

No. 09-2701

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

ERIC CARTMAN,

Petitioner,

v.

IKE BROFLOVSKI,

Respondent.

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

BRIEF FOR THE PETITIONER

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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 the 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 sources.
- 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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BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion and judgment of the United States District Court for the Western District of Silverado denying Respondent's motion to compel discovery and granting Petitioner's motion for summary judgment is unreported. (J.A. at 1-20). The United States Court of Appeals for the Fifteenth Circuit's Memorandum and Order reversing the District Court's denial of Respondent's motion to compel discovery and grant of Petitioner's motion for summary judgment and remanding the case for further proceedings is unreported and can be found at J.A. at 21-32.

JURISDICTION

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

CONSTITUTIONAL PROVISIONS INVOLVED

The First Amendment provides, in pertinent part: “Congress shall make no law... abridging the freedom of speech, or of the press...”. U.S. CONST. amend. I.

STATEMENT OF THE CASE

Eric Cartman (“Cartman”) appeals the United States Court of Appeals for the Fifteenth Circuit’s decision to reverse the United States District Court for the Western District of Silverado’s decision to deny Ike Broflovski’s (“Respondent”) motion to compel discovery and grant summary judgment for Cartman. Respondent’s defamation claim alleges that Cartman published false information exposing Respondent’s violations of human rights on his blog. (J.A. at 1, 21).

Citrus, a *Fortune 500* consumer electronics company headquartered in the coastal state of Silverado, had a bitter beginning after the sales of its handheld radios and VCRs did not bear fruit. (J.A. at 2). It was not until 1997 that Citrus fought its way into the market as stock prices soared with the introduction of a new line of high-powered, fully integrated home computer systems that were effectively virus proof and that boasted innovative features. (J.A. at 2). Citrus was able to cling to the fluctuating market despite the dot-com bust with the release of its flagship product, the ePlay, which was soon a status symbol among young people throughout the nation. (J.A. at 2). Things for Citrus seemed too sweet to be true.

It was in 2006 that Kyle Broflovski hired his brother, Respondent, to oversee the development of the new ePlay Touché as the new Director of Research and Development. (J.A. at 3). The ePlay Touché was just the twist that Citrus needed to put itself permanently in the market. (J.A. at 3). Respondent seemed an unlikely choice for the role of a CEO in a *Fortune 500* company due to his reserved nature and limited involvement at press conferences. (J.A. at

3). However, upon Kyle's announcement of Respondent's role at a press conference covered by the Associated Press on August 7, 2006, Respondent commented on his involvement in Citrus and his exuberance in pushing the new and exciting line of products to greater heights. (J.A. at 3). Respondent quickly gained a following of employees that sported "I like Ike" buttons after Kyle's continual multi-media praise of Respondent's work on new innovations. (J.A. at 3-4). How could this sudden popularity and newfound success sour into the present suit? It was Cartman, a sole proprietor of an electronic sales and repair shop and part-time blogger, who revealed how Citrus' questionable business practices helped build this empire. (J.A. at 4).

Cartman's misfortune began when Citrus decided to squeeze the prosperity out of Cartman's electronic sales and repair shop. (J.A. at 4). After Citrus set up a megastore across the street from Cartman's store, Cartman had no choice but to look for other ways to make an income. (J.A. at 4). Cartman set up a his part-time profitable blog, *The Sludge Report*, designed to make some additional income covering stories ranging from celebrity gossip to local and international politics. (J.A. at 4). Soon, with over 100,000 followers, Cartman was able to inform his readers of pressing issues such as the questionable business practices of Citrus. (J.A. at 4).

On July 8, 2008, Cartman made his report that brought about the present suit after receiving an e-mail a day earlier from his long-time friend and past source of reliable information on Citrus, "Professor Chaos". (J.A. at 5). The e-mail containing a picture showing Respondent walking through a factory and yelling at workers as they wore minimal protective gear revealed that Respondent was engaging in human rights abuses at the ePlay Touché manufacturing facility in Mumbai, India. (J.A. at 5).

Knowing Professor Chaos' past reliability on the practices and products of Citrus, Cartman hurried to publish this new information on his blog. (J.A. at 5). The blog post pucked the attention of the mainstream press with their continued coverage of human rights abuses cause by corporations' use of Third World labor. (J.A. at 6). This attention reached a peak when Keith McRiley, host of the "Countdown Factor" cable news show listed Respondent as the recipient of the "Most Heinous Individual in the Galaxy" award and urged viewers to boycott Citrus, which led to a decrease in sales and a 25% stock drop. (J.A. at 6). In response to the most recent publicity from the blog post, Respondent's attorney delivered Respondent's statement that the photograph was a fabrication. (J.A. at 7). While it was later revealed that the image of Respondent was added to the posted photograph of the poor work conditions in the ePlay Touché factory, Respondent did acknowledge making a number of visits to Mumbai. (J.A. at 7).

On the facts presented, the District Court granted Cartman's motion for summary judgment pursuant to Fed. R. Civ. P. 56 and denied Respondent's motion to compel discovery under Fed. R. Civ. P. 37. Subsequently, the United States Court of Appeals reversed the grant of summary judgment and remanded the case for further proceedings. The issue on appeal is whether the United States Court of Appeals erred in reversing the denial of Respondent's motion to compel discovery of Professor Chaos's identity and grant of summary judgment for Cartman on the claim of defamation.

SUMMARY OF THE ARGUMENT

This Court should reverse the United States Court of Appeals for the Fifteenth Circuit as it erred in reversing the District Court and this Court should affirm the United States District Court for the Western District of Silverado's decision to deny Respondent's motion to compel discovery and grant Cartman's motion for summary judgment.

The First Amendment recognizes a qualified reporter's privilege in civil cases protecting a journalist from revealing the identity of a confidential source. In this civil defamation case filed by Respondent, Cartman published an online blog posting after receiving a tip via email from a confidential source. The qualified reporter's privilege, which protects this confidential source, can only be overcome when the party seeking information demonstrates through a clear and specific showing that the information is highly material and relevant, necessary and critical to the heart of the claim, and they have exhausted all other means of obtaining the information. The confidential source's identity is not highly material and relevant because Cartman is the only named party in the lawsuit, and he had no reason to doubt the credibility of his source. It is not necessary or critical to the heart of Respondent's claim because the claim is based on the blog posting by Cartman and is not hindered if the source is kept confidential. Finally, Respondent failed to show that he exhausted all other means of obtaining the source's identity by only deposing the Mumbai factory manager and by merely emailing the employees at the factory. By failing to demonstrate a clear and convincing showing why the qualified reporter's privilege should be overcome, the First Amendment protects Cartman.

Cartman, a blogger, is within the protected class of journalists who qualify to assert the First Amendment's qualified reporter's privilege. An individual is a journalist when they intended at the time of the newsgathering to use the material sought, gathered or received to disseminate information to the public and that such intent existed at the inception of the newsgathering process. As a blogger, Cartman sought out information, intended for dissemination to the public, to post on his daily blog from the internet or newspapers and promised confidentiality to any person providing tips or information.

Additionally, Respondent failed to meet his burden of proof, and Cartman's grant of summary judgment should be granted. With the political climate cultivating headlines related to human rights violations in sweatshops, Respondent, a *Fortune 500* executive, visited a third-world country where the Citrus company had factories with questionable conditions and thus, earned a label of a limited-purpose public figure. After voluntarily injecting himself into a pre-existing public controversy, Respondent needed to show with clear and convincing evidence that Mr. Cartman acted with actual malice in publishing the listing and failed to do so. The motion for summary judgment should be granted.

This Court should affirm the denial of the motion to compel discovery and Mr. Cartman's grant of summary judgment in response to a claim of defamation.

ARGUMENT

A. THE DISTRICT COURT PROPERLY DENIED RESPONDENT'S MOTION TO COMPEL THE IDENTITY OF CARTMAN'S CONFIDENTIAL SOURCE BECAUSE THE FIRST AMENDMENT QUALIFIED REPORTER'S PRIVILEGE PROTECTS CARTMAN FROM COURT-COMPELLED DISCLOSURE OF CONFIDENTIAL SOURCES IN A CIVIL DEFAMATION SUIT ARISING FROM AN ARTICLE PUBLISHED ON CARTMAN'S ONLINE BLOG.

The District Court properly denied Respondent's motion to compel the identity of Cartman's confidential source because the qualified reporter's privilege recognized in the First Amendment protects journalists, which includes bloggers such as Cartman. Under the Federal Rules of Evidence 501:

Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority . . . in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, State, or political subdivision thereof shall be determined in accordance with State law.

Fed. R. Evid. 501. The State of Silverado has not enacted a qualified reporter's statute to protect journalists. However, almost all federal circuits recognize a qualified reporter's privilege in civil cases under the First Amendment, which assures that "Congress shall make no law... abridging the freedom of speech, or of the press...". James C. Goodale et al., *Reporter's Privilege*, 952 PLI/Pat 161 (2008); Stephanie J. Frazee, *Bloggers as Reporters: An effect-based approach to First Amendment protections in a new age of information dissemination*, 8 Van. J. Ent. & Tech. L. 609 (2006). The First Amendment recognizes a qualified reporter's privilege that may only be overcome by a showing that the information sought is (1) highly material and relevant; (2) necessary or critical to the heart of the claim; and (3) the party seeking the information has exhausted all other means of obtaining the information. Where a qualified reporter's privilege exists, it may be asserted by anyone who falls within the protected class of journalists.

- 1. THE FIRST AMENDMENT CREATES A QUALIFIED REPORTER'S PRIVILEGE THAT PROTECTS CARTMAN AGAINST COURT-COMPELLED DISCLOSURE OF CONFIDENTIAL SOURCES BECAUSE THE INFORMATION REQUESTED BY RESPONDENT IS NOT HIGHLY MATERIAL AND RELEVANT TO THE PENDING SUIT NOR IS IT NECESSARY OR CRITICAL IN LITIGATING THE CLAIM, AND RESPONDENT HAS NOT EXHAUSTED ALL OTHER MEANS OF OBTAINING THE INFORMATION.**

Although the State of Silverado has not yet enacted a qualified reporter statute, the Supreme Court acknowledged the existence of First Amendment protection for news gathering in *Branzburg v. Hayes*. 408 U.S. 665, 681 (1972); (J.A. at 9). No court has found an absolute privilege to shield reporters from disclosing the identities of their confidential sources, but a majority of circuits have recognized a qualified reporter's privilege under the First Amendment in civil cases. James C. Goodale et al., *Reporter's Privilege*, 952 PLI/Pat 161 (2008).

Respondent filed a civil action, a defamation suit, against Cartman on September 20, 2008, the type of action where the qualified reporter's privilege applies. (J.A. at 7). Cartman received the

tip from Professor Chaos that spurred his July 8 blog post via email. (J.A. at 5). Cartman assures every individual that emails tips or information “will be treated as confidential sources unless otherwise requested.” (J.A. at 5). Professor Chaos is a confidential source whose identity the privilege protects a journalist from revealing.

This privilege protects reporters from revealing the identity of their confidential sources when the public’s interest in protecting the reporter’s sources outweighs the private interest in compelling disclosure. *Zerilli v. Smith*, 656 F.2d 705, 712 (D.C. Cir. 1981) (citing *Carey v. Hume*, 492 F.2d 631, 636 (D.C. Cir. 1972)). Here, Cartman’s interest in protecting the identity of his sources and ensuring that other informants will contain to pass along information that Cartman can disseminate without fear of retaliation far outweighs any interest Respondent has in obtaining the source’s identity.

There is a presumption that the privilege will prevail in all but the most exceptional cases, otherwise its value would be significantly diminished. *Zerilli v. Smith*, 656 F.2d 705, 712 (D.C. Cir. 1981). The privilege may only be overcome when the party seeking the information demonstrates by clear and specific showing that the information sought is highly material and relevant to a good faith claim, is necessary or critical to the heart of the claim, and is not obtainable from any other available sources. *Garland v. Torre*, 259 F.2d 545, 549-551 (2d Cir. 1958), *cert. denied* 79 S.Ct. 237 (1958); *Gonzales v. Nat’l Broad. Co., Inc.*, 194 F.3d 29, 33 (2d Cir. 1999).

- a. **PROFESSOR CHAOS’S IDENTITY SHOULD BE PROTECTED FROM DISCLOSURE AS IT IS NOT RELEVANT AND MATERIAL TO WHETHER CARTMAN’S BLOG POST WAS DEFAMATORY.**

Relevant and material to a good faith claim implies a logical relationship between the evidence and the ultimate issue to which it is claimed to relate. James C. Goodale et al.,

Reporter's Privilege, 952 PLI/Pat 161 (2008). Information that has questionable relevance to a claim weighs in favor of protection. *Silkwood v. Kerr-McGee Corp.*, 563 F.2d 433 (10th Cir. 1977) (citing *Baker v. F & F Inv.*, 470 F.2d 778 (2d Cir. 1972)). Information should not be disclosed where it is of little relevance or is only marginally relevant to the claim. See *Cervantes v. Time, Inc.*, 464 F.2d 986 (8th Cir. 1972) (upholding claim of privilege in libel action by a mayor against *Time* magazine for publishing an article alleging that the mayor was affiliated with organized crime because the information sought, the names of the government employees leaking information to the journalist, was of little relevance because the journalist had conducted independent research to verify the information). See *Baker v. F & F Inv.*, 470 F.2d 778, 783-4 (2d Cir. 1972) (upholding the First Amendment privilege in part because the identity of a confidential source upon which a journalist had based an article, though potentially relevant, was not material to plaintiff's civil rights action suit alleging racial discrimination in the sale of houses). See also *Riley v. City of Chester*, 612 F.2d 708, 718 (3d Cir. 1979) (upholding the privilege and stressing the information sought, the identity of a journalist's confidential source, was of marginal relevance where an article detailed investigations conducted prior to the appellee's mayoral campaign began). But see *Garland v. Torre*, 259 F.2d 545, 551 (2d Cir. 1958) (ordering disclosure of confidential source in civil defamation suit by Judy Garland against CBS for alleged false statements made by a CBS executive and published by Marie Torre with the authorization of the executive because "the information sought was of obvious materiality and relevance").

The identity of Cartman's source is not material and only marginally relevant to Respondent's defamation suit at best. Respondent's defamation suit is based on the blog post written by Cartman based on the information received from Professor Chaos. (J.A. at 1).

Similar to how the journalist's confidential source was only marginally relevant in *Cervantes*, Professor Chaos's identity is marginally relevant at best in this case. Though the journalist in *Cervantes* conducted independent research to verify the information he was receiving from employees of the government, Cartman had first-hand knowledge of Professor Chaos's credibility because he had previously utilized information from Professor Chaos that proved reliable. (J.A. at 5). In *Garland*, the Second Circuit ordered a non-party journalist to disclose the identity of her confidential source because the plaintiff's suit against the source could not continue without that information. This is distinguishable from the case at hand because Cartman is the only party to the lawsuit and the allegations that are at issue in the case, though based on the tip from Professor Chaos, were made by Cartman. (J.A. at 5-6).

b. PROFESSOR CHAO'S IDENTITY SHOULD BE PROTECTED FROM DISCLOSURE AS IT IS NOT CRITICAL OR NECESSARY TO THE HEART OF THE CLAIM BECAUSE IT DOES NOT HINDER RESPONDENT'S ABILITY TO GO FORWARD WITH HIS SUIT.

Information is not necessary or critical to the heart of the claim merely because it is useful. *In re NBC (Krase v. Graco)*, 79 F.3d 346, 351 (2d Cir. 1996) (reversing District Court's denial of motion to quash subpoena requesting outtakes from videotaped interview finding that "critical or necessary" must mean something more than "useful" and when the "rise and fall"¹ test was applied, the appellee could not make the clear and specific showing required by the statute). *But See Garland v. Torre*, 259 F.2d 545, 550 (2d. Cir. 1958) (ordering disclosure of journalist's confidential source in a libel suit against CBS for statements made by the source, an unknown CBS executive, to the journalist because the source's identity went to the heart of the

¹ The "rise and fall" test was adopted in several courts within the Second Circuit. It requires a finding that the claim for which the information is to be used "virtually rises or falls with the admission or exclusion of the proffered evidence." "The test is not merely that the material be helpful or probative, but whether or not the defense of the action may be presented without it." *In re NBC (Krase v. Graco)*, 79 F.3d 346, 351 (2d Cir. 1996).

plaintiff's claim). *But See Carey v. Hume*, 492 F.2d 631, 637 (D.C. Cir. 1974) (finding that identity of appellant's sources is critical to the appellee's claim where it would be "exceedingly difficult for appellee to introduce evidence beyond his own testimony" to disprove the allegations).

Professor's Chaos's identity is not critical or necessary to the heart of Respondent's defamation claim. Cartman's refusal to reveal the identity of his confidential source does not hinder Respondent's ability to go forward on his defamation claim against Cartman. The Second Circuit found that to be "necessary or critical" to a claim, information must be more than "useful" adopting a "rise and fall" test, where the information sought to be used in the claim must determine the defense's ability to put forth a case. *In re NBC (Krase v. Graco)*, 79 F.3d 346, 351 (2d Cir. 1996). Here, Respondent's case against Cartman easily proceeds without the identity of Professor Chaos because Professor Chaos is not a party to the litigation, as was the source in *Garland*. Further, unlike the appellee in *Carey* whose only evidence that he did not remove the boxes at issue were his own statements, Respondent has the ability to put forth evidence beyond his own statements to disprove the allegations of violations of human rights.

c. PROFESSOR CHAOS'S IDENTITY SHOULD BE PROTECTED FROM DISCLOSURE AS RESPONDENT HAS NOT EXHAUSTED ALL OTHER MEANS OF OBTAINING THE INFORMATION BY MERELY TAKING A FEW DEPOSITIONS AND SENDING EMAILS TO EMPLOYEES.

Reporters should be compelled to disclose their sources only after the litigant has shown that they have exhausted every reasonable alternative source. *Zerilli v. Smith*, 656 F.2d 705713 (D.C. Cir. 1981) (upholding the First Amendment privilege because appellants had not met their obligation to exhaust all possible alternative sources of information when they failed to depose only four employees). An individual cannot escape their obligation to exhaust alternative

sources simply because they fear it would be time-consuming, costly, and unproductive. *Zerilli v. Smith*, 656 F.2d at 715. See *Baker v. F & F Inv.*, 470 F.2d 778, 783-4 (2d Cir. 1972) (upholding the First Amendment privilege where there were at least sixty other real estate agents available to be deposed to obtain the information sought). The “values resident in the protection of the confidential sources of newsmen certainly point towards compelled disclosure from the newsmen himself as normally the end, and not the beginning, of the inquiry.” *Carey v. Hume*, 491 F.2d 631, 638 (D.C. Cir. 1974). However, there are limitations to the obligation to pursue alternative sources. *Carey v. Hume*, 491 F.2d 631, 638-8 (D.C. Cir. 1974) (did not find the concept of exhaustion of remedies to be relevant where appellant’s stated his source was an employee of the national headquarters of the United Mine Workers of America and court held that appellee need not have deposed every worker). Although equities weigh more heavily in favor of disclosure when a journalist is a party to a libel suit and assertion of the privilege will shield him from liability, disclosure is not automatic and where other factors suggest disclosure would be inappropriate, the privilege should prevail. *Zerilli* at 714.

Respondent failed to exhaust every alternative source by deposing only the manager and a few top engineers and by merely sending emails to all employees requesting information on the source of the leak. (J.A. at 8). While Respondent has gone one step further than the appellant in *Zerilli* by deposing some of the senior members of the staff in Mumbai, he failed to show that he had exhausted all other means of obtaining the source of information. In *Baker*, the Second Circuit upheld the protections of the First Amendment where at least sixty people were available to be deposed to obtain the information sought. However, in *Carey*, the District of Columbia Circuit held that appellant need not depose every worker at the national headquarters for United Mine Workers of America. Here, Respondent had the opportunity to depose any or all of the

employees at the Mumbai factory. Further, his inquiry could easily be narrowed to those people with access to the factory in the evening when the photograph was taken. Merely sending an email inquiry is not sufficient to show that Respondent has exhausted all alternative sources of information at his disposal. (J.A. at 8).

Courts have drawn a distinction in requiring disclosure of confidential sources in civil libel cases in which the reporter is party and those in which the reporter is not a party. “When the journalist is a party, and successful assertion of the privilege will effectively shield him from liability, the equities weigh somewhat more heavily in favor of disclosure.” *Zerilli v. Smith*, 656 F.2d 705, 714 (D.C. Cir. 1981). Even though Cartman is a party to the pending defamation suit, successful assertion of the privilege will not effectively shield Cartman from liability.

Respondent’s lawsuit is based on the blog posting written and published by Cartman on his blog. (J.A. at 6-7). Protecting the identity of Cartman’s confidential source, who tipped Cartman off to the actions which became the allegations in this case, would in no way hinder Respondent’s ability to proceed against Cartman. Respondent has access to independent evidence that the information published was false without needing to inquire into the credibility of a non-party witness.

Cartman is not required to disclose the identity of his source because Respondent failed to carry the burden necessary to overcome the protections afforded by qualified reporter’s privilege recognized in the First Amendment. Therefore, Cartman is entitled to the protections of the First Amendment as he is within the class of protected journalists.

2. CARTMAN, AS A BLOGGER, QUALIFIES AS A REPORTER ENTITLED TO ASSERT THE QUALIFIED REPORTER’S PRIVILEGE AGAINST COURT-COMPULLED DISCLOSURE OF HIS CONFIDENTIAL SOURCES.

Cartman's actions as a blogger, collecting news stories and publishing them on his blog, qualify Cartman as a reporter and bring him within the protections of the First Amendment. "[P]rotection from disclosure may be sought by one not traditionally associated with institutionalized press." *von Bulow v. von Bulow*, 811 F.2d 136, 144 (2d. Cir. 1987), *cert. denied* 107 S.Ct. 1891 (1987). The Second Circuit recognized in *von Bulow v. von Bulow* that the intended manner of dissemination may vary because "[the] press in its historic connotation comprehends every sort of publication which affords a vehicle of information and opinion." 811 F.2d 136 (2d. Cir. 1987), *cert. denied* 107 S.Ct. 1891 (1987) (citing *Lovell v. Griffin*, 303 U.S. 444, 452 (1938)). The Supreme Court acknowledged in *Branzburg v. Hayes* that "[f]reedom of the press is a 'fundamental personal right' which 'is not confined to newspapers and periodicals'", but rather the "liberty of the press is the right of the lonely pamphleteer... just as much as of the large metropolitan publisher." 408 U.S. 665, 704 (1972).

The Second Circuit recognized in *von Bulow v. von Bulow* that the critical question in determining whether a person falls within the protected class of the journalist's privilege is "whether the person, at the inception of the investigatory process, had the intent to disseminate to the public the information obtained through the investigation." 811 F.2d 136, 143 (2d Cir. 1987), *cert. denied* 107 S.Ct. 1891 (1987). An individual qualifies as a reporter when they show through competent evidence that they "intend[ed] to use material-sought, gathered or received-to disseminate information to the public and that such intent existed at the inception of the newsgathering process." *von Bulow v. von Bulow*, 811 F.2d 136, 144-5 (2d Cir. 1987), *cert. denied* 107 S.Ct. 1891 (1987) (held that investigative reports commissioned by close friend of a criminal defendant on the lifestyles of alleged victim's children and notes taken by the friend during trial were discoverable because the friend did not intend to use the reports or the notes to

disseminate information to the public). *See also Silkwood v. Kerr-McGee Corp.*, 563 F.2d 433, 437 (10th Cir. 1977) (held that the fact that the witness was a free lance film documenter, not a regular salaried newspaper reporter, did not act to deprive him of the right to seek protective relief).

Bloggers, such as Cartman, qualify as reporters and are entitled to assert a qualified reporter's privilege. Cartman is similar to the witness in *Silkwood*, who was a free lance documenter that gathered information he intended to depict in a motion picture account of Karen Silkwood's life. Cartman sought out information on a variety of topics ranging from celebrity gossip to politics to post on his blog. (J.A. at 4). Unlike in *von Bulow*, where a defendant's friend obtained the investigatory reports and took notes to vindicate their friend, Cartman collected information with the intent to publish the information on his blog. To aid in his efforts of collecting a wide variety of information, he provided his personal email address so that people could confidentially send him scoops on protests and scandals in local and state governments that he could then disseminate on his blog. (J.A. at 5). Cartman updates his blog daily with information he seeks out on the internet and in major newspapers. (J.A. at 4). Seeking out information and updating his blog daily indicated that Cartman intended to disseminate information to the public. Further, Cartman's efforts to provide means for readers to confidentially submit information for stories evidenced his intent at the inception of the investigatory process.

Cartman, a blogger, qualifies as a reporter because he intended to disseminate the information he collected to the public on his blog and he possessed the requisite intent at the time he engaged in collecting information. As a reporter, he is entitled to assert a qualified reporter's privilege under the First Amendment.

B. THE DISTRICT COURT PROPERLY GRANTED CARTMAN’S MOTION FOR SUMMARY JUDGMENT ON RESPONDENT’S DEFAMATION CLAIM BECAUSE RESPONDENT, A LIMITED-PURPOSE PUBLIC FIGURE, FAILED TO SHOW THAT CARTMAN ACTED WITH ACTUAL MALICE IN PUBLISHING AN ARTICLE ON HIS INTERNET BLOG, *THE SLUDGE REPORT*.

In a cause of action for defamation in the State of Silverado, a limited-purpose public figure plaintiff bears the burden of proving that the defendant’s communication was unprivileged, false, defamatory, and made with actual malice². *Curtis Publ’g Co. v. Butts*, 388 U.S. 130, 160 (1967). Respondent has failed to meet that burden. As an individual who has assumed a central role in a public controversy, Respondent’s First Amendment protections for a defamation action are limited. *Id.* at 165. Due to this elevated status as a public figure, Respondent must prove that Cartman acted with actual malice, and Respondent has failed to meet such a bar. *Id.* at 160. Since Respondent, acting as a public figure, did not prove that Cartman acted with actual malice in making his communication, summary judgment as granted by the District Court should be affirmed.

1. SUMMARY JUDGEMENT FOR CARTMAN SHOULD BE GRANTED BECAUSE RESPONDENT VOLUNTARILY INJECTED HIMSELF INTO A PREEXISTING PUBLIC CONTROVERSY EFFECTIVELY MAKING HIMSELF A LIMITED-PURPOSE PUBLIC FIGURE AND SETTING A HIGHER BAR THAN MERE NEGLIGENCE.

No matter what test this Court adopts, the facts as applied to the test will determine that Respondent was a limited-purpose public figure and failed to meet the high bar of actual malice. Accordingly, summary judgment for Cartman should be affirmed. Throughout the variety of adopted tests, the common denominator to determine that a limited-purpose public figure in regard to a particular public controversy is that a person voluntarily thrusts himself to the

² The plaintiff bears the burden of proving “(a) a false and defamatory statement concerning another; (b) an unprivileged publication to a third party; (c) fault amounting to at least negligence on the part of the publisher; and (d) either actionability of the statement irrespective of special harm or the existence of special harm caused by the publication” in a cause of action for defamation in the State of Silverado. Restatement (Second) of Torts § 558 (1977).

forefront of that controversy. *See Gertz v. Welch*, 418 U.S. 323, 344-345 (1974) (establishing the modern definition of the term public figure to include all purpose public figures and limited-purpose public figures)³. *See also Waldbaum v. Fairchild Publ'n, Inc.*, 627 F.2d 1287, 1292 (1980) (concluding that a person is a limited-purpose public figure if he attempts to have or can be expected to have a major impact on the resolution of a specific public dispute). *See also Lerman v. Flynt Distrib. Co., Inc.*, 745 F.2d 123, 136 (2d Cir. 1984) (announcing a test for limited-purpose public figures, which includes voluntary injection into a public controversy to determine the plaintiff's participation).

To find that a limited-purpose public figure exists, the plurality of courts have adopted the three prong test advanced in *Waldbaum v. Fairchild Publ'n, Inc.*: (1) the relevant controversy is a matter of public concern; (2) the plaintiff plays more than a trivial or tangential role; and (3) the defendant's allegedly defamatory remarks are relevant to the public controversy. *Waldbaum v. Fairchild Publ'n, Inc.*, 627 F.2d 1287 (1980). The minority of courts have adopted a two prong test as used in *Gertz v. Welch*: (1) the existence of a matter of public concern or controversy; and (2) a factual determination of the extent of the plaintiff's participation in that matter. *Gertz v. Welch*, 418 U.S. 323 (1974). Prongs one and two of both tests hinge on the existence of a public controversy and the extent of plaintiff's participation in the controversy. The inconsequential difference lies in the plurality's third prong determination that the defamatory remark relates to the public controversy. Human rights violations related to the use of foreign labor constitute a preexisting public controversy. By accepting as position as an executive of a *Fortune 500* company in a public role and by actively engaging in the business

³ According to *Gertz v. Welch*, 418 U.S. 323, 344-345, the all purpose public figure category is limited to persons of such high prominence that they are deemed public figures for all purposes. Cartman conceded that Respondent is not a general-purpose public figure. J.A. 18.

through travel to foreign factories with questionable work conditions, Respondent voluntarily injected himself into the role of a limited-purpose public figure. (J.A. 3, 5).

In determining whether a person is a limited-purpose public figure, some courts look to see the plaintiff's ability to use media channels for redress. In *Partington v. Bugiosi*, the court found that an attorney in a high profile murder case was a limited-purpose public figure due to his involvement in the controversy AND the access that he had to the media for redress.

Partington v. Bugiosi, 56 F.3d 1147 (9th Cir. 1995). See also *Lohrenz v. Donnelly*, 350 F.3d 1272, 1281-1282 (D.C. Cir. 2003) (coupling the fact that plaintiff thrust herself into an existing controversy with the plaintiff's ready access to media channels to find that she was a limited-purpose public figure). Here, Respondent has ready access to the media. He works for a company that regularly holds press conferences and with as an executive with his name attached to such a popular product, he can readily attain access to medial channels. Under this test, Respondent is a limited-purpose public figure due to his involvement in the controversy and his ready access to the media.

No matter which test this Court applies, this Court should find that Respondent is a limited-purpose public figure, and summary judgment should be granted.

a. CARTMAN'S ARTICLE DETAILING THE CONDITIONS IN FACTORIES WHERE A LARGE AMERICAN CORPORATION HAS OUTSOURCED WORK IS PART OF THE PREEXISTING PUBLIC CONTROVERSY ON SWEATSHOP CONDITIONS IN FOREIGN COUNTRIES.

Due to the fact that the conditions in foreign sweatshops used by American corporations have attracted the attention of a significant segment of the public, a variety of media coverage, and a concerned focus from human rights organizations, it is a public controversy⁴. When

⁴ See David J. Lynch, *Cambodia's sales pitch: Sweatshop-free products*, USA Today, Apr. 4, 2005 (covering continued foreign labor violations of human rights in found by the International Labor Organization); see also Aaron

looking at the case as a whole, a public controversy stretches beyond matters of general interest to be classified as a real dispute, the outcome of which affects the general public or some segment of it. *See Waldbaum v. Fairchild Publ'n, Inc.*, 627 F.2d 1287, 1296 (1980) (finding that newsworthiness alone does not suffice); *see also Connick v. Myers*, 461 U.S. 138, 147-148 (1983)(looking to the “content, form, and context... as revealed by the whole record” to determine a public controversy). *But see Time, Inc. v. Firestone*, 424 U.S. 448, 454-455 (1975) (holding that private concerns or disagreements do not become public controversies).

The facts at the case at hand are outside of the private realm referenced in *Time, Inc.*. The material published in *Time, Inc.* delved into the private family lives of an individual, in contrast to the posting here that focused on a matter not of a private nature, but of international concern. Preexisting public controversies have been determined over a variety of issues, including issues occurring on a smaller domestic scale, and the larger issue of foreign labor in violation of international human rights norms should be encompassed under the broad heading of preexisting public controversies. *See Marcone v. Penthouse International Magazine for Men*, 754 F.2d 1072 (3d Cir. 1985) (concluding that a public controversy was derived from a lawyer’s voluntary representation and association with gangs that were the subject of media attention); *see also Rosanova v. Playboy Enter.*, 580 F.2d 859 (5th Cir. 1979) (finding a public controversy existed based on organized crime in general after plaintiff engaged in highly publicized criminal activities and carried on associations with organized crime).

According to the record as a whole, several factors indicate that a public controversy existed: 1) the prevalence of public debate about driving prices down through the use of foreign

Bernstein, *Nike Names Names*, Business News, April 13, 2005 (following sweatshops becoming a hot button issue in the 1990s, corporations are encouraged to reveal the locations of their factories); *see also* Stephen Franklin, *AFL-CIO asks government to limit trade with China*, Chicago Tribune, Mar. 16, 2004. (asking the U.S. government to limit trade with China due to abusive labor practices).

labor; 2) existing press coverage on the deplorable conditions in foreign sweatshops used by American corporations; and 3) the expressed concern of national and international human-rights organizations on human rights abuses in labor. The court in *Trotter v. Jack Anderson Enter., Inc.* found that a public controversy existed after examining the situation surrounding an article describing anti-union violence at a bottling plant in Guatemala. *Trotter v. Jack Anderson Enter., Inc.*, 818 F.2d 431, 432 (5th Cir. 1987). In what seems like a parallel analysis, the court looked to 1) the extensive public scrutiny on labor violence; 2) the media coverage of the topic; and 3) the attention from human rights organizations to determine that a public controversy existed. The *Trotter* court noted while emphasizing the analysis of the media coverage that “[c]reating a public issue... is not the same as revealing one.” *Id.* at 434. While a public controversy may first arise in an article or in a web posting, a preexisting public controversy may already exist. While media attention flourished after Cartman published his posting, there is no denying that the issue of atrocious work conditions in foreign factories managed by American corporations has long existed. Mr. Cartman, by revealing the public controversy, should not be held liable since a preexisting public controversy already existed.

b. RESPONDENT’S VOLUNTARY INJECTION INTO A PREEXISTING PUBLIC CONTROVERSY MAKES HIM A LIMITED-PURPOSE PUBLIC FIGURE IN RELATION TO THAT CONTROVERSY.

Respondent, acting as and publically appearing as Research & Development Director for a *Fortune 500* company, voluntarily injected himself into a preexisting public controversy, transforming himself into a limited-purpose public figure, and raising the standard of proof to actual malice. While the district court in *Rosanova v. Playboy Enter., Inc.* said “(d)efining public figures is much like trying to nail a jellyfish to the wall,” the closest workable definition for what constitutes a limited-purpose public figure comes from *Gertz v. Welch, Inc.*. *Rosanova*

v. Playboy Enter., Inc., 580 F.2d 859, 861 (5th Cir. 1978); *Gertz v. Welch, Inc.*, 418 U.S. 323 (1974). A person becomes a limited-purpose public figure when he “thrusts himself to the forefront of a particular public controversy”. *Id.* at 345. The extent of the individual's participation in public affairs and assumption of the risk of adverse publicity determines the weight of the interest in protecting his reputation. *Tavoulaareas v. Piro*, 817 F.2d 762, 772 (D.C.Cir.1987).

Respondent’s tendency to shy away from the spotlight does not definitively shield him from being a limited-purpose public figure. *See Walbaum v. Fairchild Publ’n, Inc.*, 627 F.2d 1287, 1299-1301 (D.C. Cir. 1980) (finding that for a CEO to be a limited-purpose public figure, there is no requirement that all aspects of his management be public). Requiring all aspects of management to be public in order for a person to become a limited-purpose public figure would serve as a force field from criticism relevant to a public controversy. As the court in *Marcone v. Penthouse Intern. Magazine for Men* notes, “[t]he purpose of the first amendment would be frustrated if those persons and activities that most require public scrutiny could wrap themselves in a veil of secrecy and thus remain beyond the reach of public knowledge.” *Marcone v. Penthouse Intern. Magazine for Men*, 754 F.2d 1072, 1086 (3d Cir. 1985).

Looking at Respondent’s role in Citrus, there is no denying that he served as the epicenter of the controversy. Knowing the reputation of Citrus as a *Fortune 500* company, Respondent single-handedly carried the title of Director of Research & Development, a leadership role at Citrus, albeit a predominantly behind the scenes role. (J.A. at 3). Unlike the plaintiff in *Hutchinson v. Proxmire*, who was dragged into the public’s eye after improper allegations were made, Respondent took voluntary actions to step into the spotlight at times. *Hutchinson v. Proxmire*, 443 U.S. 111 (1979). While Respondent will most likely attempt to diminish his role

by emphasizing his mere attendance at press events as insufficient to support a limited-purpose public figure finding, Respondent's participation in the press conference is more than mere attendance. At the press conference to announce Respondent's employment on August 7, 2006, Respondent took the microphone to announce his enthusiasm at pressing onward with new innovations in Citrus. (J.A. at 3.)

Additionally, Respondent voluntarily took on this elaborate title, heading up the development of the newest music player in the popular line of ePlay products where his popular innovations spurred a following of supporters who produced and wore regalia in honor of Respondent's work. (J.A. at 3-4). Respondent invited attention through his engagement of the public's attention with the development of such popular items as the ePlay Touché, designed as part of the ePlay brand a status symbol for the younger generation. (J.A. at 2). Respondent's actions invite comment and attention due to the popularity of the music player, even though he does not want to attract the attention; regardless, he is deemed to have assumed the risk of such attention by taking on such a role. *See Rosanova v. Playboy Enter., Inc.*, 580 F.2d 859 (5th Cir. 1978) (determining a public figure status due to plaintiff's name in underground criminal enterprise). Knowing the popularity of the ePlay and its status among young people, Respondent accepted a job as a Director of Research and Development and sought to "set a new standard in mobile touch screen technology", a goal that would not come without attention. (J.A. at 3). Respondent was very involved in the public controversy.

All of that is not to say that just because Respondent took on a role in a leadership position in a prominent and influential company, he is a limited-purpose public figure. *See Waldbaum v. v. Fairchild Publ'n, Inc.*, 627 F.2d 1287, 1299 (D.C. Cir. 1980) (determining that while an executive title was not determinative of status, an executive was a limited-purpose

public figure when he participated in controversial actions and public controversies). While title is not determinative, it is not irrelevant either. In *Tavoulaareas v. Piro*, the plaintiff thrust himself into the controversy by making speeches on the controversial industry, going beyond his role as a boardroom president and stepping into the preexisting public controversy. *Tavoulaareas v. Piro*, 817 F.2d 762, 774 (D.C.Cir.1987). Respondent concedes that he visited Mumbai where Citrus produced the ePlay Touché in factories with questionable work conditions, despite a preexisting public controversy related to work conditions in factories with outsourced work. (J.A. at 7). Respondent also stepped outside of his role as the Director of Research & Marketing and into the public spotlight, making himself a limited-purpose public figure.

2. CARTMAN IS ENTITLED TO SUMMARY JUDGEMENT IN THE ABSENCE OF CLEAR AND CONVINCING EVIDENCE THAT HE ACTED WITH ACTUAL MALICE AGAINST RESPONDENT, A LIMITED-PURPOSE PUBLIC FIGURE.

Summary judgment should be granted for Cartman since he did not act with actual malice against Respondent. For a defendant to act with actual malice, there must be clear and convincing evidence that he published a false statement⁵ while 1) knowing the statement was false or 2) while acting in reckless disregard for the statement's truth or falsity. *New York Times Co. v. Sullivan*, 376 U.S. 254, 279-280 (1964) (establishing an actual malice standard for defamation cases against public officials and figures). *See also St. Amant v. Thompson*, 390 U.S. 727 (1968) (requiring proof that the defendant knew or entertained serious doubts as to the truth of false publications to have actual malice).

There is evidence indicating that the picture published on the blog was true. Citrus had a factory, which produced the ePlay Touché, in India, the same country where Respondent had

⁵ A prerequisite for the actual malice standard is the actual falsehood of any published information, so truth is an absolute truth is a defense to any claim. Restatement (Second) of Torts SS 580A; Restatement (Second) of Torts SS 581A.

recently traveled. (J.A. at 5). While it appears that the photograph may have been doctored to include Respondent in the picture of the ePlay Touché factory in India, the photograph was not doctored as to the material that called the picture into the forefront of the news. The factory in the picture was unquestionably Citrus' ePlay Touché factory, and the deplorable conditions insinuate that human rights violations were occurring. (J.A. at 5). Regardless of the truth of the situation, Respondent has the burden of proving that Cartman acted while knowing the statement was false or acted with reckless disregard.

Cartman did not act knowing that the statement was false. He published information received from a trusted confidential source, who he knew personally for a number of years and who he had received reliable information from in the past. (J.A. at 5). Cartman had even received reliable information from this source about insider Citrus information, adding to his confidence in the source's reliability. (J.A. at 5). When the source was able to back up his accusations of human rights violations with a picture, Cartman published this information to his blog believing it to be true. (J.A. at 5). Because of his confidence in his source and no visually detectable forgery, Cartman did not utilize the photo software on his computer to check for forgery in the photograph, but failure to investigate by itself does not equate to actual malice. *See St. Amant v. Thompson*, 390 U.S. 727, 731 (1968). *See also New York Times Co. v. Sullivan*, 376 U.S. 254, 289 (1964) (finding that a failure to investigate the facts contained in an advertisement against new stories amounted at most to negligence). In *St. Amant*, this Court reversed the lower courts holding of actual malice even though the defendant had no personal knowledge of activities, had nothing on the record as to his source's veracity, and failed to verify the information that he broadcast through any sort of independent investigation. *Id.* at 731. The court held that the defendant had not displayed actual malice since there was no "sufficient

evidence... that the defendant in fact entertained serious doubts as to the truth of his publication.” *Id.* at 731. Cartman did not entertain doubts as to the truth of his publication. If he had doubts as to the veracity of the photograph, he could have used his photo software that he had previously used to check the veracity of photographs before publishing them. (J.A. at 7). Cartman did not act knowing that the photograph was false.

Thinking that a photograph portrays the truth is not enough to overcome actual malice if the publisher acted with reckless disregard. *See St. Amant v. Thompson*, 390 U.S. 727, 732 (1968) (finding that recklessness is enough for actual malice where the allegations are “so inherently improbable only a reckless man would have put them in circulation”). Cartman did not act with reckless disregard as to the falsity of the photograph. *Curtis Publishing Co. v. Butts* held that public figures who are not public officials may still sue news organizations if they disseminate information about them which is recklessly gathered and unchecked. *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967). In *Butts*, the journalist trying to gain a name for the newspaper acted with actual malice in publishing unverified information from a source who had been placed on probation without confirming the story by watching available footage or meeting with others present at the alleged event. *Id.* at 157. On the contrary, in *Walker*, there was a finding when news requires immediate dissemination and that news came from a trustworthy source, the conduct did not amount to actual malice as it was not an extreme departure from professional journalism. *Id.* at 140.

Cartman’s actions were not an extreme departure from professional journalism, and like the defendant in *Walker*, his actions should not be found to constitute actual malice due to reckless disregard to falsity. Cartman’s information came from a reliable source, and while he did not try and investigate the picture further, the news on a magnitude of human rights

violations should be considered the kind of news that is in need of immediate dissemination. (J.A. at 5). Cartman may have had a personal dislike for Citrus, but unlike the defendant in *Butts*, this dislike did not spur him to publish the posting or to attempt gaining popularity for his website. Cartman's blog already had over 100,000 readers, and his publishing of the Citrus information was not to gain readers. (J.A. at 4). Cartman was not haphazard like the journalist in *Butts*. He used a trustworthy source and published a story that was in line with existing allegations of human rights violations by Citrus. (J.A. at 4). In no way did his actions rise to a level of actual malice.

Without clear and convincing evidence that Cartman acted with actual malice, this court should reaffirm the lower court's holding of summary judgment for Cartman.

CONCLUSION

Cartman, a blogger, is a reporter entitled to assert the qualified reporter's privilege created by the First Amendment that protects against court-compelled disclosure of confidential sources. Respondent failed to carry the burden necessary to overcome Cartman's privilege and compel disclosure of the confidential source's identity. Respondent, a limited-purpose public figure, additionally failed to meet his burden of showing that Cartman knew the allegations were false or acted with reckless disregard in publishing the allegations in his blog posting. Because Respondent cannot show that Cartman acted with actual malice, Respondent cannot succeed on his claim for defamation and summary judgment in Cartman's favor is appropriate. This Court should reverse the Court of Appeals for the Fifteenth Circuit's decision and affirm the District Court for the Western District of Silverado's denial of Respondent's motion to compel discovery and grant of summary judgment in favor of Cartman.

Respectfully Submitted,

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Team Number

Date