

IN THE  
**SUPREME COURT OF THE UNITED STATES**  
OCTOBER TERM, 2009

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ERIC CARTMAN,

*Petitioner,*

v.

IKE BROFLOVSKI,

*Respondent.*

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*On Writ of Certiorari to the  
United States Court of Appeals  
For the Fifteenth Circuit*

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**BRIEF FOR PETITIONER**

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**TEAM # 103**  
*Counsel for Petitioner*

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## **QUESTIONS PRESENTED**

- I. DOES THE FIRST AMENDMENT CREATE A QUALIFIED REPORTER'S PRIVILEGE AGAINST THE COMPELLED DISCLOSURE OF A REPORTER'S CONFIDENTIAL SOURCES AND IF SO, DOES IT PROTECT AN INDIVIDUAL WHO GATHERS AND DISSEMINATES NEWS ON THE INTERNET?
  
- II. IS AN EXECUTIVE OF A WELL-KNOWN COMPANY A LIMITED PURPOSE PUBLIC FIGURE WHO MUST PROVE ACTUAL MALICE IN A DEFAMATION CLAIM, WHEN THE EXECUTIVE IS DRAWN INTO A PUBLIC CONTROVERSY INVOLVING THE COMPANY?

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## **STATEMENT OF JURISDICTION**

A Formal Statement of Jurisdiction has been omitted in accordance with the rules of the Washington College of Law's Burton D. Wechsler First Amendment Moot Court Competition.

## **STATEMENT OF THE CASE**

Respondent Ike Broflovski (“Ike”), Director of Research & Development at Citrus, filed a defamation action against Petitioner Eric Cartman after a story appeared on Cartman’s website, *The Sludge Report*, suggesting Ike’s involvement in human rights violations at Citrus.

### ***Citrus and Ike’s Role at the Company***

Citrus began its rise to the top of the consumer electronics industry by manufacturing several types of personal electronics under the leadership of CEO Kyle Broflovski (“Kyle”). (J.A. at 2.) The company surged to the forefront of the industry by developing the ePlay, a portable digital music player that became an icon and status symbol in American popular culture with its trademark silver earphones. (J.A. at 2.)

Kyle hired his brother Ike to develop the new ePlay Touché which promised to cement the ePlay brand in the portable music market. (J.A. at 3.) Kyle announced Ike’s hiring as the “man behind the curtain” at a press conference where Ike made some brief comments. (J.A. at 3.) The story of Ike’s hiring was published in several newspapers and Kyle continually praises Ike’s work in television and magazine interviews. (J.A. at 3.) In fact, Ike is so closely associated with the Citrus brand of products that many company employees throughout the United States wear “I Like Ike” buttons celebrating his leadership and contributions. (J.A. at 4.)

### ***The Sludge Report***

Cartman is a for-profit Internet reporter who authors a blog entitled *The Sludge Report* (“*The Report*” or “*Report*”), which he updates every evening. (J.A. at 4.) The information he publishes comes from several sources, including anonymous tips and headlines from major newspapers. (J.A. at 4.) *The Report* features stories and comments from Cartman on a wide-

range of topics, from celebrity gossip to international politics. In the past, Cartman was critical of the business practices of Citrus and Kyle. (J.A. at 4.)

*The Report* has grown in popularity with an audience of over 100,000 readers, some of whom are the source of Cartman's anonymous tips. (J.A. at 4-5.) Cartman assures tipsters confidentiality for any stories or leads they provide through the e-mail address established to solicit information. (J.A. at 5.)

***“Citrus Engaging in Acts of Modern-Day Slavery?”***

On July 7, 2008 a *Report* reader, known by the pseudonym “Professor Chaos,” submitted a tip that Citrus was engaging in human rights violations. (J.A. at 5.) For over two years, Cartman has received reliable information regarding Citrus products and developments from Professor Chaos, who claims to be a Citrus employee. (J.A. at 5.) Professor Chaos stated that Ike was responsible for the violations and even provided a photograph of Ike walking through the Citrus factory in Mumbai, India and yelling at workers manufacturing the ePlay Touché. (J.A. at 5.) Ike stipulated that he visited Mumbai several times. (J.A. at 7.) Citrus later determined that Ike's image was likely superimposed on an actual picture from the factory. (J.A. at 7.)

The day after receiving the information and photograph from Professor Chaos, Cartman wrote and posted a story for *The Report* under the headline, “Citrus Engaging in Acts of Modern-Day Slavery?” (the “Citrus Story”). (J.A. at 5.) The Citrus Story suggested that employees were being abused and could be working 16 hours a day, seven days a week, with few breaks under the direction of Ike. (J.A. at 6.) Kyle and Ike unsuccessfully made some effort to discover the source of the photograph, by deposing the manager and a few engineers at the Mumbai factory.

(J.A. at 7.) Citrus also sent a mass e-mail to employees on behalf of Ike requesting information about the source. (J.A. at 8.)

*The Report*, and specifically the Citrus Story, garnered national attention. Six weeks later the host of a top-rated cable news show, Keith McRiley, encouraged viewers to boycott Citrus and named Ike the “Most Heinous Individual in the Galaxy.” (J.A. at 6.) The day after the McRiley broadcast, retailers began pulling Citrus products from their shelves and Citrus’s stock price dropped drastically. (J.A. at 6-7.)

### ***Procedural Facts***

Ike filed a defamation suit against Cartman in Silverado Superior Court on September 20, 2008. (J.A. at 7.) After the Complaint was filed, Cartman removed the case to the United States District Court for the Western District of Silverado on diversity grounds. (J.A. at 7.) Ike propounded upon Cartman an interrogatory seeking the real name of Professor Chaos and his contact information. (J.A. at 8.) In response Cartman asserted “a qualified privilege under the First Amendment, as a news reporter, against the disclosure of his source.” (J.A. at 8.) Ike filed a Motion to Compel disclosure of the source’s identity under Fed. R. Civ. P. 37. (J.A. at 8.)

Cartman filed a brief in opposition to Ike’s Motion and filed a Motion for Summary Judgment on the defamation claim. (J.A. at 8.) The Western District of Silverado denied Ike’s Motion to Compel and granted Summary Judgment to Cartman on January 27, 2009. (J.A. at 20.) Ike timely appealed the decision, (J.A. at 22), and the United States Court of Appeals for the Fifteenth Circuit reversed both the District Court’s denial of Ike’s Motion to Compel and granting of summary judgment on May 14, 2009 (J.A. at 32). This Court granted Certiorari on August 24, 2009. (J.A. at 33.)

## SUMMARY OF THE ARGUMENT

The First Amendment creates a qualified reporter's privilege that protects reporters from court-compelled disclosure of confidential sources. This Court has not addressed the existence of the privilege in the context of a civil case. However, Justice Powell, the deciding vote in Branzburg v. Hayes, wrote a concurring opinion asserting that the privilege should be available in certain circumstances. Echoing Justice Powell's concurrence most federal appellate courts responded by recognizing the privilege in civil cases.

Cartman is entitled to assert the qualified privilege to protect the identity of Professor Chaos because he gathers and disseminates news. He engages in the same functions as reporters using traditional mediums, but chooses to publish on the Internet due to its drastic increase in popularity as a source of news. As an interactive medium, the Internet promotes First Amendment principles such as the marketplace of ideas and the free flow of information.

Because the privilege is qualified, it is possible that a reporter can be compelled to disclose his or her source. However, Ike failed to meet the burden because he did not exhaust all avenues to obtain the identity of Professor Chaos.

Ike accepted his position at Citrus to push the company to new heights in the electronics industry. His substantial role in a leading electronics company invited public comment, thus making him germane to the human rights controversy involving Citrus workers. Therefore, Ike is a limited purpose public figure.

Ike's status as a limited purpose public figure requires him to prove that Cartman published the statement with actual malice. However, Ike failed to prove that Cartman had knowledge that Professor Chaos's statement was false or recklessly disregarded its truth or falsity.

## ARGUMENT

### **I. ERIC CARTMAN IS PROTECTED FROM DISCLOSING THE IDENTITY OF PROFESSOR CHAOS.**

The Fifteenth Circuit's determination that the First Amendment does not create a qualified reporter's privilege (the "privilege") is subject to *de novo* review by this Court. A *de novo* review is required of any privilege claim, because it is a mixed question of law and fact. See In re Grand Jury Investigation, 974 F.2d 1068, 1071 (9th Cir. 1992).

The privilege protects reporters from court-compelled disclosure of a confidential source's identity. Cartman is protected by the privilege because he is a reporter who gathers news with the intent to disseminate it to the public in accordance with principles of the First Amendment's Free Press Clause. Because Ike cannot meet his burden in overcoming the privilege, this Court should reverse the Fifteenth Circuit and reinstate the District Court's decision protecting Cartman from compelled disclosure of his source.

#### **A. The First Amendment Creates a Qualified Privilege Against Compelled Disclosure of a Reporter's Sources in a Civil Case.**

The First Amendment creates the privilege in its Free Press Clause, which states that no law shall "abridg[e] the freedom of speech, or of the press..." U.S. Const. amend. I. Compelling a reporter to disclose his or her source raises a First Amendment issue because a free press is "a vital source of public information." Grosjean v. Am. Press Co., 297 U.S. 233, 250 (1936). This Court has not addressed the existence of the privilege in the civil discovery process, but nearly all federal appellate courts have applied the privilege in the civil context. Further, the privilege is consistent with our nation's free and vigorous press promoting the public's right to know.

***1. This Court has not denied the existence of the reporter's privilege in civil cases.***

This Court has only addressed the existence of the privilege as it applies to criminal grand jury testimony. See Branzburg v. Hayes, 408 U.S. 665 (1972). Specifically, the First Amendment does not protect a reporter from revealing the identity of a news source when criminal law enforcement interests require disclosure. Id. at 702. While it is said that Branzburg is the “reporter’s privilege” case, its holding is explicitly limited to the context of criminal grand jury testimony by reporters. In fact, five of the nine justices on the Court found the privilege to exist in civil cases and therefore, left open the possibility of its future application.

*i. Branzburg is limited to the context of criminal grand jury investigations.*

Where the “public interest in effective criminal law enforcement is absent, [Branzburg] is not controlling.” Carey v. Hume, 492 F.2d 631, 636 (D.C. Cir. 1974). This Court’s holding in Branzburg is explicitly limited to the context of compelling a reporter to disclose the identity of his or her source during criminal grand jury testimony. See 408 U.S. at 702, 707. In fact, much of the language in Branzburg suggests that “its holding is confined to the grand jury or criminal trial context.” Zerilli v. Smith, 656 F.2d 705, 712 n.42 (D.C. Cir. 1981); see Branzburg, 408 U.S. at 679, 682, 685-88, 690-703, 705, 707. Further evidencing the Court’s intent, the “sole issue” in Branzburg was “the obligation of reporters to respond to grand jury subpoenas...and to answer questions relevant to an investigation into the commission of crime.” 408 U.S. at 682. Therefore, unless public interest in criminal law enforcement exists, Branzburg does not control. See Carey, 492 F.2d at 636.

This Court has not addressed the existence of the privilege in the context of a civil case. A reporter’s rights can only be suppressed in the limited context of a criminal investigation when

the public interests of justice so warrant. Branzburg, 408 U.S. at 707. Justice White, writing for the majority in Branzburg, noted the limitations of the Court’s holding in that its conclusion did not threaten “the vast bulk of confidential relationships between reporters and their sources.” Id. at 691. Such a limitation emphasizes the “traditional importance of grand juries and the strong public interest in effective criminal investigations.” Zerilli, 656 F.2d at 711. This Court has never extended Branzburg’s holding beyond what is necessary to protect the public interest in law enforcement and ensure effective grand jury proceedings. See Riley v. City of Chester, 612 F.2d 708, 714 (3d Cir. 1979). Therefore, this Court has not addressed the privilege in a civil case.

*ii. Branzburg preserved reporters’ First Amendment rights in civil cases.*

While the majority in Branzburg rejected the existence of the privilege in criminal grand jury proceedings, Justice Powell, a member of the majority, wrote a concurrence emphasizing the limited nature of the Court’s holding. His opinion affirmed the premise that when a reporter’s testimony “implicates confidential source relationships without a legitimate need of law enforcement” the privilege should be available. Branzburg, 408 U.S. at 710 (Powell, J., concurring). He further clarified that newsmen will be able to seek remedy in the courts “where legitimate First Amendment interests require protection.” Id.

A majority of the justices in Branzburg, Powell and the four dissenters, recognized the privilege in a civil context. Id. In civil cases courts should be “mindful of the preferred position of the First Amendment and the importance of a vigorous press” and should take efforts to “minimize impingement upon the reporter’s ability to gather news.” Zerilli, 656 F.2d at 711-12 (citing Carey, 492 F.2d at 639).

2. *Most federal appellate courts recognize the privilege in civil cases.*

Ten out of thirteen federal appellate courts find the privilege widely available in civil cases.<sup>1</sup> These courts recognize that newsgathering is essential to a free press and deserves First Amendment protection. See Zerilli, 656 F.2d at 711-12. In the ten years following Branzburg, most circuits responded by recognizing its limited holding and allowed reporters to assert the privilege in civil cases. See, e.g., Shoen, 5 F.3d at 1292; Bruno & Stillman, 633 F.2d at 598; Zerilli, 656 F.2d at 711; Riley, 612 F.2d at 714; Baker, 470 F.2d at 781. Only two circuits have rejected the existence of the privilege, but under very different circumstances than a civil libel case. See McKevitt v. Pallasch, 339 F.3d 530, 531 (7th Cir. 2003) (rejecting absolute nature of the privilege); Storer Commc'ns, Inc. v. Stone (In re Grand Jury Proceedings), 810 F.2d 580, 584-86 (6th Cir. 1987) (following Branzburg and holding privilege not absolute in criminal grand jury proceedings). The other circuits addressing the privilege find it “readily available in civil cases.” Zerilli, 656 F.2d at 712 (citing Carey, 492 F.2d at 636).

Public policy demands recognition of the privilege. Forty-nine states and the District of Columbia agree and have some form of the privilege. See James T. Tucker and Stephen Wermiel, Enacting a Reasonable Federal Shield Law: A Reply to Professors Clymer and Eliason, 57 Am. U. L. Rev. 1291, 1293 (2008). Courts recognize that compelling disclosure intrudes into newsgathering and threatens the public’s need to be informed. See United States v. LaRouche Campaign, 841 F.2d 1176, 1182 (1st Cir. 1988); Baker, 470 F.2d at 783. Therefore,

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<sup>1</sup> See Zerilli, 656 F.2d at 710-12 (D.C. Cir. 1981); Bruno & Stillman, Inc. v. Globe Newspaper Co., 633 F.2d 583 (1st Cir. 1980); Baker v. F&F Inv., 470 F.2d 778, 783-85 (2d Cir. 1972); Riley, 612 F.2d at 715-16 (3d Cir. 1979); LaRouche v. NBC, Inc., 780 F.2d 1134, 1139 (4th Cir. 1986); Miller v. Transamerican Press, Inc., 621 F.2d 721 (5th Cir. 1980); Cervantes v. Time, Inc., 464 F.2d 986 (8th Cir. 1972); Shoen v. Shoen, 5 F.3d 1289, 1295-96 (9th Cir. 1993); Silkwood v. Kerr-McGee Corp., 563 F.2d 433, 436-38 (10th Cir. 1977); Price v. Time, Inc., 425 F.3d 1292 (11th Cir. 2005).

the balancing of interests favors the press in a civil libel case. See Miller, 621 F.2d at 725.

“[W]ithout some protection for seeking out the news, freedom of the press could be eviscerated.”

Branzburg, 408 U.S. at 681. Accordingly, courts find the privilege necessary in civil cases.

**3. *The right to protect a reporter’s sources flows from the First Amendment’s Free Press Clause.***

The constitutional right to gather news contemplates a confidential relationship between reporters and sources. Preservation of these relationships logically flows from the fact that “(1) newsmen require [sources] to gather news; (2) confidentiality...is essential to the creation and maintenance of a news-gathering relationship with sources; and (3) an unbridled subpoena power...will either deter sources from divulging information or deter reporters from gathering and publishing information.” Branzburg, 408 U.S. at 728 (Stewart, J., dissenting). These relationships are vital to a free press "so that it [can] bare the secrets of government and inform the people." N.Y. Times Co. v. United States, 403 U.S. 713, 717 (1971) (Black, J., concurring).

*i. Reporters require sources to gather news.*

Reporters rely on sources to provide information of public interest. Without tips from sources, most news stories would never come to fruition. See Zerilli, 656 F.2d at 711. One function of the press is to be a vital source of information and this "is weakened whenever the ability of journalists to gather news is impaired." Id. If the press is to “perform its constitutional mission [it] must do far more than merely print public statements or publish prepared handouts.” Branzburg, 408 U.S. at 729 (Stewart, J., dissenting). The First Amendment protects relationships between sources and reporters because they are necessary to gather news and “provide the public with a wide range of information.” Caldwell v. United States, 434 F.2d 1081, 1085 (9th Cir. 1970) (citing Associated Press v. United States, 326 U.S. 1, 20 (1945)). Without willing sources of information, compelling news stories will cease to exist.

*ii. Confidentiality is often required before a source will disclose information.*

Maintaining confidence and trust between journalists and sources is essential in establishing a relationship because it is vital to the free flow of information. Branzburg, 408 U.S. at 736 (Stewart, J., dissenting); *see also* Zerilli, 656 F.2d at 711. The chilling effect on relationships without the privilege can have a severe impact on society. For "[w]ithout an unfettered press, citizens would be far less able to make informed political, social, and economic choices." Id. Publications like "[a]nonymous pamphlets, leaflets, [and] brochures...have played an important role in the progress of mankind...." Talley v. California, 362 U.S. 60, 64 (1960).

Many citizens "have information valuable to the public discourse," but without confidentiality may not disclose information to a reporter. Branzburg, 408 U.S. at 729 (Stewart, J., dissenting); *see also* United States v. Cuthbertson, 630 F.2d 139, 147 (3d Cir. 1980). One post-Branzburg survey confirms the importance of these confidential relationships, indicating that 92% of the major newspapers surveyed use confidential sources, with over 25% using them "frequently." Charles N. Davis, et al., How Newspaper Editors Feel About Confidential Sources in Wake of Cohen v. Cowles, 17 Newspaper Res. J., no. 3/4 at 93 (1996). When information is highly controversial, sources will condition disclosure on the assurance of confidentiality.

*iii. Without the protection of the privilege, reporters and sources will be deterred from forming source relationships.*

If the privilege is unavailable to reporters, they will struggle to find sources willing to provide information. The sources and journalists will both be deterred from performing their function, which may lead to self-censorship for fear of compelled disclosure. N.Y. Times Co. v. Sullivan, 376 U.S. 254, 279 (1964); Smith v. California, 361 U.S. 147, 149-54 (1959). When reporters and their sources are uncertain that confidentiality will be kept, they will hesitate to

form a relationship. Such compelled disclosure ultimately undermines the First Amendment values that federal courts traditionally uphold. See Zerilli, 656 F.2d at 711.

Without the ability to promise confidentiality, reporters will be deterred from entering into source relationships. If a reporter reveals the identity of a confidential source, that reporter is liable to the source for any resultant harm, such as loss of a job or damage to reputation. See Cohen v. Cowles Media Co., 501 U.S. 663 (1991). If Citrus learns of Professor Chaos's identity he may be terminated and Cartman would be liable to the him. See id. The intent of a free press is not to hold potential penalties over the press for engaging in vigorous news gathering. Accordingly, without protection of the privilege reporters may stop promising confidentiality, which will deter sources from providing information.

The privilege exists under the First Amendment in the context of civil cases. This Court has not denied or even addressed the existence of the privilege in such a context. See generally Branzburg, 408 U.S. 665. The federal appellate courts recognize the privilege in civil cases and their findings are consistent with this Court's traditional First Amendment jurisprudence. Further, fundamental values of the Free Press Clause require recognition of the privilege, at least in the civil context where public interest in disclosure of a source is minimal. Therefore, this Court should reverse the Fifteenth Circuit and recognize the privilege in the First Amendment.

**B. Cartman is Protected by the Qualified Reporter's Privilege Because He Gathers and Disseminates News as an Internet Journalist.**

Freedom of the press exists "not for the benefit of the press so much as for the benefit of all of us." Time, Inc. v. Hill, 385 U.S. 374, 389 (1967). Cartman is entitled assert the privilege as a reporter because his work benefits society. The District Court agrees and properly ruled that Cartman is a reporter protected by the privilege and should be reinstated.

Federal appellate courts recognize that the privilege applies when an entity or person gathers information with “the intent to use material – sought, gathered or received – to disseminate information to the public and that such intent existed at the inception of the newsgathering process.” von Bulow v. von Bulow, 811 F.2d 136, 144 (2d Cir. 1987); Titan Sports, Inc. v. TBS, Inc. (In re Madden), 151 F.3d 125, 129 (3d Cir. 1998)<sup>2</sup>; Shoen, 5 F.3d at 1293. This test applies the privilege outside of the “institutionalized press” and focuses on the functions of a reporter, rather than just the medium through which he disseminates information. Tucker & Wermiel, *supra*, at 1313. Cartman’s chosen medium, the Internet, is protected by the First Amendment under this Court’s freedom of the press jurisprudence. Because Cartman’s activities are those traditionally associated with the gathering and dissemination of news, he is protected by the privilege regardless of the medium. *See id.*

***1. Cartman intends to disseminate news to the public at the time he gathers and solicits information.***

In order to claim the privilege, reporters must intend to disseminate the information to the public at the time of gathering the information. von Bulow, 811 F.2d at 144. This requirement ensures that a reporter can only assert the privilege for newsworthy information. However, an individual need not be a professional in the field for the privilege to apply, as long as the individual has the requisite intent. *See Blum v. Schlegel*, 150 F.R.D. 42, 45 (W.D.N.Y. 1993) (student working for law school newspaper was entitled to assert the privilege even though not a professional journalist). The First Circuit has protected the notes, tape recordings, and interview transcripts of academic researchers about Internet technology companies, because they intended to publish a book containing their findings. *See Cusumano v. Microsoft Corp.*, 162 F.3d 708 (1st

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<sup>2</sup> The Third Circuit added a factor requiring that the reporter or individual seeking protection be involved in “investigative reporting” to fall within the First Amendment. Most courts follow the test articulated in von Bulow where the “investigative reporter” requirement is noticeably absent. 811 F.2d at 142.

Cir. 1998). Conversely, the privilege was found inapplicable in von Bulow, where the friend of a criminal defendant asserted the privilege attempting to protect her personal notes of the trial from subpoena. 811 F.2d at 138. The court found that the defendant was not entitled to the privilege, because even if she intended to disseminate the information publicly, she did not possess such intent *at the time* the information was gathered. Id. at 145.

Cartman intends to publish information upon receipt and regardless of whether he is considered a “professional” journalist, he has the requisite intent under the von Bulow test. He gathers and then posts the information to *The Report*, including news on politics and other popular issues. (J.A. at 4.) As with many traditional forms of media, *The Report* is updated on a daily basis and is publicly available. (J.A. at 4.) Cartman solicits and gathers information through an e-mail address provided “for the express purpose of obtaining leads anonymously.” (J.A. at 12.) Further, because Cartman intends that information be used as part of a story in *The Report*, he assures his sources that their identity will remain confidential. (J.A. at 5.) His intent is also shown by the fact that the Citrus Story was posted the day after it was received from Professor Chaos. (J.A. at 5.) When an important story breaks such as one regarding human rights violations, it is necessary to publish the news quickly to keep the public informed. See Okla. Press Publ’g Co. v. Walling, 327 U.S. 186, 216 n.53 (1946).

By soliciting and publishing newsworthy information on a daily basis for the public’s use, and reporting his own comments on the information, Cartman performs the functions of a traditional reporter. Under this functional analysis and given Cartman’s intent to publish the information at the time of its gathering, he is protected by the privilege as a reporter.

2. *The Reporter's Privilege protects individuals, like Cartman, who use the Internet to disseminate news.*

This Court's First Amendment jurisprudence reflects an expansion of the protected forms of media, most recently Internet speech. As many Americans turn to the Internet as an important source of news about public affairs, reporters are increasingly utilizing the Internet as a medium to disseminate such information. Therefore, these Internet reporters are entitled to the protection of the privilege under the First Amendment.

i. *Internet speech is protected.*

This Court has historically defined the term "press" in the First Amendment to comprehend every sort of publication that affords a vehicle of information and opinion. Lovell v. City of Griffin, 303 U.S. 444, 452 (1938). The First Amendment protects many types of media, including print news, radio, motion pictures, broadcast television, cable television, and most recently the Internet. See, e.g., United States v. Balt. Post, 268 U.S. 388 (1925) (newspapers); United States v. Petrillo, 332 U.S. 1 (1947) (radio); Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495 (1952) (motion picture); Red Lion Broad. Co. v. FCC, 395 U.S. 367 (1969) (broadcast television); Leathers v. Medlock, 499 U.S. 439 (1991) (cable television); Reno v. ACLU, 521 U.S. 844, 849 (1997) (applying First Amendment to Internet speech as a new and changing form of speech). Given this Court's finding that the First Amendment protects Internet speech, one who reports news on the Internet, like Cartman, is protected by the privilege. Due to the overlaps between this new media and old media, Cartman should receive the same First Amendment rights and protections as users of old media. See Dun & Bradstreet v. Greenmoss Builders, Inc., 472 U.S. 749, 782 n.7 (1985) (Brennan, J., dissenting).

As with commercial television and radio news, "[o]pinion and colour [*sic*] are the lifeblood of blogs." Anne M. Macrander, Note, Bloggers as Newsmen: Expanding the

Testimonial Privilege, 88 B.U. L. Rev. 1075, 1098 (2008). Given this and other similarities, many Americans are turning away from network television and newspapers as a source for their news and turning to Internet websites and blogs. Nathan Fennessy, Comment, Bringing Bloggers Into the Journalistic Privilege Fold, 55 Cath. U.L. Rev. 1059, 1061 (2006). This is not to say they are simply relying on anything found on the Internet, but this shift has forced many traditional media outlets to consolidate in order to survive, resulting in fewer channels for news distribution. Joseph S. Alonzo, Note, Restoring the Ideal Marketplace: How Recognizing Bloggers as Journalists Can Save the Press, 9 N.Y.U. J. Legis. & Pub. Pol’y 751, 767 (2006). Some traditional journalists are even developing their own blogs to capture new followers and retain those followers turning away from traditional outlets. See CNN Blogs: Your Say, <http://edition.cnn.com/exchange/blogs/index.html> (last accessed Sept. 11, 2009). Constitutional protection of Internet reporters helps combat the negative effect of media consolidation.

To deny a reporter the protections of the privilege, simply because he chooses to publish on the Internet or through a blog, violates the Constitution by creating two classes of media and speech. Randall D. Eliason, Leakers, Bloggers, and Fourth Estate Inmates: The Misguided Pursuit of a Reporter’s Privilege, 24 Cardozo Arts & Ent. L.J. 385, 432 (2006). Every media outlet was an “upstart” at one point and there is no First Amendment preference for the established news media at the expense of upstarts like the Internet and blogs. See id. Therefore, all reporters should be protected by the privilege.

*ii. Courts recognize Internet journalists and publishers of blogs as reporters.*

In one of the first cases to address an Internet reporter’s assertion of the privilege, a California appellate court confirmed the existence of the privilege in the First Amendment. O’Grady v. Superior Court, 139 Cal. App. 4th 1423 (2006). Specifically, the court held that the

privilege protects a reporter using a blog to disseminate information and news. Id. at 1468. In O’Grady, the defendant-reporter who frequently wrote about developing products by Apple, published nearly verbatim copies of specifications for a new Apple product in his online publication. Id. at 1433. The court did not compel disclosure of the reporter’s source, despite the presence of confidential trade secrets. See generally id. The O’Grady court found First Amendment protection vital for an Internet reporter because of the “peril posed to First Amendment values” if courts decide what is newsworthy. See id. at 1478; see also Blumenthal v. Drudge, 186 F.R.D. 236 (D.D.C. 1999) (holding the plaintiff did not meet the burden to defeat defendant-blogger’s assertion of the privilege).

The Citrus Story differs from the article in O’Grady, only because it does not involve any confidential information like trade secrets. Cartman merely published and commented on a newsworthy photograph suggesting human rights abuses. (J.A. at 6.) This practice was common in Cartman’s operation of *The Report*, including prior publication of many stories about Citrus based on information provided by Professor Chaos. (J.A. at 5.) This Court, therefore, should affirm Cartman’s status as a reporter, thus entitling him to protection of the privilege. Cartman should not be compelled to disclose Professor Chaos’s identity just because he uses a new medium.

**3. *Cartman’s functions as an Internet reporter promote the First Amendment’s free press principles.***

The First Amendment occupies a preferred place in the Bill of Rights and protects a free press for a variety of reasons. See Murdock v. Pennsylvania, 319 U.S. 105, 115 (1943). The First Amendment seeks to preserve the marketplace of ideas in society, aid in citizen self-governance, and provide a free flow of information to the public. See generally CBS, Inc. v. Democratic Nat’l Comm., 412 U.S. 94 (1973).

*i. Cartman's articles and commentary contribute to the marketplace of ideas.*

The most important value of the First Amendment is the “marketplace of ideas” which posits that “the best test of truth is the power of the thought to get itself accepted in the competition of the market.” Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting). The Internet is much closer to the founding fathers’ original “marketplace of ideas” theory than traditional media, because “anyone and everyone [has] the ability to post their opinions and insights about a wide range of topics” and judge for themselves which ideas are worth acceptance. Carol J. Toland, Comment, Internet Journalists and the Reporter’s Privilege: Providing Protection for Online Periodicals, 57 Kan. L. Rev. 461, 483 (2009). Further, the Internet is “the most participatory form of mass speech yet developed” and a far more speech-enhancing medium than print or television. ACLU v. Reno, 929 F. Supp. 824, 883 (E.D. Pa. 1996), aff’d, 521 U.S. 844 (1997).

*The Report* allows all citizens to provide Cartman with information, tips, leads, and evidence about newsworthy stories. (J.A. at 5.) Cartman then participates in the “marketplace of ideas” by posting the news and his own commentary on a particular story. (J.A. at 4.) As the mass media continues to consolidate, voices like that of Cartman are becoming increasingly important in promoting free speech and the sharing of information with the public.

*ii. Cartman's articles and commentary aid in citizen self-governance.*

The founding fathers believed “that the greatest menace to freedom is an inert people; that public discussion is a political duty; and that this should be a fundamental principle of the American government.” Whitney v. California, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring). This Court traditionally empowers the press to serve as the interpreter between the

government and the governed. Grosjean, 297 U.S. at 250. In furtherance of this function, the First Amendment protects communication of ideas necessary to civil discourse which allows the citizenry to make an informed decision on a particular issue. Wright v. Fred Hutchinson Cancer Research Ctr., 206 F.R.D. 679, 681 n.2 (W.D. Wash. 2002).

*The Report* falls well within the self-governance rationale for the freedom of the press. Cartman publishes news about current political issues to inform the public and contributes to the civil discourse. (J.A. at 4.) By commenting on topics like human rights violations, Cartman advances the “profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.” Sullivan, 376 U.S. at 270.

*iii. Cartman’s articles and commentary provide a free flow of information to the public.*

The Free Press Clause protects “the paramount public interest in a free flow of information to the people.” Garrison v. Louisiana, 379 U.S. 64, 77 (1964). Cartman gathers and disseminates information about public figures like Ike through civic interest stories.

Many Internet journalists are gaining greater respect and equal treatment in today’s media world by engaging in functions similar to Cartman’s. For example, the White House has issued press credentials to bloggers, reporting organizations have honored bloggers with journalism awards, and press seats were reserved at the well-publicized Scooter Libby trial for bloggers. Randall D. Eliason, The Problems with the Reporter’s Privilege, 57 Am. U. L. Rev. 1341, 1366 (2008). Even well-known news stories were first reported on by a blogger, such as the President Clinton—Monica Lewinsky scandal and Senator Trent Lott’s segregationist comments at Senator Strom Thurmond’s birthday party. Toland, supra, at 481. Similarly, bloggers questioned the validity of Dan Rather’s report about President Bush’s military service, driving the mainstream media to cover the story. Id. Internet journalists, along with the public who read their work, are

now breaking the news and steering the media coverage of stories. Without protection for these reporters, society may remain in the dark on important issues, because a potential source is unwilling to speak out or the mainstream media deems a story unimportant.

Cartman determined that a story about potential human rights violations at Citrus was newsworthy and important to pass along to the public. Moreover, the news media relied on *The Report* and its story about Citrus. (J.A. at 6.) McRiley saw Cartman and *The Report* as a legitimate source of breaking news.

New media outlets such as the Internet and blogs also ensure that the information flowing to the public is quickly available and frequently updated to ensure accuracy and timeliness. When information is posted to *The Report*, for example, Cartman can update the story or make any necessary corrections immediately. Traditional newspapers cannot accomplish this, nor can network news broadcasts, which often must wait an entire day to correct a mistake. See Laura Kolat, Note, Unmasking Anonymous Bloggers: A Balanced Legal Standard for Defamation Lawsuits in Cyberspace, 3 Am. Civ. Liberties Rev. (forthcoming 2009). Hence, Americans turn to this medium for more interactive and frequently updated news.

Internet journalists and blog authors engage in just as important functions as traditional journalists, but with more efficiency. Therefore, those who use a blog to disseminate information, like Cartman, should be recognized as reporters and receive protection of the privilege. See Alonzo, supra, at 753. The Fifteenth Circuit erred in finding that Cartman is not a reporter protected by the privilege. Therefore, this Court should reverse the Fifteenth Circuit and reinstate the District Court's finding that Cartman is protected from disclosing his source's identity.

**C. Ike Cannot Meet the Burden Required to Overcome the Qualified Nature of the Reporter's Privilege.**

Cartman is protected from disclosing Professor Chaos's identity because Ike failed to meet his burden to overcome the privilege. Because the privilege is qualified, a plaintiff can overcome the assertion of the privilege (1) by proving that he exhausted all avenues of obtaining the information and (2) by demonstrating the information goes to the heart of his claim.<sup>3</sup> See Zerilli, 656 F.2d at 713-14. Even if Ike can prove that Professor Chaos's identity is central to his defamation claim, he cannot prove that he exhausted all avenues of obtaining the source of the information in the Citrus Story. See Blum, 150 F.R.D. at 45 (finding it unnecessary to address both factors if plaintiff fails to prove exhaustion of alternative sources).

Cartman can only be compelled to disclose his source as a "last resort after [Ike's] pursuit of other opportunities has failed." Shoen, 5 F.3d at 1297. Sufficient efforts must be taken before the exhaustion claim will stand, such as interviewing or deposing possible alternative sources. This is true even if it requires dozens or even hundreds of interviews. See, e.g., McGraw-Hill, Inc. v. Arizona (In re Petroleum Prods. Antitrust Litig.), 680 F.2d 5 (2d Cir. 1982); Zerilli, 656 F.2d 705; Carey, 492 F.2d 631. Ike's only effort to uncover the source was to depose the manager and some engineers from the Mumbai factory. (J.A. at 8.) Ike made no other efforts to uncover the source of the photograph and he cannot defeat the privilege when he "has not even worked up a sweat, much less exhausted [himself]." Pan Am Corp. v. Delta Air Lines (In re Pan Am Corp.), 161 B.R. 577, 585 (S.D.N.Y. 1993). Nor can Ike argue futility, claiming that witnesses would have withheld information out of self-protection. See Blum, 150 F.R.D. at 46. A futility claim is insufficient to overcome the privilege. See id.

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<sup>3</sup> Some courts divide the second prong into two prongs, the "heart of the claim" and "relevancy." See, e.g., Silkwood, 563 F.2d at 438. However, courts recognize that Zerilli utilizes only two factors to determine when reporters must disclose a source in civil cases. See Lee v. Dep't of Justice, 413 F.3d 53, 57 (D.C. Cir. 2005).

Equally unpersuasive in showing exhaustion is Citrus's company-wide e-mail, which was sent on Ike's behalf. The record is silent as to the contents of that e-mail. But if Ike, or Citrus in this case, did not ask people directly whether they were the source, Ike fails to meet the exhaustion requirement. See McGraw-Hill, 680 F.2d at 8-9 (where a party could not defeat the privilege by failing to ask simple questions about the source of the information in deposing hundreds of individuals). But see Carey, 492 F.2d at 639 (suggesting that if plaintiff had conducted 60 depositions, this would have met the exhaustion requirement).

Ike did not even attempt alternative methods for obtaining the source's identity, but rather relied on Citrus to do his investigation. Ike could have deposed or interviewed additional employees from the Mumbai factory. At minimum, this could include the factory workers pictured in Professor Chaos's photo or those who had access to the factory. (J.A. at 14); see, e.g., Hutira v. Islamic Republic of Iran, 211 F. Supp. 2d 115, 122 (D.D.C. 2002). Ike also could have directed a search of electronic files on all Citrus computers at the factory, including e-mail servers from which the photograph may have originated. (J.A. at 14.) However, Ike did none of these things and, therefore, has not met his burden to overcome the qualified nature of the privilege, thus the privilege protects Cartman from compelled disclosure.

This Court should recognize the existence of the privilege under the First Amendment, because Branzburg does not control in the civil context, appellate courts find the privilege widely available, and the privilege is consistent with First Amendment jurisprudence. As an Internet reporter, Cartman is entitled to assert the privilege to protect the identity of his confidential sources. Further, Ike cannot meet his burden to overcome the qualified privilege. Therefore, this Court should reverse the Fifteenth Circuit and reinstate the District Court's decision.

## II. ERIC CARTMAN IS ENTITLED TO SUMMARY JUDGMENT ON IKE BROFLOVSKI'S DEFAMATION CLAIM.

This Court reviews the Fifteenth Circuit's reversal of summary judgment *de novo*, because its finding that Ike is not a public figure is a question of law for the Court to resolve. Wolston v. Reader's Digest Ass'n, 443 U.S. 157, 161 (1979). This Court should reverse the Fifteenth Circuit and reinstate the District Court's granting of summary judgment. Summary judgment is proper when there is no genuine issue of material fact and the evidence shows the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56. The Court views the evidence in a light most favorable to the non-moving party and draws any reasonable inferences in its favor. See Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986).

"[T]he mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247 (1986). Further, a reporter's "refusal to reveal the identity of its news source need not bar the entry of summary judgment in its favor." Cerrito v. Time, Inc., 302 F. Supp. 1071 (N.D. Cal. 1969), aff'd, 449 F.2d 306 (9th Cir. 1971).

In a defamation claim, the plaintiff's status determines the standard of fault. A public figure plaintiff bears the heavy burden of proving actual malice by clear and convincing evidence. Gertz v. Robert Welch, Inc., 418 U.S. 323, 324 (1974). The reviewing court must consider the factual record in full to determine whether the statements and surrounding circumstances are protected by the First Amendment. Harte-Hanks Commc'ns, Inc. v. Connaughton, 491 U.S. 657, 688 (1989).

**A. Ike is a limited purpose public figure because his prominent position with Citrus drew him into the center of a human rights controversy.**

An individual who “voluntarily injects himself or is drawn into a particular public controversy...thereby becomes a [limited purpose] public figure.” Gertz, 418 U.S. at 351. Courts contrast a public figure and a private person based on two fundamental differences. Because public figures have greater access to the media they have a more realistic opportunity to counteract false statements. Id. at 345. Also, public figures voluntarily expose themselves to increased risk of injury from defamatory falsehoods. Id. Therefore, the determination of “voluntarily injecting” oneself is based on the nature and extent of involvement, not just on intentional injection into a controversy. Id.

The District Court correctly found Ike to be a limited purpose public figure based on his role in Citrus, regardless of the amount of media attention he sought. (J.A. at 15.) This Court recognizes that “the voluntariness requirement may be satisfied even though an individual does not intend to attract attention by his actions.” McDowell v. Paiewonsky, 769 F.2d 942, 949 (3d Cir. 1985). A private person will be considered a limited purpose public figure if the public directs massive attention to a controversy involving that person. Id. at 950. For example, a plaintiff was a limited purpose public figure by virtue of his important role as the only air traffic controller on duty during a plane crash. See Dameron v. Wash. Magazine, Inc., 779 F.2d 736, 739, 742 (D.C. Cir. 1985). Similarly, Ike accepted a prominent position in the rapidly developing electronics industry. He then achieved limited purpose public figure status without intentionally seeking public notoriety. See, e.g., Rosanova v. Playboy Enters., 580 F.2d 859, 861 (5th Cir. 1978) (holding plaintiff with underworld ties to organized crime was a limited purpose public figure even though he never actively sought such a status).

A plurality of federal appellate courts correctly apply a three-prong test to determine whether a plaintiff is a limited purpose public figure.<sup>4</sup> Waldbaum v. Fairchild Publ'ns, Inc., 627 F.2d 1287, 1296 (D.C. Cir. 1980). A plaintiff is a limited purpose public figure if: (1) the matter is a public controversy, (2) the plaintiff plays a more than trivial role in the controversy, and (3) the alleged defamation was germane to the plaintiff's participation in the controversy. Id.

***1. Human rights violations affecting the general public constitute a public controversy.***

The “major facet” of the public controversy is Citrus’s violations of human rights under the direction of Ike. A public controversy must affect more than the direct participants, such as the general public. Silvester v. ABC, Inc., 839 F.2d 1491, 1496 (11th Cir. 1988); see also Carr v. Forbes, Inc., 259 F.3d 273, 279 (4th Cir. 2001). However, a public controversy is not merely something the public finds interesting. See Time, Inc. v. Firestone, 424 U.S. 448, 454 (1976) (finding that the public’s interest in the details of a famous couple’s divorce did not make the proceedings a public controversy, nor did it make the parties public figures). Human rights violations are a matter of public controversy. See Trotter v. Jack Anderson Enters., 818 F.2d 431, 434 (5th Cir. 1987). Here, the public is affected because “social and political turmoil” sufficiently raise public concern when “United States companies are implicated.” Id. Citrus is a publicly owned company and a leading developer of electronics in the United States. Thus, the controversy involving Ike’s control over the factory’s working conditions enraged the public causing them to boycott Citrus products and causing its stock price to drop. (J.A. at 2.)

Further, the publication of the alleged defamation must reveal the issue, but not create it. Trotter, 818 F.2d at 434-35. The court in Trotter found that reporting on a preexisting public

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<sup>4</sup> A few circuits choose to apply two or four prong tests to establish a plaintiff’s status. However, the prongs of those tests are either encompassed in or redundant to the three-prong test. See McDowell, 769 F.2d at 950; see also Lerman v. Flynt Distrib. Co., 745 F.2d 123, 136 (2d Cir. 1984).

dispute did not cause labor violence, but the labor violence itself caused the public controversy. Id. Reporters “uncover matters of public concern previously hidden from the public view.” Id. The poor working conditions in Mumbai created the public controversy; Cartman merely revealed the controversy by uncovering the human rights violations. (J.A. at 6.)

**2. *Ike’s primary role as an executive of Citrus substantially influences the outcome of the controversy.***

The second prong requires plaintiff to play more than a trivial role in the public controversy. Waldbaum, 627 F.2d at 1297. Courts examine past conduct, extent of press coverage, and public reaction to the public figure’s conduct and statements. Id.

Conduct inviting of attention in a particular sphere of public debate establishes a substantial role in that specific controversy. Chuy v. Phila. Eagles Football Club, 595 F.2d 1265, 1280 (3d Cir. 1979); see also Curtis Publ’g Co v. Butts, 388 U.S. 130, 164 (1967) (holding a privately employed athletic director is a limited purpose figure for a controversy over fixing a football game). At a press conference, Ike noted his goal to “push Citrus and its employees to new heights.” (J.A. at 3.) Ike engaged in conduct, namely leading development of a premier portable music player that he knew would markedly raise his chances of becoming “embroiled in [a] public controversy.” Waldbaum, 627 F.2d at 1297.

Further, an “individual cannot erase his public figure status by limiting public comment and maintaining a low public profile.” Trotter, 818 F.2d at 436; see also Marcone v. Penthouse Int’l Magazine for Men, 754 F.2d 1072, 1086 (3d Cir. 1985) (finding that the First Amendment is frustrated if those requiring the most public scrutiny could “wrap themselves in a veil of secrecy”). Ike cannot simply assert private status because his name was published infrequently in the press. See Trotter, 818 F.2d at 435 (finding that a president of a major corporation was a

public figure despite his name appearing infrequently in the press). The public recognized Ike as a leader in the ever-growing consumer electronics industry due to his work on the ePlay Touché.

Extensive media coverage on a public controversy is a strong indicator of limited purpose public figure status. See Dameron, 779 F.2d at 742. Specifically, one court held local and national media coverage on women in the military made one of the first women in the military a limited purpose public figure. Lohrenz v. Donnelly, 223 F. Supp. 2d 25, 43 (D.D.C. 2002). Here, the Citrus Story across the Internet and six weeks later attracted the attention of the mainstream press. (J.A. at 6.) McRiley ran the Citrus Story and named Ike the “Most Heinous Individual in the Galaxy.” (J.A. at 6.) The widespread media coverage revealed Ike’s supervision of human rights abuses by Citrus and makes him a limited purpose public figure.

The vast coverage of the Citrus Story, with Ike at the center of the allegations, prompted a public reaction. The public boycotted Citrus products and its stock price fell. (J.A. at 6-7.) Therefore, Ike’s “more than trivial” role in the controversy, due to his position at Citrus, made him a limited purpose public figure regardless of his intent to achieve attention.

**3. *Ike’s role at Citrus led to his fundamental involvement in Citrus’s human rights violations.***

The third prong of the public figure analysis requires plaintiff’s involvement be germane to the public controversy. Waldbaum, 627 F.2d at 1296. Public figure status can attach “by position alone.” Butts, 388 U.S. at 155. In accepting a position of leadership in a visible company, one assumes the risk of exposure to public scrutiny. Little v. Breland, 93 F.3d 755, 757 (11th Cir. 1996); see also Lapointe v. Van Note, 35 Media L. Rep. 1065, \*23 (D.D.C. 2006) (occupying a significant executive position constitutes as a limited purpose public figure). In Little, the court held that by leading the development of a major convention center, the plaintiff invited public comment and was therefore limited purpose public figure. 93 F.3d at 757.

Similarly, Ike accepted a position in the popular electronics industry. The description of Ike as the “man behind the curtain” confirms his influential role at Citrus. (J.A. at 3.)

Ike’s prominent position at Citrus and uninhibited media access provide him the ability to influence the controversy, making his role germane. Waldbaum, 627 F.2d at 1297. For example, in Trotter, the president of a Coca-Cola bottling company had little day-to-day involvement in the company’s operations, but was found to be a limited purpose public figure by virtue of his ability to influence the anti-union violence through media access. 818 F.2d at 435. Ike’s leading role at Citrus and unfettered access to the media gives him unparalleled influence over the human rights controversy. Therefore, Ike is a limited purpose public figure because the public recognizes him as a leader in the electronics industry and his involvement is germane to the human rights controversy.

Ike’s acceptance of a prominent position drew him to the center of a public controversy. Because of his substantial influence at Citrus, Ike’s role was germane to the resolution of the potential human rights violations. Therefore, this Court should reverse the Fifteenth Circuit’s finding and reinstate the District Court’s decision that Ike is a limited purpose public figure.

**B. Ike failed to prove that Cartman had the requisite degree of fault in publishing the Citrus Story.**

Under the protections of the First Amendment, a public figure plaintiff must prove by clear and convincing evidence that a defendant acted with actual malice. Sullivan, 376 U.S. at 279-80; Gertz, 418 U.S. at 342 (requiring clear and convincing evidence). Actual malice requires that the statement be made (1) with knowledge that it was false or (2) with reckless disregard to its truth or falsity. Sullivan, 376 U.S. at 279-80. Further, this subjective standard requires a plaintiff to prove that a defendant realized his or her statement was false or subjectively entertained serious doubt as to the truth of the statement. Gertz, 418 U.S. at 335.

**1. *Cartman had no knowledge of the statement's falsity.***

Knowledge of a statement's falsity is evident when one purposely avoids the truth. Harte-Hanks, 491 U.S. at 691-92. In Harte-Hanks, the court supported its finding that the defendant purposefully avoided the truth by failing to consult a key witness or listen to an accessible tape recording that would have easily verified or negated the unlikely charges. Id. The Citrus Story was not "inherently improbable" as to put Cartman on notice. Therefore, he did not purposely avoid the truth because the tip was not improbable. In addition, use of a source who previously provided reliable information without investigation does not reach level of actual malice. Marcone, 754 F.2d at 1089; see also St. Amant v. Thompson, 390 U.S. 727, 732 (1968). The record is silent as to any conflicting information from other sources and gives no basis for Cartman to doubt a previously reliable source. Therefore, Cartman had no knowledge of the statement's falsity because Professor Chaos's tip was probable and he was a reliable source.

**2. *Cartman did not recklessly disregard the truth.***

Ike failed to demonstrate that Cartman recklessly disregarded the truth. "Failure to investigate does not in itself establish bad faith." St. Amant, 390 U.S. at 733. Conversely, a journalist recklessly disregards the truth when the source was known to have been involved in dishonest business practices. See Tavoulareas v. Piro, 759 F.2d 90, 129-30 (D.C. Cir. 1985). Thus, Cartman's use of a tip and photograph from a reliable source does not reach the level of actual malice merely because he did not scrutinize every element of the information.

Under the protection of the First Amendment, mistakes in the dissemination of news are inevitable in ascertaining the truth about public controversies. St. Amant, 390 U.S. at 732. Investigation cannot erase these mistakes and therefore will not in itself establish a serious doubt as to the truth. Id. at 733. For example, a reporter is not reckless even though checking his

newspaper's own files would have revealed that the published statement was false. Sullivan, 376 U.S. at 287-88. Cartman's choice not to analyze each photograph he receives with advanced software is insufficient to prove actual malice.

Further, evidence of ill will, spite, or intention to injure is insufficient to establish actual malice. Harte-Hanks, 491 U.S. at 667. Bad faith publication does not affirmatively prove that a defendant had subjective doubt as to the truth of the statement. See id. Cartman's feelings towards Citrus as a competitor do not prove his state of mind in publishing the Citrus Story. See, e.g., Goldwater v. Ginzburg, 414 F.2d 324, 328-29 (2d Cir. 1969) (holding that it is not actual malice when a journalist sought only negative information about the subject of his story). Cartman received the tip from a reliable source and did not seek negative information in an attempt to injure Citrus. Therefore, regardless of Cartman's feelings towards Citrus, Ike cannot prove that Cartman recklessly disregarded the truth of the statement.

Ike failed to establish actual malice by clear and convincing evidence because he did not prove that Cartman had knowledge of the statement's falsity or recklessly disregarded its truth. St. Amant, 390 U.S. at 731. Even looking at Ike's proffered evidence in its entirety, he still fails to prove actual malice. Therefore, Cartman is entitled to summary judgment.

**3. *Even if Ike is a private person, he failed to prove that Cartman's publication was negligent.***

The District Court properly applied the actual malice standard of fault. However, even under a negligence standard of fault, Cartman is entitled to summary judgment. Negligence is failing to use the amount of care which a reasonable person would use under similar circumstances. Restatement (Second) of Torts § 580B (1977). For a defamation claim, courts look at whether defendant acted reasonably in attempting to discover the truth or falsity of the statement, but left the formal standard up to the states. Gertz, 418 U.S. at 346. In analyzing

what a reasonable person would do, courts balance the potential harm to the plaintiff's reputation and the defendant's interest in publishing information. See id.

A reasonably careful person with information from a reliable source would not conduct further investigation because there is no evidence the statement is false. The Arizona Supreme Court found that a reporter failed to use the reasonable amount of care in verifying information from a source used for the first time. Peagler v. Phoenix Newspapers, Inc., 560 P.2d 1216, 1223 (Ariz. 1977). Cartman exercised reasonable care in publishing the Citrus Story because he used a proven and reliable source. In fact, a reasonable person would find no cause to investigate a tip received from a reliable source. Cartman is therefore entitled to summary judgment because Ike failed to prove that he acted unreasonably in publishing the Citrus Story.

As a public figure, Ike failed to prove actual malice by showing that Cartman had knowledge of the statement's falsity or recklessly disregarded its truth. Ike also failed to prove that Cartman acted unreasonably in using a reliable source. Therefore, this Court should reverse the Fifteenth Circuit and reinstate the District Court's grant of summary judgment to Cartman.

### **CONCLUSION**

The First Amendment creates a qualified reporter's privilege protecting a reporter from compelled disclosure of his sources' identities. As an Internet reporter, Cartman gathers and disseminates news and is entitled to protection of the privilege. Further, Ike has failed to meet his burden in overcoming the privilege. Ike is a limited purpose public figure and cannot prove actual malice. This Court should reverse the Fifteenth Circuit and reinstate the District Court's denial of Ike's Motion to Compel and its granting of summary judgment in favor of Cartman.

Respectfully submitted,

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