

No. 09-2701

In the
SUPREME COURT OF THE UNITED STATES
October Term, 2009

ERIC CARTMAN,
Petitioner

v.

IKE BROFLOVSKI,
Respondent

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

BRIEF FOR RESPONDENT

Team 219
Counsel for Respondent

QUESTIONS PRESENTED

- I. Whether a blogger is protected by a qualified reporter's privilege against court-compelled disclosure of the identity of an anonymous source in an online defamation claim where the Supreme Court of the United States has not expressly recognized such a privilege and the blogger's news gathering process and resultant content has led to publication of false and unverified information.

- II. Whether the author of an Internet blog is liable under an actual malice standard in an online defamation claim brought by a corporate executive on the grounds that the executive is a limited-purpose public figure when the executive maintains a private lifestyle and has neither given any interviews to the press nor voluntarily injected himself into any public controversy.

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JURISDICTION STATEMENT

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

STATEMENT OF THE CASE

Ike Broflovski (“Broflovski”) is Director of Research and Development at Citrus, a consumer electronics company that is well known for its product, the ePlay portable digital music player. (J.A. at 2-3.) Broflovski has been employed by Citrus since 2006, when he was hired by his brother, Kyle Broflovski, who is the CEO of Citrus. *Id.* Broflovski oversees development of the new ePlay Touché, an enhanced digital music player. (J.A. at 3.)

Since joining Citrus, the shy Broflovski has avoided the public limelight, is rarely seen in public and has given no interviews to the press. *Id.* He has been acknowledged by Kyle Broflovski, who occasionally praised his work in interviews, and by some Citrus retail employees, who decided to wear makeshift “I Like Ike” buttons. (J.A. at 3-4.) His only public appearance was at a moderately-attended press conference at which Kyle Broflovski announced Broflovski’s hiring. *Id.* Broflovski’s only comment was to thank his brother for welcoming him and to say that he was “look[ing] forward to pushing Citrus, its employees, and its products to new heights.” *Id.* The press conference garnered little media attention, with a single story by the Associated Press, which focused on the announcement of a new line of products, appearing in several newspapers. *Id.* Broflovski’s hiring by Citrus and his brief statement were only mentioned in the last paragraph of the article. *Id.*

Like many other corporate executives, Broflovski’s name and position is listed on the Citrus website along with a photograph and contact information. (J.A. at 4.) No biographical information of Broflovski’s appears on the Citrus website. *Id.*

On July 8, 2009, a story about Citrus appeared on a blog called *The Sludge Report* with the headline “Citrus Engaging in Acts of Modern-Day Slavery?” (J.A. at 5.) The story included a photograph with the caption “Ike Broflovski surveys his minions...but where’s the whip, Ike?”

(J.A. at 6.) The blog is owned and written by Eric Cartman (“Cartman”), a part-time blogger and sole proprietor of an electronics sales and repair shop called Cartman’s Computer World. (J.A. at 4.) Cartman became a blogger for profit in 2005, after business at his store began to decline due to the opening of a Citrus Megastore across the street from his store. *Id.* Cartman’s blog often expresses his dislike for large companies engaging in international trade. *Id.* Since 2005, Cartman has harshly criticized Kyle Broflovski and Citrus because the Citrus Megastore nearly drove him out of business, and because he believes that Citrus exports jobs and engages “the systematic oppression of the peoples of the Third World.” *Id.*

The Sludge Report has an audience of over 100,000 readers. *Id.* Readers give Cartman tips on story topics by emailing him at his personal e-mail address, which is listed on his website. (J.A. at 4-5.) Cartman states that users who sends tips to his e-mail address are treated as confidential sources, and that neither he nor the third-party server Bloggeroo on which his blog is operated have any personal information about the tipsters unless those users provide such information. *Id.* The story about Citrus was based on an email from one of Cartman’s sources known as Professor Chaos. (J.A. at 5.) Cartman has met Professor Chaos in person and knows his real name and email address. *Id.* In the past, Professor Chaos has provided reliable information to Cartman about the release of certain Citrus products. *Id.* In an email to Cartman, Professor Chaos alleged that Citrus, under the direction of Broflovski, was involved in human rights abuses at its factory near Mumbai. *Id.* Professor Chaos included a digital photograph that appeared to show Broflovski in a factory where workers used assembly lines and machines to assemble the ePlay Touché. *Id.* Cartman published the photograph, alleging that the picture, “worth more than a thousand words,” depicted Broflovski, and that workers in the Citrus factory were forced to work long hours, with no breaks or days off, in slave-like conditions. (J.A. at 6.)

Cartman claimed that his source, Professor Chaos, was a Citrus employee, and accused Broflovski of being a “slave driver” and shackling the workers to their stations at night. *Id.*

Word of Cartman’s blog entry spread rapidly, and attracted some attention in the mainstream media. *Id.* On August 19, 2008, cable news show host Keith McRiley named Broflovski the recipient of his nightly award for the “Most Heinous Individual in the Galaxy,” based on the information contained in Cartman’s blog. *Id.* As a result of the negative attention, Citrus’ stock dropped by 25% the next day and continued to fall, while at the same time numerous retailers pulled Citrus products from their shelves. (J.A. at 6-7.) The media clamored for a statement from Broflovski, but his only response, delivered through his attorney, was that the photograph was a fabrication and that he would seek justice in a court of law. (J.A. at 7.)

Broflovski filed a defamation suit against Cartman in Silverado Superior Court claiming that Cartman’s statements were libelous. *Id.* Cartman removed the case to the District Court for the Western District of Silverado on diversity grounds. *Id.* During discovery, Broflovski stipulated that he had visited Mumbai, but whether he actually visited the factory remains unclear. *Id.* A scan of the photograph Cartman published using Citrus PhotoWorks software revealed that it had been altered; Broflovski’s image had been superimposed onto a photograph of workers at the Mumbai factory. *Id.* Evidence of the forgery was discoverable through software, but undetectable to the naked eye. *Id.* Cartman had recently installed similar photo software capable of detecting forgeries onto his computer, and had used it on a number of other photographs before posting them to *The Sludge Report*. *Id.* Yet, he did not use the software to verify the authenticity of Professor Chaos’ photo before publishing it. *Id.*

Broflovski deposed the manager of the Mumbai factory and several top engineers in order to determine the photograph's source. (J.A. at 8.) Kyle Broflovski also sent an e-mail to

all Citrus employees requesting information on the source of the photograph. *Id.* Both efforts were fruitless. *Id.* In an interrogatory, Broflovski asked Cartman to identify the full name and contact information of his source. *Id.* Cartman refused, invoking a qualified news reporter's privilege under the First Amendment. *Id.* Broflovski then filed a motion to compel Cartman to reveal the identity of and contact information for Professor Chaos, to which Cartman filed a motion in opposition. *Id.* Cartman also filed a countermotion for summary judgment on the defamation claim, alleging that Broflovski is a public figure and failed to provide clear and convincing evidence of actual malice. *Id.* The District Court denied Broflovski's motion to compel discovery and granted Cartman's motion for summary judgment. (J.A. at 20.) Broflovski timely appealed to the United States Court of Appeals for the Fifteenth Circuit, which reversed and remanded the matter. (J.A. at 32.) Subsequently, this Court granted certiorari. (J.A. at 33.)

SUMMARY OF THE ARGUMENT

The Court of Appeals was correct to reverse the decision of the District Court. Because Cartman is not protected by a qualified reporters' privilege, he is not protected from court-compelled disclosure of the identity of his source. Even if such a privilege existed however, Cartman would not qualify as a reporter for the purposes of asserting a privilege.

Firstly, this Court has never found a qualified reporter's privilege in the First Amendment, and no federal statute has provided such license. In *Branzburg v. Hayes*, this Court's plurality opinion explicitly denies the existence of a reporter's privilege, and that ruling still controls. *Branzburg v. Hayes*, 408 U.S. 665, 681 (1972). Moreover, neither the United States Congress nor the Silverado state legislature has enacted any law creating such a privilege. Yet, even if such a privilege exists, because Cartman disseminated false and unverified

information, he did not engage in a legitimate newsgathering activity, cannot be considered a reporter for purposes of this suit, and would not enjoy protection of any reporters' privilege. *O'Grady v. Super. Ct. of Santa Clara County*, 44 Cal. Rptr. 3d 72 (2006). Finally, even if Cartman is protected by a reporters' privilege, he is still not entitled to shield the identity of his source, because, (1) Broflovski sought relevant information, (2) that information "goes to the heart" of Broflovski's defamation claim, and (3) the information cannot be obtained by other means. *Garland v. Torre*, 259 F.2d 545, 549-50 (2d Cir. 1958).

The Court of Appeals was correct to find that Broflovski is not a public figure, and as such, that he need only prove that Cartman acted negligently in publishing the photograph and accompanying commentary. Though this Court has not established a clear test for conferring public figure status, the Second Circuit's test best preserves the First Amendment principles enunciated by this Court. *See, e.g., Lerman v. Flynt Distrib. Co.*, 745 F.2d. 123 (2d Cir. 1984) (citing *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964)). Under that test, the Respondent is not a limited-purpose public figure because he has not (1) "invited attention to his views," (2) injected himself into a public controversy, (3) assumed a prominent role in the controversy, and he has not (4) maintained "regular and continuing access to the media." *Lerman*, 745 F.2d. at 136-37. Accordingly, Cartman is liable for defamation under a simple negligence standard, because Broflovski is a private person for the purposes of this defamation action.

However, even if Broflovski is found to be a public figure, Cartman is still liable for defamation, by acting with actual malice in recklessly disregarding the probable falsity of the information he posted. *Sullivan*, 376 U.S. at 280. Cartman's failure to investigate, his use of an unverified source, his ill will toward Broflovski and the materiality of his inaccuracies, considered together, present "clear and convincing evidence" of actual malice. *Id.*

ARGUMENT

In reviewing a motion to compel discovery under Fed. R. Civ. P. 37, courts normally defer to an abuse of discretion standard. *Nat'l Hockey League v. Metro. Hockey Club, Inc.*, 427 U.S. 639, 642 (1976). However, in reviewing whether the creation of a reporter's privilege furthers the purposes of the First Amendment's constitutional blueprint, determining the existence of a privilege is a question of law. *Herbert v. Lando*, 441 U.S. 153, 182 (1979) (Powell, J., concurring). Therefore, the review of any claim of privilege is a question of fact and law, and thus subject to *de novo* review. *Id.* at 182-83. Here, the Fifteenth Circuit Court of Appeals' reversal of the decision of the District Court denying the petitioner's motion to compel discovery should be affirmed because the respondent has demonstrated that the privilege sought by the petitioner does not override the sacrifice of evidentiary material, through a showing of facts consistent with the allegations in this complaint.

In reviewing a motion for summary judgment under the Federal Rules of Civil Procedure, this Court determined that if the nonmoving party fails to make a sufficient showing on an essential element of her case, the moving party "is 'entitled to a judgment as a matter of law.'" *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986) (citing Fed. R. Civ. P. 56(c)). A grant of summary judgment on appeal is subject to *de novo* review. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 153 (1970). Here, the Court of Appeals' decision reversing the District Court's grant of summary judgment should be affirmed because the respondent has adequately demonstrated support for an essential element of his case, through a showing of facts consistent with the allegations in the complaint.

I. THE RULING OF THE COURT OF APPEALS SHOULD BE UPHELD BECAUSE THERE IS NO QUALIFIED REPORTER’S PRIVILEGE AGAINST COURT-COMPELLED DISCLOSURE OF THE IDENTITY OF AN ANONYMOUS SOURCE IN AN ONLINE DEFAMATION CLAIM.

The First Amendment to the United States Constitution safeguards the right to freedom of the press. U.S. Const. amend. I. To protect this freedom, it is argued that the burden on newsgathering that stems from compelling reporters to reveal confidential information outweighs any public interest in getting this information. *See Branzburg v. Hayes*, 408 U.S. 665, 681 (1972). Nonetheless, in *Branzburg* this Court said that the First Amendment did not grant reporters a privilege to protect their confidential sources in valid grand jury inquiries. *Id.* at 690. This Court expressly declined to create a privilege “by interpreting the First Amendment to grant newsmen a testimonial privilege that other citizens do not enjoy.” *Id.* Moreover, there is no federal shield law or Silverado state statute that imbues reporters with any privilege. Therefore, absent any federal or state guidance, this Court should defer to the ruling of *Branzburg* that the First Amendment does not create a qualified reporter’s privilege. *Branzburg*, 408 U.S. 665.

Even if a qualified reporter’s privilege is created by the First Amendment, Cartman should not qualify as a reporter for the purposes of this suit because his news gathering process and resultant content has led to publication of false and unverified information about Ike Broflovski. Thus, Cartman cannot be said to have been engaged in legitimate newsgathering activities. Further, Broflovski’s need to discover the identity of Professor Chaos is highly material and relevant to his claim. Broflovski’s need to discover Chaos’ identity goes to the heart of his claim. Finally, Broflovski should not be forced to assume an onerous and murky discovery burden, where the circumstances in which the unverified information was passed to Cartman are unreasonably imprecise. Thus, the Fifteenth Circuit Court of Appeals’ ruling to reverse the denial of Broflovski’s motion to compel discovery was proper and should be upheld.

A. There Is No Qualified Reporter’s Privilege Through The First Amendment Against The Court-Compelled Discovery Of Sources Because The Privilege Has Not Been Expressly Provided By Either The Supreme Court Of The United States Or By Statute.

This Court has said that an unconstrained press, being an essential component to informed public opinion, should be protected, for allowing it “to be fettered is to fetter ourselves.” *Grosjean v. American Press Co.*, 297 U.S. 233, 250 (1936). However, news gatherers have “no special immunity from the application of general laws . . . no special privilege to invade the rights and liberties of others . . . [and] must answer for libel.” *Associated Press v. NLRB*, 301 U.S. 103, 132-33 (1937) (citation omitted). Accordingly, the press enjoys no freedom to “publish with impunity everything and anything it desires to publish.” *Branzburg*, 408 U.S. at 683. Though it has been argued that, absent a reporter’s privilege, the freedom of the press to collect and disseminate information might be hampered, this Court said that, from the country’s inception, “the press has operated without constitutional protection for press informants, and the press has flourished.” *Id.* at 698.

Accordingly, in *Branzburg v. Hayes*, this Court held that there is no reporter’s privilege for a newsman in a criminal case. *Branzburg*, 408 U.S. at 665. The public interest in law enforcement was sufficient to overcome the uncertain burden on newsgathering that resulted from requiring reporters, like other citizens, to respond to material inquiries in criminal cases. *Id.* at 690-91. Justice Powell, whose vote was necessary to secure a 5-4 decision, said in his concurrence that a claim of privilege should be decided on a case-by-case basis by weighing the freedom of the press against the obligation to aid in criminal proceedings. *McKevitt v. Pallasch*, 339 F.3d 530, 531 (7th Cir. 2003) (citing *Branzburg*, 408 U.S. at 709-10). In light of this concurrence, many courts have taken the surprising view that, though the scope is unclear, there is a reporter’s privilege. *Id.* at 532. However, Justice White’s opinion is not simply a plurality

joined by Justice Powell's separate concurrence to construct a majority view, but rather an "authoritative precedent." *In re Grand Jury Subpoena, Judith Miller*, 397 F.3d 964, 971 (D.C. Cir. 2005). Justice Powell's opinion is fully consistent with the majority, and "neither limits nor expands upon its holding." *In re Grand Jury Proceedings*, 810 F.2d 580, 585 (6th Cir. 1987). Justice Powell only sought to emphasize the necessity of First Amendment protection in situations of "bad faith investigations." See *In re Miller*, 397 F.3d at 971-72. Thus, as the Seventh Circuit correctly observed, there should be no "special criteria merely because the possessor of . . . evidence sought is a journalist." *McKevitt*, 397 F.3d at 533.

This Court has said that Congress is free to determine whether a reporter's privilege is necessary and to craft legislation that defines its contours with the desired scope. *Branzburg*, 408 U.S. at 706. However, Congress has not yet passed the proposed federal shield law. See Free Flow of Information Act, H.R. 985, 111th Cong. (2009). The United States Court of Appeals for the Fifteenth Circuit suggested that the several attempts to pass this legislation constitute an implicit admission that the First Amendment alone cannot furnish the privilege. (J.A. at 25.) Still, this case is brought under diversity jurisdiction. 28 U.S.C. § 1332(a) (2005). Thus, under Federal Rule of Evidence 501, in civil proceedings where an element or claim is settled by state law, a privilege afforded a person shall be "determined in accordance with State law." *Herbert*, 441 U.S. at 182 (Powell, J., concurring) (quoting Fed. R. Evid. 501). However, the State of Silverado has not crafted legislation recognizing a privilege. (J.A. at 25.) Therefore, absent any federal or state guidance, this Court should defer to the ruling of *Branzburg* that the First Amendment does not create a qualified reporter's privilege. *Branzburg*, 408 U.S. 665.

B. Even If The First Amendment Does Create A Qualified Reporter's Privilege, A Blogger Does Not Qualify As A Reporter For The Purposes Of This Defamation Suit And Is Not Entitled To Shield The Identity Of His Source.

Because neither Congress nor the Silverado legislature has passed legislation recognizing a reporter's privilege, it follows that there is no legislative guidance as to who qualifies as a "reporter" if a privilege is said to exist through the First Amendment. Absent statutory instruction, it is necessary for courts to "rely on judicial precedent and a well-informed judgment as to the proper . . . policy to be followed in each case." *Cf. Baker v. F & F Inv.*, 470 F.2d 778, 781 (2d Cir. 1972) (limiting the inquiry in the particular case to federal public policy).

This Court should adopt the test provided in the sole judicial decision to treat the question of whether a blogger is a reporter with a depth of consideration, *O'Grady v. Super. Ct. of Santa Clara County*, 44 Cal. Rptr. 3d 72 (2006). In that case, the court's three-part inquiry asked: (1) whether the petitioners were engaged in legitimate newsgathering activities; (2) whether a "blogger" is a reporter if new forms of media are not covered by statute; and (3) whether a website qualifies as a periodical publication. *See Id.* at 96-105. Here, because Cartman's process of newsgathering and dissemination resulted in publication of false and unverified information, it does not rise to the level of "legitimate journalism." *Id.* at 97.

Even if Cartman is considered a reporter for the purposes of this online defamation claim, a qualified privilege must in certain cases give way to "a paramount public interest in the fair administration of justice." *Garland v. Torre*, 259 F.2d 545, 549-50 (2d Cir. 1958). In determining what limits should be placed upon the granting of a qualified privilege, if one is said to exist, this Court should adopt the approach taken in *Garland*, because *Branzburg* left this approach intact "in language if not in holding . . . insofar as civil litigation is concerned." *Carey v. Hume*, 429 F.2d 631, 636 (D.C. Cir. 1974). Under the *Garland* analysis, courts must balance

the possible damage to the free flow of information against the need for the requested information. *Garland*, 259 F.2d at 547-48. This includes situations where the defendant in a defamation suit invokes the privilege. (J.A. at 13.) When analyzing whether a qualified reporter's privilege should be overcome, the court should evaluate three factors: (1) whether the information sought is highly material and relevant to the underlying claim; (2) whether the information sought goes to the "heart of the claim," i.e., is critical to the maintenance of the claim; and (3) whether the party seeking to compel discovery has exhausted all reasonable alternative means of discovery. *Garland*, 259 F.2d at 551; *Carey*, 429 F.2d at 636. Here, the United States Court of Appeals for the Fifteenth Circuit properly determined that, under such a test, Broflovski's interests in remedying the alleged damage caused by Cartman's statements outweigh Cartman's right to a qualified privilege. (J.A. at 26.)

1. Cartman should not be considered a reporter for the purposes of this defamation suit because the dissemination of false and unverified information is not a legitimate newsgathering activity.

In *O'Grady*, petitioners used two websites to disseminate news of interest to likeminded computer enthusiasts. *O'Grady*, 44 Cal. Rptr. 3d 72. There, the court used a three-part analysis to determine whether the bloggers in that case should be considered reporters. *O'Grady*, 44 Cal. Rptr. 3d at 77, 96-105. The first part of the *O'Grady* test asks whether the individuals seeking a reporter's privilege are engaged in legitimate newsgathering activities. *Id.* at 97. In *O'Grady*, the petitioners published a series of detailed articles involving a computer manufacturer's private plans for release of a new digital audio device. *Id.* at 76. The information, supplied by confidential sources with fake names, was strikingly similar to materials kept in-house in confidential "need-to-know" files. *Id.* Though Apple alleged that the petitioners were merely engaged in trade secret and copyright violations, the court found that newsgathering and editorial

judgment could reasonably be extended to “reprint[ing] ‘verbatim copies’ of Apple’s internal information.” *Id.* Thus, the petitioners’ activities were legitimate because the Petitioners, like reporters or editors for traditional media organizations, “came into possession of, and conveyed to their readers, information those readers would find of considerable interest.” *Id.* at 98.

Here, application of the first part of the *O’Grady* test shows that Cartman is not engaged in legitimate newsgathering. Unlike the near-verbatim materials collected by the petitioners in *O’Grady*, Cartman chose to publish a fake photo and a spurious accusation about work conditions in the Mumbai factory, an accusation with no analog in any internal memoranda. Moreover, though Cartman was engaged in conveying information to his interested readers, he should not be afforded the privilege to protect the information’s source where “the privilege’s purpose is to promote dissemination of *useful* information.” *In re Miller*, 397 F.3d at 1003 (Tatel, C.J., concurring) (emphasis added). Applying the rule that evidentiary privileges are not generally favored, Cartman’s status as a newsgatherer must be viewed in the context of the press’ concerns about the chilling effect on newsgathering of compelled disclosure. *Herbert*, 441 U.S. at 171, 175. If a claimed newsgathering inhibition is the result of fear of damages for publishing with actual malice, then that effect is entirely consistent with the First Amendment because “spreading false information in and of itself carries no First Amendment credentials.” *Id.* at 171. Because a computer and an Internet connection are sufficient for anyone to reach a large audience, the publication of verifiable information should be a vital component in any definition of “reporter.” See Linda L. Berger, *Shielding the Unmedia: Using the Process of Journalism to Protect the Journalist’s Privilege in an Infinite Universe of Publication*, 39 *Hous. L. Rev.* 1371, 1412 (2003). The publication of verifiable information separates legitimate reporters from “the easily created blog . . . [and] ill-defined pamphleteer.” See generally *In re Miller*, 397 F.3d at

981 (proposing that an overly broad extension of the privilege would run afoul of legitimate adjudication). Thus, because Cartman’s article, unlike the Internet articles in *O’Grady*, has been shown to contain false and unverified information, it is devoid of the necessary usefulness and is “unworthy of protection.” *Id.* at 1003 (Tatel, C.J., concurring).

The remainder of the *O’Grady* test asks: (2) whether a blogger is a reporter if new forms of media are not covered by statute; and (3) whether a website qualifies as a periodical publication. *O’Grady*, 44 Cal. Rptr. 3d at 99-100. This Court has said that the liberty of the press is not the sole provenance of the traditional, mass-market media, but extends to “the lonely pamphleteer who uses carbon paper or a mimeograph.” *Branzburg*, 408 U.S. at 774. Further, freedom of the press is broad enough to embrace “every sort of publication which affords a vehicle of information and opinion.” *Lovell v. City of Griffin*, 303 U.S. 444, 452 (1938). It is conceded that Cartman, like the petitioners in *O’Grady*, has engaged in the distribution of various news items of interest to a substantial readership. (J.A. at 4.) Further, at least some of the information he has gathered from confidential sources has been reliable. (J.A. at 5.) Yet, this assessment only serves to secure Cartman’s place in the class of those reporters associated with traditional news media. *See Berger, supra* at 1409. Confining a protected class to “professional” reporters creates a distinction not required under the First Amendment because it seeks to protect the dissemination of information, not a newsgatherer’s status. *Id.* Though Cartman is similar to the petitioners in *O’Grady* in matters of form, his process of newsgathering and dissemination resulted in publication of false and unverified information. Thus, because Cartman’s article does not rise to the level of “legitimate journalism,” he should not be considered a reporter for the purposes of this defamation suit.

2. Cartman should not be entitled to shield the identity of his source under the *Garland* test because the information sought is relevant, goes to the heart of the executive’s claim, and cannot be obtained by alternative means.

The first factor analyzed by courts when determining whether a qualified reporter’s privilege should give way in the interest of the administration of justice is whether the information sought is highly material and relevant to the claim. *Miller v. Transamerican Press, Inc.*, 621 F.2d 721, 726 (5th Cir. 1980). The District Court conceded that the information Broflovski seeks from Cartman is relevant to the issue of fault in the defamation claim. (J.A. at 13.) The court said that the information sought could unearth relevant information that speaks to the reliability and trustworthiness of Professor Chaos. *Id.* In a defamation claim, the unreliability of a source can prove a useful aid in proving a failure to observe a standard of care. *Id.* Moreover, because Cartman did not dispute the view of the District Court on appeal, it is clear that the information Broflovski seeks is relevant to his claim.

The second factor analyzed by courts when determining whether a qualified reporter’s privilege should give way in the interest of the administration of justice is whether the information sought is critical to the maintenance of the claim. *Garland*, 259 F.2d at 550. In *Garland*, the court noted that it would be imprudent to use such analysis to force disclosure of all a newspaper’s confidential sources. *Id.* at 549. Instead, the claim for which “critical” material is to be provided “virtually rises or falls with the admission or exclusion of the proffered evidence.” *In re Application to Quash Subpoena to Nat’l Broad. Co., Inc.*, 79 F.3d 346, 351 (2d Cir. 1996) (citations omitted). In *Carey*, even if the plaintiff proved the falsity of the defendant’s statements, he still required information beyond his own testimony to establish the fault component of the claim. *Carey*, 492 F.2d at 637. This he could achieve through proof that the defendant had no reliable sources, that he misrepresented his sources, or that his reliance on the

sources showed a disregard for the truth. *Id.* Because such knowledge would “logically be an initial element in the proof of any such circumstance,” the identity of the defendant’s sources was not merely useful, but critical to the plaintiff’s claim. *Id.*

Here, the information Broflovski seeks is similarly critical to his claim. As the Court of Appeals noted, Cartman is not only a discovery subject, but also a party to the litigation, and the sole individual with knowledge of Professor Chaos’ true identity. (J.A. at 26.) Additionally, Broflovski was unable to get the needed information in other depositions or from the e-mail to Citrus employees. (J.A. at 8.) Given the heavy burden of proof required for Broflovski to prove the fault element of his defamation claim, he cannot be expected to make a showing of negligence on the part of Cartman on the mere basis of the conflicting allegations of the parties. *See Carey*, 492 F.2d at 637. Further, Broflovski only seeks the identity of Professor Chaos; he does not require a wholesale disclosure of all the confidential sources who have e-mailed information to Cartman. Accordingly, the information Broflovski seeks is central to the defamation claim.

The third factor analyzed by courts when determining whether a qualified reporter’s privilege should give way in the interest of the administration of justice is whether the party seeking to compel discovery has exhausted all reasonable alternative means of discovery. *Carey*, 492 F.2d at 638. In *Carey*, because there were a substantial number of employees at the company from whence the robbery occurred, the court said that “the observations in question could have been made by anyone from an office boy to a top officer.” *Id.* Thus, the court said that litigants should not “be made to carry wide-ranging and onerous discovery burdens where the path is ill-lighted.” *Id.* at 639. By contrast, in *Zerilli v. Smith*, 656 F.2d 705 (D.C. Cir. 1981), where the plaintiffs sought discovery of transcripts between reporters and sources inside

the U.S. government who purportedly leaked damaging information about the plaintiffs, the court declined to compel discovery because the plaintiffs made no attempt to depose a number of employees on a government-provided list who had been given access to the transcripts. *Id.* at 706, 714-15. Further, the court felt that the plaintiffs' overeager acceptance of a government statement of faultlessness in the matter was "gamesmanship" because they used it to prematurely end their discovery process. *Id.* at 715.

Here, revelation of Chaos' identity should not be pursued through an onerous discovery burden on the part of Broflovski. In contrast to *Zerilli*, there are no additional employees to depose because Cartman runs his website alone. (J.A. at 4.) Additionally, the Court of Appeals was correct in noting that requiring Broflovski to root through countless thousands of e-mails, interrogate each and every Citrus employee, and scour the Mumbai factory for clues was a "fool's errand." (J.A. at 26-27.) This should extend to a third-party server who has no personal information about the users who e-mail Cartman, for the additional reason that extending the inquiry involves considerations of expense and waste that the discovery process is meant to minimize. *See Herbert*, 441 U.S. at 177 (citing Fed. R. Civ. P. 1) (reasoning that discovery should secure an inexpensive and brisk determination of every action). Further, Kyle Broflovski's company-wide e-mail request for information is not "gamesmanship" in a situation where the confidential source could be anyone from an office boy to a Mumbai engineer, but rather, is a legitimate attempt to attain information in a company with a vast number of employees. *See Carey*, 492 F.2d at 638. Exhaustion of remedies is not relevant when it concerns "guide marks as vague as these." *Id.*

In conclusion, if discovery is not allowed in situations where the issue of fault must be resolved in a defamation claim, the party with the burden of proof "face[s] a blank wall, with

practically no opportunity to discover the identity of the alleged source upon which the defense claims reliance.” *Carey*, 492 F.2d. at 640 (MacKinnon, C.J., concurring). Further, if news gatherers can refuse to reveal the sources of potentially defamatory stories and website postings, then they effectively nullify libel laws by “hiding behind anonymous sources whenever sued.” *Id.* Thus, the Fifteenth Circuit Court of Appeals’ ruling to reverse the denial of Broflovski’s motion to compel discovery was proper and should be upheld.

II. ERIC CARTMAN IS LIABLE FOR DEFAMATION UNDER A NEGLIGENCE STANDARD BECAUSE IKE BROFLOVSKI IS NOT A LIMITED-PURPOSE PUBLIC FIGURE AND IS NOT REQUIRED TO PROVE ACTUAL MALICE.

In defamation claims, the Silverado Supreme Court has adopted the standard set forth in the Second Restatement of Torts. (J.A. at 14.) Under the Restatement, a plaintiff in a defamation suit must prove: (1) “a false and defamatory statement”; (2) “an unprivileged publication to a third party”; (3) “fault amounting to at least negligence on the part of the publisher”; and (4) “either actionability of the statement irrespective of special harm or the existence of special harm caused by the publication.” Restatement (Second) of Torts § 558 (1977). Silverado follows the Restatement in requiring a showing of simple negligence to prove defamation when the plaintiff is a private individual. (J.A. at 14.) This Court has held, however, that First Amendment “guarantees of freedom of speech and press require” proof of a higher level of fault when the plaintiff is a public official or public figure. *New York Times Co. v. Sullivan*, 376 U.S. 254, 279 (1976). Therefore, to succeed in an action for defamation, a public figure must prove that the defendant’s statement was made with “actual malice,” defined by this Court as “knowledge that [the statement] was false or with reckless disregard of whether it was false or not.” *Id.* at 280.

In *Gertz*, this Court described the differences between all purpose public figures and limited-purpose public figures; however, lower courts have applied the *Gertz* factors differently, resulting in various tests across the Circuit Courts. *Gertz v. Robert Welch*, 418 U.S. 323, 351 (1974). This Court should adopt the test used by the Second Circuit in determining a public figure because it best balances the constitutional interests involved. Under this test, Broflovski is not a limited-purpose public figure because of his commitment to maintaining his privacy and avoiding media attention, especially regarding the controversy created by Cartman’s story. Therefore, Broflovski need only prove that Cartman acted negligently. However, even if this Court finds that Broflovski is a limited-purpose public figure, he has proven Cartman’s liability under an actual malice standard, by showing that Cartman disseminated false information with reckless disregard for the falsity of the matter asserted.

A. Broflovski is not a limited-purpose public figure because he maintains a private lifestyle, avoids public attention and media focus, and did not voluntarily inject himself into an existing public controversy.

In *Gertz*, this Court identified two types of public figures: an all purpose public figure, who has achieved “such pervasive fame or notoriety that he becomes a public figure for all purposes and in all contexts,” and a limited-purpose public figure, who “voluntarily injects himself or is drawn into a particular public controversy and thereby becomes a public figure for a limited range of issues.” *Gertz*, 418 U.S. at 351. The *Gertz* decision, however, did not establish “clear, objective criteria by which to evaluate a plaintiff’s status,” and therefore “lower courts have taken it upon themselves to develop their own tests for determining the status of defamation plaintiffs.” Mark D. Walton, *The Public Figure Doctrine: A Reexamination of Gertz v. Robert Welch, Inc. in Light of Lower Federal Court Public Figure Formulations*. 16 N. Ill. U. L. Rev. 141 (1995). However, these tests are ultimately simply “different formulations of the same

factors.” *Id.* at 165. Taken together, the Circuit Courts’ tests consider substantially the same factors: the nature of the controversy the alleged defamatory statement describes, the plaintiff’s role both before and during the controversy, the relationship between the defamatory statement and the controversy, and, in many circuits, the extent of the plaintiff’s access to channels of effective communication. The Second Circuit’s test concisely embodies these factors. This Court should therefore adopt the test used by the Second Circuit for determining public figure status. Under the Second Circuit’s test, Broflovski does not meet the necessary requirements for being a limited-purpose public figure and is, therefore, simply a private person.

1. The Second Circuit’s public figure test best achieves a balance between protecting both a private individual’s reputation and the constitutional guarantees of freedom of speech and press that this Court considered in *New York Times Co. v. Sullivan*.

In *Gertz* and its progeny, this Court explained that the purpose of the public figure doctrine was twofold: first, the Court recognized that “public figures are less vulnerable to injury from defamatory statements because of their ability to resort to effective self-help,” and, second, “public figures are less deserving of protection than private persons” because they have voluntarily exposed themselves to a risk of being victim of defamatory statements. *Wolston v. Reader's Digest Ass'n*, 443 U.S. 157, 164 (1979). The increased protection publishers receive when making a statement about a public figure is justified by a “profound national commitment to the principle that debate on public issues should be uninhibited, robust and wide-open.” *Sullivan*, 376 U.S. at 270. The Second Circuit test for determining whether a plaintiff in a defamation suit is a public figure applies the *Gertz* factors as an individualized assessment of whether a person has exposed himself to public critique of his involvement in a public controversy and has the requisite ability to sufficiently defend himself if denied some of the protections afforded to a private individual. The Second Circuit test will only deem a plaintiff a

limited-purpose public figure if the plaintiff has: (1) “successfully invited public attention to his views” prior to publication of the defamatory statement; (2) “voluntarily injected himself” into the relevant public controversy; (3) “assumed a position of prominence in the public controversy;” and (4) “maintained regular and continuing access to the media.” *Lerman v. Flynt Distrib. Co.*, 745 F.2d. 123, 136-37 (2d Cir. 1984). This test most effectively balances the Court’s interest in assuring First Amendment protections of free speech and press, while protecting private individuals from the harmful and often irreparable effects of defamatory statements. This Court should apply the Second Circuit test to the facts of the case to determine that Broflovski is not a limited-purpose public figure.

2. Broflovski is not a limited-purpose public figure because he did not invite public attention, is rarely seen in public, and has not given any interviews to the press.

Application of the Second Circuit test shows that Broflovski is not a limited-purpose public figure because he does not have the requisite voluntary involvement in public affairs to effectively defend himself through the media if denied the protections afforded to a private person who has been defamed. First, Broflovski did not invite public attention to himself prior to publication of the story on *The Sludge Report*. The District of Columbia Circuit has expressly held that “[b]eing an executive within a prominent and influential company does not by itself make one a public figure.” *Waldbaum v. Fairchild Publ’ns*, 627 F.2d 1287 (D.C. Cir. 1980). Although Broflovski is an executive at an international company, he “has given no interviews to the press and is rarely seen in public.” (J.A. at 3.) Broflovski’s only public statement was made at a moderately-attended press conference in 2006 and consisted of one sentence in which he thanked his brother and expressed anticipation for working at Citrus. *Id.* Broflovski did not use Citrus’ website as a means of making himself known or reaching out to the public; the website

merely lists Broflovski's title and business contact information, which is standard practice in companies both large and small. (J.A. at 4.) Like the plaintiff scientist in *Hutchinson v. Proxmire*, 443 U.S. 111, 135 (1979), who was deemed not to be a public figure, Broflovski's "activities and public profile are much like those of countless members of his profession," and simply being successful does not make one a public figure. *Proxmire*, 443 U.S. at 135. The District Court cites *Waldbaum* as relevant in the public figure inquiry, for the holding that a CEO of a supermarket cooperative was a limited-purpose public figure. However, *Waldbaum* is distinguishable because in that case, public controversies over company policies existed prior to the publication, and the plaintiff was a leading advocate of those policies, going "out of [his] way to solicit and promote involvement" of members, shareholders and consumers. *Waldbaum*, 627 F.2d at 1299. By contrast, the record here includes nothing showing that Broflovski ever reached out to anyone, not Citrus employees, consumers, or the general public. Instead, the shy Broflovski purposefully avoided attention since being hired by Citrus in 2006.

Second, Broflovski did not voluntarily inject himself into a public controversy. In fact, the controversy was created by the defamatory blog posting. This Court has explicitly held that "those charged with defamation cannot, by their own conduct, create their own defense by making the claimant a public figure." *Hutchinson*, 443 U.S. at 135. In addition, this Court held in *Wolston* that a defamation plaintiff who had garnered some media attention when forced to appear before a grand jury on espionage investigations was not a limited-purpose public figure because he did not "voluntarily thrust or inject[] himself into the forefront of the public controversy surrounding the investigation of Soviet espionage." *Wolston*, 443 U.S. at 166. This Court concluded, instead, that "the petitioner was dragged unwillingly into the controversy." *Id.* Here, it is only because of Cartman's story that Broflovski garnered any media attention at all.

Prior to Cartman’s publication of the defamatory photograph and accompanying story, there was no public controversy involving Broflovski. Like the plaintiff in *Wolston*, Broflovski was an unwitting executive thrust to the forefront of horrible allegations by Cartman, whose publication of the defamatory photograph and story both created the controversy and targeted Broflovski as the responsible individual. Prior to publication of the story on Cartman’s blog, any of the limited attention Broflovski had arguably received was as a result of his brother’s praise of him in interviews, or from Citrus retail employees’ decision to create and wear buttons expressing their fondness for him. (J.A. at 3-4.) Certainly none of these things constitute voluntary action on the part of Broflovski to attract any attention whatsoever.

Third, Broflovski has not taken on a position of prominence in the controversy. This factor is derived from the *Gertz* guidelines that public figures generally “assume special prominence in the resolution of public questions.” *Gertz*, 418 U.S. at 351. In *Gertz*, this Court held that an attorney who had represented a murder victim’s family in a civil suit against a police officer was not a limited-purpose public figure in the context of a scandalous magazine article that accused the attorney of, *inter alia*, framing the police officer. *Id.* at 326. Despite the fact that *Gertz* himself was the central focus of the article and the surrounding controversy, this Court determined that he was not a limited-purpose public figure because “he did not engage the public’s attention in an attempt to influence” resolution of the controversy. *Id.* at 352. This Court also held in *Time, Inc. v. Firestone*, 424 U.S. 448 (1976), that the wife of the well-known Russell Firestone was not a limited-purpose public figure relating to her very publicized divorce from Firestone—she did not seek public attention in an effort to influence the resolution of a controversy. Similarly, Broflovski has not assumed any special prominence or tried to engage the public’s attention to influence resolution of the controversy. Broflovski has not spoken out

on behalf of himself or Citrus, and has done nothing to assume a prominent role in the resolution of the alleged controversy.

Fourth, Broflovski has not maintained regular or continuing access to the media in order to combat the defamatory remarks. In *Hutchinson*, this Court held that a scientist who was accused by a senator of wasteful spending of government contract funds was not a limited-purpose public figure in part because he did not have sufficient access to the media. *Hutchinson*, 443 U.S. at 136. Hutchinson's access "was limited to responding to the announcement" of the accusations against him. *Id.* Likewise, Broflovski's only public statement came through his attorney and was in direct response to the allegations averred in Cartman's story. (J.A. at 7.) Broflovski did not address demands by the news media to respond to Cartman's story and, in fact, has not given any interviews to the press since arriving at Citrus. (J.A. at 3, 7.) Thus Broflovski has not had the regular and continuing media access that a true public figure must exercise. Because he fails to satisfy any of the criteria of the test for a public figure, Broflovski is therefore a private person for the purposes of this defamation action against Cartman.

B. Even if this Court finds that Broflovski is a limited-purpose public figure, Cartman is liable under a heightened actual malice standard because he disseminated false information with reckless disregard for the falsity of the matter asserted.

Assuming, *arguendo*, that Broflovski is a limited-purpose public figure, Cartman's blog posting was nevertheless defamatory, as Cartman acted with actual malice in disseminating false information, doing so with reckless disregard for the falsity of his assertions. *Sullivan*, 376 U.S. at 280. Cartman's failure to investigate, his use of an unverified source, his ill will toward Broflovski and the materiality of his inaccuracies, considered together, present "clear and convincing evidence" of actual malice. *Id.*

This Court's oft-cited ruling in *Sullivan* requires that public officials claiming defamation prove actual malice, showing by clear and convincing evidence the dissemination of false information, in a manner either knowing and intentional, or in reckless disregard for the falsity of the matter asserted. *Id.* Establishing negligence falls short of proving actual malice. *Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496, 510-11 (1991). Courts have since defined "clear and convincing evidence" as meaning "more than a preponderance." *See, e.g., Vandenburg v. Newsweek, Inc.*, 507 F.2d 1024, 1026-27 (5th Cir. 1975). Since its ruling in *Sullivan*, this Court has held that public figures claiming defamation must also satisfy the actual malice standard, whether categorized as general-purpose or limited-purpose public figures. *Sullivan*, 376 U.S. 254; *Curtis Publ'g Co. v. Butts*, 388 U.S. 130, 160 (1967) (extending the actual malice standard to public figures); *Gertz*, 418 U.S. at 351 (identifying the two types of public figures, requiring that both prove actual malice). In proving actual malice, the burden of proof rests with the plaintiff, and the existence of such malice may not be presumed. *New York Times Co. v. Connor*, 365 F.2d 567 (5th Cir. 1966).

As a threshold matter, plaintiffs alleging actual malice must prove the falsity of the statements challenged. *Phila. Newspapers, Inc. v. Hepps*, 475 U.S. 767, 775(1986) (citing *Garrison v. Louisiana*, 379 U.S. 64, 74 (1964)). This Court has repeatedly declined to consider the "quality of proof of falsity" required of plaintiffs, instead deferring to the trial court's choice on the standard of proof for falsity. *See, e.g., Hepps*, 475 U.S. at 779 n.4; *see also Harte-Hanks Commc'ns, Inc. v. Connaughton*, 491 U.S. 657, 661 n.2 (1989).

Proving actual malice itself requires that the defendant knowingly spread false information, or spread it "with a reckless disregard for the truth." *Harte-Hanks*, 491 U.S. at 667. Though reckless disregard "cannot be characterized in a single definition," it is found where the

defendant “entertained serious doubts as to the truth of his publication.” *St. Amant v. Thompson*, 390 U.S. 727, 730-31 (1968). However, even where a defendant claims ignorance of falsity, recklessness may be found where “elementary precautions . . . were ignored,” particularly when ignored while reporting highly damaging or sensitive information. *Curtis*, 388 U.S. at 157. Overall, “[r]ecklessness may be found where there are obvious reasons to doubt the . . . accuracy of [the defendant’s] reports.” *St. Amant*, 390 U.S. at 732.

A disreputable or unverified source presents such “obvious reasons” to doubt its veracity. *St. Amant*, 390 U.S. at 732. Reckless disregard may be found where, for example, “a story is . . . based wholly on an unverified anonymous telephone call.” *Id.* Evidence of ill will toward the plaintiff bolsters the inference that such investigatory failures constitute recklessness. *Harte-Hanks*, 491 U.S. at 668 (noting, “it cannot be said that evidence concerning motive or care never bears any relation to the actual malice inquiry.”); *see also Goldwater v. Ginzburg*, 414 F.2d 324 (2d Cir. 1969). While a defendant’s ill will in propagating such falsehoods is insufficient by itself to prove actual malice, such ill will supports an inference of intent to avoid truth. *Harte-Hanks*, 491 U.S. at 668; *accord Goldwater*, 414 F.2d 324, 341-42 (stating, “[t]here is no doubt that evidence of . . . motive and of intent may be adduced for the purpose of establishing, by cumulation and by appropriate inferences, the fact of a defendant's recklessness”) (citing *Curtis*, 388 U.S. 130).

Overall, appellate courts evaluating actual malice “must exercise independent judgment,” and determine *de novo* whether the record “establishes actual malice with convincing clarity.” *Bose Corp. v. Consumers Union*, 466 U.S. 485, 514 (1984). Evidence of actual malice may comprise either direct or circumstantial evidence, and the materiality of a defendant’s falsehoods will enhance an inference of reckless disregard. *Masson*, 501 U.S. 496; *Harte-Hanks*, 491 U.S.

at 668. Indeed, “proof of [knowledge or recklessness] must usually be inferred from circumstances difficult to develop on motion for summary judgment.” *Vandenburg v. Newsweek, Inc.*, 441 F.2d 378, 380 (5th Cir. 1971).

Applying the *Sullivan* standard in *Curtis*, this Court found reckless disregard in a defendant’s news article about a public figure plaintiff. *Curtis*, 388 U.S. 130. The source for the article claimed to overhear phone calls on which a college football coach relayed inside information to other teams’ coaches in advance of a scheduled meet—a charge proven false only after a reporter published the listener’s account. *Id.* at 160. There, this Court found for the plaintiff, focusing on the lack of investigative work done by the author, and noting that “elementary precautions were . . . ignored.” *Id.* at 157. Supporting this finding were the author’s lack of familiarity with the sport he covered and the complete lack of editorial or independent verification of his reporting. *Id.* at 157-58. Compounding the general lack of investigation were the gravity of the defendant’s charges and questions as to the reliability of the source (a man on criminal probation relating to bad check charges). *Id.* These concerns exacerbated the need to more closely scrutinize the source’s credibility. *Id.* at 157. In finding reckless disregard, this Court characterized the defendant as having taken “an extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers.” *Id.* at 157-58.

Distinguishable from that ruling is this Court’s decision in *St. Amant*, where the plaintiff failed to prove reckless disregard. *St. Amant*, 390 U.S. 727. There, during a political campaign, a candidate broadcasted false statements critical of his opponent, acting in good faith reliance on a trusted source’s tip. *Id.* at 731-32. This Court ruled that absent any reason to doubt the veracity of the source, incorrect information alone did not prove reckless disregard. *Id.* at

731. Yet, this Court also emphasized that if the plaintiff had reason to question the reliability of his source, failing to verify his lead would imply recklessness. *Id.* at 732-33.

In the same manner, in *Goldwater*, evidence of ill will motivated investigatory failures by the defendant, and cumulatively created an inference of reckless disregard. *Goldwater*, 414 F.2d 324. There, the Second Circuit affirmed the district court denial of summary judgment, finding clear and convincing evidence of actual malice in a reporter's published vendettas against Senator Barry Goldwater. *Id.* at 340. Among the evidence on which the court relied were the author's editorial statements of disdain for the Senator, as well as allegations that the Senator was mentally ill and suffered nervous breakdowns—claims lacking any expert or evidentiary support, and proven false at trial. *Id.* at 328-40. Indeed, the evidence suggested a “possible preconceived plan to attack [the plaintiff] regardless of the facts.” *Id.* at 339-40. The Second Circuit ruled that the circumstantial evidence of animus, combined with the lack of basic diligence in reporting, at least matched the extent of actual malice encountered in *Curtis*. *Id.* at 339, 342 (citing *Curtis*, 388 U.S. 130).

Similarly, a highly material inaccuracy bolsters an inference of recklessness. *Masson*, 501 U.S. 496. In *Masson*, this Court held that misquotes of a public figure's statements demonstrated actual malice, where the alterations resulted in a material change in the meaning of the statements. *Id.* at 517-18. Based on significant, unexplained changes between the published quotes and the original statements, this Court reversed and remanded, reasoning that the author's work gives the reader no clue that the quotations are anything but the reproductions of actual conversations, leading a reader to take the quotations at face value. *Id.* at 521-22. This Court held granting summary judgment to be particularly improper there, where the jury should have evaluated the materiality of the misquotations in evaluating reckless disregard. *Id.* at 521-25.

Here, clear and convincing evidence proves actual malice by Cartman in his blog posting. At the outset, the record contains no proof that the charges leveled against Broflovski are true. There is absolutely no evidence on the record to substantiate the virulent attack on Broflovski as a “slave driver,” having shackled workers to their workstations. (J.A. at 6.) Importantly, the *Sludge Report* post originated from a photograph known to be falsified. (J.A. at 7.) As the Court of Appeals indicated, Cartman acted in a “hasty” and “reckless” manner in reaching incorrect conclusions based on the doctored photograph. (J.A. at 32.) Broflovski asserts the complete falsity of the published allegations.

Cartman’s reckless disregard for this falsity exceeds the evidentiary threshold for actual malice set by this Court in the past. *See, e.g., Curtis*, 388 U.S. 130. Surpassing mere “failure to investigate,” Cartman’s posting employed no independent or editorial verification whatsoever. (J.A. at 5); *St. Amant*, 390 U.S. at 733. While Cartman might have first asked Broflovski for comment before posting, he did not, and he posted only one day after receiving the unverified lead. (J.A. at 5.) Indeed, Cartman here relaxed even further his already minimal investigative standards, failing to use the Citrus verification software he had used elsewhere. (J.A. at 7.) Abandoning such “elementary precautions” was particularly reckless here, as Cartman lacked expertise in the serious matter of Citrus’ record on human rights. *Curtis*, 388 U.S. at 157-58. The seriousness of the claim charges the defendant with having “recognized the need for a thorough investigation of the serious charges.” *Id.* Indeed, the potential of the reporting in *Curtis* to ruin that plaintiff’s career led this Court to find reckless disregard for falsity, implying the same reckless disregard in Cartman’s unfounded assertions. *Id.* at 157.

This failure to investigate is compounded by Cartman’s reliance on a single, unverified source—additional evidence of reckless disregard. *St. Amant*, 390 U.S. 727. In a manner

strikingly similar to the *Curtis* defendant's failure to investigate the credibility of his maligned source, Cartman makes it a policy not to question the identity or motives of his sources. (J.A. at 5); *Curtis*, 388 U.S. at 157-58. By relying only on Professor Chaos, Cartman's posting falls squarely within this Court's admonition against reporting "based wholly on an unverified anonymous telephone call." *St. Amant*, 390 U.S. at 732. The strong evidence of tampering in the published photo here exemplifies the inadequacy of relying on only one source. (J.A. at 4-5.) In that regard, Professor Chaos is easily distinguishable from the trusted single source in *St. Amant*, further implicating this Court's warning against failure to verify an unreliable source's leads. *St. Amant*, 390 U.S. at 732. That admonition carries particular weight with regard to Internet sources, who can very easily pass falsified photos or text as authentic. Cartman, seeming to recognize the danger, took precautions against this risk in the past, by his use of the Citrus verification software, but discontinued that practice here. (J.A. at 7.) Such recklessness rebuts assertions of good faith. *Id.* By relying on one source, the truth of Cartman's reports was "so inherently improbable that only a reckless man would have put them in circulation." *Id.*

Additionally probative of Cartman's recklessness is his longstanding disdain for Broflovski. Much like the vehement and prolonged vendetta described in *Goldwater*, 414 F.2d 324, Cartman's grudge began well before the incipience of the blog posting. (J.A. at 4.) Likely motivated by Citrus' encroachment on his business, for over four years Cartman leveled harsh attacks on Broflovski. *Id.* As in *Goldwater*, the record lacks evidence to support the substance of those attacks, with the motivation of personal animus further diminishing their veracity. *Goldwater*, 414 F.2d at 328-40. Because of his longstanding animus, it is reasonable to infer that Cartman was willing to publish defamatory reports, "regardless of the facts." *Id.* at 339-40.

Considering his many investigatory failures together with this animus displays “more than a preponderance” of evidence of reckless disregard. *Vandenburg*, 507 F.2d at 1026-27.

Finally, the materiality of Cartman’s falsehoods bolsters this evidence of reckless disregard. Cartman’s posting of the doctored photo is closely analogous to the doctored quotations evaluated by this Court in *Masson*, 501 U.S. 496. A doctored photo is as materially deceptive as a misquotation, particularly where accompanied by a persuasive written passage attesting to its truth. (J.A. at 6.) Cartman’s assertion that the picture is worth “more than a thousand words” evokes Justice Kennedy’s discussion in *Masson* on quotations as “add[ing] authority to the [author’s] statement and credibility to the author's work.” (J.A. at 6); *Masson*, 501 U.S. at 511. It is likely that the inclusion of the doctored photo and its caption added such credibility to Cartman’s posting, enough to garner widespread attention. (J.A. at 6.) Such outright deception at least shows Cartman’s reckless disregard for falsity, and by itself is a sufficient basis for affirmation of the Fifteenth Circuit’s decision.

CONCLUSION

For the reasons set forth above, Ike Broflovski, Respondent, respectfully requests that this Court affirm the decision of the United States Court of Appeals for the Fifteenth Circuit.

Respectfully Submitted,

Team 219
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