2006 ACTUAL MALICE PRACTICE GUIDE

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November 13, 2006

When defamation plaintiffs face the onerous task of surmounting the public figure actual malice standard, they usually resort to a standard refrain: the reporter relied on biased sources, the reporter was negligent, the reporter failed to investigate, the reporter had ill-will towards plaintiff, the reporter had knowledge of plaintiff's denials, the reporter relied on a single source, the reporter relied on a confidential source, the article was slanted or unfair towards plaintiff, and the reporter failed to interview sources favorable to plaintiff, among others.

This Practice Guide collects – by these various themes – a number of leading and/or recent actual malice cases and includes quotations from each case.[2] There is somewhat of a general slant towards citing New York and California cases, but other jurisdictions are included. The purpose of this Practice Guide is to inform defense counsel of this relevant case law so they can quickly respond to a claim of actual malice.[3] Cases that have been added since the publication of the 2003 Practice Guide are highlighted in bold.

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[2] Some of the source material in this Practice Guide comes from *The Media Law Resource Center 50-State Survey of Media Libel Law* and John B. McCrory's and Robert C. Bernius' excellent summary *"Constitutional Privilege in Libel Law"* in the 1997 PLI Communications Law Materials.

[3] This article is not intended, nor should it be used, as a substitute for specific legal advice or opinions since legal counsel may only be given in response to inquiries regarding particular factual and legal situations. The cases cited below have been key-cited, quote-checked and are current as of November 13, 2006.

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A. THE ACTUAL MALICE STANDARD GENERALLY DEFINED

"The standard of actual malice is a daunting one." Howard v. Antilla, 294 F.3d 244, 252 (1st Cir. 2002) (quoting McFarlane v. Esquire Magazine, 74 F.3d 1296, 1308 (D.C. Cir. 1996)). Under the First Amendment, a public figure cannot recover for a false and defamatory statement unless he or she can prove that a defendant published the statement "with 'knowledge that it was false or with reckless disregard of whether it was false or not.'" Masson v. The New Yorker Magazine, 501 U.S. 496, 510 (1991) (quoting New York Times v. Sullivan, 376 U.S. 254, 279-80 (1964)). This high barrier to recovery by public figure libel plaintiffs is necessary to guarantee "the national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open ... ." New York Times, 376 U.S. at 270.

Importantly, the actual malice standard focuses solely on the defendant's actual state of mind "at the time of publication." Bose Corp. v. Consumer Union of U.S., Inc., 466 U.S. 485, 512 (1984); McFarlane v. Sheridan Square Press, 91 F.3d 1501, 1508 (D.C. Cir. 1996) (actual malice must "necessarily be drawn solely upon the basis of the information that was available to and considered by the defendant prior to publication"). "Mere negligence does not suffice." Masson, 501 U.S. at 510. Rather, the term "knowledge of falsity means simply that the defendant was actually aware that the contested publication was false." Woods v. Evansville Press Co., Inc., 791 F.2d 480, 484 (7th Cir. 1986) (emphasis added).

Similarly, to establish that the defendant published a statement with "reckless disregard" for the truth, the plaintiff must show "that the defendant actually had a 'high degree of awareness ... of probable falsity.'" Harte-Hanks Communications, Inc. v. Connaughton, 491 U.S. 657, 688 (1989) (emphasis added). As explained by the Supreme Court, "reckless disregard" is not measured by a reasonableness standard:

> [our] cases are clear that reckless conduct is not measured by what a reasonably prudent man would have published, or would have investigated before publishing. There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication.

St. Amant v. Thompson, 390 U.S. 727, 731 (1968) (emphasis added).

Plaintiff must prove actual malice by "clear and convincing" evidence. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255-57 (1986); Gertz v. Robert Welch, Inc., 418 U.S. 323, 342 (1974). Under this heightened evidentiary standard, the plaintiff's proof must be "strong, positive and free from doubt ... , full, clear and decisive." Stone v. Essex County Newspapers, Inc., 330 N.E.2d 161, 175 (Mass. 1975). To defeat summary judgment, plaintiff must show that the "evidence in the record would permit a reasonable finder of fact, by clear and convincing evidence, to conclude that [defendants] published a defamatory statement with actual malice[.]" Masson, 501 U.S. at 508; see also Anderson, 477 U.S. at 254-56.

Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 254 (1986) (Considering all of the evidence before this court in a light most favorable to plaintiff, it "is of insufficient caliber or quantity to allow a rational finder of fact to find actual malice by clear and convincing evidence").

Desnick v. ABC, 233 F.3d 514, 517 (7th Cir. 2000) ("The defendant must either know that his published statement was probably false or, suspecting that it may be false, deliberately close his eyes to the possibility").

Revell v. Hoffman, 309 F.3d 1228, 1233 (10th Cir. 2002) ("Because [plaintiff] fails to offer any evidence concerning defendant's subjective state of mind, we have before us no 'concrete evidence from which a reasonable juror could return a verdict in his favor'").

McFarlane v. Sheridan Square Press, Inc., 91 F.3d 1501, 1508 (D.C. Cir. 1996) ("The actual malice standard is subjective; the plaintiff must prove that the defendant actually entertained a serious doubt").

Wolf v. Ramsey, 253 F. Supp.2d 1323, 1353 (N.D. Ga 2003) ("Clear and convincing evidence … [is] evidence so clear, direct and weighty and convincing as to enable [the factfinder] to come to a clear conviction, without hesitancy, of the truth of the precise facts in issue").

Rosenaur v. Scherer, 88 Cal.App.4th 260, 274, 29 Media L. Rep. 1481 (2001) ("The clear and convincing standard requires that the evidence be such as to command the unhesitating assent of every reasonable mind").

Bement v. N.Y.P. Holdings, 307 A.D.2d 86, 91, 760 N.Y.S.2d 133, 137 (N.Y. 1st Dep't 2003) ("In order to prove a reckless disregard for the truth, plaintiff has to show that [defendant] subjectively doubted the truth of the information received

from his [] source and that he deliberately failed to seek information that might have confirmed the probable falsity of that received from his [] source").

Bartlett v. Bradford Publishing, Inc., 885 A.2d 562, 566, 33 Media L. Rep. 2477 (Pa. Super. 2005) ("The actual malice standard is a rigorous, if not impossible, burden to meet in most circumstances.")

Finebaum & Capstar Operating Corp. d/b/a WERC AM/FM Radio v. Coulter, 854 So.2d 1120, 1125, 31 Media L. Rep. 1560 (Ala. 2003) ("The most repulsive speech enjoys immunity provided it falls short of a deliberate or reckless untruth.") (citation and quotation omitted).

Kilcoyne v. Plain Dealer Publishing Co., 678 N.E.2d 581, 586 (Ohio 1996) ("The term 'actual malice' in a libel suit concerns the publisher's attitude toward the truth rather than toward the plaintiff").

B. COURTS ROUTINELY GRANT SUMMARY JUDGMENT FOR FAILURE TO SHOW ACTUAL MALICE BY CLEAR AND CONVINCING EVIDENCE

Given the high level of proof necessary to show actual malice by clear and convincing evidence, courts routinely grant summary judgment dismissing libel claims. See, e.g., **Flowers v. Carville, 310 F. Supp.2d 1157 (D. Nev. 2004), aff'd, 161 Fed. Appx. 697 (9th Cir. 2006); Harris v. City of Seattle, 315 F. Supp.2d 1105 (W.D. Wash.), aff'd, 152 Fed. Appx. 565 (9th Cir. 2005); Lowell v. Hayes, 117 P.3d 745 (Alaska 2005); Pegasus v. Reno Newspapers, Inc., 57 P.3d 82, 31 Media L. Rep. 1353 (Nev. 2002); Nichols v. Moore, 396 F. Supp.2d 783 (D. Mich. 2005); Smith v. Huntsville Times Co., Inc., 888 So. 2d 492, 32 Media L. Rep. 1776 (Ala. 2004); Johnson v. KTBS, Inc., 889 S.2d 329, 32 Media L. Rep. 2582 (La. Ct. App. 2004); Freedom Newspapers of Texas v. Cantu, 168 S.W.3d 847, 33 Media L. Rep. 1907 (Tex. 2005); Hearst Corp. v. Skeen, 159 S.W.3d 633, 33 Media L. Rep. 1434 (Tex. 2005); New Times Inc. v. Isaacks, 146 S.W.3d 144, 32 Media L. Rep. 2480 (Tex. 2004); Forbes, Inc. v. Granada Biosciences, Inc., 124 S.W.3d 167, 32 Media L. Rep. 1498 (Tex. 2003); Hugger v. Rutherford Inst., 94 Fed. Appx. 162 (4th Cir. 2004); Metts v. Mims, 635 S.E.2d 640 (S.C. Ct. App. 2006); Chafin v. Gibson, 578 S.E.2d 361 (W. Va. 2003)**; Wolf v. Ramsey, 253 F. Supp.2d 1323 (N.D. Ga 2003); Bement v. N.Y.P. Holdings, 307 A.D.2d 86, 760 N.Y.S.2d 133 (N.Y. 1st Dep't 2003); Piper v. Mize, 31 Media L. Rep. 1833, 2003 WL 21338696 (Tenn. Ct. App. 2003); Featherston v. CM Media, 31 Media L. Rep. 2336, 2002 WL 31750286 (Ohio App. Dist. Dec. 10, 2002); Sikora v. Plain Dealer Publishing Comp., 2003 WL

21419279 (Ohio. App. Dist. Jun. 19, 2003); New Times, Inc. v. Wamstad, 106 S.W.3d 916 (Ct. App. Tex. 2003); Chafoulias v. Peterson, 668 N.W.2d 642, 31 Media L. Rep. 2377 (Minn. 2003); Lane v. MPG Newspapers, 31 Media L. Rep. 1279, 781 N.E.2d 800 (Mass 2003); Finebaum v. Coulter, 854 So.2d 1120, 31 Media L. Rep. 1560 (Ala 2003); Lewis v. Philadelphia Newspapers, **833 A.2d 185, 31 Media L. Rep. 2249 (Pa. Super. 2003)**; **Atlanta Humane Society v. Mills, 618 S.E.2d 18 (Ga. Ct. App. 2005)**; **Martin v. Comm. For Honesty and Justice at Star Valley Ranch, 101 P.3d 123 (2004)**; Lloyd v. Quorum Health Resources, LLC, 77 P.3d 993 (Ct. App. Kan. 2003); Carr v. Forbes, 259 F.3d 273 (4th Cir. 2001); Church of Scientology Int'l v. Behar, 238 F.3d 168 (2d Cir. 2001); Desnick v. ABC, 233 F.3d 514 (7th Cir. 2000); McFarlane v. Sheridan Square Press, Inc., 91 F.3d 1501 (D.C. Cir. 1996); El Deeb v. University of Minn., Inc., 60 F.3d 423 (8th Cir. 1995); Underwager v. Salter, 22 F.3d 730 (7th Cir. 1994); Meisler v. Gannett Comp., Inc., 12 F.3d 1026 (11th Cir. 1994); Dockery v. Florida Democratic Party, 799 So.2d 291 (Fla. Dist. Ct. App. 2001); Fort Worth Star-Telegram v. Street, 61 S.W.3d 704, 30 Media L. Rep. 1016 (Tex. App. 2001); Fleming v. Rose, 567 S.E.2d 857 (S.C. 2002); Fodor v. Leeman, 41 P.3d 446, 30 Media L. Rep. 1538 (Or. App. 2002); **Wilson v. City of Tulsa, 91 P.3d 673 (Okla. Civ. App. 2004)**; Gross v. New York Times Co., 281 A.D.2d 299, 724 N.Y.S.2d 16 (N.Y.A.D. 1 Dept. 2001); Sanderson v. Bellevue Maternity Hospital, 259 A.D.2d 888, 686 N.Y.S.2d 535 (N.Y.A.D. 3 Dept. 1999); Dancer v. Bergman, 246 A.D.2d 573, 668 N.Y.S.2d 213 (N.Y.A.D. 2 Dept. 1998); Feldschuh v. State of New York, 240 A.D.2d 914, 658 N.Y.S.2d 772 (N.Y.A.D. 3 Dept. 1997); Goldblatt v. Seaman, 225 A.D.2d 585, 639 N.Y.S.2d 438 (N.Y.A.D. 2 Dept. 1996); Seltzer v. Orlando, 225 A.D.2d 456, 656 N.Y.S.2d 1 (N.Y.A.D. 1 Dept. 1996); Roberts v. Oellrich and Behling, Inc., 223 A.D.2d 860, 636 N.Y.S.2d 205 (N.Y.A.D. 3 Dept. 1996); Roche v. Mulvihill, 214 A.D.2d 376, 625 N.Y.S.2d 169 (N.Y.A.D. 1 Dept. 1995).

Chafin v. Gibson, 578 S.E.2d 361, 367 (W. Va. 2003) (Clear and convincing standard of proof "applies with equal force at the summary judgment stage of public official defamation actions … 'courts generally are more inclined to grant motions for summary judgment in defamation actions filed by public officials or public figures.'") (citation omitted).

DeAngelis v. Hill, 847 A.2d 1261, 1267 (N.J. 2004) (A court "should grant summary judgment dismissing the complaint if a reasonable jury could not find that the plaintiff had established actual malice by clear and convincing evidence.") quoting Lynch v. N.J. Educ. Ass'n, 735 A.2d 1129, 1137 (1999).

Washington Post Co. v. Keogh, 365 F.2d 965, 968 (D.C. Cir. 1996) ("In the First Amendment area, summary procedures are even more essential. For the stake here, if harassment succeeds, is free debate … The threat of being put to the defense of a lawsuit brought by a popular public official may be as chilling to the exercise of First Amendment freedoms as fear of the outcome of the lawsuit itself").

C. NO FINDING OF ACTUAL MALICE WHERE PLAINTIFF HAS SHOWN MULTIPLE THEMES AGAINST DEFENDANTS

While this Practice Guide describes more than two dozen different themes that plaintiffs attempt to use to show actual malice, it is common for a plaintiff to allege many of these disparate themes in a single case. Courts, however, can and do find that plaintiffs have failed to meet their burden of establishing actual malice, even when a plaintiff shows that many of the different themes are collectively present:

Freedom Newspapers of Texas v. Cantu, 168 S.W.3d 847, 854-58, 33 Media L. Rep. 1907 (Tex. 2005) (finding no actual malice despite plaintiff's claims that (1) defendant attributed words to speaker that were not a direct quote, (2) defendant made a deliberate and material change in meaning of the plaintiff's remarks, (3) defendant had ill will toward plaintiff, (4) defendant was under pressure to produce story from a particular point of view, (5) defendant published second story after learning of plaintiff's denials, (6) defendants had raised questions after reading the article during the editorial process, and (7) expert journalist criticized defendant's handling of the story and noted that there was biased reporting)

Hearst Corp. v. Skeen, 159 S.W.3d 633, 637, 33 Media L. Rep. 1434 (Tex. 2005) (finding no actual malice despite plaintiff's claim that defendants "purposefully avoided the truth, relied on dubious information from biased sources, deviated from professional standards of care, and were motivated to fabricate," in addition to knowing that plaintiff had denied allegations).

Bement v. N.Y.P. Holdings, 307 A.D.2d 86, 91, 760 N.Y.S.2d 133, 137 (N.Y. 1st Dep't 2003) (Insufficient evidence of actual malice despite plaintiff's contentions that defendant: (1) "fail[ed] to read treatment beforehand"; (2) made "minimal efforts to contact plaintiff to verify the treatment's accuracy"; and (3) failed to "inquire" of source "as to the accuracy of the treatment").

Piper v. Mize, 31 Media L. Rep. 1833, 2003 WL 21338696 at *11 (Tenn. Ct. App. 2003) (Insufficient evidence of actual malice despite plaintiff's contentions that defendant: (1) "did not subjectively believe the rumors"; (2) "did not investigate the validity of the rumors"; and (3) was a "political opponent" of plaintiff. "These facts fall considerably short of being 'clear and convincing evidence' of actual malice[.]").

Cobb v. Time, Inc., 278 F.3d 629, 638-639 (6th Cir. 2002) (Insufficient evidence of actual malice despite plaintiff's contentions that defendant: (1) relied on a source with a "criminal background," who was being "paid" for his information (some of which was "bizarre") and who was a "drug user"; (2) failed to ask any of its interviewees whether plaintiff "participated in the fix" of a boxing match; and (3) failed to act as a "prudent reporter would have acted").

Lohrenz v. Donnelly, 223 F. Supp.2d 25, 53 (D.D.C. 2002) (Insufficient evidence of actual malice despite plaintiff's contention that defendant: (1) was "informed clearly and repeatedly that her information was incorrect"; (2) "never sought to obtain a full copy of plaintiff's training records"; (3) "selectively edited the portion of plaintiff's training records that she did have in her possession"; and (4) published report that contained "factual errors"); **aff'd, 350 F.3d 1272 (D.C. Cir. 2003)**.

Tucker v. Fischbein, 237 F.3d 275, 286 (3rd Cir. 2001) (Insufficient evidence of actual malice despite plaintiff's contentions that defendant: (1) engaged in "poor journalistic practices"; (2) had "a preconceived story line"; (3) "did not follow ... editorial guidelines"; (4) "failed to conduct a thorough investigation"; and (5) relied on "biased sources").

Levan v. Capital Cities/ABC, Inc., 190 F.3d 1230 (11th Cir. 1999) (Insufficient evidence of actual malice despite plaintiff's contentions that defendant: (1) stated that "the truth is irrelevant to me"; (2) chose "not to include statements" favorable to the plaintiff; and (3) knew that there was a "[d]ifference of opinion as to truth" of the allegations).

Gray v. St. Martin's Press, 221 F.3d 243 (1st Cir. 2000) (Insufficient evidence of actual malice despite plaintiff's contentions that defendant: (1) was "careless"; (2) relied on sources with "an axe to grind" against plaintiff; (3) relied on sources with "limited knowledge"; (4) failed to "seek out decisive witnesses" who would "have denied" the allegations; and (5) failed to publish statements favorable to plaintiff).

McFarlane v. Sheridan Square Press, Inc., 91 F.3d 1501 (D.C. Cir. 1996) (Insufficient evidence of actual malice despite plaintiff's contentions that defendant: (1) failed to "corroborate" and "independently verify" allegations about plaintiff; (2) failed to "contact any individual who would have had first-hand knowledge" of allegations about plaintiff; (3) "fail[ed] to contact [plaintiff] himself about the allegations"; (4) relied upon a source who was a "controversial figure"; (5) knew that "there were different opinions [about a source's] credibility"; (6) "fail[ed] to update the reader on the state of the controversy"; and (7) failed "to retract" the statement).

DARE America v. Rolling Stone Magazine, 101 F. Supp.2d 1270 (C.D. Cal. 2000) (Insufficient evidence of actual malice despite plaintiff's contentions that magazine: (1) relied on a non-employee journalist who gave "fabricated quotes" and "wholly concocted" information to magazine; (2) "failed to contact [plaintiff]"; (3) had a "motive to write [the story] with a particular slant"; and (4) refused to "retract defamatory statements"), aff'd, 270 F.3d 793 (9th Cir. 2001).

Secord v. Cockburn, 747 F. Supp. 779 (D.D.C. 1990) (Insufficient evidence of actual malice despite plaintiff's contentions that: (1) defendant failed to "divulge the contents of [the] book prior to publication" to the plaintiff; (2) "post-publication events" showed that defendant relied on an affidavit containing falsehoods; (3) "divided opinion exist[ed] among reporters as to the credibility" of a source; (4) defendant relied on "convicted felons" as sources; and (5) defendant relied on "unnamed sources").

Perk v. Reader's Digest Assn., Inc., 1989 WL 226143 (N.D. Ohio) (Insufficient evidence of actual malice despite plaintiff's contentions that defendant: (1) failed "to contact the subject of the article"; (2) failed to contact "other sources that would speak favorably of plaintiff"; (3) "did not present opposing viewpoints concerning [the challenged statements]" in the article; (4) relied on "biased sources"; (5) failed to "retract" the article; and (6) used "sensationalist and derogatory" terms in the article), aff'd, 931 F.2d 408 (6th Cir. 1991).

Kilcoyne v. Plain Dealer Publishing Comp., 112 Ohio App.3d 229, 678 N.E.2d 581 (Ohio Ct. App. 1996) (Insufficient evidence of actual malice despite plaintiff's contentions that defendant: (1) failed to investigate fully; (2) did not comply with their own journalistic standards; (3) used hostile sources; (4) bore ill-will toward plaintiff; and (5) slanted the publication against him).

Jackson v. Paramount Pictures Corp., 68 Cal. App. 4th 10 (1998) (Insufficient evidence of actual malice despite plaintiff's contentions that: (1) defendant relied

on a source who ultimately was shown to have made up his story that the plaintiff had molested a teenager; (2) the district attorney's office refused to confirm or deny the source's allegation; and (3) another source described the allegation as "B.S." and warned defendant that it might be a "setup").

Fletcher v. San Jose Mercury News, 216 Cal. App. 3d 172 (1989) (Insufficient evidence of actual malice despite plaintiff's contentions that defendant: (1) had "hostility" and "ill-will" toward plaintiff; (2) interviewed sources in a "slick" and "devious" manner and tried to "put words in the witnesses's mouth"; (3) omitted favorable information of plaintiff in article; (4) failed to follow "professional journalism standards"; and (5) failed to "further investigate" the allegations).

Wanless v. Rothballer, 115 Ill.2d 158, 503 N.E.2d 316 (Ill. 1986) (Insufficient evidence of actual malice despite plaintiff's contentions that defendant: (1) was an "inexperienced investigative reporter;" (2) was influenced by a partisan investigator who assisted in developing the stories; (3) relied almost exclusively on plaintiff's political opponents as sources for her stories; and (4) did not confirm her information with neutral sources).

Reader's Digest Ass'n v. Superior Court of Marin County, 37 Cal.3d 244 (1984) (Insufficient evidence of actual malice despite plaintiff's contentions that: (1) defendant failed to contact plaintiff; (2) defendant knew that plaintiff had already sued a source for libel; (3) defendant failed to "independently corroborate" allegations of a source; (4) article was not "fair" or "objective"; and (5) article omitted favorable information about plaintiff).

D. PLAINTIFF MUST PROVE KNOWLEDGE OF FALSITY AS TO EACH STATEMENT

Actual malice cannot be proved in the abstract. Where the plaintiff sues on several specific statements, he must demonstrate actual malice as to each statement separately before he can recover on that statement. See, e.g., Church of Scientology Int'l v. Time Warner, Inc., 903 F. Supp. 637, 641 (S.D.N.Y. 1995) (on summary judgment, "the Court considers each allegedly libelous statement individually to determine whether a rational finder of fact could find actual malice by clear and convincing evidence"), aff'd, 238 F.3d 168 (2nd Cir. 2001); Henry v. National Ass'n of Air Traffic Specialists, Inc., 836 F. Supp. 1204, 1212 (D. Md. 1993) ("The plaintiffs must produce clear and convincing evidence that the defendants uttered [each] challenged statement [] with actual malice"), aff'd, 34 F.3d 1066 (4th Cir. 1994).

E. INFORMATION ACQUIRED AFTER PUBLICATION DOES NOT ESTABLISH ACTUAL MALICE

McFarlane v. Sheridan Square Press, 91 F.3d 1501, 1508 (D.C. Cir. 1996) (Actual malice must "necessarily be drawn solely upon the basis of the information that was available to and considered by the defendant prior to publication").

Herbert v. Lando, 781 F.2d 298, 305 (2nd Cir. 1986) ("It is self-evident that information acquired after the publication of defamatory material cannot be relevant to the publisher's state of mind or his alleged malice at the time of publication").

Secord v. Cockburn, 747 F. Supp. 779, 792 (D.D.C. 1990) ("[I]t is hornbook libel law that post-publication events have no impact whatever on actual malice as it bears on this lawsuit since the existence or non-existence of such malice must be determine as of the date of publication").

Silvester v. American Broadcasting Cos., Inc., 650 F. Supp. 766, 779 (S.D. Fla. 1986) ("The statement of an ABC employee that the legal department thought after the broadcast that it might contain libelous material does not, without more, prove that defendants had such thoughts at the time the segment was aired, which is the critical time for purposes of establishing actual malice"), aff'd, 839 F.2d 1491 (11th Cir. 1988).

Freedom Newspapers of Texas v. Cantu, 168 S.W.3d 847, 858, 33 Media L. Rep. 1907 (Tex. 2005) ("The focus of the actual-malice inquiry is the defendant's state of mind during the editorial process. Evidence concerning events after an article has been printed and distributed, has little, if any, bearing on that issue.") (citations omitted)

New Times Inc. v. Isaacks, 146 S.W.3d 144, 168, 32 Media L. Rep. 2480 (Tex. 2004) ("The actual malice inquiry focuses on the defendant's state of mind at the time of publication . . . hindsight acknowledgment that some people could have been fooled is not evidence that the reasonable reader could have understood the satire to state actual facts, nor is it evidence of actual malice at the time of publication.") (citations omitted)

F. REPORTER'S RATIONAL INTERPRETATION OF COMPLEX/AMBIGUOUS EVENT DOES NOT ESTABLISH ACTUAL MALICE (BOSE AND PAPE ANALYSIS)

"[W]hen a writer is evaluating or giving an account of inherently ambiguous materials or subject matter, the First Amendment requires that the courts allow latitude for interpretation." Moldea v. New York Times Co., 22 F.3d 310, 315 (D.C. Cir. 1991). Accordingly, in Time, Inc. v. Pape, 401 U.S. 279, 290 (1971) and Bose Corp. v. Consumer Union of U.S., Inc., 466 U.S. 485, 512-513 (1984), the Supreme Court established the principle that where an event lends itself to "a number of possible rational interpretations," an author's "deliberate choice of [one] such ... interpretation, though arguably reflecting a misconception, [is] not enough to create a jury issue of 'malice' under New York Times." Pape, 401 U.S. at 289-90.

Flowers v. Carville, 310 F. Supp.2d 1157, 1166 (D. Nev. 2004) ("[A] defendant who publishes a rational interpretation of an ambiguous report has not acted with actual malice, even though his interpretation 'arguably reflects a misconception'"), (quoting Time, Inc. v. Pape, 401 U.S. 279, 290 (1971)), aff'd, 161 Fed. Appx. 697 (9th Cir. 2006).

Newton v. NBC, 930 F.2d 662, 681 (9th Cir. 1990) ("[T]he choice of such [ambiguous] language, though reflecting a misconception, does not place the speech beyond the outer limits of the First Amendment's broad protective umbrella").

McFarlane v. Esquire Magazine, 74 F.3d 1296, 1305 (D.C. Cir. 1996) (Given "the inherent difficulties in verifying or refuting a claim that someone is the agent of a foreign power, the proofs do not add up to the possibility of a reasonable jury finding of clear and convincing evidence of reckless awareness of probable falsity, and in no way show an actual belief in falsity").

Freedom Newspapers of Texas v. Cantu, 168 S.W.3d 847, 855, 857, 33 Media L. Rep. 1907 (Tex. 2005) ("An understandable misinterpretation of ambiguous facts does not show actual malice . . . the Herald's articles were a rational interpretation of Cantu's remarks.") (citation omitted)

SEIU Dist. 1199 v. Ohio Elections Comm'n, 822 N.E.2d 424 (Ohio Ct. App. 2004) (No actual malice when defendant's "interpretation of the statement is rational and has a basis in fact to support it").

G. NEGLIGENCE OR "UNPROFESSIONAL CONDUCT" DOES NOT ESTABLISH ACTUAL MALICE

Harte-Hanks Communications, Inc. v. Connaughton, 491 U.S. 657, 663-64 n.5 (1989) (Actual malice is not established by proof of "highly unreasonable conduct constituting an extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers").

Garrison v. State of Louisiana, 379 U.S. 64, 78 (1964) ("The test which we laid down in New York Times is not keyed to ordinary care; defeasance of the privilege is conditioned, not on mere negligence, but on reckless disregard for the truth").

Franklin Prescriptions, Inc. v. New York Times Co., 424 F.3d 336, 342 (3d Cir. 2005) ("mere negligence does not rise to the level of actual malice").

Howard v. Antilla, 294 F.3d 244, 255 (1st Cir. 2002) ("[A] negligent failure to connect the dots in a voluminous paper trail" does not constitute evidence of actual malice).

Tavoulareas v. Piro, 817 F.2d 762, 796 (D.C. Cir. 1987) (In determining actual malice, courts "do not sit 'as some kind of journalism review seminar offering our observations on contemporary journalism and journalists.' Neither do juries").

Lohrenz v. Donnelly, 350 F.3d 1272, 1284 (D.C. Cir. 2003) (Defamation plaintiff "must show more than 'highly unreasonable conduct constituting an extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers'"), quoting Harte-Hanks Communications Inc. v. Connaughton, 491 U.S. 657, 666 (1989).

Bartimo v. Horsemen's Benevolent and Protective Ass'n, 771 F.2d 894, 901 (5th Cir. 1985) ("Bad judgment" and use of "hyperbole" in news reporting insufficient to establish malice).

Marcone v. Penthouse Int'l Magazine for Men, 754 F.2d 1072, 1090 (3rd Cir. 1985) (Neither "unprofessional conduct" nor negligence rises to the level of actual malice).

Long v. Arcell, 618 F.2d 1145, 1148 (5th Cir. 1980) ("Although the Constitution neither condones nor encourages careless journalistic practices, the journalist who merely is careless may not be held liable for defaming a public figure").

OAO Alfa Bank v. Center for Public Integrity, 387 F. Supp.2d 20, 51 (D.D.C. 2005) (Various "lapses in ethics and judgment" identified by plaintiff, including failure to contact plaintiffs and failure to fully research certain points more carefully, "amount at most to negligence or bad journalism, not actual malice").

Medure v. The Vindicator Printing Co., 273 F. Supp.2d 588, 598 (W.D. Penn. 2002) (Rejecting argument that reporter's allegedly "unreasonable" conduct constituted actual malice).

Colt v. Freedom Communications, Inc., 109 Cal. App. 4th 1551, 1561, 32 Media L. Rep. 1251 (2003) (reporter's admissions that he made an erroneous statement in website posting because he was "in a rush" when he posted the message "may qualify as negligence, but it is hardly clear and convincing evidence of malice").

Annette F. v. Sharon S., 119 Cal. App. 4th 1146, 1167, 15 Cal. Rptr. 3d 100, 114 (2004) ("Gross or even extreme negligence will not suffice to establish actual malice; the defendant must have made the statement with knowledge that the statement was false or with 'actual doubt concerning the truth of the publication'"), quoting Reader's Digest Ass'n v. Superior Court, 37 Cal.3d 244, 259 n.11 (1984)

Themed Restaurants, Inc. v. Zagat Survey, LLC, 781 N.Y.S.2d 441, 449 (N.Y. Sup. 2004) (In defamation suit against publisher of restaurant ratings, assertions that publisher "knew or should have known that its survey and assessment procedures could be improved . . . raise only a challenge to the reasonableness of defendants' methodology, sounding in negligence and lacking the requisite claim of actual or reckless eliciting or presentation of false information"), aff'd, 801 N.Y.S.2d 38 (N.Y. App. Div. 2004).

Tucker v. Philadelphia Daily News, 848 A.2d 113, 135 (Pa. 2004) ("It is clear that a showing of '[a] reckless disregard for the truth … requires more than a departure from reasonably prudent conduct.' Failure to check sources, or negligence alone, is simply insufficient to maintain a cause of action for defamation"). (citation omitted)

Bartlett v. Bradford Publishing, Inc., 885 A.2d 562, 567 (Pa. Super. Ct. 2005) ("The fact that [defendant] could have employed a higher degree of journalistic responsibility does not constitute actual malice … although a

failure to corroborate a source's statements may be indicative of sub-standard journalistic techniques, it does not satisfy the actual malice standard.")

Sigafus v. St. Louis Post-Dispatch, 109 S.W.3d 174, 180 (Mo. Ct. App. 2003) (Negligent incorrect attribution of source of allegedly defamatory information is "insufficient to show the recklessness that is required for a finding of actual malice")

Fletcher v. San Jose Mercury News, 216 Cal. App. 3d 172, 187 (1989) (Testimony by plaintiff's expert, a Stanford journalism professor, that the defendants "failed to follow certain accepted journalism practices" did not demonstrate actual malice; "The question we face is whether [the reporters] believed the articles were untrue, not whether their reporting practices passed [a journalism professor's] test").

Khan v. New York Times Co., Inc., 269 A.D.2d 74, 79, 710 N.Y.S.2d 41, 45 (N.Y.A.D. 1 Dept. 2000) ("[T]he fact that [reporter's] reading of the source articles was clearly incorrect and that there is evidence that, with the exercise of reasonable care, she would have realized her mistakes, does not permit the inference that she could not have misperceived the information she relied on").

H. FAILURE TO INVESTIGATE DOES NOT ESTABLISH ACTUAL MALICE

The Supreme Court has held that "[f]ailure to investigate before publishing, even when a reasonably prudent person would have done so, is not sufficient to establish reckless disregard." Harte-Hanks Communications, Inc. v. Connaughton, 491 U.S. 657, 688 (1989); St. Amant v. Thompson, 390 U.S. 727, 733 (1968) ("Failure to investigate does not in itself establish bad faith"); Gertz v. Robert Welch, Inc., 418 U.S. 323, 332 (1974).

Beckley Newspapers Corp. v. Hanks, 389 U.S. 81, 84-85 (1967) (Defendant's failure to make a prior investigation is not sufficient proof that statements were published "with reckless disregard of whether they were false or not").

Desnick v. ABC, 233 F.3d 514, 518 (7th Cir. 2000) ("We may assume that the defendants were careless in having failed to investigate the [] accusation further; but there is no evidence that they actually believed the accusation to be false").

McFarlane v. Sheridan Square Press, Inc., 91 F.3d 1501, 1509 (D.C. Cir. 1996) ("To hold that a publisher who relies upon a questionable source must not only investigate the allegations but actually corroborate them … would be to turn the

inquiry away from the publisher's state of mind and to inquire instead whether the publisher satisfied an objective standard of care").

Revell v. Hoffman, 309 F.3d 1228, 1233 (10th Cir. 2002) ("[T]he Supreme Court has made clear that 'the mere failure to investigate cannot establish reckless disregard for the truth.'") (quoting Gertz v. Welch, 418 U.S. 323, 332 (1974)).

Bressler v. Fortune Magazine, 971 F.2d 1226, 1233 (6th Cir. 1992) ("Given the consistent stories which *Fortune*'s several sources had provided, and these sources apparent reliability, *Fortune*'s decision not to gain additional comment from [an expert on the subject of the article]" is not evidence of a "purposeful avoidance of the truth").

Tavoulareas v. Piro, 817 F.2d 762, 798 (D.C. Cir. 1987) ("[W]e cannot agree that an allegation of insufficient investigation may itself constitute the very proof of the 'serious doubts' that is separately required").

Woods v. Evansville Press Co., Inc., 791 F.2d 480, 485 (7th Cir. 1986) ("[P]roof of failure to investigate, by itself, is not sufficient to establish a publisher's reckless disregard for the truth or falsity of the challenged publication").

Lohrenz v. Donnelly, 350 F.3d 1272, 1285 (D.C. Cir. 2003) ("Even where doubt-inducing evidence could be discovered, a publisher may still opt not to seek out such evidence and may rely on an informed source so long as there is no 'obvious reason to doubt' that source"), quoting McFarlane v. Esquire Magazine, 74 F.3d 1296, 1305 (D.C. Cir. 1996).

Flowers v. Carville, 310 F. Supp.2d 1157, 1163 (D. Nev. 2004) ("Proof that a reasonable person would have investigated before publishing … does not establish the requisite state of mind on the part of the defendant"), aff'd, 161 Fed. Appx 697 (9th Cir. 2006).

Silvester v. American Broadcasting Cos., Inc., 650 F. Supp. 766, 779 (S.D. Fla.) ("[T]he lack of a specific source for the [reporter's] arson hypothesis does not offend the Constitution. Members of the news media may spin their own theories so long as those propositions are not so unreasonable under the circumstances as to demonstrate malice"), aff'd, 839 F.2d 1491 (11th Cir. 1988).

OAO Alfa Bank v. Center for Public Integrity, 387 F. Supp.2d 20, 53 (D.D.C. 2005) (Failure to investigate is not evidence of actual malice, since "a plaintiff

will always be able to point to ways in which the defendant could have pursued another lead or sought another piece of corroborating evidence").

Metts v. Mims, 635 S.E.2d 640, 643 (S.C. Ct. App. 2006) ("failure to investigate in and of itself is insufficient to establish that a defendant 'recklessly disregarded' the falsity of a published article.") (citation omitted).

Fleming v. Rose, 567 S.E.2d 857, 862 (S.C. 2002) (Failure to conduct independent investigation not evidence of actual malice "because there were no obvious reasons to doubt the veracity of [] report and no evidence [of] purposefully avoiding the truth").

Alpine Industries, Computers, Inc. v. Cowles Publishing Co., 57 P.3d 1178, 1191 (Wash. Ct. App. 2002) ("Mere failures to investigate or mistakes made in an investigation leading to a news story will not prove recklessness"), opinion amended, 64 P.3d 49 (Wash. Ct. App. 2003).

Lowell v. Hayes, 117 P.3d 745, 751 (Alaska 2005) ("A defendant's 'failure to make a prior investigation into the accuracy of published statements' does not, by itself, constitute actual malice.") (citation omitted)

Pegasus v. Reno Newspapers, Inc., 57 P.3d 82, 93, 31 Media L. Rep. 1353 (Nev. 2002) ("[F]ailure to investigate alone, or to read other previously printed material is not grounds for a finding of actual malice.")

Eubanks v. N. Cascades Broad., 61 P.3d 368, 374, 31 Media L. Rep. 1407 (Wash. Ct. App. 2003) ("The defendant's failure to investigate or mistakes he or she made in investigating the offensive story will not establish recklessness absent evidence of knowledge or reckless disregard.")

Annette F. v. Sharon S., 119 Cal. App. 4th 1146, 1169, 15 Cal. Rptr. 3d 100, 116 (2004) ("[M]ere failure to investigate the truthfulness of a statement, even when a reasonably prudent person would have done so, is insufficient.")

Reader's Digest Ass'n v. Superior Court, 37 Cal. 3d 244, 258-259 (1984) ("Where the publication comes from a known reliable source and there is nothing in the circumstances to suggest inaccuracy, there is no duty to investigate").

Sweeney v. Prisoners' Legal Services of New York, Inc., 84 N.Y.2d 786, 793 (N.Y. 1995) ("A qualified privilege may be sustained if the speaker is genuinely unaware that a statement is false because the failure to investigate its truth,

standing alone, is not enough to prove actual malice even if a prudent person would have investigated before publishing the statement").

Dally v. Orange County Publications, 117 A.D.2d 577, 579 (N.Y.A.D. 2 Dept. 1986) (Although employee had not followed defendant newspaper's "call-back procedure" for sensitive personal advertisements, such failure to investigate an unreliable source is not evidence of "a high degree of awareness that the advertisement was false").

James v. Gannett Co., Inc., 40 N.Y.2d 415, 424 (N.Y. 1976) ("Only where the publisher has, or should have had, reasons to doubt the accuracy of the report or it reporter is there a legal duty to make further inquiry").

Safarets, Inc. v. Gannett Co., Inc., 80 Misc.2d 109, 113 (N.Y. Sup. 1974) ("Though the article was published without prior information or reliance on the credibility of the source, that does not amount to 'reckless disregard' for the truth").

I. FAILURE TO SPEAK TO FAVORABLE SOURCES PRIOR TO PUBLICATION DOES NOT ESTABLISH ACTUAL MALICE

Desnick v. American Broadcasting Cos., Inc., 233 F.3d 514, 520 (7th Cir. 2000) ("[M]aybe that failure [to interview technicians with actual knowledge of the machine at issue in the case] was negligent … . But negligence is not the applicable standard").

Levan v. ABC, 190 F.3d 1230, 1242 (11th Cir. 1999) (Defendant "was not required to continue its investigation until it found somebody who would stand up for [plaintiff]").

Perk v. Reader's Digest Assn., Inc., 1989 WL 226143, *3 (N.D. Ohio) ("Defendant's failure to contact the subject of the article or other sources that would speak favorably of plaintiff, or the fact that defendant's article did not present opposing viewpoints concerning [the challenged statements] is not enough evidence to establish the element of actual malice ..."), aff'd, 931 F.2d 408 (6th Cir. 1991).

Westmoreland v. CBS Inc., 596 F. Supp. 1170, 1173 (S.D.N.Y. 1984) (Actual malice would not be present based on plaintiff's contentions that "the selection of interviewees, the framing of questions and the handling of witnesses were designed to confirm a hostile premise rather than to find the truth" and that "witnesses, who were not privy to the facts and offered only speculative conclusions, were treated as authoritative if their views supported [defendants'] premise, while the contrary

views of witnesses who possessed firsthand information were ignored by [defendants]").

Sanderson v. Bellevue Maternity Hosp. Inc., 686 N.Y.S.2d 535, 538 (N.Y.A.D. 3 Dept. 1999) ("[Defendant's] alleged failure to investigate the co-worker's claims and listen to plaintiff's version of the events was, at most, negligent and did not constitute a reckless disregard for the truth which could rise to the level of actual malice").

J. FAILURE TO CONSULT WITH PLAINTIFF PRIOR TO PUBLICATION DOES NOT ESTABLISH ACTUAL MALICE

OAO Alfa Bank v. Center for Public Integrity, 387 F. Supp.2d 20, 55 (D.D.C. 2005) (Reporter's explanation of why he failed to contact plaintiffs was "less than compelling, and might not excuse defendant's failure to contact [plaintiffs] as a matter of ethics. But it does not amount to actual malice.")

DARE America v. Rolling Stone Magazine, 101 F. Supp.2d 1270, 1284 n.3 (C.D. Cal. 2000) ("Plaintiff's suggestion that Defendants failed to contact [plaintiff] before publishing [the] article evidences actual malice is ... legally misguided. Defendants were not required to contact the subjects of the article before publication"), aff'd, 270 F.3d 793 (9th Cir. 2001).

Coliniatis v. Dimas, 965 F. Supp. 511, 518 (S.D.N.Y. 1997) (Newspaper did not act with actual malice where it failed to contact plaintiff until one day before publication of article describing his involvement in kickback arrangement, or to broach subject matter in interview conducted four days before publication).

Secord v. Cockburn, 747 F. Supp. 779, 788 (D.D.C. 1990) ("If the caselaw is clear on any point it is that an author is under no duty to divulge the contents of a book prior to publication in order to provide the subject an opportunity to reply").

Secord v. Cockburn, 747 F. Supp. 779, 789 (D.D.C. 1990) (Author of book regarding Contra and drug activities in Nicaragua not required to apprise retired Major General William Secord of specific information gleaned from interview with him that she intended to print; such a requirement would degrade author's "quintessential" exercise of her First Amendment rights).

Loeb v. New Times Communications Corp, 497 F. Supp. 85, 93 (S.D.N.Y. 1980) ("[F]ailure to verify statements with the plaintiff and reliance upon some biased sources, in themselves, do not amount to reckless disregard of the truth").

Tucker v. Philadelphia Daily News, 848 A.2d 113, 133 (Pa. 2004) ("The fact that the newspapers did not interview [plaintiff] does not mean that they knew the statement of [the source] was false, nor does it create the inference that [newspapers] had obvious reasons to doubt the veracity of his statements …"). (citation omitted)

Khan v. New York Times Co., Inc., 710 N.Y.S.2d 41, 45, 29 Media L. Rep. 1627 (N.Y.A.D. 1 Dept. 2000) ("[T]he evidence that [the reporter] did not contact plaintiff with respect to the second article, even after plaintiff corrected her first mistake and allegedly obtained from her a promise that she would verify information with him in the future, is insufficient to create a triable issue of fact as to whether she recklessly disregarded the truth with respect to the second article").

James v. Gannett Co., Inc., 40 N.Y.2d 415, 423-24 (N.Y. 1976) ("A requirement that persons mentioned in the proposed newspaper accounts or articles be permitted a first instance, prepublication review, including review of direct quotations, would, in effect, impose the equivalent of censorship traditionally anathema in our society").

K. UNFAIRNESS, BIAS OR SLANT IN PUBLICATION DOES NOT ESTABLISH ACTUAL MALICE

As explained by the court in Westmoreland v. CBS Inc., 601 F. Supp. 66, 68 (S.D.N.Y. 1984):

> The fairness of the broadcast is not at issue in the libel suit. Publishers and reporters do not commit a libel in a public figure case by publishing unfair one-sided attacks ... The fact that a commentary is one sided and sets forth categorical accusations has no tendency to prove that the publisher believed it to be false. The libel law does not require the publisher to grant his accused equal time or fair reply ... A publisher who honestly believes in the truth of his accusations (and can point to a non-reckless basis for his belief) is under no obligation under the libel law to treat the subject of his accusations fairly or evenhandedly.

Lohrenz v. Donnelly, 223 F. Supp.2d 25, 48 (D. D.C. 2002) (Any "pre-existing agenda," even one which may be noxious to some minds, is not indicative of actual

malice, and this argument may therefore be summarily rejected"); **aff'd, 350 F.3d 1272 (D.C. Cir. 2003)**.

Lohrenz v. Donnelly, 350 F.2d 1272, 1284 (D.C. Cir. 2003) ("Evidence that the publishers of the allegedly defamatory statements [about female fighter pilot] were on a mission to reinstate the ban against women being assigned to combat positions in the military does not suffice to show actual malice.")

Tucker v. Fischbein, 237 F.3d 275, 286 (3rd Cir. 2001) (Insufficient evidence of actual malice even though plaintiff alleged that magazine engaged in "poor journalistic practices" and had "a preconceived story line").

Levan v. Capital Cities/ABC, Inc., 190 F.3d 1230, 1242 (11th Cir. 1999) (Decision "not to include statements" favorable to plaintiff does not constitute actual malice).

Machleder v. Diaz, 801 F.2d 46, 55 (2nd Cir. 1986) ("A court cannot substitute its judgment for that of the press by requiring the press to present an article or broadcast in what the court believes is a balanced manner").

Church of Scientology v. Cazares, 638 F.2d 1272, 1286 (5th Cir. 1981) ("[W]hile most of the articles and cartoons can fairly be described as slanted, mean, vicious, and substantially below the level of objectivity that one would expect of responsible journalism, there is no evidence called to our attention which clearly and convincingly demonstrates that a single one of the articles was a false statement of fact made with actual malice").

New York Times Co. v. Connor, 365 F.2d 567, 576 (5th Cir. 1966) ("Although accuracy and objectivity in reporting are goals for which all responsible news media strive, the protection of the First Amendment is not limited to statements whose validity are beyond question or which reflect an objective picture of the reported events").

Corporate Training Unlimited, Inc. v. NBC, Inc., 981 F. Supp. 112, 122 (E.D.N.Y. 1997) ("The fact that NBC may not have included certain favorable statements regarding plaintiffs, in and of itself, cannot support their defamation claim").

Saenz v. Playboy Enterprises, Inc., 653 F. Supp. 552, 572 (N.D. Ill. 1987) ("When reporting charges made by others, failure to give the other side of the controversy is not of itself evidence of malice"; no actual malice even though report failed to include denials by plaintiff), aff'd, 841 F.2d 1309 (7th Cir. 1988).

Silvester v. American Broadcasting Cos., Inc., 650 F. Supp. 766, 779 (S.D. Fla. 1986) ("The court does not believe that these purported transgressions into bad journalism rise to the level of constitutional malice. A reporter's bias, 'in the sense of a determined effort to confirm a previously formed suspicion' does not establish malice"), aff'd, 839 F.2d 1491 (11th Cir. 1988).

Westmoreland v. CBS, Inc., 596 F. Supp. 1170, 1174 (S.D.N.Y. 1984) ("A previously formed belief rebuts as much as it establishes constitutional malice, as it tends to demonstrate sincerity").

Freedom Newspapers of Texas v. Cantu, 168 S.W.3d 847, 859, 33 Media L. Rep. 1907 (Tex. 2005) ("[N]othing in the Constitution requires the press to adopt favorable attitudes toward public figures.")

Hearst Corp. v. Skeen, 159 S.W.3d 633, 639, 33 Media L. Rep. 1434 (Tex. 2005) ("evidence that the article was written "from a particular point of view, even when [the article is] hard-hitting or sensationalistic, is no evidence of actual malice." . . . ") (citations omitted)

Tucker v. Philadelphia Daily News, 848 A.2d 113, 133 (Pa. 2004) ("[A]n article is not made defamatory by being unfair …").

Deangelis v. Hill, 847 A.2d 1261, 1271 (N.J. 2004) (While writer's decision to omit portions of a taped conversation from a newsletter may have been unfair, it "is insufficient to meet plaintiff's heavy burden of proving actual malice by clear and convincing evidence").

Gotbetter v. Dow Jones & Co., Inc., 259 A.D.2d 335, 335, 687 N.Y.S.2d 43, 43 (N.Y.A.D. 1 Dept. 1999) ("Plaintiff argues that defendants' reporting was not fair and balanced, but this Court has observed that '[w]hether or not a particular article constitutes unbalanced reporting is essentially a matter of editorial judgment and is not actionable'").

Chafoulias v. Peterson, 668 N.W.2d 642, 655 (Minn. 2003) ("Although a 'highly slanted perspective' may contribute to a finding of actual malice, such a perspective is not enough by itself to establish actual malice").

Kilcoyne v. Plain Dealer Publishing Co., 678 N.E.2d 581, 586 (Ohio 1996) ("Lack of fairness or balance in a newspaper article simply does not establish 'actual malice'").

Fletcher v. San Jose Mercury News, 216 Cal. App. 3d 172, 187 (1989) ("In applying a constitutional test we note that there is no requirement that an article be objective").

Reader's Digest Ass'n v. Superior Court of Marin County, 37 Cal.3d 244, 259 (1984) ("Neither is there a duty to write an objective account. A publisher is 'not required to provide an objective picture, or an accurate one.' ... So long as he has no serious doubts concerning its truth, he can present but one side of the story").

L. THE CHARACTER AND CONTENT OF A PUBLICATION DO NOT ESTABLISH ACTUAL MALICE

Greenbelt Cooperative Publishing Ass'n v. Bresler, 398 U.S. 6, 10 n.3 (1970) (Jury instruction that permitted finding of constitutional malice based on "'character of publication [that was] so excessive, intemperate, unreasonable and abusive as to defy any other reasonable conclusion'" held to be "error of constitutional magnitude").

Bose Corp. v. Consumers Union of U.S., Inc., 466 U.S. 485, 512-513 (1984) (Reporter's word choice, even if incorrect, does not demonstrate actual malice when "the language chosen was one of a number of possible rational interpretations of an event that bristled with ambiguities and descriptive challenges for the writer").

Lohrenz v. Donnelly, 223 F. Supp.2d 25, 54 (D.D.C. 2002) ("No inference of malice may be drawn from defendant's ... 'selective editing'.... It is generally accepted that media defendants are not compelled to publish the entirety of their sources and may edit or abridge their sources as they see fit")**; aff'd, 350 F.2d 1272 (D.C. Cir. 2003)**.

Washington Post Co. v. Keogh, 365 F.2d 965, 969 (D.C. Cir. 1966) (The "character and content of the publication … [is] a constitutionally impermissible evidentiary basis for a finding of actual malice").

Loeb v. New Times Communications Corp., 497 F. Supp. 85, 93 (S.D.N.Y. 1980) ("In essence, plaintiff relies upon the character and content of the publication to support his claim that defendants acted with reckless disregard of the truth. This, however, is a constitutionally impermissible evidentiary basis for a finding of actual malice").

Goldman v. Time, Inc., 336 F. Supp. 133, 138 (N.D. Cal. 1971) ("[A]ctual malice cannot be found simply from the language of the article alone").

New Times Inc. v. Isaacks, 146 S.W.3d 144, 166, 32 Media L. Rep. 2480 (Tex. 2004) ("The *Buzz* column was certainly crude and provocative, but the First Amendment does not police bad taste.")

Rudnick v. McMillan, 25 Cal.App. 4th 1183, 1192 (1994) ("[T]he First Amendment protects even sharp attacks on the character, motives, or moral qualifications of 'a public officer …'").

Diez v. Pearson, 834 S.W.2d 250, 252 (Mo. App. 1992) ("The use of strong language to show disapproval will not make the words actionable").

M. REPORTERS' ILL WILL TOWARDS PLAINTIFF DOES NOT ESTABLISH ACTUAL MALICE

Mangual v. Rotger-Sabat, 317 F.3d 45, 65 (1st Cir. 2003) ("The actual malice standard is distinct from common law malice which refers to spite or ill will").

Mercer v. City of Cedar Rapids, 308 F.3d 840, 849 (8th Cir. 2002) ("[W]hether [defendant] was angry at [plaintiff] ... has no bearing on the question whether he acted with actual malice in the constitutional sense – knowledge that his defamatory statement was false, or reckless disregard for its lack of truth").

Campbell v. Citizens for an Honest Government, Inc., 255 F.3d 560, 569 (8th Cir. 2001) ("Evidence of a defendant's ill will, desire to injure, or political or profit motive does not suffice" to establish actual malice).

Levan v. Capital Cities/ABC, Inc., 190 F.3d 1230, 1241 n. 33 (11th Cir. 1999) (Reporter's statement to plaintiff that "I don't care about the truth" or "the truth is irrelevant to me" is insufficient evidence of actual malice).

Tavoulareas v. Piro, 817 F.2d 762, 795 (D.C. Cir. 1987) (Statements indicating an adversarial attitude towards plaintiff were "well within the everyday parlance of an investigative reporter;" "[i]t would be sadly ironic for judges in our adversarial system to conclude … that the mere taking of an adversarial stance is antithetical to the truthful presentation of facts").

Herbert v. Lando, 781 F.2d 298, 309 (2nd Cir. 1986) (Lack of actual malice even though prior to publication reporter allegedly told plaintiff "I'll get you" and "I'll destroy you").

DARE America v. Rolling Stone Magazine, 101 F. Supp.2d 1270, 1285-6 (C.D. Cal. 2000) ("Even if [defendants] were biased against [plaintiff] this would not

show actual malice"; "*Rolling Stone*'s editorial slant is not at issue here"), aff'd, 270 F.3d 793 (9th Cir. 2001).

Corporate Training Unlimited, Inc. v. NBC, Inc., 981 F. Supp. 112, 124 (E.D.N.Y. 1997) (Reporter's alleged "ill will," purportedly owing to possible competition for the story, had no bearing on the actual malice inquiry, which "refers to a defendant's knowledge of the falsity of the defamatory statements or a reckless disregard concerning their truth, not to any subjective ill will it may have borne the plaintiff").

McFarlane v. Esquire Magazine, 1994 WL 510088, *16 (D.D.C. 1994) (Allegation that a reporter was allegedly out to "get" plaintiff insufficient evidence of actual malice).

Clark v. Hagedorn Communications, 2006 Conn. Super LEXIS 979, 14 (Conn. Super. Ct. 2006) ("Actual malice in defamation cases has nothing to do with bad motive or ill will").

Metts v. Mims, 635 S.E.2d 640, 643 (S.C. Ct. App. 2006) ("In deciding whether actual malice exists in a given case, we note 'the actual malice standard is not satisfied merely through a showing of ill will or 'malice' in the ordinary sense of the term.'") (citation omitted)

Ray v. City of Bossier City, 859 So.2d 264, 277 (La. Ct. App. 2003) (While "there had been an antagonistic relationship between plaintiffs . . . and [defendant], ill will alone is insufficient to establish that there was actual malice").

Freedom Newspapers of Texas v. Cantu, 168 S.W.3d 847, 857-58, 33 Media L. Rep. 1907 (Tex. 2005) (plaintiff "detailed several out-of-court statements by Herald reporters to the effect that the officers of the paper 'don't like you' and 'had it out' for him. Assuming the truth of this hearsay, it only establishes ill will, which is not proof of actual malice. Jurors cannot impose liability on the basis of a defendant's 'hatred, spite, ill will, or desire to injure.'") (citations omitted)

Deangelis v. Hill, 847 A.2d 1261, 1270 (N.J. 2004) (No actual malice where "[a]lthough defendant was clearly upset with plaintiff … plaintiff's evidence does not suggest that defendant doubted that his statements in the newsletter were true").

Fodor v. Leeman, 41 P.3d 446, 448, 30 Media L. Rep. 1538 (Or. App. 2002) (Reporter's admitted desire to "discredit" plaintiff is insufficient to show actual malice).

Fletcher v. San Jose Mercury News, 216 Cal. App. 3d 172, 186 (1989) (The fact that a reporter is "aggressive and abrasive," engages in "zealous investigative reporting" and is "slick" and "devious" "does not ... trigger a question about that reporter's belief in the truth of the story"; reporter's alleged hostility, by itself, does not demonstrate "awareness of probable falsity" and "if anything, ... suggests [reporter] believed that the allegations against [plaintiff] were true").

Reader's Digest Ass'n v. Superior Court, 37 Cal. 3d 244, 260 (1984) (Reporter's unpublished statement that plaintiff was "very, very nasty and litigious as hell" may have been a "reasonable reaction to what [the reporter] had learned in preparing to write an article, and [did] not indicate a state of mind that would suggest that [the reporter] had serious doubts about the article's veracity").

N. KNOWLEDGE OF PLAINTIFF'S DENIALS DOES NOT ESTABLISH ACTUAL MALICE

Worrell-Payne v. Gannett Co., Inc., 49 Fed. Appx. 105, 108, 2002 WL 31246121, *2 (9th Cir. 2002) (Defendants' knowledge that plaintiff made "statements [] in her own defense at a press conference" and distributed packet of "corrective information" did not support a finding of actual malice).

Lohrenz v. Donnelly, 350 F.2d 1272, 1285 (D.C. Cir. 2003) ("Publishers need not accept 'denials, however vehement'"), quoting Harte-Hanks Communications, Inc. v. Connaughton, 491 U.S. 657, 691 (1989).

McFarlane v. Sheridan Square Press, Inc., 91 F.3d 1501, 1510-1522 (D.C. Cir. 1996) ("[Defendant's] failure to contact [plaintiff] himself about the allegations provides even less support for a finding of actual malice. [Defendant] knew … that [plaintiff] had sued … for defamation based upon similar allegations; [plaintiff] could reasonably expect [defendant] to deny any involvement regardless of the facts").

Anderson v. Rocky Mountain News, 15 Media L. Rep. (BNA) 2058, 2060 (10th Cir. 1988) ("The mere rejection of plaintiff's version of events, standing alone, is not sufficient circumstantial evidence to support a reasonable jury finding that plaintiff has shown actual malice by clear and convincing evidence").

Edwards v. National Audubon Society, Inc., 556 F.2d 113, 121 (2nd Cir. 1977) (Actual malice "cannot be predicated on mere denials, however vehement, such denials are so commonplace in the world of polemical charge and countercharge that, in themselves, they hardly alert the conscientious reporter to the likelihood of error").

Coliniatis v. Dimas, 965 F. Supp. 511 (S.D.N.Y. 1997) (Neither denial of allegations by plaintiff prior to publication nor denial of soliciting a bribe from plaintiff by interested protagonist establish clear and convincing evidence of actual malice).

McFarlane v. Esquire Magazine, 1994 WL 510088, 16 (D.D.C. 1994) ("[Defendant] did know that plaintiff disputed the substance of the statements; however, this alone is not sufficient evidence of actual malice").

Contemporary Mission, Inc. v. New York Times, 665 F. Supp. 248, 270 (S.D.N.Y. 1987) ("Publication in the face of a denial by plaintiffs of a statement's truth does not demonstrate actual malice"), aff'd, 842 F.2d 612 (2nd Cir. 1988).

Contemporary Mission, Inc. v. New York Times, 842 F.2d 612, 624 (2d Cir. 1988) ("Mere denials prior to publication, however, are insufficient to establish actual malice").

Silvester v. American Broadcasting Cos., Inc., 650 F. Supp. 766, 780 (S.D. Fla. 1986) ("Defendants' failure to give equal time [to "detailed refutations of broadcast's allegations"] does not, in these circumstances, prove malice"), aff'd, 839 F.2d 1491 (11th Cir 1988).

Westmoreland v. CBS, Inc., 596 F. Supp. 1170, 1174 (S.D.N.Y. 1984) ("Nor is the reporter required to accept denials of wrongdoing as conclusive, or to prefer them over apparently creditable accusations").

Martin Marietta Corp. v. Evening Star Newspaper Co., 417 F. Supp. 947, 960 (D.D.C. 1976) ("If potential plaintiffs in libel suits could cut off a malice defense simply by calling a newspaper and giving a broad denial of an article, the first amendment policy embodied in New York Times would be undermined").

Freedom Newspapers of Texas v. Cantu, 168 S.W.3d 847, 858, 33 Media L. Rep. 1907 (Tex. 2005) ("The mere fact that a defamation defendant knows that the public figure has denied harmful allegations or offered an alternative explanation of events is not evidence that the defendant doubted the allegations.") (citation omitted)

Smith v. Huntsville Times Co., Inc., 888 So. 2d 492, 501, 32 Media L. Rep. 1776 (Ala. 2004) ("To require that a reporter withhold such a story or face potential liability for defamation because a police officer denies a citizen's allegation of misconduct is exactly the type of self-censorship the New York Times rule was intended to avoid.") (citations and quotations omitted).

O. DEMAND FOR RETRACTION OR THREAT OF LIBEL ACTION DOES NOT ESTABLISH ACTUAL MALICE

Reader's Digest Ass'n v. Superior Court, 37 Cal.3d 244, 260 (Cal. 1984) (A demand for a retraction or a threat of libel action does not establish that defendant doubted "the truthfulness of its article or its sources").

Safarets v. Gannett Co., 80 Misc.2d 109, 113 (Sup. Ct. N.Y. 1974) ("[T]he fact that the requested retraction was not made does not establish the necessary elements of 'reckless disregard' since the plaintiffs' names did not appear in the letter which was printed").

P. FAILURE TO RETRACT STATEMENT AFTER PUBLICATION DOES NOT ESTABLISH ACTUAL MALICE

Lohrenz v. Donnelly, 223 F. Supp.2d 25, 56 (D.D.C. 2002) ("[T]here is no duty to retract or correct a publication, even where grave doubt is cast upon the veracity of the publication after it has been released")**; aff'd, 350 F.3d 1272 (D.C. Cir. 2003)**.

McFarlane v. Sheridan Square Press, Inc., 91 F.3d 1501, 1515 (D.C. Cir. 1996) ("[Plaintiff] presents no authority, however, nor are we aware of any, for the proposition that a publisher may be liable for defamation because it fails to retract a statement upon which grave doubt is cast after publication").

McFarlane v. Sheridan Square Press, Inc., 91 F.3d 1501, 1515 (D.C. Cir. 1996) ("[T]he publisher's failure to update the reader on the state of the controversy can hardly be taken as evidence that it published the book with actual malice").

Kaufman v. Tucker, 2002 WL 59610 at *3 (Tex. App. Jan. 17, 2002) (no actual malice despite fact that, inter alia, defendant "never retracted any statement about [plaintiff] and reiterated the statements deeming a radio interview after receiving [plaintiff's] demand for a retraction").

Connelly v. Northwest Publications, Inc., 448 N.W.2d 901, 905 (Minn. Ct. App. 1989) (Defendant's "failure to retract the article is not probative of actual malice. Indeed, in this case [defendant's] decision not to retract after discussing

[plaintiff's] retraction demand provides some evidence they reasonably believed [plaintiff] had not been defamed").

Q. RELIANCE ON A SINGLE SOURCE DOES NOT ESTABLISH ACTUAL MALICE

Hugger v. Rutherford Inst., 94 Fed. Appx. 162, 167 (4th Cir. 2004) ("Although a reasonable person may have waited to hear from one of the corroborating witnesses before issuing the press release, the First and Fourteenth Amendments do not allow states to impose a standard of reasonableness upon defamers who are discussing matters of public concern.")

Desnick v. ABC, Inc., 233 F.3d 514, 519 (7th Cir. 2000) ("That [the source] might not be credible enough to have a good chance of persuading a jury does not mean that he was not credible enough to be a source for a news story").

Woods v. Evansville Press Co., Inc., 791 F.2d 480, 488 (7th Cir. 1986) (That defendant's sole source was a disgruntled employee is not "enough to establish that the author had serious doubts about the veracity of his source. Reliance on a single source, in the absence of a high degree of awareness of probably falsity, does not constitute actual malice").

McFarlane v. Esquire Magazine, 1994 WL 510088, *15 (D.D.C. 1994) ("As for relying upon a single source who may have been biased or unreliable, other courts have found that type of evidence insufficient for actual malice").

Secord v. Cockburn, 747 F. Supp. 779, 789 (D.D.C. 1990) ("[E]ven assuming that this [single] source was unreliable, the plaintiff has failed to point to any record facts to show that the author was subjectively aware that the source was unreliable").

Clyburn v. News World Communications, Inc., 705 F. Supp. 635, 642 (D.D.C. 1989) (A journalist's "reliance on a single source does not indicate actual malice ..., especially where," "the source has no apparent motive for misleading the reporters"), aff'd, 903 F.2d 29 (D.C. Cir. 1990).

New Times, Inc. v. Wamstad, 106 S.W.3d 916, 928 (Ct. App. Tex. 2003) ("A reporter may rely on statements by a single source, even though they reflect only one side of the story, without manifesting a reckless disregard for the truth").

R. RELIANCE ON HOSTILE SOURCE DOES NOT ESTABLISH ACTUAL MALICE

Reliance on an allegedly biased source does not constitute legally sufficient evidence that the journalist had serious doubts as to the source's credibility or the accuracy of his information. See St. Amant v. Thompson, 390 U.S. 727, 730 (1968). The reason for this rule is apparent: the fact that a source is a terminated employee – or has some other alleged bias – does not itself logically support a conclusion that the source is not credible or his information is not accurate.

Isgrigg v. Cosmos Broadcasting Corp., 30 Med. L. Rep. 1331, 2002 WL 215995 (S.D. Ind. 2002) (Sources' "status as former employees – even disgruntled former employees – does not render [defendant] reckless for using their statements in her investigative series").

Woods v. Evansville Press Co., 791 F.2d 480, 488 (7th Cir. 1986) ("It is true that [author] knew when he published the challenged column that Mr. Fitzgerald was a disgruntled [former] employee of Channel 7 .... These facts alone, however, are not enough to establish that the author had serious doubts about the veracity of his source").

Lohrenz v. Donnelly, 350 F.3d 1272, 1284 (D.C. Cir. 2003) (Fact that defendants "acted on the basis of a biased source and incomplete information" did not establish actual malice).

Sunshine Sportswear & Electronics v. WSOC Television, Inc., 738 F. Supp. 1499, 1508 (D.S.C. 1989) ("Failure to make an independent investigation of a story, even when the [defendant] is aware of the possible bias of its source, does not amount to reckless disregard in the absence of serious doubts about the story's truthfulness").

Loeb v. New Times Communications Corp., 497 F. Supp. 85, 92-93 (S.D.N.Y. 1980) (Magazine's reliance on "hostile" sources did "not amount to reckless disregard of the truth," especially since "there is no evidence that these sources, even if biased, would necessarily provide false information").

Gross v. New York Times Co., 281 A.D.2d 299, 724 N.Y.S.2d 16, 17 (N.Y.A.D. 1 Dept. 2001) (That "some of the Times's sources may have borne plaintiff ill-will ... is not probative of actual malice since it does not warrant the inference that the Times ... entertained serious doubts about the truth of the complained of statements").

Davis v. Keystone Printing Service, Inc., 507 N.E.2d 1358, 1367-68 (Ill. App. 2 Dist. 1987) ("Reliance upon sources antagonistic to the subject of [the article] does not constitute actual malice where [the] sources were in a position to know and where their assertions are not so improbable as to engender serious doubt").

Rye v. Seattle Times Co., 678 P.2d 1282, 1288 (Wash. App. 1984) ("Even if ... the reporter knew of the hostility of his sources [who were two fired employees], this is still insufficient to establish a prima facie case by evidence of convincing clarity that the reporter wrote his article with reckless disregard ...").

Metts v. Mims, 635 S.E.2d 640, 644 (S.C. Ct. App. 2006) ("However, simply because the reporter was aware that Mims and Metts's supervisor were political adversaries does not mean the reporter had obvious reasons to doubt Mims' credibility as a source of information").

Chafoulias v. Peterson, 642 N.W.2d 764, 778 (Minn. Ct. App. 2002) (Reliance on source who was attorney with history of professional misconduct did not demonstrate actual malice because source's "professional travails" were not "germane to a determination of her credibility," especially where publisher "conducted an investigation to corroborate her charges"), **aff'd in relevant part, 668 N.W.2d 642 (Minn. 2003).**

S. RELIANCE ON SOURCE WHO IS A CONVICTED FELON DOES NOT ESTABLISH ACTUAL MALICE

Cobb v. Time, Inc., 278 F.3d 629, 638 (6th Cir. 2002) (Reliance on a source with a "criminal background," who was being "paid" for his information (some of which was "bizarre") and who was a drug user did not constitute evidence of actual malice).

Desnick v. ABC, 233 F.3d 514, 519 (7th Cir. 2000) ("[A] broadcaster is entitled to repose confidence in a conspirator unless the circumstances create in the broadcaster's mind a belief that there is a high probability that the conspirator is lying").

Secord v. Cockburn, 747 F. Supp. 779, 794 (D.D.C. 1990) ("The use of convicted felons cannot alone constitute a fact of actual malice. Rather the plaintiff must specifically establish that there were surrounding circumstances in relying upon a particular felon as a source which would constitute evidence of a knowing or reckless disregard of the truth").

Sweeney v. Prisoners' Legal Services of New York, 84 N.Y.2d 786, 793-94 (1995) ("The Appellate Division majority concluded that Mays' complaint was incredible because Mays was a convicted felon who had been administratively disciplined and who had not suffered serious injuries during the alleged incident. Even if that inference is drawn, it does not support the further inference that defendants were likely aware that Mays' allegations were probably false").

T. RELIANCE ON SOURCE WHO HAS BEEN CONTRADICTED DOES NOT ESTABLISH ACTUAL MALICE

Liberty Lobby v. Anderson, 1991 WL 186998, *8 (D.D.C. 1991) ("[D]efendants' knowledge of the existence of a contradictory source, without more, does not constitute clear and convincing evidence of actual malice").

Secord v. Cockburn, 747 F. Supp. 779, 793 (D.D.C. 1990) ("[T]he mere fact that divided opinion exists among reporters as to the credibility of an individual does not reflect on defendant's state of mind and actual malice").

Clyburn v. News World Communications, 705 F. Supp. 635, 642 (D.D.C. 1989) (Reliance on the testimony of one source whose account of the incident differed from another source was not evidence of actual malice).

Sands v. News America Publishing, Inc., Index No. 9729/87 (Sup. Ct. N.Y. Co. Jan. 23, 1995), N.Y.L.J., January 17, 1995 27:4 (The fact that a law enforcement agency issued a report stating that it could not prove allegation that plaintiff was associated with organized crime did not constitute evidence that author acted with constitutional malice in reporting on such association), aff'd, 237 A.D.2d 177, 655 N.Y.S.2d 18 (N.Y.A.D. 1 Dept. 1997).

Freeman v. Johnston, 614 N.Y.S.2d 377, 380, 637 N.E.2d 268, 271 (N.Y. 1994) (Disagreement between sources as to the recollection of plaintiff's statement not evidence of actual malice because "[g]iven … different possible interpretations, no rational finder of fact could, in this case, find actual malice by clear and convincing evidence").

Colombo v. Times-Argus Ass'n, Inc., 380 A.2d 80, 83 (Vt. 1977) ("Publication of [a] contradicted story, in itself, [does] not meet the test of reckless disregard").

U. RELIANCE ON CONFIDENTIAL SOURCE DOES NOT ESTABLISH ACTUAL MALICE

Federal courts have held that "summary judgment is proper even without disclosure of a confidential source, if the plaintiff fails to produce evidence that the article in question is either (1) inherently improbable, or is (2) published with serious doubts about the truth of its contents." Southwell v. Southern Poverty Law Center, 949 F. Supp. 1303, 1311 (W.D. Mich. 1996).

As one court explained, "allowing plaintiffs carte blanche to depose every defendant's confidential source anytime they otherwise lack evidence of actual malice in a libel suit – would swallow the rule cautioning against disclosure in the absence of compelling evidence that such disclosure would be relevant to the issue of malice." Southwell v. Southern Poverty Law Cent., 949 F. Supp. 1303, 1313 (W.D. Mich. 1996).

In Southwell, for example, the defendant relied exclusively on a confidential source (who was paid by the defendant) in publishing that the plaintiff attended a meeting with the Director for Aryan Nations. 949 F. Supp. at 1304. Even though the Southwell court denied the plaintiff's motion to compel disclosure of the confidential source, it granted summary judgment to the defendant. Id. at 1306-1314. The court held that the plaintiff failed to provide any evidence that the defendant doubted the truth of the challenged libel or the reliability of its confidential source. Id.

Cervantes v. Time, Inc., 464 F.2d 986, 990 (8th Cir. 1972) (Granting summary judgment on lack of malice where reporter relied on confidential source; court refused to compel disclosure of confidential source).

Clyburn v. News World Communications, Inc., 705 F. Supp. 635 (D.D.C. 1989) (Granting summary judgment on lack malice where reporter relied on several confidential sources).

Sharon v. Time, Inc., 599 F. Supp. 538, 583 (S.D.N.Y. 1984) ("Even where one or more sources is not revealed, the record may nevertheless establish the absence of an adequate factual basis for a finding of actual malice").

Schultz v. Reader's Digest Ass'n, 468 F. Supp. 551, 568 (E.D. Mich. 1979) (Granting summary judgment on lack of malice where reporter partially relied on confidential source; plaintiff produced no evidence that the challenged article was inherently improbable or that defendant published it with serious doubts about the truth of its contents).

Cerrito v. Time, Inc., 302 F. Supp. 1071, 1075 (N.D. Cal. 1969) (Granting summary judgment on lack of malice where reporter relied on confidential sources; court refused to order disclosure of confidential sources), aff'd, 449 F.2d 306 (9th Cir. 1971).

V. RELIANCE ON PREVIOUSLY PUBLISHED MATERIAL DOES NOT ESTABLISH ACTUAL MALICE

It is well settled that "good faith reliance on previously published reports in reputable sources ... precludes a finding of actual malice as a matter of law." Liberty Lobby, Inc. v. Dow Jones & Co., 838 F.2d 1287, 1297 (D.C. Cir. 1988).

Flowers v. Carville, 310 F.3d 1118, 1130 (9th Cir. 2002) ("One who repeats what he hears from a reputable news source, with no individualized reason external to the news report to doubt its accuracy, has not acted recklessly.")

Reader's Digest Ass'n Inc. v. Superior Court, 37 Cal.3d 244, 259 (1984) ("Where the publication comes from a known reliable source and there is nothing in the circumstances to suggest inaccuracy, there is no duty to investigate").

World Boxing Council v. Cosell, 715 F. Supp. 1259, 1265 (S.D.N.Y. 1989) ("[Defendant] is permitted to rely on these [previously published] articles … the articles appeared in respected publications, and were authored by reputable journalists, whose allegations were not so improbable that a prudent author would have questioned their accuracy").

Schultz v. Reader's Digest Ass'n, 468 F. Supp. 551, 564 (E.D. Mich. 1979) (Granting summary judgment and holding no evidence of actual malice since author "relied on contemporaneous reports in local and national newspapers and magazines for the statements regarding [plaintiff]").

W. RELIANCE ON REPORTER DOES NOT ESTABLISH ACTUAL MALICE

DARE America v. Rolling Stone Magazine, 101 F. Supp.2d 1270, 1281-82 (C.D. Cal. 2000) (Even though non-employee journalist gave "fabricated quotes" and "wholly concocted" information to Rolling Stone, magazine did not act with actual malice in publishing information because it did not have a "high degree of awareness of the probably falsity of his statements"), aff'd, 270 F.3d 793 (9th Cir. 2001.

McManus v. Doubleday & Co., Inc., 513 F. Supp. 1383, 1390 (S.D.N.Y. 1981) (Where reporter had "extensive experience as a foreign correspondent for five major newspapers and had seven published books to his credit," co-author and publisher were "entitled as a matter of law to rely on Howe's proven reportorial ability, and the motion for summary judgment as to them must be granted").

Pegasus v. Reno Newspapers, Inc., 57 P.3d 82, 93, 31 Media L. Rep. 1353 (Nev. 2002) (Even if there were sufficient evidence that freelance reporter's statement in article was false, newspaper did not act with actual malice where "there is no evidence that … anyone at [the newspaper] had any reason to believe [the freelance reporter] would lie …").

X. RESPONDEAT SUPERIOR

Revell v. Hoffman, 309 F.3d 1228, 1234 (10th Cir. 2002) ("[A]ctual malice must be proved separately as to each defendant").

Cantrell v. Forrest City Publ'g Co., 419 U.S. 245, 253 (1974) (Actual malice of the publisher must be established independent of the author).

McFarlane v. Esquire Magazine, 74 F.3d 1296, 1303 (D.C. Cir. 1996) ("[Plaintiff] may show [publisher's] malice only through evidence of the information available to, and conduct of, its employees").

Price v. Viking Penguin, Inc., 881 F.2d 1426, 1446 (8th Cir. 1989) ("If [author] is not an employee of Viking, independent evidence of Viking's culpability is required").

Secord v. Cockburn, 747 F. Supp. 779, 787 (D.D.C. 1990) ("Actual malice must be proved separately with respect to each defendant … and cannot be imputed from one defendant to another absent an employer-employee relationship giving rise to respondeat superior").

Secord v. Cockburn, 747 F. Supp. 779, 787 (D.D.C. 1990) ("Plaintiff cannot rely upon the theory of respondeat superior to impute evidence of actual malice from [defendant] because the undisputed facts in the record before this Court provide that the author is an independent contractor").

Pegasus v. Reno Newspapers, Inc., 57 P.3d 82, 93, 31 Media L. Rep. 1353 (Nev. 2002) (Editor's questions to reporter seeking verification of fact in her article did not establish that editor doubted reporter's veracity or published with actual malice).

Sanderson v. Bellevue Maternity Hospital, 259 A.D.2d 888, 892 (N.Y.A.D. 3 1999) ("Having determined that [defendant's] statements … are not actionable … we likewise conclude that Bellevue as an employer cannot be held liable to plaintiff for these same, nonmalicious, privileged statements under the doctrine of respondeat superior").

Y. REVIEW BY OUTSIDE COUNSEL CONSTITUTES AFFIRMATIVE EVIDENCE OF LACK OF ACTUAL MALICE

Where a publisher has submitted a book to experienced outside counsel for pre-publication review, courts have dismissed claims of "reckless disregard" by the publisher. See, e.g., Goldblatt v. Seamen, 225 A.D.2d 585, 587, 639 N.Y.S.2d 438, 440 (N.Y.A.D. 2 Dept. 1996) (summary judgment granted where "outside counsel believed in good faith in the truthfulness of the author's account of the incident and did not entertain serious doubts as to the truth of the incident as described in the book"); Doubleday & Co., Inc. v. Rogers, 674 S.W.2d 751, 756 (Tex. 1984) (since publisher "submitted [book] to outside legal counsel for review," there "was no evidence that [publisher] published the defamatory statement about [plaintiff] with reckless disregard for its truth").

Z. PUBLICATION OF PROMPT CORRECTION OR AGREEING NOT TO REPEAT STATEMENT CONSTITUTES AFFIRMATIVE EVIDENCE OF LACK OF ACTUAL MALICE

Johnson v. KTBS, Inc., 889 So. 2d 329, 334, 32 Media L. Rep. 2582 (La. Ct. App. 2004) (no actual malice where television news station "ceased using [the allegedly defamatory information] after being notified . . . that the statement was false").

Hoffman v. Washington Post Co., 433 F Supp. 600, 605 (D.D.C. 1977) ("[I]t is significant and tends to negate any inference of actual malice on the part of the [newspaper] that it published a retraction"), aff'd, 578 F.2d 442 (D.C. Cir. 1978).

New Times Inc. v. Isaacks, 146 S.W.3d 144, 166, 32 Media L. Rep. 2480 (Tex. 2004) (Defendant's "labeling and clarification in the next edition's *Buzz* column, as well as its explanatory responses to readers, evidence a lack of actual malice.")

Freedom Newspapers of Texas v. Cantu, 168 S.W.3d 847, 858, 33 Media L. Rep. 1907 (Tex. 2005) ("prompt follow up article quoting [plaintiff's] version of his remarks and the opinions of his supporters is evidence of the absence of actual malice, not the opposite").

West v. Daily News, 5 Media L. Rep. (BNA) 1269, 1271 (Sup. Ct. N.Y. Co. 1979) ("[D]efendants negate any inference of actual malice on their part by having offered evidence of the correction").

AA. ATTEMPT TO INTERVIEW PLAINTIFF CONSTITUTES AFFIRMATIVE EVIDENCE OF LACK OF ACTUAL MALICE

Newton v. Nat'l Broadcasting Co., Inc., 930 F.2d 662, 686 (9th Cir. 1990) (Repeated attempts to interview plaintiff dispel accusation of actual malice and purposeful avoidance of the truth).

Loeb v New Times Communications Corp, 497 F. Supp. 35, 93 (S.D.N.Y. 1980) ("It cannot be said that the defendants' conduct constitutes an 'extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers.' Loeb himself was interviewed").

BB. INCLUSION IN ARTICLE OF GENERAL DENIALS BY PLAINTIFF AND DISCLOSURE OF BIAS CONSTITUTES AFFIRMATIVE EVIDENCE OF LACK OF ACTUAL MALICE

Lohrenz v. Donnelly, 350 F.2d 1272, 1286 (D.C. Cir. 2003) ("Reporting perspectives at odds with the publisher's own 'tends to rebut a claim of malice'"), quoting McFarlane v. Esquire Magazine, 748 3d 1296, 1304 (D.C. Cir. 1996).

McFarlane v. Esquire Magazine, 74 F.3d 1296, 1304 (D.C. Cir. 1996). ("[F]ull (or pretty full) publication of the grounds for doubting a source tends to rebut a claim of malice, not to establish one").

Silvester v. American Broadcasting Cos., Inc., 650 F. Supp. 766, 778 (S.D. Fl. 1986) ("[T]he viewers of the broadcast were not led to believe that [the source's] credibility was unimpeachable. Defendants' efforts to temper the impact of [the source's] statements by presenting him as a man with an ax to grind, as well as the corroboration they obtained, distinguish this case from Hunt v. Liberty Lobby, where the editor and publisher had reason to and in fact did question the author's neutrality"), aff'd, 839 F.2d 1491 (11th Cir 1988).

Tavoulareas v. Piro, 817 F.2d 762, 797 (D.C. Cir. 1985) (Accusation of "slanted reporting" determined to be "utterly without merit" where defendant "included most of the information furnished by [plaintiff's company] in the article (with no substantial omissions) and suppressed no information that would have proved the article incorrect").

Freedom Newspapers of Texas v. Cantu, 168 S.W.3d 847, 858, 33 Media L. Rep. 1907 (Tex. 2005) ("The *Herald*'s prompt follow-up article quoting Cantu's version of his remarks and the opinions of his supporters is evidence of the absence of actual malice, not the opposite.")

CC. MISTAKEN IDENTITY DOES NOT ESTABLISH ACTUAL MALICE

Marcone v. Penthouse Int'l Magazine for Men, 754 F.2d 1072 (3rd Cir. 1985) (Reversing libel judgment for a plaintiff who had been mistakenly identified as a drug defendant, even though documents in the reporters' possession, which they had evidently misread, showed that another man with a completely different name was actually the defendant who had done so).

Pierce v. Capital Cities Communications, Inc., 576 F.2d 495, 507 (3rd Cir. 1978) (Finding no actual malice where defendant "could have reasonably believed" plaintiff was the brother-in-law of convicted fellow official; error was "an 'honest utterance, even if inaccurate,' and therefore constitutionally protected").

Miele v. William Morrow & Co., Inc., 670 F. Supp. 136 (E.D. Pa.) (Granting summary judgment to the defendants in a case of mistaken identity because "the authors of the offending publication genuinely believed" that plaintiff was the brother of a notorious man with the same last name who was in the same business as plaintiff – toxic waste disposal), aff'd mem., 829 F.2d 31 (3rd Cir. 1987).

Buendorf v. National Public Radio, Inc., 822 F. Supp. 6 (D.D.C. 1993) (No genuine issue as to actual malice where a journalist had previously known that two attempts had been made on President Ford's life, but forgot; a researcher produced the name of the man who saved Ford from the first attempted assassination, and the journalist broadcast it without checking further, erroneously naming that man as the one who had saved Ford's life and later been identified as a homosexual).

Vazquez Rivera v. El Dia, Inc., 641 F. Supp. 668 (D.P.R. 1986) (Granting summary judgment where defendants published a photograph of the plaintiff with a caption stating that the district attorney had filed charges against him, even though the accompanying article would have shown the defendants that the caption named the wrong person).

Jenkins v. Liberty Newspapers Ltd. Partnership, 971 P.2d 1089 (Haw. 1999) (Granting summary judgment on actual malice grounds where a newspaper mistakenly identified plaintiff, an attorney, as being the target of a State Insurance Commissioner's investigation; even though the reporter had the correct name in a document which he possessed, the court nevertheless held that plaintiff failed to

adduce evidence that the reporter or the newspaper entertained serious doubts as to the truth of the challenged statement).

Gonzales v. Hearst Corp., 930 S.W.2d 275 (Tex. App. 1996) (Dismissing libel action where defendant mistakenly identified plaintiff, a police officer, as being involved in a shooting death; even though the plaintiff contended that the source relied upon by the newspaper denied giving the reporter the erroneous name that appeared in the challenged article, the court held a reasonable jury could not find that the reporter "willfully published false information in his story").

Richie v. Paramount Pictures Corp., 544 N.W.2d 21 (Minn. 1996) (Holding that godparents of child who had prevailed in a lawsuit against the child's parents could not recover for publication of a picture of them with the child that was accompanied by a misidentification of them as the parents).

Glover v. Herald Co., 549 S.W.2d 858 (Mo. 1997) (Reversing trial court's judgment in favor of an alderwoman to whom statements made at a meeting were incorrectly attributed, even though copywriter had the correct facts available to him).

DD. SUBSIDIARY MEANING DOCTRINE

Herbert v. Lando, 781 F.2d 298, 312 (2nd Cir. 1986) (Holding that if defendants' "published view that [plaintiff] lied about reporting war crimes was not actionable, other statements – even those that might be found to have been published with actual malice – should not be actionable if they merely imply the same view, and are simply an outgrowth of and subsidiary to those claims upon which it has been held there can be no recovery").

Church of Scientology v. Time Warner, Inc., 932 F. Supp. 589, 594 (S.D.N.Y. 1996) ("[T]he subsidiary meaning doctrine does bear on the First Amendment issue of actual malice, because if a minor inaccuracy could be grounds for libel, where the ultimate conclusion which the inaccuracy supports could not be because it is published without actual malice, the protection afforded to freedom of speech by the requirement that a plaintiff prove actual malice would be undermined"), aff'd, 238 F.3d 168 (2nd Cir. 2001).

Nicholson v. Promoters On Listings, 159 F.R.D. 343, 355 (D. Mass. 1994) ("If there is no actual malice with regard to the bulk of the assertions and with regard to the general thrust of an article, inaccuracies with regard to subsidiary matters will not support recovery").

EE. UNINTENDED IMPLICATIONS OR INFERENCES THAT MAY DEFAME PLAINTIFF ARE NOT EVIDENCE OF ACTUAL MALICE

Newton v. National Broadcasting Co., 930 F.2d 662, 681 (9th Cir. 1990) ("Nor is it permissible to uphold the jury's verdict against [defendants] on the ground that, … or because the broadcast may be capable of supporting the impression [plaintiff] claims, [defendants] must therefore have intended to convey the defamatory impression at issue here").

Saenz v. Playboy Enterprises, Inc., 841 F.2d 1309, 1318 (7th Cir. 1988) ("[W]here the plaintiff is claiming defamation by innuendo, he also must show with clear and convincing evidence that the defendants intended or knew of the implications that the plaintiff is attempting to draw from the allegedly defamatory material").

Woods v. Evansville Press Co., Inc., 791 F.2d 480, 487-88 (7th Cir. 1986) ("A publisher … cannot be charged with the intolerable burden of guessing what inferences a jury might draw from an article and ruling out all possible false and defamatory innuendoes").

Corporate Training Unlimited, Inc. v National Broadcasting Co., Inc., 981 F. Supp. 112, 121 (E.D.N.Y. 1997) (Plaintiff presented no evidence that "NBC employees responsible for the Broadcast were *aware* of that implication [that plaintiff had received a dishonorable discharge] when the Broadcast was aired").

Battaglieri v. Mackinac Ctr. for Pub. Policy, 680 N.W.2d 915, 922 (Mich. Ct. App. 2004) (Applying actual malice standard to false light claim, and holding that to recover based on an allegedly harmful implication, "[I]t is necessary for plaintiffs to prove that defendant intended the offensive interpretation that they allege . . . plaintiffs have simply come forward with no such circumstantial evidence that [defendant] intended or knew that its publication would be interpreted by its readers in the manner plaintiffs argue").

FF. REPORTERS SHOULD NOT BE HELD TO THE PLATONIC IDEAL

Carr v. Forbes, 259 F.3d 273, 283 (4th Cir. 2001) ("[T]he First Amendment does not require perfection from the news media. … [T]he Constitution provides the press with a shield whereby it may be wrong when commenting on acts of a public figure, as long as it is not intentionally or recklessly so").

Newton v. National Broadcasting Co., Inc., 930 F.2d 662, 683 (9th Cir. 1990) ("Newspapers might never be published if they were required to guarantee the accuracy of every reported fact").

Tavoulareas v. Piro, 817 F.2d 762, 796 (D.C. Cir. 1987) (In determining actual malice, courts "do not sit 'as some kind of journalism review seminar offering our observations on contemporary journalism and journalists.' Neither do juries").

Woods v. Evansville Press Co., Inc., 791 F.2d 480, 489 (7th Cir. 1986) ("[Defendant's] journalism skills are not on trial in this case. The central issue is not whether the June 22 column measured up to the highest standards of reporting or even to a reasonable reporting standard, but whether the defendants published the column with actual malice").

Westmoreland v. CBS, Inc., 596 F. Supp. 1170, 1174 (S.D.N.Y. 1984) ("The press is not obliged to satisfy the Platonic ideal of investigation to qualify for summary judgment on the issue of [actual] malice").

Fletcher v. San Jose Mercury News, 216 Cal. App. 3d 172, 187 (1989) (Testimony by plaintiff's expert, a Stanford journalism professor, that the defendants "failed to follow certain accepted journalism practices" did not demonstrate actual malice; "The question we face is whether [the reporters] believed the articles were untrue, not whether their reporting practices passed [a journalism professor's] test").

Wanless v. Rothballer, 115 Ill.2d 158, 172 (1986) ("Journalists are not held by the constitution to higher expectations of accuracy than any other members of the community. While newspapers generally have far greater resources than the average person to investigate the facts, those greater abilities only raise the spectre of reckless disregard when their use has revealed either insufficient information to support the allegations in good faith or information which creates substantial doubt as to the truth of published allegations").

GG. PARAPHRASING OR ALTERING SPEAKER'S WORDS DOES NOT ESTABLISH ACTUAL MALICE

Masson v. New Yorker Magazine, Inc., 501 U.S. 496, 517 (1991) ("We reject the idea that any alteration [of the speaker's words] beyond correction of grammar or syntax by itself proves falsity in the sense relevant to determining actual malice. . . deliberate alteration of the words uttered by a plaintiff" is not evidence of actual malice "unless the alteration results in a material change in the meaning conveyed" by plaintiff's statement).

Freedom Newspapers of Texas v. Cantu, 168 S.W.3d 847, 854-55, 33 Media L. Rep. 1907 (Tex. 2005) (rejecting notion that "every alteration of a speaker's words was some evidence of actual malice" and holding that it would constitute some evidence of actual malice only where the reasonable reader

could understand the passage as the speaker's actual words, not a paraphrase, and the alteration was material; "a deliberate alteration of the words uttered by a plaintiff does not equate with knowledge of falsity for purposes" of *Sullivan*). (citations omitted)

Southwell v. Southern Poverty Law Center, 949 F. Supp. 1303, 1309-10 (W.D. Mich. 1996) ("While defendant's failure to accurately quote the subject of a news story when its employees had a tape recording of the exact words plaintiff used is troublesome, given that this was not a breaking news story, it also appears relatively harmless where the message being communicated has not been significantly altered").

Tilton v. Capital Cities/ABC Inc., 905 F. Supp. 1514, 1535 (N.D. Okl. 1995) ("An edited or altered quotation is not sufficient to establish actual malice 'unless the alteration results in a material change in the meaning conveyed in the statement"), (quoting Masson v. New Yorker Magazine, Inc. , 501 U.S. 496, 517 (1991)), aff'd, 95 F.3d 32 (10th Cir. 1996).

Chesapeake Pub. Corp. v. Williams, 661 A.2d 1169, 1177-8 (Md. 1995) (no actual malice shown where plaintiff was quoted in article as saying "I hurt her a little" in regard to child abuse charge, when he allegedly actually said "I hurt [my daughter's] feelings when I disciplined her", since "there was not clear and convincing evidence that the inaccuracy of the quote in question was deliberate and, furthermore . . . the meaning of his intended statement was not materially changed by [the] alteration …").