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**No. 09 - 2701**

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**IN THE  
SUPREME COURT OF THE UNITED STATES**

FALL TERM 2009

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**ERIC CARTMAN,  
PETITIONER,**

**v.**

**IKE BROFLOVSKI,  
RESPONDENT.**

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ON PETITION FOR 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 # 108  
Attorneys for Petitioner**

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## **QUESTIONS PRESENTED**

- I. Does the First Amendment's guarantee of the freedom of the press create a qualified reporter's privilege that protects a journalist from court-compelled disclosure of the confidential source's identity in an online defamation claim?
- II. Should an independent, for profit blogger disseminating news information for the public interest qualify as a reporter for purposes of this defamation suit and therefore be permitted to maintain his source's confidential identity?
- III. Does a corporate executive's major influence over policies shaping a controversy make him a limited purpose public figure subject to added media scrutiny regarding coverage of that controversy?
- IV. Can it be shown with convincing clarity that a reporter seriously doubted his own article's veracity if the reporter was personally acquainted with his source, knew the source was employed by the subject company, and had received credible information from the source on past occasions?

**TABLE OF CONTENTS**

**QUESTIONS PRESENTED**.....i

**TABLE OF AUTHORITIES**.....v

**JURISDICTION STATEMENT** .....vii

**STANDARD OF REVIEW**.....1

**STATEMENT OF THE CASE**.....1

**A. Summary of the Facts** .....1

**B. Summary of the Proceedings**.....3

**SUMMARY OF THE ARGUMENT**.....4

**ARGUMENT**.....7

**I. THE FIFTEENTH CIRCUIT ERRED IN RULING THAT NO REPORTER’S PRIVILEGE AGAINST DISCLOSURE OF CONFIDENTIAL SOURCES EXISTS.** .....7

**A. The First Amendment creates a qualified reporter’s privilege against the court compelled disclosure of confidential sources.**.....7

**B. No compulsory disclosure is required because Respondent has not exhausted all reasonably available sources nor exhibited a compelling interest for disclosure.** .....11

**C. Cartman qualifies as a reporter for the purposes of the defamation suit and is entitled to maintain the confidentiality of his source under the qualified reporter’s privilege.** .....13

**D. Revealing confidential sources would expose reporters to liability and will chill reporting of controversial and important news stories.** .....15

**II. RESPONDENT IS A LIMITED-PURPOSE PUBLIC FIGURE BECAUSE HE WAS INFLUENTIAL IN OVERSEEING LABOR PRACTICES THAT ENGENDERED THE EXACT PUBLIC CONTROVERSY UPON WHICH CARTMAN’S REPORTING FOCUSED.**.....17

**A. This Court’s precedent rejects any condition on LPPF status which requires Cartman to prove that Respondent voluntarily injected himself into the media’s spotlight or sought out public attention.**.....18

<b>B.</b>	<b>Under the three-step test adopted by a plurality of circuits, Respondent’s significant influence over the outcome of the Citrus labor controversy is sufficient for imposition of LPPF status.....</b>	<b>19</b>
1.	<b>Citrus’ labor scandal rises to the level of a public controversy because it was discussed publicly and had substantial negative effects on multiple individuals other than Cartman and Respondent. ....</b>	<b>21</b>
2.	<b>Respondent is intimately involved in the outcome of the labor controversy because he is the corporate executive responsible for developing the ePlay the manufacture of which prompted the foreign labor exploitation now in question. ....</b>	<b>22</b>
3.	<b>Cartman’s comments were aimed exclusively at Respondent’s role in Citrus’ use of controversial labor policies; therefore, these comments are fully relevant to Respondent’s participation in the controversy. ....</b>	<b>23</b>
<b>C.</b>	<b>This Court’s decision to impose LPPF status upon Respondent should not be affected by the fact that the labor controversy originated overseas.....</b>	<b>23</b>
<b>D.</b>	<b>While Cartman was the first reporter to bring Citrus’ controversial practices to the public’s attention, this is not equivalent to a finding that Cartman “created” the controversy under which he now claims First Amendment Protection.....</b>	<b>24</b>
<b>E.</b>	<b>Given the Constitutional dimension to this Court’s decision to impose LPPF status on Respondent, it should focus on concrete evidence of Respondent’s actions and not Respondent’s subjective intent to avoid the public spotlight.....</b>	<b>25</b>
<b>III.</b>	<b>BECAUSE RESPONDENT IS AN LPPF, HE IS REQUIRED TO PROVE ACTUAL MALICE; THEREFORE, RESPONDENT’S CLAIM FAILS BECAUSE HE IS UNABLE TO PROVIDE CLEAR AND CONVINCING EVIDENCE THAT CARTMAN ENTERTAINED HIS OWN SERIOUS DOUBTS AS TO THE EXISTENCE OF POTENTIAL FALSEHOODS IN HIS REPORT.....</b>	<b>26</b>
<b>A.</b>	<b>Cartman’s trust in Professor’s credibility is supported by evidence that this trust was extended only after the opportunity to make a positive in-person assessment of Professor’s demeanor during an event the two attended.....</b>	<b>27</b>

**B. Cartman had no reason to doubt the reliability of Professor’s information prior to publishing the report because Cartman knew Professor to be a Citrus employee-insider and reliable source on numerous prior occasions.....27**

**C. Cartman’s decision not to corroborate Professor’s information with another party is not a critical element of this Court’s actual malice analysis.....28**

**D. Any potential dislike Cartman feels towards Respondent fails to prove actual malice because “actual malice” is a Constitutional term-of-art distinct from common law malice involving malevolence or spite.....29**

**CONCLUSION .....30**

**TABLE OF AUTHORITIES**

**Cases**

**United States Supreme Court Cases**

*Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986) .....19, 20

*Bose Corp. v. Consumers Union*, 466 U.S. 485 (1984).....1

*Branzburg v. Hayes*, 408 U.S. 665 (1972) .....7, 8, 9, 10, 11, 12, 13, 14

*Cohen v. Cowles Media Co.*, 501 U.S. 663 (1991) .....15, 16

*Curtis Publ’g Co. v. Butts*, 388 U.S. 130 (1967) .....17

*Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974) .....19

*Grosjean v. Am. Press Co.*, 297 U.S. 233 (1936) .....8

*Harte-Hanks Commc’ns, Inc. v. Connaughton*, 491 U.S. 657 (1989) .....27, 30

*Herbert v. Lando*, 390 U.S. 727 (1968) .....26, 27

*Lovell v. City of Griffin*, 303 U.S. 444 (1983) .....7, 8, 14

*N.Y. Times Co. v. Sullivan*, 376 U.S. 254 (1964) .....17, 18, 25, 26

*St. Amant v. Thompson*, 390 U.S. 727 (1968) .....18, 27, 28, 29

**United States Court of Appeals Cases**

*Baker v. F & F Inv.*, 470 F.2d 778 (2d Cir. 1972) .....7, 8, 10, 11, 12, 16

*Dameron v. Washington, Inc.*, 779 F.2d 736 (D.C. Cir. 1985) .....19

*Faigin v. Kelly*, 184 F.3d 67 (1st Cir. 1999) .....20

*Gonzales v. Nat’l Broad. Co.*, 194 F.3d 29 (2d Cir. 1999) .....8, 11, 14

*In re Petroleum Prod. Antitrust Litig.*, 680 F.2d 5 (2d Cir. 1982) .....11

*Lerman v. Flynt Distrib. Co.*, 745 F.2d 123 (2d Cir. 1984) .....18, 19

*McCullen v. Coakley*, 571 F.3d 167 (1st Cir. 2009) .....1

<i>McKevitt v. Pallasch</i> , 339 F.3d 530 (7th Cir. 2003) .....	11
<i>Price v. Time, Inc.</i> , 416 F.3d 1327 (11th Cir. 2005) .....	12
<i>Reuber v. Food Chemicals News, Inc.</i> , 925 F.2d 703 (4th Cir. 1992) .....	27
<i>Rosanova v. Playboy Enter., Inc.</i> , 580 F.2d 859 (5th Cir. 1978) .....	18, 25, 26
<i>Shoen v. Shoen</i> , 48 F.3d 412 (9th Cir. 1995) .....	8, 10
<i>Silvester v. Am. Broad. Cos.</i> , 839 F.2d 1491 (11th Cir. 1988) .....	19, 20
<i>Trotter v. Jack Anderson Enters., Inc.</i> , 818 F.2d 431 (5th Cir. 1987) .....	19, 23, 24, 25
<i>United States v. Cutler</i> , 6 F.3d 67 (2d Cir. 1993) .....	11
<i>Utah Educ. Ass'n v. Shurtleff</i> , 565 F.3d 1226 (10th Cir. 2009) .....	1
<i>von Bulow v. von Bulow</i> , 811 F.2d 136 (2d Cir. 1987) .....	8, 12, 14, 15
<i>Waldbaum v. Fairchild Publ'ns, Inc.</i> , 627 F.2d 1287 (D.C. Cir 1980) .....	20, 21, 22, 23
<i>Zerilli v. Smith</i> , 656 F.2d 705 (D.C. Cir. 1981) .....	11

**United States District Court Cases**

<i>Faigin v. Kelly</i> , 978 F. Supp 420 (D.N.H. 1997) .....	20
<i>World Boxing Council v. Cosell</i> , 715 F.Supp 1259 (S.D.N.Y. 1989) .....	27

**Statutory Sources**

Fed. R. Civ. P. 37. ....	3
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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.

## **STANDARD OF REVIEW**

When issues on appeal implicate the First Amendment, *de novo* review is required on findings of constitutional fact, conclusions of law, and a grant or denial of summary judgment. *See Bose Corp. v. Consumers Union*, 466 U.S. 485, 508 (1984); *McCullen v. Coakley*, 571 F.3d 167, 174 (1st Cir. 2009); *Utah Educ. Ass'n v. Shurtleff*, 565 F.3d 1226, 1229 (10th Cir. 2009).

Furthermore, as Respondent is a limited-purpose public figure whose defamation claim is governed by the Federal Constitutional standard in *N.Y. Times v. Sullivan*, this Court must undertake an independent appellate review of the entire record, determining *de novo* “whether the record establishes actual malice with convincing clarity.” *Bose Corp.*, 466 U.S. at 514.

## **STATEMENT OF THE CASE**

### **A. Summary of the Facts**

Eric Cartman has published the internet blog *The Sludge Report* since June 2005. (J.A. at 4). Cartman began *The Sludge Report* to supplement his declining income from Cartman’s Computer World, a small electronics shop of which he is the sole proprietor. *Id.* *The Sludge Report* is updated daily and features important news from international events to corporate developments; it also includes Cartman’s commentary and opinions, which often focus on large companies engaged in international commerce. (J.A. at 4, 6).

*The Sludge Report* is widely regarded for its investigative reporting and its daily readership numbers more than 100,000. (J.A. at 4). To best provide breaking news, Cartman integrates his reader’s own submissions into his articles and then disseminates them on the website. (J.A. at 5). Cartman pledges that the identities of readers who provide information will be kept confidential unless they request otherwise. *Id.* One of Cartman’s confidential sources is “Professor Chaos” (“Professor”), an employee of Citrus - a *Fortune 500* company at “the top of

the consumer electronics industry.” (J.A. at 2, 5). Cartman knows Professor personally from time the two spent together at an electronics tradeshow. (J.A. at 5). On multiple occasions, Professor has provided *The Sludge Report* with credible information on breaking Citrus developments. *Id.*

Respondent Ike Broflovski (“Respondent”) is Citrus’ Director of Research and Development, as well as brother to Citrus CEO Kyle Broflovski. (J.A. at 2, 3). Respondent’s appointment was announced at a press conference in 2006, at which time Kyle Broflovski acknowledged that Respondent would lead all of Citrus’ product development efforts. (J.A. 3). Respondent stated at the press conference that he looked “forward to pushing Citrus, its employees, and its products to new heights.” *Id.*

On July 7, 2008, Professor supplied Cartman with information regarding potential human rights abuses perpetrated by Citrus at its Mumbai, India manufacturing plant. (J.A. at 5). In his report, Professor provided a photograph which depicted Respondent yelling at beleaguered factory workers on the assembly line. *Id.* The photograph also showed that none of these workers were wearing sufficient protective gear. *Id.* On July 8, 2008, Cartman posted both Professor’s photograph and his own critique of Citrus’ exploitation on *The Sludge Report*. (J.A. at 5, 6). Cartman’s report soon generated immense public interest and became the subject of further media coverage. (J.A. at 6). In the aftermath of the Mumbai discovery, Citrus’ stock price declined and electronics stores began pulling Citrus’ signature ePlay music device from their shelves. (J.A. at 6, 7).

After initiating this common law defamation action against Cartman on September 20, 2008, Respondent alleged that a scan of Professor’s photograph using Citrus software proved that the photograph was a forgery. (J.A. at 7). Any evidence of this forgery was not detectable

to the naked eye. *Id.* Although discovery revealed that Respondent traveled to Mumbai on numerous occasions, it is unclear whether Respondent visited the factory in question. *Id.* Respondent then attempted to discover Professor's identity by sending out a form email to Citrus employees requesting this information and deposed some of the Mumbai factory's engineers. (J.A. at 8). Dissatisfied with his leads, Respondent served Cartman with an interrogatory directing him to disclose the source of the photograph featured in Cartman's July 8, 2008 *Sludge Report*. *Id.*

#### **B. Summary of the Proceedings**

On September 20, 2008, Respondent filed suit against Cartman for defamation in Silverado Superior Court, asserting that Cartman published false information regarding Respondent's involvement in human rights violations perpetrated during Citrus' ePlay manufacturing process. (J.A. at 1). Cartman removed the action to the United States District Court for the Western District of Silverado on diversity grounds. (J.A. at 1). After partial discovery, Respondent moved for the District Court to compel Cartman to reveal Professor's full identity pursuant to Fed. R. Civ. P. 37. (J.A. at 1). Cartman opposed the disclosure and moved for summary judgment on grounds that he is a journalist protected by the First Amendment qualified reporter's privilege and that Respondent is a limited-purpose public figure who failed to prove actual malice. (J.A. at 2). The District Court denied Respondent's motion to compel discovery and granted Cartman's motion for summary judgment. (J.A. at 2). Respondent appealed the decision of the District Court to the United States Court of Appeals for the Fifteenth Circuit. (J.A. at 21).

In its Memorandum and Order dated May 14, 2009, The Fifteenth Circuit reversed the District Court's decisions by granting the Rule 37 motion to compel discovery and denying

summary judgment. (J.A. at 27, 32). The Fifteenth Circuit held that the First Amendment qualified reporter's privilege did not shield Cartman and that Respondent was not a limited-purpose public figure required to prove actual malice to succeed in his defamation claim. (J.A. at 25, 30, 32). The Supreme Court of the United States granted Cartman's petition for a writ of certiorari on August 24, 2009. (J.A. at 33).

### **SUMMARY OF THE ARGUMENT**

This Court should reverse the Fifteenth Circuit's decision to grant Respondent's motion to compel Cartman to disclose his confidential source. Additionally, it should reverse the Fifteenth Circuit's denial of Cartman's motion for summary judgment in regards to Respondent's defamation action.

The qualified reporter's privilege is derived from the First Amendment's protection of the press' responsibility to maintain an enlightened citizenry. The privilege guards journalists against compelled disclosure of confidential sources and materials obtained during the newsgathering process; therefore, it ensures an unrestricted flow of information to the public. The reporter's ability to safeguard his news source's confidential identity is critical to the ongoing promulgation of controversial yet sensitive news that would not otherwise reach the public.

This Court should not allow Respondent to defeat Cartman's significant privilege and compel disclosure of Cartman's source because Respondent has not made a clear and specific showing that: (1) the evidence sought is material to the litigation; (2) a compelling interest in obtaining the information exists which is sufficient to defeat the qualified reporter's privilege; and (3) the information sought could not be obtained by other reasonable means. The absence of a compelling interest in this civil proceeding and the availability of other reasonable methods of

obtaining Professor's identity make Respondent's interest in disclosure insufficient to overcome Cartman's qualified reporter's privilege.

Cartman qualifies as a journalist and is entitled to the protection of the qualified reporter's privilege because: (1) the First Amendment right of the freedom of the press is not restricted to newspapers; (2) *The Sludge Report* serves the press' core purpose of distributing news stories of interest to the public; and (3) at the time Cartman received Professor's tip, he intended to disseminate the information to *Sludge Reporter* readers. Furthermore, compelling a reporter such as Cartman to disclose the identity of his confidential source would expose Cartman to liability and will chill future reporting of controversial but important news. This Court should recognize that Respondent has failed to overcome the requirements needed to compel disclosure and this Court should not infringe on a reporter's necessary and fundamental right to maintain the confidentiality of his sources.

After Cartman received information from Professor that one of Respondent's corporate policies condoned the exploitation of foreign workers at Citrus' Mumbai factory, Cartman broke news of this potential human rights violation in the July 8, 2008 edition of *The Sludge Report*. A public controversy affecting the rights of numerous parties quickly developed. Despite the influential role which Respondent played in creating this labor controversy, he asks this Court to ignore such facts and treat him as a purely private citizen. By requesting such treatment, Respondent aims to hold Cartman liable for potential falsehoods in Cartman's report on a showing of negligence, i.e. evidence that a reasonable reporter in Cartman's position would have taken additional precautions in ascertaining the truthfulness of the report. This Court should not treat Respondent as it would an inconspicuous private citizen and hold Cartman liable for mere

negligence; rather, this Court should impose “limited-purpose public figure” (LPPF) status upon Respondent.

LPPF status is imposed upon a Plaintiff, such as Respondent, who sues a Defendant-reporter, such as Cartman, for defamatory comments regarding a specific public controversy, the outcome of which Plaintiff had an influential role in shaping. Respondent’s LPPF status should not turn on his earnest attempt to avoid the public spotlight; this would enable Respondent to escape the consequences of voluntarily undertaking a course of misconduct which, if exposed to the public, was bound to invite comment and criticism. Rather, Respondent is an LPPF in regards to press commentary surrounding his prominent role in overseeing corporate labor policies which currently fuel (and could eventually resolve) the ongoing public controversy. Precedent strongly urges this Court not to protect the reputation of an LPPF at the expense of the press’s First Amendment rights.

As a result of the increased First Amendment protection Cartman receives from Respondent’s LPPF designation, Respondent cannot succeed in this defamation action because he is unable to show by clear and convincing evidence that “actual malice” infected Cartman’s decision to publish the July 8, 2008 report. This Court has been clear that actual malice is not common law malice; it does not inquire as to whether Cartman was motivated by hatred or ill-will towards Respondent. Furthermore, the actual malice standard does not analyze Cartman’s confidence in the veracity of his report from the objective viewpoint of a “reasonable person” or even a “reasonable reporter”. What actual malice does constitutionally require is clear and convincing evidence that Cartman published his report despite entertaining serious doubts, in his own mind, that the information contained therein was false. When this Court considers that Cartman and Professor were personally acquainted, that Professor was a Citrus employee

capable of providing reliable information on Citrus activities, and that Professor had proven credible on many prior occasions, it should dismiss Respondent's claim of actual malice for failure to adduce clear and convincing evidence.

For the foregoing reasons, this Court should reverse the decision of the Fifteenth Circuit.

## **ARGUMENT**

### **I. THE FIFTEENTH CIRCUIT ERRED IN RULING THAT NO REPORTER'S PRIVILEGE AGAINST DISCLOSURE OF CONFIDENTIAL SOURCES EXISTS.**

#### **A. The First Amendment creates a qualified reporter's privilege against the court compelled disclosure of confidential sources.**

The First Amendment guarantee of the freedom of the press is a fundamental constitutional right that exists not only to protect reporters from potential government restrictions, but also to ensure society's right to a free flow of information to the public from independent sources. *See Lovell v. City of Griffin*, 303 U.S. 444, 450 (1983) ("Freedom of speech and freedom of the press, which are protected by the First Amendment . . . are among the fundamental personal rights and liberties which are protected . . .").

The courts have recognized that there exists "a paramount public interest in the maintenance of a vigorous, aggressive and independent press capable of participating in robust, unfettered debate over controversial matters, an interest which has always been a principal concern of the First Amendment." *Baker v. F & F Inv.*, 470 F.2d 778, 782 (2d Cir. 1972). The press exists as an essential resource to provide the public with uninhibited and, at times, contentious information. The public benefits from learning about the often concealed actions of its government and society. *Branzburg v. Hayes*, 408 U.S. 665, 725 (1972) (Stewart, J., dissenting) ("Enlightened choice by an informed citizenry is the basic ideal upon which an open society is premised, and a free press is thus indispensable to a free society.").

Critical to the press' role is its ability to gather information from whatever avenues are available to it, especially from confidential sources who would otherwise be unwilling to provide information if they had to risk losing their anonymity. *See Baker*, 470 F.2d at 782 (“Compelled disclosure of confidential sources unquestionably threatens a journalist’s ability to secure information that is made available to him only on a confidential basis . . .”). This Court’s recognition of the qualified reporter’s privilege would protect the dissemination of information that is critical to ensuring the public’s access to the free flow of information and opinions. *See Lovell*, 303 U.S. at 452 (Recognizing that right of free press is of “vital importance of protecting this essential liberty from every sort of infringement.”); *Branzburg*, 408 U.S. at 725 (Stewart, J., dissenting) (warning that failure to recognize reporter’s privilege “impair[s] performance of the press by attempting to annex the journalistic profession as an investigative arm of government” and will “harm rather than help the administration of justice.”).

The qualified reporter’s privilege in civil cases is well established in a majority of the circuit courts. The Ninth Circuit has noted that “all but one of the federal circuits to address the issue [of the reporter’s privilege] have interpreted [*Branzburg*] as establishing a qualified privilege for journalists against compelled disclosure of information gathered in the course of their work.” *Shoen v. Shoen*, 48 F.3d 412, 414 (9th Cir. 1995). The privilege protects journalists against disclosure of confidential and nonconfidential sources and any materials obtained during the newsgathering process. *See Gonzales v. Nat’l Broad. Co.*, 194 F.3d 29, 35 (2d Cir. 1998); *see also von Bulow v. von Bulow*, 811 F.2d 136, 142 (2d Cir. 1987) (“[T]he process of newsgathering is a protected right under the First Amendment, albeit a qualified one . . . This qualified right . . . results in the journalist’s privilege.”). The privilege exists to ensure a free flow of information to the public. *See Grosjean v. Am. Press Co.*, 297 U.S. 233, 250 (1936)

(“[N]ewspapers . . . it is safe to say, have shed and continue to shed, more light on the public and business affairs of the nation than any other instrumentality of publicity . . .”). Cartman’s aims is to distribute the confidential tips he receives to all *Sludge Report* readers, and forcing Cartman to disclose Professor’s identity will greatly harm and diminish Cartman’s ability to supply the public with freely-flowing information. (J.A. at 5).

The Supreme Court in *Branzburg v. Hayes* denied the existence of a qualified reporter’s privilege in a criminal grand jury proceeding. *Branzburg*, 408 U.S. at 667. Petitioner Branzburg published a story regarding his observations of two individuals creating hashish from marijuana. *Id.* at 667. Branzburg was given the opportunity to observe the procedure because he had promised not to disclose the true identity of the individuals. *Id.* at 667 – 68. Shortly after the story’s publication, Branzburg was subpoenaed by a grand jury, but he refused to reveal the true identities of the two individuals who he had interviewed and observed. *Id.* at 668. This Court determined that the reporter’s privilege did not guard journalists from being compelled to reveal confidential sources involved in criminal activity during a grand jury proceeding. *Id.* at 665. While this Court recognized that a qualified reporter’s privilege existed, it nonetheless held that the superseding interests of law enforcement overcame this privilege in a criminal context, even if sources were promised to be kept confidential. *Id.*

*Branzburg*, however, left open the possibility that journalists in civil actions would not be subjected to the same requirements. The *Branzburg* majority focused on the importance of a grand jury in effective law enforcement. *Id.* at 690. The court stated that “[o]nly where news sources themselves are implicated in crime or possess information relevant to the grand jury’s task need they or the reporter be concerned . . .” *Id.* at 691. Significantly, Justice Powell, *Branzburg*’s deciding vote wrote a concurring opinion that stressed “the limited nature of the

Court's holding." *Id.* at 709. Justice Powell recognized that when a journalist "is called upon to give information bearing only a remote and tenuous relationship to the subject of the investigation, or if he has some other reason to believe that his testimony implicates confidential source relationship without a legitimate need for law enforcement" the journalist should have access to protection by the courts. *Id.* at 710. Judging a claim of privilege should "balance [ ] these vital constitutional and societal interests on a case-by-case basis" in order to strike a "proper balance between freedom of the press and the obligation of all citizens to give relevant testimony with respect to *criminal conduct.*" *Id.* at 710 (emphasis added).

Various circuit courts have relied on Justice Powell's concurrence to recognize that the qualified reporter's privilege should exist in a civil action. *See Shoen*, 48 F.3d at 414. The need of confidential sources disclosure is significantly reduced in a civil, as opposed to a criminal grand jury, proceeding, and thus the need to protect a journalist's First Amendment right is considerably stronger. Civil proceedings do not serve as important a societal interest as the apprehension of individuals participating in criminal activity. The Second Circuit has recognized that while there are a few cases "where the First Amendment rights must yield, we are still mindful of the preferred position which the First Amendment occupies in the pantheon of freedoms." *Baker*, 470 F.2d at 784. Therefore, "though a journalist's right to protect confidential sources may not take precedence over that rare overriding and compelling interest . . . there are circumstances, *at the very least in civil cases*, in which the public interest in non-disclosure of a journalist's confidential sources outweighs the public and private interest in compelled" disclosure. *Baker*, 470 F.2d at 784 (emphasis added). Since there would be cases

in which First Amendment values outweigh the duty of a journalist to testify even in the context of a criminal investigation, surely in civil cases, courts must recognize that the public interest in non-disclosure of journalists' confidential news sources will often be weightier than the private interest in compelled disclosure.

*Baker*, 470 F.2d at 784-85. The D.C. Circuit has stated similarly that “in the ordinary case the civil litigant’s interest in disclosure should yield to the journalist’s privilege . . . if the privilege does not prevail in all but the most exceptional cases, its value will be substantially diminished.” *Zerilli v. Smith*, 656 F.2d 705, 712 (D.C. Cir. 1981); *but see McKevitt v. Pallasch*, 339 F.3d 530, 532 (7th Cir. 2003) (holding reporters cannot assure source confidentiality in matters of cooperating foreign criminal investigations). This Court should follow the vast majority of the circuits and recognize the existence of the qualified reporter’s privilege.

**B. No compulsory disclosure is required because Respondent has not exhausted all reasonably available sources nor exhibited a compelling interest for disclosure.**

Respondent cannot defeat Cartman’s reporter’s privilege and compel Cartman to disclose Professor’s identity because Respondent is unable to make “clear and specific showing” that: (1) the evidence he seeks is highly material to the litigation; (2) there is a compelling interest necessary to the claim that is sufficient to overcome privilege; and (3) the evidence cannot be obtained from other available sources. *In re Petroleum Prod. Antitrust Litig.*, 680 F.2d 5, 7-8 (2d Cir. 1982); *Zerilli*, 656 F.2d at 713-14; *see also United States v. Cutler*, 6 F.3d 67, 71 (2d Cir. 1993). The Court in *Branzburg* similarly noted that to overcome the privilege there must a “compelling” or “paramount” interest “to justify even an indirect burden on the First Amendment.” *Branzburg*, 408 U.S. at 700. The burden on Respondent is highly demanding and it protects Cartman’s right to obtain “unrestricted, court-enforced access to journalistic resources.” *Gonzales*, 194 F.3d at 35. Lessening this burden would make Cartman “appear to be an investigative arm of the judicial system, the government, or private parties.” *Id.*

Respondent has not met his burden required to overcome Cartman's reporter privilege. Since the present case is a civil matter, the presumption of privilege is stronger than for a criminal proceeding. *Baker*, 470 F.2d at 784. Cartman distributes information on *The Sludge Report* that is of public interest. *von Bulow*, 811 F.2d at 142. In exchange for providing information regarding the latest development at Citrus, Professor, like many other tipsters to Cartman's blog, was promised confidentiality. (J.A. 5). While information regarding the photograph's source may be relevant to the litigation, Respondent has not showed that his private interest is sufficiently compelling to overcome Cartman's privilege. More importantly, Respondent has not taken adequate steps to discover the identity of Professor through other available sources. Although Respondent has deposed a few individuals and made a general inquiry into Professor's identity, he has failed to take any other substantive efforts to uncover Professor's identity. (J.A. 8); *see generally Price v. Time, Inc.*, 416 F.3d 1327, 1346 (11th Cir. 2005). This Court should require Respondent, who has access to vast technological resource, to engage in further efforts to discover Professor's identity without court-compelled disclosure. Respondent has the ability and the resources to conduct a widespread computer search to attempt to find the leak of Citrus information; he has not done so. Respondent should also be required to take further depositions. Since Respondent has not exhausted all reasonable means of uncovering Professor's identity, Cartman's presumptive right to the qualified reporter's privilege should prevail.

Furthermore, the Court in *Branzburg* recognized that the First Amendment protects reporters against investigations conducted in bad faith. *Branzburg*, 408 U.S. at 707. The Court held that "[o]fficial harassment of the press undertaken not for the purpose of law enforcement but to disrupt a reporter's relationship with his news sources would have no justification" for

disclosure of confidential sources. *Id.* at 707-08. Although the instant case does not involve a grand jury proceeding, this Court's concern regarding bad faith is still applicable to Cartman. Professor has provided Cartman with reliable information regarding Citrus on numerous past occasions. (J.A. 5). As a result, revealing Professor's identity would disrupt his confidential relationship with Cartman. This Court should also consider that Respondent is a leader of a major corporation and, as such, has significant access to the mass media. This enables Respondent to publicly combat the allegedly defamatory nature of Cartman's report and remedy his own reputation.

Respondent has not exhausted his resources in identifying Cartman's confidential source. This may indicate that Respondent is only trying to disrupt the relationship between Cartman and Professor. This disruption not only would result in a loss of a reliable source, but would diminish the public's access to information regarding developments at Citrus. Ultimately, this Court should view Respondent's efforts as an attempt to cover up Respondent's misconduct. Court compelled disclosure in the instant case would stifle the First Amendment's protection of the press' newsgathering function.

**C. Cartman qualifies as a reporter for the purposes of the defamation suit and is entitled to maintain the confidentiality of his source under the qualified reporter's privilege.**

The First Amendment's guarantee of a free press is applicable to the expanding Internet medium. The changing nature of journalism due to the Internet expansion makes the application of the First Amendment guarantee more complicated, but no less critical. This Court has recognized that the Constitutional right of the "[f]reedom of the press is a 'fundamental personal right' which is not confined to newspapers or periodicals . . . '[t]he press in its historic connotation comprehends every sort of publication which affords a vehicle of information and

opinion.’” *Branzburg*, 408 U.S. at 704. (quoting *Lovell*, 303 U.S. at 450, 452). This Court recognized in *Lovell* that the non-institutionalized press has served as “historic weapon[s] in the defense of liberty” in America’s history. *Lovell*, 303 U.S. at 452. The qualified reporter’s privilege, therefore, is not limited to newspaper journalists because the “liberty of the press is the right of the lonely pamphleteer . . . just as much as of the large metropolitan publisher . . . .” *Branzburg*, 408 U.S. at 704. Cartman’s blog features news and opinions on various topics. (J.A. 4). Cartman’s blog reaches over 100,000 individuals and though not a traditional newspaper, *The Sludge Report* serves the same core purpose as a traditional newspaper. *Id.* Cartman disseminates news and offers opinions to inform the public of current events around the world; therefore, Cartman warrants the same protections as traditional reporters.

To be protected by the qualified reporter’s privilege a reporter must show that he intended to disseminate the information received from his and that this intention existed at the time the information was obtained. *See Gonzales*, 194 F.3d at 35. At the time Cartman received Professor’s confidential tip, Cartman intended to disseminate the information to *Sludge Report* readers. Cartman has previously shared tips he gathered Professor and other readers on his website. (J.A. 4-5). The lower circuits have recognized that the “process of newsgathering is a protected right under the First Amendment.” *von Bulow*, 811 F.2d at 142. The Second Circuit in *von Bulow* recognized that the qualified journalist’s privilege “emanates from the strong public policy supporting the unfettered communication of information by the journalist to the public.” *Id.* at 142. However, the court established further requirements to determine whether someone would be considered a journalist, and thus fall under the First Amendment protection. *Id.* at 142. Journalist classification “must be determined by the person’s intent at the inception of information-gathering process.” *Id.* The court recognized that any person may assert the

journalist's privilege successfully if "he is involved in activities traditionally associated with the gathering and dissemination of news, even though he may not ordinarily be a member of the institutionalized press." *Id.* Specifically, the court held that the "talisman" in determining a journalist and the application of the privilege is whether a person "at the inception of the investigatory process, had the intent to disseminate to the public the information obtained" from his source. *Id.* at 143, 145. Cartman's intent at the outset was to disseminate any tips or news he received on his website. (J.A. 5). His newsgathering purpose, whether from sources or his own efforts, was to distribute his findings to his readers. His intent, therefore, qualifies him as a journalist and he is protected by the reporter's privilege.

**D. Revealing confidential sources would expose reporters to liability and will chill reporting of controversial and important news stories.**

Forcing reporters to reveal confidential sources may expose them to liability and damages which could have a detrimental impact on the entire newsgathering process. This Court in *Cohen v. Cowles Media Co.* held that the freedom of the press did not prevent an informant from recovering damages from newspapers after the newspapers breached their promise to keep his identity confidential. *Cohen v. Cowles Media Co.*, 501 U.S. 663, 665 (1991). In *Cohen*, reporters from two different newspapers obtained potentially incriminating information on a Democratic gubernatorial candidate from Dan Cohen, a staff member for the Republican contender. *Id.* The reporters received this information only after Cohen was given a promise that he would remain anonymous. *Id.* Instead, both newspapers' editorial boards decided that Cohen's identity was newsworthy in itself and published his name as part of the story. *Id.* at 666. As a result, Cohen was fired from his position. *Id.* at 671.

This Court held that the First Amendment did not afford the Respondents limitless protection against a cause of action based upon promissory estoppel. *Id.* at 672. Although no

written contract existed, this Court recognized that Cohen had detrimentally relied upon the reporters' promises and only revealed information on the Democratic gubernatorial candidate after he was given adequate assurances of confidentiality. *Id.* at 671. The breach of the newspapers' promise resulted in its liability to Cohen for his loss of his employment. This Court determined that the newspapers could be held liable for "disregard[ing] promises that would otherwise be enforced" under Minnesota law. *Id.* at 672.

Though Cartman knows Professor personally, Cartman has explicitly stated that sources "will be treated as confidential . . . unless otherwise requested." (J.A. 5). Professor relied on Cartman's promise of confidentiality when Professor decided to reveal confidential information regarding his employer, Citrus. (J.A. 6). Forcing Cartman to reveal Professor's identity could expose Cartman to a similar claim, based upon promissory estoppel action, like the one this Court debated in *Cohen*. Exposing Professor as a Citrus employee will put Professor's job at risk, and therefore expose Cartman to potential damages if Professor is fired. *See Cohen*, 501 U.S. at 665, 671. Furthermore, if Cartman is compelled to reveal Professor's identity, his other readers contributing their own confidential material may no longer trust Cartman's promises of confidentiality. In the end, all of Cartman's sources would disappear and *The Sludge Report* may be driven out of business.

Most importantly, compelling Cartman to reveal Professor's identity will not only have negative implications for the individuals involved in this case, but would also impact newsgathering on the whole. *See Baker*, 470 F.2d at 782 ("The threat to a newsman of being charged with contempt and of being imprisoned for failing to disclose his information or its sources can significantly reduce his ability to gather vital information . . ."). Uncovering controversial stories requires reporters to rely on confidential sources such as Professor to

uncover often controversial stories. Historically, this nation's most important news stories, such as the Watergate, have been made possible through the use of confidential sources. Raising a reporter's concern for potential liability by compelling him to reveal his confidential sources in a civil proceeding would chill the reporter's willingness to print information critical to the public. This chilling effect would not only negatively impact journalism as a profession, but would detrimentally impact the public, who would no longer have access to news simply because of the reporter's liability concerns.

Therefore, this Court should protect Cartman's qualified reporter's privilege because Respondent has not shown a sufficiently compelling interest to overcome it in this case.

**II. RESPONDENT IS A LIMITED-PURPOSE PUBLIC FIGURE BECAUSE HE WAS INFLUENTIAL IN OVERSEEING LABOR PRACTICES THAT ENGENDERED THE EXACT PUBLIC CONTROVERSY UPON WHICH CARTMAN'S REPORTING FOCUSED.**

In *N.Y. Times Co. v. Sullivan*, this Court recognized that Plaintiffs frequently abuse defamation actions as a device to silence potential critics; therefore, baseless defamation claims cause self-censorship of the "unfettered interchange of ideas" guaranteed by the First Amendment. 376 U.S. 254, 269 (1964). To prevent self-censorship, this Court still sanctions the defamation action as a reputational remedy for unsuspecting, purely-private Plaintiffs, however, it affords heightened First Amendment protections - beyond those promised in state defamation statutes - to citizens criticizing influential Plaintiffs in the spirit of public debate. *Id.* at 279-280; *Curtis Publ'g Co. v. Butts*, 388 U.S. 130, 149, 155 (1967).

In order to uphold the *N.Y. Times* First Amendment protections, this Court should find that, as Director of Research and Development for a *Fortune 500* company and the executive responsible for overseeing Citrus' use of controversial labor practices, Respondent is of "special prominence in the resolution of public questions[,] . . . has engaged in a course that was bound to

invite attention and comment” and has therefore attained the status of limited-purpose public figure (LPPF).<sup>1</sup> (J.A. at 2, 3); *Rosanova v. Playboy Enter., Inc.*, 580 F.2d 859, 861 (5th Cir. 1978). Because Respondent is an LPPF for purposes of the press’ coverage of the Citrus labor controversy, the *N.Y. Times* “actual malice” standard protects Cartman and requires Respondent to prove more than Cartman’s mere negligence towards ascertaining the truthfulness of his July 8, 2008 *Sludge Report*. *N.Y. Times*, 376 U.S at 279. Respondent must provide clear and convincing evidence that Cartman published the report with “actual malice,” meaning proof “that the defendant in fact entertained serious doubts as to the truth of his publication.” *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968). Since the record suggests that Cartman personally assessed Professor’s demeanor, believed Professor to be a Citrus employee and used Professor as a reliable source prior to July 8, 2008, Respondent is unable to prove actual malice by the clear and convincing evidence required.

**A. This Court’s precedent rejects any condition on LPPF status which requires Cartman to prove that Respondent voluntarily injected himself into the media’s spotlight or sought out public attention.**

Although the Fifteenth Circuit had not adopted a determinative test for LPPF status by the time this action was appealed, its decision - that LPPF status only attaches if Respondent had “voluntarily thrust [himself] into the public fire” and invited attention upon himself - controverts this Court’s basic LPPF guidelines and the prevalent test of sister circuits. (J.A. at 16, 28, 39) (citing *Lerman v. Flynt Distrib. Co.*, 745 F.2d 123, 136-37 (2nd Cir. 1984)).

This Court has insisted on multiple occasions that LPPF status is warranted even when a defamation Plaintiff does not deliberately seek out the public’s attention or the media’s spotlight in an attempt to intentionally bias the outcome of a public controversy. *See Anderson v. Liberty*

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<sup>1</sup> Petitioner concedes that Respondent is not a “public official” or “general-purpose public figure” in regards to the instant action.

*Lobby, Inc.*, 477 U.S. 242, 246 (1986) (noting that LPPF status attaches either when the Plaintiff “voluntarily injects himself or is *drawn into a particular public controversy and thereby becomes a public figure for a limited range of issues*. In either case such persons assume special prominence in the resolution of public questions.” (quoting *Gertz v. Welch*, 418 U.S. 323, 351 (1974))) (emphasis added). The critical recognition in both *Anderson* and *Gertz* - that LPPF status attaches even when a Plaintiff is drawn into a public controversy by another - now precludes this Court from adopting the test derived by the Second Circuit and relied upon by the Fifteenth Circuit in its majority opinion. (J.A. at 29) (holding that LPPF status required, as a discrete element, that the defamation Plaintiff “‘voluntarily inject’ himself into the relevant public controversy” as well as “maintain regular and continuing access to the media in order to combat the defamatory remarks” (quoting *Lerman*, 745 F.2d at 136-137)); *see Dameron v. Washington, Inc.*, 779 F.2d 736, 737 (D.C. Cir. 1985) (holding that Plaintiff’s “role in a major public occurrence resulted in his becoming an involuntary, limited-purpose public figure” because “[i]njection is not the only means by which public-figure status is achieved,” nor the “the be-all and end-all of public figure status.”).

**B. Under the three-step test adopted by a plurality of circuits, Respondent’s significant influence over the outcome of the Citrus labor controversy is sufficient for imposition of LPPF status.**

Because LPPF status requires no “voluntary injection” by Respondent, this Court should instead apply the test advocated by the First, Fifth, Eleventh and D.C. Circuits to find that Respondent’s influential role in a public controversy over Citrus’ foreign labor practices warrants imposition of LPPF status. *Trotter v. Jack Anderson Enters., Inc.*, 818 F.2d 431, 433-34 (5<sup>th</sup> Cir. 1987) (noting that the “District of Columbia has developed a three-step test”); *Silvester v. Am. Broad. Cos.*, 839 F.2d 1491, 1494 (11<sup>th</sup> Cir. 1988) (holding that “the proper

standard for determining whether plaintiffs are limited purpose public figures are best set forth in *Waldbaum v. Fairchild*<sup>2</sup> (citing *Waldbaum*, 627 F.2d 1287 (D.C. Cir 1980)); *see also Faigin v. Kelly*, 978 F. Supp 420, 427-428 (D.N.H. 1997) (finding LPPF status even though “the plaintiff does not assume an ideological position in the resulting debate”) *aff’d*, *Faigin v. Kelly*, 184 F.3d 67 (1<sup>st</sup> Cir. 1999). According to the plurality of circuits, this Court “must (1) isolate the public controversy, (2) examine the plaintiff’s involvement in the controversy, and (3) determine whether ‘the alleged defamation [was] germane to the plaintiff’s participation in the controversy.’” *Silvester*, 839 F.2d at 1494 (quoting *Waldbaum*, 627 F. 2d 1287).

Under the three-step plurality test, this Court should not conclude that Respondent is a purely-private citizen simply because of his limited media appearances, his infrequent public announcements, or his general distaste for the public spotlight. (J.A. at 3, 7). Regardless of how unassuming Respondent may be, his “special prominence in the resolution” of Citrus’ labor scandal satisfies this Court’s threshold inquiry as to whether Respondent can be deemed an LPPF for purposes of this defamation claim.<sup>2</sup> (J.A. at 3); *see Waldbaum*, 627 F.2d at 1294; *see also Anderson*, 477 U.S. at 246. The Fifteenth Circuit’s decision to reject Respondent’s LPPF status because “he has not voluntarily injected himself into a pre-existing public controversy” is in apposite to this Court’s own willingness to recognize LPPF status where a Plaintiff is drawn into the fray by virtue of his critical role in an important public question. (J.A. at 28).

**1. Citrus’ labor scandal rises to the level of a public controversy because it was discussed publicly and had substantial negative effects on multiple individuals other than Cartman and Respondent.**

In a decision representative of the plurality test, the D.C. Circuit determined that the President of a major supermarket chain (Greenbelt) was an LPPF for purposes of his defamation

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<sup>2</sup> Respondent is admittedly in-charge of developing the same product which mistreated Indian workers are seen manufacturing in Cartman’s photograph.

action against a magazine that had published a report on the dubious circumstances under which the President was fired. *See Waldbaum*, 627 F.2d 1287. The Circuit noted that, “[w]hile serving as Greenbelt's president, Waldbaum played an active role not only in the management of the cooperative but also in *setting policies and standards* within the supermarket industry.” *Id.* at 1290 (emphasis added). In step one of the three-part LPPF test, the Court “isolate[d] the public controversy” surrounding the President’s bold corporate policies, noting that the policy-driven controversy could support LPPF status because it “has received public attention [and] because its ramifications will be felt by persons who are not direct participants.” *Id.* at 1296. With only a small variance in language, the Eleventh Circuit asks whether “the issue was being debated publicly and if it had foreseeable and substantial ramifications for nonparticipants.” *Silvester*, 839 F.2d at 1495.

The labor practices Respondent oversaw as head developer and “man behind the curtain” of Citrus’ industry-leading ePlay were receiving attention from *The Sludge Report’s* 100,000-member audience for nearly four years prior to the instant action. (J.A. at 3, 4). As required by step one in *Waldbaum* and *Silvester*, the ramifications of Citrus’ labor practices extended far beyond the direct participants to this action. Those collaterally affected include shareholders whose stocks plummeted in value after Cartman’s report, American retailers forced to pull the ePlay from shelves to protect their image, American workers whose jobs were disappearing as a result of the artificially cheap labor employed in Mumbai, and the Indian laborers themselves, forced to continue working in unsuitable conditions. (J.A. at 4, 6). Citrus’ longstanding labor practices were not “matters essentially of a private nature . . . that someone in the press believed . . . deserved media coverage”; rather, the practices were “being publicly debated” by *Sludge*

*Report* readers through email contributions, “had substantial ramifications for nonparticipants” and, therefore, comprised a public controversy. *Waldbaum*, 627 F.2d at 1296-97; (J.A. at 5).

**2. Respondent is intimately involved in the outcome of the labor controversy because he is the corporate executive responsible for developing the ePlay, the manufacture of which prompted the foreign labor exploitation now in question.**

After isolating the public controversy posed by Waldbaum’s corporate policies, the D.C. Circuit’s next analyzed Waldbaum’s role in the controversy, indicating as a threshold requirement that “trivial or tangential participation is not enough.” *Waldbaum*, 627 F.2d at 1297. Cognizant that many public concerns are shaped by the boardroom decisions of a few powerful individuals, the Court imposed LPPF status on Waldbaum because he “could realistically have been expected, because of his position in the controversy, to have an impact on its resolution.” *Id.* Since the controversy before this Court is Citrus’ exploitation of labor in the development of its ePlay device - which Respondent oversees as Director of R&D - Respondent has *the* most influential role in any decision to continue or immediately cease the controversial exploitation. Respondent’s influence and preeminence at Citrus as “the man behind the curtain” of its most successful product is so pervasive that he has amassed a “following” amongst low-level employees who don Respondent’s name on their work shirts. (J.A. at 3, 4). The record indicates that, behind only his brother, Respondent is the most powerful corporate figure in the Citrus machine, responsible for “pushing Citrus, its employees, and its products to new heights.” (J.A. at 3). As head developer of the very product whose manufacture instigated Citrus’ use of substandard labor practices, Respondent is uniquely capable of shaping the outcome of any public controversy surrounding such practices. For this reason, LPPF status is appropriate.

**3. Cartman’s comments were aimed exclusively at Respondent’s role in Citrus’ use of controversial labor policies; therefore, these comments are fully relevant to Respondent’s participation in the controversy.**

In the final step of the D.C. Circuit’s analysis, the Court examined whether the defamatory comments underlying the LPPF’s suit were germane to his participation in the public controversy. *Waldbaum*, 627 F.2d at 1297. It explained that “[m]istatements wholly unrelated to the controversy . . . do not receive the New York Times protection.” *Id.* at 1298. Although Cartman’s July 8, 2008 report is strongly-worded, in totality it is an extended commentary on the consequences of labor conditions he believes Respondent permits at Citrus’ Mumbai factory. The only specific individuals for whom Cartman expresses concern are “the men and women depicted in the photograph [who] are forced to work in slave-like conditions to put together . . . little more than a cheap status toy.” (J.A. at 6). Beyond mention of these workers, Cartman expresses a concern for “humanity” and the shameful circumstances which render Citrus’ profits “the fruit of a very poisonous tree.” *Id.* What Cartman’s comments address are the social repercussions of Citrus’ labor policy choices, and specifically those choices connected to Respondent’s oversight of the ePlay’s production. Cartman does not disparage Citrus simply for turning a profit; he disparages Citrus for the *practices* they employ in turning a profit. Given the scope and concern of Cartman’s report, the comments which fuel this action are germane to Respondent’s influence in shaping a public controversy.

**C. This Court’s decision to impose LPPF status upon Respondent should not be affected by the fact that the labor controversy originated overseas.**

In a case of similar corporate misconduct, the Fifth Circuit held that the President of an American company’s foreign bottling plant was an LPPF in his defamation claim against a columnist who had alleged that the President condoned a violent labor conflict and imposed “minimum labor standards” at the foreign plant. *Trotter v. Jack Anderson Enters., Inc.*, 818

F.2d 431 (5th Cir. 1987). Applying the “sensible” three-prong LPPF test announced in *Waldbaum*, the Fifth Circuit determined that the foreign labor conflict could be considered a legitimate public controversy despite its distant setting. *Id.* at 434. It noted that “social and political turmoil occurring there has aroused particular domestic concern, *more so when United States companies are implicated. Id.* (emphasis added). This Court should also view Respondent’s foreign labor practices as a legitimate basis for public concern, especially given the Fifth Circuit’s determination that a controversy’s foreign setting does not always mitigate its domestic impact. Many Americans including Citrus shareholders, American retailers and Citrus’ domestic employees are sure to feel the ramifications of these policies regardless of the ePlay factory’s foreign address.

**D. While Cartman was the first reporter to bring Citrus’ controversial practices to the public’s attention, this is not equivalent to a finding that Cartman “created” the controversy under which he now claims First Amendment Protection.**

This Court should not regard Cartman as having created this controversy simply because his source was able to reveal Respondent’s labor policies before any other media organization. In *Trotter*, the bottling company President argued unsuccessfully that it was manifestly unfair to impose LPPF status upon him for a controversy precipitated by the exact defamatory articles to which he objected. The Fifth Circuit dismissed his contention, explaining that “[c]reating a public issue, however, is not the same as revealing one. The purpose of investigative reporting is to uncover matters of public concern previously hidden from the public view.” *Id.* In this regard, Cartman encapsulates the role of investigative reporter. He utilized a trusted anonymous source in Professor to shine light upon an important matter warranting public attention. The record suggests that many of *The Sludge Report*’s 100,000 readers were first attracted to the blog because of its superior investigative reporting; it provides hard-to-obtain breaking news on

controversies and scandals in various arenas of public concern. (J.A. at 4, 5). Should this court fail to impose LPPF status on Respondent, such a decision would punish Cartman for his bold initiative and investigative efforts, while also undermining the First Amendment’s protection of “debate on issues of public concern.” *See N.Y. Times Co.*, 376 U.S. at 266 (noting that discouragement of reports which “protested claimed abuses...would be to shackle the First Amendment in its attempt to secure ‘the widest possible dissemination of information from diverse and antagonistic sources.’”).

After dismissing the claim that a controversy was created rather than revealed by the allegedly defamatory articles, the Fifth Circuit returned to the second determinative prong of the *Waldbaum* test. It analyzed “whether [President] Trotter had more than a trivial or tangential role in the controversy” and concluded that “[b]y virtue of his position...Trotter was a central figure in important policy matters . . . including the labor union controversy.” *Trotter*, 818 F.2d at 435. Given that the President in *Trotter* was deemed a central figure in the public controversy because of his “major responsibility for [the bottling plant’s] labor policy” this Court should find that Respondent too is a central figure in the Mumbai controversy. *Id.* The record indicates that Respondent “was charged with overseeing the development” of the ePlay Touché, the exact product which Cartman contends is manufactured by beleaguered Mumbai workers. (J.A. at 3).

**E. Given the Constitutional dimension to this Court’s decision to impose LPPF status on Respondent, it should focus on concrete evidence of Respondent’s actions and not Respondent’s subjective intent to avoid the public spotlight.**

This Court should not be misguided by Respondent’s insistence that he is “shy and does not enter the public limelight.” (J.A. at 3). The First Amendment’s protection of our right to be informed of pressing public concerns was never meant to turn on a particular figure’s desire for press coverage. *See Rosanova v. Playboy Enterprises, Inc.*, 580 F.2d 859, 861 (5th Cir.1978).

(insisting that “the law resulting from the inevitable collision between First Amendment freedoms and the right of privacy [including] the status of public figure *Vel non* does not depend upon the desires of an individual”). By choosing to lead a major corporation in a way that caused justifiable public concern, Respondent invited comment on his corporate affairs. In rejecting Respondent’s contentions and imposing LPPF status, this Court should understand that “ [i]t is no answer to the assertion that one is a public figure to say, truthfully, that one doesn't choose to be.” *Id.* For the foregoing reasons, this Court should find that Respondent is a limited-purpose public figure.

**III. BECAUSE RESPONDENT IS AN LPPF, HE IS REQUIRED TO PROVE ACTUAL MALICE; THEREFORE, RESPONDENT’S CLAIM FAILS BECAUSE HE IS UNABLE TO PROVIDE CLEAR AND CONVINCING EVIDENCE THAT CARTMAN ENTERTAINED SERIOUS DOUBTS AS TO THE EXISTENCE OF POTENTIAL FALSEHOODS IN HIS REPORT.**

Respondent has failed to prove “actual malice” by not meeting his required burden of adducing clear and convincing evidence that Cartman entertained serious doubts as to the truthfulness of allegations published in his July 8, 2008 report. *N.Y. Times v. Sullivan* identified actual malice, generally, as a defendant’s choice to publish an allegedly defamatory comment despite “knowledge that it was false or with reckless disregard of whether it was false or not.” 376 U.S. at 269. From this broad definition, *Herbert v. Lando* narrowed the actual malice inquiry by requiring courts to focus on the defendant’s own *subjective* knowledge at the time of publishing. *See* 441 U.S. 153 (1968). The *Herbert* Court wrote “*New York Times* and its progeny made it essential to proving liability that plaintiff focus on the conduct and state of mind of the defendant. The alleged defamer of public officials or of public figures must know or have reason to suspect his publication is false.” *Id.* at 160. In essence, “there must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the

truth of his publication,” or “made the false publication with a ‘high degree of awareness of probable falsity.’” *Id.* at 156 (citing *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968)); *Harte-Hanks Commc’n, Inc. v. Connaughton*, 491 U.S. 657, 667 (1989); *Reuber v. Food Chemicals News, Inc.*, 925 F.2d 703, 711 (4th Cir. 1992).

**A. Cartman’s trust in Professor’s credibility is supported by evidence that this trust was extended only after Cartman had the opportunity to make a positive in-person assessment of Professor’s demeanor during an event the two attended together.**

Not only has Respondent failed to provide clear and convincing evidence - evidence that is “significantly probative and more than merely colorable” - that Cartman entertained serious doubts towards Professor’s information on Citrus labor practices, but the record suggests that Cartman felt totally secure in his decision to proceed on July 8, 2008. *World Boxing Council v. Cosell*, 715 F.Supp 1259, 1262 (S.D.N.Y 1989). Cartman had the opportunity to judge Professor’s demeanor in-person and face-to-face before ever using him as an anonymous source in *The Sludge Report*. (J.A. at 5). Given their personal contact, this Court should not liken the relationship between Cartman and Professor to that of the newsman and proverbial anonymous tipster. *See St. Amant*, 390 U.S. at 732. If a jury is uniquely capable of judging a witness’s credibility because it examines the witness’s demeanor in-person, then Cartman’s positive in-person assessment of Professor’s demeanor should indicate the subjective reasonableness of his subsequent decision to trust Professor’s information.

**B. Cartman had no reason to doubt the reliability of Professor’s information prior to publishing the report because Cartman knew Professor to be a Citrus employee-insider and reliable source on numerous prior occasions.**

Beyond the reassurance of personal interaction, Cartman believed Professor worked for Citrus; therefore, it is doubtful that Cartman would feel suspicious towards information supplied by a company insider. (J.A. at 5, 6). That the two men first met at an *electronics* tradeshow--an

event which Citrus employees would attend--supports Cartman's subjectively reasonable belief that Professor worked for Citrus and would have access to reliable company details. Cartman reasoned that Professor would be able to supply him with credible information regarding Respondent's labor policies because Professor worked for Respondent. Therefore, nothing about Professor's personal demeanor, connection to Citrus, or prospective access to company information would alert Cartman to any potential falsehoods.

Evidence that on multiple occasions prior to July 8, 2008, Professor supplied *The Sludge Report* with reliable information regarding Citrus' activities defeats Respondent's contention that Cartman entertained serious pre-publication misgivings. (J.A. at 5). By the time Cartman exposed Petitioner's labor practices using Professor as his source, a justifiable relationship of trust had developed between Cartman and Professor based on past interaction. Cartman's long-established satisfaction with Professor as his confidential insider source precludes Respondent from claiming, especially with convincing clarity, that Cartman entertained subjective doubts sufficient enough to infer actual malice.

**C. Cartman's decision not to corroborate Professor's information with another party is not a critical element of this Court's actual malice analysis.**

Respondent cannot prove actual malice by highlighting Cartman's decision not to corroborate Professor's information with additional sources or with Respondent himself. Such a finding is precluded by this Court's decision in *St. Amant*, which involved a sheriff's defamation claim against a political candidate for remarks accusing the sheriff of accepting bribes from local union members. *See St. Amant*, 390 U.S. at 729. The Defendant-candidate, St. Amant, had obtained his insider information through one source, Albin, a member of the bribing union's rival faction. *Id.* at 728. The sheriff - determined to be a "public official" and thereby required to prove actual malice - insisted that actual malice was present because St. Amant "relied solely on

Albin's affidavit although the record was silent as to Alban's reputation for veracity . . . [and St. Amant] failed to verify the information with those in the union office who might have known the facts." *Id.* at 730. In dismissing the sheriff's contention that these failures proved clear and convincing evidence of actual malice, this Court noted that "[f]ailure to investigate does not in itself establish bad faith...there was no evidence in the record of Albin's reputation for veracity, and this fact merely underlines the failure of [Sherriff] Thompson's evidence to demonstrate . . . unsatisfactory experience with him by St. Amant." *Id.* at 733. Given this Court's past holding, no finding of actual malice in the instant action can be premised on Cartman's failure to check the veracity of the photograph with Citrus offices, Respondent, or potentially knowledgeable third parties. (J.A. at 5). Furthermore, nothing suggests that Cartman had any past unsatisfactory experiences with Professor which might lead Cartman to question Professor's reputation. In fact, on multiple occasions prior to July 8, 2008, Professor provided Cartman with reliable information that was subsequently published without uproar. Therefore, Cartman could conceive of no reason to subject the photograph to a PhotoWorks computer scan. Cartman's decision to publish Professor's information in his report is not, standing alone, clear and convincing evidence of actual malice.

**D. Any potential dislike Cartman feels towards Respondent fails to prove actual malice because "actual malice" is a Constitutional term-of-art distinct from common law malice involving malevolence or spite.**

This court should not detect the presence of actual malice from any alleged ill-will Cartman may have harbored against Respondent as a result of financial difficulties Cartman suffered after a Citrus MegaStore opened near his electronics shop. (J.A. at 4). This Court has stated with clarity that "the actual malice standard is not satisfied merely through a showing of ill will or "malice" in the ordinary sense of the term . . . actual malice may not be inferred alone

from evidence of personal spite, ill will or intention to injure on the part of the writer.” *Harte-Hanks Commc’ns, Inc.* 491 U.S. at 667-68. Therefore, Cartman’s personal animus towards Citrus is insufficient as a matter of law to prove actual malice. Even if this Court does allow personal animosity to enter into its final determination, it should nonetheless recognize that Respondent has failed *in toto* to provide clear and convincing evidence of actual malice.

This Court should reject Respondent’s allegation of actual malice whether it analyzes Cartman’s assessment of Professor’s credibility, the past instances in which Professor served as an informant, Professor’s connection to Citrus, Cartman’s decision not to corroborate Professor’s information, or the personal animosity between parties. If this Court maintains its focus on Cartman’s own subjective belief in the authenticity of his report, then the evidence will show that Cartman never entertained the sort of serious doubts required to hold him liable on a Constitutional actual malice standard.

### **CONCLUSION**

The evidence in this case suggests that no compelling reason exists to accept Respondent’s request for court-compelled disclosure of Petitioner’s confidential source. Furthermore, the evidence indicates that Respondent is a limited-purpose public figure who has failed to prove actual malice in the Petitioner’s publication of the July 8, 2008 *Sludge Report*.

For the aforementioned reasons, Petitioner respectfully requests this Court to reverse the Fifteenth Circuit’s decision to compel disclosure of Professor’s identity and hereby grant Cartman’s motion for summary judgment.