IN THE SUPERIOR COURT
FOR THE
COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS

WILLIE TAN,

Plaintiff,

v.

YOUNIS ART STUDIO, INC., d/b/a MARIANAS VARIETY,

Defendant/Third-Party Plaintiff,

v.

STANLEY T. TORRES,

Third-Party Defendant.

BENIGNO R. FITIAL,

Plaintiff,

v.

YOUNIS ART STUDIO, INC., d/b/a MARIANAS VARIETY,

Defendant/Third-Party Plaintiff,

v.

STANLEY T. TORRES,

Third-Party Defendant.

CONSOLIDATED CIVIL ACTIONS
NOS. 01-0624 and 03-0116

ORDER DENYING THIRD-PARTY DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AS TO CONSOLIDATED CASES AND GRANTING IN PART/DENYING IN PART THIRD PARTY DEFENDANT'S MOTION TO STRIKE

I. INTRODUCTION / PROCEDURAL HISTORY

These two civil actions were filed separately by Willie Tan ("Tan") and Benigno R. Fitial ("Fitial") against the same defendant, the Marianas Variety, for the tort of defamation. The Complaints both concern a letter, written by Third-Party Defendant Stanley T. Torres ("Torres") to then Speaker of the House and gubernatorial candidate Fitial, that was subsequently published via a "paid political advertisement" in the Marianas Variety newspaper. *See* COMPLAINT (Civ. Action No. 01-0624A) at 2; COMPLAINT (Civ. Action No. 03-0116B) at 2. Defendant Marianas Variety filed its Third-Party Complaint in each of these actions against Torres for indemnification and contribution only.[1]

This matter came before the court for a hearing on December 22, 2003, at 9:00 a.m., to consider Third-Party Defendant Torres' MOTION FOR SUMMARY JUDGMENT AS TO CONSOLIDATED CASES (hereinafter "MOT. SUMM. J.") and MOTION TO STRIKE PLEADINGS AND EXHIBITS IN PLAINTIFFS' OPPOSITION (hereinafter "MOT. TO STRIKE"). Defendant Marianas Variety joined in Torres' MOT. SUMM. J. on the grounds that the publications complained of are protected by absolute privilege or, alternatively, conditional (a.k.a. "qualified") privilege.

At the hearing, Plaintiffs Tan and Fitial were represented by Mr. Steven Pixley, Esq. Defendant Younis Art Studio d/b/a Marianas Variety was represented by Mr. G. Anthony Long, Esq., and Third-Party Defendant Torres was represented by Mr. Robert T. Torres, Esq. This Court, having considered the arguments of counsel and having reviewed the materials submitted,

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[1] This Court takes judicial notice of the fact that Plaintiff Willie Tan previously filed a direct suit against Stanley T. Torres for a claim of defamation based on the same letter involved in these two cases. ***See, Willie Tan v. Stanley T. Torres***, Civil Action No. 01-0579(D). The parties subsequently stipulated to the dismissal of the suit with prejudice. *Id.*

now renders its decision, denying the MOT. SUMM. J., and granting in part/denying in part the MOT. TO STRIKE, for the reasons that follow.

II. ISSUES

1. Whether the Federal Speech and Debate Clause, U.S. CONST. ART. I, §6, extends absolute immunity to a member of the legislature, or to any party who is not a member of the legislative sphere, for republishing, outside the legislature, any statements initially made in the legislature.

2. Whether the Commonwealth Speech and Debate Clause, N.M.I. Const. art. II, § 12, extends absolute immunity to a member of the legislature, or to any party who is not a member of the legislative sphere, for republishing, outside the legislature, any statements initially made in the legislature.

3. Whether the republication in the Marianas Variety of Representative Torres' letter to Speaker Fitial is entitled to the defense of qualified privilege as provided for in the Restatement of Torts.[2]

III. ANALYSIS

A. Legal Standard for Summary Judgment

Torres and Marianas Variety have moved jointly for summary judgment, pursuant to Commonwealth Rule of Civil Procedure 56(b). Summary judgment is appropriate where the materials submitted to the Court demonstrate "that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Com. R. Civ. P. 56(c); *see, e.g., In re Estate of Roberto*, 2002 MP 23 ¶14. "In deciding a summary judgment motion, a court will construe the evidence and inferences drawn therefrom in favor of the non-moving party." *Santos v. Santos*, 4 NMI 206, 209 (1994) (*citing Rios v. Marianas Pub. Land Corp.*, 3 NMI 512, 518 (1993)).

[2] Torres' Mot. Summ. J. cites to various case law on the subject of qualified privilege. However, 7 CMC § 3401 provides:

> In all proceedings, the rules of the common law, *as expressed in the restatements* of the law approved by the American Law Institute and, to the extent not so expressed as generally understood and applied in the United States, shall be the rules of decision in the courts of the Commonwealth, in the absence of written law or local customary law to the contrary.

(Emphasis added.)

> A moving party bears the "initial and the ultimate" burden of establishing its entitlement to summary judgment. *Lopez v. Corporacion Azucarera de Puerto Rico*, 938 F.2d 1510, 1516 (1st Cir. 1991). If a moving party is the plaintiff, he or she must prove that the undisputed facts establish every element of the presented claim. *Id*. **If a movant is the defendant, he or she has the correlative duty of showing that the undisputed facts establish every element of an asserted affirmative defense**. *Id*. Upon satisfying this burden, the non-moving party must establish that there exists a genuine issue of material fact. *Bais v. Advantage Int'l, Inc*., 905 F.2d 1558, 1561 (D.C. Cir. 1990).

Id. at 210 (emphasis added).

B. Torres' Motion for Summary Judgment

Although the movants concede that a factual dispute remains as to whether the statements contained in the letter published in the Marianas Variety are true, they argue that Plaintiffs Tan and Fitial cannot (as a matter of law) establish a claim for defamation, and that both Plaintiffs' claims against Marianas Variety, and Marianas Variety's Third-Party Complaint against Torres, should therefore be dismissed. *See* MOT. SUMM. J. at 41, line 22. The primary basis for the motion is that the allegedly defamatory statements published in the Marianas Variety by Torres were *privileged*, insofar as they were subject to both absolute (legislative) privilege and conditional (a.k.a. "qualified") privilege. At the hearing on this matter, and in the REPLY to the OPPOSITION to the MOTION FOR SUMMARY JUDGMENT (hereinafter "REPLY"), Torres also argued that the publications at issue were made without malice, and that the Plaintiffs' failure to refute

this factual basis constituted an independent basis for awarding summary judgment.[3] The Court addresses these arguments individually.

1. *Torres' Claim of Absolute Privilege Under the Speech and Debate Clause of the United States Constitution*

Torres argues in his motion that the Federal Speech and Debate Clause, contained in the U.S. Const. art. I, § 6, immunizes him in this action. *See* MOT. SUMM. J. at 12. As Plaintiffs noted in their OPPOSITION TO THIRD PARTY DEFENDANT'S MOTION FOR SUMMARY JUDGMENT (hereinafter "OPP'N"), the terms of the Federal Speech and Debate Clause provide that it applies only to members of the Federal legislature. *See* OPP'N at 5. Torres has provided scant case law to support his contention that the Federal Speech and Debate Clause extends to Commonwealth legislators, and of those cases cited, none are persuasive.

The case of *Bogan v. Scott-Harris*, 523 U.S. 44, 118 S. Ct. 966, 140 L. Ed. 2d 79 (1998), for example, is offered for the proposition that, under the Federal Speech and Debate Clause, "legislative immunity protects local as well as federal, state or regional legislators" MOT. SUMM. J. at 13 (emphasis added). The distinguishing feature of the *Bogan* case is that the Plaintiff was asserting *Federal* rights under the Federal Civil Rights Act, 42 U.S.C. §§ 1983, *et seq.*, and the U.S. Supreme Court's holding was expressly limited to finding that state and local legislators are immune from suit for their legislative activities in cases brought pursuant to 42 U.S.C. § 1983.

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[3] Torres and Marianas Variety also argued in the hearing that the motion should succeed on policy grounds: that permitting the Plaintiffs to pursue their defamation claims against Marianas Variety would result in a "chilling effect" on the exercise of free speech and freedom of the press among members of the media. Because this was not raised in the MOT. SUMM. J., summary judgment is denied with respect to this argument. Moreover, the Court recognizes that, although public officials and "public figures" have been required (for policy reasons related to the encouragement of free and open debate of public issues) to meet a heightened, "actual malice" standard in order to succeed on claims for defamation, *New York Times Co. v. Sullivan*, 376 U.S. 254, 84 S. Ct. 710, 11 L. Ed. 2d 686 (1964); *see also* RESTATEMENT (SECOND) OF TORTS § 580A ("Defamation of Public Official or Public Figure"), they are not barred from pursuing those claims, *Curtis Pub. Co. v. Butts*, 388 U.S. 130, 87 S. Ct. 1975, 18 L. Ed. 2d 1094 (1967), and the First Amendment of the U.S. Constitution does not confer carte blanche to members of the media to defame public officials, public figures, or anyone else.

Id., 523 U.S. at 49, 118 S. Ct. at 970, 140 L. Ed. 2d at 85. Similarly, the case of *Tenney v. Brandhove*, 341 U.S. 367, 71 S. Ct. 783, 95 L. Ed. 1019 (1951), also cited in the motion, stands for the limited proposition that liability cannot be imposed under the Federal Civil Rights Act of 1871, 8 U.S.C. §§ 43, *et seq.,* for statements made by state legislators while performing a legislative function.

Other cases cited by Torres are similarly distinguishable from the facts of this case. The case of *Supreme Court of Virginia v. Consumers Union of United States*, 446 U.S. 719, 100 S. Ct. 1967, 64 L. Ed. 2d (1980), like *Bogan*, was limited to the context of claims raised pursuant to Federal statute 42 U.S.C. § 1983. The case of *United States v. Helstoski*, 442 U.S. 477, 99 S. Ct. 2432, 61 L. Ed. 2d 12 (1979), concerned the application of the Federal Speech and Debate Clause to publications made regarding a former member of the U.S. House of Representatives concerning conduct that occurred while he was a member of the *Federal* legislature. The case of *Eastland v. United States Servicemen's Fund*, 421 U.S. 491, 95 S. Ct. 1813, 44 L. Ed. 2d 324 (1975), also dealt solely with members of the *Federal* legislature and subcommittees thereof. None of these cases are relevant to the present action. Neither Plaintiffs or Torres were members of the Federal legislature when the statements at issue were published, and Plaintiffs are not asserting rights based on Federal statutes.

Because neither Torres nor Marianas Variety have presented any case law, and this Court is not aware of any, to support their contention that the Federal Speech and Debate Clause extends immunity to legislators of the Commonwealth or to any other party who republishes outside the legislative sphere and who are sued under the laws of the Commonwealth, summary judgment on the basis of the Federal Speech and Debate Clause is denied.

2. *Torres' Claim of Absolute Privilege Under the Speech and Debate Clause of the Commonwealth Constitution*

Torres also claims absolute, legislative privilege under the Commonwealth "Speech and Debate" clause, Article 2, section 12 of the Commonwealth Constitution. *See* MOT. SUMM. J. at 13-14. That section provides:

> **Section 12: Immunity.** *A member of the legislature may not be questioned in any other place for any written or oral statement in the legislature* and a member of the legislature may not be subject to arrest while going to or coming from a meeting of the legislature except for commission of treason, a felony or breach of the peace.

N.M.I. Const. art. II, § 12 (emphasis added). In these two cases, Plaintiffs' lawsuits against Marianas Variety are based in part on Marianas Variety's publications of Torres' letter outside of the Commonwealth Legislature. At the hearing, Plaintiffs conceded that Torres' publication of the letter *within the legislature* was protected by the doctrine of absolute legislative immunity provided for in Article 2, section 12 of the Commonwealth Constitution. Plaintiffs, however, argue that the republication of the letter outside the Commonwealth Legislature by either Torres or Marianas Variety is not protected by the doctrine of absolute legislative immunity.

In Torres' motion, he summarily asserts this absolute privilege for himself "in publishing, for public notice, a purported defamatory matter as it was made on the floor of the House, in a duly convened session of the Legislature, and while performing a legislative function, even if the purported defamatory matter had no relation to a legitimate object of legislative concern." MOT. SUMM. J. at 14. In his conclusion, Torres asserts that "[t]he Letter to Mr. Fitial, while purported to be defamatory, is absolutely privileged under the United States and CNMI Constitutions." MOT. SUMM. J. at 22. He further contends that "summary judgment as to the Complaints by Plaintiffs Willie Tan and Benigno R. Fitial is appropriate." *Id.* This determination can only be reached if this Court finds that, because Torres originally published the letter in the legislature

while he was a legislator and was entitled to immunity under Section 12 of Article II of the Commonwealth Constitution, the subsequent republications of that letter by Marianas Variety through his paid political advertisements (as to Tan's claim) and, in addition, through various articles and letters to the editor (as to Fitial's claim) were privileged. The issue of whether the Commonwealth Speech and Debate Clause extends immunity to a member of the legislature, or to any party who is not a member of the legislative sphere, for republishing outside the legislature, statements initially made in the legislature is evidently one of first impression in the CNMI.

Article II, Section 12 of the CNMI Constitution provides that "[a] member of the legislature may not be questioned in any other place for any written or oral statement *in the legislature*" (emphasis added). The publications at issue in this case are not statements that were made in the legislature, but rather, statements that were made in political advertisements, letters to the editor, and articles published in the Marianas Variety. Based on the plain text reading of Section 12, the CNMI Speech and Debate Clause does not, on its face, immunize Torres from liability in the Third-Party Complaint against him, nor does it immunize Mariana Variety republishing the alleged defamatory statements.

The plain text of the CNMI Speech and Debate Clause appears to limit its application to statements made solely within the legislature, however THE ANALYSIS OF THE CONSTITUTION OF THE COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS (Dec. 6, 1976), provides further guidance as to the scope of the applicability of Article II, Section 12. It states that Section 12 "makes members of the legislature immune from civil suits or criminal prosecutions for any oral or written statement made on the floor of the legislature *or in any legislative activity such as a legislative committee or a legislative report*." *Id.* at 53-54. Thus, regardless of whether or not a

defamatory statement is made within the four walls of the legislature, so long as it is made in pursuit of a legitimate *legislative activity*, it will be protected under the CNMI Speech and Debate Clause. Having said that, where a statement is *republished*, the same standards must apply to the republication, insofar as every publication constitutes a new statement that must be individually assessed to determine whether it is subject to absolute legislative immunity.

In accord with this view, the U.S. Supreme Court has repeatedly held that the Federal equivalent of the CNMI Speech and Debate Clause (at U.S. Const. art. I, § 6) does not immunize republications of defamatory statements made initially within the Congress that are later republished by legislators (or legislative aides or committees) acting outside the sphere of a legitimate legislative activity. *See Doe v. McMillan*, 412 U.S. 306, 93 S. Ct. 2018, 36 L. Ed. 2d 912 (1973)*; see also Hutchinson v. Proxmire*, 443 U.S. 111, 130, 99 S. Ct. 2675, 2685, 61 L. Ed. 2d 411, 428 (1979); *Eastland*, 421 U.S. at 502-03, 95 S. Ct. at 1821, 44 L. Ed. 2d at 336 (1975); *Gravel v. United States*, 408 U.S. 606, 625, 92 S. Ct. 2614, 2627, 33 L. Ed. 2d 583, 602 (1972); *Kilbourn v. Thompson*, 103 U.S. 168, 204, 26 L. Ed. 377, 392 (1880). Among these cases, the facts in *Hutchinson v. Proxmire* most closely resembles the facts of the present case.

In *Hutchinson*, the respondent (Senator Proxmire) had published allegedly defamatory statements in the Senate, the text of which was then republished outside the legislature via the news media and printed in a newsletter. 443 U.S. at 117, 99 S. Ct. at 2679, 61 L. Ed. 2d at 420. The United States Supreme Court held that "[a] speech by Proxmire in the Senate would be wholly immune and would be available to other Members of Congress and the public in the Congressional Record. But neither the newsletters nor the press release was 'essential to the deliberations of the Senate' and neither was part of the deliberative process." *Id.*, 443 U.S. at 130, 99 S. Ct. at 2686, 61 L. Ed. 2d at 428. The Supreme Court further held that "the precedents

abundantly support the conclusion that a Member may be held liable for republishing defamatory statements originally made in either House," and that "nothing in history or in the explicit language of the [Speech and Debate] Clause suggests any intention to create an absolute privilege from liability or suit for defamatory statements made outside the Chamber." *Id., 443 U.S.* at 127-28, 99 S. Ct. at 2683-84, 61 L. Ed. 2d at 426-27. Likewise, nothing in the text of the Speech and Debate Clause of the Commonwealth Constitution, or in the analysis thereof, indicates that it was intended to extend to republications of defamatory statements made initially in the legislature, that are not also republished in pursuit of a legitimate legislative activity such as a legislative committee or a legislative report. Neither party has apprised the Court of anything in the history of the clause to demonstrate such an intent.

The evidence in this case demonstrates that the statements at issue were published by Torres outside of the legislature and outside any sort of legislative activity. The statements were not published at the request of the legislature at large, nor at the request of a legislative committee, and they present only the personal observations of Torres. The contents of the statements published by Torres via the Marianas Variety, as well as the circumstances within which those publications were made, establish conclusively that Torres was not acting in pursuit of a legitimate "legislative activity" (for purposes of the CNMI Speech and Debate Clause) in issuing those statements; and nor was he acting in an "official capacity" for purposes of *conditional* privilege as the motion suggests. *See* MOT. SUMM. J. at 17; *see also* Dep. of Stanley Torres at 19 in Ex. A of the MOT. SUMM. J. Torres paid for, and submitted, the advertisements and other statements personally, and all of the advertisements unambiguously stated, "Paid for by Representative Stanley T. Torres." *See* Dep. of Stanley Torres at 12-23 in Ex. A to MOT. SUMM. J.; *see also* Ex. B to COMPLAINT (Civ. Action No. 01-0624A); Ex. B to OPP'N at 4, 6, 7,

8, 9.[4] Most compelling is the fact that later advertisements included the prominent caption, "Vote Estanislao (Stanley) Tudela TORRES, 'Your Independent Voice in Congress.'" Ex. B to OPP'N at 8, 9. This fact plainly contradicts Torres' assertion that "[h]e did not intend the Marianas Variety publication to be a political advertisement designed to further the Congressman's own political agenda." MOT. SUMM. J. at 7. For obvious reasons, this Court does not consider political self-promotion to constitute a legitimate legislative activity.

Based on the plain text of the Commonwealth's Speech and Debate Clause and considering the weight of the Federal precedents cited, this Court concludes as a matter of law that the Speech and Debate Clause of the CNMI Constitution does not immunize the publications made by Torres that are complained of in this case, because those publications were not made in the legislature nor were they in the pursuit of a legitimate legislative activity.

3. Conditional Privilege ("Common Interest") Under the Restatements

The second of Torres' "privilege" arguments is that these statements were "conditionally privileged," to the extent that they were made to someone who shared a "common interest" with Torres. The "common interest" conditional privilege has not been previously considered in CNMI case law, and for that reason, the Court looks first to the Restatement of Torts. *See* 7 CMC § 3401. The Restatement of Torts provides: "[a]n occasion makes a publication conditionally privileged if the circumstances lead any one of several persons having a common interest in a particular subject matter correctly or reasonably to believe that there is information

[4] Because the pages of Exhibit B were not numbered, and because the Court is striking some of those pages with respect to the motion as it relates to the action of Willie Tan (*see infra* section D), the Court is numbering the individual pages consecutively 1 through 9. Since page 7 has been struck with respect to Willie Tan but not Benigno Fitial, the citation to page 7 is made here only in regard to the motion as it concerns the Fitial action, and any subsequent references to portions of the Exhibit that have been stricken are likewise made solely with respect to Benigno Fitial.

that another sharing the common interest is entitled to know." RESTATEMENT (SECOND) OF TORTS § 596 (1977).

> The rule is based on the fact that one is entitled to learn from his associates what is being done in a matter in which he has an interest in common with them. This interest in their common affairs entitles him to information as to how they are conducted, or to information that affects the common interest, even though he is not personally concerned with the information.

RESTATEMENT (SECOND) OF TORTS § 596 cmt. c (1977). As noted in Torres' Motion, the "common interest" conditional privilege may apply only in cases where "'the statement is made for a common interest shared between the *publisher* and the *recipient*.'" MOT. SUMM. J. at 14, *(quoting Monroe v. Host Marriot Servs. Corp*., 999 F. Supp. 599, 604 (D.N.J. 1998) (emphasis added). The statement must also be "of a kind reasonably calculated to protect or further such interest." *Kainz v. Lussier*, 667 P.2d 797, 801 (Haw. Ct. App. 1983); *see also Sheehan v. Tobin*, 93 N.E.2d 524, 528 (Mass. 1950). Thus, the issues before the Court with respect to the "common interest" conditional privilege are (1) whether Torres shared a common interest with the public in general with respect to whether Fitial received funds from Willie Tan in exchange for political favors, and (2) whether the chosen manner of communication was reasonably calculated to further that interest.[5]

Although Torres claims in the Mot. Summ. J. that the remarks in the advertisement were made "on a proper occasion, in a proper manner, to the proper parties," he does not address the question of whether he shared a "common interest" with the public, consistent with his claim to a

[5] In contrast, Torres characterized the issue in the Motion as being "whether Benigno Fitial and Congressman Torres have a common interest in the subject matter of the communication[,] to wit: Mr. Fitial's claim for economic development in the CNMI through his relationship with Willie Tan." MOT. SUMM. J. AT 15. This description misidentifies both the recipient and the subject matter of the statements contained in the political advertisement published in the Marianas Variety, which were the basis of Plaintiffs' claim for defamation against Marianas Variety. The recipients, clearly, are the Marianas Variety's readers, made up of the public in general, and the subject matter of the advertisement is the allegation that Mr. Fitial received funds from Willie Tan in exchange for political favors.

conditional privilege, nor does he directly address the reasonableness of this communication with respect to furthering whatever "common interest" may exist. MOT. SUMM. J. at 21. For these reasons, the "conditional privilege" argument has been insufficiently pled. Even were this Court to determine that Torres shared a "common interest" with the public in eradicating political corruption, it could not be said that the particular publications that Plaintiffs complain of were reasonably calculated to protect or further that interest. One reason for this is that Torres, in these publications, was alleging facts that he had become aware of several years previously (in 1985), and the publication of this information so many years later undercuts the suggestion that the publications were "reasonably calculated" to weed out political corruption. If Torres did know these facts when he claims to have become aware of them, it was not reasonable to wait so long in communicating them. Furthermore, Torres has acknowledged that he never reported the occurrence alleged in the publications in the Marianas Variety to any law enforcement authority. *See* Dep. of Torres at 72 in Ex. A to MOT. SUMM. J. Had Torres truly been acting to further the public interest, presumably he would have directed this information to an office of law enforcement, where the claim could then have been investigated to determine whether any laws had been violated within the CNMI, and if so, whether Fitial or Tan could be prosecuted.

For the reasons stated, this Court finds that no "common interest" conditional privilege attached in this case, and therefore denies that portion of the motion that was based on conditional or qualified privilege.

C. The "Absence of Malice" Argument with Regard to the Present Motion

In the REPLY, the movants contended that "unrefuted" evidence demonstrates an absence of malice on Torres' part in publishing the statements at issue, and counsel for both Torres and

Marianas Variety again stressed this point in the oral argument. REPLY at 12. As the movants in this motion, Torres and Marianas Variety have the initial burden to discharge by "'showing'-that is pointing out to the [] court - that there is an absence of evidence to support the nonmoving party's case." *Furuoka v. Dai-Ichi Hotel*, 2002 MP 5 ¶ 23 (*citing Celotex Corp. v. Catrett*, 477 U.S. 317, 325, 106 S. Ct. 2548, 2554, 91 L. Ed. 2d 265 (1986)). The movants never pointed out, in their moving papers, an absence of evidence to support an essential element of Plaintiffs' case. In fact, the elements movants presented are for a prima facie case of defamation. *See* MOT. SUMM. J. at 4. They did not show that there is no genuine issue of material fact that both Plaintiffs are public figures or public officials, or that there is no genuine issue of material fact that they have failed to prove their heightened element of malice. Because the malice argument was not properly raised and briefed in the original motion, the Plaintiffs had no opportunity to refute it in their opposition. This Court will not consider arguments introduced for the first time in a reply, precisely for the reason that doing so denies the opposing party an opportunity to effectively rebut the argument. The issue of malice, however, would be relevant to demonstrate that a conditional privilege, if proven, had not been abused. Because this Court finds that no conditional privilege attached, arguments relating to the abuse of the privilege and the defenses thereto are moot.

Furthermore, as mentioned above, Torres acknowledged in his motion that there remains a genuine issue of material fact as to Plaintiffs' claim of defamation, stating, "the parties *may dispute* whether the statements made by Congressman Torres in the letter were *true*." MOT. SUMM. J. at 4 (emphasis added). Even had the issue of malice been properly raised and contested, it is not yet evident from the facts submitted to the Court that Tan qualifies as a "public figure" within the meaning of RESTATEMENT (SECOND) OF TORTS § 580A (1977), which

sets forth the heightened "malice" standard for defamation claims against public officials and public figures. *See Borja v. Goodman*, 1 N.M.I. 225, 239 (1990). In fact, at the hearing, Torres conceded that there is still an issue of fact as to whether Tan is a public figure. For these reasons, the question of whether Torres acted with malice would have no bearing on whether summary judgment was appropriate with respect to Tan's claims. Accordingly, the movants' "absence of malice" argument fails.[6]

D. TORRES' MOTION TO STRIKE PLEADINGS AND EXHIBITS IN PLAINTIFFS' OPPOSITION

Torres has moved to strike exhibits submitted with respect to Plaintiffs' OPP'N that are attached collectively as Exhibit B. Contained within Exhibit B are various articles (and advertisements) published in the Marianas Variety newspaper. Torres argues that the publications relevant with respect to his motion are limited entirely to the one published in the Marianas Variety on October 19, 2001. Although the THIRD-PARTY COMPLAINT against Torres is limited in scope to a "political advertisement" placed "on or about October 22, 2001" containing a letter from October 19, 2001 that was previously published in the House of Representatives, the subjects of the Plaintiffs' Complaints against Marianas Variety are broader. Def.'s AMENDED ANSWER AND THIRD PARTY COMPLAINT at 3. The Complaint of Tan addresses publications containing the letter that was published in the Marianas Variety through a "paid political advertisement," "*on or about October 19, 2001, and on various dates thereafter*." *See* COMPLAINT (Civ. Action no. 01-0624A) at 2 (emphasis added); *see also* EX. B to COMPLAINT. Given this fact, the MOTION TO STRIKE Exhibit B to the Plaintiffs' OPPOSITION to the MOTION

[6] Should Torres and Marianas Variety wish to pursue the issue of absence of malice as to Fitial's complaint, the parties should file and notice such a motion for a hearing no later than February 9, 2004. This Court accordingly amends the July 1, 2003, Scheduling Order to allow for this particular motion to be filed and heard on February 9, 2004.

FOR SUMMARY JUDGMENT is granted, solely with respect to the instant motion of Tan, insofar as pages 1, 2, 3, 5, and 7 of Exhibit B consist of articles and advertisements that do not include the letter complained of in the Tan Complaint, and are not relevant for the purpose of determining whether summary judgment is appropriate on the basis of conditional or absolute immunity. Because this Court is of the view that an allegedly defamatory statement should be considered in the totality of its particular context, the MOTION TO STRIKE is denied as to those advertisements contained in Exhibit B to the OPP'N that include the letter complained of in the Tan COMPLAINT, and the MOTION TO STRIKE is thus denied with respect to any additional statements included within those publications (such as the caption, "I don't hide behind legislative shield to tell LIES," etc.). Ex. B to OPP'N at 4, 6, 8, 9; *see Info. Control Corp. v. Genesis One Computer Corp*., 611 F.2d 781, 784 (9th Cir. 1980) ("the test to be applied in determining whether an allegedly defamatory statement constitutes an actionable statement of fact requires that the court examine the statement in its totality in the context in which it was uttered or published").

The COMPLAINT of Benigno Fitial (Civ. Action no. 03-0116B) addresses a broader range of publications, including "various articles, political advertisements and letters to the editor alleging that the Plaintiff received the sum of $100,000.00 in 1985 from Willie Tan." COMPLAINT (Civ. Action no. 03-0116B) at 2. None of the materials included in Exhibit B to the Plaintiffs' OPP'N fall outside of that description, and therefore, Torres' MOTION TO STRIKE with regard to the action of Benigno Fitial is denied in whole.

IV. CONCLUSION

Having determined that Torres has failed to establish that the statements complained of by Plaintiffs were absolutely or conditionally privileged, and given that genuine issues of

material fact remain, Torres' and Marianas Variety's joint MOTION FOR SUMMARY JUDGMENT AS TO CONSOLIDATED CASES is hereby DENIED.

Because pages 1, 2, 3, 5, and 7 of Exhibit B to the Plaintiffs' OPPOSITION TO THE MOTION FOR SUMMARY JUDGMENT consisted of articles and advertisements that did not contain the letter that were the sole focus of Plaintiff Willie Tan's COMPLAINT, the MOTION TO STRIKE PLEADINGS AND EXHIBITS IN PLAINTIFFS' OPPOSITION is hereby GRANTED IN PART as it regards those portions of the exhibit (with respect to Plaintiff Willie Tan) and DENIED IN PART (with respect to Plaintiff Benigno Fitial).

SO ORDERED this 7th day of January 2004.

/s/_____
RAMONA V. MANGLONA, Associate Judge