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JURISDICTIONAL STATEMENT

Plaintiff Steven J. Hatfill ("Hatfill") alleges that defendant, The New York Times Company ("The Times"), defamed and intentionally inflicted emotional distress on him in a series of columns written by Nicholas Kristof that were published in 2002. This Court has previously held that a jury could reasonably conclude that the columns "imputed to Hatfill the commission of a crime involving moral turpitude," *Hatfill v. The New York Times Co.*, 416 F. 3d 320, 334 (4th Cir. 2005) – namely, using anthrax to kill five people in the fall of 2001. Hatfill now appeals the decision of the U.S. District Court for the Eastern District of Virginia (Hilton, J.) granting summary judgment to The Times on all counts.

The district court's jurisdiction was based on diversity of citizenship, 28 U.S.C. § 1332. The district court entered its decision on January 30, 2007, and a timely notice of appeal was filed on February 2, 2007. The Times filed a cross-appeal on February 27, 2007, challenging orders issued by the district court on October 20, 2006, and October 31, 2006. This Court has jurisdiction under 28 U.S.C. § 1291.

ISSUES PRESENTED FOR REVIEW

1. Whether Hatfill is a "public official" even though he held no full-time government position at the time of the defamation and was neither actually nor apparently responsible for any government operations.

2. Whether Hatfill is a "limited purpose public figure" even though he did not thrust himself into the controversy concerning the anthrax murders.

3. Whether limited press attention rendered Hatfill an "involuntary public figure."

4. Whether a reasonable jury could find "actual malice" from Hatfill's evidence that Kristof fabricated false statements implying Hatfill was the anthrax killer, advanced inherently improbable allegations in support of that thesis, purposely avoided obtaining contrary information, and otherwise acted recklessly.

5. Whether the lower court properly granted summary judgment notwithstanding The Times' outright defiance of the court's prior order requiring The Times to disclose the identity of two sources that the court found Hatfill had a "compelling" need to depose.

6. Whether summary judgment was warranted on the intentional infliction of emotional distress claim.

STATEMENT OF THE CASE

This Court previously reversed the district court's order dismissing this case under Rule 12(b)(6). The Court held that, as alleged in Count I of Hatfill's complaint, Kristof's columns as a whole can be read as accusing Hatfill of being the anthrax murderer. *Hatfill*, 416 F.3d at 334. The Court also agreed with Hatfill that a number of individual statements from Kristof's columns set forth in Count II are independently capable of defamatory meaning. *Id.* at 335. The Court also reinstated Hatfill's Count III claim for intentional infliction of emotional distress. *Id.* at 337.

On remand, the parties disputed whether Hatfill could depose certain key sources – the *only* sources for some of Kristof's false claims that this Court previously determined were independently capable of defamatory meaning. The district court ordered the sources disclosed, finding that Hatfill was entitled to learn whether Kristof had fabricated or misrepresented information the sources supposedly provided, and this "compelling" need overcame the "reporter's privilege" claimed by The Times. Although The Times refused to disclose the sources, the district court granted The Times' motion for summary judgment without explaining how summary judgment was consistent with Hatfill's "compelling" need for discovery that he never received.

The court's summary judgment order concluded that Hatfill was a public official, a limited purpose public figure, and an involuntary public figure, and accordingly required Hatfill to show that The Times published the false allegations with "actual malice." The court dismissed Count I on the ground that Hatfill had failed to establish that Kristof's allegation that Hatfill likely was the anthrax murderer was made with knowledge or reckless disregard of its falsity. The court dismissed Count II on the theory that the individual false allegations were not actionable if the more general allegation was not and, alternatively, on the ground that some of the individual statements were not materially false. The court dismissed Count III on the ground that Hatfill could not show that The Times engaged in outrageous conduct that intentionally or recklessly caused severe distress.

STATEMENT OF FACTS

The defamatory columns underlying this case transformed Hatfill from a virtual unknown into an infamous criminal suspect. In the months following the 2001 anthrax attacks, The Times' columnist Nicholas Kristof came to believe the government's investigation was grossly deficient. Kristof's defamatory columns succeeded in "lighting a fire" under the FBI to investigate Hatfill and ruined his life.

Hatfill's Employment History: Hatfill attended college in Kansas and took time off to work with a Methodist doctor in Zaire. After graduation, Hatfill returned to Africa to attend medical school in Rhodesia, where he received his M.D. He then moved to South Africa, where he obtained his master's degrees and practiced medicine in a clinic.

In 1995, Hatfill returned to the United States and, in 1996, received a research fellowship from the National Institutes of Health ("NIH"). In the fall of 1997, Hatfill received a fellowship from the National Research Council ("NRC") – a private entity – to conduct virology research at the United States Army Medical Research Institute for Infectious Diseases ("USAMRIID") at Fort Detrick, Maryland. Hatfill's responsibilities at USAMRIID involved collecting and testing blood samples from primates infected with viruses. John Huggins Deposition (10/24/06) at 43-44.

USAMRIID's biocontainment facilities stored "wet spore" anthrax – not the dry, aerosolized kind used in the attacks – but Hatfill neither knew where it was stored nor had access to the secure facilities in which it was studied. *Id.* at 68; 71-72. USAMRIID research personnel were given access only to labs in which they worked – and for Hatfill that was only the virology lab. *Id.* at 217; *see also* John Ezzell Deposition (11/21/06) at 60, 63, 66.

In January 1999, Hatfill's NRC fellowship expired and he took a private-sector job with Science Applications International Corporation ("SAIC"). SAIC hired Hatfill because it needed additional instructors to lecture in hospitals across the country regarding preparedness for terrorist events (the "120 cities program"). One of Hatfill's SAIC supervisors, Dr. Peter Lowry, prepared the curriculum years before Hatfill joined the company. Peter Lowry Deposition (11/15/06) at 23.

Hatfill worked at the "lowest level" in SAIC. *Id.* at 20, 29, 32. He was one of over twenty doctors SAIC employed to teach in the 120 cities program and "look[] occasionally at revisions in the material." *Id.* at 32. Hatfill sometimes gave similar lectures to military audiences, including a one-time training program at Fort Bragg. *Id.* at 33-34. Although Hatfill's primary expertise at SAIC – as in his previous laboratory positions – was virology, Katrina Barlow Deposition (10/26/06) at 34, he sometimes filled in for other instructors and taught in general terms about biological weapons. *Id.* at 64.

SAIC terminated Hatfill in March 2002, ostensibly because his security clearance was suspended. Hatfill then served as a part-time lecturer and, in July 2002, a brief full-time employee for Louisiana State University, where he played a limited role in the "TOPOFF" program, a massive, federal program begun in 2000 to "test" the reactions of government agencies in the face of simulated terrorism events. Hatfill helped – together with many other members of the biodefense

community – to design a single simulated "scenario" involving release of the plague virus. Steven Hatfill Deposition (11/22/06) at 423. Hatfill had absolutely no role in the management of TOPOFF or in the administration or evaluation of any "tests" given.

Hatfill's Press Contacts from 1996-1999: Although Hatfill's work specifically concerned viruses, he had some general knowledge of other pathogens, Huggins Dep. at 50, and thus he was occasionally asked to make media appearances relating to bioterrorism. In this regard, however, the lower court's statement that Hatfill "offered his thoughts and expertise on nationally syndicated radio and television shows," 2007 U.S. Dist. LEXIS 7295, at *4, is potentially misleading. Hatfill made only three appearances on radio and television during his five years at USAMRIID and SAIC, all during 1998. He was on CBS Radio's Armstrong Williams Show discussing mass terror incidents as background for an author promoting a book on the Tokyo subway attack. Amended Responses to Agency Defendants' Interrogatories 13 and 14, *Hatfill v. Ashcroft*. He participated in a Radio America program on bioterrorism with another speaker. *Id.* And finally, he appeared fleetingly in a biohazard suit (although he did not speak) on a Canadian Broadcast television show at his USAMRIID supervisor's request. Steven Hatfill Declaration ¶ 2. Hatfill had no role in determining the show's subject matter and did not ask to appear. *Id.*

Hatfill was twice quoted in the print media during 1997 and 1998. In August 1997, Hatfill's acquaintance Fred Reed of *The Washington Times* approached Hatfill and "suggested [a] column" addressing the threat of bioterrorism. Reed to Kristof email (7/7/02). Hatfill agreed to be quoted in the column because Reed did not want to "source [him]self." *Id.* In January 1998, *Insight Magazine* interviewed Hatfill for a similar article regarding the risks of bioterrorism. A photo of Hatfill pretending to prepare a toxin (plague) in his kitchen, taken some time earlier, appeared in the article. In March 1998, the French-language magazine *Quebec Science* noted that Hatfill had allegedly "demonstrated" making plague in his kitchen, presumably as a result of the *Insight* photo. *Quebec Science* did not interview or quote Hatfill.

In September 1999, in conjunction with his hospital lectures for SAIC, Hatfill co-authored an article in the trade journal "Surgical Services Management," which – like the classes he taught – urged hospital health officials to increase bioterrorism preparedness. Also in 1999, author Richard Preston interviewed Hatfill regarding bioterrorism, but did not publish anything from that interview until 2002.

In sum, Hatfill's public appearances in connection with bioterrorism in 1997 and 1998 included two radio appearances and one non-speaking TV appearance, and quotations in two print media articles. He did not appear at all in the general

media from March 1998 until well after the anthrax killings more than three years later. Hatfill did not gain any renown as a result of his handful of media appearances. Indeed, Kristof's sources – including his primary source, Dr. Barbara Hatch Rosenberg – testified that they never heard of Hatfill until after the anthrax murders. *See* Barbara Hatch Rosenberg Deposition (7/25/06) at 27-28; Milton Leitenberg Deposition (10/10/06) at 69-76; Meryl Nass Deposition (10/9/06) at 72-73.

Rosenberg's Theory and the Resulting Press Investigation of Hatfill: A group of academics began questioning the efficacy of the FBI's investigation of the anthrax killings shortly after the attacks. Rosenberg was one such "expert," who contended that the attacks were perpetrated by a U.S. bioweapons insider, perhaps as part of a secret CIA project. *See* William Broad and Judith Miller, *A Nation Challenged*, N.Y. Times, Dec. 2, 2001; Lois Ember, *An Intellectual Provocateur*, Chemical Today, Apr. 2, 2002. She further asserted that the FBI had a prime suspect but refused to arrest this U.S. insider because he had worked on secret projects that the government did not want revealed. Scott Shane, *FBI scrutinizes biodefense labs in anthrax probe*, Baltimore Sun, Feb. 2, 2002.

As a result of Rosenberg's theory, reporters began to seek out Hatfill in an effort to question him about the anthrax attacks. The district court noted that Hatfill "spoke with a reporter for ABC News," without clarifying who contacted

whom or what they spoke about. 2007 U.S. Dist. LEXIS 7295, at *20. In fact, in January or February 2002, Vic Walter and Brian Ross of ABC News sought out Hatfill. They led him to believe they wished to employ him as a consultant, Steven Hatfill Deposition (5/5/06), *Hatfill v. Ashcroft*¸ at 87:22-88:13, but actually contacted Hatfill because "scientists" (Rosenberg) had told them Hatfill was "suspicious" and "responsible" for the attacks. Brian Ross Deposition (3/23/06), *Hatfill v. Ashcroft*, at 263:16-21. Walter and Ross tried to cultivate a relationship with Hatfill with the "goal" of getting him to agree to an interview in which they could "confront" him with their accusation. Ross Dep. at 272:15-273:4. Hatfill never sat for an interview.

Also in January or February 2002, Scott Shane, then a reporter for the Baltimore Sun, twice telephoned Hatfill, because he was interested in Hatfill as a "potential subject of the investigation." Scott Shane Deposition (11/1/06) at 75, 81. During Shane's second call to Hatfill, he accused Hatfill of committing the anthrax attacks. Plaintiff's Amended Response to Agency Defendants' Interrogatories 13 and 14.

Following The Times' publication of Kristof's May 24, 2002 column, William Broad, a science reporter for The Times, sent Hatfill two letters – dated May 28 and June 3 – requesting an interview. Broad offered to allow Hatfill to tell his side of the story. Hatfill phoned Broad, indicated that he would not give Broad

an interview, and requested that Broad stop contacting him. Hatfill Dep. at 120; Hatfill *Ashcroft* Dep. at 123:22-124:7.

The "Mr. Z" Columns and Their Results: After contacting Rosenberg about her insider theory, Rosenberg Dep. at 11, Kristof published his first column advancing that theory. On January 4, 2002, he wrote, "I think I know who sent out the anthrax last fall" and proceeded to describe "an American insider" who possessed the same characteristics Kristof later attributed to Hatfill. Kristof, *Profile of a Killer*, N.Y. Times, Jan. 4, 2002.

Despite numerous warnings from experts and colleagues about Rosenberg's expertise and credibility, *see* Broad and Miller, *A Nation Challenged*; Leitenberg Dep. at 193:1-194:13; Ebright to Kristof email (1/4/02); Broad to Kristof email (5/23/02); Miller to Kristof email (7/3/02), Kristof focused on Hatfill as his "suspect" and "likely culprit." From May 24 to August 13, 2002, Kristof wrote five columns about a suspect named "Mr. Z," ultimately confessing that "Mr. Z" was Hatfill. *See* Kristof, *Connecting Deadly Dots*, N.Y. Times, May 24, 2002; Kristof, *Anthrax? The F.B.I. Yawns*, N.Y. Times, July 2, 2002; Kristof, *The Anthrax Files*, N.Y. Times, July 12, 2002; Kristof, *Case of the Missing Anthrax*, N.Y. Times, July 19, 2002; Kristof, *The Anthrax Files*, N.Y. Times, Aug. 13, 2002.

Hatfill alleged in Count I that the "Mr. Z" columns, taken as a whole, falsely implicate him as having perpetrated the anthrax killings. That implication arises

from a variety of false statements implying that Hatfill had the ability, access, and motive to make and send anthrax. For example, Kristof falsely claimed that Hatfill had access to an "isolated residence" that was a "CIA safehouse" and gave Cipro – an antibiotic used to treat anthrax – to people who visited it, thereby implying that Hatfill had in fact used the location to make anthrax. Kristof falsely wrote that Hatfill had failed three successive polygraph examinations since January, suggesting that Hatfill had repeatedly lied to the FBI about the murders. Kristof falsely maintained that Hatfill had traveled under an "alias" and claimed that "specially trained" bloodhounds had "responded strongly" to Hatfill eleven months after the murders, notwithstanding that another journalist had already debunked the "miracle bloodhound" story. And so on: Kristof alleged that Hatfill was one of a "handful" of people who had the ability to make and send anthrax; that he "unquestionably had the ability to make first-rate anthrax;" that his anthrax vaccinations were up to date – all false. Hatfill alleges in Count II that a number of these false statements are independently capable of defamatory meaning.

Despite the gravity of Kristof's accusations, he did not contact Hatfill prior to publication – yet other reporters seemed to have no trouble finding Hatfill. Nor did Kristof contact the owner of the supposed "isolated residence," although the owner of the home, George Borsari, described himself as "the easiest person in the world to track down." George Borsari Deposition (10/23/06) at 96:14-16. Kristof

has provided no source for his claim that Hatfill failed three polygraphs, has conceded outright fabrication of the "CIA safehouse" allegation, and made no attempt to investigate the improbable "miracle bloodhound" story. In short, the evidence gathered during discovery firmly establishes that Kristof fabricated some of the allegations published by The Times, had very strong reasons to believe that others were false, and deliberately misled his readers.

Notwithstanding Kristof's dubious methods, the columns achieved their intended result. The FBI ramped up its investigation of Hatfill to the point where he was shadowed 24 hours a day and his apartment was repeatedly searched under intense media scrutiny. Attorney General Ashcroft appeared on two network news shows to publicly identify Hatfill as a "person of interest" in the anthrax investigation. On August 11, 2002, Hatfill went before the press to deny rampant speculation about his guilt fueled by Kristof's columns.

SUMMARY OF ARGUMENT

I. Hatfill is not a "public official," a "limited purpose public figure," or an "involuntary public figure." The category of "public officials" is limited to those "government employees who have, or appear to the public to have, substantial responsibility for or control over the conduct of governmental affairs," *Rosenblatt v. Baer*, 383 U.S. 75, 85 (1966), for defamation relating to their "official conduct," *New York Times v. Sullivan*, 376 U.S. 254, 280 (1964). But at the time Kristof

wrote his first defamatory article, Hatfill had not been a full-time government employee for more than four years and neither had nor appeared to have substantial responsibility for government operations. Moreover, The Times' defamation of Hatfill had nothing to do with Hatfill's (then-non-existent) "official duties."

Nor is Hatfill a "limited purpose public figure" for purposes of the defamation at issue. Determining whether an individual is a limited-purpose public figure is a two-part inquiry: "First, was there a *particular* 'public controversy' that gave rise to the alleged defamation? Second, was the nature and extent of the plaintiff's participation in that *particular* controversy sufficient to justify 'public figure' status?" *Foretich v. Capital Cities/ABC, Inc.*, 37 F.3d 1541, 1553 (4th Cir. 1994) (emphasis added). The district court failed to address Hatfill's primary argument that any debate regarding "the nation's preparedness for biological attack" – in which Hatfill played a minor role from 1996 to 1998 – was simply not the "particular" public controversy that gave rise to the defamation here. Rather, Kristof wrote about the anthrax murders and the government's inept investigation of them. The district court's focus on the earlier, far more general controversy simply reads the word "particular" out of *Foretich*.

Once the proper controversy is identified, it is clear that Hatfill had *no* voluntary involvement with it. Indeed, the *only contact* the district court mentioned between Hatfill and the anthrax investigation is that he spoke with a

reporter for ABC News about it. The Times selectively reported that fact to the district court. As the publicly available documents The Times relied on demonstrate, however, ABC News *called Hatfill* because they wanted to "confront" him with their belief that he was the anthrax killer. But efforts by reporters to bait someone they suspect of a crime into an interview to confront him with an accusation do not represent the suspect "voluntarily assuming a role of special prominence" in the public controversy concerning the crime.

Neither the Supreme Court nor this Court has *ever* held a plaintiff in a defamation action to be a so-called "involuntary public figure," but the district court found Hatfill to be so in a single cursory paragraph. Hatfill, however, had no reason to believe that his limited press contacts in the 1990s would open him to accusations of murder years later.

II. If the court concludes that Hatfill is neither a public official nor a public figure, then Hatfill need show only that The Times negligently defamed him. The Times did not (nor could it) contend that a jury could not reasonably conclude that Kristof was negligent, so rejecting The Times' arguments that Hatfill is a public official or a public figure would plainly require reversal.

But reversal is warranted even if this Court concludes that Hatfill is a public official or a public figure. Such a plaintiff may recover for defamation only by showing "actual malice," which does not require a showing of "ill will" but rather

that a defamatory statement was made (1) with knowledge that it was false, or (2) with reckless disregard for its falsity.

The evidence strongly suggests that Kristof acted at least recklessly. The district court, however, committed reversible error by failing even to consider most of the relevant evidence bearing on whether Kristof published with "actual malice." Moreover, as discussed below, that evidence shows that Kristof fabricated allegations, advanced improbable theories, and deliberately avoided learning the truth.

III. The district court erred by granting summary judgment in the face of The Times' defiance of the court's order to disclose its sources. The court found that Hatfill's need to depose those sources was compelling enough to overcome any "reporter's privilege" but then granted summary judgment without *any* explanation of the inconsistency with its earlier ruling.

IV. The district court erred in granting summary judgment on Hatfill's claim for intentional infliction of emotional distress. Hatfill has produced ample evidence that would allow a jury to find that The Times was reckless in publishing fabricated assertions implicating Hatfill in the anthrax murders.

STANDARD OF REVIEW

This Court reviews de novo the district court's grant of summary judgment, construing "all factual inferences…in favor of the plaintiff," *Fitzgerald v.*

Penthouse, Int'l, Ltd., 691 F.2d 666, 670 (4th Cir. 1982), and considering the appropriate evidentiary burden "as part of the summary judgment calculus," *Wells v. Liddy*, 186 F.3d 505, 520 (4th Cir. 1999).

ARGUMENT

I. HATFILL IS NOT A PUBLIC OFFICIAL.

Analyzing whether a defamation plaintiff is a "public official" requires addressing whether he was "responsible" or "apparently responsible" for government operations, and whether the defamation related to his "official conduct." The lower court failed both to articulate and to apply that standard.

A. The Lower Court Misconstrued the Public Official Standard.

In *New York Times v. Sullivan*, the Supreme Court adopted a "rule that prohibits a *public official* from recovering damages for a defamatory falsehood *relating to his official conduct* unless he proves that the statement was made with 'actual malice.'" 376 U.S. at 279-80 (emphasis added). The Court explained that "the censorial power is in the people over the Government, and not in the Government over the people." *Id.* at 282 (citation omitted). The Court declined, however, to address "how far down into the lower ranks of government employees the 'public official' designation would extend" or to "determine the boundaries of the 'official conduct' concept." *Id.* at 284 n.23.

In *Rosenblatt*, the Supreme Court addressed the reach of the *New York Times* rule "by reference to the *New York Times* concern over seditious libel." *Jenoff v. The Hearst Corp*., 644 F.2d 1004, 1006 (4th Cir. 1981). Specifically, *Rosenblatt* held that because "[c]riticism of government is at the very center of the constitutionally protected area of free discussion," "[c]riticism of those responsible for government operations must be free, lest criticism of government itself be penalized." 383 U.S. at 85. Accordingly, the *Rosenblatt* Court found that "the 'public official' designation applies at the very least to those among the hierarchy of government employees who have, or appear to the public to have, substantial responsibility for or control over the conduct of governmental affairs." *Id.* But the Court also emphasized that the government position must be one "which would invite public scrutiny and discussion of the person holding it, entirely apart from the scrutiny and discussion occasioned by the particular charges in controversy." *Id.* at 86 n.13.

In short, the basic principle underlying the "public official" concept is that a democratic people must be free to criticize its government without fear of reprisal in the guise of defamation actions. That is why the "actual malice" rule extends only to "those responsible [or apparently responsible] for government operations," *id.* at 85, for "defamatory falsehood[s] relating to [their] official conduct," *New York Times*, 376 U.S. at 280. Accordingly, the "public official" analysis in this

case must address 1) whether Hatfill was responsible or apparently responsible for government operations, and 2) whether The Times' defamatory falsehoods related to Hatfill's "official conduct," if any. Significantly, however, while the lower court cited the cases discussed above, its opinion contains little analysis of the first question and none of the second.

Instead, the court below adopted nearly verbatim The Times' argument that Hatfill is a public official under *Baumback v. American Broadcasting Co.*, No. 97-2316, 1998 U.S. App. LEXIS 18770, at *13-14 (4th Cir. Aug. 13, 1998). But *Baumback* involved a paradigmatic example of a *government official* invoking the courts via a defamation action to retaliate for *criticism directed to the performance of his official duties.* Baumback was the U.S. Forest Service official in charge of timber sales in California's Eldorado National Forest. *Id.* at *2. Under his direction, the Forest Service entered into contracts to sell tracts of Eldorado timber. A public controversy arose when environmental groups claimed that those contracts were illegal under new environmental standards. *Id.* at *3-4. Baumback and his Forest Service colleagues reneged on the contracts, "creating a tremendous amount of legal exposure for the United States." *Id*. at *2. ABC News criticized Baumback as "the bureaucrat who got away with" a $25 million error. *Id.* at *6. Baumback sued ABC for defamation.

Baumback was obviously a "public official." He was *the* government official in charge of the timber sales at the heart of a heated public controversy. ABC News criticized his handling of his official duties, and he sued in retaliation. This Court simply rejected Baumback's claim that he was not sufficiently high-ranking to qualify as a "public official." *Baumback* is nothing more than an unremarkable application of the principles underlying *New York Times*, *Rosenblatt*, and *Jenoff*. As further set forth below, however, the present case is no such thing.

B. Hatfill Had *No* Actual or Apparent Responsibility for *Any* Government Operations at the Time of the Defamation.

At the time Kristof wrote his first defamatory article, Hatfill had not been a full-time government employee for more than four years. He was a government employee from 1996 until the fall of 1997, when he worked for NIH as a laboratory researcher. But it cannot seriously be maintained that Hatfill's work culturing cells and tissue gave him responsibility or apparent responsibility for government operations under *Rosenblatt.* Nor can it seriously be maintained that while on a private NRC research fellowship at USAMRIID, Hatfill's work in the virology laboratory collecting and testing blood samples from primates gave him substantial responsibility, actual or apparent, for the conduct of government affairs.

In January 1999, Hatfill's NRC fellowship ended and he took a job with SAIC. SAIC is an enormous private enterprise with more than 44,000 employees in 150 cities around the world. Hatfill worked at the "lowest level" within that

company. Lowry Dep. at 20, 29, 32. He was hired to teach hospital training courses addressing preparedness for terrorist events in cities across the country, which he did with a large number ("up into the 20s") of other instructors. *Id.* at 42-43. Those training courses had been designed and written by one of Hatfill's superiors years before he joined SAIC. Hatfill did have some input into updating the materials, *id.* at 32, and occasionally taught similar courses to military and government audiences, Barlow Dep. at 64.

Plainly, Hatfill's work as an instructor for a private company cannot render him a "public official" under the precedents of this Court and the Supreme Court. Hatfill, like his score or more of colleagues, was all but anonymous in the performance of his duties with SAIC, with absolutely *no* responsibility or apparent responsibility for "government operations," and subject to absolutely *no* public scrutiny or discussion. *Rosenblatt*, 383 U.S. at 85, 86 n.13.

After leaving SAIC in 2002, Hatfill served as a part-time contract lecturer for Louisiana State University, where in July 2002 – *after* Kristof began publishing these columns – Hatfill began a short-lived full-time position. There Hatfill continued to train personnel on responding to potential terrorist threats. In addition, he played a limited role in the "TOPOFF" program, helping to design a single simulated "scenario" involving release of plague. Hatfill Dep. at 423. But he had no responsibility for the TOPOFF program and had no role in administering

or evaluating any "tests" that were ultimately given. In short, while at LSU, Hatfill neither had nor appeared to have "substantial responsibility" for government operations, and was subject to absolutely *no* public scrutiny or discussion. *Rosenblatt*, 383 U.S. at 85, 86 n.13.

The district court was accordingly able to hold Hatfill to be a public official only by departing from *Rosenblatt* and *Jenoff* and applying *dicta* from *Baumback*, 1998 U.S. App. LEXIS 18770, at *8, focusing solely on whether Hatfill "made [] recommendations, participated in [] policy determinations, and exercised [] discretion."

First, the district court found that "Plaintiff regularly made recommendations to highly-ranked government officials." 2007 U.S. Dist. LEXIS 7295, at *14. Because the court cited no record evidence of such recommendations, it is hard to know what it meant. The closest thing to "recommendations" that Hatfill appears to have made to "government officials" were the SAIC training classes that he gave to audiences that may have included government officials. But, again, it is hard to imagine that being one of more than a score of educators teaching about preparedness for terror events is what *Rosenblatt* meant by "substantial responsibility" for governmental affairs.

The district court also concluded that Hatfill participated in government "decisionmaking." 2007 U.S. Dist. LEXIS 7295, at *15. Again, the district court

did not give examples of such "decisionmaking," so we are left to guess at what it meant. In fact, however, there is simply no evidence in the record that Hatfill participated in *any* government decisions.

Similarly, the district court without citation stated that Hatfill "exercised discretion in developing training programs and protocols." *Id.* at *14. But while Hatfill certainly had some input into the classes that he and others taught at SAIC, his discretion was very limited. Hatfill, for example, needed a "go ahead" from his superior to ask a colleague to draft a report, *see* Lowry Dep. at 43-46, or develop a marketing proposal, *see* Hatfill to Coullahan email (12/28/01). Again, Hatfill operated at the "lowest level in SAIC," subordinate to heads and deputies of divisions, which formed groups, which in turn operated within sectors at SAIC. Lowry Dep. at 20, 29-34.

In sum, the district court's finding that Hatfill was a "public official" appeared to rely primarily on Hatfill's *private* employment. And although this Court has suggested in dicta that a "consultant employed by a government entity *could* be classified as a public official," *Arctic Co. v. Loudoun Times Mirror*, 624 F.2d 518, 522 (4th Cir. 1980) (emphasis added), it has *never* found a private citizen to be a "public official."

C. The Times' Defamatory Statements Had *Nothing* to Do With Hatfill's Handling of Any "Official Duties."

Even if this Court accepts the district court's misguided view that Hatfill satisfies the first step in the two-part public official analysis, the "actual malice" standard is inapplicable because Kristof's defamatory columns were in no way "relat[ed] to [Hatfill's alleged] official conduct." *New York Times*, 376 U.S. at 279. Again, the actual malice rule applies only to prevent "a public official from recovering damages for a defamatory falsehood *relating to his official conduct*." *Id.* at 279-80 (emphasis added). "This rule was prompted by a concern that" requiring a critic to "guarantee the truth of all his factual assertions" "with respect to the criticism of public officials *in their conduct of governmental affairs*" would deter protected speech. *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 14 (1990) (emphasis added) (citation omitted). The court below reads this "official conduct" requirement out of the Supreme Court's rule. The columns at issue falsely accuse Hatfill of committing murder *years after he left his brief stint of full-time government service*. In holding that Hatfill was a public official, the court below did not even attempt to explain any connection between the defamatory statements and any allegedly official conduct by Hatfill. For this reason as well, the court erred in burdening Hatfill with the "actual malice" standard.

II. HATFILL IS NOT A LIMITED PURPOSE PUBLIC FIGURE.

A. The Lower Court Failed to Identify Properly the Particular Public Controversy Giving Rise to the Defamation.

The Supreme Court has held that individuals who are neither public officials nor public figures for all purposes may nonetheless become "limited purpose public figures" if they "thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved." *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 345 (1974). This Court has specified that determining whether an individual is a limited-purpose public figure is a two-part inquiry: "First, was there a *particular* 'public controversy' that gave rise to the alleged defamation? Second, was the nature and extent of the plaintiff's participation in that *particular* controversy sufficient to justify 'public figure' status?" *Foretich v. Capital Cities/ABC, Inc.*, 37 F.3d 1541, 1553 (4th Cir. 1994) (emphasis added). The defendant carries the burden of proof on these questions. *Id.*

The district court failed to identify the "particular" public controversy giving rise to The Times' defamation of Hatfill. The court found that "Plaintiff voluntarily assumed a role of special prominence in the public debate over the nation's preparedness for a biological attack" because of his "lectures, writings, participation on panels, and interviews, as well as his own resume." 2007 U.S. Dist. LEXIS 7295, at *19. As discussed above, however, this impressive-sounding

litany in reality comprises only the lectures and classes that Hatfill taught on preparedness while he was at the private company SAIC – which were not public at all – the job-related article on the same topic that he published in a trade journal in 1998, and the two radio and one non-speaking TV appearances that Hatfill made in 1997 and 1998. Hatfill's teaching role and extremely limited press contacts do not constitute "thrust[ing] [himself] to the forefront" of whatever debate existed on preparedness for bioterrorism at that time. *See Gertz*, 418 U.S. at 345.

More importantly, however, *the district court never even addressed Hatfill's primary argument, namely that any public controversy regarding "the nation's preparedness for biological attack" in which Hatfill may have participated from 1996 to 1998 is simply not the "particular" public controversy that gave rise to the defamatory comments at issue here.* Rather, in the fall of 2001 – three years after Hatfill's last prior press appearance – someone committed five murders employing anthrax as the murder weapon. A very public controversy ensued regarding who committed the crime and whether law enforcement authorities were doing enough to apprehend the criminals. *That* controversy regarding the anthrax murders and the government's inept investigation of them is what Kristof wrote about in 2002. The district court's focus on the earlier, far more general controversy simply reads the word "particular" out of *Foretich*.

This Court has previously acknowledged that media defendants in defamation cases naturally wish to "inflate" any "public controversy" they can find "into its most general and amorphous form" in an attempt to render the plaintiff a "public figure" with respect to everything under the sun. *See, e.g.*, *Carr v. Forbes, Inc.*, 259 F.3d 273, 279 (4th Cir. 2001). But as the D.C. Circuit's decision in *Waldbaum v. Fairchild Publications, Inc.*, 627 F.2d 1287 (D.C. Cir. 1980) – extensively cited by this Court in *Foretich* – demonstrates, a plaintiff may well be a limited public figure in connection with one "public controversy" but *not* in connection with a related controversy or "subcontroversy." *Id.* at 1296-97. Accordingly, "the court must isolate the public controversy," *id.* at 1296, that particularly gave rise to the defamation, *see Foretich*, 37 F.3d at 1553.

Conflating the controversy about which Kristof wrote with whatever debate existed in the 1990s regarding preparedness for bioterrorism leads to absurd results. For example, there is undoubtedly a public controversy today regarding gun control, with some experts urging that the government has not done enough to curb gun crimes and others arguing that it has done too much. But if Hatfill were an expert taking part in this debate – publicly lobbying, for example, against extending handgun bans to rifles – he could not with impunity be falsely accused of shooting shoppers in parking lots with a rifle. Such crimes would undoubtedly generate a public controversy about who committed them – but that would be a

different public controversy from the gun control debate. The same is true with the general debate about preparedness for bioterrorism and the specific controversy arising from the anthrax murders.

Similarly, if Hatfill were an expert on nuclear weapons – arguing, for example, that battlefield nuclear weapons should be part of the United States' arsenal – he could not with impunity be falsely accused of exploding a dirty bomb in the metro. If he were an expert on teenage sexual behavior – arguing, say, for more sexual education in our schools – he could not with impunity be falsely accused of molesting a neighbor's child. If he were a medical expert urging the legalization of marijuana for cancer victims, he could not with impunity be falsely accused of smuggling pot across the border. And if Hatfill, in fact, were genuinely an expert on bioterrorism, he could not with impunity be falsely accused of using anthrax to commit murder. In each example, there are *two* controversies, not one – a general public policy debate is simply not the same as a particular public controversy regarding a specific crime.

B. The Lower Court Failed to Analyze Properly the "Nature and Extent" of Hatfill's Participation in the Particular Public Controversy Giving Rise to the Defamation.

Because the district court failed to isolate the public controversy giving rise to the defamation – the controversy regarding the anthrax murder investigation – the court did not even attempt to analyze whether "plaintiff's participation in that

particular controversy [was] sufficient to justify 'public figure' status." *Foretich*, 37 F.3d at 1553. Plainly, it was not.

This Court has "set forth five requirements that the defamation defendant must prove before a court can properly hold that the plaintiff is a public figure for the limited purpose of comment on a particular public controversy:

> (1) the plaintiff had access to channels of effective communication;
> (2) the plaintiff voluntarily assumed a role of special prominence in the public controversy;
> (3) the plaintiff sought to influence the resolution or outcome of the controversy;
> (4) the controversy existed prior to the publication of the defamatory statement; and
> (5) the plaintiff retained public-figure status at the time of the alleged defamation." *Id.*

This Court has held that the "heart" of this test "is the second and third factors," *Carr*, 259 F.3d at 280, which "reflect a normative consideration that public figures are less deserving of protection than private persons because public figures, like public officials, have voluntarily exposed themselves to increased risk of injury from defamatory falsehood concerning them." *Reuber v. Food Chemical News, Inc.*, 925 F.2d 703, 709 (4th Cir. 1991) (internal citations omitted).

Here, Hatfill did not "voluntarily assume[]" *any* role in the public debate over the anthrax investigation. Indeed, the *only contact* the district court even mentioned between Hatfill and the investigation is that he "spoke with a reporter for ABC News on the subject of the anthrax mailings after the mailings occurred

but before the Times published any of Mr. Kristof's columns." 2007 U.S. Dist. LEXIS 7295, at *20. That Hatfill "*spoke with* a reporter" is literally true, but the district court was wrong both to infer and to imply from this that Hatfill "voluntarily" inserted himself into the coverage of the anthrax investigation. On the contrary, Hatfill specifically denied that he reached out to any reporters or gave any interviews, and he testified that when reporters phoned him he would do his best to hang up politely. Hatfill Dep. at 94-96. The actual facts of the ABC encounter cited by the district court demonstrate precisely why it is so important for district courts to draw all inferences in favor of, rather than against, the non-moving party.

ABC News reporter Brian Ross and his producer Vic Walter *called Hatfill* in January or February 2002 because, in Ross's words, "we, based on what [some] scientists had told us…believed he was responsible" for the anthrax murders. Ross Dep. at 263. Ross stated that "Vic called [Hatfill]" and was "trying to set up a sit-down meeting" that would be "on camera." *Id.* at 265. He explained that "it was our goal to sort of confront [Hatfill] with [our belief that he was the murderer] once we actually had an interview." *Id.* at 273. Of course, ABC News could not very well tell Hatfill that they wanted to ambush him with an accusation, so they lured Hatfill into a meeting by suggesting that they wanted to "use [him] as a consultant." Hatfill *Ashcroft* Dep. at 88, 121. But, at that meeting, when "Walter

expressed an interest in interviewing him," Hatfill "declined" because he "really had no interest in talking to reporters" about the anthrax murders. *Id.* at 87, 92. Walter later initiated a third and final contact with Hatfill and again indicated that he "wanted a meeting," but Hatfill "never intended to go." *Id.* at 94-95. There were no further contacts between Hatfill and ABC News and ABC never publicized anything relating to its repeated attempts to draw Hatfill into a confrontation regarding the crimes.

It should go without saying that efforts by reporters to bait someone they suspect of a crime into an interview so as to confront him with an accusation do not represent the suspect "voluntarily assuming a role of special prominence" in the public debate concerning the crime. Such an interaction is not "voluntary" on the part of the interview target; it is not "prominent;" it is not even "public." The Supreme Court's decision in *Wolston v. Reader's Digest Ass'n, Inc.*, 443 U.S. 157 (1979), is illustrative in this regard. Wolston pleaded guilty to criminal contempt for failing to testify in connection with the government's investigation of Soviet espionage. A book later accused him of being a Soviet spy. The Court rejected the argument that Wolston's contempt conviction made him a public figure: "It would be more accurate to say that [Wolston] was dragged unwillingly into the controversy. The Government *pursued him* in its investigation." *Id.* at 166 (emphasis added); *see also Foretich*, 37 F.3d at 1557 (discussing *Wolston*). The

same is true of Hatfill here – ABC News *pursued him* in its investigation of the anthrax murders.

In short, there was nothing "voluntary" or "prominent" about the *only contact* upon which the district court relied to suggest that Hatfill had *any* connection to the anthrax investigation before the publication of The Times' columns accusing him of the murders. And neither The Times' argument below nor the district court's opinion even attempts to rely upon Hatfill's efforts to *respond* to The Times' published accusation to manufacture "public figure" status. *See, e.g.*, *Jenoff*, 644 F.2d at 1007 (citation omitted) ("[T]hose charged with defamation cannot, by their own conduct, create their own defense by making the claimant a public figure.").[1]

C. This Court's Precedents on Limited Purpose Public Figures Do Not Support the District Court's Analysis.

None of the cases cited by the district court supports the conclusion that Hatfill is a public figure. Indeed, none of those cases remotely addresses the central issue presented by the district court's holding: whether an expert's involvement in a debate concerning government policy in connection with a danger to society – from particular weapons, behaviors, drugs, or whatever – renders the

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[1] Because The Times cannot demonstrate the two requirements at the "heart" of this Court's five-factor inquiry into the nature of Hatfill's contacts with the anthrax investigation, *see Carr*, 259 F.3d at 280, there is no need to address the other factors.

expert a "public figure" in connection with public controversies relating to *particular* crimes involving the danger on which he is expert. A closer look at the cases confirms their irrelevance.

The most recent case, *Carr v. Forbes, Inc.*, involved Forbes's allegation that Carr – a civil engineer – "smelled money" in public-private financing and that his company used fraudulent feasibility studies to sell projects doomed to fail. This Court found "a public controversy over the soundness of privately financed public projects" discussed in the Forbes article. 259 F.3d at 279. And Carr played a "dominant role" in those projects – "he attended public meetings . . . wrote editorials for the local press, and was quoted in the local media," thus "voluntarily inject[ing] himself into…the public imbroglio surrounding these projects." *Id.* at 281. In *Carr*, there was thus an extremely close "fit" between the public controversy, the plaintiff's extensive role in it, and the defamation. Here, in contrast, The Times' accusation that Hatfill is the anthrax murderer has nothing to do with Hatfill's limited participation – in the 1990s – in a policy debate concerning the nation's preparedness for bio-terrorism.

Reuber stands in similar contrast to this case. Reuber was an expert on the carcinogenic effects of pesticides and he participated extensively in a public controversy regarding the safety of malathion. In particular, he published a paper appearing (falsely) to represent a change in the National Cancer Institute's official

position on malathion. Reuber's boss issued a letter of reprimand for that conduct, which the defendant eventually published. Reuber claimed that the letter was defamatory. This Court held that "the First Amendment is a two-way street…. Reuber may use his research to challenge the credibility of scientists employed by the government; but when other scientists respond by challenging his credibility and the media reports these challenges, Reuber has little right to cry foul." *Reuber*, 925 F.2d at 711.

Under *Reuber*, there is no question that The Times could properly have challenged Hatfill's credentials in connection with his limited participation in the public debate involving national preparedness for bioterrorism. But that is not what happened here. Rather, years later, The Times accused Hatfill of murdering five innocent people. The equivalent in *Reuber* would have been for the defendant to have falsely accused Reuber of poisoning five people with malathion. This Court's holding in *Reuber* does not suggest that the plaintiff would have been a public figure for *that* purpose, and of course he should not be.

Fitzgerald is likewise inapposite here. Fitzgerald was a self-proclaimed expert on the use of dolphins for military purposes. This Court found that there was a "public controversy concerning the use of trained dolphins by the military" and that Fitzgerald made repeated public appearances advocating such use. *Fitzgerald*, 691 F.2d at 668-69. The court found that he "sought pecuniary gain

through the military and non-military use of dolphin technology and sought to influence the outcome of the controversy through his brochures and public statements." *Id.* at 669. Penthouse suggested (falsely, according to Fitzgerald) that Fitzgerald's efforts at pecuniary gain extended to urging foreign governments to employ his military dolphin technology. This Court unsurprisingly found that plaintiff was a "public figure with respect to the topic of publication," the "military application of dolphin technology." *Id.*

Like *Reuber*, *Fitzgerald* is not analogous to this case, but an analogous variant may readily be constructed. Suppose Fitzgerald had participated in a public debate regarding the military use of dolphins from 1973 to 1974. Suppose that in 1977 a naval ship had mysteriously sunk off the coast of the Carolinas. And suppose that the government had determined that the sinking was effectuated by a dolphin but had failed to apprehend those responsible, resulting in public outcry over the failed investigation. If a 1978 article in *Penthouse* had falsely accused Fitzgerald of sinking the boat even though he had *not* voluntarily assumed *any* role in the controversy surrounding the sinking, *that* would be like this case. In that hypothetical, Fitzgerald might well belong on a short list of suspects – as a result of his dolphin expertise – but in a defamation action his expertise would be relevant only to a potential defense of truth. Analytically speaking, the fact that Fitzgerald had participated in a public debate regarding the military use of dolphins

should no more make him a public figure in connection with every dolphin crime than a handgun expert's expertise should make him a public figure in connection with every handgun crime. The same is true of Hatfill here.

III. HATFILL IS NOT AN INVOLUNTARY PUBLIC FIGURE.

Although neither the Supreme Court nor this Court has *ever* held a plaintiff in a defamation action to be a so-called "involuntary public figure," the district court found Hatfill to be one, stating that he "should have foreseen that by providing interviews, delivering lectures, and publishing articles on the subject of the bioterrorism threat, a public interest *in him* would arise." 2007 U.S. Dist. LEXIS 7295, at *21 (emphasis added). However, the general public had no interest in Hatfill as a result of his extremely limited press appearances in 1997 and 1998. Prior to the anthrax killings, even Rosenberg had never heard of Hatfill, and certainly the general public never had.

Moreover, as discussed above, Hatfill's limited press contacts in no way related to the public controversy regarding the FBI's handling of its investigation or the identity of the anthrax murders. Hatfill's actions simply did not constitute "circumstances in which a reasonable person would understand that publicity would likely inhere" that could implicate him in murder. *Wells*, 186 F.3d at 540. Indeed, if Hatfill's actions make him an involuntary public figure, there would be almost no circumstance in which a private person could speak with the media

without being subject to false criminal accusations. Such a result would stand in direct conflict with the warnings of both this Court and the Supreme Court that "the instances of truly involuntary public figures must be exceedingly rare." *Id.* at 538 (quoting *Gertz*, 418 U.S. at 345).

IV. THE EVIDENCE CLEARLY SHOWS "ACTUAL MALICE."

If the court concludes that Hatfill is neither a public official nor a public figure, then Hatfill need show only that The Times negligently defamed him. The Times did not contend that a reasonable jury could not find that Kristof was negligent, so rejecting The Times' arguments that Hatfill is a public official or a public figure would plainly require reversal.

But reversal is warranted even if this Court concludes that Hatfill is a public official or a public figure. Such a plaintiff may recover for defamation by showing "actual malice," which requires no showing of "ill will" but rather "that a defamatory statement was made (1) with knowledge that it was false, or (2) with reckless disregard of its falsity." 2007 U.S. Dist. LEXIS 7295, at *22 (quoting *Reuber*, 925 F.2d at 714). "Actual malice must be established by clear and convincing evidence," as the district court stated. *Id*. at 23 (quoting *Carr*, 259 F.3d at 283). However, "[w]hile a defamation plaintiff must meet a clear and convincing standard of proof of actual malice, during summary judgment proceedings initiated by the defendant the court must draw all possible inferences

in the plaintiff's favor." *Wells*, 186 F.3d at 543. Whether the evidence "is sufficient to support a finding of actual malice is a question of law." *Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S 657, 685 (1989).

The evidence of "actual malice" here is overwhelming, far more than is necessary to reach a jury. "Reckless disregard," the Supreme Court has stated, "cannot be fully encompassed in one infallible definition," but would be shown "where a story is fabricated" or if "the publisher's allegations are so inherently improbable that only a reckless man would have put them in circulation." *St. Amant v. Thompson*, 390 U.S. 727, 730, 732 (1968). In addition, "[a]lthough failure to investigate will not alone support a finding of actual malice,…the purposeful avoidance of the truth is in a different category" – and failure to contact persons likely to have relevant information can be "evidence of an intent to avoid the truth." *Harte-Hanks*, 491 U.S. at 692, 693.

A. The Evidence Clearly Shows That Kristof Knew or Should Have Known That His Allegations Were False.

The evidence developed through discovery shows that ten of the allegations listed in Count II of the complaint were false, as were a number of Kristof's other allegations supporting the overall accusation of Count I that Hatfill was the anthrax killer. Many of those false allegations by themselves show *intentional* falsity. But viewing the false statements either separately or together, it is at least clear that a jury could reasonably find that Kristof acted with "reckless disregard" for the truth.

The claim that Hatfill dispensed Cipro at a "safe house": One of Kristof's most damaging allegations was that Hatfill had access to an "isolated residence" and "gave Cipro to people who visited it." July 2 Column. Kristof suggested that the "isolated residence" might be a "safe house[] operated by American intelligence." *Id.* This accusation is extremely harmful because it identifies a specific location where Hatfill might have made the anthrax that was used to kill people. The allegation concerning Cipro – an antibiotic used to treat anthrax exposure – was particularly damning, because it strongly suggested that Hatfill in fact had used the "isolated residence" to make or send the anthrax and needed to ensure that exposure to anthrax did not harm visitors. A reader of the column commented: "it is amazing what you found out – the building, the Cipro….it really is incredible. it's almost too perfect." Reader to Kristof email (7/8/02).

But this claim is *entirely untrue*, and Kristof *admitted* that a significant part of it was fabricated. The "isolated residence" was, in fact, a house owned by Borsari, who testified that "there's no way in the world Steve Hatfill could have made anthrax at my house." Borsari Dep. at 97:9-11. Hatfill visited the house only once in 2001, *after* the attacks had occurred, when he spent a weekend with a number of other guests, and he did not distribute Cipro to anyone there. Tamara McDevitt Deposition (11/20/06) at 63:1-68:10. Hatfill did not know the code for

the security system, and even needed directions to drive there. Borsari Dep. at 22-23.

There is simply no basis for the bizarre allegation that Borsari's house was a CIA "safe house." When deposed, Kristof first testified that he thought he "had heard that idea from somebody and thought it was from Barbara." Nicholas Kristof Deposition (6/13/06) at 199:10-12. Rosenberg testified, however, that she had heard it from Kristof. Rosenberg Dep. at 138-42, 348; *see also* Rosenberg to Kristof email (8/4/02). Kristof ultimately conceded that the allegation was "guesswork" based on a "tantalizing possibility," Kristof Dep. at 198-208, and thus that he simply fabricated the allegation. A jury could reasonably take Kristof's concession into account in evaluating his other claims – especially since, as shown below, many of Kristof's sources have denied that they provided the information Kristof claims they provided, and Kristof has concealed the identity of other purported sources.

The basis for Kristof's allegation that Hatfill distributed Cipro to guests at his "isolated residence" was a third-hand report from Rosenberg, but when the alleged source of the report was deposed, she called it "a lie." McDevitt Dep. at 64. Kristof published it without contacting Borsari (the owner of the house) or Hatfill about the allegation. Many other reporters contacted Borsari, who

described himself as "the easiest person in the world to track down." Borsari Dep. at 96:14-16.

In *Harte-Hanks*, the Court concluded that a defendant had acted recklessly where he failed to interview a person who might have contradicted a story the defendant was anxious to publish. The likely reason for the failure to contact the person, the Court determined, was that the defendant "was committed to running the story," but a denial from the person who was not interviewed "would quickly put an end to the story." *Harte-Hanks*, 491 U.S. at 682. In this case, a jury could reasonably conclude that Kristof failed to contact Hatfill, Borsari, or *anyone else* who was present for this gathering because Kristof wanted to advance the allegation that Hatfill dispensed Cipro at an isolated safe house and he did not want to face denials from people who were there. Indeed, those denials likely would have precluded Kristof from making the allegation, given its shaky foundation in hearsay and guesswork.

The district court failed to address the allegation that Hatfill distributed Cipro at an isolated safe house in the malice portion of its decision. Presumably, the court neglected to do so because the court separately concluded that the allegation was not "materially false." That conclusion, however, is seriously flawed. The court acknowledged the evidence that Hatfill had never visited the house without the owner and did not give Cipro to anyone at the residence, but

found the allegation to be essentially correct because Hatfill had visited the house and had dispensed Cipro elsewhere. 2007 U.S. Dist. LEXIS 7295, at *30. The district court simply failed to grasp that the "sting" of this allegation comes from the dispensing Cipro *at* an isolated residence. That *combination* strongly supports the conclusion that Hatfill had anthrax there, yet the lower court simply ignored it.

By itself, the false allegation that Hatfill dispensed Cipro to visitors at an "isolated residence" alleged to be a "safe house," based in part on a third-hand story from a source known to be prone to fabrication, at the least shows recklessness. But there is much more.

The allegation that Hatfill failed three polygraph examinations: In his August 13 column, Kristof wrote that Hatfill had "failed three successive polygraph examinations since January." August 13 Column. That is a damaging allegation because it implies that Hatfill repeatedly lied to the FBI about his involvement with the anthrax murders. The allegation is false. Hatfill took one FBI polygraph examination and was told by the examiner that he passed. *See* Hatfill Press Statement (8/11/02).

As matters stand, there is no basis whatsoever for Kristof's false allegation. Kristof claims that two FBI agents – known as "confidential sources #2 and #3" – provided this information. Kristof Dep. at 272:5-273:5. But after the district court ordered Kristof to identify the FBI agents so that Hatfill could depose them, he

refused to do so. In light of other instances where Kristof's alleged sources contradicted Kristof's account – including Rosenberg's testimony that she did *not* suggest to Kristof that Hatfill used a "safe house" (see above) and the testimony of numerous alleged sources that they had *not* told Kristof that Hatfill could make "first-rate anthrax" (see below) – Hatfill moved for sanctions designed to require The Times to follow the court's order. But while the magistrate recognized that Hatfill will suffer "some prejudice…as he will not be afforded an opportunity to…determine if Mr. Kristof accurately reported information the sources provided," he ordered only that The Times "not be allowed to refer to, rely on, or enter into evidence t[he] existence of Confidential Source #2 or #3." Order Granting Plaintiff's Motion for Supplemental Enforcement of Discovery Orders, at 3 (Nov. 20, 2006). As a result, the magistrate stated, "[d]efendant is left with little to no explanation for some of the allegedly defamatory statements which Defendant published." *Id.*

Under the magistrate's order, The Times has *no* source for the allegation that Hatfill failed three polygraph examinations. In that circumstance, it would be reasonable for a jury to conclude that, as with the "safe house" allegation, Kristof

simply fabricated the allegation as tantalizing "guesswork."[2] Plainly, fabricating the story that Hatfill failed three polygraph examinations shows actual malice.

As with the allegation concerning Cipro, the district court did not consider the polygraph allegation at all in its malice discussion. Again, it mistakenly concluded that the allegation was not materially false, primarily on the ground that Hatfill took one polygraph test with multiple sequences and the FBI apparently remained interested in him after the test. 2007 U.S. Dist. LEXIS 7295, at *30-31. But being obliged to take "three successive polygraph examinations" *would* show that the FBI was not satisfied with Hatfill's answers, while one test with several sub-parts does not. In any event, the FBI's continued interest in Hatfill seems to have arisen largely from Kristof's continued attacks on the Bureau for failing to investigate Hatfill more thoroughly.

The district court also stated, without further analysis, that "[i]t is also undisputed that Plaintiff retained his own polygrapher in 2002." 2007 U.S. Dist. LEXIS 7295, at *31. But Kristof's allegation begins with a reference to the FBI and was undoubtedly understood as an allegation that Hatfill had failed polygraphs

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[2] Indeed, it is far from certain that the FBI agents would confirm Kristof's story. One FBI agent has testified that Kristof made statements that were "just ridiculous," and told his FBI colleagues that "one of the best things that can happen to you is to have this type of person [*i.e.*, Kristof] criticize you." Robert Roth Deposition (11/4/05), *Hatfill v. Ashcroft*, at 210:16-211:1.

administered by the FBI. In short, the allegation was not essentially correct, but was materially false: Hatfill took one FBI polygraph examination, not three, and he passed. It was reckless for Kristof to allege otherwise.

The Hatfield "alias": In the July 2 column, Kristof said that he had "found at least one alias" used by Hatfill. July 2 Column. This is a damaging allegation (because an honest citizen does not need "at least one alias"), and Kristof made it worse by conjoining it with a completely false allegation about suspicious travel to Central Asia. *Id*. In the same column, Kristof speculated that delay by the FBI might permit the anthrax perpetrator to flee to Iran or North Korea. *Id.*

But the "alias" was "Steven Hatfield." Kristof to Niman email (7/12/02). Kristof's failure to ask himself whether that was simply a misspelling represents willful blindness. Indeed, when Kristof's research assistant expressed concern that "Steven Hatfield" was the only "alias" she found, Kristof responded that it was "enough to raise the issue" that Hatfill could use the alias to "flee the country and go to Iran and Libya" (more baseless guesswork). Lem to Kristof email (6/27/02). The fact that Kristof did not identify this supposed alias in this or later columns suggests that he willfully misled his readers. Kristof would not have advanced his thesis that Hatfill likely was the anthrax murderer by stating that he had found that Hatfill allegedly used "Steven Hatfield" as an alias. To the contrary, Kristof would have opened himself to derision by exposing the foolish basis for his allegation.

By failing to specify the "alias" he found, Kristof intentionally made Hatfill appear nefarious while concealing the obvious fallacy of the allegation.

The district court again failed to analyze this evidence of malice at all. It may be that the district court thought it unnecessary to do so because the allegation was not listed in Count II, and The Times had argued that Hatfill could not rely on allegations not listed there. But that makes no sense. The best possible evidence of malice – an affidavit from Kristof admitting that he *knew* his columns falsely accused Hatfill – would *also* not be listed in Count II, because Count II is there only to specify false statements that would provide an *independent basis for liability.* The point of the alias evidence, and many other facts not listed in Count II, is different. The point is to demonstrate that Kristof was recklessly indifferent to the truth, rather than simply mistaken.

The miracle bloodhounds: The district court also failed to consider whether Kristof's use of an inherently improbable allegation concerning bloodhound identification evidenced recklessness. Kristof wrote that "[s]pecially trained bloodhounds were given scent packets preserved from the anthrax letters" – *i.e.*, from the *eleven-month-old* anthrax letters that were widely reported to have no DNA on them to begin with and that were irradiated to kill the anthrax before the bloodhounds could get their "scent" – and that the dogs "responded strongly" not just to Hatfill, but "to his apartment, to his girlfriend's apartment and even to his

former girlfriend's apartment, as well as to restaurants that he had recently entered." August 13 Column. Common sense refutes the idea that a bloodhound – specially trained or otherwise – could months later track scent from irradiated envelopes with no trace of DNA. Indeed, Shane had debunked the "bloodhound evidence" in a report published five days before Kristof included it in his column. *See* Scott Shane, *Security clearance with faulty resume*, Baltimore Sun, Aug. 8, 2002. Part of the bloodhound rumor was that the dogs had alerted at a Denny's restaurant that Hatfill had visited in Louisiana. Although that story seems implausible on its face, Shane called each of the twelve Denny's restaurants in Louisiana and determined that no bloodhounds had even visited. Kristof did not investigate, but instead chose to publish a story "so inherently improbable that only a reckless man would have put [it] in circulation." *St. Amant*, 390 U.S. at 732. That is clear evidence upon which a jury could find actual malice.

Again, the district court simply failed to address the argument that a jury could reasonably conclude that Kristof's reliance on the implausible bloodhound "evidence" showed actual malice. As with the "alias," the court did not explain this failure, but it seems likely that the court again mistakenly accepted The Times' flawed argument that the court should ignore evidence of malice not listed in Count II.

Other evidence of malice: Kristof also alleged that Hatfill was one of a "handful" of people who had the ability to make and send anthrax. More specifically, Kristof claimed that Hatfill "unquestionably had the ability to make first-rate anthrax," May 24 Column, and had "access to Fort Detrick labs where anthrax spores were kept," August 13 Column. Kristof also alleged that Hatfill's vaccinations were up to date – which would be prudent if he were to have made and sent the anthrax. Each of these allegations is false. The basis for most of them is that Hatfill, along with many others, once worked at Fort Detrick where wet anthrax was kept in a biocontainment storage facility. But Hatfill did not know that and had no access to the laboratories in which anthrax-related work was conducted. Hatfill Decl. ¶ 3; Hatfill Dep. at 540-541; Huggins Dep. at 68, 71-72. In addition, while Hatfill had a "working knowledge"[3] of anthrax and a number of other biological weapons, he had never converted wet anthrax to the dry form used to commit the murders. Hatfill Decl. ¶ 3.

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[3] The district court cited the fact that Hatfill claimed to have "working knowledge of wet and dry biological weapon agents" as grounds for concluding it was substantially true that Hatfill could make first-rate anthrax. 2007 U.S. Dist. LEXIS 7295, at *29. The court, however, ignored the evidence – from Kristof's sources, Hatfill's co-workers, and scientific literature – showing that "working knowledge" does not equate to actual ability. Leitenberg Dep. at 128-30; 89; Hatfill Dep. at 409; Gary Boyd Deposition (10/23/06) at 102; Lowry Dep. at 128-30.

Anyone who "unquestionably had the ability to make first-rate anthrax" and had up-to-date vaccinations *would* be among a "handful" of people capable of carrying out the attacks. But it appears, once again, that Kristof fabricated the claim. Kristof identified Barbara Rosenberg, Meryl Nass, and Milton Leitenberg as sources for the claim that Hatfill unquestionably had the ability to make first-rate anthrax. Kristof Dep. at 122:4-21, 129:13-23. None of the three had worked with Hatfill. More importantly, *each denied telling Kristof that Hatfill had the ability to make dry anthrax.* Rosenberg Dep. at 44:6-45:22; Leitenberg Dep. at 109:17-111:5; Nass Dep. at 72:6-16.

Moreover, the district court brushed past Hatfill's denial that he had the ability to make dry anthrax, holding without legal citation that "Plaintiff's own assertions of what he knows or does not know cannot create a triable issue on a motion for summary judgment." 2007 U.S. Dist. LEXIS 7295, at *29. In this, the court was simply wrong. It is for the jury to decide the credibility of Hatfill's denials, combined with the denials of Kristof's alleged sources, in determining whether there is clear evidence that Kristof acted recklessly. Indeed, "[c]ourts routinely and properly deny summary judgment on the basis of a party's sworn testimony even though it is self-serving." *Price v. Time, Inc.*, 416 F.3d 1327, 1345 (11th Cir. 2005) ("To hold that testimony under oath by an interested party cannot

be substantial evidence of a fact in that party's favor would undermine much of the law on summary judgment.").

Kristof also claimed that Rosenberg and Nass told him that Hatfill had up-to-date vaccinations, but each denied that she had. Kristof Dep. at 269:6-270:3; Rosenberg Dep. at 124:22-125:9; Nass Dep. at 71:15-72:5. In fact, Hatfill had taken only four of six shots needed for an effective vaccination in 1999, and even a full dose would not have been considered up to date or likely to be effective two years later, in 2001. *See* Hatfill's Vaccination Records.

The district court did not consider the denials by Kristof's alleged sources as bearing on malice. Again, the court instead found the allegations to be materially true. For example, the court said that the fact that Hatfill allegedly had (unknowing) access to wet – as opposed to dry – anthrax "would likely not change the mind of the ordinary reader." 2007 U.S. Dist. LEXIS 7295, at *29. Putting aside the fact that Hatfill never accessed anthrax, the court's view erroneously assumes that Kristof had the right to mislead the ordinary reader. Kristof knew the difference between wet and dry anthrax. Kristof Dep. at 140-41. With that knowledge, it would have been maliciously misleading if Kristof thought that Hatfill had access to *wet* anthrax but could *not* make dry anthrax, but he nevertheless wrote that Hatfill had access to "anthrax." In that case, Kristof might have fooled the ordinary reader with a literally true statement, but it would have

been intentionally misleading to do so and therefore highly relevant to the malice inquiry. As that shows, it is critical whether Hatfill unquestionably had the ability to make "first-rate" (dry) anthrax, as Kristof wrote. He did not, and Kristof's sources deny saying that he did.

Kristof also wrote in the May 24 column that Hatfill had a motive to commit the anthrax murders because he was "upset at the United States government." May 24 Column. But Hatfill was not mad at the government generally, he was mad at one government employee whom he viewed as responsible for pulling his security clearance. *See, e.g.*, Hatfill Dep. at 100:3-7. Kristof did not specify why Hatfill was mad at the government in his columns, but clarifying that he was involved in a dispute about his security clearance would have alerted readers that Kristof was stretching matters – just as he stretched the Hatfield "alias."

Moreover, Hatfill's alleged anger at the government occurred in 2001, two years after he left Fort Detrick. Therefore, he did not have access to anthrax, knowingly or unknowingly, wet or dry, at that point. Kristof again blurred matters so that this critical mismatch between Hatfill's alleged ability to injure people and his alleged anger at the government was not apparent to his readers.

Kristof made a number of other attacks on Hatfill that bear on malice. For example, in the July 2 column he alleged that Hatfill is a racist and suggested that Hatfill was partly responsible for an anthrax outbreak that sickened approximately

10,000 black farmers in Zimbabwe in 1978-80. After the column was published, Leitenberg told Kristof that Hatfill had no connection to that outbreak, which was not bioterrorism but had natural causes. Milton Leitenberg Memorandum Re: Further Gratuitous Inaccuracies in the David Tell/Weekly Standard Story, *"The Hunting of Steven J. Hatfill"* (Leitenberg Dep. Ex. 6); Leitenberg Dep. at 81:1-103:7, 106:17-107:2. But Kristof did not correct his error, even though he has conceded that "I didn't have any specific information that Dr. Hatfill had been involved in that anthrax outbreak." Kristof Dep. at 280-81, 317. In other words, once again Kristof relied on guesswork.[4] As with the other false allegations not listed in Count II, the district court did not consider whether this false allegation showed actual malice.

In short, the district court failed to consider the relevant evidence bearing on whether Kristof published with knowledge that his allegations were false or with reckless disregard of their falsity. The relevant evidence – both the false statements listed in Count II *and* other evidence bearing on malice – shows that

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[4] Kristof made his allegation of racism without seeking the opinion of anyone who knew or worked with Hatfill. Lowry, Hatfill's boss at SAIC, contacted Kristof to contradict that allegation the day after its publication, *see* Lowry to Kristof email (7/3/02), but Kristof made no effort to correct it or investigate further, *see* Kristof Dep. at 331–33. In fact, Kristof continued to publish in subsequent columns the accusation that Hatfill was a racist based only on his African military service. *See* July 19 Column; August 13 Column.

Kristof fabricated evidence, advanced improbable theories, avoided the truth, and generally shaded matters to implicate Hatfill. For those reasons, a jury could reasonably conclude that The Times published with actual malice.[5]

B. The District Court Erred in Applying the Malice Standard.

As discussed above, the district court's most basic error in the portion of its opinion concerning actual malice is that the court simply failed to address most of the evidence showing that Kristof fabricated some of his allegations, advanced improbable theories, avoided the truth, and otherwise acted recklessly. To repeat: None of the evidence analyzed above was addressed by the district court in its discussion of malice. The district court addressed some of the evidence in other portions of its opinion, incorrectly holding that Kristof's allegations were substantially true. But, as shown above, the allegations were *not* substantially true in any relevant sense. While *parts* of Kristof's allegations were true – such as that Hatfill went to Borsari's house and that he dispensed Cipro to work colleagues – such half-truths do not add up to the "substantial truth" of the whole. The lower court thus erred in failing even to consider this evidence of malice in determining

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[5] In addition, for the reasons stated with respect to the malice inquiry, the district court erred in holding that various allegations in Count II were not materially false. There also is no basis for the district court's invocation of the "subsidiary meaning" doctrine as an alternative basis for granting summary judgment on Count II. This court has not adopted the subsidiary meaning doctrine and should not do so.

whether a reasonable jury could find actual malice. Other evidence – including the evidence relating to the Hatfield "alias" and the miracle bloodhounds – was not discussed by the district court, whether in determining actual malice or anywhere else. Again, that was legal error. Although the district court failed to explain its reasoning, it seems clear that the district court erroneously thought that it could disregard any evidence of malice not listed in Count II.

The district court responded to only *one* argument advanced by Hatfill as showing actual malice, rejecting "Plaintiff's attempt to paint Dr. Rosenberg as a conspiracy theorist with absolutely no credibility." 2007 U.S. Dist. LEXIS 7295, at *24-25. In so doing, the court overlooked important evidence. Kristof relied very heavily on Rosenberg's speculations. Yet, one of his colleagues, Broad, had warned Kristof in a May 23, 2002 email – before Kristof wrote the second of the six columns – that if the damaging allegation that Hatfill might have made the anthrax at an isolated "safe house" came "from Barbara i would be very suspicious." Broad to Kristof email, 5/23/02. Another colleague, Judith Miller, told Kristof before he published the last three columns that Rosenberg was "vindictive" and "prone to fabrication." Miller to Kristof email, 7/3/02. And one of Kristof's alleged sources, Leitenberg, warned Kristof not "to believe everything Barbara says." Leitenberg Dep. at 145-47; *see also id.* at 193:1-194:13 (concluding that Rosenberg had "some rather flaky hypotheses"). Despite this

evidence, the court concluded that "Plaintiff has shown…*no reason* that Mr. Kristof should have doubted the veracity of Dr. Rosenberg as an informant." 2007 U.S. Dist. LEXIS 7295, at *25 (emphasis added). In truth, however, Hatfill did provide a "reason" – several in fact. The district court simply refused to accept them. But it is for a jury to decide whether Kristof acted recklessly by failing to heed these warnings.

This Court's decision in *Fitzgerald* is instructive. In that case, the defendant relied heavily on the theories of one informant, despite warnings that the informant was a "fraud" and prone to fabrication. *Fitzgerald*, 691 F.2d at 671. Moreover, the plaintiff in that case "showed that the pertinent statements made by [the informant] were not researched any further than a simple cross checking among [the informant], the author, and the research editor." *Id.* Based on that evidence, this Court reversed the district court's entry of summary judgment, concluding that "[t]he plaintiff has presented a factual question as to the reliability of [the informant] and the defendants' 'obvious reason to doubt' the veracity of their informant." *Id.* at 672. This Court should do the same here.

In addition, the district court apparently thought that The Times was entitled to summary judgment unless the evidence clearly showed that Kristof published

his allegations despite a *subjective* belief that Hatfill was innocent.[6] It is peculiar, however, for The Times to have defended its false accusation that Hatfill is a mass murderer on the ground that the author did not *know* whether it was true. One would expect journalists to refrain from implicating a person in a mass murder without a sincere belief in the accusation. In any event, a defamation plaintiff is not required to show that the accuser subjectively knew that he was making a false allegation – as discussed above, the standard is "reckless disregard."

V. THE DISTRICT COURT ERRED BY GRANTING SUMMARY JUDGMENT DESPITE THE TIMES' REFUSAL TO DISCLOSE ITS SOURCES.

As mentioned briefly above, the district court granted Hatfill's motion to compel The Times' disclosure of "confidential sources #2 and #3." That order necessarily found that Hatfill's need to prove his "case in chief is compelling enough to overcome the First Amendment's reporter's privilege against disclosure

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[6] It is clear that Kristof knew that he was effectively accusing Hatfill. One of his editors, Philip Taubman, told him in a May 23, 2002, email that "you're still pointing pretty directly at the guy." Taubman to Kristof email (5/23/02); *see also* Lem Dep. at 228 (Kristof's assistant, Christina Lem, testified that Kristof "was worried" about the effect the columns would have on Hatfill). Kristof's readers also understood that he was accusing Hatfill of being the anthrax murderer. One said in an email to Kristof, "I know this is the infamous Dr. Steven J. Hatfill. . . . I want to nail this guy." Molholt to Kristof email (7/12/02). Indeed, Kristof's references to Hatfill as "Mr. Z" – while ineffective in hiding Hatfill's identity (*see* Kristof Dep. at 105-06) – show that Kristof understood that he was accusing Hatfill.

of confidential sources." *Phillip Morris Co. v. American Broad. Co.*, 36 Va. Cir. 1, 21 (1995). And the court below expressly held that "[i]n order for Plaintiff to meet its burden in the defamation case and offer evidence as to the reporter's state of mind, Plaintiff *needs an opportunity to question the confidential sources and determine if Mr. Kristof accurately reported information the sources provided*." Order to Compel at 6 (Oct. 20, 2006) (emphasis added). But after The Times defied the order to disclose the confidential sources, the district court – with no mention of that order – inexplicably proceeded to enter summary judgment against Hatfill even though he had not been given the opportunity to obtain the confidential information that the court previously held was "central to this dispute." Order Granting Plaintiff's Motion to Compel the Identity of Defendant's Confidential Sources, at 7 (Oct. 20, 2006). That was legal error separate from those discussed above.

The district court based its grant of summary judgment in large part on Hatfill's supposed failure to provide precisely the type of evidence that these confidential sources could have offered. For instance, the district court stated that "Plaintiff also challenges the statement that he failed three polygraph examinations, *but he has not come forth with evidence sufficient to show that the published statement is materially false.*" 2007 U.S. Dist. LEXIS 7295, at *30 (emphasis added). Even assuming the district court is correct in that assertion, it

plainly would show actual malice if the confidential sources said that they did *not* tell Kristof that Hatfill failed *any* polygraph examinations, let alone three. But Hatfill has not been able to ask them.

Hatfill *did* obtain evidence of what FBI agents told the Washington-based reporter who normally covered federal law enforcement for *The Times* and that evidence called Kristof's whole theory into question. When asked to find out what the FBI was thinking about Hatfill, reporter David Johnston reported back to Kristof that Hatfill was *not* regarded as a suspect, and that he was one of a number of people "who have emerged in the case from time to time who appear to be likely subjects, but who turn out, upon a closer look to fade from view." Johnston to Broad email (5/24/02). With unfortunate prescience, Johnston continued, "Frequently, these people are the subject of intense gossip on the grape vines of the science community, where there is a lot of speculation, but often a lack of hard fact." *Id*. Clearly, if Kristof's FBI sources told him anything like the information contemporaneously received from Johnston's FBI sources, The Times would have every incentive to conceal those sources in light of the conflicting allegations published in Kristof's columns. Just as clearly, it would be patently unfair to uphold summary judgment for the party who refused to comply with court-ordered disclosure.

Kristof has suggested that the FBI agents were sources for some of his other defamatory allegations as well. As noted above, however, Kristof's other sources have denied providing the information imputed to them and there is every reason to believe that "confidential sources #2 and #3" might make similar denials. That is why the district court determined that Hatfill's interest in this information was sufficiently compelling to overcome The Times' qualified privilege. In short, it defied logic for the district court to grant summary judgment even though The Times had refused to obey the order to identify the confidential sources.

VI. HATFILL PROVIDED AMPLE EVIDENCE TO SUPPORT HIS CLAIM FOR INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS.

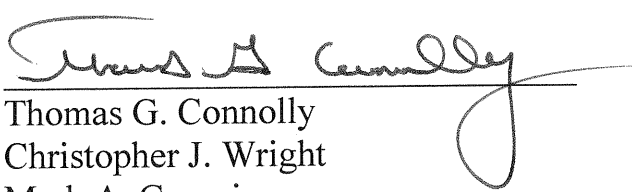
Finally, the district court erroneously granted summary judgment with regard to Hatfill's claim for intentional infliction of emotional distress. To survive summary judgment, Hatfill must proffer evidence that The Times recklessly engaged in conduct that was outrageous or intolerable, thus causing severe emotional distress. *See Womack v. Eldridge*, 210 S.E.2d 145, 148 (Va. 1974). The court below granted summary judgment for two reasons. First, the court held that "[t]he record is void of any evidence" that The Times acted recklessly. 2007 U.S. Dist. LEXIS 7295, at *33. As discussed above, however, Hatfill has produced ample evidence that would allow a jury to find that The Times was reckless in publishing fabricated assertions implicating Hatfill in the anthrax murders.

Second, the district court held that "Plaintiff cannot prove that Defendant's conduct was sufficiently outrageous." *Id.* This Court, however, has already concluded that, if true, Hatfill's allegations that The Times intentionally published false charges accusing him of being responsible for the anthrax murders "without regard for the truth of those charges and without giving Hatfill an opportunity to respond" "is extreme or outrageous under Virginia law." *Hatfill*, 416 F.3d at 336. As detailed above, Hatfill has offered considerable evidence upon which a jury could conclude that Hatfill's allegations are indeed true.

CONCLUSION

This Court should reverse the district court's grant of summary judgment.

Respectfully submitted,

By: 

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April 10, 2007

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 07-1124 **Caption:** Steven J. Hatfill v. The New York Times Company

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