
No. 09-2701

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2009

ERIC CARTMAN,

Petitioner,

- v. -

IKE BROFLOVSKI,

Respondent.

*ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FIFTEENTH CIRCUIT*

BRIEF FOR PETITIONER

Team 106
Counsel for Petitioner

QUESTIONS PRESENTED

- I. Whether Eric Cartman is protected by a qualified reporter's privilege against court-compelled disclosure of the identity of an anonymous source in an online defamation claim.
 - A. Whether the First Amendment creates a qualified reporter's privilege against court-compelled discovery of sources.
 - B. If A is answered in the affirmative, whether Eric Cartman qualifies as a reporter for the purposes of this defamation suit and is, therefore, entitled to shield the identity of his anonymous source.
- II. Whether Eric Cartman, author of the Internet blog *The Sludge Report*, should be held liable on an actual malice standard in an online defamation claim brought by Ike Broflovski on the grounds that Broflovski is a limited-purpose public figure.

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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

Citrus, a *Fortune 500* consumer electronics company founded in 1992, climbed the ranks of its industry in the late 1990s and successfully coasted through the dot.com bust of the early 2000s thanks to its most famous product, the ePlay. (J.A. at 2.) Today, Citrus dominates the consumer electronics industry, cornering the marketplace with its consumer electronic devices. (J.A. at 2.) Citrus' ePlay has become a status symbol among teenagers and twenty-somethings throughout the country. (J.A. at 2.) Its successor, the ePlay Touché, promises to permanently entrench the ePlay brand as the premier portable music player on the market. (J.A. at 2.)

In 2006, Citrus' famous CEO, Kyle Broflovski ("Kyle"), promoted his brother Ike Broflovski ("Ike") to Director of Research and Development ("DR&D") and charged him with overseeing new product development, including the ePlay Touché. (J.A. at 3.) On August 7, 2006, Kyle hosted a press conference announcing, "I have hired my genius brother Ike to oversee the development of a new line of Citrus products. Ike's a little shy, but one day may just be as famous as I am. Luckily our customers don't care about personalities; they care about consumer electronics. So pay no attention to the man behind the curtain!" (J.A. at 3.) Ike reluctantly agreed to participate in the press conference, simply thanked his brother and announced that he looked forward to "pushing Citrus, its employees, and its products to new heights." (J.A. at 3.)

The Associated Press ("AP") published a story about the press conference, which was printed in several newspapers. (J.A. at 3.) Since that time, Kyle has gone out of his way to publicly praise Ike's work. (J.A. at 3.) Ike's photo, title, and contact information appear on Citrus' Web site. (J.A. at 4.) Ike has even developed fans, led by Citrus MegaStore employees who made "I Like Ike" buttons – featuring his face – to celebrate his innovations. (J.A. at 4.)

Eric Cartman ("Cartman"), sole proprietor of Cartman's Computer World, became a part-

time blogger for profit in June 2005. (J.A. at 4.) Cartman’s Web-based audience exceeds 100,000 readers, and he generates ad revenue based on readership. (J.A. at 4.) His topics range from celebrity gossip to international politics and are mostly taken from internet and newspaper headlines. (J.A. at 4.) Cartman’s site often proclaims that major corporations, particularly Citrus, engage in international trade and exportation of American jobs, while systematically oppressing third world populations and driving smaller companies out of business. (J.A. at 4.)

As with any reporter, Cartman relies on confidential sources for a host of information, such as local and state government scandals. (J.A. at 4-5.) Unless otherwise requested, all persons sending confidential information to Cartman’s email remain completely anonymous, and Cartman has no way to identify the confidential sources. (J.A. at 5.) On June 7, 2008, Cartman received an email from Professor Chaos (“Chaos”), who works for Citrus. (J.A. at 5.) Cartman met Chaos, at an electronics trade show two years ago, and since then Chaos has routinely provided Cartman with reliable tips. (J.A. at 5.) In the email, Chaos alleged that Citrus was engaging in human rights abuses at its Mumbai factory. (J.A. 4-5.) The email included a digital photograph of Citrus workers wearing very little protection while using assembly lines and machines to assemble the ePlay Touché. (J.A. at 5.) The photo appeared to depict Ike walking through the factory and yelling at workers with a group of subordinates in tow. (J.A. at 5.)

Cartman immediately put a story together and published it to his blog the next day under the headline “Citrus Engaging in Acts of Modern Slavery?” (J.A. at 6.) The blog entry detailed the working conditions at Citrus’ Mumbai factory and credited Chaos as the source. (J.A. at 6.) Cartman’s story also featured the digital photograph, in which he identified Ike (J.A. at 6.) He closed the blog entry stating that if the mainstream media wouldn’t do their jobs, then he would. (J.A. at 6.)

Within days, the article attracted mainstream media attention, including the interest of top-rated cable news show host Keith McRiley (“McRiley”). (J.A. at 6.) On August 19, 2008, McRiley, in urging his viewers to boycott Citrus products, awarded Ike the “Most Heinous Individual in the Galaxy” award, and credited Cartman with breaking the story. (J.A. at 6.) The next day, Citrus products were pulled from retail shelves nationwide and its stock plunged. (J.A. at 6-7.) Ike refused media demands for a response and instead delivered a message through his attorney claiming that the photo was a fake, and justice would be sought. (J.A. at 7.)

On September 20, 2008, Ike filed a defamation suit against Cartman in the State of Silverado, alleging the information in the blog was false. (J.A. at 1.) On October 14th, Cartman removed the case to the Western District of Silverado on diversity grounds. (J.A. at 1.) On January 8, 2009, Ike moved to compel discovery pursuant to Fed. R. Civ. P. 37, asking that Cartman reveal his confidential source. (J.A. at 1.) Cartman refused, asserting a qualified reporter’s privilege, and moved for summary judgment. (J.A. at 2.) The district court denied Ike’s motion for discovery, and granted Cartman’s motion for summary judgment, finding Ike was a limited purpose public figure and that he subsequently failed to prove that Cartman acted with actual malice. (J.A. at 2) On appeal, the circuit court reversed both district court rulings, finding that Ike was a private citizen and the standard of fault was negligence. (J.A. at 32.) On August 24, 2009, this Court granted the petition for a writ of Certiorari. (J.A. at 33.)

SUMMARY OF THE ARGUMENT

As a member of America's free press, Petitioner Cartman should receive a First Amendment qualified reporter's privilege preventing forced disclosure of a confidential source in discovery for a civil suit. Respondent Ike, in pursuit of a defamation claim, may exercise his right to defeat this privilege, yet the record evidences a failure to do so. Ike's prominent status as a product

developer for one of the country's most popular consumer-electronics companies has pulled him out of obscurity and into American culture as a limited purpose public figure. Therefore, his libel suit against Cartman must be grounded on actual malice, rather than negligence. This increased burden, which he must prove with clear and convincing evidence, remains unsatisfied and Ike's claim should be defeated by a reversal of the circuit court's erroneous decision.

The First Amendment protects citizens and the press alike by creating a relatively open forum for criticism of the government and public figures. Such effect prevents a chill on exchange of ideas in our society. Accordingly, the Supreme Court decision in *Branzburg* resulted with many circuits interpreting it as creating a qualified reporter's privilege. This privilege, by protecting journalists from court-compelled disclosure of confidential sources, encourages informants to provide journalists with otherwise hard-to-discover information.

To receive the privilege, one must establish himself as a member of the press. Cartman successfully achieves this status, using the two-part *Von Bulow* test, by showing (1) he began a career as blogger with specific intent to (2) disseminate news to his growing audience.

A plaintiff may however pierce the reporter's privilege and force disclosure of a confidential source if he demonstrates that doing so (1) is relevant, (2) compelling, and (3) discovery of the source cannot be obtained by other means or he has exhausted possibilities of discovering the informant's identity on his own. Ike falls short of meeting these standards since revealing Chaos' identity is not a necessary, and he has performed minimal discovery attempts, while the courts require time consuming, laborious efforts in satisfying that prong.

To be successful in his suit, Ike must clearly and convincingly prove that Cartman published the alleged defamatory statements with actual malice. This burden of proof exists due to Ike's status as a limited purpose public figure.

Per the D.C. circuit's *Waldbaum* test used by the district court, Ike qualifies as a limited purpose public figure since (1) Cartman's article directly addressed (2) Ike's participation in (3) Citrus' role in an ongoing, general controversy regarding human rights violations committed by American companies in their outsourced manufacturing to Third World countries. Ike also meets the two additional requirements set forth by the second circuit's *Lerman* test. First by successfully inviting media attention, and voluntarily accepting a powerful position within a well-known company which posted Ike's photo on Citrus' Web site. This attention created "Ike fans" wearing buttons with his name and face. Secondly, Ike benefited from regular media access since Kyle, his brother, regularly praised him in the media; and his relationship with his brother ensured that readily available media attention was never more than a phone call away.

Finally, Ike must prove Cartman published the alleged defamatory statements with actual malice, clearly and convincingly. Actual malice is defined as known falsity or reckless disregard for the truth. As a matter of law, Ike cannot prove a known publishing of false information by Cartman since nothing in the record evidences adequate falsity. While the photo in question might contain a superimposed image of Ike, his relation to the photo's content is undeniable and the images themselves are accurate and undoctored. Accordingly, the law protects statements that are substantially true. Hence, Ike faces near impossibility in proving a knowing disregard for the truth in Cartman's story. Ike's attempt to prove recklessness requires a showing that the journalist harbored serious doubts as to the veracity of the information in which his story is based. However, our record indicates that Cartman's confidential source maintained a track record of reliability in predicting Citrus' product releases and as such, Cartman had no reason to doubt the veracity of other confidential information he received from Chaos regarding working conditions from within a Citrus factory.

ARGUMENT

Ordinarily, an appeal of a ruling on a Rule 37 motion to compel discovery is subject to a deferential abuse of discretion standard. (J.A. 22.) However, the determination of the existence of a privilege asserted under Rule 26(b)(5) is a question of law. (J.A. 22.) Therefore, we review claims of privilege as mixed questions of law and fact subject to *de novo* review. *See In re Grand Jury Investigation*, 974 F.2d 1068, 1071 (9th Cir. 1992). Similarly, a review of a grant of summary judgment on appeal is subject to *de novo* review. *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962). Summary judgment review is governed by the standard used under Federal Rule of Civil Procedure 56(c). *Adcock v. Chrysler Corp.*, 166 F.3d 1290, 1292 (9th Cir. 1999). In viewing evidence in the light most favorable to the nonmoving party, we must determine whether there are any genuine issues of material fact and whether the appellate court correctly applied the relevant substantive law. *Devereaux v. Abbey*, 263 F.3d 1070, 1074 (9th Cir. 2001).

I. THE DISTRICT COURT PROPERLY GRANTED CARTMAN’S MOTION FOR SUMMARY JUDGMENT BECAUSE A FIRST AMENDMENT QUALIFIED REPORTER’S PRIVILEGE PROTECTS HIM FROM DISCLOSURE OF A CONFIDENTIAL SOURCE, AND IKE FAILS TO PIERCE THE PRIVILEGE.

The First Amendment of the United States Constitution says, “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech; or of the press; or the right of people peaceably to assemble, and to petition the government for a redress of grievances.” U.S. Const. amend. I. The doctrine of the freedom of the press is “universally acknowledged.” *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 366 (1995). The Freedom of the Press, which every Person in the United States at present enjoys, is a privilege of infinite importance, for which we have fought and bled. *Id.*

A. The Supreme Court, and a Clear Majority of Circuits Agree, in a Number of Situations, a Qualified Reporter's Privilege Against Court-Compelled Discovery of Confidential Sources Exists Under the First Amendment of the Constitution.

1. Branzburg permits a First Amendment qualified reporter's privilege.

In the only Supreme Court case to directly rule on the existence of a qualified reporter's privilege protecting newsmen from revealing their sources, the Court held, to require newsmen to appear and testify before state or federal grand juries would not abridge the freedom of speech and the press, as guaranteed by the First Amendment. *Branzburg v. Hayes*, 408 U.S. 665, 667 (1972). However, in recognizing the significance of a free press for the country's welfare, the Court did suggest that news-gathering does qualify for First Amendment protection since “without some protection . . . freedom of the press could be eviscerated.” *Id.*

Today, American reporters remain free to seek news from any source, by any legal means. *Id.* at 681. *Branzburg* made no attempt to require the press to publish its sources, or indiscriminately disclose them upon request. *Id.* at 681-82. Rather, the court in *Branzburg* addressed the specific obligation of reporters to respond to grand jury subpoenas and to answer questions regarding criminal investigations. *Id.* at 682. The majority opinion states that only where news sources themselves are implicated in a crime or possess information relevant to the grand jury's task, need they or the reporter be concerned about grand jury subpoenas. *Id.* at 691.

Justice Powell's concurrence said “a claim to privilege should be judged on its facts by the striking of a proper balance between the freedom of the press and the obligations of all citizens to give reliable testimony with respect to criminal conduct.” *Id.* at 711. Justice Stewart dissenting in *Branzburg*, states “no less important to the news dissemination process is the gathering of information.” *Id.* at 728. Without freedom to acquire information, the right to publish would be impermissibly compromised. *Id.* The right to gather news implies a right to a confidential relationship between reporter and source. *Id.* at 729. Informants are critical to the news-gathering

process, and the promise of confidentiality may be necessary to the founding and maintenance of productive relationships between newsmen and informants. *Branzburg*, 408 U.S. at 730.

It is of greatest concern when governmental officials possess unchecked power to compel disclosure of information received in confidence; and an un-American environment of “self-censorship” is likely to arise where sources would be deterred from giving valuable information, and reporters would be deterred from publishing it. *Id.* at 731, citing *Smith v. California*, 361 U.S. 147, 149-154 (1959); *New York Times Co. v. Sullivan*, 376 U.S. 254, 279 (1964).

When a court-ordered investigation impinges on First Amendment rights, the government must show that the inquiry is of “compelling and overriding importance” and must “convincingly” demonstrate the investigation is “substantially related” to the information sought. *Branzburg*, 408 U.S. at 740. Further, governmental officials must illustrate a valid inference that the witness in question has sought information, and no other means, less destructive of Amendment liberties, exist to reasonably obtain the information. *Id.*

2. *The vast majority of circuits, in applying Branzburg, recognize a qualified reporter’s privilege.*

Many federal courts interpret *Branzburg* as endorsing a qualified reporter’s privilege derived from the First Amendment, in situations other than grand jury investigations, thanks to a concurring opinion by Justice Powell. *Id.* at 709-10. Justice Powell sided with the majority in denying a First Amendment privilege, but also emphasized that the decision was limited to the case’s particular fact pattern. *Id.* And since 1972, most courts have agreed that there is a qualified privilege protecting confidential information held by journalists or people doing work similar to journalism. See, e.g., *Bruno & Stillman, Inc. v. Globe Newspaper Co.*, 633 F.2d 583, 595-96 (1st Cir. 1980); *Gonzales v. NBC*, 194 F.3d 29 (2d Cir. 1999); *Titan Sports, Inc. v. Turner Broad. Sys. (In re Madden)*, 151 F.3d 125, 128 (3d Cir. 1998); *LaRouche v. National Broadcasting*

Company, 780 F.2d 1134 (4th Cir.1986); *Miller v. Transamerican Press, Inc.*, 621 F.2d 721 (5th Cir. 1980); *Shoen v. Shoen*, 5 F.3d 1289, 1292 (9th Cir. 1993); *Silkwood v. Kerr-McGee Corp.*, 563 F.2d 433, 437 (10th Cir. 1977); *Price v. Time*, 416 F.3d 1327 (11th Cir. 2005), *Zerilli v. Smith*, 656 F.2d 705, 711 (D.C. Cir. 1981); *But see, In re Grand Jury Proceedings*, 810 F.2d 580, 584-85 (6th Cir. 1987), *McKevitt v. Pallasch*, 339 F.3d 530 (7th Cir. 2003).

The First Circuit recognizes a qualified reporter's privilege, and requires the party seeking information to satisfy all conditions of the balancing test outlined by Justice Stewart. *See, Bruno & Stillman, Inc.*, 633 F.2d at 595-96 (it is important when courts are faced with enforcing requests for the discovery of materials used in the preparation of journalistic reports to be aware of the possibility that the unlimited, or unthinking allowance of such requests will impinge upon First Amendment rights); *followed by United States v. LaRouche Campaign*, 841 F.2d 1176, 1181-82 (1st Cir. 1988); *Cusumano v. Microsoft Corp.*, 162 F.3d 708, 716-17 (1st Cir. 1998).

The Second Circuit acknowledges a broad qualified reporter's privilege extending to confidential and non-confidential sources for civil and criminal cases. Parties seeking information are required to satisfy conditions of a balancing test. *See, Gonzales*, 194 F.3d at 29 (looking to the larger concerns of a reporter's ability to collect and disseminate information, the court reaffirms that the qualified privilege for journalists applies to non-confidential, as well as to confidential information); *United States v. Burke*, 700 F.2d 70, 77 (2d Cir. 1983) (the court holds that no distinction should be drawn between civil and criminal cases when balancing the interest of the parties); *Von Bulow v. Von Bulow* 811 F.2d 136, 142 (2d Cir. 1987) (holding the public interest in non-disclosure of a journalist's confidential sources outweigh the public and private interest in compelled testimony); *N.Y. Times Co. v. Gonzales*, 459 F.3d 160, 169-70 (2d Cir. 2006) (there is a First Amendment privilege, applicable in civil actions and in all phases of a

criminal prosecution, that protects reporters from compelled disclosure of confidential sources).

The Third Circuit recognizes a broad qualified reporter's privilege, and similarly relies on satisfaction of a balancing test. *See, In re Madden*, 151 F.3d at 128, *citing Riley v. City of Chester*, 612 F.2d at 708 (3d Cir. 1979) (journalist's privilege for civil cases); *United States v. Cuthbertson*, 630 F.2d 139 (3d Cir. 1980) (journalist's privilege for criminal cases); *United States v. Criden*, 633 F.2d 346, 356-357 (3d Cir. 1980) (when countervailing constitutional concerns are at stake a qualified reporter's privilege must be established by a balancing test).

The Fourth Circuit allows the privilege when there is (1) evidence of governmental harassment or "bad faith," resulting from the grand jury subpoena or, (2) the source is confidential. *See Ashcraft v. Conoco*, 218 F.3d 282, 287 (4th Cir. 2000) (the privilege will be overcome when society's need for the confidential information outweighs the intrusion on the reporter's First Amendment interests); *La Rouche*, 780 F.2d at 1139 (regarding defamation, when the object of discovery is a journalist's confidential source, it is necessary for the court to balance the interests involved to determine whether the journalist's privilege will protect the source).

The Fifth Circuit mirrors the majority of its brethren by recognizing a qualified reporter's privilege which can be satisfied through a balancing test. *See, Miller*, 621 F.2d at 725 (holding that in civil libel suits, a reporter possesses a qualified privilege not to disclose the identity of confidential informants); *In re Selcraig*, 705 F.2d 789, 792 (5th Cir. 1983) (recognizing the First Amendment shields a reporter from being required to disclose the identity of persons who have imparted information to them in confidence).

The Ninth Circuit recognizes a broad qualified privilege, requiring satisfaction of a balancing test. *See, Shoen*, 5 F.3d at 1292 (when facts acquired by a journalist in the course of

news-gathering become the target of discovery, a qualified privilege against compelled disclosure comes into play consistent with interpretation of *Branzburg*).

The Tenth Circuit upholds a broad qualified privilege in civil cases through satisfaction of a balancing test. *See, Silkwood*, 563 F.2d at 437 (inferring that *Branzburg* creates a privilege, and holds that a reporter responding to a subpoena may claim a privilege in relationship to questions which probe his sources); *Donohue v. Hoey*, 109 Fed. Appx. 340, 370 (10th Cir. 2004) (holding the district court properly concluded reporters deserved protection via the privilege).

The Eleventh Circuit recognizes a qualified privilege and requires the party seeking information to satisfy a balancing test. *See, United States v. Caporale*, 806 F.2d 1487, 1504 (11th Cir. 1986) (information may only be compelled from a privileged reporter if the party requesting the information can show it is highly relevant, necessary to the proper presentation of the case, and unavailable from other sources); *followed by Price*, 416 F.3d at 1327.

The D.C. Circuit permits a qualified privilege in civil cases. *See, Zerilli*, 656 F.2d at 711 (holding that Justice Powell, who cast the deciding vote in *Branzburg*, wrote a concurring opinion stating that courts can determine whether a privilege applies by using a balancing test, and although *Branzburg* may limit the scope of the reporter's First Amendment privilege in *criminal* proceedings, this circuit has previously held that in *civil* cases, where the public interest in effective criminal law enforcement is absent, that case is not controlling); *Carey v. Hume*, 492 F.2d 631, 636 (D.C. Cir. 1974) (it appears to us that *Branzburg*, in language if not in holding, left intact, insofar as civil litigation is concerned, the approach essentially that the court will examine facts on a case-by-case basis weighing the need for disclosure against the claims of the newsman's need for confidentiality of the source).

Joining a small minority of courts, the Sixth Circuit does not recognize a reporter's

privilege. *See, In re Grand Jury Proceedings*, 810 F.2d at 584-85 (stating that *Branzburg* does not support a qualified immunity for reporters). *In re Grand Jury Proceedings* is distinguishable from the facts in our case as it applies to the duty of a reporter to testify before a grand jury. However, the case at bar involves a civil suit, not a grand jury subpoena. (J.A. at 2.)

The Seventh Circuit ruled in a factually distinct situation that the production of tape recordings for use in an Irish trial was sound since the known source indicated he did not object to the disclosure of the tapes. *McKevitt*, 339 F.3d at 532. However, in reading this opinion from Judge Posner, one could conclude that this circuit does not recognize a privilege. *See, McKevitt*, 339 F.3d at 531-532 (stating courts have been “skating on thin ice” when interpreting non-confidential information to be protected by a reporter’s privilege, and Posner added that some courts have ignored *Branzburg* by treating the majority opinion as just a plurality opinion). Posner's opinion is however distinguishable from our case because his comments were directed at grand jury proceedings and non-confidential sources. The facts of our case show the source is confidential, and the claim is a civil claim and not a grand jury subpoena. (J.A. at 2.)

In the Eighth Circuit the question of a reporter’s privilege remains open. *See, Cervantes v. Time, Inc.*, 464 F.2d 986, 993 (8th Cir. 1972) (seeking compulsory disclosure of anonymous news sources without first inquiring into the substance of a libel allegation would utterly emasculate the fundamental First Amendment principles); *In re Grand Jury Subpoena Duces Tecum*, 112 F.3d 910, 918 (8th Cir. 1997) (recognizing that some courts have interpreted *Branzburg* as establishing a qualified news reporter's privilege).

The evidence offered here establishes a circuit majority respecting existence of a qualified reporter's privilege. These courts have found that the privilege springs from this Court's *Branzburg* opinion. It therefore puzzles logic that the Fifteenth Circuit chose to join a weaker

pool of courts, rather than adhering to a majority view that protects freedom of the press. We therefore request that this Court, consistent with *Branzburg* and the majority of circuits, find there is a qualified reports privilege under the First Amendment of the U.S. Constitution.

B. Cartman's Intent to Disseminate News At the Inception of His News-Gathering Process Evidences His Status as a Journalist, and Entitles Him to a Reporter's Privilege Which He Fails to Overcome When Balancing His Claim Against of the Public Versus His Claim.

1. Cartman is a journalist because he created a blog, where he possessed intent to disseminate topical news information from the inception of his news gathering.

The Supreme Court prevents excessive scrutiny when determining who qualifies as a journalist by recognizing that “liberty of the press is not confined to newspapers and periodicals.” *Lovell v. Griffin*, 303 U.S. 444, 452 (1938). That the “Constitution specifically selected the press, which includes not only newspapers, books, and magazines, but also humble leaflets and circulars” evidences the press’ “important role in the discussion of public affairs.” *Mills v. Alabama*, 384 U.S. 214, 219 (1966).

This Court reinforced its broad definition of press with the highly quotable assertion that a “lonely pamphleteer” stands alongside a “large metropolitan publisher” as a member of the press. *Branzburg*, 408 U.S. at 704. Then just over a decade ago, as the Internet became a major media outlet, offering content “as diverse as human thought,” the Court wasted no time in acknowledging that “the use of Web pages, mail exploders, and newsgroups” can establish an individual as a member of the press, deserving First Amendment protections. *Reno v. American Civil Liberties Union*, 521 U.S. 844, 870 (1997).

In following this Court, many circuits agree “the medium an individual uses to provide his investigative reporting to the public does not make a dispositive difference in the degree of protection accorded to his work.” *Cusumano*, 162 F.3d at 714. What does matter in defining a

member of the press is (1) whether the person seeking to invoke the privilege had intent to use the material sought, gathered, or received to disseminate information to the public, and (2) whether such intent existed at the inception of the news-gathering process. *Shoen*, 5 F.3d at 1293, quoting *Von Bulow*, 811 F.2d at 144. The Third Circuit added another prong to this formula by requiring the journalist to be “engaged in investigative reporting.” *In re Madden*, 151 F.3d at 131. In applying these three parameters, we now turn to the record and apply this test to establish Cartman's legal status as a journalist for purposes of this suit.

In *Shoen*, the Ninth Circuit found an investigative author, motivated by profit, was a member of the press since he undertook “research with the intention of a writing a book.” 151 F.3d at 1293. Additionally, “what makes journalism journalism is not its format but its content.” *Id.* Focusing here on “intent to disseminate news to the public from inception,” the record shows that Cartman established his blog to earn income by disseminating news related to celebrity gossip and world politics. (J.A. at 4.) Using this analysis, Cartman's journalistic activities are equal to, if not greater, than those of the book author. Cartman boasts a growing audience of over 100,000 readers, and the attention his Mumbai factory story received from mainstream media eventually led to a 25% drop in Citrus' stock value. (J.A. at 4-6.) Combining his intent to generate income by disseminating his news-gathering to an audience, Cartman satisfies the first and second prong of the test because he undertook a career as a blogger with intent to distribute newsworthy information to his public audience, which continues to grow.

The final prong, created by the Third Circuit, requires evidence of Cartman's involvement in investigative reporting. *In re Madden*, 151 F.3d at 131. This circuit found that an author of fiction (*Madden*) was not conducting investigative reporting, rather he was “disseminating hype not news” by creating a “piece of art or entertainment” based on promotional information given

to him by his employers. *In re Madden*, 151 F.3d at 130. Alternatively, this same court found that a reporter, who published a story in the *Saturday Evening Post* after receiving a confidential tip from an anonymous source using a pseudonym, was involved in traditional, investigative reporting. *Id.* at 129-30, citing *Baker v. F & F Investment*, 470 F.2d 778, 780 (2d Cir. 1972).

Cartman's activities are distinguishable from Madden's, but closely resemble those of the author from *Baker*. Cartman publishes stories dealing with celebrities, politics, and technology. (J.A. at 4.) Disseminating such information resembles traditional journalism more than Madden's "fictional works." *In re Madden*, 151 F.3d at 128-31. Also, Cartman maintains contact with sources by providing his email address and promising confidentiality. (J.A. at 5.) Seeking tips from anonymous sources, with intent to publish breaking news, mirrors the actions of the reporter in *Baker* who was afforded journalist status by the court. As a result, it is likely that Cartman would be found a journalist, satisfying the final part of the analysis.

This Court should find that Cartman qualifies as a reporter when he intended to disseminate his information to the public from the inception of his news gathering, evidenced by his undertaking a career as a blogger, his publishing of the information acquired, the public's reaction to his blog, and its growing audience. (J.A. at 2-6.) Cartman is also involved in "investigative reporting" since he conducts traditional journalism by publishing stories about world news, technology, and politics; and reaches out to confidential sources by providing an avenue for anonymous contact. Combining these findings confirms the identity of Cartman as a reporter, deserving protection under the reporter's privilege established in the First Amendment.

2. *Cartman is protected from revealing Chaos' identity since Ike fails to prove revealing the source is necessary to his claim and since he did not exhaust alternative means of discovering the confidential source.*

Since *Branzburg* created the constitutional reporter's privilege in 1972, a majority of circuits have arrived at a nearly uniform method of determining when and how a plaintiff defeats the

privilege, thereby forcing a defendant journalist to disclose a confidential source. Based on the *Branzburg* balancing approach discussed by Justices Powell and Stewart, the privilege provides journalists “access to the court on a motion to quash” disclosure of a confidential source. *Branzburg*, 408 U.S. at 710. The motion to quash is granted on a “case-by-case,” factual basis “by the striking of a proper balance between freedom of the press and the obligation of all citizens to give relevant testimony with respect to criminal conduct.” *Id.* While *Branzburg* focused on criminal cases, a majority of circuits have also ruled “a privilege should be readily available in civil cases,” and “a balancing approach should be applied.” *Zerilli*, 656 F.2d at 712.

Even though when the journalist is a party “the equities weigh somewhat more heavily in favor of disclosure,” to “routinely grant motions seeking compulsory disclosure of anonymous news sources without first inquiring into the substance of a libel allegation would utterly emasculate the fundamental principles that underlay . . . constitutional restrictions” protecting a journalist’s confidential sources. *Zerilli*, 656 F.2d at 714; *Cervantes*, 464 F.2d at 993.

In establishing that Cartman invokes the reporter’s privilege the burden then shifts to the “requesting party,” Ike, “to overcome the privilege.” *Shoen*, 5 F.3d at 1296. In almost complete accord, the circuits determine the reporter’s privilege can be overcome using a three-part balancing test: (1) whether the information is relevant, (2) whether there is a compelling interest in the information, and (3) whether the information can be obtained by alternative means. *LaRouche*, 780 F.2d at 1139, citing *Miller*, 621 F.2d at 726; *Zerrilli*, 656 F.2d at 713; *Garland v. Torre*, 259 F.2d 545 (2d. Cir 1958); *Riley v. City of Chester*, 612 F.2d at 716-17; *Silkwood*, 563 F.2d at 438; *Caporale*, 806 F.2d at 1504.

The Court may find the identity of Chaos is relevant to Ike’s motion. In a case similar to ours, the Fifth Circuit found that the identity of a confidential source used by an editor and

publisher was relevant to plaintiff's libel suit. *Miller*, 621 F.2d at 726.

However, the second prong examines necessity, and requires “concrete demonstration” that revealing a defendant’s sources will lead to “persuasive evidence on the issue of malice.” *Cervantes*, 464 F.2d at 994. Such a demonstration overcomes the privilege when revealing a confidential source’s identity is the only way to show a journalist recklessly relied on a potentially untruthful source. *Carey*, 492 F.2d at 637; *Miller*, 621 F.2d at 726; *Price*, 416 F.3d at 1344. The heavy burden of proof faced by a libeled plaintiff will “often make discovery of confidential sources critical.” *Carey*, 492 F.2d at 634. However, the plaintiff, during pretrial discovery must still uncover some factor which supports the conclusion “the defendant in fact entertained serious doubt as to the truth of the matters published.” *Cervantes*, 464 F.2d at 994.

While the Fifteenth Circuit found revealing Chaos’ identity will aid in satisfying this “necessity,” we disagree. (J.A. at 26.) The Fifteenth Circuit uses a D.C. Circuit ruling to illustrate the point that a source’s identity is necessary evidence in evaluating his or her trustworthiness; thereby making said identity a critical determinative factor in measuring a journalist’s reckless reliance on such source. *Carey*, 492 F.2d at 637; (J.A. at 26.) This analysis cannot apply to our case due to distinguishing differences between *Carey* and Ike's claim. In *Carey*, a journalist relied on a one-time, eyewitness report and failed to research the eyewitness’ credibility. *Carey*, 492 F.2d at 632-33. This led the D.C. Circuit to conclude the veil of confidentiality must be lifted to prove the journalist’s recklessly relied on an eyewitness. *Id.* at 638.

Our record, on the contrary, establishes Chaos’ reliability and a prior relationship with Cartman. (J.A. at 5.) Chaos sends Cartman insider stories concerning Citrus product releases, and the pair have know each other personally for two years. (J.A. at 5.) Additionally, the picture sent by Chaos to Cartman, which formed the foundation for the Mumbai story, shows workers

assembling an identifiable Citrus product, further evidencing the authenticity of the photograph as coming from the Citrus factory. (J.A. at 5.) Based on these facts, Cartman's reliance on Chaos' apparent trustworthiness is well-founded by a track-record of accuracy, nullifying the possibility that Cartman entertained serious doubts as to Chaos' credibility. Therefore, revealing Chaos' identity would not further Ike's attempt to prove malice against Cartman.

The balancing test's final prong states, "even when the information is crucial to a litigant's case, reporters should be compelled to disclose their sources" only when a litigant has "exhausted every reasonable alternative source of information." *Zerilli*, 656 F.2d at 713. Compelled disclosure is "the end, and not the beginning, of the inquiry." *Carey*, 492 F.2d at 638.

The obligation to exhaust other means of discovering a confidential source's identity is "clearly very substantial." *Zerilli*, 656 F.2d at 714. The Second Circuit concluded that, when men sought to force a Detroit reporter to reveal confidential information sent to him by Department of Justice employees, those bringing suit could not "escape their obligation to exhaust alternative sources" simply because their efforts in deposing an entire list of possible informants might be "time-consuming, costly, and unproductive." *Id.* at 715. The D.C. Circuit in *Carey* thought as many as sixty depositions would still be a reasonable expectation of investigation prior to compelled disclosure. *Carey*, 492 F.2d at 639. Similarly, a Supreme Court decision, involving a television reporter who aired an accusatory piece about a judge, intimated that deposing up to sixty-five witnesses along with other "somewhat roundabout methods" might satisfy adequate alternative means of discovery. *In re Roche*, 448 U.S. 1312, 1313-16 (1980).

In light of this heavy burden to exhaust alternative means of discovery, it is admittedly reasonable that the libeled plaintiff be required to only "beat the bushes" and not to "pull up every tree, bush, and blade of grass by the roots." *Price*, 416 F.3d at 1348. Yet, our record fails

to prove that Ike has done anything more than flip over a few leaves. Ike deposed the factory manager and several of his top engineers. (J.A. at 8.) Additionally, he sent an email to Citrus employees requesting information concerning the leak. (J.A. at 8.) All told, this equates to one email and a small handful of depositions, perhaps less than half-a-day's effort. (J.A. at 8.) These attempts hardly come close to sixty depositions, which has been found to be an efficacious measuring stick; nor do they match efforts that can be described as exhausting, substantial or time consuming. As a result of Ike's failure to take any steps of consequence in determining if alternative means outside of disclosure could be productive, he failed to meet the final prong.

When looking at Chaos' track record of accuracy, and the apparent realism of the photograph, it appears Chaos' identity does not go the heart of Ike's claim and therefore fails to meet the necessity prong. Additionally, Ike has not scratched the surface in fulfilling his obligation to exhaust alternative means. For these reasons, the district courts granting of summary judgment for Cartman should stand as the correct evaluation of case law and our facts.

II. IKE CANNOT PROVE WITH CLEAR AND CONVINCING EVIDENCE THAT CARTMAN ACTED WITH ACTUAL MALICE WHEN IKE ELEVATED HIMSELF TO LIMITED PURPOSE PUBLIC FIGURE STATUS BY ASSUMING AN INFLUENTIAL ROLE IN A PUBLIC CONTROVERSY

“Defining public figures is much like trying to nail a jellyfish to the wall.” *Rosanova v. Playboy Enter.*, 411 F. Supp. 440, 443 (S.D. Ga. 1976). This Court first constitutionalized the law of defamation by requiring public officials to prove with clear and convincing evidence that defamatory statements relating to their conduct were published on grounds of actual malice. *New York Times Co.*, 376 U.S. at 279-80. Actual malice implies knowledge that a published statement is “false” or published “with reckless disregard” for the truth. *Id.* By forcing public officials to meet this burden, the court defended “free political discussion, to the end that government may

be responsive to the will of the people.” *De Jonge v. Oregon*, 299 U.S. 353, 365 (1937).

The Court further extended actual malice to “public figures” since certain people “by reason of their fame, shape events in areas of concern to society at large.” *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 164 (1967) (Warren, J. concurring). No longer limited to public officials, the actual malice shield was extended one step further to private individuals when the relevant topic was of “public or general concern.” *Rosenbloom v. Metromedia*, 403 U.S. 29, 48 (1971).

Realizing *Rosenbloom* left private individuals with little room for redress, the pivotal *Gertz* decision then overruled this extension and drew a line between public figures generally and private citizens. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 343-44 (1974). The court reasoned public figures assume a risk of defamation and have greater media access than private individuals; thereby facilitating a more effective, rapid counteraction to false and defamatory statements. *Id.* Yet *Gertz* did not completely shut the door for the potential of private individuals to creep into public status. The court carved out two distinct types of public figures: (1) general purpose public figures, who are those that achieve pervasive fame and notoriety in all contexts, and (2) limited purpose public figures, who voluntarily, or involuntarily, participate in a particular public controversy, and might reasonably expect to have an influence over the outcome. *Gertz*, 418 U.S. at 351. The second of these is the court’s “jellyfish.”

A. Ike is a Limited Purpose Public Figure Because He Could Reasonably Expect To Affect the Outcome of the Controversy Surrounding Citrus’ Participation in Human Rights Violations, When He Assumed An Influential Role in the Company and the Article was Germane to His Participation in Controversy.

The meaningful question, in determining limited purpose public figure status, is the nature and extent of the individual’s participation in a particular public controversy. *Gertz*, 418 U.S. at 352. Following this broad precedent, the circuits employ one of four different tests to determine an individual status for purposes of defamation. *See, Waldbaum v Fairchild Publications, Co.*,

627 F.2d 1287, 1296 (D.C. Cir. 1980) (three-prong); *Lerman v. Flyny Distrib. Co.*, 745 F.2d 123, 136-137 (2d Cir. 1984) (four-prong); *Marcone v. Penthouse International Magazine for Men*, 754 F.2d 1072,1082 (3d Cir. 1985) (two-prong) *Foretisch v. Capital Cities/ABC, Inc.*, 37 F.3d 1541, 1556 (1994) (five-prong). The district court applied the *Waldbaum* test, used by a circuit majority, finding Ike to be a limited purpose public figure; while the circuit court chose the *Lerman* test, reaching an opposite outcome. (J.A. at 18.); (J.A. at 29.) This conclusion, however, was erroneous, and we now reexamine the previous decisions under both tests.

Under the *Waldbaum* analysis, the court must (1) isolate the public controversy, (2) examine the plaintiffs' involvement in the controversy, and (3) determine whether "the alleged defamation [was] germane to the plaintiffs' participation in the controversy." *Silvester v. ABC, Inc.*, 839 F.2d 1491, 1497 (11th Cir. 1988).

The district court, in adopting the *Waldbaum* test, properly identified Ike as a limited purpose public figure when (1) human rights violations at Citrus' Mumbai factory constituted a public controversy, (2) as head of research and development he played an affirmative role in the controversy and, (3) the alleged defamation is germane to Ike's role in the controversy. (J.A. at 18.); *Waldbaum*, 627 F.2d at 1296-98.

1. Using Waldbaum, a court must first isolate the public controversy, which in this case is the human rights violations at Citrus' Mumbai factory.

A public controversy must be more than a matter of public interest. *Id.* at 1296. To determine the existence of a public controversy, courts should ask if the matter was "being debated publicly" and "persons beyond the immediate participants in the dispute" will "feel the impact of its resolution." *Id.* at 1297-98. Additionally, this Court found a journalist cannot create a public controversy by defaming a private individual engaged in normal activities like "countless members of his profession." *Hutchinson v. Proxmire*, 443 U.S. 111, 135 (1979). Such a rule

prevents those “charged with defamation” from “creating their own defense by making the claimant a public figure.” *Hutchinson*, 443 U.S. at 135. That said, “creating a public issue, however, is not the same as revealing one,” since investigative reporting expects to “uncover matters of public concern previously hidden from the public view.” *Trotter v. Jack Anderson Enters., Inc.*, 818 F.2d 431, 434 (5th Cir. 1987).

Using these rules as context, the D.C Circuit found that when a large supermarket cooperative dismissed a top level executive it created a public controversy. *Waldbaum*, 627 F.2d at 1299. Additional factors leading to their decision noted the cooperative’s role in the market, its “pathbreaking marketing policies,” and the executive’s firing would “affect consumers and retailers” in the “area, and perhaps elsewhere.” *Id.*

The Fourth Circuit recently found a public controversy existed concerning the “the quality and effectiveness of treatment for troubled priests.” *New Life Ctr. Inc. v. Fessio*, 28 Media L. Rep. 2249, 17 (4th Cir. 2000). So when a specific church was defamed for the treatment of its priests, there already existed a controversy “when the Article was published,” and although the controversy was broad and previously unrelated to that particular church, the “allegedly defamatory portions of the Article” were “sufficiently related” to that church itself. *Id.* Holding otherwise would oversimplify the “nature and scope of the controversy.” *Id.* at 15.

Similar to troubled priests in the *New Life Ctr. Inc.* situation, human rights violations by large corporations have long been a concern of public debate. *See Trotter*, 818 F.2d at 434 (labor violence at an overseas bottling factory was a public controversy). Recently, this trend has grown as “a more conscious public, and better organized activists, have shone a spotlight on the overseas practices” of “powerful, multinational corporations.” Alexandra Reeve, *Within Reach:*

A New Strategy for Regulating American Corporations that Commit Human Rights Abuses Abroad, 2008 COLUM. BUS. L. REV. 387 (2008).

Ike's disputed presence in the Mumbai photo fails to impact the otherwise accurate image of Citrus' factory as background. (J.A. at 7.) The photo depicts workers assembling the Citrus ePlay Touché using assembly lines and machines with minimal protective gear. (J.A. at 5.) These unsafe working conditions, exposing employees to an increased likelihood of danger, constitute a violation of human rights by an American corporation, and hence Citrus' role in a public controversy. Additionally, after this photo was published, Citrus' stock plummeted by 25% and numerous retailers pulled Citrus' products from their shelves. (J.A. at 6-7.) These events can be viewed as foreseeable and substantial ramifications for nonparticipants as Cartman's reporting of Citrus' participation in the human rights controversy had a large impact beyond those involved. As a result the first prong in the *Waldbaum* test is satisfied.

2 Ike's participation in Citrus' human rights violations and his likely influence over the outcome of that controversy satisfies Waldbaum's second prong.

Satisfaction of the *Waldbaum* test's second prong requires that an allegedly defamed plaintiff must have been "purposely trying to influence the outcome" of a public controversy or could "realistically have been expected, because of his position in the controversy, to have an impact on its resolution." *Waldbaum*, 627 F.2d at 1297. When analyzing this prong, courts "can look to the plaintiff's past conduct, the extent of press coverage, and the public reaction to his conduct and statements." *Id.* Indeed, "trivial or tangential participation is not enough." *Id.*

Occupying an executive position within a prominent corporation does not alone make one a public figure. *Id.* at 1299. Yet, the court in *Waldbaum* still found that when an executive "supervised, or at least approved" of "policies" and other "consumer-oriented activities," he stepped out of the "boardroom," and his image became associated with the cooperative in a

manner “far beyond the dollars and cents aspects of marketing.” *Waldbaum*, 627 F.2d at 1299-300.

Relying on the *Waldbaum* test, the Eleventh Circuit labeled jai alai executives as public figures since they “held positions of prominence in an industry with a very limited number of major figures” and were in a “position to influence the resolution of the controversy over corruption.” *Silvester*, 839 F.2d at 1497.

An application of the above rules and explanations to the facts on record illuminates the robust nature of Ike’s role in the controversy reported to the world via Cartman’s blog. At a press conference announcing his promotion to DR&D, specifically tasked with overseeing the development of Citrus’ new products, including the ePlay Touché, Ike evidenced his upcoming influential role in Citrus’ policies and consumer-related manufacturing activities by stating, “I look forward to pushing Citrus, its employees, and its products to new heights.” (J.A. at 3.) Moments earlier, Kyle made reference to Ike’s impending fame due to the projected popularity of the Citrus products. (J.A. at 3.) These statements were subsequently published by AP in “several newspapers.” (J.A. at 3.) Indeed news reported by AP spreads fast, as according their official Web site, “more than half the world's population sees news from AP.” AP Page, <http://www.ap.org/pages/about/about.html> (last visited Oct. 1, 2009)

Cartman’s story included a photo revealing actual working conditions in Citrus’ Mumbai factory. (J.A. at 5-7.) The record also evidences Ike’s travels to Mumbai, although there is no clear indication he has visited the factory itself. (J.A. at 7.) However when Ike, as DR&D, has been hired to oversee development of a new product being manufactured in a foreign city, to which he has traveled, one can hardly fathom the manufacturing process taking place therein remains a mystery to him. (J.A. at 7.)

Ike's prominent role within Citrus was not unnoticed by the public either. Along with the press conference announcing his hiring, Kyle continuously praised Ike's achievements in television and magazine interviews. (J.A. at 3.) Additionally, Ike developed a cult-like following among Citrus employee's and was honored by them, as many wore "I Like Ike" buttons bearing his countenance. (J.A. at 3-4.)

In conclusion, Ike is not caught up in this controversy involuntarily. By attending the press conference and accepting a position in one of America's most dynamic technology companies, Ike affirmatively stepped "into the public spotlight" and as a result of his willingness to so, "he must take the bad with the good." *Waldbaum*, 627 F.2d at 1294-95. Given all these factors, a reasonable person would conclude that Ike possesses considerable sway in influencing the outcome of the controversy regarding human rights violations at Citrus' Mumbai factory.

3 Cartman's article specifically addresses Ike's role in overseeing human rights violations at the factory where Ike's products were being manufactured, and is therefore germane to his executive role within Citrus.

An alleged defamation must be germane to the plaintiff's participation in the public controversy. *Id.* at 1298. Statements that are wholly unrelated to the public controversy do not receive protection laid out in *New York Times. Id.*

The Eleventh Circuit found this prong to be "self evident" when the "primary concern" of a publication was germane to the "alleged corruption in the jai alai industry and the plaintiffs' role in it." *Silvester*, 839 F.2d at 1497.

Likewise, the subject-matter of Cartman's article focused solely on Ike's role in overseeing human rights abuses at the Mumbai factory. (J.A. at 6.) Company records indicate Ike has traveled to Mumbai on several occasions, and the alleged defamation concerns the human rights violations experienced by workers manufacturing and producing the ePlay Touché. (J.A. at

7.) The third *Waldbaum* prong is thus sufficiently fulfilled as Cartman's article is germane to Ike's role within the Citrus controversy.

4 The Circuit Court's unexplained adoption of the Lerman test Runs afoul of Gertz since it prohibits an individual to be drawn into a controversy and requires continuing media access.

When the circuit court ignored the *Waldbaum* test and chose to use the *Lerman* test, it also discarded precedent laid down in *Gertz*. Yet even in the face of this constitutional misstep, Ike's status still meets the two additional requirements set forth by *Lerman*.

The *Lerman* test mimics *Waldbaum* but adds two requirements: (1) that a plaintiff successfully invite public attention prior to the litigation, and (2) have regular and continuing access to the media. *Lerman*, 745 F.2d at 136-37. The first of these runs contrary to *Gertz* by disallowing an individual from being involuntarily drawn into a controversy. *Gertz*, 418 U.S. at 351. The second prong gives too much weight to media access, since *Gertz* explains such a requirement is not dispositive of public figure status. *Gertz*, 418 U.S. at 344-45. The Fifth Circuit considers "media access as only one factor in the public-figure analysis" and values "significant involvement in public controversies as more important." *Trotter*, 818 F.2d at 436.

In *Lerman*, the plaintiff was an author well-known for publishing her views on controversial topics relating to gender inequality. 745 F.2d at 137-38. The court found she satisfied the two above prongs in question because she invited attention to herself through the printing of her picture on book jackets, and she frequently accessed the media to promote her books. *Lerman*, 745 F.2d at 137. Likewise, Ike's picture is similarly displayed, with his title, on Citrus' website. (J.A. at 4.) Additionally, his responsibility for Citrus' product development and employees made his name revered within Citrus MegaStores. (J.A. at 3-4.)

Ike's refusal to address the media's demands for a response to Cartman's allegations is not evidence of him "not inviting" media attention. (J.A. at 7.) For policy reasons, one "cannot erase his public-figure status by limiting public comment or avoiding media attention." *Trotter*, 818 F.2d at 436. This would encourage corporate executives to "wield influence" from "behind the scenes" so they could avoid a later public figure classification and only have to "prove defamation under a negligence standard." William M. Krogh, *The Anonymous Public Figure: Influence Without Notoriety and the Defamation Plaintiff*, 15 GEO. MASON L. REV. 839 (2008). Thus by maintaining a low profile, which Ike has attempted since Cartman's exposure of the Mumbai factory work conditions, Ike would be able to oversee egregious business conduct without any reciprocal public accountability. Additionally, it cannot be ignored, in regards to media access, Kyle has featured Ike at a press conference and repeatedly "goes out of his way" to mention Ike's name and his achievements in media interviews. (J.A. at 3.) One can conclude Ike's close relations to Kyle assured that media access was never too far away. (J.A. at 3.)

Assuming these additional *Lerman* requirements are consistent with *Gertz*, the circuit court erred when it found Ike neither invited public attention, nor had continuing media access.

B. Ike Fails to Bring Forth Enough Factual Evidence to Prove With Clear and Convincing Evidence Cartman Knowingly or Recklessly Published False Statements Pertaining to His Role in the Controversy.

To prove actual malice with clear and convincing evidence, a plaintiff must establish the defendant published defamatory statements with a "high degree of awareness . . . of probable falsity." *Garrison v. Louisiana*, 379 U.S. 64, 74 (1964). The publisher must have "serious doubts as to the truth of the publication." *St. Amant v. Thompson*, 390 U.S. 727, 730 (1968).

1. *As a matter of law, Cartman could not knowingly publish false statements if the statements have not been proven false.*

This Court has held that the plaintiff must prove the substance of an allegation is false before it becomes actionable. *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 19 (1990); *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 776 (1986). “Substantially true” statements cannot establish a reporter’s knowledge of falsity. *Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496, 509 (1991). Additionally, some falsity inevitably occurs in public debate, and the First Amendment should protect it. *Gertz*, 418 U.S. at 340. However, “where the question of truth or falsity is a close one, a court should err on the side of nonactionability.” *Liberty Lobby, Inc. v. Dow Jones & Co.*, 838 F.2d 1287, 1292 (D.C. Cir. 1988).

When a journalist exaggerated relations between a civic group and an anti-Semitic publisher, the D.C. Circuit found the exaggerations were not completely false because the record evidenced “substantial financial and editorial control over the publishing activities” exercised by the civic group over the prejudicial publisher. *Id.* at 1294. Ultimately, the “the substantial ties” between the parties would prevent production of “a fair preponderance of the evidence” that the defamatory statements concerning their relations were false. *Id.* at 1295-65.

Our record contains conflicting evidence as to whether Cartman's allegations or the published photo are actually false. (J.A. at 19.) Computer software revealed a likely superimposition of Ike’s image in the Mumbai photo, however, no other inaccuracies in the photo are claimed or disputed. (J.A. at 7.) The photo was, in fact, taken at the Citrus factory in Mumbai, and Ike had traveled there several times. (J.A. at 7.) Although the purpose of his visits remains unclear, the picture depicts factory workers producing the ePlay Touché in substandard safety conditions. (J.A. at 7.) Taken as a whole, the facts in the record indicate strong substantial

ties between Ike and the Mumbai factory, hinting that Cartman’s allegations may be true. Therefore, Ike has failed to prove that Cartman knowingly published false statements.

2. *Cartman published the Citrus story based on a reliable source, and therefore did not act in reckless disregard for the truth.*

The law requires Ike to prove with clear and convincing evidence that Cartman recklessly disregarded the truth or subjectively entertained serious doubt as to the truth of the matter asserted. *St. Amant*, 390 U.S. at 730. Alternatively, a defendant in a defamation suit cannot “automatically ensure a favorable verdict” by testifying on his belief alone. *Id.* at 732. The finder of fact must determine whether the publication was indeed made in good faith. *Id.*

This has led courts to analyze the following factors as relevant in showing actual malice, (1) whether a story is fabricated or based wholly on an unverified, anonymous source, (2) whether the defendant's allegations are so inherently improbable only a reckless person would have put them in circulation, or (3) whether there are obvious reasons to doubt the veracity of the informant or the accuracy of his reports. *Church of Scientology Intern. v. Behar*, 238 F.3d 168, 174 (2d Cir. 2001), *citing St. Amant*, 390 U.S. at 732.

In *St. Amant*, a candidate for public office alluded to corrupt activities by a local deputy sheriff. 390 U.S. at 728-29. The candidate based his statements on an affidavit from a source with an unverified “reputation for veracity.” *Id.* at 730. He also “failed to verify” any information therein and proceeded without regard of the consequences. *Id.* Regardless, the court found the evidence “failed to show that the publisher was aware of the likelihood he was circulating false information,” since he believed in good faith that it was true. *St. Amant*, 390 U.S. at 731.

The First Amendment must protect some erroneous publications as well true ones. *Id.* at 732. Also, there must be “sufficient evidence” to show a defendant “entertained serious doubts as to the truth of his publication.” *Id.* at 731. Given these guidelines, our facts paint a more responsible

picture of Cartman’s reporting compared to the details in *St. Amant*, and hence, the record lacks evidence to illustrate Cartman entertained any serious doubts at the time of publication.

Cartman and his source, Chaos, were not strangers. (J.A. at 5.) They knew each other personally and how to contact one another. (J.A. at 5.) Also, Chaos has previously reported accurate information regarding Citrus on numerous occasions. (J.A. at 5.) Chaos’ ability to predict Citrus product releases in advance suggests that there is no “obvious reason” to doubt he would have first-hand, truthful information regarding other aspects of Citrus. (J.A. at 5.)

Cartman chose to publish Chaos’ allegations almost immediately, which necessarily resulted in his failure to investigate. (J.A. at 5.) Although Cartman possessed the software to detect forgery in digital photos, the fact that he did not scan the picture from Chaos fails to prove actual malice because the standard of ordinary care does not apply. (J.A. at 7.); *St. Amant v. Thompson*, 390 U.S. at 732. Based on this application of applicable case law, Ike falls well short of the required clear and convincing burden in proving the existence of actual malice.

CONCLUSION

For the reasons set forth above, Eric Cartman, Petitioner, respectfully requests that this Court reverse the decision of the United States Court of Appeals for the Fifteenth Circuit.

Respectfully submitted,

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