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**No. 09-2701**

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IN THE  
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2009

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**ERIC CARTMAN,**

*Petitioner,*

- v. -

**IKE BROFLOVSKI,**

*Respondent.*

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

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**BRIEF FOR PETITIONER**

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*Team 116  
Counsel for Petitioner*

## QUESTIONS PRESENTED

- I. Whether a First Amendment qualified reporter's confidential source privilege is necessary in defamation actions against reporters to balance the competing interests between plaintiffs and defendant reporters and, if so, whether the author of an internet blog, the defendant in a defamation suit, should be have the benefit of such privilege when he was involved in the gathering and dissemination of news from a confidential source and where the plaintiff has neither shown that the identity of the source is crucial to its case nor exhausted all reasonable avenues for identification of the confidential source.
  
- II. Whether this Court should reverse the appellate court's denial of Cartman's Motion for Summary Judgment because the Respondent is a limited purpose public figure and Respondent has failed to show by clear and convincing evidence that Cartman acted with actual malice when (1) the allegedly defamatory statement addressed potential human rights abuses at an overseas factory of a multinational corporation, (2) Plaintiff, an executive in the corporation, was charged with overseeing the development of the product being manufactured at the factory, and (3) Cartman obtained information for the allegedly defamatory post through a source who was (a) a personal acquaintance and an employee of the corporation and (b) from whom he had previously obtained reliable information.

**TABLE OF CONTENTS**

QUESTIONS PRESENTED ..... ii

TABLE OF CONTENTS ..... iii

TABLE OF AUTHORITIES ..... v

JURISDICTION STATEMENT ..... ix

STATEMENT OF THE CASE ..... 1

SUMMARY OF THE ARGUMENT ..... 5

ARGUMENT ..... 7

**I. THE APPELLATE COURT’S RULING SHOULD BE REVERSED SINCE THE FIRST AMENDMENT NECESSARILY INCORPORATES A QUALIFIED REPORTER’S CONFIDENTIAL SOURCE PRIVILEGE AND CARTMAN IS ENTITLED TO THE PROTECTION OF SUCH PRIVILEGE IN THIS ONLINE DEFAMATION CLAIM SINCE (1) HE IS A REPORTER, (2) HIS SOURCE WAS CONFIDENTIAL AND (3) THE PLAINTIFF HAS FAILED TO MEET THE REQUIREMENTS FOR LIFTING THE PRIVILEGE ..... 7**

**A. A First Amendment Qualified Reporter’s Confidential Source Privilege Is Necessary To Ensure Freedom Of The Press While Protecting The Interests Of Plaintiffs In Defamation Actions And Such Competing Interests Are Constitutionally Protected By Conditioning Disclosure Of A Confidential Source’s Identity Upon A Plaintiff’s Showing That (1) The Source’s Identity Is Crucial To The Plaintiff’s Case And (2) All Reasonable Avenues For Discovery Of The Source’s Identity Have Been Exhausted ..... 9**

**B. Cartman Is A Reporter Since His Intent At All Times Was To Gather And Disseminate The News Which He Received From A Confidential Source And Is Entitled To Shield The Identity Of His Source Under The Qualified Reporter’s Confidential Source Privilege Since The Respondent Has Failed To (1) Show That The Source’s Identity Is Crucial To His Case, Or (2) Exhaust All Reasonable Avenues Of Discovering The Source’s Identity ..... 13**

*1. Cartman is a reporter for the purpose of the qualified reporter’s confidential source privilege since at the inception of his news gathering process he intended to disseminate the gathered news to the public ..... 14*

2.	<i>Professor Chaos is a confidential source and therefore Cartman may seek to protect Chaos' identity</i> .....	16
3.	<i>Cartman is entitled to use the privilege to shield the identity of his anonymous source since the Respondent has failed to show that the identity of the source is crucial to the Respondent's case or that all reasonable avenues for discovering the source's identity have been exhausted</i> .....	17
<b>II.</b>	<b>THIS COURT SHOULD REVERSE THE APPELLATE COURT'S DENIAL OF CARTMAN'S MOTION FOR SUMMARY JUDGMENT BECAUSE THE RESPONDENT IS A LIMITED PURPOSE PUBLIC FIGURE AND THE RESPONDENT HAS FAILED TO SHOW BY CLEAR AND CONVINCING EVIDENCE THAT CARTMAN ACTED WITH ACTUAL MALICE IN PUBLISHING THE PHOTOGRAPH AND COMMENTARY</b> .....	18
<b>A.</b>	<b>The Respondent Is A Limited Purpose Public Figure Because A Public Controversy, In Which He Played A Prominent Role, Gave Rise To The Alleged Defamation, The Alleged Defamatory Statement Was Germane To His Role In The Public Controversy and He Has Regular And Continuing Access To Channels Of Effective Communication Through Which He Can Defend Himself</b> .....	19
1.	<i>The alleged defamation concerned a public controversy</i> .....	21
2.	<i>Respondent played a direct and prominent role in the controversy regardless of whether his participation was voluntary</i> .....	24
3.	<i>The alleged defamation was germane to Respondent's role in the public controversy</i> .....	25
4.	<i>Respondent has regular and continuing access to channels of communication through which he can defend himself against defamatory statements</i> .....	26
<b>B.</b>	<b>Respondent Has Failed To Show With Clear and Convincing Evidence That Cartman Acted With Actual Malice In Publishing the Photograph And Commentary On His Blog Because (1) Cartman Did Not Entertain Serious Doubts As To The Statement's Truth, (2) The Statement Was Not So Inherently Improbable That Only A Reckless Person Would Have Put It Into Circulation and (3) Cartman Obtained The Allegedly Defamatory Statement From A Personal Acquaintance And Employee At Citrus, From Whom He Had Previously Obtained Reliable Information</b> .....	27
	<b>CONCLUSION</b> .....	30

## TABLE OF AUTHORITIES

	Page
<b>UNITED STATES SUPREME COURT CASES</b>	
<u>Anderson v. Liberty Lobby, Inc.</u> , 477 U.S. 242 (1986) .....	18, 19
<u>Branzburg v. Hayes</u> , 408 U.S. 665 (1972) .....	passim
<u>Curtiss Publishing Co. v. Butts</u> , 388 U.S. 130 (1967) .....	28
<u>Gertz v. Robert Welch, Inc.</u> , 418 U.S. 323 (1974) .....	passim
<u>Grosjean v. American Press Co.</u> , 297 U.S. 233 (1936) .....	8
<u>Hutchinson v. Proxmire</u> , 443 U.S. 111 (1979) .....	19, 22, 26
<u>Marbury v. Madison</u> , 5 U.S. 137 (1803) .....	13
<u>Masson v. New Yorker Magazine</u> , 501 U.S. 496 (1991) .....	27
<u>N.Y. Times Co. v. Sullivan</u> , 376 U.S. 254 (1964) .....	7, 19, 20, 27
<u>St. Amant v. Thomson</u> , 390 U.S. 727 (1968) .....	19, 27, 28
<u>United States v. Bryan</u> , 339 U.S. 323 (1950) .....	8
<u>Wolston v. Reader's Digest Assn., Inc.</u> , 443 U.S. 157 (1979) .....	21

## UNITED STATES COURT OF APPEALS CASES

<u>Baker v. F &amp; F Investment,</u> 470 F.2d 778 (2d Cir. 1972) .....	11
<u>Bruno &amp; Stillman, Inc. v. Globe Newspaper Co.,</u> 633 F.2d 583 (1st Cir. 1980) .....	8, 9
<u>Cervantes v. Time, Inc.,</u> 464 F.2d 986 (8th Cir. 1972) .....	11
<u>Clyburn v. New World Communications,</u> 903 F.2d 29 (D.C. Cir. 1990) .....	17
<u>Dameron v. Washington Magazine, Inc.,</u> 779 F.2d 736 (D.C. Cir. 1985) .....	25
<u>Desnick v. ABC, Inc.,</u> 233 F.3d 514 (7th Cir. 2000) .....	29
<u>Farr v. Pitchess,</u> 522 F.2d 464 (9th Cir. 1975) .....	10
<u>Foretich v. Capital Cities/ABC, Inc.,</u> 37 F.3d 1541 (4th Cir. 1994) .....	21
<u>Garland v. Torre,</u> 259 F.2d 545 (2d Cir. 1958) .....	8
<u>Gonzales v. Nat’l Broad. Co.,</u> 194 F.3d 29 (2d Cir. 1998) .....	8
<u>In re Maden,</u> 151 F.3d 125 (3d Cir. 1998) .....	15, 16
<u>Lee v. Department of Justice,</u> 413 F.3d 53 (D.C. Cir. 2005) .....	12
<u>Lerman v. Flynt,</u> 745 F. 2d 123 (2d Cir. 1984) .....	21
<u>Lohrenz v. Donnelly,</u> 350 F.3d 1272 (D.C. Cir. 2003) .....	passim
<u>McDowell v. Paiewonsky,</u> 769 F.2d 942 (3d Cir. 1985) .....	21

<u>McKevitt v. Pallasch,</u> 339 F.3d 530 (7th Cir. 2003) .....	16
<u>McFarlane v. Sheridan Square Press, Inc.,</u> 91 F.3d 1501 (D.C. Cir. 1996) .....	28, 29
<u>Metastorm, Inc. v. Gartner Group, Inc.,</u> 28 F. Supp. 2d 665 (Dist. Court DC 1998) .....	22, 23
<u>Miller v. Transamerican Press, Inc.,</u> 628 F.2d 932 (5th Cir. 1980) .....	11, 17
<u>N.Y. Times Co. v. Gonzalez,</u> 382 F.3d 160 (2d Cir. 2006) .....	10
<u>Shoen v. Shoen,</u> 5 F.3d 1289 (9th Cir. 1993) .....	7, 15
<u>Silkwood v. Kerr-McGee Corp.,</u> 563 F.2d 433 (10th Cir. 1977) .....	16
<u>Von Bulow v. Von Bulow,</u> 811 F.2d 136 (2d Cir. 1987) .....	5, 14, 15
<u>Waldbaum v. Fairchild Publications, Inc.,</u> 627 F.2d 1287 (D.C. Cir. 1980) .....	21, 22, 23, 26
<u>Zerilli v. Smith,</u> 656 F.2d 705 (D.C. Cir. 1981) .....	passim

## **UNITED STATES DISTRICT COURTS**

<u>Ashcroft v. Conoco,</u> 26 Media L. Rep. (BNA) 1620 (E.D.N.C. 1998) .....	17
<u>Blumenthal v. Drudge,</u> 186 F.R.D. 236 (D.D.C 1990) .....	15
<u>In re Grand Jury Proceeding,</u> 8 Media L. Rep. (BNA) 1418 (D. Colo. 1982) .....	13
<u>John Doe v. 2TheMart.com Inc.,</u> 140 F. Supp. 2d 1088 (W.D. Wash. 2001) .....	14

**STATE COURTS**

Bartlett v. Superior Ct.,  
722 P.2d 346 (Ariz. App. 1986) ..... 16

Dallas Morning News Co. v. Garcia,  
822 S.W.2d 675 (Tex. App. 1991) ..... 11

**STATUTES**

Fed. R. Civ. P. 56(c) ..... 18

Fed. R. Evid. 501 ..... 12

U.S. Const. amend. I ..... 8

**AMERICAN LAW REPORTS**

20 A.L.R. 3d 988 ..... 19

## **JURISDICTION STATEMENT**

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

## STATEMENT OF THE CASE

Eric Cartman (“Cartman”) is a sole proprietor of Cartman’s Music World, an electronics and repair shop located in the State of Washoe. (J.A. at 4.) Cartman is also a part-time blogger for profit. (J.A. at 4.) At present his blog, “The Sludge Report” has an audience of over 100,000 readers. (J.A. at 4.) Topics on “The Sludge Report” range from international and local politics to celebrity gossip. (J.A. at 4.) A significant number of Cartman’s readers supply him with scoops on protests, scandals in local and state governments and other information by sending emails to Cartman’s e-mail address listed on his website. (J.A. at 4-5.) Cartman states on his website that all persons who supply him with information and tips via his e-mail address will be treated as a confidential source unless otherwise requested. (J.A. at 5.)

Professor Chaos is the alias of one of Cartman’s confidential sources. (J.A. at 5.) Cartman knows Professor Chaos personally and met him in the early part of 2007. (J.A. at 5.) Since 2007 Professor Chaos has supplied Cartman with reliable information about a corporation known as Citrus Electronics Inc. (“Citrus”), which information Cartman has used in various stories posted on Cartman’s website. (J.A. at 5.) Professor Chaos is an employee of Citrus. (J.A. at 6.)

Citrus is Fortune 500 consumer-electronics company headquartered in the State of Silverado. (J.A. at 2.) Citrus, which began business by selling handheld radios and VCRs, saw its business take off in 1997 with the introduction of a sleek line of high-powered, fully integrated home computer systems. (J.A. at 2.) The company quickly rose to the top of the consumer electronics industry and its stock price soared. (J.A. at 2.) The company rode out the dot-com bust of the early 2000s on the back of its flagship portable digital music player, the ePlay, which quickly became a status symbol among teenagers and young adults. (J.A. at 2.)

Citrus' CEO and majority shareholder is Kyle Broflovski. ("Broflovski") (J.A. at 2.) In 2006 Broflovski hired his brother, the Respondent, Ike, as Citrus' Director of Research and Development. (J.A. at 3.) The Respondent, the holder of a PhD degree, was charged with overseeing the development of Citrus' new ePlay Touché that Citrus wanted to be the premier portable touch screen music player on the market. (J.A. at 3.) Broflovski announced the Respondent's hiring at a press conference held at Citrus' campus on August 7th 2006. (J.A. at 3.) At the press conference Broflovski boasted that Citrus was soon going to set the standard in mobile touch screen technology. (J.A. at 3.) He added that he had hired his genius brother (the Respondent) to oversee the development of a new line of Citrus products (J.A. at 3.) and that one day the Respondent was going to be as famous as Broflovski. (J.A. at 3.) In response the Respondent stated that he "look[ed] forward to pushing Citrus, its employees and its products to new heights." (J.A. at 3.) The press conference, Broflovski's statement, the Respondent's hiring and the Respondent's response was the subject of an Associated Press story printed in several newspapers. (J.A. at 3.)

Since Citrus hired the Respondent, Broflovski has gone out of the way to praise the Respondent's work in television and magazine interviews (J.A. at 3.). Further, employees at Citrus Megastores throughout the United States have been wearing "I Like Ike" buttons to celebrate the Respondent's innovations (J.A. at 4.) and the Respondent is listed on Citrus' website as its Director of Research and Development, along with his photograph and contact information.(J.A. at 4.)

On July 7th 2008 Cartman received an e-mail from Professor Chaos which alleged that Citrus, at the direction of the Respondent, was engaging in human rights abuses at Citrus' factory outside of Mumbai, India. (J.A. at 5) The e-mail included a digital photograph of what appeared

to be the Respondent walking through the factory with subordinates in tow yelling at workers assembling the ePlay Touché. (J.A. at 5.) The workers appeared to be wearing surgical masks and minimally protective gear. (J.A. at 5.)

On July the 8th, the next day, Cartman added a new lead post to “The Sludge Report” with the photograph Professor Chaos sent and with a headline asking, “Citrus Engaging in Acts of Modern-Day Slavery?” (J.A. at 5.) In the post Cartman mentioned that according to Professor Chaos the workers depicted in the photograph worked under slave-like conditions, working 16 hour days, seven days a week, with few breaks. (J.A. at 6.) Cartman, whose blog has a populist and nationalist tone (J.A. at 4.), opined that the Broflovskis are a danger to humanity (J.A. at 6.) and compared the Respondent to a slave-driver. (J.A. at 6)

Within days of its publication Cartman’s blog entry spread rapidly throughout the “blogosphere,” and has attracted the attention of the mainstream press. (J.A. at 6.) On August the 19th 2008 the host of a top-rated cable news show named the Respondent as recipient of his “Most Heinous Individual in the Galaxy” award. (J.A. at 6.) The next day Citrus’ stock dropped by 25% and continued to fall in anticipation of declining sales. (J.A. at 6-7.) The Respondent failed to address media calls to respond to Cartman’s allegation. (J.A. at 7.) However, the Respondent, through his attorney, has said that the photograph is a fabrication. (J.A. at 7.)

On September 20th 2008 the Respondent filed a defamation suit against Cartman. (J.A. at 7.) Discovery revealed that the Respondent has been to India on a number of visits, though it is not clear whether he visited Citrus’ factory on those visits. (J.A. at 7.) Discovery has also revealed that while the Respondent’s image had been superimposed, the underlying photograph was an unaltered depiction of Citrus’ night-shift workers assembling the ePlay Touché. (J.A. at 7.) While evidence of the alteration is discoverable using particular software, it is undetectable to

the naked eye. (J.A. at 7.) Cartman has the said software, and has used same before, though he did not use it to test Professor Chaos' photo. (J.A. at 7.)

Though the Respondent seeks information about the source of the photograph, he has failed to depose Citrus' non-management employees on this issue (J.A. at 8.) However, the manager of the Mumbai factory and some of Citrus' engineers have been deposed. (J.A. at 8.) Also Broflovski has sent an e-mail to Citrus' employees requesting information on the source of the leak. (J.A. at 8.) The Respondent's efforts have yielded few leads. (J.A. at 8.)

On December 15th 2008 the Respondent submitted to Cartman an interrogatory requesting Professor Chaos' name and contact information. (J.A. at 8.) In response Cartman invoked the First Amendment qualified reporter's confidential source privilege. (J.A. at 8.) The Respondent then filed a motion, pursuant to Fed. R. Civ. P. 27, to compel discovery of Professor Chaos' identity. (J.A. at 1.) Cartman opposed discovery on the ground that Professor Chaos' identity was protected by the First Amendment privilege and sought summary judgment on the ground that the Respondent failed to meet his burden, as a limited-purpose public figure, of proving actual malice. (J.A. at 2.) The United States District Court for the Western District of Silverado denied the Respondent's motion to compel discovery and granted Cartman's motion for summary judgment. (J.A. at 2.) The Respondent appealed to the United States Court of Appeals for the Fifteenth Circuit, which reversed and remanded the matter. (J.A. at 3.) Subsequently this Court granted certiorari. (J.A. at 33.)

## SUMMARY OF THE ARGUMENT

This Court should (1) reverse the appellate court's grant of Respondent's Motion to Compel Disclosure and find that the First Amendment does create a qualified reporter's confidential source privilege which Cartman, as a reporter is entitled to assert and (2) reverse the appellate court's denial of Cartman's Motion for Summary Judgment and find that Respondent is a limited purpose public figure, who failed to prove with convincing clarity that Cartman acted with actual malice in publishing the allegedly defamatory material.

First, The First Amendment establishes a qualified reporter's confidential source privilege that protects reporters against court-compelled disclosure of sources. Consistent with the Supreme Court's acknowledgement in Branzburg v. Hayes, that without some protection for seeking out news, freedom of the press could be eviscerated, 408 U.S 665, 681 (1972), nearly every federal circuit has recognized a qualified reporter's confidential source privilege to shield the identity of confidential sources.

Cartman is a reporter because he received and published news from a confidential source. This Court should apply the test used by the second circuit in Von Bulow that places an emphasis on the intent, at the inception of the investigative phase, to disseminate information to the public. Von Bulow v. Von Bulow, 811 F.2d 136, 144 (2d Cir. 1987). Cartman uses his blog, *The Sludge Report*, as a vehicle for disseminating news to the public and had the intention to do same when he received the tip from Professor Chaos, a source who used an alias to maintain anonymity when supplying the relevant information. As Cartman is a reporter entitled to the constitutionally derived qualified reporter's confidential source privilege, Respondent should not be allowed to compel disclosure of the source's identity since Respondent has failed show that

the source's identity is crucial to his case or that he has exhausted all reasonable alternative avenues for discovering such identity.

Second, Respondent is a limited purpose public figure because potential human rights abuses and poor working conditions at a Citrus factory where ePlay Touche's are being made constitute a public controversy; Respondent, as an executive of Citrus charged with overseeing the development of said product plays a direct role in working conditions of the factories where these product are being made, and the photograph and commentary that Cartman published on his blog directly addressed Respondent's participation in the controversy.

Respondent has failed to meet his burden of proving actual malice because Cartman did not fabricate the allegedly defamatory statement, he did not entertain serious doubts as to the truth of the statement, nor were the allegations in the statement so inherently improbable that only a reckless person would have put it into circulation. Further, Cartman obtained the allegedly defamatory statement from a personal acquaintance and employee at Citrus, from whom he had previously obtained reliable information for his blog.

Accordingly, this court should reverse the lower court's grant of Respondent's Motion To Compel Disclosure and reverse the lower court's denial of Cartman's Motion for Summary Judgment.

## ARGUMENT

This case is about a reporter seeking to protect his First Amendment rights to free speech and freedom of the press against a Motion to Compel Disclosure of the identity of the confidential source that alerted him to the public controversy and to defend himself against an unfounded defamation attack. This Court should find that the lower court (1) improperly granted Respondent's Motion to Compel Disclosure because Cartman is a reporter entitled to the qualified reporter's confidential source privilege created by the First Amendment, and (2) improperly denied Cartman's Motion for Summary Judgment, because Respondent is a limited purpose public figure as a matter of law and is therefore, constitutionally required to prove actual malice.

Because the question of whether a reporter's privilege exists is a pure question of law, the proper standard of review for the first issue is *de novo*. Shoen v. Shoen, 5 F.3d 1289, 1292 (9th Cir. 1993). In reviewing a lower court's ruling on a motion for summary judgment, a court must "make an independent examination of the whole record," so as to be sure that the judgment does not "constitute a forbidden intrusion on the field of free expression." N.Y. Times Co. v. Sullivan, 376 U.S. 254, 285 (1964).

**I. THE APPELLATE COURT'S RULING SHOULD BE REVERSED SINCE THE FIRST AMENDMENT NECESSARILY INCORPORATES A QUALIFIED REPORTER'S CONFIDENTIAL SOURCE PRIVILEGE AND CARTMAN IS ENTITLED TO THE PROTECTION OF SUCH PRIVILEGE IN THIS ONLINE DEFAMATION CLAIM SINCE (1) HE IS A REPORTER, (2) HIS SOURCE WAS CONFIDENTIAL AND (3) THE PLAINTIFF HAS FAILED TO MEET THE REQUIREMENTS FOR LIFTING THE PRIVILEGE.**

The First Amendment makes a reporter's confidential news sources privileged from disclosure. Such privilege is qualified. The privilege is lifted only upon a litigant's showing that

the identity of the source is crucial to such litigant's case and that the litigant has exhausted all reasonable avenues for discovering the source's identity.

There is a paramount public interest in the maintenance of a vigorous, aggressive and independent press capable of participating in robust, unfettered debate over controversial matters. Gonzales v. Nat'l Broad. Co., 194 F.3d 29, 33 (2d Cir. 1998). Recognizing that public interest, this Court has stated that "a free press is indispensable to a free society," Branzburg v. Hayes, 408 U.S. 665, 726 (1972), and that the First Amendment, U.S. Const. amend. I, guarantees a free press primarily because of the important role it can play as "a vital source of public information." Grosjean v. American Press Co., 297 U.S. 233, 250 56 S. Ct. 444 (1936). Freedom of the press within the historic meaning of the First Amendment meant primarily freedom from restraints upon publication and freedom from censorship. Garland v. Torre, 259 F.2d 545, 548, (2d Cir. 1958). However, compulsory disclosure of a journalist's sources of information entails an abridgment of press freedom by imposing some limitation upon the availability of news, id., since the promise of confidentiality may be a necessary prerequisite to a productive relationship between a newsman and his informants. Branzburg, 408 U.S. at 729. Persons at all levels of society "may have information valuable to the public discourse [but] may be willing to relate that information only in confidence to a reporter whom he trusts, either because of excessive caution or because of reasonable fear of reprisals or censure for unorthodox views. Id. In recognition of this fact, the First Amendment necessarily incorporates a reporter's confidential source privilege. Zerilli v. Smith, 656 F.2d 705 (D.C. Cir. 1981).

While the general principle is that litigants have a right to every man's evidence, United States v. Bryan, 339 U.S. 323, 331, (1950), courts faced with enforcing requests for the discovery of materials used in the preparation of journalistic reports should be aware that

unlimited or unthinking allowance of such requests will impinge upon First Amendment rights. Bruno & Stillman, Inc. v. Globe Newspaper Co., 633 F.2d 583, 595 (1st Cir. 1980). In granting such discovery requests courts must balance (1) the potential harm to the free flow of information that might result from granting such request with (2) the need for the requested information. Id.

In balancing such competing interests many courts have held that a reporter's First Amendment confidential source privilege should only give way to a plaintiff's discovery request upon a showing that the identification of the source is crucial to the plaintiff's case and that the plaintiff has exhausted all reasonable avenues for discovery of the source's identity. Zerilli v. Smith, 656 F.2d 705 (D.C. Cir. 1981)

In the present case Cartman is a reporter, he received and published news from a confidential source, and the Respondent should not be allowed discovery of the source's identity since Respondent has failed show that the source's identity is crucial to his case or that he has exhausted all reasonable alternative avenues for discovering such identity.

**A. A First Amendment Qualified Reporter's Confidential Source Privilege Is Necessary To Ensure Freedom Of the Press While Protecting The Interests Of Plaintiffs In Defamation Actions And Such Competing Interests Are Constitutionally Protected By Conditioning Disclosure Of A Confidential Source's Identity Upon A Plaintiff's Showing That (1) The Source's Identity Is Crucial To The Plaintiff's Case And (2) All Reasonable Avenues For Discovery Of The Source's Identity Have Been Exhausted.**

This Court has acknowledged that there are circumstances where a reporter's relationship with his news source will be protected by the First Amendment. Branzburg, 408 U.S. at 707-08 (referring to grand jury investigations conducted in bad faith). This Court has also correctly pointed out that without some protection for seeking out news, freedom of the press could be eviscerated. Id. at 681. Justice Powell explained the Court's decision in Branzburg to mean that a

reporter enjoys First Amendment protection for his confidential source if such source bears only a tenuous relationship to a suit, or if testimony requested of the reporter implicates a confidential source relationship without legitimate need. Id. at 710. Justice Powell Further stated that, “The asserted claim to [First Amendment] privilege should be judged on its facts by striking a proper balance between freedom of the press and the obligation of all citizens to give relevant testimony.” Id.

Following this Court’s lead in Branzburg, every federal circuit, save the 6th and 7th have recognized a qualified reporter’s confidential source privilege in some circumstances. 1-18 Newsgathering and The Law, MB, §18.02, 1 (2008). Courts have concluded that the language of Branzburg indicates that that the privilege is a limited or conditional one. Farr v. Pitchess, 522 F.2d 464, 467 (9th Cir. 1975). Further, courts have been successfully using and this privilege to accommodate the legitimate interests of the press for more than thirty years. N.Y. Times Co. v. Gonzales, 382 F.3d 160, 182 (2d Cir. 2006).

In order to determine whether the privilege applies, a court should look at the facts of each case, weighing the public interest in protecting the reporter’s sources against the civil litigant’s interest in compelling disclosure. Zerilli, 656 F.2d at 712. In general, when striking that balance the court must be mindful of the preferred position of the First Amendment and the importance of a vigorous press, id., and efforts will be taken to minimize impingement upon the reporter’s ability to gather news. Id.

The court must require a plaintiff seeking disclosure of the identity of a reporter’s source to show that such identity is crucial to the plaintiff’s case. Id. at 713. In a defamation suit brought by a plaintiff who is a public figure or a limited-purpose public figure, such plaintiff might argue that identity of the defendant reporter’s source is crucial to enable him to prove malice (i.e. the

reporter knew that his source was not credible or entertained serious doubts about the source's credibility). See generally, Cervantes v. Time, Inc., 464 F.2d 986, 991 (8th Cir. 1972) (setting out plaintiff mayor's argument that identity of reporter's source was needed as proof of malice). In such a case, to show that the identity of the source is crucial to his case, the defamation plaintiff must not merely plead that he was injured by an untrue statement. Miller v. Transamerican Press, Inc., 628 F.2d 932 (5th Cir. 1980). Such Plaintiff must go through the two step process of showing (1) substantial evidence that the challenged publication is factually false, id., and then (2) that the identity of the source is required to prove actual malice. Miller v. Transamerican Press, Inc., 621 F.2d 721, 726 (5th Cir. 1980).

Even when the information sought is crucial to a litigant's case, a reporter should not be compelled to disclose his source's identity unless the litigant has shown that he has exhausted every reasonable avenue for discovering the source's identity. Id. at 713. The obligation to show exhaustion of other sources is very substantial, Zerilli, 656 F.2d at 713, and may, depending upon the facts, require taking depositions from as many as sixty persons. Baker v. F & F Investment, 470 F.2d 778 (2d Cir. 1972) (opining that it was reasonable to depose sixty defendants in a class action suit before seeking disclosure of a journalist's confidential source).

The need to show that the identity of a confidential source is crucial to the plaintiff's case is illustrated by Dallas Morning News Co. v. Garcia, 822 S.W.2d 675 (Tex. App. 1991). There a sheriff sued for libel in relation to a newspaper article that linked the sheriff to drug trafficking. The court held that before the sheriff could be entitled to disclosure of the newspaper's sources he was required to show that the article was false, id. at 682, and that this burden was not met by the sheriff's self serving statement that the article was false. Id. at 683. If this requirement to show falsity was not imposed on a plaintiff there would be "no privilege at all; [since] anyone

could overcome [the privilege] merely by filing a libel suit and expressing the opinion that the defendant's statements were false. Id.

The efforts that a litigant should make to show that he has exhausted all reasonable alternative avenues for discovery of the source's identity is seen in Lee v. Department of Justice, 413 F.3d 53 (D.C. Cir. 2005). In Lee the court, after agreeing that the First Amendment included a qualified reporter's privilege for confidential sources, found that a litigant had exhausted all reasonable sources of information after he had made 420 discovery requests to government officials (which were objected to on the grounds of law enforcement privilege), and deposed six Department of Energy ("DOE") employees (including the former Secretary of Energy, the Acting Director of DOE Intelligence and Counterintelligence, and the former Director of the DOE's Office of Counterintelligence), six Department of Justice employees and eight Federal Bureau of Investigation employees.

The Respondent might argue that a privilege for reporters' confidential sources is best left to for the legislature to address, or that without resorting to the Constitution courts can adequately protect reporters' interests by simply ensuring that subpoenas issued to reporters are reasonable in the circumstances (the general criterion for judicial review of subpoenas), or that federal courts can use Rule 501 of the Federal Rules of Evidence to develop an evidentiary reporter's confidential source privilege. However, such line of argument ignores this Court's acceptance in Branzburg that newsgathering qualifies for First Amendment protection and without protection for seeking out news, freedom of the press could be eviscerated. Branzburg, 408 U.S. at 681. As one court put it:

“[F]reedom, of the press cannot operate without some protection for its sources, and it does no good to say people have a right to publish but not a right to obtain information to

publish...[E]very time a court ordered a reporter to testify or go to jail, I think that has a substantial chilling effect on the zeal by which other reporters pursue their sources, and it has a chilling effect on those who have information, often government employees who otherwise might be willing to divulge information that ought to be divulged in the public interest. Therefore, while certainly not an absolute privilege, there is a privilege that needs to be weighed.” In re Grand Jury Proceeding, 8 Media L. Rep. (BNA) 1418, 1419 (D. Colo. 1982).

Further, this Court’s acceptance in Branzburg that newsgathering qualifies for First Amendment protection, necessarily means that this Court has a responsibility to define the constitutional boundaries of that protection rather than passing that task to the national or state legislatures. As this Court has said:

“The judicial power of the United States is extended to all cases arising under the constitution. Could it be the intention of those who gave this power, to say...That a case arising under the constitution should be decided without examining the instrument under which it arises? This is too extravagant to be maintained.” Marbury v. Madison, 5 U.S. 137, 178 -79 (1803).

Therefore this Court must find that the First Amendment incorporates a reporter’s confidential source privilege, the lifting of which is conditioned upon a civil litigant’s showing that the source’s identity is crucial to his case and that he has exhausted all reasonable avenues to discover the source’s identity.

**B. Cartman Is A Reporter Since His Intent At All Times Was To Gather And Disseminate The News Which He Received From A Confidential Source And Is Entitled To Shield The Identity Of His Source Under The Qualified Reporter’s Confidential Source Privilege Since The Respondent Has Failed To (1) Show That The Source’s Identity Is Crucial To His Case, Or (2) Exhaust All Reasonable Avenues Of Discovering The Source’s Identity.**

Cartman qualifies as a reporter for the purpose of this defamation suit since at all material times he was engaged in the gathering of news with the intent to disseminate same via a medium (the internet) which has the benefit of the First Amendment freedom of the press protections. His information came from a confidential source, and he is protected by the First Amendment qualified reporter's confidential source privilege since the Respondent has not shown that the source's identity is crucial to the Respondent's case, and that all reasonable avenues for discovery of the source's identity have been exhausted.

- 1. Cartman is a reporter for the purpose of the qualified reporter's confidential source privilege since at the inception of his news gathering process he intended to disseminate the gathered news to the public.*

Cartman is a reporter under the First Amendment since he gathered news with the intent to disseminate same to the public.

Whether a person is a reporter, and thus protected by the privilege is an intent-based factual enquiry. Von Bulow v. Von Bulow, 811 F.2d 136, 144 (2d Cir. 1987). This enquiry calls upon an individual claiming the privilege to demonstrate the intent to use the material - sought, gathered or received- to disseminate information to the public. Id. He must also show that such intent existed at the inception of the news gathering process. Id. The First Amendment protects a broad spectrum of media including dissemination of information and opinion by newspaper, magazine, book, public or private broadcast facilities, id., and even the internet. John Doe v. 2TheMart.com Inc., 140 F. Supp. 2d 1088, 1092 (W.D. Wash. 2001). Prior professional experience is not a pre-condition for being recognized as a reporter for First Amendment purposes, Von Bulow, 811 F.2d at 144, nor need one be part of the institutionalized press, id., because the informative function asserted by representatives of the organized press is also

performed by the lonely pamphleteer, lecturers, political pollsters, novelists, academic researchers and dramatists. Branzburg, 408 U.S. at 703-05.

Where a person witnessing a trial involving a family feud had made a personal journal of her observations and thoughts and gathered other material for personal use, the court held that she was not entitled to the benefit of the privilege since she did not intend, at the inception of her gathering process, to distribute such material to the public. Von Bulow, 811 F.2d at 145. On the other hand, an investigative author writing a book for publication about a long bitter family feud was found to be covered by the privilege because at all times he intended to disseminate his writings to the public. Shoen v. Shoen, 5 F.3d 1289 (9th Cir. 1993). An operator of a world-wide internet website (publishing political and social current events and commentary), was found to have the benefit of the privilege to protect the identity of his sources for allegedly defamatory matter published on his website entitled “the Drudge Report.” Blumenthal v. Drudge, 186 F.R.D. 236 (D.D.C. 1990). Also the fact that a person did not work for an established newspaper was found to be irrelevant to the question of whether he was protected by the privilege. Silkwood v. Kerr-McGee Corp., 563 F.2d 433 (10th Cir. 1977) (holding that a freelance documentary filmmaker was covered by the privilege since he was engaged in investigative reporting). However, where a person is an entertainer engaged in the dissemination of hype rather than news, he will not be covered by the privilege. In re Maden, 151 F.3d 125 (3d Cir. 1998) (holding that a World Championship Wrestling (“WCW”) employee who made tape-recorded commentaries to replay to callers to the WCW’s hotline was not a reporter for the purpose of the privilege since he disseminated hype rather than news).

In this case, Cartman is a reporter and is entitled to the benefit of the privilege. Like the investigative author in Shoen, and unlike the person keeping the personal journal in Von Bulow,

Cartman's intention, at the time he received the information concerning the Respondent's business operations, was to disseminate same to the public. Further, like the filmmaker in Silkwood, the fact that Cartman does not work for a newspaper is irrelevant. Also, like the author of the "Drudge Report", Cartman uses the internet and *The Sludge Report* to publish news relating to political and social current events. Lastly, unlike the WCW employee in In re Maden, at the material time Cartman was not engaged in the dissemination of mere hype, but rather the distribution of matters of serious concern to the society at large.

Cartman is therefore a reporter for the purpose of the privilege.

2. *Professor Chaos is a confidential source and therefore Cartman may seek to protect Chaos' identity.*

Professor Chaos is a confidential source and this entitles Cartman to seek to protect Chaos' identity. The claim of privilege depends, in the first instance, upon the existence of a confidential relationship such that compliance with a subpoena would either result in disclosure of confidential information or sources or would seriously interfere with the news gathering and editorial process. Bartlett v. Superior Ct., 722 P.2d 346, 350 (Ariz. App. 1986).

In McKevitt, a journalist sought the protection of the privilege for certain tape recordings of an interview. However, the source of the recordings was known and had no objection to disclosure of the tapes. The court in rejecting the journalist's application said, "When the information in the reporter's possession does not come from a confidential source, it is difficult to see what possible bearing the First Amendment could have on the question of compelled disclosure." McKevitt v. Pallasch, 339 F.3d 530, 533 (7th Cir. 2003).

In this case, Cartman's source used an alias when he supplied the relevant information to Cartman. "Professor Chaos" used that alias in order to maintain anonymity. (J.A. at 6.) Further, Chaos relies upon Cartman to protect that anonymity.

Therefore, a confidential relationship exists between Professor Chaos and Cartman and Cartman may seek to protect Professor Chaos' identity.

3. *Cartman is entitled to use the privilege to shield the identity of his anonymous source since the Respondent has failed to show that the identity of the source is crucial to the Respondent's case or that all reasonable avenues for discovering the source's identity have been exhausted.*

The Respondent has not satisfied the prerequisites for the lifting of the privilege since he has not shown that Professor Chaos' identity is crucial to the defamation action, nor has he shown that he has exhausted all reasonable avenues for discovering Professor Chaos' identity.

As a first step to showing that a source's identity is crucial to his case, a defamation plaintiff must show substantial evidence that the challenged statement is false. Miller v. Transamerican Press, Inc., 628 F.2d 932 (5th Cir. 1980).

Even when the information sought is crucial, a reporter should be compelled to disclose his source only after a litigant has demonstrated an exhaustion of every reasonable alternative source of information. Zerilli, 656 F.2d at 714. Although this task might be cumbersome and possibly fruitless, until such efforts have been pursued, it cannot be said that all reasonable non-media outlets have been exhausted. Ashcraft v. Conoco, 26 Media L. Rep. (BNA) 1620, 1628 (E.D.N.C. 1998). A court should not order disclosure if a litigant has utterly failed to pursue obvious alternative sources of information. Clyburn v. New World Communications, 903 F.2d 29, 35 (D.C. Cir. 1990).

In this case the Respondent has failed to provide substantial evidence that the challenged statement is false.

The Respondent has also failed to demonstrate an exhaustion of all reasonable alternative sources for discovering Professor Chaos' identity. He has taken no personal steps to obtain discovery of Professor Chaos' identity. Also, while the Broflovskis have deposed the manager of

the Mumbai factory and several engineers (J.A. at 8.) no security personnel have been deposed, nor any of Citrus' employees. Further, while Kyle Broflovski has sent out an e-mail to Citrus' employees, *id.*, this is not a reasonable substitute for the Respondent's use of depositions under oath to obtain relevant information from Citrus' employees. The Respondent has utterly failed to pursue obvious alternative sources of information.

The First Amendment reporter's confidential source privilege therefore entitles Cartman to shield Professor Chaos' identity since Cartman qualifies as a reporter, Professor Chaos is a confidential source and the Respondent has failed to show that Chaos' identity is crucial to the Respondent's case and that he has exhausted all reasonable avenues for discovering Chaos' identity.

**II. THIS COURT SHOULD REVERSE THE APPELLATE COURT'S DENIAL OF CARTMAN'S MOTION FOR SUMMARY JUDGMENT BECAUSE THE RESPONDENT IS A LIMITED PURPOSE PUBLIC FIGURE AND THE RESPONDENT HAS FAILED TO SHOW BY CLEAR AND CONVINCING EVIDENCE THAT CARTMAN ACTED WITH ACTUAL MALICE IN PUBLISHING THE PHOTOGRAPH AND COMMENTARY.**

Cartman is entitled to summary judgment because Respondent, a limited purpose public figure, has failed to show by clear and convincing evidence that Cartman acted with actual malice in displaying the photograph and commentary on *The Sludge Report*.

A motion for summary judgment should be granted if after taking all reasonable inferences in the light most favorable to the nonmoving party, there is "no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." Fed. R. Civ. Proc. 56(c); Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986). The proper standard of fault when the plaintiff in a defamation case is a limited purpose public figure, is actual malice shown by clear and convincing evidence. Anderson, 477 U.S. at 254.

Largely to preserve the “profound national commitment to...uninhibited, robust, and wide-open debate” on public issues, N.Y. Times v. Sullivan, 376 U.S. 254, 270 (1964), which is protected by the First Amendment, the actual malice standard of fault has become a “federal constitutional prerequisite to the recovery of a [public figure].” 20 A.L.R. 3d 988. See generally, Gertz v. Welch, 418 U.S. 323 (1974). A lesser burden of proof for such a high measure of fault would have the chilling effect self-censorship, a severe consequence of and derogation from First Amendment guarantees this Court has oft cautioned against. St. Amant v. Thomson, 390 U.S. 727, 732 (1968). Denial of summary judgment to the defendant in instances where the public figure plaintiff has failed to prove actual malice by clear and convincing evidence constitutes “a forbidden intrusion on the field of free expression.” N.Y. Times Co. v. Sullivan, 376 U.S. at 285.

While this Court recognized the actual malice standard, “which calls a defendant’s state of mind into question,” does not “readily lend itself to summary judgment,” Hutchinson v. Proxmire, 443 U.S. 111, n.9 (1979), it subsequently clarified, in Anderson, that a plaintiff *must* offer concrete evidence from which a reasonable juror could return a verdict in his favor” in order to defeat a motion for summary judgment. 477 U.S. at 256 (emphasis added).

Here, Respondent is a limited purpose public figure and must therefore meet the heavy burden constitutionally imposed upon such defamation plaintiffs. Respondent must prove actual malice in order to survive Cartman’s Motion for Summary Judgment and he has failed so to do. Accordingly, this Court should reverse the appellate court’s erroneous denial of Cartman’s Motion for Summary Judgment.

- A. The Respondent Is A Limited Purpose Public Figure Because A Public Controversy, In Which He Played A Prominent Role, Gave Rise To The Alleged Defamation, The Alleged Defamatory Statement Was Germane To His Role In The Public Controversy and He Has Regular And Continuing Access To Channels Of Effective Communication Through Which He Can Defend Himself.**

This Court should find the Respondent is a limited purpose public figure because (1) the actions of a Citrus in general and sweatshop conditions in overseas factories constitute a public controversy; (2) Respondent, as director of development of the ePlay Touché, plays a direct and prominent role in the controversial working conditions in Citrus factories that manufacture the ePlay Touché; (3) the photograph and commentary that Cartman published on his blog directly concern Respondent's role in the controversy; and (4) Respondent has regular and continuing access to channels of effective communication.

In distinguishing between different standards of fault and burdens of proof that distinct defamation plaintiffs must bear, the Court sought to strike a balance between two competing interests – constitutional commitment to free speech and press with state protection of individuals' reputation. See generally, N.Y. Times v. Sullivan, 376 U.S. 254 (1964); Gertz v. Welch, 418 U.S. 323 (1974); Lohrenz v. Donnelly, 350 F.3d 1272 (D.C. Cir. 2003). The Court noted that this balance might be struck on a case-by-case basis. Gertz, 418 U.S. at 343. The reasons for requiring a public figure to meet a higher burden of proof to withstand a motion for summary judgment are twofold. First, a public figure has likely assumed the risk of public comment by becoming prominent and pervasive members of society either in general or for a particular controversy. Id. at 344. Second, public figures generally enjoy greater access to channels of effective communication giving them “a more realistic opportunity to counteract false statements” than do private individuals. Id.

A limited purpose public figure was initially defined as an individual who “voluntarily injects himself or is drawn into a particular public controversy.” Id. at 351. Subsequently, circuit courts seeking to apply such constitutional standards, established four distinct tests for determining whether a plaintiff is a limited purpose public figure. Though the tests differ in some

respects, all reflect the rationale for the public figure distinction and contemplate the balance that must be reached between constitutional protection and state interests. Gertz, 418 U.S. at 343.

Synthesizing the various permutations of factors used in limited public figure tests, a plaintiff is a limited purpose public figure when: (1) a public controversy gave rise to the alleged defamation, Lohrenz, 350 F.3d at 1279; (2) the plaintiff played a direct and prominent role in the controversy, Id.; Lerman v. Flynt, 745 F.2d 123, 136 (2d Cir. 1984), McDowell v. Paiewonsky, 769 F.2d 942, 948 (3d Cir. 1985); (3) the alleged defamation was germane to the plaintiff's role in the controversy, Lohrenz, 350 F.2d at 1279; and (4) the plaintiff has regular and continuing access to channels of communication, Lerman, 745 F.2d at 137; Foretich v. Capital Cities/ABC, Inc., 37 F.3d 1541, 1553 (4th Cir. 1994).

Per Gertz, “not all of the considerations which justify adoption of a given rule will obtain in each particular case decided under its authority.” 418 U.S. at 344. Nevertheless, each factor, used in some form across the circuits in their limited purpose public figure tests is met in this case. Thus, this Court must find that Respondent is a limited purpose public figure.

*1. A public controversy gave rise to the alleged defamation.*

A public controversy exists “if the issue was being debated publicly and if it had foreseeable ramifications” for the general public or some segment of it in an appreciable way. Waldbaum v. Fairchild Publications, Inc., 627 F.2d 1287, 1297 (D.C. Cir. 1980). Because the alleged defamation itself “indicates that someone in the press believed the matter deserved media coverage,” newsworthiness alone will not suffice. Id. at 1296. As this Court has noted, a defendant may not manufacture his own defense by creating with defamatory material, the public controversy or public figure. Wolston v. Reader's Digest Assn., Inc., 443 U.S. 157, 168 (1979); Hutchinson v. Proxmire, 443 U.S. 111, 135 (1979) (holding that a public controversy was not

preexisting where the subject of plaintiff scientist's writings became a controversy as a consequence of the "Golden Fleece Award," an award given to federal agencies to draw attention to wasteful government spending).

In isolating the public controversy, a court may not question the legitimacy of the public's concern about a certain issue; thus, it "must look to what already were disputes." Waldbaum, 627 F.2d at 1297 (citing Hutchinson, 443 U.S. at 135).

In Waldbaum, the president of the second largest cooperative in the nation sued a newspaper for publishing a five-sentence article about his dismissal that mentioned the supermarket cooperative "had been losing money the last year and retrenching." 627 F.2d at 1290. The court, in holding the president to be a limited purpose public figure, found that a public controversy existed because the cooperative attracted attention and was often the subject of news reports due to its size, innovation and "path-breaking marketing policies," that had become the subject of "public debate within the supermarket industry and beyond, affecting consumers and retailers in the Washington area and elsewhere." Id. at 1299.

A public controversy was also found in Metastorm, where the plaintiff, a corporation that resold electronic forms, alleged defamation against a publisher for revealing the corporation's marketing agreement with a potential forms product vendor. Metastorm v. Gartner Group, Inc., 28 F. Supp. 2d 665, 669 (D.D.C 1998). The court in that case, identified the fact that members of the relevant industry and specialized trade publications had become aware of the agreement, and that the corporation's "broad client base...could be affected if [the corporation] was unable to successfully market [the product] or otherwise failed to fulfill the terms of the subject agreement," as determinative in finding a public controversy. The court also took special note

that consumers have an interest in “ascertain[ing] whether the products they are purchasing are supported by a stable, financially sound company.” Id.

Here, a public controversy exists because both the actions of a large corporation and human rights abuses and poor working conditions in overseas factories are issues that are publicly debated, and the ramifications of such abuses by Citrus affects not only the abused factory workers but consumers, investors, government regulatory agencies and the public at large.

Citrus is a large, publicly traded Fortune 500 corporation, engaging in international trade (J.A. at 4.) that is at “the top of the consumer electronics industry.” (J.A. at 2.) The company’s “flagship product,” the ePlay has become a “status symbol among teenagers and twenty-somethings.” (J.A. at 2.) Like the corporation in Waldbaum, Citrus has been the subject of news and public commentary, the CEO, Kyle Broflovski giving television and magazine interviews and hosting press conferences (J.A. at 3). Its path-breaking mobile touch screen technology, Id. presumably provokes discussion about Citrus within the consumer electronics industry and beyond.

Likewise, human rights abuses and poor working conditions in overseas factories, where regulations may be less stringent, has been the subject of contentious debates that has implicated many large corporations like Wal-Mart and Nike. The severe reactions of the mainstream press (J.A. at 6.) and retailers (J.A. at 7.) to the news of potential sweatshop conditions in Citrus factories indicate that similar controversies have been debated before and that strong opinions with respect to them exist.

Potential human rights abuses and poor working conditions in Citrus factories abroad undeniably have foreseeable ramifications for those other than direct participants. Indian factory

workers are affected because if true, they are forced to endure abuses of their basic human rights as employment at Citrus factories could be the only basis of their livelihood. More sweepingly, this controversy could affect the financial stability of the company with regard to declining stock prices, potential lawsuits and consumer boycotts. Each potential consequence affects consumers, who should be able to ascertain whether the products they are purchasing are supported by a financially sound company; investors, who will indubitably be affected by declining stock prices; government agencies who will be forced to respond to such egregious international human rights abuses that implicate a domestic company; and the public at large, who have an interest in the respect for human life.

It is undeniable that a public controversy exists, and that it gave rise to the allegedly defamatory post on *The Sludge Report*.

2. *Respondent played a direct and prominent role in the controversy regardless of whether his participation was voluntary.*

Most courts engage in some sort of inquiry to determine the extent of a plaintiff's role in a given public controversy for the purposes of establishing limited purpose public figure status. Some courts, deriving their test from language in Gertz, inquire as to the nature of the plaintiff's involvement in the controversy. This inquiry has its genesis in the Supreme Court's assertion that limited purpose public figures most commonly, have attained that status by voluntarily thrusting themselves to the forefront of a particular public controversy with the aim of influencing the outcome. Gertz, 418 U.S. at 345. A corollary characteristic is that such plaintiffs assumed the risk of public comment. Id. at 344.

In Lohrenz, the plaintiff was held to be a limited purpose public figure because she assumed the risk of public comment by choosing a profession that had a reasonable place in

public debate, thereby voluntarily thrusting herself to the forefront of a public controversy that “came with the territory.” Lohrenz, 350 F.3d at 1274.

Notwithstanding, the prevalence of limited public figures who attained their status through voluntary means, the Supreme Court did explicitly note the rare, but very real instance in which an individual may become a limited purpose public figure through no volition of his own. Gertz, 418 U.S. at 345. In Dameron v. Washington Magazine, Inc., an air traffic controller was held to be a limited purpose public figure where he had the misfortune of being on duty when an airplane crashed igniting a public controversy in its stead. 779 F.2d 736, 742 (D.C. Cir. 1985). Because the plaintiff in that case was “drawn into a public controversy,” he too had to bear the burden of proving actual malice with convincing clarity in order to prevail on his defamation claim. Id.

Respondent in this case, like the plaintiff in Lohrenz, voluntarily injected himself into the forefront of a public controversy, see Brief Section A1, by choosing to accept a position in a large, international corporation at the peak of the consumer electronics industry. Respondent, publicly promising to “take [Citrus] products to new heights,” (J.A. at 3.) accepted the position as director of development for the ePlay Touché, a product that would feature cutting edge touch screen technology, its predecessor, the ePlay, having redefined portable music in popular culture.

Even if Respondent is held to not have voluntarily injected himself into the controversy, by virtue of the fact that he was charged with overseeing the development of the ePlay Touché (J.A. at 3.), that he was “on duty,” so to speak, at the time the public controversy surfaced, in and of itself shows that Respondent had a direct and prominent role in the controversy.

3. *The alleged defamation was germane to Respondent’s role in the public controversy.*

Many circuit tests require that the alleged defamation be germane to the plaintiff's participation in the controversy. Waldbaum, 627 F.2d at 1297. Here, the alleged defamation is the photograph and associated commentary that places the Respondent at a Citrus factory in Mumbai looking on while workers assemble the ePlay Touché in sweatshop conditions. (J.A. at 5.) It is of little consequence that discovery revealed Respondent had been superimposed onto the picture of the Citrus factory. (J.A. at 7.) The crux of the allegedly defamatory post is that Citrus is committing egregious human rights violations in their factories in India. Id. Respondent is necessarily implicated as he is charged with overseeing the development of the very product depicted in the photograph as being made by under-protected Citrus factory workers.

4. *Respondent has regular and continuing access to channels of effective communication through which he can defend himself against defamatory statements.*

Regular and continuing access to the media has been considered by this Court to be one of the “accouterments of having become a public figure.” Hutchinson v. Proxmire, 443 U.S. 111, 136 (1979). Here, Respondent, in his position as executive of a large, Fortune 500 corporation, engaged in international trade, whose products have dominated the consumer electronics market, media, and popular culture has regular and continuing access to the media. The fact that Plaintiff *chose* to not to utilize his unfettered access to the media to respond to the allegedly defamatory remarks does not speak to his *ability* to access the media for the purposes of determining his public figure status.

Following analysis of each factor by which any circuit has evaluated a defamation plaintiff in determining his public figure status, it is apparent that in this case (1) there existed a public controversy from which the alleged defamation arose, (2) Respondent played a direct and prominent role in the controversy, (3) the allegedly defamatory post was germane to the

controversy, and (4) Respondent maintains regular and continuing access to channels of effective communication that he may utilize at any time to refute the allegations made against him. Thus, this Court must find that Respondent is a limited purpose public figure hence constitutionally required to prove actual malice with convincing clarity in order to prevail on Cartman's Motion for Summary Judgment.

**B. Respondent Has Failed To Show With Clear and Convincing Evidence That Cartman Acted With Actual Malice In Publishing the Photograph And Commentary On His Blog Because (1) Cartman Did Not Entertain Serious Doubts As To The Statement's Truth, (2) The Statement Was Not So Inherently Improbable That Only A Reckless Person Would Have Put It Into Circulation and (3) Cartman Obtained The Allegedly Defamatory Statement From A Personal Acquaintance And Employee At Citrus, From Whom He Had Previously Obtained Reliable Information.**

Respondent has failed to meet his constitutional burden of showing with convincing clarity that Cartman acted with actual malice.

Actual malice is "a term of art denoting deliberate or reckless falsification." Masson v. New Yorker Magazine, 501 U.S. 496, 499 (1991). Actual malice in a defamation context does not equate with "the concept of malice as an evil intent or motive arising from spite or ill will." Id. at 510. The Supreme Court defines actual malice as knowledge that a defamatory statement was false or that the statement was made with reckless disregard as to its falsity or truth. N.Y. Times v. Sullivan, 376 U.S. 254, 279-80 (1964). While knowledge of actual falsity is self-explanatory, "'reckless disregard' must be defined through case-by-case adjudication." St. Amant v. Thomson, 390 U.S. 727, 730.

A cornerstone of the actual malice inquiry is that it be subjective, the proper inquiry being whether the defendant himself acted with knowledge of falsity or with reckless disregard as to falsity. The D.C. Circuit, in Lohrenz, synthesized the circuit court jurisprudence on reckless disregard, derived of St. Amant. To prove actual malice in a defamation claim, a "plaintiff must

show by clear and convincing evidence, that when defendants published the alleged defamations they (1) entertained serious doubts as to the statement's truth, (2) were *subjectively* aware" that the story was "so inherently improbable that only a reckless person would have put it into circulation"; or (3) the story was "based wholly on an unverified anonymous telephone call or some other source that [the defendant] had obvious reasons to doubt." Lohrenz, 350 F.3d at, 1283 (emphasis added), See generally, St. Amant, 390 U.S. at 732.

A failure to verify does not constitute reckless disregard for truth and is not evidence that a defendant necessarily entertained serious doubts as to the truth of the statement. See, McFarlane v. Sheridan Square Press, Inc., 91 F.3d 1501, 1509 (D.C. Cir. 1996) (finding that a publisher's efforts to investigate potentially libelous allegations, particularly when made by a questionable source, is actually evidence that the publisher neither believed the allegations to be false, nor willfully blinded himself to the truth). A requirement to verify would turn what is a constitutionally mandated subjective standard of a defendant's state of mind into an objective standard of care. Id.

In Curtiss Publishing Co., the Court found that a reporter's failure to verify did constitute reckless disregard where the source, who was on probation for having written bad checks, claimed to have overheard a conversation implicating the plaintiff in the fixing of a football game. Curtiss Publishing Co. v. Butts, 388 U.S. 130, 136 (1967). In finding reckless disregard, the Court specifically noted that the reporter there failed to take even the most "elementary precautions" to verify in the face of such an obviously dubious source. Id. at 157. "That a publisher can, by investigating a questionable allegation, preclude the implication that it acted in reckless disregard of the truth, does not mean that the publisher had a duty to corroborate." McFarlane, 91 F.3d at 1510. Further, an allegation that a defamation defendant acted with

reckless disregard in failing to verify or investigate necessarily must include an indication of what would have been revealed had such verification taken place. Desnick v. American Broadcasting Companies, 233 F.3d 514, 520 (7th Cir. 2000) (analogizing such a requirement with the duty of a party who objects to the exclusion of testimony to show by an offer of proof that the testimony would have been helpful).

Here, Respondent failed to show that Cartman acted with knowledge of actual falsity or reckless disregard as to falsity or truth because he did not entertain serious doubts as to the truth of the allegedly defamatory information.

The information that Respondent was present at a Citrus factory in Mumbai, looking on as workers assembled ePlay Touchés was not wholly improbable given that Citrus owned factories in Mumbai, (J.A. at 7.), Cartman has written about Citrus' "systematic oppression of the peoples of the Third World" before, (J.A. at 4.), the workers in the photograph were assembling ePlay Touchés, (J.A. at 5, 7.), and Respondent was the director of development of the ePlay Touché. (J.A. at 3.) To find reckless disregard would be improper also because Cartman relied on a source, he knew personally, who worked for Citrus, and from whom he had previously obtained reliable information. If the court in McFarlane found no reckless disregard for truth where information from a questionable source was not corroborated, surely this Court cannot find actual malice where the source was not even remotely questionable in the subjective mind of Cartman.

Finally, assuming *arguendo* that Cartman, under an objective standard, should have verified the authenticity of the photograph, it still would not prove his liability. In discovery, it was revealed that a third party took the photograph of night-shift workers at the Mumbai factory (J.A. at 7). Had Cartman passed the photograph through the software, it would have revealed

evidence that a picture of Respondent had been artificially superimposed onto an otherwise unaltered photograph of a Citrus factory in Mumbai where under-protected workers were assembling the ePlay Touché.

The fact remains, however, that it was the working conditions of the factory that formed the crux of Cartman's critique. Respondent, in his position overseeing the development of the ePlay Touché, would have been implicated in the controversy regardless of his appearance in the photograph. Thus, under both an actual malice and negligence standard, Respondent's argument has a fatal flaw. Respondent has failed to prove that Cartman's conduct as a reporter, even if he had been infallibly diligent in verification, would have yielded a different result.

On an independent examination of the whole record, this Court should find that respondent has failed to meet his constitutional burden of showing actual malice with convincing clarity. Thus Cartman must prevail on his Motion for Summary Judgment.

### **CONCLUSION**

For the reasons set forth above, Petitioner, Eric Cartman, respectfully requests that this Court reverse the decision of the United States Court of Appeals for the Fifteenth Circuit granting Respondent's Motion to Compel Disclosure and denying Petitioner's Motion for Summary Judgment.

Respectfully submitted,

Team 116  
Counsel for Petitioner