed. R. Civ. P. 56(d). As set forth in Plaintiff's Objections to Magistrate Judge Louis' August 3, 2018 order (Dkt. No. 145), those documents concern "subjects such as the sourcing for factual statements" and potentially "defamatory statements about [ ] living and identifiable person[s]" made in the Book. (See Dkt. No. 109-1, (Karp Decl., ¶ 11).) What Lawson did—or did not—tell Simon & Schuster about the factual sourcing for the statements about Berisha (or other factual errors in the Book) is highly

relevant to whether Simon & Schuster published with reckless disregard for the truth.[5]

August 22, 2018 Respectfully Submitted,

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[5] It is not appropriate to grant summary judgment for Podrizki or Packouz either. Construing the facts and inferences in favor of Berisha – as the Court must do on summary judgment – a reasonable jury could find that, in 2007, Podrizki and Packouz conspired with Diveroli to fabricate Berisha's involvement to pressure Trebicka to keep quiet. And, because they were being paid and wanted to rehabilitate their reputations, they provided false information to Lawson knowing that it would be published. Admittedly, if actual malice is the appropriate standard—and it is not for the reasons set forth above—there are insufficient facts to show that Recorded Books acted with reckless disregard for the truth.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that, on June 12, 2018, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send a notice of electronic filing via electronic mail to all attorneys of record.

/s/ Brandon P. Rose

Attorney for Plaintiff Shkëlzen Berisha

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA

SHKËLZEN BERISHA, Plaintiff, vs. GUY LAWSON, EFRAIM DIVEROLI, ALEXANDER PODRIZKI, DAVID PACKOUZ, SIMON & SCHUSTER, INC., RECORDED BOOKS, INC., AND INCARCERATED ENTERTAINMENT, LLC, Defendants.	Case No. 17-cv-22144 **COMPLAINT** **JURY TRIAL DEMANDED** (Filed Jun. 8, 2017)

Plaintiff SHKËLZEN BERISHA ("Berisha" or "Plaintiff") sues GUY LAWSON ("Lawson"), EFRAIM DIVEROLI ("Diveroli"), ALEXANDER PODRIZKI ("Podrizki"), DAVID PACKOUZ ("Packouz"), SIMON & SCHUSTER, INC. ("Simon & Schuster"), RECORDED BOOKS, INC. ("Recorded Books"), and INCARCERATED ENTERTAINMENT, LLC ("Incarcerated Entertainment") (collectively referred to as "Defendants") for false, incendiary, and defamatory allegations of Plaintiff's involvement in organized crime, corruption and a scheme to defraud the United States Government.

INTRODUCTION

1. This action arises from the elaborate deceptions of convicted con men and the slipshod, bad-faith

reporting of a so-called investigative journalist. It is an action for defamation. Yet, as set out in painstaking detail herein, it is fundamentally a story of how greed, fraud and the careless pursuit for notoriety, combined to destroy the reputation of a good man.

2. In June 2015, Simon & Schuster published a fantastical tale of international arms dealing titled *Arms and the Dudes: How Three Stoners from Miami Beach Became the Most Unlikely Gunrunners in History* (the "*Dudes Book*"). In the *Dudes Book*—and a repackaged version of it, published in July 2016, titled *War Dogs* (the "*War Dogs Book*")—Lawson wrote of how three arms dealers defrauded the United States Government (the "Government") on a military contract worth hundreds of millions of dollars.

3. Lawson's primary eyewitness sources for the *Dudes Book*, however, were serial liars and convicted frauds. A mere recitation of their rap sheets though does not convey the breadth and audacity of the deceptions they perpetrated. As demonstrated by proof at trial evidence that Lawson knew well—Podrizki, Packouz and Diveroli lied shamelessly and compulsively to protect their interests. They lied to obtain the military contract; lied to keep it; lied in its execution; lied to cheat their business partners; lied to boost their profits; and lied to scare their enemies. They forged documents, faked invoices and destroyed evidence.

4. As a result, Lawson himself doubted the veracity of his sources. He knew that, without credible

corroboration, it was reckless to rely on their word. When asked about his sources, Lawson stated:[1]

> *Interviewer*: Was he [Packouz] your chief source?
>
> *Lawson*: **My chief source was the documents.** You know, **it's one thing to hear from somebody about this or that—they had this or that happen, and it's great.** And I hope that the book gives you a real sense of inside that voyage. **But, you know, there's nothing that can beat research and primary documents. So that was my main source.**

(emphasis added).

5. Nevertheless, Lawson did not have "research and primary documents" to justify the *entire* story that he wished to tell. Not satisfied with a book merely recounting the gunrunning exploits of drug-addled twenty-somethings, Lawson coveted an even "bigger" story—one of geopolitical intrigue, Albanian "mafia" and the purported corruption of a prime minister's son.

6. Therefore, based solely upon his lying sources' false recounting of an inherently improbable meeting, Lawson recklessly accused the Plaintiff (to whom he has never attempted to speak) of associating with

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[1] *Topical Currents: How Three Stoners from Miami Beach Became the Most Unlikely Gunrunners in History* (Miami Public Radio WLRN radio broadcast, July 6, 2015), available at http://wlrn.org/post/how-three-stoners-miami-beach-became-most-unlikely-gunrunners-history (last visited June 3, 2017).

organized crime, cheating his own country, and conspiring to defraud the United States. In lieu of reporting an honest story, Lawson played upon the vague prejudices of his readers—the one-dimensional caricature of Albanians as corrupt. To that end, he leveled disastrous allegations with full knowledge that his sources were not only untrustworthy, but motivated financially to lie about Plaintiff's involvement. Worst of all, he spread his sources' lies despite knowing that this was not the first time that they exploited an innocent person in service of fraud.

7. With absolutely no credible evidence that Mr. Berisha was involved in criminality, Lawson and his publishers recklessly elected to destroy Plaintiffs reputation in hopes of selling more books. Like the many sensationalists that preceded them, Lawson and his publishers relied on the fact that, although cruelly defamed, most victims of defamation will not sue. In this case, however, their reliance was misplaced. Mr. Berisha brings this action to vindicate his rights and restore his reputation.

THE PARTIES

Defendant Lawson

8. Guy Lawson is a New York citizen and resident, author, and investigative journalist. With direction and editorial assistance from Simon & Schuster, Lawson authored the *Dudes Book*, and contracted with Simon & Schuster for its national and international distribution.

9. Over the last several years, Lawson has spent significant time working in Florida to prepare books and articles. In fact, Lawson's most recent large projects—the *Dudes Book, War Dogs Book* and *The Dukes of Oxy: How a Band of Teen Wrestlers Built a Smuggling Empire*—concern events and individuals situated in Florida.

10. In addition to his work on Florida-based stories, Lawson has personally marketed his books in Florida. For example, on July 6, 2015, Lawson promoted the *Dudes Book* via a fifty-minute interview broadcast on Miami Public Radio WLRN; he promoted the *War Dogs Book* by way of an August 12, 2016 interview published in the Miami Herald. Furthermore, Lawson has promoted the *Dudes Book* and the *War Dogs Book* in many interviews broadcasted nationally and internationally.

Defendants Diveroli, Packouz and Podrizki

11. Diveroli, Packouz and Podrizki are Florida residents and citizens, liars and felons. In 2009, they were convicted of: (1) conspiring to commit major fraud against the United States; (2) conspiring to commit wire fraud; and (3) conspiring to make false statements.

12. Diveroli is the primary author of a book, published in May 2016, titled *Once a Gunrunner . . . The Real Story* (the "*Gunrunner Book*"). He is a managing member of Incarcerated Entertainment.

Defendant Simon & Schuster

13. Simon & Schuster—publisher of the *Dudes Book* and its movie tie-in version *War Dogs* Book—edits, publishes, promotes and disseminates adult and children's consumer books in printed, digital and audio formats in the United States and internationally.

14. Simon & Schuster is a citizen of Delaware and New York because it is incorporated in Delaware and its principal place of business is in New York. It is a wholly-owned subsidiary of CBS Corporation.

15. Simon & Schuster does and solicits business in Florida, and that Florida business includes the promotion and dissemination of the *Dudes Book* and *War Dogs Book* in print and digital formats.

Defendant Recorded Books

16. Recorded Books—the "largest independent publisher of unabridged audiobooks"—records, publishes, promotes and disseminates audiobooks in the United States and internationally.[2] On August 8, 2016, Recorded Books published distinct audiobook versions of the *Dudes Book* and *War Dogs Book*.[3]

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[2] *See* Recorded Books, Inc., *About*,_http://www.recordedbooks.com/about (last visited June 3, 2017).

[3] Via its website, Recorded Books represents that "before any title is released to the market, the audiobook is sent to proofers for their critical feedback and recommendations." *See* Recorded Books, Inc., *Our Story*, http://www.recordedbooks.com/about/our-story (last visited June 3, 2017).

17. Recorded Books is a citizen of Delaware and Maryland because it is incorporated in Delaware and its principal place of business is in Maryland.

18. Recorded Books does and solicits business in Florida. That Florida business includes the promotion and dissemination of the *Dudes Book* and *War Dogs Book* in audiobook formats (*e.g.*, mp3 CD and eAudio) via, among other outlets, its website and third-party vendors (*e.g.*, Audible, Inc.).

Defendant Incarcerated Entertainment

19. Incarcerated Entertainment's business is "focused on monetizing . . . 'Once a Gunrunner . . . The Real Story', the content associated with www.Efraim-Diveroli.com, [and] Mr. Diveroli's life and movie rights . . . "[4]

20. Incarcerated Entertainment is a citizen of Florida because its principal place of business is in Florida and it was organized under Florida law.

21. Incarcerated Entertainment is owned and controlled by Ross Reback and Diveroli.

Plaintiff Berisha

22. Shkëlzen Berisha is a father, lawyer and businessman. He is a resident and citizen of Albania.

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[4] Complaint at 2-3, *Incarcerated Ent., LLC v. Warner Bros. Ent., Inc., et al.*, Case No. 16-CV-00732, April 28, 2016.

JURISDICTION

23. This Court has jurisdiction over the subject matter of this lawsuit pursuant to 28 U.S.C. § 1332(a)(2) because: (1) the amount in controversy exceeds $75,000; (2) Defendants are citizens of Florida, New York, Delaware and Maryland; and (3) Plaintiff is a citizen and resident of Albania.

24. This Court may exercise personal jurisdiction over each of the Defendants pursuant to § 48.193(1)(a)(2), Fla. Stat. (2016) because each of the Defendants caused injury to Plaintiff in Florida by committing a tortious act in Florida.

25. This Court may exercise personal jurisdiction over Defendants Diveroli, Packouz, Podrizki, and Incarcerated Entertainment because they reside in Florida.

26. This Court may exercise personal jurisdiction over Defendants Lawson, Simon & Schuster and Recorded Books because they have had continuous and systematic business contact with Florida, and are thereby subject to jurisdiction pursuant to § 48.193(1)(a)(1), Fla. Stat. (2016). In addition, Defendants Lawson, Simon & Schuster, and Recorded Books are subject to jurisdiction pursuant to § 48.193(1)(a)(6), Fla. Stat. (2016), because they caused injury in Florida through the release of a product consumed in Florida.

27. Moreover, this case is brought properly in this Court because significant events giving rise to

Mr. Berisha's complaint—and significant damage to Mr. Berisha's reputation—occurred within Florida.

VENUE

28. Venue is proper in this District pursuant to: (1) 28 U.S.C. § 1391(b)(2) because a substantial part of the events giving rise to Plaintiffs claim occurred in Miami, Florida; and (2) 28 U.S.C. § 1391(b)(3) because Defendants are subject to personal jurisdiction in this District and there is no other district in which this action may be brought under § 1391(b)(1) or (b)(2).

29. Additionally, Diveroli, Packouz and Podrizki reside in this District.

FLORIDA DEFAMATION NOTICE COMPLIANCE

30. On May 31, 2017 and June 1, 2017, Plaintiff complied with § 770.01 Fla. Stat. (2016) by providing written notice—more than five days before instituting this action—to each defendant that he would be sued for circulating the false and defamatory allegations specified herein.

FACTUAL BACKGROUND

Diveroli Assumes Control of AEY and Partners with Merrill

31. In early 2004, at age 18, Diveroli took control of AEY, Inc. ("AEY")—a shell company incorporated by

his father. Shortly after acquiring control, Diveroli began using the company to bid on Government contracts for military equipment, including weapons and ammunition.

32. Neither Diveroli, nor AEY, manufactured weapons or any other equipment. Instead, Diveroli sought profit as a middleman—locating and purchasing military equipment for markup and resale to the Government.

33. Diveroli could not finance AEY's nascent arms brokering business by himself. Most Government military contract solicitations provided for payment thirty-days after equipment delivery. Since AEY needed to obtain military materiel before receiving payment from the Government, Diveroli sought a financier.

34. In 2004, Diveroli contacted Ralph Merrill ("Merrill") to obtain financing in connection with a bid on a Government contract to supply equipment for the Iraqi police and army.[5] In exchange for repayment and a cut of the profits, Merrill agreed to supply $550,000 in financing for the deal.[6]

35. From 2004 through 2006, Merrill partnered with AEY on at least six Government contracts. To that end, Merrill risked approximately $1,500,000 in the

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[5] *See* Excerpted Testimony of Ralph Merrill from the Jury Trial of Ralph Merrill at 14, *U.S. v. Merrill*, Case No. 08-20574 (Dec. 8, 2010).

[6] *Id.* at 16.

joint venture and helped Diveroli locate suppliers and logistics support.[7] At the conclusion of each contract, Merrill reinvested in AEY.[8]

Seeking Profit, Diveroli and Merrill Lie to the Government

36. During 2005 and 2006, Diveroli and AEY developed a reputation for unreliability and deceit with several Government officials responsible for overseeing AEY's contracts. For example: (1) in July 2005, unbeknownst to Diveroli and Merrill, the U.S. State Department referred AEY to criminal authorities for illegally procuring Chinese-made AK-47s and fraudulently repackaging and re-marking the guns to conceal their true origin;[9] and (2) in February 2006, a U.S. Army Contracting Officer canceled an AEY contract for provision of "J-Point Scopes" because AEY sought to provide "cheap copies of an actual patented J-Point system."[10]

37. Moreover, in late 2005, AEY failed to deliver on a $5.6 million contract to supply Beretta pistols to Iraqi Security Forces (the "Beretta Deal"). Government contracting officers concluded that AEY provided a

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[7] *See id.* at 16-20.

[8] *Id.*

[9] *See* Excerpted Testimony of Michael Mentavlos and David Packouz from the Jury Trial at 6-7, *U.S. v. Merrill*, Case No. 08-20574 (Dec. 8, 2010).

[10] House Committee on Government Oversight and Reform, Majority Staff Analysis, *The AEY Investigation* at 13 (June 24, 2008).

series of false excuses for its failure to perform, including that: (1) a plane crash destroyed key documents; (2) the German government was interfering; and (3) a hurricane hit Miami.[11] A contracting officer, responsible for the Beretta deal, remarked: "[W]e could tell there was no hurricane in Miami. It wasn't like we didn't have Internet in the Green Zone."[12] Another noted: "I couldn't take anything [Diveroli] said credibly."[13] The truth was that Diveroli and Merrill couldn't get their Beretta supplier to perform.[14] As a result, the contracting officers cancelled the deal.[15]

38. Diveroli and Merrill knew that AEY's poor performance on the Beretta Deal could imperil AEY's prospects for obtaining Government contracts. Thus, Merrill and Diveroli concocted a scheme to "get back on the bidders list in good graces, and continue

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[11] *See* House Committee on Oversight and Government Reform, *Transcribed Interview of Commander Robert Brooks* (June 13, 2008); House Committee on Oversight and Government Reform, *Transcribed Interview of Commander Frank Futcher* (June 13, 2008).

[12] House Committee on Oversight and Government Reform, *Transcribed Interview of Commander Frank Futcher* (June 13, 2008).

[13] House Committee on Oversight and Government Reform, *Transcribed Interview of Commander Robert Brooks* (June 13, 2008).

[14] *See* Government's Trial Exhibit EM-036 (1/27/07 e-mail from Merrill to AEY), *U.S. v. Merrill*, Case No. 08-20574.

[15] House Committee on Oversight and Government Reform, *Transcribed Interview of Commander Robert Brooks* (June 13, 2008).

business as usual."[16] Merrill would vouch for Diveroli's false excuses and misrepresent his involvement in AEY.[17] In Merrill's own words at trial:[18]

> *Q. So Efraim Diveroli told you to lie to the Government and you went ahead and did so?*
>
> *A. I didn't regard it, really, as a lie-lie. It was kind of one of those white lies that you tell to try to correct something that has clearly gone wrong.*
>
> * * *
>
> *Q. And so, to further your financial interest in this contract, you falsely represented yourself to be something you were not?*
>
> *A. That sounds a little harsh. But that –*
>
> *Q. That's accurate. Right?*
>
> *A. You know, it – it is what it is.*

39. Merrill's and Diveroli's lies concerning the Beretta Deal foreshadowed more elaborate frauds to come, and demonstrated a *modus operandi* that Diveroli, and his coconspirators, would employ in the future. Namely, Merrill, Packouz, Podrizki and Diveroli would

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[16] *See* Government's Trial Exhibit EM-004 (3/17/06 e-mail from Merrill to Sgt. Martinez, with attached letter) at Bates No. YGAC-009658, *U.S. v. Merrill*, Case No. 08-20574

[17] *Id.*

[18] *See* Jury Trial Tr. at 61-62, *U.S. v. Merrill*, Case No. 08-20574 (Dec. 9, 2010).

exploit uninvolved people, companies and events in service of their deceptions.

Packouz, Merrill and Diveroli Lie and Falsify Documents in a Fraudulent Bid for the Afghanistan Contract

40. In late July 2006, the Government solicited bids to provide an enormous quantity of "non-standard ammunition"[19] to the Afghanistan National Army and Afghanistan National Police (the "Solicitation" or "Afghan Solicitation").[20] Among other items, the Government sought a large supply of 7.62 x 39mm rounds—the caliber used in AK-47 Assault Rifles. The solicitation was for a "[o]ne firm fixed-price award, on an all or none basis . . . two year Requirements contract";[21] meaning that the entire contract would be sourced from one company that would supply the Government's requirements, if any, on-demand. The sheer magnitude of the solicitation assured that the winning contractor would be paid hundreds of millions of dollars.

41. Given the importance of the Government's goal (*i.e.*, arming Afghan forces to stem the Taliban's advance), the Solicitation required that each bidder

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[19] "Non-standard ammunition" refers to ammunition not typically fired by U.S. forces.

[20] *See generally* Government's Trial Exhibit 3 (AEY "Solicitation" for Afghanistan Contract, dated 9/11/06), *U.S. v. Merrill*, Case No. 08-20574.

[21] *Id.* at ASC 01304.

provide substantial evidence of experience and success with sourcing, qualifying, testing and delivering similar military materiel.[22]

42. In early August 2006, Merrill, Diveroli and Packouz decided to bid on the Afghan Solicitation.[23] Diveroli, Packouz and Merrill understood that past performance "weigh[ed] more heavily than price" in the Government's evaluation of AEY's bid.[24] But they also understood that AEY didn't have the capital, expertise or experience needed to warrant the Government's trust. AEY—led by a 20-year-old high school dropout—was generally ill-prepared to deliver on such a large contract.

43. Instead of abandoning the bid—and developing the resume needed for success on large Government solicitations—Diveroli, Packouz and Merrill

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[22] *See id.* at ASC 01339-40.

[23] *See* Excerpted Testimony of Michael Mentavlos and David Packouz from the Jury Trial at 118, *U.S. v. Merrill*, Case No. 08-20574 (Nov. 30, 2010). Six months before the Government issued the Afghan Solicitation, David Packouz—a 25-year-old part-time masseuse with no prior education or experience in arms dealing—joined AEY. *See id.* at 103-106. Packouz joined AEY as an "account executive" but later changed his business card to read "Vice President." *Id.* at 106.

[24] *See* Government's Trial Exhibit EM-012 (9/10/06 e-mail Merrill to Thomet), *U.S. v. Merrill*, Case No. 08-20574; Excerpted Testimony of Michael Mentavlos and David Packouz from the Jury Trial at 119, *U.S. v. Merrill*, Case No. 08-20574 (Nov. 30, 2010).

conspired to execute an elaborate fraud.[25] The trio fabricated documents, cooked books and lied shamelessly about AEY's experience and operations.[26]

44. Packouz, Merrill and Diveroli constructed a "Past Performance" tender comprising more fiction than fact.[27] In it, the trio submitted a document titled "Past Performance System Integrator" containing, among many others, the following outright lies:[28]

a. "AEY . . . has twenty years of experience brokering foreign weapons systems." At trial, Packouz admitted:[29]

> *Q. How long was the history of AEY, to begin with?*
>
> *A. I think Efraim had been doing business under AEY at that point for almost two years.*

b. "Two of our officers are former army personnel. One of these officers is a retired Israeli colonel . . .

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[25] *See* Excerpted Testimony of Michael Mentavlos and David Packouz from the Jury Trial at 119-37, *U.S. v. Merrill*, Case No. 08-20574 (Nov. 30, 2010).

[26] *See generally id.*

[27] *See generally* Government's Trial Exhibit 3A, *U.S. v. Merrill*, Case No. 08-20574; Excerpted Testimony of Michael Mentavlos and David Packouz from the Jury Trial at 118-37, *U.S. v. Merrill*, Case No. 08-20574 (Nov. 30, 2010); Excerpted Testimony of David Packouz from the Jury Trial at 25-26, *U.S. v. Merrill*, Case No. 08-20574 (Sept. 16, 2010.

[28] *See id.*

[29] Excerpted Testimony of Michael Mentavlos and David Packouz from the Jury Trial at 122-23, *U.S. v. Merrill*, Case No. 08-20574 (Nov. 30, 2010).

Another company officer owns a manufacturing company in the U.S., which currently builds 4 different weapons systems." In the words of David Packouz:[30]

> *Q. Was this true or false?*
>
> *A. I mean, Efraim was the only officer in the – the legal officer in the company. So no.*
>
> *Q. And to your knowledge, had he ever served in the Army?*
>
> *A. Efraim Diveroli, the president, never served in the Army. No.*
>
> * * *
>
> *Q. "One of these officers is a retired Israeli Army colonel who has used many of these systems." Do you have any retired Israeli Army colonels affiliated with AEY?*
>
> *A. Affiliated, yes. But he was not an officer of the company. He's talking about one of our suppliers, which is Talon Limited. But he's just a supplier, not an actual officer of AEY.*
>
> *Q. So he's somebody you're buying from – or potentially AEY might be buying from?*
>
> *A. Could potentially buy from. Yes.*

Here again, Diveroli, Merrill and Packouz use an uninvolved person in their fraud.

c. "Personal, on site [sic] inspections of manufacturing facilities to review quality control capabilities,

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[30] *Id.* at 123-24.

and on site [sic] inspections of existing stocks to assess storage practices, condition of ammunition, and packaging." Packouz confessed:[31]

> *Q. Did anybody at AEY do personal on-site inspections of manufacturing facilities?*
>
> *A. That I'm aware of we hadn't done that ever at – until that point. No.*

d. "Knowledge of ammunition testing methods and practices, and the location of laboratories and testing facilities to certify all types of ammunition. Experience having done this." Packouz conceded:[32]

> *Q. Did AEY have any experience in testing and certifying ammunition?*
>
> *A. I am not aware that AEY ever tested or certified ammunition.*

e. "AEY has dealt with all of the Suppliers of foreign ammunition, both factories and MODs, and has qualified the better plants and arsenals from the marginal ones." Packouz testified:[33]

> *Q. Had AEY dealt with the foreign suppliers, Ministries of Defense and factories and qualified the better plants and arsenals from the marginal ones?*
>
> *A. Not that I'm aware of No.*

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[31] *Id.* at 126.

[32] *Id.* at 127.

[33] *Id.* at 129.

f. "We also know which of these historically adhere to their schedules, and which have capacity and which are backlogged." Packouz admitted:[34]

> *Q. Did you know which ones historically had adhered to their schedules and which had capacity and which were backlogged?*
>
> *A. No.*

g. "AEY through its European office, has visited all plants and/or MOD storage facilities involved in sourcing the ammunition included in this tender, and has inspected the available goods for qualification." At trial, Packouz conceded:[35]

> *Q. [D]id AEY have a European office?*
>
> *A. No. We just had Henri Thomet.*
>
> *Q. He didn't work for AEY? He had his own business?*
>
> *A. No. He was a supplier of AEY, but he was based in Europe.*
>
> * * *
>
> *Q. Had anyone from AEY visited all plants and Ministry of Defense storage facilities involved in sourcing the ammunition included in this tender?*
>
> *A. Definitely not.*

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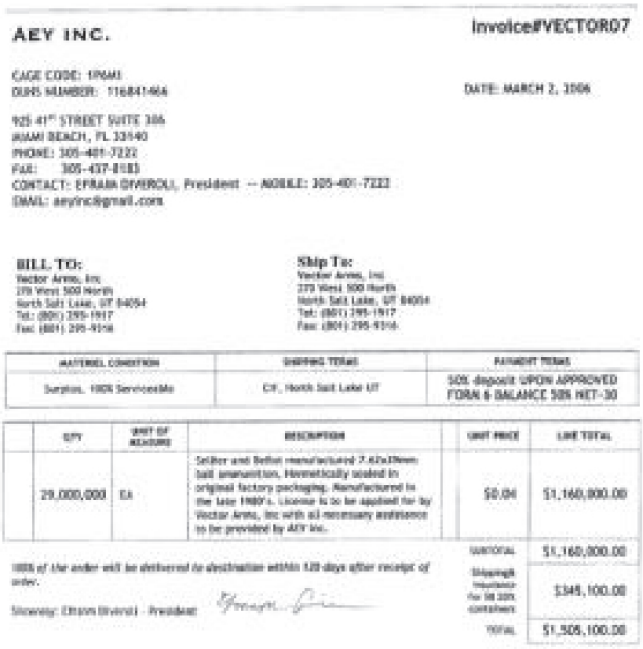
[34] *Id.*

[35] *Id.* at 128-29.

45. Since AEY did not have the proficiency required to warrant the Government's award of the contract, Packouz, Diveroli, and Merrill invented experience that did not exist. For example, in their "Past Performance" submission, the trio fabricated the following invoice for a non-existent contract (the "Vector Arms Contract") between AEY and another company owned by Merrill, Vector Arms, Inc. ("Vector Arms"):[36]



AEY INC.

Invoice#VECTOR07

CAGE CODE: 1PNM1
DUNS NUMBER: 116841466

DATE: MARCH 2, 2006

925 41ST STREET SUITE 306
MIAMI BEACH, FL 33140
PHONE: 305-401-7222
FAX: 305-437-8183
CONTACT: EFRAIM DIVEROLI, President -- MOBILE: 305-401-7222
EMAIL: aeyinc@gmail.com

BILL TO:
Vector Arms, Inc
270 West 500 North
North Salt Lake, UT 84054
Tel: (801) 295-1917
Fax: (801) 295-9316

Ship To:
Vector Arms, Inc
270 West 500 North
North Salt Lake, UT 84054
Tel: (801) 295-1917
Fax: (801) 295-9316

MATERIEL CONDITION	SHIPPING TERMS	PAYMENT TERMS
Surplus, 100% Serviceable	CIF, North Salt Lake UT	50% deposit UPON APPROVED FORM & BALANCE 50% NET-30

	QTY	UNIT OF MEASURE	DESCRIPTION	UNIT PRICE	LINE TOTAL
	29,000,000	EA	Soldier and Ballot manufactured 7.62x39mm ball ammunition, Hermetically sealed in original factory packaging. Manufactured in the late 1980's. License is to be applied for by Vector Arms, Inc with all necessary assistance to be provided by AEY Inc.	$0.04	$1,160,000.00
				SUBTOTAL	$1,160,000.00
				Shipping& Insurance for 58 20ft containers	$345,100.00
				TOTAL	$1,505,100.00

100% of the order will be delivered to destination within 120 days after receipt of order.

Sincerely: Efraim Diveroli - President

ASC 01360

[36] *See* Government's Trial Exhibit 3A (AEY "Past Performance" for Afghanistan Contract, dated 9/11/06) at ASC 01360, *U.S. v. Merrill*, Case No. 08-20574.

46. The Vector Arms Contract was an important part of AEY's "Past Performance" submission. As a result, in October 2006, a Government contracting officer contacted Merrill—Merrill was president of Vector Arms—with eighteen specific questions concerning AEY's performance on the phony contract.[37] Merrill responded with elaborate details regarding a contract that never happened.[38]

47. Regarding the invoice, contract, and Merrill's response, Packouz testified:

> *Q. And when Merrill was listed as a reference for AEY's past performance, did anybody tell the Army that he also stood to gain 50 percent of the profits if this contract were granted to AEY?*
>
> *A. Of course not.*
>
> *Q. Did Mr. Merrill provide the response that he wanted AEY to submit to the Army to convince Ms. Porschke that AEY merited receiving this contract?*
>
> *A. I believe Efraim and myself actually wrote that response and sent it to Merrill, to Ralph. And he sent it to the Army.*
>
> * * *

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[37] *See* Government's Trial Exhibit EM-016 (10/05/06 e-mail from Merrill to AEY, forwarding a 10/02/06 e-mail from K. Porschke to Merrill), *U.S. v. Merrill*, Case No. 08-20574.

[38] *See* Government's Trial Exhibit EM-017 (10/06/06 e-mail from Merrill to AEY), *U.S. v. Merrill*, Case No. 08-20574.

Q. Did AEY ever actually provide Vector Arms with 29 million rounds of 7.62-millimeter ammunition from the Czech Republic to Utah?

A. No.

* * *

Q. And does the rest of this e-mail basically laud the performance of AEY on the deal that never occurred?

A. Yes.

48. Further, in late December 2006, the Defense Contract Management Agency sent a letter to AEY, seeking to verify AEY's "financial capability to perform on the requirements under Solicitation" including "Ammunition[] in the estimated amount of $298,824.919."[39] Among other items, the requested data included "copies of any corporate or personal guaranty and any unusually favorable creditor/vendor payment terms."[40]

49. Because Merrill, Packouz, and Diveroli wanted "to make AEY look as financially capable as possible", the trio again conspired to fabricate documents.[41] In particular, they concocted "Financial

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[39] *See* Government's Trial Exhibit EM-029 (12/26/06 e-mail from AEY to Merrill) at SWG 02117788-90, *U.S. v. Merrill*, Case No. 08-20574.

[40] *Id.*

[41] *See* Excerpted Testimony of David Packouz from the Jury Trial at 27-31, *U.S. v. Merrill*, Case No. 08-20574 (Sept. 17, 2010).

Support" declarations[42] from various entities containing fake provisions.[43]

50. As a result of the aforementioned lies—and many others—Packouz, Diveroli and Merrill convinced the Government to award the Afghan Solicitation to AEY.[44] In the words of David Packouz:[45]

> *Q. So what ultimately happened with your bid[ ] and all of the information you provided to the Army for the Afghanistan solicitation?*
>
> *A. Well, we won the bid.*

Motivated by Greed, Podrizki, Packouz, Merrill and Diveroli Concoct Elaborate Forgeries and Lies in Executing the Afghanistan Contract

51. AEY's primary supplier in its contract with the Government (the "Afghanistan Contract" or the "Contract") was Heinrich Thomet ("Thomet").[46] Thomet was an international arms dealer who operated via several shell companies, including Talon Ltd. (an Israeli

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[42] *See* Government's Trial Exhibits EM-030 (12/29/06 e-mail from AEY to Merrill), EM-31 (12/31/06 e-mail from AEY to Merrill), and EM-32 (1/1/07 e-mail from Merrill to AEY), *U.S. v. Merrill*, Case No. 08-20574.

[43] *See* Excerpted Testimony of David Packouz from the Jury Trial at 27-31, *U.S. v. Merrill*, Case No. 08-20574 (Sept. 17, 2010).

[44] *See* Excerpted Testimony of David Packouz from the Jury Trial at 33-34, *U.S. v. Merrill*, Case No. 08-20574 (Sept. 17, 2010.

[45] *Id.*

[46] *See* Excerpted Testimony of David Packouz from the Jury Trial at 22, *U.S. v. Merrill*, Case No. 08-20574 (Dec. 1, 2010).

company), BT International (a Swiss entity), and Evdin, Ltd. ("Evdin") (a Cyprus company).[47] Thomet organized Evdin for use specifically in his dealings with AEY on the Afghan contract. Like AEY, Thomet was merely a broker; he had no manufacturing capacity or inventory.[48]

52. AEY's contracts with Evdin concerned mostly 7.62 x 39mm (*i.e.*, AK-47 caliber) ammunition sourced from military caches in Albania.[49] Initially, AEY agreed to purchase AK-47 ammunition for $0.0431 per round;[50] ammunition that it would sell to the Government, via the Afghanistan Contract, for $0.0989 per round.[51]

53. For historical reasons, Albania was an obvious source for the Afghanistan Contract's ammunition requirements. From 1945 to 1991, Albania was a communist dictatorship. However, by allying itself with

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[47] *See* Excerpted Testimony of David Packouz from the Jury Trial at 16-17, 24, *U.S. v. Merrill*, Case No. 08-20574 (Sept. 16, 2010).

[48] *See* Government's Trial Exhibit EM-073 (3/23/07 e-mail from Merrill to Diveroli), *U.S. v. Merrill*, Case No. 08-20574. Also like AEY, Thomet had earned himself a place on U.S. State Department watch list for illicit arms trafficking. *See* House Committee on Government Oversight and Reform, Majority Staff Analysis, *The AEY Investigation* at 7 (June 24, 2008).

[49] *See, e.g.*, Government's Trial Exhibit EM-103 (04/17/07 e-mail from Packouz to Podrizki, attaching Evdin contract) at SWG04-005143 - 53, *U.S. v. Merrill*, Case No. 08-20574.

[50] *Id.* at SWG04-005142.

[51] *See* Government's Trial Exhibit 3B (AEY "Price" submission for Afghanistan Contract, dated 9/11/06) at ASC 01297, *U.S. v. Merrill*, Case No. 08-20574.

China, Albania largely avoided falling within the U.S.S.R.'s sphere of influence during the Cold War. To deter the (perceived) threat of military encroachment by NATO, Yugoslavia, and the U.S.S.R., Enver Hoxha—Albania's dictator from 1945 to 1985—oversaw the construction of approximately 175,000 military bunkers in Albania. Due to Albania's alliance with China, Albania's military bunkers were stocked largely with Chinese-manufactured ammunition.

54. With the end of the Cold War, in 1991, Albania's communist dictatorship dissolved and the country reconstituted itself as a parliamentary democracy, allying itself with other western democracies. To that end, Albania sought entry to NATO. NATO was receptive to Albania's admission on condition that Albania secure and reduce its enormous ammunition stockpiles.

55. Albania's Ministry of Defense ("MOD") authorized a company—Albania's Military Export Import Company ("MEICO")—to, among other things, sell or dispose of Albania's aging surplus ammunition.[52] In 2007, and throughout the course of AEY's execution on the Afghanistan Contract, Ylli Pinari ("Pinari")

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[52] *See* Excerpted Testimony of David Packouz from the Jury Trial at 31, *U.S. v. Merrill*, Case No. 08-20574 (Dec. 1, 2010); *See* Government's Trial Exhibit EM-102 (04/17/06 e-mail from Diveroli to Pinari and Thomet, cc'ing Packouz, Podrizki and Merrill), *U.S. v. Merrill*, Case No. 08-20574.

was the president of, and AEY's primary contact at, MEICO.[53]

56. In April 2007, Alexander Podrizki joined Diveroli and Packouz (collectively, the "AEY Conspirators") at AEY to work on the Afghanistan Contract.[54] On April 18, 2007, Podrizki travelled to Albania to oversee the shipment of ammunition to Afghanistan.[55]

57. Shortly after arriving in Albania, Podrizki learned that nearly all of the ammunition that MEICO intended to supply was manufactured by a Chinese military company.[56] The ammunition was packed in metal boxes, arranged in wooden crates.[57] Both the wooden crates and metal boxes contained markings that demonstrated the ammunition's Chinese origin. On April 20, 2007, Packouz requested that Podrizki "get pictures of the packaging and all of the markings on the crates and metal tins [because] we're trying to figure out if the chinese [sic] markings could fuck us."[58] Podrizki sent photographs to Packouz—

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[53] *See id.* at 31

[54] *Id.* at 29.

[55] *See id.*

[56] *See* Government's Trial Exhibits EM-114 (04/20/07 e-mail from Podrizki to Packouz, attaching photos of Chinese ammunition), EM-115 (04/20/07 e-mail from Podrizki to Packouz, attaching photos of Chinese ammunition), EM-116 (04/20/07 e-mail from Packouz to Podrizki), and EM-118 (04/20/07 e-mail from Packouz to Diveroli and Merrill, attaching photos of Chinese ammunition), *U.S. v. Merrill*, Case No. 08-20574.

[57] *See id.*

[58] *See* Government's Trial Exhibit EM-116 (04/20/07 e-mail from Packouz to Podrizki), *U.S. v. Merrill*, Case No. 08-20574.

photos forwarded to Merrill and Diveroli—demonstrating the Chinese origin of the ammunition.[59]

58. Packouz' worry about the "chinese [sic] markings" was well-founded in both the Afghanistan Contract and U.S. law. The Contract contained an amendment prohibiting acquisition of military materiel manufactured by Chinese companies.[60] Moreover, to receive payment, AEY was required to certify the name and location of the ammunition's manufacturer.[61]

59. Yet even if the Contract did not contain an amendment forbidding the supply of Chinese-manufactured ammunition, the AEY Conspirators knew that it was illegal to broker its sale. The United States established an arms embargo against China following the Tiananmen Square massacre. In Packouz' own words:

> *Q. When you received this amendment, was it any surprise to you?*
>
> *A. No.*
>
> *Q. And why was that?*

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[59] *See* Government's Trial Exhibit EM-118 (04/20/07 e-mail from Packouz to Diveroli and Merrill, attaching photos of Chinese ammunition), *U.S. v. Merrill*, Case No. 08-20574.

[60] *See* Government's Trial Exhibit 2A (11/20/06 "Amendment of Solicitation/Modification of Contract") at ASC 00720, *U.S. v. Merrill*, Case No. 08-20574.

[61] *See* Excerpted Testimony of Michael Mentavlos and David Packouz from the Jury Trial at 4852, *U.S. v. Merrill*, Case No. 08-20574 (Nov. 30, 2010).

A. Well, it was widely known in the arms industry that there is an embargo against China and that US companies cannot buy or sell to Chinese companies Munitions List items.

Q. So at the time you received this amendment, you already knew that you couldn't do what this amendment says you can['t] do?

A. That's right.

60. On April 20, 2007—the very day that Podrizki discovered the Chinese origin of the ammunition—the AEY Conspirators agreed to defraud the Government.[62] Initially, the AEY Conspirators thought that they could conceal the Chinese origin by repainting the metal boxes and scraping the Chinese markings from wooden crates. On April 23, 2007, Podrizki sent an email to Pinari stating: "As I'm sure you know the USA has had an embargo on China since 1989 . . . we will need to have the metal cases repainted over."[63] On April 25, 2007, Merrill sent an email to Diveroli and Packouz attaching photos "showing three suggested methods of cleaning wooden crates."[64]

61. Ultimately, however, Podrizki discovered that the metal tins of ammunition contained stencil paper betraying its Chinese origin. As a result, the

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[62] *See* Government's Trial Exhibit EM-119 (04/20/07 e-mail from Packouz to Podrizki), *U.S. v. Merrill*, Case No. 08-20574.

[63] *See* Government's Trial Exhibit EM-123 (04/23/07 e-mail from Packouz to Podrizki), *U.S. v. Merrill*, Case No. 08-20574.

[64] *See* Government's Trial Exhibit EM-137 (04/25/07 e-mail from Merrill to Diveroli and Packouz), *U.S. v. Merrill*, Case No. 08-20574.

AEY Conspirators decided to remove the ammunition from the metal tins, discard the stencil paper, and repack it in cardboard boxes. In support of their fraud, Packouz e-mailed a U.S. military officer in Afghanistan:[65]

> "In order to confirm that all of the ammunition we are shipping is undamaged and serviceable without qualification as required by the contract, we opened every metal can of ammunition to perform a complete, visual inspection along with an extensive sample of test firing . . . To ensure packaging stability and efficiency, we repackaged the ammunition in cardboard boxes strapped to euro pallets (see attached pictures of packaging configuration). . . . [W]e wanted to confirm with you that this packaging configuration will not cause any issues . . . "

Yet at trial, Packouz admitted:[66]

> *Q. When you say "we opened every metal [can of] ammunition to perform a complete visual inspection," was that, in fact, true?*
>
> *A. No.*

* * *

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[65] *See* Government's Trial Exhibit EM-136 (04/25/07 e-mail from Packouz to Maj. Walck, attaching photos), *U.S. v. Merrill*, Case No. 08-20574.

[66] *See* Excerpted Testimony of David Packouz from the Jury Trial at 79-80, *U.S. v. Merrill*, Case No. 08-20574 (Dec. 1, 2010).

Q. And what was the reason for your plans to have the ammunition packaged in cardboard boxes?

A. In order to remove the Chinese lettering.

Q. Did it have anything to do with corroded tins or bullets?

A. Not really. No.

62. Packouz' fraudulent e-mail worked—the U.S. military officer consented to delivery in cardboard boxes—and so Packouz informed Podrizki and Pinari that they could proceed with concealing the origin of the Chinese ammunition.[67]

63. The AEY Conspirators suspected that neither MEICO nor Evdin would ultimately agree to perform the repackaging operation. As a result, Podrizki located a company to do the repackaging.[68] That company, Xhoi, Ltd. ("Xhoi"), was owned by a man named Kosta Trebicka ("Trebicka").[69]

64. The AEY Conspirators' suspicion was correct—MEICO and Evdin would not (at least initially)

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[67] *See* Government's Trial Exhibit EM-138 (4/25/07 e-mail from Packouz to Pinari and Podrizki), *U.S. v. Merrill*, Case No. 08-20574.

[68] *See* Government's Trial Exhibit EM-150 (4/27/07 e-mail from Podrizki to Diveroli and Packouz), *U.S. v. Merrill*, Case No. 08-20574.

[69] *Id.*

agree to repackage the Chinese ammunition.[70] Thomet informed AEY:[71]

> Any additional customized packing requirements were at no point included in this offer . . . If AEY desires additional packing as requested now . . . all costs will be forwarded as received by MEICO to the buyer.

In a bizarre attempt to cover-up the illegal scheme, Diveroli responded:[72]

> AEY was never aware of or excepted [sic] Chinese ammunition for the delivery [on] US Government contracts and we will only accept the loose packed ammunition in cardboard boxes in lieu of the Chinese . . . AEY has been told that we will be allowed to repack the ammunition using its own packing company in Albania . . .

Regarding this deception, Packouz testified:[73]

> *Q. When he's talking about loose-packed ammunition in lieu of Chinese, what is he really saying?*
>
> *A. He's covering himself He's just trying to say, "Hey, you know, this" – to leave like a trail*

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[70] *See* Excerpted Testimony of David Packouz from the Jury Trial at 82, 94, *U.S. v. Merrill*, Case No. 08-20574 (Dec. 1, 2010).

[71] *See* Government's Trial Exhibit EM-157 (4/29/07 e-mail from Diveroli to Merrill, Packouz and Thomet), *U.S. v. Merrill*, Case No. 08-20574.

[72] *Id.*

[73] *See* Excerpted Testimony of David Packouz from the Jury Trial at 95, *U.S. v. Merrill*, Case No. 08-20574 (Dec. 1, 2010).

> *– you know, that we didn't actually deliver Chinese. But he – you know, he knows he's going to be delivering Chinese.*

Shortly thereafter, the AEY Conspirators hired Trebicka to perform the repackaging.[74]

65. Trebicka wasn't satisfied with his profit on the repackaging contract. He wanted a piece of the ammunition deal. Merrill writes Evdin:[75]

> As you probably know by now, Pinari would not repack the ammo, so our agent, Alex, found a company that would do it . . . The owner of that company is a guy by the name of Kosta. It seems that when Kosta discovered what was going on, he became enterprising, and went to the MOD on his own, to see if they would sell him the ammo. He then calculated to offer it to us at a reduced price, thinking to cut out both Pinari and Evdin. Kosta and Pinari were friends until this happened, and Pinari found out about it. Before Pinari found out about it, he tried to cut Kosta out of the game by offering Efraim to repack the ammo and earn the money himself . . . In the process of all this intrigue, Kosta revealed to Alex the MOD sell price of $20 per K [*i.e.*, $0.020 per round]. Efraim is upset that Evdin and Pinari

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[74] *See* Government's Trial Exhibit EM-167 (5/6/07 e-mail from Packouz to Trebicka, cc'ing Podrizki and Diveroli), *U.S. v. Merrill*, Case No. 08-20574.

[75] *See* Government's Trial Exhibit EM-175 (5/16/07 e-mail from Diveroli to Merrill, Packouz and Thomet), *U.S. v. Merrill*, Case No. 08-20574.

> are making alot [sic] of money, and we are loosing [sic] money.

In reality, Trebicka was not in a position to cut Pinari and Evdin out of the ammunition deal. Yet Pinari and Evdin were concerned that Trebicka would expose the scheme. Thomet writes Diveroli and Merrill:[76]

> The events produced in the past few days are most disturbing and unpleasant. . . . By having AEY representatives on the ground and by all the discussions for cheaper packing . . . **too many people became interested in this business and all what Evdin has tried to keep smooth and low profile has hit the fan.**

(emphasis added).

66. Based upon the price that Trebicka quoted, Diveroli believed that he could renegotiate for a lower price on the ammunition. To that end, Diveroli decided to meet with Pinari in Albania. In advance of the meeting, Diveroli, Packouz and Podrizki conspired to manufacture documents reflecting phony, lower prices on the same ammunition that MEICO was selling AEY. Packouz admitted:[77]

> *Q. And what was the purpose of* [*Diveroli*] *traveling to Albania?*

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[76] *See* Government's Trial Exhibit EM-178 (5/21/07 e-mail from Thomet to Diveroli and Merrill), *U.S. v. Merrill*, Case No. 08-20574.

[77] *See* Excerpted Testimony of David Packouz from the Jury Trial at 119-20, *U.S. v. Merrill*, Case No. 08-20574 (Dec. 1, 2010).

A. To try to work out a deal with Pinari to lower the price.

Q. And did you assist in preparing Efraim for the negotiations that he was going to be undertaking?

* * *

A. I concocted a bunch of fake documents that he could use in the negotiations.

Q. And what type of information was contained in those documents?

A. There were quotes that were modified to show prices that we could use as leverage to show Pinari that—say, "Hey, we got other options" when, really, we didn't really have options.

67. On May 23, 2007, Diveroli and Podrizki met with Pinari in Albania to renegotiate the price of ammunition.[78] Ultimately, Evdin and Pinari agreed to grant AEY a tiny price reduction. But, in exchange for a lower price, Pinari insisted that AEY cancel its contract[79] with the "enterprising" Trebicka and instead hire another company—Alb-Demil—to perform the repackaging.

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[78] *See* Government's Trial Exhibit EM-181 (5/23/07 e-mail from Diveroli to Merrill), *U.S. v. Merrill*, Case No. 08-20574.

[79] *See* Government's Trial Exhibit EM-167 (5/6/07 e-mail from Packouz to Trebicka, cc'ing Podrizki and Diveroli, attaching the repackaging contract), *U.S. v. Merrill*, Case No. 08-20574.

Podrizki, Packouz, and Diveroli Conspire to Silence a Potential Whistleblower

68. Diveroli and Packouz coveted the price reduction, but it presented a new problem—how to make Trebicka go away quietly. Trebicka both knew that the ammunition was Chinese and was in possession of a contract (signed by AEY) describing his job as: "Removing ammunition from wooden crates and metal tins and repacking the ammunition into strong plastic bags sealed within 5 ply cardboard [b]oxes."[80] Moreover, Trebicka was aware that Evdin (*i.e.*, Thomet) was taking a substantial cut on a deal that would've been much more profitable to Albania if Evdin was not sitting in the middle of the transaction.

69. Therefore, on May 23, 2007—shortly after that day's meeting with PinariDiveroli, Packouz and Podrizki formulated a plan to silence Trebicka.[81] They would try to scare him into remaining silent about the repackaging work by concocting yet another phony story.

70. The next morning, on May 24, 2007, Podrizki and Diveroli met with Trebicka and lied to him. They told Trebicka that Albanian "mafia," and the prime minister's son, were present at the meeting with

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[80] *See* Government's Trial Exhibit EM-167 (5/6/07 e-mail from Packouz to Trebicka, cc'ing Podrizki and Diveroli, attaching the repackaging contract), *U.S. v. Merrill*, Case No. 08-20574.

[81] After the meeting, Diveroli contacted Merrill to discuss cancelling Trebicka's contract. *See* Excerpted Testimony of Ralph Merrill from the Jury Trial at 182, *U.S. v. Merrill*, Case No. 08-20574 (Dec. 1, 2010).

Pinari, and that the "mafia" threatened to kill them if they didn't cancel Trebicka's repackaging contract. Further, Diveroli and Podrizki told Trebicka that Pinari warned them to keep quiet because the prime minister's son was involved. These claims were completely false. What's more, Podrizki and Diveroli concealed the reason that AEY cancelled Trebicka's contract; namely, AEY wanted a lower price on the ammunition.

71. Trebicka was incensed by the cancellation of his repackaging contract, and informed Diveroli and Podrizki that he intended, later that day, to tell Diveroli's story of corruption to U.S. officials. Diveroli—frightened that Trebicka would disclose the repackaging deal—agreed to sit down with American diplomats. In his account to U.S. officials, Diveroli concealed both the repackaging contract *and* the price renegotiation.

72. Nevertheless, the AEY Conspirators' lie backfired. Trebicka would not go away quietly. In June 2007, Trebicka recorded a telephone conversation with Diveroli, in which Trebicka and Diveroli discussed the cancellation of Trebicka's repackaging contract:[82]

> Trebicka: *So what's happening with your pal Pinari?*
>
> Diveroli: *I don't know, you tell me. Did you make a deal with him for the boxes?*

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[82] *See Efraim Diveroli talks with Kosta Trebicka,* https://www.youtube.com/watch?v=B3Tur7Hlw7k&list=PLWXgJA_3LGskE6hsGQfcyEW3si5XceOsf&index=1 (last visited June 3, 2017).

> Trebicka: *I don't want to make a deal with him. You know that he's a crook You told me before that he's a mafia guy, didn't you?*
>
> Diveroli: *I think he is. Yeah – either he's Mafia or the Mafia is controlling him . . .*

Diveroli feigned innocence in the repackaging contract's cancellation:

> Diveroli: *I've been 100% with you. I did not remove you from this job . . . I had nothing to do with this. Nothing. Even though Pinari asked me to – he forced me to. I have never supported this decision.*
>
> Pinari: *I understand. I understand.*
>
> Diveroli: *I'm very, very upset. I'm very concerned . . .*
>
> Pinari: *Is he* [*Pinari*] *still working with Henri – with Henri Thomet?*
>
> Diveroli: *I think he's still working with Henri – I'm still working with Henri. I have to work with Henri . . . I can't play monkey business with the mafia . . .*

Later in the call, Trebicka implicitly threatened to expose Diveroli to the United States Government:

> Trebicka: *Probably I will be invited in Washington, D.C. – you know, from the CIA guys and from my friends over there. And we will be meeting in one week or two weeks from now – I will come in Florida to shake hands with you and to discuss future deals.*

> Diveroli: *I like that, let's do that.*
>
> Trebicka: *I found good partners and I think I can continue the job . . . But for me, it's fine. I will not talk I will not open my mouth . . .*

Diveroli fired back with the same threatening lie he told in Albania:

> Diveroli: *You protect me, I protect you kind of thing . . .*
>
> * * *
>
> Diveroli: *The more it went up higher, to the prime minister, to his son . . . This mafia is too strong for me.*

Trebicka ultimately delivered a recording of that conversation to Gary Kokalari ("Kokalari")—Albanian contact in the United States. Kokalari, in turn, sent the recording to the New York Times (the "Times"). On March 27, 2008, the Times published a story that led to the investigations concerning, and criminal fraud convictions of, Podrizki, Packouz, Diveroli and Merrill.[83]

Diveroli Fabricates a Fake Investor to Cheat Merrill

73. A few days after Diveroli conspired with Podrizki and Packouz to slander Mr. Berisha, Diveroli

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[83] C.J. Chivers, *Supplier Under Scrutiny on Arms for Afghans*, N.Y. Times, Mar. 27, 2008.

laid the groundwork for yet another fraud. Merrill testified:[84]

> *Q. Did Diveroli call you when he returned from Albania?*
>
> *A. Yes, he did.*
>
> * * *
>
> *Q. And what did he tell you when he returned?*
>
> *A. . . .* [*He said*] *that he had succeeded in getting an even better price on the ammunition. And I think he mentioned that he fired Kosta and hired – Pinari was back in the action and Pinari was now doing the repackaging.*
>
> * * *
>
> *Q. . . . Did he raise any issues with respect to your potential profit from the contract?*
>
> *A. Yes, he did.*
>
> *Q. Tell us what he said to you regarding your deal with him.*
>
> *A. . . . He was grateful for the financial support that I had given so far, but my million and a half, whatever I had invested at that point, was insufficient to carry on with this very large contract and that AEY needed additional financing.*
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> * * *

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[84] *See* Excerpted Testimony of Ralph Merrill from the Jury Trial at 182-83, *U.S. v. Merrill*, Case No. 08-20574 (Dec. 1, 2010).

Q. Did you have a subsequent conversation with him about your percentage interest in the contract?

A. . . . He called back a few days later and said he found someone that he knew from years back, that it was family that came over from the Ukraine after the wall went down, a wealthy Jewish family in this case, and that the son of this family had 2 or $3 million that he could put into the contract and he was interested, but he drove a very hard bargain. He said the – this guy's name was Danny and that he wanted – in return, he wanted 70 percent of the profits.

Packouz revealed:[85]

Q. . . . [Diveroli] tried to cut Ralph out or reduce Ralph's profit percentage. Right?

A. Right.

* * *

Q. Because he's greedy?

A. Yes.

* * *

Q. . . . [T]he way Diveroli tried to reduce Ralph's percentage of profit, that was by creating a false investor, Danny. Right?

A. Right.

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[85] *See* Excerpted Testimony of David Packouz from the Jury Trial at 30-32, *U.S. v. Merrill*, Case No. 08-20574 (Dec. 2, 2010).

Q. Modeled after Daniel Doudnik?

A. Right.

Q. Did you find that Diveroli had done that with other facts, take a true fact like somebody's name and then use that as the foundation or basis for a lie?

A. I'm not really sure what you mean.

Q. Well, here's what I mean. Danny was a real person. Right?

A. Yes.

Q. But everything surrounding Danny and the investment was false?

A. That's true.

Q. And it all came out of Diveroli's mouth. Right?

A. Right.

(emphasis added). Here, Diveroli employs—just like his phony tale about the prime minister's son—the signature tactic of successful pathological liars: the use of real details in deception. It is true that Daniel Doudnik ("Doudnik") is Jewish, and that his family hails from the Ukraine.[86] But Doudnik never invested money in AEY.[87] In fact, Doudnik was a low-level AEY

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[86] *See* Excerpted Testimony of David Packouz from the Jury Trial at 36-37, *U.S. v. Merrill*, Case No. 08-20574 (Dec. 1, 2010).

[87] *See* Excerpted Testimony of David Packouz from the Jury Trial at 30-32, *U.S. v. Merrill*, Case No. 08-20574 (Dec. 2, 2010).

employee.[88] Likewise, the plaintiff, Shkëlzen Berisha, is in fact the son of Albania's former prime minister. But he has never been in a room with Efraim Diveroli, nor has he ever been involved, in any manner whatsoever, with the sale of arms.

Podrizki, Packouz and Diveroli Slander Mr. Berisha in Interviews with Lawson

74. In 2011, shortly after their fraud convictions, Lawson contacted Diveroli, Packouz, Merrill and Podrizki (the "AEY Sources") in hopes of writing a story about the Afghanistan Contract.[89] In Florida, and elsewhere, Lawson extensively interviewed the AEY sources.[90]

75. In those interviews, Diveroli, Packouz and Podrizki slandered Mr. Berisha, knowing and intending that their false statements about the Plaintiff would appear in Lawson's published works. In particular, Diveroli, Packouz and Podrizki lied to Lawson regarding Mr. Berisha's presence at the May 2007 meeting in which Diveroli and Podrizki sought to renegotiate ammunition prices.[91]

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[88] *See* Excerpted Testimony of David Packouz from the Jury Trial at 155, *U.S. v. Merrill*, Case No. 08-20574 (Sept. 21, 2010).

[89] Guy Lawson, *War Dogs* xix-xx (2016).

[90] *See id.* xviii-xx.

[91] In the *War Dogs Book* and the *Dudes Book*, Lawson includes a photograph of Mr. Berishaalongside a photo of Ylli Pinari behind bars—with a caption: "Also involved, the dudes

76. Diveroli, Packouz and Podrizki well knew that their defamatory statements would be published throughout the United States and abroad. They were also aware that Lawson's story was being adapted for the screen, and therefore Diveroli, Packouz and Podrizki knew, or should have known, that many other publications would carry their defamatory statements contemporaneous with the adaptation's theatrical release.

Lawson Promises Merrill, Packouz, Podrizki and Diveroli a Favorable Story in Exchange for Access

77. Lawson knew that the AEY Sources were motivated to have someone give a favorable account of their fraudulent behavior. In the *War Dogs Book*, Lawson writes:[92]

> I knew from experience—this is a trick of the trade—that the best time for a journalist to approach criminal defendants is after they've been sentenced and their legal jeopardy is at an end. So I waited until David Packouz and Alex Podrizki were about to be sentenced for the federal fraud counts they'd pleaded guilty to.

As young, convicted felons, Packouz, Podrizki and Diveroli wanted to clean up their public personas. In a

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discovered, was the prime minister's son, Shkelzen [sic] Berisha." Guy Lawson, *War Dogs*, (*photographs section*) (2016).

[92] *Id.* xviii.

nationally televised interview, Lawson described the desperate—albeit self-inflicted—situation of his sources: "A federal felony offense is a big obstacle in your life when you are in your twenties. It's easy to forget the wound that this puts on people . . . these are real people and it had real consequences."[93]

78. To entice potential publishers, Lawson wanted to tell the most fantastical story possible. In his own words:[94]

> As a writer for Rolling Stone, I knew the magazine was always looking for a certain kind of story—"tales about young people doing f—ked-up things," to use the precise words of my editors. The three friends from Miami Beach certainly seemed to qualify. . . . The improbable voyage Packouz, Diveroli, and Podrizki had taken included geopolitical intrigue, Albanian mobsters, a shady Swiss arms dealer, and an underhanded conspiracy to repackage millions of ancient surplus Chinese-made AK-47 cartridges—all leading to federal indictments for fraud . . .

Therefore, in exchange for an incredible—and, in Mr. Berisha's case, utterly false—tale, Lawson agreed to rehabilitate the reputations of the AEY Sources.

79. Lawson held up his end of the bargain. In the *War Dogs Book*, and several interviews, Lawson sought

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[93] *BOOKTV: Arms and the Dudes* (C-SPAN2 television broadcast June 20, 2015), available at https://www.c-span.org/video/?326840-1/arms-dudes (last visited June 3, 2017).

[94] Guy Lawson, *War Dogs* xvii-xviii (2016).

to rehabilitate the reputations—and thereby the credibility—of his sources. For example, in a nationally televised interview, Lawson stated:[95]

> The truth is that the kids didn't defraud the Government—not in any way that crime is currently understood.
>
> * * *
>
> [Podrizki] is more like a Che Guevara guy, and he really feels beaten up by this, because he did really very marginal things wrong. . . . Ralph Merrill—that's an older guy that was their financier . . . [He's] like the most straight-laced Utah Mormon guy you've ever met.

80. On Miami Public Radio, Lawson said:[96]

> *Lawson*: In contrast to the New York Times portrait of these kids as sleazy fools, they were anything but [sleazy fools].

When challenged, however, Lawson backpedaled:[97]

> *Interviewer*: . . . When you say they were mistakenly portrayed as sleazy, that kind of

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[95] *BOOKTV: Arms and the Dudes* (C-SPAN2 television broadcast June 20, 2015), available at https://www.c-span.org/video/?326840-1/arms-dudes (last visited June 3, 2017).

[96] *Topical Currents: How Three Stoners from Miami Beach Became the Most Unlikely Gunrunners in History* (Miami Public Radio WLRN radio broadcast 07/06/15), available at http://wlrn.org/post/how-three-stoners-miami-beach-became-most-unlikely.gunrunners-history (last visited June 3, 2017).

[97] *Id.*

> rubs me a little bit the wrong way because they were greedy, they were reckless, they were unethical, they were immoral, they didn't care where the arms were really going—
>
> *Lawson*: . . . What you just said was true, of course.
>
> *Interviewer*: Okay.

Yet Lawson continued:[98]

> [Merrill] is really the one who got the worst end of the stick in all this because he effectively did nothing wrong . . . He didn't plead guilty. And the way that these prosecutors work is if you don't do what they say, they're gonna double down on you . . . This is as political a prosecution as you're ever going to see.

81. Moreover, in an August 2015 interview for Beyond 50 Radio, Lawson stated:[99]

> When the New York Times ran a story about this, in 2008, on the front page, it made it seem like these kids were just these sleazy profiteers . . . but really, almost everything was the opposite. It was—the kids were doing exactly what the Government wanted them to do.

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[98] *Id.*

[99] *Beyond50Radio.com: Arms & The Dudes* (Beyond50 podcast August 2, 2015), available at https://www.youtube.com/watch?v=uV8bwnQ5q1c (last visited June 3, 2017).

Furthermore, in June 2015, for the specific purpose of rehabilitating Packouz' reputation, Lawson arranged for Packouz to appear on an episode of a National Public Radio ("NPR") show called Snap Judgment.[100] Lawson received a producer credit for the episode.[101]

Lawson Knew that His Sources Were Compulsive Liars and Serial Fraudsters

82. In the *War Dogs Book*, Lawson boasted that he "spent months paging through court transcripts, studying defense-contract regulations, and drafting Freedom of Information requests."[102] As a result, Lawson was fully aware of the countless lies, phony documents and forgeries executed by his sources. What's more, Lawson knew that the AEY Sources often used the names of real people in their fraudulent schemes.[103]

83. Lawson detailed some of their deceptions in the *War Dogs Book* itself. For example, Lawson wrote:

> Diveroli was a genius. He was also a liar. He misled directly, indirectly, compulsively—

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[100] *Topical Currents: How Three Stoners from Miami Beach Became the Most Unlikely Gunrunners in History* (Miami Public Radio WLRN radio broadcast, July 6, 2015), available at http://wlrn.org/post/how-three-stoners-miami-beach-became-most-unlikely.gunrunners-history (last visited June 3, 2017).

[101] *Id.*

[102] Guy Lawson, *War Dogs* xix (2016).

[103] *Id.* at 213-13.

almost as if telling a lie were better than telling the truth as a matter of principle.[104]

* * *

Diveroli begged the procurement officer not to cancel the contract. His voice was shaking and his eyes were welling with tears. He said that if the deal fell through he'd be ruined. His tiny business would go into bankruptcy. He was going to lose his house. His children would go hungry. His wife would leave him. He was begging for his life and all of it was completely made up. But he was totally convincing. The procurement officer backed down. "I'd never seen more skillful lying," Packouz said. "I didn't know if Efraim was psychotic, or if he was acting. But he believed what he was saying—at least while he was talking."[105]

* * *

To gain their attention, Packouz told the companies that AEY already had won the contract with the Pentagon. To be taken seriously, he considered the lie a necessity. He also faxed AEY's firearms license from the ATF, even though it had nothing to do with international arms dealing—it looked official, and he hoped it would impress the Eastern Europeans.[106]

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[104] *Id.* at 48.

[105] *Id.* at 49-50.

[106] *Id* at 79-80.

> Giddy, Diveroli leaped up and high-fived Packouz. "Now you're going to modify the contract and put in a fake price that the government is paying us," Diveroli instructed Packouz. "Put it like we're only making three percent profit on the deal. But make sure the fake documents are fucking beautiful. We got millions riding on this." "Yes, sir," said Packouz, awed by Diveroli's gift for dissembling. "We're going to have a twenty-five-percent profit margin on a twentysix-million-dollar deal. Holy fuck, dude!" "Stick with me, buddy. You and me, we're going places."[107]
>
> * * *
>
> Before AEY had been awarded the contract, it had been audited by the Army to make sure it had the financial wherewithal to sustain the contract on the government's net-thirty-day terms. Reams of documents had been produced by Diveroli and Packouz, many of them exaggerated to show that AEY had far more money than it actually did. None of the ledger high jinks had been detected.[108]
>
> * * *

The Army didn't care about AEY's profit margins—it expected the deliveries to be made as contracted. So Diveroli dissembled with the Army. He told the procurement officers in Rock Island that AEY couldn't ship because of delays in governments' issuing

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[107] *Id.* at 110.

[108] *Id.* at 103.

the export permits needed to move the ammo across national frontiers. It was a lie, but a necessary one to make the contract economically viable.[109]

* * *

> [Podrizki said:] "Don't worry, Kosta. The simple reason is that the ammo passes over different countries during transportation. If the authorities in another country stop the flight and see that part of the ammunition is from Albania and part is from China they will start an investigation."[110]

* * *

> Diveroli checked his e-mails and found the documents Packouz had doctored, showing false prices for AK-47 ammo. Packouz had done an excellent job changing the numbers, doctoring quotes from other suppliers to show the Hungarians and the Bulgarians could beat MEICO's price by a significant amount. Diveroli and Podrizki were ready.[111]

* * *

> Podrizki stepped out of the bar onto the deck of the ferry. He looked around to be sure no one was watching. He quietly slipped his laptop overboard, the computer disappearing into the black Adriatic Sea.[112]

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[109] *Id.* at 117.

[110] *Id.* at 163-64.

[111] *Id.* at 173.

[112] *Id.* at 227.

* * *

> Diveroli wanted AEY to write an e-mail to the Kyrgyz military that was forged to look as if it came from the US military—the dudes could threaten all kinds of dire consequences that way.[113]

84. In fact, Lawson himself entertained serious doubts as to the veracity and accuracy of the reports of the AEY Sources. He knew that, without other credible evidence, it was reckless to rely on their word. In a radio interview, Lawson stated:[114]

> *Interviewer*: Was he [Packouz] your chief source?
>
> *Lawson*: **My chief source was the documents.** You know, **it's one thing to hear from somebody about this or that—they had this or that happen, and it's great**. And I hope that the book gives you a real sense of inside that voyage. **But, you know, there's nothing that can beat research and primary documents. So that was my main source.** But, you know, David and Alex and, to a lesser extent, Efraim, and then the older gentleman [Merrill].

(emphasis added).

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[113] *Id.* at 182.

[114] *Topical Currents: How Three Stoners from Miami Beach Became the Most Unlikely Gunrunners in History* (Miami Public Radio WLRN radio broadcast, July 6, 2015), available at http://wlrn.org/post/how-three-stoners-miami-beach-became-most-unlikely.gunrunners-history (last visited June 3, 2017).

85. But Lawson didn't have documents to support the *entire* story that he wanted to tell. In particular, Lawson had absolutely no credible evidence for his claims that Shkëlzen Berisha was involved with AEY, corruption or the Albanian "mafia"; he had only the word of serial liars and convicted fraudsters.

86. Unfortunately, it mattered little to Lawson that he had no reliable proof that Mr. Berisha was involved in corruption, so long as the anecdote made the story more sensational—so long as it sold more books.

Lawson Knew that His Sources' Account of the Alleged Meeting Was Inherently Improbable and Likely False

87. Lawson had obvious reasons to doubt—and, in fact, did doubt—the truth of the AEY Sources' claims about Mr. Berisha. His sources could provide no details that might corroborate the purported meeting. Lawson wrote, regarding Podrizki's and Diveroli's price-renegotiation meeting with Pinari, that:[115]

> **The first stop was Ylli Pinari's office in the Ministry of Defense.** More raki was poured and cigarettes were passed around. Diveroli placed a stack of documents on the table. He said they were quotes from other Eastern European countries for the same ammunition he was buying from MEICO.

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[115] Guy Lawson, *War Dogs* 173-76 (2016).

"These are the standard prices," Diveroli said. "Any more than this, I will walk away."

Pinari inspected the sheet. He'd been in the business for decades. He knew the real prices of surplus nonstandard munitions. He looked up and shook his head with contempt. "These are fake."

Diveroli had been busted. Stumbling for what to say next, he forged on, "Your ammo is old. Some of it is nearly fifty years old. It doesn't warrant the price."

Pinari was unmoved.

"It's steel-cased, not brass," Diveroli said. "It's not as good." Pinari said nothing.

"The only place you can sell your ammo is in Africa. The Africans can't afford to pay as much as the government of the United States."

The conversation was going nowhere, it seemed: Diveroli demanded a reduction, and Pinari insisted on the agreed terms. All the extra costs AEY had incurred, for the repacking, the higher airfreight prices, the unexpected licenses and fees at Tirana's airport—those were issues for Diveroli to take up with Henri Thomet, not MEICO, Pinari said.

Diveroli asked to see the Albanian minister of defense.

If you want to change the price, you have to meet someone else," Pinari said finally.

Apparently, someone was more powerful than the minister—a strange assertion. Ylli Pinari escorted Diveroli and Podrizki to his Mercedes sedan. **The pair were driven around the streets of Tirana in a seemingly deliberately confusing route, so the Americans wouldn't be able to re-create where they'd gone. Finally, they turned into an abandoned construction site for a partially completed office building.** Pinari led the pair up a set of stairs and along a corridor until they reached a door. **Stepping inside, they found a sleek, stylish office, like the suite of a corporate law firm in a skyscraper in Miami.** The incongruity was disorienting. So was the sight of the man rising from his seat behind the desk. Instead of the kind of global businessman who might be expected to occupy such an office, there was a hard-looking man—a real thug, Podrizki thought, fear rising. Gegh was the Albanian word for such a man: muscular, dark-skinned, with what appeared to be prison tattoos on his forearms, a native of the tribal mountains.

This was Mihail Delijorgji. Diveroli and Podrizki then turned to see a young man around their age sitting in the corner. Dressed in a baseball cap and a sweater, he had dark hair, a soft chin, and sharklike eyes. **He wasn't introduced. This was Shkëlzen Berisha, the son of the prime minister of Albania, they would later be told by Pinari. Shkëlzen was part of what was known in Albania as "the family," the tight-knit**

and extremely dangerous group that surrounded and lived at the beneficence of the prime minister, Sali Berisha.

Delijorgji didn't speak English, so Pinari translated Diveroli's reasons for wanting a price reduction. Diveroli's brash manner disappeared, as did his idea of cutting Thomet out of the deal. Diveroli and Podrizki were obviously in the presence of seriously connected men. "Diveroli's complexion turned pale. Now his main complaint was that the vast majority of the rounds AEY was buying had steel casings. Brass casings were much more valuable, Diveroli claimed. Steel casings damaged the barrels of weapons, shortening their life span. Diveroli wanted to pay 3.7 cents a round.

Delijorgji said that if Diveroli wanted a discount he would have to change the arrangements for the repacking operation at the airport. If AEY was going to pay less for the ammo, the money would have to be made up another way—by giving the contract to repack to Delijorgji's company. **The son of the prime minister remained silent.** Henri Thomet's name was never mentioned. Nor was the fact that Diveroli knew MEICO was selling the rounds to Thomet for just over two cents a round.

Diveroli and Podrizki departed.

"That guy looked stupid enough to be dangerous," Diveroli said of Delijorgji.

> **"Did we just get out of a meeting with the Albanian mafia?" Podrizki joked.**
>
> **"Absolutely.** Absofuckinglutely."

(emphasis added).

88. Lawson's sources provided exactly the kind of improbable account that should—and did—raise the specter in Lawson's mind that their story was likely false.

89. Lawson asked his sources where the meeting occurred, and Podrizki, Diveroli and Packouz responded, in essence, that "the pair were driven . . . on a seemingly confusing route, so [they] . . . couldn't recreate where they'd gone"—despite that Podrizki had been living in Tirana for over a month at the time.

90. Lawson asked his sources what the meeting building looked like—since distinctive details might verify the alleged meeting's location—and his sources responded "an abandoned construction site for a partially completed office building."

91. Lawson's asked his sources about what Mr. Berisha said at the meeting; they told him that "[t]he prime minister's son remained silent." This too, conveniently, prevented the exploration of any corroborative detail.

92. In short, Lawson knew that his sources' account was calculated to be unverifiable. He also knew that—when combined with his sources' lack of credibility—it was highly unreliable and likely false.

93. Nonetheless, Lawson recklessly defamed Mr. Berisha based on the false recounting of a single alleged meeting. He stamped the imprimatur of investigative journalism on a supposed gathering in a nondescript building, with no known location; a meeting in which the Plaintiff was purportedly silent; a meeting that never actually happened.

Lawson Knew that His Sources Were Highly Motivated to Silence Kosta Trebicka and Secure Better Contract Terms

94. Lawson's false and defamatory assertions are all the more reckless because he knew that his sources were motivated to lie. In addition to the court transcripts and other documents that Lawson "spent months paging through,"[116] the *Dudes Book* itself demonstrates that Packouz, Podrizki and Diveroli had ulterior motives.

95. First, Lawson admits that Podrizki and Diveroli lied to Trebicka regarding *the very same alleged meeting*:[117]

> "The next morning, Kosta Trebicka was pacing in the lobby of the Sheraton, desperate to hear about Diveroli's meetings the day before. As ever eager to please, Trebicka provided a BMW and a driver for the rest of Diveroli's stay in Albania. Trebicka would also supply an attractive young woman for Diveroli's

[116] *Id.* at xix.

[117] *Id.* at 176-77.

pleasure, an offer the young arms dealer gladly accepted.

Diveroli could have told Trebicka the truth about his encounter with Delijorgji: AEY would get a discount on the AK-47 rounds only if Delijorgji's company took over the repacking job—cutting Trebicka out of the deal. **But Diveroli did what he'd become accustomed to doing: he dissembled. Diveroli said he'd been taken to a "hidden" place and threatened. The Albanians had said he'd be killed if he didn't go along with Thomet and Evdin as the middlemen. Diveroli told Trebicka that Ylli Pinari of MEICO had warned him to keep his mouth shut because the prime minister's son had been in the meeting.**

Trebicka was outraged—something had to be done. He readily agreed to try to help Diveroli escape the clutches of men he considered gangsters. Trebicka arranged a meeting with an official in the Albanian Ministry of Defense who could supposedly help. But it turned out that the official was far too young and junior to do anything. Trebicka obviously wasn't as connected as he believed . . . **Trebicka had planned for Diveroli to meet with US Embassy officials,** so they went for a sit-down in the lobby of the Sheraton. The diplomat Robert Newsome was in his late forties or early fifties and gave off the aura of being involved in the intelligence world. **Newsome was with military attaché Victor Myev**, a former soldier turned

> diplomat nearing retirement age—the **man Podrizki had talked to on the phone weeks earlier**.

(emphasis added). In that passage, Lawson recounts that Diveroli lied about the purported meeting in a "hidden place" to justify cancellation of Trebicka's repackaging contract. That is, Lawson concedes that Diveroli lied about threats of murder and being warned "to keep his mouth shut because the prime minister's son had been in the meeting." Moreover, Lawson himself acknowledged that Podrizki, Packouz and Diveroli had good reason to silence Trebicka:[118]

> After the Albanian businessman had been cut out of the repacking deal months earlier, he'd complained constantly to Diveroli, calling and e-mailing to try to be put back on the deal, or at least to be paid for the thousands of dollars' worth of useless cardboard boxes he'd been left stuck with.
>
> Refusing to go away quietly, Trebicka had initially tried to cause trouble for the Albanians who'd taken over the repacking job. He'd told the workers he'd hired that they were being fired because of corruption inside the Ministry of Defense.
>
> * * *
>
> After losing the contract, Trebicka continued to stalk Podrizki in Tirana, claiming that they were "friends," muttering about exacting

[118] *Id.* at 199.

> revenge against Ylli Pinari, trying to find a way to get back in on the deal.
>
> Podrizki finally lost his patience and told him, "You fucked up. You overstepped your boundaries. You got what you deserved."

96. Second, Lawson knew that Diveroli told a different story regarding *the very same alleged meeting* to U.S. Embassy officials later *that same day*:[119]

> He described the meeting the day before, with the prime minister's son and Mihail Delijorgji, who were controlling the contract to sell the ammo. Diveroli said that he'd been told that if he didn't pay bribes he wouldn't be able to get delivery of the ammo, which would imperil America's ability to arm the Afghans.
>
> The story wasn't entirely true. He shaded certain inconvenient facts, like the possibility that selling Albanian-Chinese ammo was against the law. Or the reality that AEY had yet to pay MEICO for any of the rounds, which would explain the delays in delivery. Or that he'd cut Kosta Trebicka out of the deal. In essence, Diveroli didn't want to disclose that he was actually trying to get a better price from the Albanians, instead casting himself as the innocent victim of corruption.

97. Third, Lawson knew that Packouz, Podrizki and Diveroli were told—weeks before the purported May 23, 2007 meeting—that they must allege corruption to

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[119] *Id.* at 178.

enlist the U.S. Embassy to put pressure on MEICO. Lawson writes:[120]

> "MEICO isn't delivering," Podrizki said. "I need help."
>
> **"I can't help unless there's an allegation of corruption," Myev said.** Since AEY was a private company, even though it was doing business with both the American and Albanian governments, it would have to solve its troubles directly with the Albanians. But Myev sympathized. Doing business in Albania was frustrating, Myev allowed—especially inside the government. "That's just the way things are done here," Myev said, sighing.
>
> Podrizki wrote to Diveroli to say he'd tried the US Embassy: "I spoke with the US Embassy to see if they could do something to help—like put pressure on Pinari, MEICO, or the Minister of Defense. Or all three. **They said that unless something illegal is happening they can't do anything.** They also said this type of treatment and attitude (laziness) is typical of the region and especially Albania."
>
> Diveroli called Podrizki to discuss the situation.

(emphasis added). In fact, Lawson knew Diveroli used Mr. Berisha's alleged involvement in corruption to convince the U.S. State Department to cajole MEICO into reaching more favorable terms with AEY. Lawson

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[120] *Id.* at 154.

recounts an e-mail from the U.S. Ambassador in Albania to senior officials in the U.S. State Department:[121]

> "We have a Florida company here called AEY that has a Department of Defense contract to provide Soviet and Chinese arms to the Afghan government," Newsome wrote. "The validity of the contract has been verified. AEY contacted us because they are having problems ('informality' issues) with MEICO."
>
> "Informality" was a reference to corruption allegations. Newsome said the embassy wouldn't intervene on AEY's behalf unless a request came from higher authorities in State or Defense.
>
> "We're bringing this to your attention as AEY has a legitimate contract to provide arms to the Afghan government and the implications this might have for Coalition efforts in Afghanistan."

98. In sum, Lawson recklessly credits a story told by utterly unreliable sources, despite knowing that: (1) his sources' account was unverifiable and improbable; (2) his sources were highly motivated to lie; (3) his sources had concocted similar phony stories when motivated to lie; and (4) his sources lied about the very same purported meeting two times on the same day. However, Lawson intentionally and recklessly disregarded these facts because he was far more interested

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[121] *Id.* at 179-80.

in telling a "good" story than he was in reporting a true one.

Motivated by Greed and Celebrity, Lawson Recklessly Libels Mr. Berisha Despite Obvious Reasons to Doubt the Veracity of His Sources

99. Lawson's account of an alleged meeting between Podrizki, Diveroli and the Plaintiff is unequivocally false and defamatory per se. Lawson—relying on wholly discredited sources—accused Mr. Berisha of: (1) receiving illegal kickbacks in connection with illicit arms dealings; (2) conspiring to defraud the U.S. Government; (3) being "part of an extremely dangerous group"; and (4) working with an organized criminal enterprise (*i.e.*, "Albanian mafia"). Yet Mr. Berisha has never been done business with MEICO, Pinari or Delijorgi, nor is he "part of an extremely dangerous group" or associated with "Albanian mafia." Moreover, he was not involved, in any manner whatsoever, with AEY and he has never been in a room with Diveroli or Podrizki.

100. Nonetheless, based solely upon a false—and inherently improbable—account of a single fantastical meeting, Lawson recklessly defamed Berisha throughout the *Dudes Book* and the *War Dogs Book*. Several of those false and defamatory statements are set out below.

101. In the "Author's Note" section, Lawson writes:[122]

> The improbable voyage Packouz, Diveroli, and Podrizki had taken included geopolitical intrigue, Albanian mobsters, a shady Swiss arms dealer, and an underhanded conspiracy to repackage millions of ancient surplus Chinese-made AK-47 cartridges.
>
> * * *
>
> The US government had used a string of brokers like Packouz and Diveroli and Podrizki to insulate it from the dirty work of arms dealing in the Balkans—the kickbacks and bribes and double-dealing.

Taken in context, Lawson's references to "geopolitical intrigue, Albanian mobsters, a shady Swiss arms dealer, and an underhanded conspiracy" and "the dirty work of arms dealing in the Balkans—the kickbacks and bribes" falsely, and recklessly, accuse the Plaintiff of criminal activity.

102. In Chapter One, Lawson states:[123]

> Five thousand miles away, in the Balkan city of Tirana, Albania, Packouz's friends Efraim Diveroli and Alex Podrizki were also dealing with menacing and mysterious forces as they tried to arrange for 100 million rounds of AK-47 ammo to be transported to Kabul. Alone in a notoriously lawless country, **Diveroli and**

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[122] *Id.* at xviii.

[123] *Id.* at 2.

> **Podrizki were trying to negotiate with an Albanian mafioso taking kickbacks**, as well as a Swiss gun dealer running the deal through a Cyprus company **seemingly as a way to grease the palms of shadowy operators allegedly associated with the prime minister of Albania**.

(emphasis added). Again, Lawson cruelly and falsely asserts—without credible evidence—that Plaintiff was a "shadowy operator" involved with "mafioso taking kickbacks."

103. In Chapter Eight, Lawson writes:[124]

> After returning to Miami, Diveroli had come to an agreement with the Albanians. AEY would receive a discount of two-tenths of a penny on each round of ammo, reducing the price to 3.8 cents. **In return, Diveroli had agreed to cut Trebicka out of the repacking job, which was now being done by a company called Alb-Demil, an entity seemingly controlled by the prime minister's son** and Mihail Delijorgji.

(emphasis added). Here, like elsewhere, Lawson falsely reports Mr. Berisha's alleged criminal activity as fact. Yet he utterly fails to explain why he chose to rely on wholly discredited sources to support his conclusion.

104. In the "Photographs" section, Lawson includes the following picture, captioned: "Also involved,

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[124] *Id.* at 188-89.

the dudes discovered, was the prime minister's son, Shkelzen [sic] Berisha."

Also involved, the dudes discovered, was the prime minister's son, Shkelzen Berisha. *Credit: Gent Shkullaku*

In addition to the false and defamatory caption, the photograph appears alongside a picture of Pinari behind bars—deliberately implying Plaintiff's association with criminal activity.

105. In Chapter Eight, Lawson recounts the recorded telephone conversation between Trebicka and Diveroli:[125]

> Diveroli urged Trebicka to try to find an accommodation. "Why don't you kiss Pinari's ass

[125] *Id.* at 201-02.

> one more time? Call him up, beg him, kiss him, send one of your girls to fuck him. Let's get him happy. Maybe he gives you a chance to do the job. Maybe you give him a little money. He's not going to get much from this deal. If he gets twenty thousand dollars from you, I'm okay with that."
>
> "I understand," Trebicka said, luring Diveroli further into his plot.
>
> "The more it went up higher, to the prime minister, to his son—this Mafia is too strong for me," Diveroli said. "I can't fight this Mafia. It got too big. The animals got too out of control."

Here, Lawson repeats the false and defamatory statements of Efraim Diveroli—a man Lawson described as "a liar . . . [who] misled directly, indirectly, compulsively."[126]

106. Lawson recklessly made the aforementioned false and defamatory statements despite obvious reasons to doubt the veracity of his sources. Moreover—given Lawson's knowledge of his sources' pervasive lies, fraud and improbable tales—Lawson did, in fact, doubt that Mr. Berisha was involved in criminal activity related to the Afghanistan Contract. But Lawson didn't care about Plaintiff's reputation, and the impact that grave, criminal allegations would have on Mr. Berisha's business, community involvement and family life. Lawson wanted a bestseller, so he told a "bigger" story.

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[126] *Id.* at 48.

Lawson Slanders Mr. Berisha in Interviews

107. Lawson continues to slander Mr. Berisha in television and radio interviews. For example, Lawson slandered the Plaintiff during a July 6, 2015 interview on Miami Public Radio:[127]

> *Interviewer*: So, tell us how they finally got into trouble?
>
> *Lawson*: Well, this guy Kosta Trebicka you referred to was an Albanian businessman who was doing the repackaging for them. The nefarious repackaging. And he – they didn't tell him why they were doing it, and he grew suspicious. And then eventually, as will happen in Albania, gangsters came along and wanted the contract for themselves. These gangsters happened to be connected to the prime minister of Albania.

108. In a March 16, 2016 television interview, Lawson further slandered Mr. Berisha:[128]

> *Interviewer*: [*in Albanian*] The son of the prime minister is mentioned everywhere [in

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[127] *Topical Currents: How Three Stoners from Miami Beach Became the Most Unlikely Gunrunners in History* (Miami Public Radio WLRN radio broadcast 07/06/15), available at http://wlrn.org/post/how-three-stoners-miami-beach-became-most-unlikely.gunrunners-history (last visited June 3, 2017).

[128] *Dritare: Exclusive Interview with Guy Lawson*, (Vizion Plus Albania television broadcast 3/16/16), available at https://www.youtube.com/watch?v=mRRNBzQCnho (last visited June 3, 2017).

> the book], but what facts do you have that prove his involvement in the matter?
>
> Lawson: [*in English*] That's what you need an investigation to discover, you know, **the ex-prime-minister's son met with the Dudes when they were in Albania to arrange the delivery and repackaging of these munitions at a price that was, a, twice the price that the Albanian government was getting.** So the Albanian government was selling the munitions for two cents a round; sold that to another company for four cents a round, and then the [*inaudible*] were buying it for eight cents a round. So what happened to all that money? **Well, the implication is clear that the prime minister's son, and perhaps even the prime minister, certainly the defense minister and other officials, were profiteers** and the money was shipped off to a Cyprus holding company and then vanished.

(emphasis added).

109. Lawson—without performing the "investigation" that "you need"—accused Mr. Berisha of conspiring to defraud the United States and acting as an illegal "profiteer" at the expense of his own country. Again, Lawson bases his allegations on the word of serial fraudsters; on a single uncorroborated anecdote from his lying "Dudes."

Lawson Purposely Avoided Further Investigation with Intent to Avoid the Truth

110. In violation of basic journalistic standards[129]—the very norms meant to prevent publication of defamatory falsehoods—Lawson never afforded Mr. Berisha an opportunity to respond before publishing incendiary criminal accusations against him.

111. Had Lawson contacted Mr. Berisha he would have learned that: (1) Mr. Berisha has never done business with MEICO, Pinari or Delijorgji; (2) Mr. Berisha was not involved, in any manner whatsoever, with AEY; and (3) Mr. Berisha has never been in a room with Efraim Diveroli.

112. Lawson purposely avoided contacting Mr. Berisha because Lawson feared that Mr. Berisha would cast further doubt on his sources already dubious claims.

Simon & Schuster and Recorded Books Published the Dudes Book and War Dogs in Reckless Disregard of Obvious Reasons to Doubt the Reliability of Lawson's Sources

113. Simon & Schuster and Recorded Books (the "Publisher Defendants") published, marketed and

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[129] "Journalist practice—and basic fairness—require that if a reporter intends to publish derogatory information about anyone, he or she should seek that person's side of the story." *See* Sheila Coronel, Steve Coll, and Derek Karvitz, *Rolling Stone and UVA: The Columbia University Graduate School of Journalism Report*, Rolling Stone, Apr. 5, 2015.

disseminated the *Dudes Book* and the *War Dogs Book* with reckless and/or intentional disregard of the truth of Lawson's allegations concerning Mr. Berisha.

114. Despite specific and obvious reasons to doubt Lawson's claims about the Plaintiff (*e.g.*, the AEY Sources' elaborate frauds, their improbable recounting of the alleged May 23, 2007 meeting, and their evident motivation to silence Trebicka), the Publisher Defendants failed recklessly to fact-check Lawson's claims.

115. Moreover, the Publisher Defendants knew that Lawson never contacted Mr. Berisha to obtain his response to the extraordinarily damaging allegations leveled against him—notwithstanding that the charges were sourced to convicted, serial liars. Again, the Publisher Defendants did nothing to verify Lawson's slipshod reporting.

116. Like Lawson, the Publisher Defendants were motivated to sell more books; and they knew that allegations of kickbacks to the families of foreign leaders were likely to do just that.

Diveroli and Incarcerated Entertainment Knowingly Libeled Plaintiff

117. In May 2016, Incarcerated Entertainment published the *Gunrunner Book*, authored by Efraim Diveroli and Matthew Cox ("Cox"). Like Diveroli, Cox is a felon and con man who fleeced his victims using

falsified documents and stolen identities.[130] Diveroli and Cox co-wrote the *Gunrunner Book* while incarcerated at a federal prison in Florida.

118. The *Gunrunner Book* is Diveroli's self-serving account of his arms trafficking activities and fraud concerning the Afghanistan Contract. As a felon convicted of crimes of dishonesty, Diveroli can no longer compete for Government military contracts. Therefore, via the *Gunrunner Book*, Diveroli seeks to burnish his reputation, and profit from the story of his crimes.

119. Like in his interviews with Lawson, Diveroli intentionally defamed Mr. Berisha in the *Gunrunner Book*. However—despite being one of Lawson's two "eyewitness" sources to the May 23, 2007 purported meeting with Mr. Berisha (and its aftermath)—Diveroli's account differs substantially from the version presented by Lawson.

120. In Lawson's account from *War Dogs*, Diveroli's *first* renegotiation meeting in Albania was at "Ylli Pinari's office at the Ministry of Defense."[131] During that purported first meeting, Lawson states that Diveroli asked to see the Albanian Minister of Defense, and upon that request Pinari drove Diveroli and Podrizki to a *second* meeting in a "sleek, stylish office, like the suite of a corporate law firm in a skyscraper in

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[130] Jeff Testerman, *Swindler Cox gets 26 years*, Tampa Bay Times, Nov. 17, 2007.

[131] Guy Lawson, *War Dogs* 173 (2016).

Miami" located inside "a partially completed office building."[132]

121. Yet, in the *Gunrunner Book*, Diveroli says that there was only *one* meeting and that it was held "around a chipped wooden table" at a "possibly condemned building" in a "damp" office with "[y]ellow [] paint peeling off the walls." Diveroli writes:[133]

> I arrived on May 23rd of 2007, at the International Airport just outside of Tirana. I checked into the Sheraton Hotel; it was tall and opulent, a luxurious onyx tower and without a doubt the nicest structure in the entire country.
>
> Pinari's driver picked Alex and me up in a 20-year-old brown Mercedes—a rusted out beater. On the drive to the meeting, it crossed my mind that this was the type of move that could get me killed. Meeting with high-ranking officials of dubious character to cut murky arms deals was dangerous in a country as corrupt and backward as Albania. People went missing and had "accidents" all the time in that country. We were taken to an abandoned office building; it appeared to be under heavy renovation or possibly even condemned.
>
> THE OFFICE WAS FILLED WITH SMOKE; it smelled like mildew and cigars. Pinari and several other hard-looking characters were

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[132] *Id.* at 174.

[133] Efraim Diveroli and Matthew B. Cox, *Once a Gunrunner . . . The Real Story*, Kindle Edition, at locations 2278-90 (2016).

> sitting at a chipped wooden table cluttered with paperwork and boxes of 7.62 mm rounds, having a heated discussion in Albanian. Yellow paint was peeling off the walls and it was damp. Pinari was an overweight balding Eastern European in his late 40s, wearing a cheap suit. Mihal [sic] Delijorgji and his bodyguard were heavy, thick-necked and weathered; both had rudimentary gulag style tattoos on their hands and arms. A third, Scandinavian type, with light features, Skelzen [sic] Berisha, sat quietly listening to the discussion—turns out he was Sali Berisha, the Albanian Prime Minister's son. Based on the tone of their conversation, it was pretty obvious Delijorgji was calling the shots, dictating terms for the sale of military equipment and munitions—state-owned assets.

122. In Lawson's account, Diveroli and Podrizki are told *during the second meeting* that "if Diveroli wanted a discount he would have to change the repackaging operation . . . by giving the contract to repack to Delijorgji's company."[134]

123. But in the *Gunrunner Book*, Diveroli asserts that he received word—of both the ammunition discount *and* that the fact that he needed to cancel Trebicka's repackaging contract—on the day after the purported meeting with Mr. Berisha. Furthermore, Diveroli attributes the price reduction to his May 24,

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[134] Guy Lawson, *War Dogs* 175 (2016).

2007 meeting with U.S. Embassy officials. Diveroli writes:[135]

> Newsome grunted his understanding, and Myev said, "I don't want to be rude, Mister Diveroli, but we really can't get involved in the internal workings of the Albanian government, especially when it relates to a commercial contract—which is technically what you have." Which was bullshit: The U.S. did it all the time. I'm not an expert in geopolitics, but any semi-intelligent person knows that the U.S. influences and manipulates the laws and decisions of so-called "sovereign" nations all the time, especially in politically unstable, economically depressed shitholes like Albania.
>
> I looked him in the face and said, "This is a crucial operation to the war on terror—and you can't make a couple of calls?"
>
> Myev leaned back into his chair and glanced at Newsome. No one spoke for several seconds, and then Myev said, "I'll look into it . . . Give me a call in a couple of days if there's no movement on your end."
>
> "Gentlemen," I smiled, "that's all I'm asking for."
>
> WHEN NEWSOME GOT BACK TO THE EMBASSY, he shot off an email to the State Department:

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[135] Efraim Diveroli and Matthew B. Cox, *Once a Gunrunner . . . The Real Story*, Kindle Edition, at locations 2328-47 (2016).

> "FYI: We have a Florida company here called AEY, that has a DOD contract to provide Soviet & Chinese arms to the Afghan government . . . They are having problems ("informality" issues) with MEIKO, the MOD arms contracting company. AEY wants to buy arms & munitions from MEIKO and ship to Afghanistan. They have been unable to come to terms with MEIKO to date."
>
> He then wrote the embassy wasn't planning to intervene:
>
> "We're bringing this to your attention as AEY, has legitimate DOD contract to provide arms to the Afghan government and the implication this might have for Coalition efforts in Afghanistan.
>
> Please respond on the classified side as you deem appropriate."
>
> NOW I DON'T KNOW WHAT THEIR "CLASSIFIED" response was, **but several hours after that email, Heinrich [Thomet] called and said, "Okay Efraim, I don't know what you did, but Pinari will do twenty-seven per one thousand . . . but he wants the repackaging contract as well, okay?" I didn't have a problem with that, although I knew Trebicka would.**

(emphasis added).

124. Moreover, Lawson asserts that Diveroli and Podrizki met with Trebicka first thing "the next morning" (*i.e.*, May 24, 2007) in "the lobby of the Sheraton"

and at that time Diveroli told Trebicka that "he'd [Diveroli] be killed if he didn't go along with Thomet and Evdin as middlemen."[136] Lawson reported further that "Trebicka had planned for Diveroli to meet with US Embassy officials" later that day.[137]

125. Yet again, Diveroli's story is different. Diveroli makes no mention of meeting Trebicka on the day after the purported renegotiation meeting(s), and asserts that he—not Trebicka—"called the U.S. Embassy and asked to meet with someone regarding an issue of national interest."[138]

126. Inconsistencies aside, however, one thing is certain: both Lawson's and Diveroli's accounts of Mr. Berisha's involvement are utterly false and defamatory. Diveroli is clearly a compulsive liar, and it was reckless for Lawson to rely on him.

Defendants' Widely Disseminated Defamatory Statements are Republished in Media Outlets, Compounding and Continuing Harm to the Plaintiff

127. Defendants' publication of cruel lies about Mr. Berisha ignited a media firestorm. It was a reaction that Lawson anticipated. In a July 6, 2015 interview, Lawson stated: "The Book is being published

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[136] Guy Lawson, *War Dogs* 176 (2016).

[137] *Id.* at 177.

[138] Efraim Diveroli and Matthew B. Cox, *Once a Gunrunner . . . The Real Story*, Kindle Edition, at locations 2322 (2016).

today, as it happens, in Albania. And it's on the front page of a few Albanian newspapers because it really is a big deal in that country."

128. Lawson was right. In addition to his books' worldwide distribution, Lawson's highly defamatory allegations were repeated—and continue to be repeated—by international media outlets. For example:

- A September 9, 2016 article in *Balkan Insight—a* media outlet aimed at Balkan peoples living in the United States—reads in part:[139] "Lawson investigated the complicated scheme by which AEY, its broker Heinrich Thomet, and Albanian contractors repacked Chinese ammunition that was under a US embargo in Albania and sold it on to US forces fighting in Afghanistan. Lawson alleged in the book that high-level Albanian officials and the son of former Albanian Prime Minister Sali Berisha were involved in the trade."
- An August 8, 2016 article on Dritare.net—a popular Albanian news portal—repeats Lawson's false and defamatory accusations alongside photos of Mr. Berisha.[140] The article's title—"Trafiku i armeve, filmi hollivudian per

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[139] Fatjona Mejdini, *Albanians Feel Left out of Hollywood Blockbuster*, Balkan Insight, Sept. 9, 2016, http://www.balkaninsight.com/en/article/war-dogs-disappointed-albanians-expectancies-09-09-2016 (last visited June 3, 2017).

[140] *Trafiku i armëve, filmi hollivudian për Diverolin dhe Shkelzen Berishën "Qentë e Luftës*, Dritare.net, Aug. 8, 2016,_http://www.dritare.net/2016/08/08/trafiku-i-arnieve-filmi-hollivudianper-diverolin-dhe-shkelzen-berishen-qente-e-luftes/1 (last visited June 3, 2017).

Diverolin dhe Shkëlzen Berishen "Qente e Luftes"—translates roughly to "Hollywood Film *War Dogs* to Feature Arms Trafficking, Shkelzen Berisha."

- Lawson's allegations were referenced in an August 18, 2016 *Macedonia Shqiptare* article titled "Filmi i Shkëlzenit dhe Kosta Trebickës, këtë javë në kinematë amerikane." The article's title translates roughly to: "Shkelzeni and Kosta Trebicka film in American cinemas this week."
- In September and October 2016, Lawson's accusations regarding Mr. Berisha were read aloud, during Albanian parliamentary sessions, by political opponents of Mr. Berisha's father.[141]

129. In fact, Lawson made certain that his defamatory allegations against Mr. Berisha would be a "big deal." Encouraged and prompted by Lawson, media outlets spread Lawson's defamatory allegations against Mr. Berisha. For example:

- On August 2, 2015, Lawson gave an interview to *Gazeta Dita*—an Albanian newspaper—during which he was asked: "[*in Albanian*] You've said that Fatmir Mediu, Shkelzen Berisha, etc. were involved. Is the former prime minister Berisha implicated in this

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[141] *Autori i librit për Gërdecin, Guy Lawson, ka një pyetje për Taulant Ballën*, VOAL: Voice of Albanians, Sept. 28, 2016, https://www.voal.ch/autori-i-librit-per-gerdecin-guy-lawson-ka-njepyetje-per-taulant-ballen/ (last visited June 3, 2017).

corruption?" Lawson responded: "I don't know, but his son was involved."[142]

- On March 14, 2016, during an interview aired on Albanian television, Lawson stated: "the implication is clear that the prime minister's son, and perhaps even the prime minister, certainly the defense minister and other officials, were profiteers."[143]

Mr. Berisha is a Private Figure

130. The true story, as it pertains to Mr. Berisha, is entirely uncontroversial. Mr. Berisha is a private citizen, an Albanian-trained lawyer and businessman, and a father of two.

131. Mr. Berisha works primarily as a legal consultant and advisor for international companies seeking to invest in Albania. In particular, Mr. Berisha's practice focuses on companies aiming to invest in real estate and energy projects in Albania. Most of his clients and business partners are located in the United States and Europe.

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[142] *Ekskluzive nga SHBA/ Flet Guy Lawson, autor i librit për tragjedinë e Gërdecit: Rihapeni Gërdecin*, Gazeta Dita, Aug. 2, 2015, available at http://www.gazetadita.al/ekskluzive-nga-shba-flet-guy-lawson-autor-i-librit-per-tragiedine-e-gerdecit-rihapeni-gerdecin-2/ (last visited June 3, 2017).

[143] *Dritare: Exclusive Interview with Guy Lawson*, (Vizion Plus Albania television broadcast 3/16/16), available at_https://www.youtube.com/watch?v=mRRNBzQCnho (last visited June 3, 2017).

132. Although Plaintiff is the son of a former prime-minister, he has never held or run for public office, never worked for a political party, nor participated—even indirectly—in government affairs.

133. Apart from his mere relation to an Albanian politician, Mr. Berisha is the quintessential private figure.

Mr. Berisha has Suffered Severe Reputational and Financial Harm

134. Defendants' false and per se defamatory statements continue to harm Mr. Berisha personally and professionally. Everyday, Defendant's widely-distributed criminal allegations serve to impeach Plaintiff's integrity, honesty and virtue.

135. As a lawyer and businessman, Plaintiff remains hindered in his professional dealings—particularly with new clients and contacts. Obviously, Mr. Berisha may become unemployable if potential clients and business partners believe that he is involved in organized crime and corruption.

136. Further, the damage to Plaintiff's personal reputation is itself extraordinary. Given the nature of the internet—and the resultant global media environment—Defendants' defamatory allegations are permanently on display, available to everyone in the world; including Mr. Berisha's children, who are exposed often to Defendants' viciously false reports that their father cheated his own country.

137. Moreover, Plaintiff has been forced to deal with unwanted and unsolicited attention. For example, in September 2016, political opponents of Mr. Berisha's father read Lawson's false and defamatory allegations during Albanian parliamentary sessions broadcast on Albanian television.

138. Unwillingly thrust into the spotlight by Defendants' accusations, Plaintiff is regularly threatened, harassed and heckled. As a result, Mr. Berisha has been forced to take extra security precautions.

139. As a direct and proximate result of Defendants' false and defamatory allegations of fraud, criminality and association with organized crime, Plaintiff has suffered damages, professionally and personally. Based upon on Defendants' wide dissemination of malicious lies, Plaintiff believes, and thereby alleges, that his damages exceed the sum of $60 million (although the exact amount is presently unknown).

Defendants' Conduct Warrants Punitive Damages

140. Defendants' libelous publications and slanderous statements about Mr. Berisha were knowingly and/or recklessly made for financial gain and personal advantage.

141. Diveroli, Podrizki and Packouz knew that their statements about the Plaintiff were false when they made them. Initially, Diveroli, Podrizki and Packouz intentionally defamed Plaintiff in a failed attempt to keep secret their fraudulent repackaging scheme.

Later, they cruelly maintained the concocted story to, among other ends, salvage their own reputations and curry favor with Lawson.

142. Lawson, Simon & Schuster, and Recorded Books do not purport to have a reliable source for their viciously false assertions. They failed recklessly to corroborate the claims of known fraudsters. Yet they knew that the inclusion of purported kickbacks to the families of foreign politicians would make the "Dudes" tale more marketable. In short, they recklessly destroyed a man's reputation to sell more books.

COUNT I: DEFAMATION

(*All Defendants*)

143. Plaintiff re-alleges the allegations contained in Paragraphs 1 through 142 as though fully set forth herein.

144. Defendants made and published statements purported to be facts, in an intentionally false, malicious, or otherwise defamatory manner (*i.e.*, with knowledge that their statements were false or with reckless disregard of the truth) and distributed the same in Florida and throughout the world.

145. All of the defamatory statements made and published by Defendants concerning Plaintiff are false.

146. Defendants specifically and unambiguously stated and/or implied that Plaintiff was involved in arms trafficking. That is false.

147. Defendants specifically and unambiguously stated and/or implied that Plaintiff met with Diveroli and Podrizki. That is false.

148. Defendants specifically and unambiguously stated and/or implied that Plaintiff was involved in a scheme to defraud the United States Government by disguising the origin of Chinese ammunition. That is false.

149. Defendants specifically and unambiguously stated and/or implied that Plaintiff accepted and/or facilitated illegal payments in connection with arms trafficking. That is false.

150. Defendants specifically and unambiguously stated and/or implied that Plaintiff was associated with organized crime. That is false.

151. Defendants specifically and unambiguously stated and/or implied that Plaintiff was involved with the criminal misappropriation of Albanian state-owned assets. That is false.

152. Defendants caused the false and defamatory statements to be published with knowledge of the statements' falsity and/or with reckless disregard for the truth.

153. Defendants knew and/or intended that their defamatory statements would be widely disseminated in the United States and abroad.

154. Defendants' statements had, and continue to have, a defamatory effect, because they have

resulted in damage to the reputation and community standing of the Plaintiff. In particular, Defendants' defamatory statements have damaged Plaintiff's reputation and standing with businesspeople whom he has done, was in the process of doing, or plans to do business with in the future.

155. Defendants' false and defamatory statements about Plaintiff had, and continue to have, the effect of impeaching Plaintiff's honesty, integrity and morals. Plaintiffs positive character has opened doors for him in community life. Defendants' actions have already caused, and will continue to cause, harm to the Plaintiffs standing in the Albanian community (and other communities) in the United States and abroad, which is of utmost importance in his day-to-day dealings.

COUNT II: DEFAMATION PER SE

(*All Defendants*)

156. Plaintiff re-alleges the allegations contained in Paragraphs 1 through 155 as though fully set forth herein.

157. Defendants made and published statements purported to be facts, in an intentionally false, malicious, or otherwise defamatory manner (*i.e.*, with knowledge that their statements were false or with reckless disregard of the truth) and distributed the same in Florida and throughout the world.

158. All of the defamatory statements made and published by Defendants concerning Plaintiff are false.

159. All of the defamatory statements made and published by Defendants concerning the Plaintiff are defamatory *per se.* That is, each false and defamatory statement: (1) asserts that Plaintiff has been involved with criminal activity; and (2) specifically injures Plaintiff in his profession (*i.e.*, law practice) and other business ventures.

160. Defendants specifically and unambiguously stated and/or implied that Plaintiff was involved in arms trafficking. That is false.

161. Defendants specifically and unambiguously stated and/or implied that Plaintiff met with Diveroli and Podrizki. That is false.

162. Defendants specifically and unambiguously stated and/or implied that Plaintiff was involved in a scheme to defraud the United States Government by disguising the origin of Chinese ammunition. That is false.

163. Defendants specifically and unambiguously stated and/or implied that Plaintiff accepted and/or facilitated illegal payments in connection with arms trafficking. That is false.

164. Defendants specifically and unambiguously stated and/or implied that Plaintiff was associated with organized crime. That is false.

165. Defendants specifically and unambiguously stated and/or implied that Plaintiff was involved with the criminal misappropriation of Albanian state-owned assets. That is false.

166. Defendants caused the false and defamatory statements to be published with knowledge of the statements' falsity and/or with reckless disregard for the truth.

167. Defendants knew and/or intended that their defamatory statements would be widely disseminated in the United States and abroad.

DAMAGES

168. As a direct and proximate cause of Defendants' defamatory statements, Plaintiff has suffered and continues to suffer compensable and pecuniary damages. Moreover, Plaintiff has lost business opportunities because associates believed the false statements made by Defendants and concluded that Plaintiff was criminally dishonest and immoral.

169. The actions of Defendants set forth in this Complaint demonstrate malice, egregious defamation, and grave insult. Such actions were taken with malicious intent or reckless disregard of the falsity of the speech and its effect on Plaintiff. Accordingly, Plaintiff requests an award of punitive damages and attorneys' fees beyond those damages necessary to compensate Plaintiff for injuries resulting from Defendants' conduct.

PRAYER FOR RELIEF

Plaintiff prays that this Court provide the following relief:

(1) An order requiring Simon & Schuster to remove the defamatory language from the *Dudes Book* and *War Dogs*;

(2) An order requiring Recorded Books to remove the defamatory language from the *Dudes Book* and *War Dogs*;

(3) An order requiring Incarcerated Entertainment to remove the defamatory language from the *Gunrunner Book*;

(4) Compensatory and consequential damages of $60 million, or such other and greater sum as shall be found;

(5) Punitive damages to punish Defendants' reprehensible conduct and to deter its future occurrence; and

(6) Further relief as this Court shall deem just and proper.

JURY DEMAND

Plaintiff respectfully requests a trial by jury on all issues raised by this Complaint which are triable by right of a jury.

DATED: June 8, 2017 Respectfully Submitted,

s/ Jeffrey W. Gutchess
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