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**Docket No. 09-2701**

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IN THE  
**Supreme Court of the United States**

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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 105  
*Counsel for Petitioner*

## QUESTIONS PRESENTED

- I. Whether Eric Cartman falls within the First Amendment qualified reporter's privilege, which would entitle him to shield the identity of his anonymous source from compelled disclosure against Ike Broflovski's defamation claim.
  
- II. Whether Eric Cartman should be held liable under an actual malice standard where he reported information, which came from a reliable source and was corroborated with photographic evidence, about a limited purpose public figure who voluntarily accepted a prominent role in a public human rights controversy.

## TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED .....	i
TABLE OF AUTHORITIES .....	iv
JURISDICTION STATEMENT .....	ix
STATEMENT OF THE CASE .....	1
SUMMARY OF THE ARGUMENT .....	3
ARGUMENT .....	5
STANDARD OF REVIEW. ....	5
<b>I. THE DECISION OF THE FIFTEENTH CIRCUIT MUST BE REVERSED BECAUSE CARTMAN IS PROTECTED FROM COMPELLED DISCLOSURE UNDER THE QUALIFIED REPORTER’S PRIVILEGE.</b> .....	<b>5</b>
A. <u>The Qualified Reporter’s Privilege Which Protects Against the Compelled Discovery of Anonymous Sources is Inferred from the First Amendment Protections of a Free Press.</u> .....	6
B. <u>Since Cartman Possessed the Intent to Disseminate News at the Inception of the Newsgathering Process His Work On the Sludge Report Entitles Him to Protection under the Qualified Reporter’s Privilege</u> .....	10
C. <u>Ike Is Not Entitled to Court-Compelled Disclosure of Cartman’s Anonymous Source Because He has Failed to Demonstrate the Necessary Elements To Overcome the Qualified Reporter’s Privilege</u> .....	13
1. <b>Ike has failed to prove that he has a compelling interest in obtaining the identity of Professor Chaos</b> .....	<b>14</b>
2. <b>Ike has not fulfilled the requirement of exhaustion necessary for court-compelled disclosure of an anonymous source</b> .....	<b>15</b>
<b>II. THE FIFTEENTH CIRCUIT ERRED IN DENYING CARTMAN’S MOTION FOR SUMMARY JUDGMENT BECAUSE CARTMAN DID NOT INTENTIONALLY OR RECKLESSLY MAKE DEFAMATORY STATEMENTS REGARDING IKE BROFLOVSKI, A LIMITED PURPOSE PUBLIC FIGURE.</b> .....	<b>17</b>
A. <u>Ike Broflovski Is A Limited-Purpose Public Figure Requiring That He Prove Defamation Under An Actual Malice Standard</u> .....	18

1. **The human rights abuses at Citrus constitute a public controversy. . . . .** 20

2. **Cartman’s blog posting relates to Ike’s involvement in the Citrus controversy . . . . .** 22

3. **Ike was situated at the forefront of Citrus’ human rights controversy . . .** 22

B. Cartman Is Not Liable Under An Actual Malice Standard Because He Neither Knowingly Nor Recklessly Circulated False Information About Ike Broflovski .26

CONCLUSION. . . . . 30

**TABLE OF AUTHORITIES**

	<b>Page</b>
<b><u>CASES</u></b>	
<b>UNITED STATES SUPREME COURT</b>	
<u>Associated Press v. United States</u> , 326 U.S. 1 (1945) .....	5, 12
<u>Bose Corp. v. Consumers Union</u> , 466 U.S. 485 (1984) .....	29
<u>Branzburg v. Hayes</u> , 408 U.S. 665 (1972) .....	<i>passim</i>
<u>Curtis Publishing Co. v. Butts</u> , 388 U.S. 130 (1967) .....	<i>passim</i>
<u>Garrison v. Louisiana</u> , 379 U.S. 64 (1964) .....	26
<u>Gertz v. Robert Welch, Inc.</u> , 418 U.S. 323 (1974) .....	<i>passim</i>
<u>Gooding v. Wilson</u> , 405 U.S. 518 (1972) .....	6
<u>Grosjean v. American Press Co.</u> , 297 U.S. 233 (1936) .....	6
<u>Harte-Hanks Commc'ns, Inc. v. Connaughton</u> , 491 U.S. 657 (1989) .....	28
<u>Hutchinson v. Proxmire</u> , 443 U.S. 111 (1979) .....	26
<u>Lamont v. Postmaster General</u> , 381 U.S. 301 (1965) .....	7
<u>Lovell v. City of Griffin</u> , 303 U.S. 444 (1935) .....	5, 7, 10
<u>Masson v. New Yorker Magazine, Inc.</u> , 501 U.S. 496 (1991) .....	28, 29
<u>Near v. State of Minnesota</u> , 283 U.S. 697 (1931) .....	5, 7

<u>New York Times Co. v. U.S.</u> , 403 U.S. 713 (1971) .....	5, 7
<u>New York Times Co. v. Sullivan</u> , 376 U.S. 254 (1964) .....	17, 18, 26
<u>St. Amant v. Thompson</u> , 390 U.S. 727 (1968) .....	27, 28
<u>Time, Inc. v. Firestone</u> , 424 U.S. 448 (1976) .....	23, 24, 25
<u>Time, Inc. v. Pape</u> , 401 U.S. 279 (1971) .....	28
<u>Wolston v. Reader’s Digest Assn., Inc.</u> , 433 U.S. 157 (1979) .....	23, 24
<b>UNITED STATES COURT OF APPEALS</b>	
<u>Baker v. F &amp; F Investment</u> , 430 F.2d 778 (2nd Cir. 1972) .....	10
<u>Brewer v. Memphis Pub. Co., Inc.</u> , 626 F.2d 1238 (5th Cir. 1980) .....	27
<u>Carey v. Hume</u> , 492 F.2d 631 (D.C. Cir. 1972) .....	15, 16
<u>Garland v. Torre</u> , 259 F.2d 545 (2nd Cir. 1958) .....	5
<u>Gonzalez v. NBC</u> , 194 F.3d 29 (2nd Cir. 1998) .....	10
<u>In re Grand Jury Proceeding</u> , 810 F.2d 580 (6th Cir. 1987) .....	9
<u>In re Madden</u> , 151 F.3d 125 (3rd Cir. 1998) .....	8, 10, 13
<u>Lerman v. Flynt Distributing Co., Inc.</u> , 745 F.2d 123 (2nd Cir.1984) .....	19, 25, 25
<u>Marcone v. Penthouse Int’l Magazine for Men</u> , 754 F.2d 1072 (3rd Cir. 1985) .....	19

<u>McKevitt v. Pallasch,</u> 339 F.3d 530 (7th Cir. 2003) .....	9
<u>Miller v. Transamerican Press, Inc.,</u> 628 F.2d 932 (5th Cir. 1980) .....	9, 14
<u>New York Times v. Connor,</u> 365 F.2d 567 (5th Cir. 1966) .....	28
<u>Price v. Time, Inc.,</u> 416 F.3d 1327 (11th Cir. 2005) .....	16
<u>Rosanova v. Playboy Enterprises, Inc.,</u> 580 F.2d 859 (5th Cir. 1978) .....	26
<u>Shoen v. Shoen,</u> 5 F.3d 1289 (9th Cir. 1993) .....	9, 11
<u>Silkwood v. Kerr-McGee,</u> 563 F.2d 433 (10th Cir. 1977) .....	<i>passim</i>
<u>Trotter v. Jack Anderson Enterprises, Inc.,</u> 818 F.2d 431 (5th Cir. 1987) .....	<i>passim</i>
<u>U.S. v. Cuthbertson,</u> 630 F.2d 139 (3rd Cir. 1980) .....	6
<u>U.S. v. Cutler,</u> 6 F.3d 5 (2nd Cir. 1982) .....	14
<u>United States v. La Rouche Campaign,</u> 841 F.2d 1176 (1st Cir. 1988) .....	6
<u>United States v. Steelhammer,</u> 561 F.2d 539 (4th Cir.1977) .....	8
<u>United States v. Caporale,</u> 806 F.2d 1487 (11th Cir.1986) .....	9
<u>von Bulow v. von Bulow,</u> 811 F.2d 136 (2nd Cir. 1987) .....	<i>passim</i>
<u>Waldbaum v. Fairchild Publications, Inc.,</u> 627 F.2d 1287, 1294 (D.C. Cir. 1980) .....	<i>passim</i>

<u>Zerelli v. Smith,</u> 656 F.2d 705, 711 (D.C. Cir. 1981) .....	9, 13, 16
--	-----------

**UNITED STATES DISTRICT COURT**

<u>Alioto v. Cowles Communications, Inc.,</u> 430 F. Supp. 1363 (N.D. Cal. 1977) .....	27
---	----

<u>Apicella v. McNeil Lab., Inc.,</u> 66 F.R.D. 78 (E.D.N.Y. 1975) .....	11
---	----

<u>Barger v. Playboy Enterprises, Inc.,</u> 564 F. Supp. 1151 (N.D. Cal. 1983) .....	27
---	----

<u>Chuy v. Philadelphia Eagles Football Club,</u> 431 F. Supp. 254 (E.D.Pa. 1977) .....	23
--	----

<u>Loadholtz v. Fields,</u> 389 F.Supp 1299 (D.C. Fla. 1975) .....	9
---	---

<u>Martin Marietta Corp. v. Evening Star Newspaper,</u> 417 F. Supp. 947 (D.D.C. 1976) .....	27
---	----

<u>Tavoulareas v. Piro,</u> 817 F.2d 762 (D.C. Cir. 1987) .....	26
--	----

**STATE COURT**

<u>Readers Digest Assoc. v. Marin Cty.,</u> 37 Cal. 3d 244 (1984) .....	24, 29
--	--------

**SECONDARY SOURCES**

**RESTATEMENTS**

Restatement (Second) of Torts § 580A (1965) .....	25, 28
---	--------

Restatement (Second) of Torts § 580B (1965) .....	29
---	----

**LAW REVIEWS**

Barbara Larkin Stocker, <i>An Analysis of the Distinction Between Public Figures and Private Defamation Plaintiffs Applied to relatives of Public Persons</i> , 49 S. CAL. L. REV. 1131 (1976) .	25
--	----

Mark D. Walton, <i>The Public Figure Doctrine: A Reexamination of Gertz v. Robert Welch, Inc. in Light of Lower Federal Court Public Figure Formulations</i> , 16 N. ILL. U. L. REV. 141, 165-66 (1995) .....	19
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visited Oct. 1, 2009) . . . . . 20

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<http://www.un.org/en/documents/udhr/index.shtml> (last visited Oct. 1, 2009) . . . . . 20

## **JURISDICTION STATEMENT**

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

In 2006, Ike Broflovski (“Ike”) was publicly introduced as the new Director of Research & Development (“R & D”) at Citrus. (J.A. at 3.) Citrus, a *Fortune* 500 Company, has dominated the consumer electronics market since the introduction of its signature product, the ePlay, in 2001. (J.A. at 2.) Capitalizing on this success, Citrus undertook efforts to solidify its position atop the portable music player market by launching production of the ePlay Touché, an updated version of the ePlay. (J.A. at 3.) Pegged as the product that will secure the future success of the company, Citrus CEO Kyle Broflovski (“Kyle”) convened a press conference on August 7, 2006 to announce that Ike, his younger brother, would oversee development of the ePlay Touché. Id. At the press conference, Kyle praised Ike, as a “genius” and forecast that Ike’s role in the company would lead to his personal fame. Id. Ike’s leadership of R & D was greeted with continued coverage by television and news media, and despite his reticent demeanor, Ike’s notoriety was amplified by retail employees nation wide who donned “I Like Ike” buttons to celebrate his innovations. Id.

However, not all news coverage of Ike was positive. In particular, Eric Cartman (“Cartman”) criticized Ike on his blog, *The Sludge Report*. (J.A. at 5-6.) Started in 2005, *The Sludge Report* offered daily news updates concerning various headlines and stories of popular concern. (J.A. at 5.) Having developed a following of over 100,000 readers, Cartman regularly received insider information about controversial stories from his dedicated audience. Id. It was Cartman’s policy to treat all who provided him with information as confidential sources. Id.

On July 7, 2008, Cartman received information regarding Citrus from one of his confidential sources, Professor Chaos (“Chaos”). Id. As a Citrus employee, Chaos has regularly provided Cartman with reliable information about the company’s products and practices. Id. Although

Cartman was privy to Chaos's real name and contact information as per a prior meeting, he respected Chaos's wishes to remain confidential. Id. In his email, Chaos revealed the existence of human rights abuses at a Citrus manufacturing facility in Mumbai, India, where the ePlay Touché was being produced. Id. Moreover, Chaos asserted that Ike played a significant role in these abuses. Id. Corroborating his claims, Chaos provided Cartman with a photograph depicting horrific labor condition in which worn down and ill-protected workers slaved over the ePlay Touché. Id. The photograph also displayed Ike walking through the factory yelling at the workers. Id. Cartman posted the photograph on his blog within a day of receipt, expounding on the substance of Chaos's lead. (J.A. at 5-6.) Subsequently, major media outlets also reported on Citrus's abusive labor practices, causing Citrus to incur substantial financial losses. (J.A. at 6.)

After issuing a statement to the media, Ike filed a defamation suit against Cartman in state court, alleging that Cartman's statements were libelous. (J.A. at 7.) Cartman removed the case to the federal court on diversity grounds. Id. In the ensuing discovery, it was revealed that Ike frequently traveled to Mumbai. Id. Further, while scanning software raised questions as to Ike's presence in the photograph, the depictions of human rights abuse at the factory were unquestioned. Id. Ike and Kyle also deposed several Mumbai factory employees, and sent out a corporate wide email to identify the source of the leak. (J.A. at 8.) Despite producing leads, Ike submitted an interrogatory to Cartman demanding the identity of Chaos. Id. When Cartman invoked a qualified reporter's privilege against disclosure, Ike responded by filing a motion to compel. Cartman then filed a countermotion for summary judgment. Id.

The District Court for the Western District of Silverado, denied Ike's motion to compel discovery and granted summary judgment in favor of Cartman. (J.A. at 20.) On appeal, the

Court of Appeals for the Fifteenth Circuit reversed both holdings and remanded for further proceedings. (J.A. at 32.) Subsequently this Court granted certiorari. (J.A. at 33.)

### **SUMMARY OF THE ARGUMENT**

The Court of Appeals for the Fifteenth Circuit erred when it held that the First Amendment does not recognize a qualified reporter's privilege, and that Ike Broflovski was entitled to court-compelled disclosure of Eric Cartman's anonymous source, Professor Chaos. Liberty of the press is a broad constitutional protection that protects the societal interests in maintaining a free flow of information as well as the rights of the press to publish and distribute news. These fundamental interests are rendered meaningless if reporters cannot provide their confidential sources of information the most basic protection of anonymity. Thus, it follows that the protections of the qualified reporter's privilege are inferred from the First Amendment.

For purposes of the instant defamation suit, Cartman qualified as a reporter under the First Amendment since he possessed an intent to use information from anonymous sources in the dissemination of news, and in fact did so when the information was obtained. As such, Cartman was justified in invoking the qualified reporter's privilege and the burden shifted to Ike in order to demonstrate a compelling interest that sufficiently outweighed Cartman's privilege. Having failed to demonstrate such an interest Ike was not entitled to court-compelled disclosure, and the decision of the Fifteenth Circuit granting such disclosure constitutes a reversible error

In addition, Eric Cartman's motion for summary judgment must be granted because his actions did not meet the requisite level of actual malice required for defamation of a limited purpose public figure. Ike Broflovski is a limited purpose public figure because he voluntarily accepted a prominent role in the human rights controversy at Citrus. Furthermore, given his status at Citrus, a Fortune 500 company, Ike maintains the ability to access public channels of

communication to refute any alleged defamatory statements. As per Gertz v. Robert Welch, Inc. and its progeny, this Court has enumerated that one who publishes defamatory remarks regarding a limited purpose public figure will only be found liable for defamation if they acted with actual malice.

Cartman is not liable under an actual malice standard because he neither knowingly nor recklessly published defamatory information about Ike. Cartman depended on a reliable source, Professor Chaos, from whom he received accurate information regarding Citrus on many prior occasions. Additionally, Chaos corroborated his lead with photographic evidence of the human rights abuses at Citrus' Mumbai facility. Since the record lacks evidentiary support to prove actual malice under a heightened clear and convincing evidence standard, summary judgment should be granted in Cartman's favor.

## ARGUMENT

### STANDARD OF REVIEW:

Denial of the existence of Petitioner's qualified reporter's privilege under Rule 26(b)(5) is a question of law and a decision to compel discovery under Rule 37 is a question of fact. On appeal, a mixed question of law and fact is subject to de novo review. U.S. v. Spillone, 879 F.2d 514, 520 (9th Cir. 1989), cert. denied, 498 U.S. 878 (1990). Additionally, an appeal of a motion for summary judgment under Fed. R. Civ. P. 56 requires this Court to subject the lower court decision to de novo review as well. U.S. v. Diebold, Inc., 369 U.S. 654,655 (1962).

### **I. THE DECISION OF THE FIFTEENTH CIRCUIT MUST BE REVERSED BECAUSE CARTMAN IS PROTECTED FROM COMPELLED DISCLOSURE UNDER THE QUALIFIED REPORTER'S PRIVILEGE.**

The paramount harm that the freedom of the press protects against is government censorship. Near v. State of Minnesota, 283 U.S. 697 (1931); New York Times Co. v. U.S., 403 U.S. 713 (1971). However, ensuring against government censorship is far from the only protection encompassed within the free press clause of the First Amendment. By providing the right of the press to be free from government censorship, the First Amendment simultaneously protects the right of the people to maintain a free flow of information and to receive ideas. See Near, 283 U.S. at 716; Associated Press v. United States, 326 U.S. 1, 20 (1945). It follows that in order to maintain the rights of the people to be fully informed, freedom of the press must embrace varied forms of publication. Lovell v. City of Griffin, 303 U.S. 444, 452 (1935).

While the guarantees of a free press are not absolute, they can only yield in instances where the basic power of the courts to discover truth outweighs the right of the press to remain silent. See Garland v. Torre, 259 F.2d 545, 548 (2nd Cir. 1958). Prior systematic restraints on press protections must not be tolerated because, as an indispensable First Amendment liberty, preservation of a free press requires that courts "not limit the protection of the right to any

particular way of abridging it.” Id. (quoting Grosjean v. American Press Co., 297 U.S. 233, 249 (1936)). Refusing to recognize the protections of the qualified reporter’s privilege violates this constitutional maxim since it represents a particularized abridgement of free press liberty guaranteed by the First Amendment.

The qualified reporter’s privilege is a crucial measure that ensures the freedom of the press. In the arena of civil litigation, the privilege shields reporters from compulsory disclosure of their anonymous sources during pretrial discovery. These protections are essential to prevent disingenuous plaintiffs from undercutting the public policy favoring the free flow of information and from converting journalists into the investigative arm of adverse litigants. See U.S. v. Cuthbertson, 630 F.2d 139, 147 (3rd Cir. 1980); United States v. La Rouche Campaign, 841 F.2d 1176, 1182 (1st Cir. 1988). After receiving information from a confidential source, Eric Cartman (“Cartman”) uncovered a story of paramount public concern about human rights abuses at a major corporation. Without Cartman’s steadfast assurances of confidentiality, the public would have remained oblivious to Citrus’s horrific labor practices. Cartman’s dedicated effort to gather and disseminate news exemplifies the significant role that a free press plays in a free society. These contributions are not without protections under the First Amendment; protections that the qualified reporter’s privilege affords. Accordingly, the decision of the Fifteenth Circuit denying the existence of these protections, and compelling Cartman to disclose the identity of his confidential source must be reversed.

A. The Qualified Reporter’s Privilege Which Protects Against the Compelled Discovery of Anonymous Sources is Inferred from the First Amendment Protections of a Free Press.

This Court has long held that the First Amendment occupies a preferred position in the bill of rights. Gooding v. Wilson, 405 U.S. 518 (1972). Consistent with this preference, the history of this Court’s decisions demonstrate that liberty of the press is a broad protection. In addition to

protection from government censorship, this Court has held that liberty of the press includes the right to publish, Near v. State of Minnesota, 283 U.S. 697 (1931); the right to distribute information, Lovell, 303 U.S. at 452; and the right to receive printed materials. Lamont v. Postmaster General, 381 U.S. 301 (1965).

Compelling a reporter to disclose the identity of a confidential source is the most egregious threat to a free press as it attacks the fundamental liberty at its source. Publication, distribution, and reception of information are all rendered meaningless if those who provide the news cannot guarantee their sources the confidentiality necessary to protect them from reprisal. Thus, the protections of the qualified reporter's privilege are inferred from the First Amendment because absent these protections, the ability of the press to be fully informed evaporates and "without an informed and free press there cannot be an enlightened people." New York Times Co. v. United States, 403 U.S. 713, 729 (1971) (Stewart, J., concurring).

Cartman obtained information from an anonymous source based on his pledge of confidentiality. Acting on this information, he informed the public about human rights abuses at Citrus, where Ike Broflovski ("Ike") is the Director of Research & Development ("R & D"). (J. A. at 3.). After being fully apprised about the horrific labor abuses at Citrus, the public's disapproval of the major corporation was swift and overwhelming. (J.A. at 6-7.) Declining to protect reporters like Cartman who contribute to the flow of information confounds the ability of the public to make informed decisions. Cartman's actions were entirely consistent with the purpose of free press liberty guarded by the First Amendment; a purpose rendered meaningless if not for the qualified reporter's privilege.

The constitutional questions surrounding the existence of a qualified reporter's privilege can be traced back to this Court's holding in Branzburg v. Hayes, 408 U.S. 665 (1972). In

Branzberg, this Court rejected the argument that the protections of the free press afforded a reporter with a testimonial privilege to shield the identity of his anonymous source from a grand jury, investigating criminal conduct detailed in the reporter's story. The Court held that the interests of the press in maintaining the confidentiality of anonymous sources must yield to the compelling state interests of investigating criminal activity. Id. at 689. Justice Powell, who provided the deciding vote in Branzberg, articulated the limited nature of the holding in a brief concurring opinion. The thrust of Justice Powell's concurrence held that while the press might at times be required to disclose the identity of their confidential sources, they are not without protections under the law.<sup>1</sup> Id. at 710.

This case, however, is not controlled by Branzberg, as that holding applies only to criminal cases. The plain text of the majority opinion concretely established that sole issue before the court concerned, "the obligation of reporters to respond to grand jury subpoenas as other citizens do and to answer questions relevant to an investigation into the commission of crime." Id. at 682. While a state's interest in preserving the investigatory function of the grand jury is unquestionably compelling, the fact remains that the grand jury plays no role in civil litigation. Hence, the logic behind limiting free press protections in Branzberg is not equally transferable to non-criminal proceedings.

Moreover, since Branzberg was decided in 1972, an overwhelming majority of circuit courts have recognized the existence of a reporter's privilege in civil litigation. These decisions have identified Branzberg's application is limited to criminal proceedings. See e.g., LaRouche Campaign, 841 F.2d at 1181-82 (1st Cir.1988); von Bulow v. von Bulow, 811 F.2d 136, 142 (2d Cir.1987); In re Madden, 151 F.3d 125, 128-29 (3d Cir.1998); United States v. Steelhammer,

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<sup>1</sup> Specifically, Justice Powell held that reporters can move to quash subpoenas ordering them to appear before a grand jury where a subpoena is not issued in good faith, or when the information sought bears only a "remote and tenuous relationship to the subject of the investigation." Branzberg, 408 U.S. at 710.

561 F.2d 539 (4th Cir.1977) (en banc); Miller v. Transamerican Press, Inc., 621 F.2d 721, 725 (5th Cir. 1980); Shoen v. Shoen, 5 F.3d 1289, 1292-93 (9th Cir.1993); Silkwood v. Kerr-McGee, 563 F.2d 433, 436 (10th Cir. 1977); United States v. Caporale, 806 F.2d 1487, 1504 (11th Cir.1986); Zerelli v. Smith, 656 F.2d 705, 712 (D.C. Cir. 1981).

By denying the existence of the qualified reporter's privilege, Ike grossly oversimplifies the extent of the liberty at stake. Failing to uphold the protections of the qualified reporter's privilege is far from an incidental burdening of the press. Rather, it represents a direct assault on the this fundamental liberty. Ike's inability to grasp this distinction is illustrated by his assertion that Cartman is afforded sufficient protection under the Federal Rules of Civil Procedure, which negates his need for additional privilege protections. This position fails to acknowledge that the liberal discovery provided by the federal rules is subordinate to the constitutional rights of the free press provided by the First Amendment. Loadholtz v. Fields, 389 F. Supp 1299, 1300 (D.C. Fla. 1975). Thus, even if the Federal Rules applied, the societal interest in the free flow of information outweighs the statutory preference for liberal discovery. Id.

Similarly, Ike's use of case law outliers as widely accepted legal precedent is inaccurate to the point approaching deceptiveness. His reliance on the Seventh Circuit decision in McKevitt v. Pallasch, 339 F.3d 530 (7th Cir. 2003), and the Sixth Circuit holding in In re Grand Jury Proceeding, 810 F.2d 580 (6th Cir. 1987), fails to comprehend the legitimate need for confidentiality protected by the privilege. Unlike Chaos, the informant in McKevitt was not only publicly known, but also did not object to the disclosure of information sought by the plaintiff. McKevitt, 339 F.3d at 522. Moreover, the Sixth Circuit in In re Grand Jury Proceeding merely reiterates this Court's decision in Branzberg, and in dicta, refuses to recognize a qualified reporter's privilege in civil litigation. In re Grand Jury Proceeding, 810 F.2d at 584-85. These

decisions are noticeably dissimilar from the case at bar since they do not represent the circumstances where the need for the qualified reporter's privilege arises.

B. Since Cartman Possessed the Intent to Disseminate News at the Inception of the Newsgathering Process, His Work On the Sludge Report Entitles Him to Protection Under the Qualified Reporter's Privilege.

This Court has long recognized that liberty of the press is an individual right, and not solely the preserve of reporters working for the institutions of traditional media. Lovell, 303 U.S. at 444. Cartman exercised his First Amendment liberty by operating his blog, *The Sludge Report*, where he gathered and disseminated information to his dedicated following of readers. As a result, armed solely with his computer and an internet connection, Cartman uncovered a story of major public concern and reported it to the world. Despite his lack of formalized press credentials, Cartman's blogging had the same intent to disseminate news as those reporters who work for *The Wall Street Journal* and *The Washington Post*. Accordingly, Cartman qualifies as a journalist under the First Amendment and is entitled to the protections of the qualified reporter's privilege.

A person is considered a journalist, and protected by the qualified reporter's privilege, if that person can prove that they (1) intended to use information from an anonymous source in the dissemination of news; and (2) such intent existed when the information was obtained. See Gonzalez v. NBC, 194 F.3d 29, 35 (2nd Cir. 1998) (citing Baker v. F & F Investment, 430 F.2d 778 (2nd Cir. 1972); and von Bulow, 811 F.2d at 142). [Hereinafter "the Journalistic Intent test"].

By focusing on the intent of the individual, the journalistic privilege extends to all individuals engaged in the act of investigative reporting. In re Madden, 151 F.3d at 129. Accordingly, the medium of communication chosen by the reporter bears little on whether or not

an individual is protected by the privilege. Shoen, 5 F.3d at 1293. Lower courts have exemplified the breadth of the qualified reporter's privilege by permitting a number of lower court decisions have permitted a variety of nontraditional journalists to invoke its protections. See Silkwood, 563 F.2d at 436 (permitting documentary filmmaker to invoke journalist's privilege against disclosure); Apicella v. McNeil Lab., Inc., 66 F.R.D. 78 (E.D.N.Y. 1975) (holding that authors of technical publications and professional investigative books can invoke privilege); Shoen, 5 F.3d at 1293 (holding that professional investigative book author has status to claim journalist's privilege). Therefore, blogging, the medium of communication at issue in this appeal, must come within the qualified reporter's privilege if the individual blogger can demonstrate his journalistic intent.

Applying the test to the facts in the case at bar, it is clear that Cartman is a journalist who is entitled to the protections of the qualified reporter's privilege. Cartman satisfies the first prong of the Journalistic Intent test since it is his blog's policy to treat all those who provide him with information as confidential informants. (J. A. at 4-5.) Cartman has also consistently used the information provided to him by anonymous sources in the dissemination of news on his blog. Id. Furthermore, Cartman has routinely used information specifically provided by Professor Chaos ("Chaos") without once revealing his identity. Taken together, these facts demonstrate Cartman's intention to use information obtained from anonymous sources in the dissemination of news.

Secondly, Cartman's intent to disseminate existed when the information was obtained since he posted the news on his blog within twenty-four hours of receipt. (J. A at 5.) In order to determine journalistic intent a court must look to the individual's "primary purpose." von Bulow, 811 F.2d 145. As Cartman's comments make clear, his purpose behind publishing the photograph and attaching his comments was to inform his devoted readers of potential human

rights violation. (J. A. at 6.) The mere fact that Cartman's comments were antagonistic fails to negate his intent because this Court has held that opinions are a protected form of publication. See Associated Press, 326 U.S. at 20 (establishing that free press protects dissemination of information from diverse and antagonistic sources).

Ike's challenge that Cartman is not a reporter entitled to the qualified reporter's privilege is not only facially deficient, but also undermined by the facts of the instant appeal. There is an inherent contradiction in the argument that an individual is not a genuine reporter entitled to the privilege, when simultaneously making a major legal effort to obtain the individual's work product. See Silkwood, 563 F.2d at 437. Surely, Ike would not have taken issue with Cartman's comments nor sought to compel disclosure of his anonymous source, if he did not think Cartman's reports did not resonate with the public.

Ike may also contend that Cartman fails the first prong of the Journalistic Intent test because he had a preexisting relationship with Chaos, and that under von Bulow this negates any subsequent promise of confidentiality. von Bulow, 811 F.2d at 146; See also (J. A. at 5.) This argument is without merit, as it fails to recognize factual distinctions and practical necessity. The relationship between Cartman and Chaos is unlike the relationship between the defendant and the source of information in von Bulow, because the defendant in that case began writing a book *after* having received information from sources, to whom she had never previously given her assurances of confidentiality. Id. In stark contrast, Cartman's blog not only employed a confidentiality policy for those who supply him with tips, but Chaos specifically chose to hide his identity for protection. (J. A. at 4-6.) Thus, there are both express and implied assurances of confidentiality present here, that were absent in von Bulow. Moreover, as a practical matter, reporters need to build a relationship with sources of information in order to establish trust. The

resulting promise of confidentiality is essential to preserving the relationship so a reporter can effectively gather and disseminate news. See Zerelli, 656 F.2d at 711.

Lastly, Ike cannot circumvent Cartman's status as a journalist by attacking the substance of his reporting. While his work contains his opinion, Cartman's blogging disseminates real time reports based on the available facts. Unlike authors of creative fiction who have the liberty to change the sequence of events, or to fill in gaps with fictitious incidents, journalists are bound by the facts. See In re Madden, 151 F.3d at 130. Though Ike may bitterly resent Cartman's interpretation of events, Cartman's reporting is undeniably grounded in the facts, which distinguishes him from the unprotected class of authors outside of the privilege protections.

C. Ike Is Not Entitled to Court-Compelled Disclosure of Cartman's Anonymous Source Because He has Failed to Demonstrate the Necessary Elements To Overcome the Qualified Reporter's Privilege.

In light of the significant interference that compelled disclosure has on the freedom of the press, it is essential that a plaintiff establish that the information they seek is crucial to their case. Zerelli, 656 F.2d at 713-15. Absent proof of a plaintiff's extraordinary circumstances, the privilege must prevail over a civil litigant's request for disclosure. Id. at 712. Since Ike has failed to meet this threshold, the Fifteenth Circuit erred in holding that Ike's need for evidence to prove the fault element of his defamation claim warranted court-compelled disclosure.

The protections afforded to a journalist under the qualified reporter's privilege are qualified, not absolute. Accordingly, the protections of the privilege must yield when the party seeking to compel disclosure affirmatively demonstrates that (1) the evidence sought is clearly relevant to the litigation; (2) there exists a compelling interest in obtaining the information that sufficiently outweighs the invocation of the privilege; and (3) the party has exhausted all other means reasonably available to obtain the information. See Zerelli, 656 F.2d at 713-14; Silkwood, 563

F.2d at 438; Miller, 621 at 726; U.S. v. Cutler, 6 F.3d 5, 7 (2nd Cir. 1982).

The applicability of these factors are relevant when a journalist is a non-party to a lawsuit or when a journalist is the defendant in a defamation claim. While a court may give greater weight to a plaintiff's motion to compel where the journalist is the actual defendant, a journalist's status as a defendant alone does not equate to a waiver of privilege. Cervantes v. Time, 464 F.2d 986, 993 (8th Cir. 1972). This heightened degree of deference notwithstanding, Ike's claim remains deficient. Ike has demonstrated neither a compelling interest for the information sought nor exhausted his other reasonably available means to independently discover the identity of Chaos.

**1. Ike has failed to prove that he has a compelling interest in obtaining the identity of Chaos.**

Ike has not shown even the slightest indicia of a compelling interest that would approach outweighing Cartman's invocation of privilege. Central to Ike's defamation suit against Cartman is the assumption that Chaos is an untrustworthy source. Accordingly, Ike maintains that without the identity of Chaos, he cannot demonstrate that Cartman was reckless or negligent for not corroborating Chaos's lead. In this sense, Ike's challenge is similar to the facts of the Eighth Circuit case, Cervantes v. Time. In Cervantes, the mayor of the city of Saint Louis brought a libel action and motion to compel against Time, Inc. after an article in *Time Magazine* accused him of having connections to organized crime. The Mayor specifically argued that four paragraphs of the eighty-seven paragraph article were made with reckless disregard for the truth. Id. at 988. The Court refused to compel the article's author to disclose the identity of his anonymous sources. In rejecting the mayor's argument, the Court noted that his preoccupation with disclosure ignored the fact that he was otherwise unable to prove that the select paragraphs were written with a knowing or reckless disregard for the truth. Id. at 992.

Similar to the Mayor in Cervantes, Ike's preoccupation with trying to identify the person who

superimposed his image onto the photograph ignores the fact that the conditions depicted at the Mumbai factory were accurately captured. (J. A. at 7). Ike only denies that he was *at* the factory when the photograph was taken, not that the depictions of the factory are untrue. To wit, the record is entirely devoid of any statement by Ike denying the existence of such conditions.<sup>2</sup> In light of this distinction, any issues concerning Chaos’s penchant for trustworthiness are not crucial to Ike’s defamation claim. Even with Chaos’s identity, Ike is otherwise unable to demonstrate that Cartman’s comments on the conditions in Citrus’s Mumbai factory were made with a knowing or reckless disregard for the truth. Therefore, Ike’s alleged need for Chaos’s identity cannot constitute as a compelling interest to overcome Cartman’s privilege.

**2. Ike has not fulfilled the requirement of exhaustion necessary for court-compelled disclosure of an anonymous source.**

The entirety of Ike’s argument for compelled disclosure is premised on a skewed understanding of the principle of exhaustion. First, Ike contends that has he exhausted all other reasonably available means to discover the identity of Chaos. Second, Ike asserts that under the reasoning of Carey v. Hume, exhaustion is inapplicable because the information available was so vague that it provided him with no reasonable basis to know where to begin. 492 F.2d at 638-39. Both of these arguments are without foundation in fact or law.

Compelled disclosure is a plaintiff’s last resort in the discovery process. Id. As a last resort, it requires that all of the plaintiff’s reasonably available means of obtaining information be exhausted before a court may intervene. Id. Ike’s paltry efforts to independently confirm the identity of Chaos fall far short of the exhaustion necessary to overcome the protections of the qualified reporter’s privilege. After sending out a corporate wide e-mail and performing a handful of depositions with certain Mumbai factory employees, Ike submitted to Cartman an

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<sup>2</sup> The only statement made by Ike concerning Cartman’s post was delivered by his attorney, Terrence Phillips, who ambiguously claimed that, “The photograph posted on that site is a total fabrication.” (J.A. at 7.)

interrogatory on December 15, 2008. (J. A. at 8.) However, at the time of submitting the interrogatory to Cartman, Ike's efforts had produced leads, albeit only a few. Id.

In light of these leads, Ike's claim of exhaustion must fail. The principle of exhaustion details availability of sources, not personal stamina or patience. Thus, where a reasonable source of information is available a plaintiff cannot escape his obligation out of fear that an investigation would be, "time consuming, costly, and unproductive." Zerelli, 656 F.2d at 714-15 (holding that a plaintiff had not exhausted his alternative sources of information when he had yet to depose four individuals who had knowledge about a government leak). Moreover, by failing to perform his required due diligence, the Court cannot be assured that Chaos's identity can only be discovered by disregarding Cartman's privilege and compelling disclosure, and. See Price v. Time, Inc., 416 F.3d 1327, 1347 (11th Cir. 2005) (stating that court-compelled disclosure is appropriate only when a court is virtually certain that the identity of a confidential source can be discovered no other way).

Likewise, Ike's claim that exhaustion is inapplicable is equally unpersuasive. Ike has available information about Chaos to facilitate his search beyond Chaos's general status as a "Citrus Employee." As such, Ike is unlike the plaintiff in Carey who was only provided with a reporter's unsubstantiated claims that the anonymous eyewitness source sought was a "union employee" who worked at a largely staffed union office. Carey, 492 at 372. Prior to the Mumbai posting, Chaos had supplied Cartman with information, which Cartman used on *The Sludge Report*. (J.A. at 5.) Ike could have easily researched these postings and cross-referenced the list of employees involved to begin identifying persons of interest. Far from being the product of an exercise in futility, Ike's lack of available information to search for Chaos is the result of his failure to exert virtually any effort to limit the pool of possible informants.

Finally, Ike's attempt to distinguish his individual standing as a plaintiff from his professional capacity as Citrus's Director of R & D is nothing more than a transparent end run on Cartman's privilege protections. While it is true that Citrus is not a litigant in the current defamation suit, the resources and interest of the company are unquestionably involved because of Ike's position as a corporate director. As demonstrated by Ike and Kyle's joint depositions of Mumbai factory workers, and Kyle's follow up corporate email, the corporate and personal interests of the Broflovskis' are so inextricably intertwined that one cannot be resolved without the other. (J. A. at 8.) As a result, the virtually limitless resources of Citrus are at Ike's disposal either to identify Chaos directly in relation to his defamation claim, or indirectly to identify the internal whistleblower. This conclusion neither incorrectly imputes Kyle's authority onto Ike, nor conflates Ike's authority with Kyle's. To the contrary, this conclusion recognizes the inescapable fact that Citrus has its own stake in identifying Chaos, and that as a powerful corporate director, Ike has access to a wide range of resources unavailable to average defamation plaintiff. Thus, in light the foregoing, Ike has failed to meet the requirements of exhaustion and is not entitled to court-compelled disclosure.

**II. THE FIFTEENTH CIRCUIT ERRED IN DENYING CARTMAN'S MOTION FOR SUMMARY JUDGMENT BECAUSE CARTMAN DID NOT INTENTIONALLY OR RECKLESSLY MAKE DEFAMATORY STATEMENTS REGARDING IKE BROFLOVSKI, A LIMITED PURPOSE PUBLIC FIGURE.**

This Court's First Amendment jurisprudence has recognized the importance of the right to free speech and thus allows for some misstatements and false assertions without imposing liability. New York Times Co. v. Sullivan, 376 U.S. 254 (1964). Accordingly, this Court rejected the common law rule that subjected defamation defendants to strict liability unless they could prove the truth of their assertion because "erroneous statement is inevitable in free debate

and must be protected if freedoms of expression are to have the breathing space they need to survive.” Id. Instead, this Court instituted burdens of proof dependent upon a defamation plaintiff’s status. See Sullivan, 376 U.S. 254; Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967); Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974).

In a defamation case, the interests of the plaintiff are adverse to the First Amendment protections of freedom of speech and the press. Sullivan, 376 U.S. 254. This Court has enunciated different burdens of proof dependent upon whether a defamation plaintiff is a public or private figure. Gertz, 418 U.S. 323. States can allow private individuals to recover damages for defamation under any standard except strict liability. Id. Conversely, one who publishes defamatory remarks regarding a public official, public figure or limited purpose public figure is subject to liability only if they acted with actual malice. See Id.; Sullivan, 376 U.S. 254. Ike is a limited purpose public figure because he voluntarily accepted a prominent role in Citrus’ abusive labor practices. See Gertz, 418 U.S. at 351 (holding that a limited purpose public figure is an individual who is drawn in or voluntarily injects himself into a particular public controversy). He was responsible for development of the ePlay Touché, which was manufactured at the company’s Mumbai facility where the uncontested human rights abuses occurred. Further, he was immediately introduced to the public after accepting this position and maintains the ability to access the media to refute any alleged defamation. Since Ike is a limited purpose public figure and Cartman’s blog posting did not rise to a level of actual malice, the Fifteenth Circuit’s holding must be overturned and summary judgment granted in favor of Cartman.

C. Ike Broflovski Is A Limited Purpose Public Figure Requiring That He Prove Defamation Under An Actual Malice Standard.

In Gertz, 418 U.S. 323, this Court declared two reasons for extending the actual malice standard to include public figures: (i) public figures are less vulnerable to injury from defamation

due to their ability to access the media and other channels of communication; and (ii) public figures are less deserving of protection since they voluntarily exposed themselves to increased risk of injury from defamation. Id. at 344-45.

This Court has recognized two different classes of public figures. The first class is the all-purpose public figure who has achieved pervasive fame and notoriety. Gertz, 418 U.S. at 351; see also Waldbaum v. Fairchild Publications, Inc., 627 F.2d 1287, 1294 (D.C. Cir. 1980) (“a general public figure is a well-known ‘celebrity’, his name a ‘household word’”). Few people attain the ilk of general notoriety sufficient to attain general purpose public figure status. Id. at 1296. However, when a court determines that a person does not merit general purpose public figure status, it must continue its analysis to determine whether or not that person consists a limited purpose public figure. Id.

Although Gertz did not articulate a precise framework for determining limited purpose public figure status, Circuit Courts have focused on several key elements that can be synthesized into a three-part analysis that asks: (1) was the plaintiff involved in a public controversy; (2) were the defamatory statements related to the plaintiff’s involvement in the controversy; and (3) was the plaintiff drawn in or did he voluntarily thrust himself to the forefront of the controversy. See Waldbaum, 627 F.2d at 1296-98; Lerman v. Flynt Distributing Co., Inc., 745 F.2d 123, 136-37 (2nd Cir.1984); Marcone v. Penthouse Int’l Magazine for Men, 754 F.2d 1072 (3rd Cir. 1985), cert. denied, 474 U.S. 864 (1985); Mark D. Walton, *The Public Figure Doctrine: A Reexamination of Gertz v. Robert Welch, Inc. in Light of Lower Federal Court Public Figure Formulations*, 16 N. ILL. U. L. REV. 141, 165-66 (1995). This analysis is a subjective balancing test in which no one factor is dispositive. Waldbaum, 627 F.2d at 1295.

Ike is a limited purpose public figure because he voluntarily assumed a prominent role in

Citrus' controversial labor procedure. See Gertz, 418 U.S. at 351. All three elements of the analysis are satisfied since Ike played a role in Citrus' abusive labor practices, Cartman's statement addressed Ike's role in the human rights abuses, and Ike voluntarily accepted the position as Director of R&D at Citrus, thus accepting oversight responsibility for the procedures at the Mumbai manufacturing plant.<sup>3</sup>

### **1. The human rights abuses at Citrus constitute a public controversy.**

Matters of public concern include issues involving potential costs to taxpayers, corruption of public morals, or possible criminal activity. (J.A. at 17.) Contrary to the Fifteenth Circuit's swift dismissal of slave labor concerns at Citrus, human rights issues, especially those regarding migrant workers in third world countries, are at the forefront of topics garnering national and international public attention. See, e.g., United Nations, Universal Declaration of Human Rights, <http://www.un.org/en/documents/udhr/index.shtml> (last visited Oct. 1, 2009); Aaron Bernstein et. al., *A World of Sweatshops*, BUSINESS WEEK, November 6, 2000, [http://www.businessweek.com/2000/00\\_45/b3706008.htm](http://www.businessweek.com/2000/00_45/b3706008.htm). Further, the human rights violations in this case are significant. Citrus is a successful *Fortune* 500 company whose employment practices affect countless innocent workers. Its business practices have even further ramifications on industry-wide standards as competitors are forced to imitate Citrus' successful business model or risk losing additional market share.

In conducting the limited purpose public figure analysis, the Court must isolate the public controversy at issue. Waldbaum, 627 F.2d at 1296. A public controversy is a dispute that has "received public attention because its ramifications will be felt by persons who are not direct

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<sup>3</sup> For a discussion of a Director of Research & Development's responsibilities, see Dexter A. Hansen, *Job Descriptions Help Site*, <http://iso9k1.home.att.net/jobs/dranded.html> (last visited Oct. 1, 2009) (The Director of R&D is responsible for implementation and maintenance of the company R&D procedures, reporting on the performance and initiating improvements. The Director also acts as a liaison with external parties on matters relating to the procurement of services.).

participants.” Id. In Waldbaum, the D.C. Circuit held that a public controversy existed where the second largest supermarket cooperative in the nation pioneered various marketing tactics that were the subject of debate “within the supermarket industry and beyond . . . affect[ing] consumers and retailers.” 627 F.2d at 1298. Additionally, in Trotter v. Jack Anderson Enterprises, Inc., 818 F.2d 431, 436 (5th Cir. 1987), the Fifth Circuit determined that a public controversy existed where social turmoil was erupting due to labor disputes in a foreign country. There, the labor disputes involved a subsidiary of Coca-Cola, an American corporation. The court concluded that the disputes at the foreign bottling company constituted a public controversy because they captured the attention of the media, “human rights organizations, labor unions, and [shareholders].” Id.

Here, the controversy implicates human rights abuses in a third world country by a large American corporation, as opposed to its mere subsidiary. It involves issues that are the subject of common debate including the abuse of migrant workers, the affects of human rights abuses on consumers and other market participants, and the financial ramifications for Citrus’s shareholders. These considerations, in conjunction with the attention this issue will garner from human rights organizations and labor unions, demonstrate an obvious public controversy.

Finally, in determining the existence of a public controversy, courts have considered the level of press coverage that the issue has received. The caveat to this analysis occurs when issues constituting public controversies are exposed for the first time. This danger is realized in the case at bar. Human rights abuse is a hot issue that attracts attention from the public and the media. See Nike and Human Rights Abuses, DEMOCRACY NOW!, September 23, 1997, [http://www.democracynow.org/1997/9/23/nike\\_and\\_human\\_rights\\_abuses](http://www.democracynow.org/1997/9/23/nike_and_human_rights_abuses) (discussing the outcry from human rights and labor activists regarding the exploitation and mistreatment of workers by

Nike and Reebok). However, the clandestine human rights abuses occurring at Citrus went undisclosed until Cartman’s blog posting. In a similar scenario, the Fifth Circuit clarified that creating a public issue is not the same as revealing one and the first person to report on a pre-existing public controversy should not be held to a higher standard of liability. Trotter, 818 F.2d at 434. In this case, Cartman did not cause the later press coverage of Citrus’ human rights abuse, Citrus’ abusive labor practices did. See Id. (“[Publisher’s] articles did not cause the later press coverage of the labor violence, the labor violence itself did”).

## **2. Cartman’s blog posting relates to Ike’s involvement in the Citrus controversy.**

When conducting a limited purpose public figure analysis, courts consider whether the alleged defamation was connected to the plaintiff’s participation in the controversy. Waldbaum, 627 F.2d at 1298. In alleging that Ike was responsible for human rights abuses at Citrus, Cartman was also describing Ike’s role in the controversy. See Trotter, 818 F.2d at 436 (“in alleging that [plaintiff] was responsible for the anti-union violence, [defendant] was also describing [plaintiff’s] role in the controversy”). Cartman’s blog posting poignantly discusses the human rights abuses at Citrus and the responsibility that Ike must bear for said abuses as the Director of R&D. Armed with reliable information from an inside source, Cartman published this breaking news on *The Sludge Report* to alert the public about the inhumane business practices being imposed by Citrus.

## **3. Ike was situated at the forefront of Citrus’ human rights controversy.**

A person must play more than a trivial or tangential role in a controversy to be deemed a limited purpose public figure. The plaintiff must have either purposefully tried to influence the outcome or have been realistically “expected, because of his position in the controversy, to have an impact on the resolution.” Waldbaum, 627 F.2d at 1298. See also Butts, 388 U.S. at 155;

Chuy v. Philadelphia Eagles Football Club, 431 F. Supp. 254, 267 (E.D.Pa. 1977), aff'd 595 F.2d 1265 (3rd Cir. 1979) (holding that a person may be deemed a public figure based solely on her position). Court's have also considered whether an individual was actually involved in the procedures that led to the controversy. See Waldbaum, 627 F.2d at 1300 ("being an executive within a prominent and influential company does not by itself make one a public figure"); Time, Inc. v. Firestone, 424 U.S. 448, 454 (1976) (holding that responding to press inquiries does not necessarily imply that one plays a significant role in the controversy). As the Director of R&D, Ike was able to shape policy and procedures including the human rights abuses that were unquestionably depicted in the picture on Cartman's blog. See Wolston v. Reader's Digest Assn., Inc., 433 U.S. 157 (1979) (holding that courts must focus on the "nature and extent of an individual's participation in the public controversy giving rise to the defamation").

There is no mechanical analysis for defining a public figure but prior cases provide useful guidance. Trotter, 818 F.2d at 433. In Butts, this Court consolidated the appeals of two separate claims. In the first case, a university athletic director, employed by a private corporation, was deemed a limited purpose public figure based upon his prominence among coaches. 388 U.S. at 155. In the second case, this Court conferred limited purpose public figure status on a private citizen whose publicized statements about desegregation thrust him into the vortex of an important public controversy. Id. This Court held that the commonality between these two individuals was that both commanded continuing public interest and had sufficient access to channels of public communication to expose the fallacies of the alleged defamation. Id. Similarly, as a high-ranking executive at a public company in which retail employees nationwide wore buttons displaying his name, Ike commanded continuing public attention. Additionally, Ike has access to public channels of communication to refute any alleged defamatory statements.

Other decisions have also emphasized a plaintiff's specific actions when determining public figure status. In Waldbaum, the D.C. Circuit stressed that the plaintiff was a "mover and shaper of many of the [supermarket] cooperative's controversial actions." Id. Similarly, in Trotter, the plaintiff had responsibility for general overall policy at the plant and the Fifth Circuit held that by virtue of his position, the plaintiff was a central figure in important policy measures at the company. 818 F.2d at 433.

Likewise, Ike was hired by Citrus as a "genius" who could shape the company's growth by overseeing the development of its newest groundbreaking technologies. (J.A. at 3.) By virtue of his position as Director of R&D, Ike was a central figure in important policy measures. Ike's brilliance was publicly regarded as the employee led campaign involving "I Like Ike" buttons "celebrate[d] his innovations." Id. at 4. Ike is a limited purpose public figure because he "shap[ed] . . . the outcome of a specific public controversy", the human rights abuse of laborers assembling the ePlay Touché at Citrus' Mumbai plant. See Waldbaum, 627 F.2d at 1298.

One is not a public figure solely because they sought legal relief or happen to be involved in a newsworthy controversy. See Wolston, 433 U.S. at 157; Firestone, 424 U.S. 448. However, when a person accepts a leadership role with a renowned public company at which his position and production capability are continuously publicized, public figure status is appropriate. See Readers Digest Assoc. v. Marin Cty., 37 Cal. 3d 244, 255 (1984) (holding that the public figure determination was appropriate because plaintiffs' case was thrust into the public eye). Courts also look to a person's ability to access the media as a general consideration in determining public figure status. Lerman, 745 F.2d at 136-37. The logic underlying this analysis is that less protection is required for a person who has the ability to refute defamation on his own. As a high-ranking executive at a prominent public company, Ike has access to the media. In fact, after

being introduced to the media as the Director of R&D, Ike's work has received continuous praise on television and in magazines. (J.A. at 3.) Hence, Ike possesses the self-help capability envisaged by Lerman in its analysis of limited purpose public figures. 745 F.2d at 136-37.

The voluntary nature of a person's participation is only one factor to be considered and it is not controlling.<sup>4</sup> Even if the Court determines that Ike's involvement in the controversy was involuntary, he is still a limited purpose public figure. In Gertz, this Court clearly enunciated that a person may *be drawn into* a public controversy. 418 U.S. at 351. Individuals may be drawn into a controversy unintentionally but still assume a prominent role in its outcome. Waldbaum, 627 F.2d at 1298. To this end, courts have held that "unless [a person] rejects any role in the debate, he too has 'invited comment' relating to the issue at hand." Id. (citing Barbara Larkin Stocker, *An Analysis of the Distinction Between Public Figures and Private Defamation Plaintiffs Applied to relatives of Public Persons*, 49 S. CAL. L. REV. 1131, 1199-200 (1976)). Here, Ike may have been "a little shy," but he never rejected the publicity that accompanied his role at Citrus or his involvement with the development of the ePlay Touché at the Mumbai facility. (J.A. at 3.) In short, Ike was at the forefront of Citrus' public controversy because "a reasonable person would have concluded that [he] would play [a] . . . major role in determining the outcome of the controversy." Waldbaum, 627 F.2d at 1298.

An argument that Ike has been reticent to engage the media and does not appear as frequently as his brother in the press is unpersuasive to defeat limited purpose public figure status. The Fifth Circuit held that "while an individual can achieve public-figure status by aggressively seeking public attention, or by exercising his access to the media, an individual cannot erase his public-figure status by limiting public comment and [adopting] a low public profile." Trotter,

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<sup>4</sup> See Gertz, 418 U.S. at 345 (discussing the existence of involuntary public figures); see also Firestone, 424 U.S. at 476; Restatement (Second) of Torts § 580A (1965) (highlighting that a person's voluntary involvement in a controversy is not controlling).

818 F.2d at 435-36 (citing Hutchinson v. Proxmire, 443 U.S. 111, 136 (1979); Tavoulareas v. Piro, 817 F.2d 762, 772 (D.C. Cir. 1987); Rosanova v. Playboy Enterprises, Inc., 580 F.2d 859, 861 (5th Cir. 1978)).

**D. Cartman Is Not Liable Under An Actual Malice Standard Because He Neither Knowingly Nor Recklessly Circulated False Information About Ike Broflovski.**

The First Amendment requirement for defamation of a public figure is clear and convincing evidence of actual malice in the publication of false statements. Butts, 388 U.S. 130 (holding that public figures, like public officials, must also prove actual malice in order to recover in a defamation action). As a limited purpose public figure, Cartman is subject to this standard “to the extent that the allegedly defamatory communication relates to his role in [the] public controversy.” Gertz, 418 U.S. at 351. Here, the actual malice standard is appropriate because Cartman’s blog posting specifically addressed Ike’s role in the human rights abuses occurring at Citrus. (J.A. at 6.) Cartman is not liable for defamation under an actual malice standard because he neither intentionally nor recklessly defamed Ike.

Actual malice requires that a defendant either have knowledge that information is false or recklessly disregard the possibility of its falsehood. Sullivan, 376 U.S. at 285-86. Professor Chaos, Cartman’s informant, was an employee at Citrus who provided accurate information to Cartman regarding various products manufactured by the *Fortune* 500 giant. (J.A. at 5.) Cartman did not intentionally defame Ike because he believed, as had been the case in past dealings, that all of the information he was posting was truthful. (J.A. at 6.) (“Cartman has received reliable information from [Chaos] about . . . various Citrus products.”).

Moreover, Cartman did not recklessly disregard whether or not the information he posted on *The Sludge Report* was false. Recklessness exists when there is “a high degree of awareness of .

. . probable falseness” or there are “serious doubts as to the truth” of an assertion. Garrison v. Louisiana, 379 U.S. 64, 74 (1964); St. Amant v. Thompson, 390 U.S. 727, 730 (1968) (holding that reckless conduct is not measured by whether a reasonably prudent man would have published or investigated before publishing). Cartman believed that his posting was accurate and that he was merely a “loveable little fuzz-ball with a talent for telling the truth.” (J.A. at 6.)

The actual malice test employs a subjective analysis to discern a defendant’s actual beliefs regarding the truthfulness of his publication. Alioto v. Cowles Communications, Inc., 430 F. Supp. 1363, 1365-66 (N.D. Cal. 1977). Cartman was not required to conduct a thorough and objective investigation to defeat the actual malice standard because a failure to do so does not prove actual malice or “even necessarily raise a triable issue of fact.” St. Amant, 390 U.S. at 733. Furthermore, a publisher may rely solely on the investigation and conclusions of other reputable sources. Brewer v. Memphis Pub. Co., Inc., 626 F.2d 1238 (5th Cir. 1980); Barger v. Playboy Enterprises, Inc., 564 F. Supp. 1151, 1157 (N.D. Cal. 1983); Martin Marietta Corp. v. Evening Star Newspaper, 417 F. Supp. 947, 958-59 (D.D.C. 1976). Chaos provided Cartman with reliable information on numerous prior occasions. (J.A. at 5.) As an employee at Citrus, Chaos had a heightened ability to obtain information about issues within the company. Even if the Court determined that Chaos had a questionable reputation, actual malice cannot be found because Cartman corroborated Chaos’ statements with photographic evidence of the human rights abuses at Citrus’ Mumbai manufacturing facility. See Velle Transcendental Research Ass’n v. Sanders, 518 F. Supp. 512, 518-19 (D.C. Cal. 1981) (holding that even reliance on sources of doubtful reputation are acceptable when corroborated with one another).

In Butts, this Court found actual malice holding that the publisher seriously departed from good investigative standards by relying on a source he knew to be on criminal probation and not

using an expert to confirm the legitimacy of the story. Conversely, in St. Amant, nothing in the record indicated the publisher's awareness of the probable falsity of the statements. 390 U.S. at 733. The actual malice threshold could not be met despite the publisher's failure to verify information, inattention to consequences for the plaintiff, and mistaken belief that he had no responsibility because he was reiterating information from a third party. Id.

Here, Professor Chaos was not on criminal probation and, as an employee at Citrus, he could be considered an expert on information related to the company. Furthermore, Cartman took precautions in addition to those taken by the publisher in St. Amant because his source corroborated the information with photographic evidence. The record is wanting of any evidence that Cartman published the story at issue with actual malice.

An argument that Cartman should be liable under an actual malice standard because he had a predisposed negative impression of Citrus is unpersuasive. Primarily, there is no evidence that Cartman's personal agenda interfered with his professional blogging career when, in fact, he considered himself to have a penchant for uncovering and reporting the truth. (J.A. at 6.) Furthermore, ill will or desire to injure another party does not have the effect of taking the communication outside the protection of the Constitution. Ill will or animus has no more effect than to supplement an inference that the publisher knew his statement was untrue or disregarded its falsity. See Masson v. New Yorker Magazine, Inc., 501 U.S. 496, 510 (1991); Harte-Hanks Commc'ns, Inc. v. Connaughton, 491 U.S. 657, 666 (1989); Restatement (Second) of Torts § 580A cmt. d. Furthermore, Cartman would not lose his First Amendment protection upon a showing that his blog posting lacked objectivity. New York Times v. Connor, 365 F.2d 567, 576 (5th Cir. 1966) (a publisher need not provide an objective picture); Time, Inc. v. Pape, 401 U.S. 279 (1971) (a publisher need not provide an accurate picture).

There is a potential chilling effect on the freedom of speech and press from protracted litigation. Courts may give effect to these concerns by finding no triable issues of fact unless actual malice may be proved by clear and convincing evidence. Bose Corp. v. Consumers Union, 466 U.S. 485 (1984). For these reasons, summary judgment is a preferred remedy in defamation cases that involve the actual malice standard. Readers Digest, 37 Cal. 3d at 252.

Here, Cartman depended upon a reliable source, Chaos, from whom he had received a plethora of accurate information in the past. (J.A. at 5.) The record is absent any evidence to support an inference of malice on Cartman's behalf. In fact, there is no evidence to indicate that the crux of Cartman's assertions were false at all. (J.A. at 7.) ("Broflovski stipulated that he had made a number of visits to Mumbai . . . [and] the scan [of the photograph] revealed no other digital distortions."). The facts are insufficient to prove actual malice by clear and convincing evidence and thus, summary judgment must be granted in Cartman's favor.

Even if Cartman is deemed a private figure, he should be granted summary judgment as his actions were not contrary to those of a reasonable person.<sup>5</sup> See Restatement (Second) of Torts § 580B. Human rights abuse is a "hot news" issue that requires immediate disclosure to the public. See generally Masson, 501 U.S. 496. Furthermore, Cartman used a reliable source from whom he had previously received accurate information about Citrus. Availability of sufficient time and opportunity to investigate the truth of the statement is another factor in determining whether the publisher was negligent. See Restatement (Second) of Torts § 580B. In the case at bar, Cartman unsheathed relevant, pressing news that he deemed important to report because human rights abuse is a matter of public concern. While Cartman was unable to engage in a thorough investigation of the claims, he had confidence in the accuracy of this time sensitive information

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<sup>5</sup> As per Gertz, States can allow private individuals to recover damages for defamation under any standard except strict liability. 418 U.S. 323. The Silverado Supreme Court has adopted language from the Second Restatement of Torts to impose a negligence standard for private figure defamation plaintiffs.

as it came from a reliable source and was supported by photographic evidence. (J.A. at 5.) Accordingly, even under a negligence standard, Cartman can not be found liable for defamation and summary judgment should be granted in his favor.

### **CONCLUSION**

For the foregoing reasons, Eric Cartman, Petitioner, respectfully requests that this Court reverse the decision of the United States Court of Appeals for the Fifteenth Circuit, denying Respondent's motion to compel discovery and granting Petitioner's motion for summary judgment.

Respectfully submitted,

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TEAM NO. 105  
COUNSEL FOR PETITIONER