

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 # 220

QUESTION PRESENTED

- I. Whether the First Amendment contains a reporter's privilege that protects journalists from compelled disclosure of their confidential sources. If so, does the qualified reporter's privilege extend to Internet bloggers?
- II. Whether the Respondent qualifies as a private citizen in this defamation claim, and therefore is not required to prove the standard of actual malice under the First Amendment?

TABLE OF CONTENTS

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iv

OPINIONS BELOW..... vii

JURISDICTIONAL STATEMENT viii

STATEMENT OF THE CASE.....1

SUMMARY OF ARGUMENT5

ARGUMENT.....6

I. THE FIRST AMENDMENT DOES NOT RECOGNIZE A QUALIFIED REPORTER’S PRIVILEGE; THEREFORE RESPONDENT MAY COMPEL THE DISCLOSURE OF PROFESSOR CHAOS’S IDENTITY.....6

A. There is no qualified reporters privilege to protect Petitioner from answering the motion to compel.....8

1. The federal rules provide the only protection reporters need.9

2. The First Amendment does not entitle reporters to balancing tests concerning discovery requests.11

3. The First Amendment does not require courts to use factors in determining if a reporter is compelled to answer discovery requests.13

4. In the absence of a First Amendment privilege, neither the federal government nor the State of Silverado has legislated a shield law protecting journalists.....14

B. The status of a blogger does not merit a qualified reporter’s privilege under the First Amendment.....15

II. RESPONDENT IS NOT A LIMITED-PURPOSE PUBLIC FIGURE FOR THIS SUIT; THEREFORE, THE FIRST AMENDMENT ONLY REQUIRES RESPONDENT TO SATISFY THE STANDARD OF NEGLIGENCE SET BY THE STATE OF SILVERADO.....19

A. The conduct of Respondent does not place him into the role of a limited-purpose public figure.....20

1. There is no public controversy because Petitioner created the controversy by the publication of the defamatory statements and photo.	22
2. Respondent did not act or conduct himself as a limited-purpose public figure.....	23
3. Respondent had no role in the alleged public controversy; therefore, the defamatory statements and the photography are not related.....	25
B. Respondent, as a private citizen, need only prove a standard of negligence.....	26
1. Respondent can establish Petitioner was negligent in publishing the defamatory photo and statements on the blog post.....	27
2. In the alternative, if Respondent is a limited-purpose public figure, Petitioner’s conduct meets the standard of actual malice	28
CONCLUSION	30

TABLE OF AUTHORITIES

UNITED STATES SUPREME COURT CASES:

Assoc. Press v. NLRB, 301 U.S. 103 (1937).7, 9

Branzburg v. Hayes, 408 U.S. 665 (1972). passim

Curtis Publ’g Co. v. Butts, 388 U.S. 130 (1967). 19-20, 23

Garrison v. State of Louisiana, 379 U.S. 64 (1964).29

Gertz v. Welch, 418 U.S. 323 (1973). passim

Harte-Hanks Commc’ns, Inc. v. Connaughton, 491 U.S. 657 (1989). 20-21, 28-29

Hutchinson v. Proxmire, 443 U.S. 111 (1979).23

Lovell v. City of Griffin, 303 U.S. 444 (1938).15

Mason v. New Yorker Magazine, 501 U.S. 498 (1991). 28-29

New York Times Co. v. Sullivan, 376 U.S. 254 (1964).20, 26, 28

St. Amant v. Thompson, 390 U.S. 727 (1968).29

Time, Inc. v. Firestone, 424 U.S. 488 (1976).22

United States v. Diebold, 369 U.S. 654 (1962).7

Wolston v. Readers Digest Assn., Inc., 443 U.S. 157 (1979).22, 23

OTHER FEDERAL CASES:

Bressler v. Fortune Magazine, 971 F.2d 1226 (6th Cir. 1992).29

Carey v. Hume, 492 F.2d 631 (D.C. Cir. 1974).11

[Johnny] Carson v. Allied News Co., 529 F.2d 206 (7th Cir. 1976).20

Cervantes v. Times, 464 F.2d 986 (8th Cir. 1972).12

Clyburn v. News World Commc’ns, Inc., 903 F.2d 29 (D.C. Cir. 1990).21

<i>Dameron v. Washington Magazine Inc.</i> , 779 F.2d 736 (D.C. Cir. 1990).	21
<i>Gonzales v. NBC</i> , 194 F.3d 29 (2d Cir. 1999).	13
<i>In re Grand Jury Investigation</i> , 974 F.2d 1068 (9th Cir. 1976).	7
<i>In re Grand Jury Proceedings</i> , 810 F.2d 580 (6th Cir. 1987).	8,10-11
<i>In re Shain</i> , 978 F.2d 850 (4th Cir. 1992).	8-9
<i>Lohrenz v. Donnelly</i> , 350 F.3d 1272 (D.C. Cir. 2003).	21
<i>McKevitt v. Pallah</i> , F.3d 530 (7th Cir. 2003).	8,10
<i>Reich v. ConAgra, Inc.</i> , 987 F.2d 1357 (8th Cir. 1992).	7
<i>Silkwood v. Kerr-McGee</i> , 563 F.2d 433 (10th Cir. 1977).	13
<i>Tavoulareas v. Piro</i> , 817 F.2d 762 (D.C. Cir. 1987).	22
<i>Titan Sports, Inc. v. Turner Broad. Sys., Inc.</i> , 151 F.3d 125 (3d Cir. 1998).	15
<i>United States v. Criden</i> , 633 F.2d 346 (3d Cir. 1980).	13
<i>United States v. LaRouche Campaign</i> , 780 F.2d 1134 (4th Cir. 1986).	8
<i>von Bulow v. von Bulow</i> , 811 F.2d 135 (2d Cir.1987).	15-16
<i>Waldbaum v. Fairchild Publ'ns, Inc.</i> , 627 F.2d 1287 (D.C. Cir. 1980).	21, 22, 26
<i>Zerilli v. Smith</i> , 656 F.2d 705 (D.C. Cir 1981).	12
<i>United States v. Libby</i> , 432 F.Supp.2d 26 (D.D.C. 2006).	9

STATE CASES:

<i>O'Grady v. Superior Court</i> , 44 Cal.Rptr.3d 72 (2006).	16
--	----

CONSTITUTIONAL PROVISIONS, STATUTES, RULES:

U.S Const. amend. I6

Fed. R. Civ. P. 26..... 6, 9-10

Fed. R. Civ. P. 37.....6

Fed. R. Civ. P. 56.7

Restatement (Second) of Torts § 558 (1977).....20, 27

OTHER AUTHORITIES:

Free Flow of Information Act of 2007, H.R. 2102, 110th Cong. (1st Sess. 2007).....18

Laura Durity, *Shielding Journalists-“Bloggers”*: *The Need to Protect Newsgathering Despite the Distribution Medium*, 2006 Duke L. & Tech. Rev. 11..... 16-17

Stephanie J. Frazee, Note, *Bloggers as Reporters: An Effect-Based Approach To First Amendment Protections in a New Age of Information Dissemination*, 8 Vand. J. ent. & Tech L. 609 (2006).....8, 11

Anne M. Macrander, *Bloggers as Newsmen: Expanding the Testimonial Privilege*: 88 B.U.L. Rev. 1075 (2008). 16-17

James Thomas Tucker and Stephen Wermiel, *Enacting a Reasonable Federal Shield Law: A Reply to Professors Clymer and Eliason*. 57 Am. U. L. Rev. 1291, 1311 (2008).....14, 18

Sunny Woan, *The Blogosphere: Past Present, and Future, Preserving the Unfettered Development of Alternate Journalism*, 44 Cal W. L. Rev. 447 (2008).19

OPINIONS BELOW

The opinion and final judgment of the United States District Court for the Western District of Silverado is not published but appears in the Record on Appeal at 1-20. The opinion and final judgment of the United States Court of Appeals for the Fifteenth Circuit is not published but appears in the Record on Appeal at 21-32.

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

This case is an appeal from the Fifteenth Circuit Court of Appeals. Ike Broflovski seeks to compel the identity of Eric Cartman's source and overcome the motion for summary judgment.

Ike Broflovski is the Director of Research and Development for Citrus, a consumer electronics company. (J.A. at 2.) In 2006, Ike accepted this position from the CEO of Citrus, Kyle Broflovski. (J.A. at 2.) Since joining Citrus, Ike has shied away from media attention by giving no interviews, unlike his brother Kyle Broflovski. (J. A. at 3.) He leads a very private life and stays out of the public eye. (J.A. at 3.) At the press conference announcing Ike's hiring, Kyle Broflovski said Ike was shy and to "pay no attention to the man behind the curtain." (J.A. at 3.) During the press conference, Ike only participated by thanking his brother. (J.A. at 3.) The conference was held at Citrus, was moderately attended, and the Associated Press's coverage of the press conference focused on the new line of Citrus products, rather than Ike's hiring. (J.A. at 3.)

Eric Cartman owns his own business, an electronic sales and repair shop. (J.A. at 4.) In June 2005, a new Citrus Megastore opened across the street from Cartman's business. (J.A. at 4.) This direct competition resulted in a decline in Cartman's business. (J.A. at 4.) To supplement his income, Cartman became a part-time blogger for profit. (J.A. at 4.) His blog, *The Sludge Report*, covers topics from celebrity gossip to politics. (J.A. at 4.) The blog acts as a medium to express Cartman's personal disdain for large companies. (J.A. at 4.) Cartman has posted anti-Citrus comments and harsh criticism of the company's CEO, Kyle Broflovski on his blog. (J. A. at 4.) For example, he credits Citrus and Kyle Broflovski for driving him out of business and

alleges that Citrus has engaged in the “systematic oppression of the peoples of the Third World”. (J. A. at 4.)

The Sludge Report has over 100,000 readers. (J. A. at 4.) Many of these readers provide Cartman with information via email that he uses in reports on his blog. (J. A. at 5.) Cartman maintains an email account for the express purpose of receiving these leads anonymously. (J. A. at 12.) He claims that all information related to his sources is confidential, and the emails he receives do not contain any personal information about the senders. (J. A. at 5.)

Cartman receives multiple tips from a source referred to as “Professor Chaos.” (J. A. at 5.) Although Cartman claims that the sources of e-mail tips are anonymous, he knows Professor Chaos personally. (J. A. at 5.) The two met at an electronics tradeshow in 2006, and since that meeting, Professor Chaos has consistently provided the Petitioner with reliable information about Citrus product releases. (J. A. at 5.) Cartman indicates on *The Sludge Report* that Professor Chaos is an employee of Citrus. (J. A. at 6.)

On July 7, 2008 Professor Chaos provided an email tip that claimed the Director of Research & Development of Citrus, Ike Broflovski, was carrying out human rights abuses at a Citrus manufacturing building in Mumbai, India. (J.A. at 5.) Professor Chaos attached a photo depicting Broflovski walking among Citrus assembly line workers at the factory, allegedly yelling at the workers assembling the ePlay Touché. (J. A. at 5.) The workers appear to be wearing surgical masks and minimal protective equipment. (J. A. at 5.)

On July 8, 2008 Cartman added a new post to *The Sludge Report* entitled: “Citrus Engaging in Acts of Modern-Day Slavery?” (J. A. at 5.) Below the headline was the photo provided by Professor Chaos of Broflovski at the factory in Mumbai. (J. A. at 5.) In a caption below the photo, Cartman provides context with the text, “Ike Broflovski, surveys his

minions...but where's the whip, Ike?" (J. A. at 6.) Inside the body of the blog reads, "For those of you who don't know who this man is, it is none other than Ike Broflovski, the pawn of his evil older brother, Kyle..." (J. A. at 6.) The blog continues, "I wouldn't be surprised if Ike didn't have these poor Indians shackled to their stations at night...and I am only half-joking about that." (J. A. at 6.) Additionally, the post states "Ike Broflovski is nothing but a slave driver." (J.A. at 6.) Cartman concludes the post by asserting; "I'm just a harmless, loveable, little fuzzleball with a talent for telling the truth." (J.A. at 6.) The final line of the post concludes, "If the mainstream media won't do their jobs, then I will!" (J. A. at 6.)

This report spread rapidly throughout the online community, and eventually into the mainstream press. (J. A. at 6.) On August 19, 2008, Keith McRiley, in his top-rated cable news show "The Countdown Factor," named Broflovski "Most Heinous Individual in the Galaxy." (J. A. at 6.) McRiley strongly urged his audience to boycott Citrus products. (J. A. at 6.) McRiley credited Cartman for breaking this story. (J.A. at 6.) The next day, Citrus's stock fell twenty-five percent, and continued falling in the days that followed. (J. A. at 6.) Several retailers, such as Q-Mart, participated in the boycott and removed all Citrus products from their stores. (J. A. at 7.) The public responded to this story by threatening Broflovski's life; as result of these threats, he suffers from depression. (J. A. at 7.) Broflovski responded to the allegation by issuing a statement through his attorney, Terrance Phillips, stating, "The photograph posted on that site is a total fabrication, and Ike Broflovski will soon seek civil justice against its authors in a court of law." (J. A. at 7.)

Broflovski filed a defamation suit against Cartman on September 20, 2008. (J. A. at 7.) The lawsuit alleges that Cartman's July 8 post on *The Sludge Report* contained libelous statements. (J. A. at 7.) In the discovery stage of this litigation, Broflovski determined that the

photo was doctored. (J. A. at 7.) Through the use of computer software, Broflovski's image was digitally superimposed onto a photo of night-shift workers. (J. A. at 7.) Cartman possesses the computer capabilities to detect this forgery, and in the past, he analyzed photos received from his readers for integrity using anti-forgery software. (J. A. at 7.) However, Cartman neglected to inspect the photo in question for digital distortions, and within twenty-four hours, posted the photo on *The Sludge Report*. (J. A. at 7.) Broflovski conducted his own investigation to determine the source of the photograph. (J.A. at 8.) This inquiry included the following: depositions of several Mumbai factory managers and engineers, and circulation of an e-mail within Citrus requesting information about the leak. Then, Broflovski submitted a discovery interrogatory to Cartman. (J. A. at 8.) Cartman's response to the interrogatory asserted a First Amendment qualified privilege against disclosure of the source of the story. (J. A. at 8.)

Broflovski filed a motion to compel discovery in order to learn the identity of Cartman's source. (J. A. at 8.) In response, Cartman filed a motion in opposition to Ike's motion to compel discovery and moved for summary judgment. (J. A. at 8.) Cartman's relies on the First Amendment for protection from court-compelled disclosure of his source. (J.A. at 8.) Cartman alleges a summary judgment should be granted in his favor because Broflovski is a public figure and has failed to prove clear and convincing evidence of actual malice under the First Amendment. (J. A. at 8.)

The District Court for the Western District of Silverado denied Broflovski's motion to compel and granted Cartman's summary judgment. (J.A. at 20.) On appeal by Broflovski, the Fifteenth Circuit Court of Appeals reversed the lower court's decision on both issues. (J.A. at 32.) The appeals court concluded that the privilege asserted by Cartman does not exist under the First Amendment and that Broflovski is a private citizen entitled to the negligence standard in his

defamation action. On August 24, 2009, this Court granted Cartman’s petition for writ of certiorari. (J.A. at 33.)

SUMMARY OF THE ARGUMENT

Respondent seeks to uphold the proper First Amendment application in this case. The First Amendment “freedom of speech” does not provide a privilege Petitioner seeks. U.S. Const. amend. I. Petitioner’s First Amendment claims are distortions of well-founded Constitutional law theories. Moreover, the First Amendment was not designed to provide individuals, like Petitioner, protection for his defamatory statements.

This Court should grant Respondent’s motion to compel and deny the privilege asserted by Petitioner. The First Amendment offers protection in many circumstances; however, this Court has never found the existence of a privilege under the First Amendment that protects reporters from court-compelled disclosure of sources. In *Branzburg v. Hayes*, this Court held there is no privilege protecting journalists from revealing confidential information. 408 U.S. 665 (1972). Therefore, the applicable standard is provided in the Federal Rules of Civil Procedure and Petitioner should be compelled to disclose the identity of Professor Chaos. Even if this Court interprets the First Amendment to find the existence of a qualified reporter’s privilege, Petitioner would not qualify for protection under any of the circuit’s interpretations. Moreover, if this Court finds that journalists are entitled to a qualified reporter’s privilege, Petitioner is merely a part-time blogger, unaffiliated with any legitimate journalistic media, and deserves no First Amendment protection.

The First Amendment defamation defense asserted by Petitioner is without merit because Respondent is not a limited-purpose public figure. The First Amendment offers little shelter to those who make defamatory statements toward private citizens. The conduct of Respondent does

not place him into the role of a limited-purpose public figure. This Court has held that a limited-purpose public figure has placed themselves in “the forefront of particular public controversies in order to influence the resolution of the issues involved.” *Gertz v. Welch*, 418 U.S. 323, 345 (1973). The analysis centers around the “nature and extent of an individual’s participation in the particular controversy giving rise to the defamation.” *Id.* at 352. Respondent lives a very private life, and any controversy surrounding Respondent was directly created by the malicious acts of Petitioner through his defamatory blog – *The Sludge Report*. Because Respondent is a private citizen, negligence is the appropriate standard of fault in this defamation action.

Petitioner’s level of fault associated with the publication of the libelous material exceeds negligence, and even satisfies actual malice. Petitioner’s failure to detect the forged photograph rose to the level of negligence. The nature of the information is evidence of Petitioner’s reckless disregard for the truth because Petitioner should have relied on more than one resource to verify the tip. Petitioner saw the danger this information posed to Citrus and published it regardless of the truth. Since a jury could reasonably infer that Petitioner’s statements were negligent and defamatory, a summary judgment is improper. This Court should affirm the Fifteenth Court of Appeals opinion and uphold Respondent’s motion to compel and denial of summary judgment.

ARGUMENT

I. THE FIRST AMENDMENT DOES NOT RECOGNIZE A QUALIFIED REPORTER’S PRIVILEGE; THEREFORE, RESPONDENT MAY COMPEL PROFESSOR CHAOS’S IDENTITY.

Petitioner must answer the Rule 37 motion to compel the identity of Professor Chaos because the First Amendment provides no reporter’s privilege. The determination regarding the existence of a privilege asserted under Fed. R. Civ. P. 26(b)(5) is a question of law. Petitioner’s privilege claim involves a mixed question of law and fact, the claim should be subject to *de novo*

review. See *In Re Grand Jury Investigation*, 974 F.2d 1068, 1071 (9th Cir. 1976). A movant is entitled to summary judgment when there is no genuine issue of material fact. Fed. R. Civ. P. 56(c). A review of a summary judgment ruling is subject to *de novo* review. See *Reich v. ConAgra, Inc.*, 987 F.2d 1357, 1359 (8th Cir. 1992). During the review of a summary judgment ruling, all inferences from the underlying facts should be made in a light most favorable to the non-moving party. *United States v. Diebold*, 369 U.S. 654, 655 (1962).

As this Court held in *Branzburg v. Hayes*, there is no First Amendment privilege that protects journalists from revealing confidential information to a jury. 408 U.S. 665, 686 (1972). In the majority opinion, Justice White stated the First Amendment does not exempt the press from all inconveniences. *Id.* at 682. Justice Powell, the deciding vote in *Branzburg*, wrote:

The asserted claim to privilege should be judged on its facts by the striking of a proper balance between freedom of the press and the obligation of all citizens to give relevant testimony with respect to criminal conduct. The balance of these vital constitutional and societal interests on a case-by-case basis accords with the tried and traditional way of adjudicating such questions.

Id. at 701. Based on this Court's interpretation of the First Amendment, Petitioner has no shield to protect Professor Chaos's identity as a confidential source.

This Court has long realized that journalists have no special privileges or immunities against civil or criminal laws that all other citizens have to obey. *Assoc. Press v. NLRB*, 301 U.S. 103, 132-33 (1937). At common law, there was no privilege allowing journalists to protect confidential sources. *Branzburg*, 408 U.S. at 685. This Court should affirm the Fifteenth Circuit's denial of summary judgment and finding that there is no qualified reporter's privilege under the First Amendment. (J.A. at 23.)

A. There is no qualified reporter's privilege to protect Petitioner from answering the motion to compel.

This Court has never held that there is a First Amendment reporter's privilege shielding reporters from revealing confidential sources. Petitioner cannot use the First Amendment to avoid the motion to compel in this case. Though there are split decisions between the circuits on the issue of a reporter's privilege, the Sixth, Seventh, and Fifteenth Circuit's interpretation of the First Amendment properly follow this Court's *Branzburg* majority opinion. See *In re Grand Jury Proceedings*, 810 F.2d 580, 584 (6th Cir. 1987); *McKevitt v. Pallasch*, 339 F.3d 530, 533 (7th Cir. 2003). Therefore, this Court should follow the interpretation set forth by the Sixth, Seventh, and Fifteenth Circuits and apply the standard set in the Federal Rules of Civil Procedure.

The Fourth, Fifth, and Eleventh Circuits recognize a highly qualified reporter's privilege. Stephanie J. Frazee, Note, *Bloggers as Reporters: An Effect-Based Approach to First Amendment Protections in a New Age of Information Dissemination*, 8 Vand. J. Ent. & Tech. L. 609, 616-19 (2006). The Fourth Circuit's test comes close to the spirit of the *Branzburg* decision by only shielding reporters from answering subpoenas if there is evidence of governmental harassment or bad faith. *LaRouche v. NBC*, 780 F.2d 1134 (4th Cir. 1986); *In re Shain*, 978 F.2d 850, 852-53 (4th Cir. 1992). This position is illogical since the Federal Rules of Civil Procedure already accomplish that goal by putting the standard in the rule. The First, Second, Third, Ninth, Tenth, and D.C. Circuits recognize a broad reporter's privilege by relying on Justice Powell's *Branzburg* concurring opinion, rather than the majority opinion. Stephanie J. Frazee, Note, *Bloggers as Reporters: An Effect-Based Approach to First Amendment Protections in a New Age of Information Dissemination*, 8 Vand. J. Ent. & Tech. L. at 616-19 (2006).

This Court and all of the circuits either reject or severely limit any reporter's privilege in criminal cases because of the strong judicial need for the information. In anticipation of Petitioner's argument that *Branzburg* does not apply in this case because it was a criminal case, Respondent can demonstrate there is a vital need for the information. Previously, this Court in *Branzburg*, compelled a reporter to reveal before a grand jury the identities of men that were taking drugs in his photograph. 408 U.S. 665, 709 (1972). The D.C. Circuit, in *United States v. Libby*, rejected the reporter's privilege at the trial stage of a criminal proceeding because the First Amendment does not protect journalists from producing documents that are critical to the prosecution of criminal activity. 432 F.Supp.2d 26,48 (2006). *In re Shain*, a Fourth Circuit case, compelled four reporters to testify about interviews they had with a Senator charged for violating the Hobbs Act because of the strong public interest in the information. 978 F.2d 850, 851 (4th Cir. 1992).

Nevertheless, this Court has held that *all* citizens must obey criminal and civil laws. *Assoc. Press v. NLRB*, 301 U.S. 103, 132-33 (1937). Therefore, Petitioner must follow the laws like every other citizen. Allowing publications of libelous statements without accountability hurts the public by diminishing the credibility of the news media. Even though this is a civil defamation case, compelled disclosure serves the public interest because the Respondent cannot reasonably prove his defamation case without the source and there is no way to redress his injured reputation.

1. The federal rules provide the only protection reporters need.

The Sixth, Seventh, and Fifteenth Circuits, though a minority, are the only circuits correctly interpreting that the First Amendment does not offer a reporter's privilege. This Court, the Sixth, Seventh and Fifteenth Circuits properly hold that Fed. R. Civ. P. 26(c) is the only

protection reporters need from burdensome discovery requests. *Branzburg*, 408 U.S. 665; *In re Grand Jury*, 810 F.2d 580 (6th Cir. 1987); *McKevitt v. Pallasch*, 339 F.3d 530 (7th Cir. 2003). Rule 26(c) provides that any person seek a protective order from the trial court if the discovery request is annoying, embarrassing, oppressing, or unduly burdensome or expensive. Fed. R. Civ. P. 26(c). Respondent's request is part of a legitimate need for information and not a tactic to annoy Petitioner.

The Sixth Circuit denied a journalist petition for habeus corpus after the district court kept a television reporter in contempt, for refusing to testify in front of a grand jury. *In re Grand Jury*, 810 F.2d at 581 (6th Cir. 1987). The television reporter failed to comply with a subpoena to provide video to law enforcement to aid in the identification of two gang members who killed a police officer. *Id.* The Sixth Circuit held that *Branzburg* did not require any special protection to journalists and dissolved the stay on the contempt order and denied the writ. *Id.* at 588.

The Seventh Circuit properly holds that the court should consider *all* subpoenas in light of their reasonableness under the circumstances, because the rules should not change because journalists are subpoenaed. *McKevitt v. Pallasch*, 339 F.3d at 533 (7th Cir. 2003). The Seventh Circuit dealt with a subpoena for tape recordings to help prepare for cross-examination of the prosecution's star witness. *McKevitt*, 339 F.3d at 531. *McKevitt* rejected any privilege recognized in the other circuits and compelled the tape recordings for use in the Irish trial based on *Branzburg* rejection of a First Amendment and common law reporter's privilege. *Id.* at 532-35. These cases relied on *Branzburg* only using the Federal Rules of Civil Procedure.

Petitioner seeks to avoid revealing the source of the photograph posted on his blog *The Sludge Report*, but this is inconsistent with the Sixth and Seventh Circuits requiring reporters to turn over their video or recordings and reveal sources. In application of Rule 26(c), Petitioner

would have to answer the motion to compel because the disclosure of Professor Chaos's identity is not troublesome or oppressive, nor does Respondent seek it to annoy the Petitioner or damage his relationship with confidential sources. This compelled disclosure will not damage Petitioner's relationship with Professor Chaos because they already have a continuing friendship. (J.A. at 5.) Revealing Professor Chaos's identity will not be troublesome because he has known him on a personal level for over two years. (J.A. at 5.) Respondent already independently tried to obtain Professor Chaos's identity and failed; thus, this is the first request Respondent made to Petitioner for the information. (J.A. at 8.) Respondent has satisfied the requirements of Rule 26(c), and this Court should grant the motion to compel.

2. The First Amendment does not entitle reporters to balancing tests concerning discovery devices.

Some circuits balance the interests of the First Amendment and the judicial need for disclosure, as suggested in the *Branzburg* concurring opinion. Stephanie J. Frazee, Note, *Bloggers as Reporters: An Effect-Based Approach to First Amendment Protections in a New Age of Information Dissemination*, 8 Vand. J. Ent. & Tech. L. at 616-19 (2006). These circuits only balance the interests if there is evidence of harassment, but these tests incorrectly rely on the three dissenting opinions in *Branzburg*. *In re Grand Jury*, 810 F.2d at 584. Under the First Amendment, Petitioner is not entitled to a balancing test.

The D.C. Circuit balances the freedom of the press with the obligation of all citizens to give relevant testimony. *Carey v. Hume*, 492 F.2d 631, 636 (D.C. Cir. 1974). In *Carey*, a newspaper column alleged the plaintiff moved records during an ongoing criminal investigation to hide them. *Id.* The court upheld the district court's ruling to reveal the identity of the eyewitnesses and found that there was not an absolute reporter's privilege. *Id.* at 633. The *Carey* decision supports the Respondent's position that this Court should compel disclosure of

Professor Chaos's identity because shielding the reporter would vitiate the remainder of the libel laws.

In *Zerilli v. Smith*, the D.C. Circuit stated the First Amendment interests of a reporter protecting his informants outweighed the public interest for disclosure. 656 F.2d 705 (D.C. Cir 1981). However, in *Zerilli*, the reporters were not parties in the criminal case. The court acknowledged that a distinction could be drawn in civil cases between when the journalist is a party and when he is not a party. *Id.* at 714. When the journalist is a party, the court would favor compelled disclosure because being able to assert the privilege would remove the potential for liability. *Id.* Since Petitioner is a party, the balance of factors would shift against him because allowing him to claim the privilege would shield him from liability in the defamation case.

When balancing the interests the court should presume the libellee has a justifiable need for the information the libellant possesses. *Cervantes v. Time, Inc.*, 464 F.2d 986, 994 (8th Cir. 1972). In *Cervantes*, Life magazine ran an article claiming that the Mayor had personal ties to the Mob. *Id.* at 988. The Mayor argued that, as a libellee, he could not possibly prove the actual malice standard without disclosure of the reporter's sources. *Id.* at 991. The Eighth Circuit did not compel disclosure because the balance of interest in favored of the reporter. *Id.* The evidence the showed reporter provided the Mayor with hundreds of documents, satisfying multiple factors set by the court, and the Mayor had deposed almost every employee with any connection to the allegedly defamatory article. *Id.* at 994. However, in this case, Petitioner has given Respondent nothing that would help in proving fault in the defamation case. Likewise, Respondent's need for the disclosure outweighs Petitioner's interest in protecting Professor Chaos's identity.

Even if this Court adopts a balancing test, this Court should compel disclosure because all citizens have a duty to give relevant testimony; moreover, Petitioner is a party and would avoid liability. Petitioner's interest is fending off a chilling effect of his confidential sources preventing him from writing his blog. Respondent's interest is being able to prove his defamation case and receive damages for his injured reputation. The balance is in favor of Respondent because the source is necessary for proving the cause of action, the First Amendment is not supposed to shield defamatory statements, and the interest in his reputation is greater than the Internet gossip blog. In addition, Respondent, as a libellee, possesses a presumption of justifiable need for the identity of Professor Chaos. Respondent can satisfy a balancing test and compel Professor Chaos' identity.

3. The First Amendment does not require courts to use factors in determining if a reporter has to answer discovery requests.

Other circuits use factors to determine if the reporter can claim a privilege. These circuits consider the following factors to determine if they should compel disclosure: (1) whether the party seeking information has independently attempted to obtain the information elsewhere and has been unsuccessful, (2) whether the information goes to the heart of the matter, (3) whether the information is of relevant, and (4) the type of controversy. *Gonzales v. NBC*, 194 F.3d 29, 34 (2d Cir. 1999); *Silkwood v. Kerr-McGee Corp.*, 563 F.2d 433, 438 (10th Cir. 1977); *See generally United States v. Criden*, 633 F.2d 346, 358-59 (3d Cir. 1980).

In *Gonzales*, the plaintiffs filed a civil rights suit alleging a Deputy Sheriff pulled them over because they were Hispanic. *Gonzales*, 194 F.3d at 31. NBC aired a "Dateline" special episode with footage of the same Deputy Sheriff stopping another person for inadequate reasons. *Id.* The Second Circuit, using the factors, compelled NBC to turn over videotapes because the information was relevant to a significant issue in the case. *Id.* at 36.

The factors establish such a low threshold, that a privilege could be overcome in nearly all cases. By using the factors tests, this Court should still grant Respondent's motion to compel because he satisfies all of the factors. First, Respondent reasonably sought to obtain the information on his own by deposing the Mumbai factory manager, along with several engineers and e-mailed all Citrus employees to try to determine the source of the leak. (J.A. at 8.) Because Professor Chaos is the source of the photo and blog entry on *The Sludge Report*, it is highly relevant and goes to a crucial issue of the defamation case. (J.A. at 5.) Finally, because this is a defamation case and Petitioner is a party to the case allowing himself to shield himself from answering the subpoena would essentially shield him from liability.

4. In the absence of a First Amendment privilege, neither the federal government nor the State of Silverado has legislated a shield law protecting journalists.

This Court should compel Petitioner to reveal the identity of Professor Chaos because there is no First Amendment reporter's privilege, Silverado has not passed a shield law for reporters, and finally, there is no federal shield law protecting journalists to protect a journalist from revealing information to a court. Petitioner wants this Court to find a First Amendment or common law privilege because Silverado has not created a shield law, but this is illogical because the creation of privileges has always been left to the states. Despite hundreds of bills in the thirty-five years since the *Branzburg* decision, Congress has never passed a federal shield law. James Thomas Tucker and Stephen Wermiel, *Enacting a Reasonable Federal Shield Law: A Reply to Professors Clymer and Eliason*. 57 Am. U. L. Rev. 1291, 1311 (2008). The failure of Congress to enact such a federal shield law is a strong conclusion that there is no inherent First Amendment protection for reporters. Because there is no federal shield law, state sovereignty leaves the creation of privileges to the state legislatures, and Silverado decided not to exempt reporters from testifying during the judicial process. As the Fifteenth Circuit held, it would be

grossly unfair to require Respondent to search through thousands of e-mails and interview every employee without assurance of even finding information regarding the leak; therefore, Petitioner should have to answer the motion to compel. (J.A. at 27.)

B. The status of a blogger does not merit a qualified reporter's privilege under the First Amendment.

Should a qualified reporter's privilege be established, this Court has never recognized bloggers as journalists worthy of First Amendment protection. The Circuits have held that to qualify as a journalist, he must be involved actively in the gathering and dissemination of news. *von Bulow v. von Bulow*, 811 F.2d 135, 140 (2d Cir.1987). The party claiming the privilege has the burden of establishing the elements of the privileged relationship. *Id.* at 144. Although the freedom of the press is not limited to newspapers and periodicals, *Lovell v. City of Griffin*, 303 U.S. 444, 452 (1938), the Third Circuit stressed that *Lovell* does not shield all people with a manuscript, film, or a website. *Titan Sports, Inc. v. Turner Broad. Sys., Inc.*, 151 F.3d 125, 128 (3d Cir. 1998). This Court should give more weight to the Third Circuit because this decision is updated and relevant to technological advances. Petitioner's blogging does not constitute active involvement in the gathering and dissemination of news to merit a reporter's privilege.

In *von Bulow*, Reynolds, a third party witness investigated Mrs. von Bulow by attempting to write a book about her and her children, and took notes during Mr. Von Bulow's criminal trial for a possible contract with the *New York Post*. *von Bulow*, 811 F.2d at 139. Mrs. von Bulow subpoenaed "any books being written" about the case, but Reynolds claimed a reporter's privilege. *Id.* The Second Circuit held that since the primary purpose of the confidential information was to vindicate a family rather than for newsgathering, the qualified reporter's privilege did not apply making the information discoverable. *Id.* at 145. *Von Bulow* also held a person taking notes during a trial while negotiating to write for a newspaper does not qualify for

journalistic protection. *Id.* Petitioner, like in *von Bulow*, focuses on vindication rather than on gathering the news.

The only refuge Petitioner has for recognition as a journalist is a state court decision. In *O’Grady v. Superior Court*, the California appellate court held that their state shield law did protect bloggers. 44 Cal.Rptr.3d 72, 77-81 (2006). The *O’Grady* decision, in the interpretation of the shield law, held that the news-oriented website qualified as a newspaper, periodical, or magazine. *Id.* at 100. Petitioner’s blog, *The Sludge Report*, covers celebrity gossip, his bitterness toward large companies, and his views on the politics and is in no way a news-oriented website.

The states that have adopted shield laws generally focus on the journalist’s affiliation and not the motivation of the journalists. Laura Durity, Note, *Shielding Journalist-“Bloggers”*: *The Need to Protect Newsgathering Despite the Distribution Medium*, 2006 Duke L. & Tech. Rev. 11, 22. California’s definition of a journalist is “a person connected with or employed [by] a newspaper, magazine, or other periodical publication, or by a press association or wire service, or any person who has been so connected or employed.” Laura Durity, Note, *Shielding Journalist-“Bloggers”*: *The Need to Protect Newsgathering Despite the Distribution Medium*, 2006 Duke L. & Tech. Rev. at 22. Delaware’s definition is even more limited to defining journalists as those earning their principal livelihood or who have spent at least twenty hours in the last few hours gathering information for dissemination to the public. Laura Durity, Note, *Shielding Journalist-“Bloggers”*: *The Need to Protect Newsgathering Despite the Distribution Medium*, 2006 Duke L. & Tech. Rev. at 22. Alabama’s shield law limits the journalistic class to people employed by or strongly associated with any newspaper, radio, television, or broadcasting station in a newsgathering capacity. Anne M. Macrander, Note, *Bloggers as*

Newsmen: Expanding the Testimonial Privilege, 88 B.U. L. Rev. 1075, 1086 (2008). If this Court were to adopt a definition of a journalist similar to these, Petitioner would not qualify as a journalist.

A minority of states, including Oklahoma, Alaska, and Louisiana, are more liberal by defining a journalist as someone regularly engaged in the business or activities of journalism, which could include bloggers. Laura Durity, Note, *Shielding Journalist-“Bloggers”*: *The Need to Protect Newsgathering Despite the Distribution Medium*. 2006 Duke L. & Tech. Rev. at 22. The District of Columbia also has an open definition of a journalist as anyone associated with the news media. Anne M. Macrander, Note, *Bloggers as Newsmen: Expanding the Testimonial Privilege*, 88 B.U. L. Rev. at 1087. North Dakota also has a more lenient definition, but they require employment in the news industry. However, the general trend is to define the protected class of journalists as those with a relationship to or significant association with a traditional news media engaged in standard journalistic activities. Laura Durity, Note, *Shielding Journalist-“Bloggers”*: *The Need to Protect Newsgathering Despite the Distribution Medium*, 2006 Duke L. & Tech. Rev. at 22. Adopting a liberal definition is incorrect because that would extend the class of journalists to almost anyone who posts online. Petitioner would not qualify as a journalist even under these liberal definitions because he is not affiliated with a recognized news media.

Using any of the state reporter shield laws, Petitioner would not qualify for protection as a journalist. Petitioner is not a journalist, under any state law, because he owns and operates Cartman’s Computer World as his primary job. (J.A. at 4.) He began operating *The Sludge Report* to supplement his income and to express his personal disdain after Citrus nearly drove him out of business. (J.A. at 4.) Petitioner’s blog covers celebrity gossip to politics by way of

his populist and nationalist viewpoint. (J.A. at 4.) Although some bloggers affiliated with news networks might be legitimate reporters, his journal entries with his opinions of events and people are not journalism. The fact that his blog attracts 100,000 readers does not legitimize the blog since a great number of them are probably reading it for the gossip. (J.A. at 4.) No newspaper, magazine, periodical, or wire service employs or associates itself with Petitioner, nor is Petitioner earning his principal livelihood from his blogging activities. Since Petitioner does not satisfy any of the current definitions of journalists, this Court should hold that Petitioner is a blogger only, not a journalist.

The federal government does not want to shield Petitioner or legitimate journalists from answering discovery requests and the recently failed H.R. 2102, the “Free Flow of Information Act” secretes that point. Free Flow of Information Act of 2007, H.R. 2102, 110th Cong. (1st Sess. 2007). The 2007 House Resolution created a four-part definition of a journalist: (1) person regularly engages in acts of journalism, (2) with the purpose for the gathering of information being to disseminate the information to the public, (3) must do so for their “livelihood” or substantial financial gain, but (4) excludes most foreign entities for national security reasons. James Thomas Tucker and Stephen Wermiel, *Enacting a Reasonable Federal Shield Law: A Reply to Professors Clymer and Eliason*. 57 Am. U. L. Rev. 1291, 1313-14 (2008). If this Court were to adopt the failed House resolution’s definition of a journalist, Petitioner would also not merit protection because his blogging is not his livelihood. Petitioner claimed the blogging supplemented his income because his primary business was in decline; thus, he tacitly admitted that the store was his livelihood.

There are millions of bloggers on the Internet at any given time and shielding all of them under a qualified reporter’s privilege would essentially allow many libelous statements to go

unpunished. Most bloggers on the Internet are not even in the attempt of gathering news, but use their blogs as online diaries rather than forums for reporting the news. The average blogger is a man in his twenties writing at home with one or more higher education degrees living in the suburbs. Sunny Woan, *The Blogosphere: Past, Present, and Future: Preserving the Unfettered Development of Alternative Journalism*, 44 Cal. W. L. Rev. 477, 486 (2008). Extending a qualified reporter's privilege to bloggers hurts the freedom of the press by comparing legitimate journalists to the Perez Hiltons of the world.

Since Petitioner has not met his burden of proving that he is a reporter, this Court should not extend any special exemption to him. Allowing Petitioner protection under a reporter's privilege would give a windfall to the millions of bloggers posting their personal feelings about life with no tie to any news organization the opportunity to claim a reporter's privilege. Allowing this protection would be grossly unfair to all of the libellees trying to prove their defamation cases against men in their twenties posting journal-type entries from their homes. This Court should affirm the Fifteenth Circuit's decision that even if the First Amendment provides a qualified reporter's privilege, it does not shield Petitioner from disclosing Professor Chaos's identity.

II. RESPONDENT IS NOT A LIMITED-PURPOSE PUBLIC FIGURE FOR THIS SUIT; THEREFORE, THE FIRST AMENDMENT ONLY REQUIRES RESPONDENT TO SATISFY THE STANDARD OF NEGLIGENCE SET BY THE STATE OF SILVERADO.

The original intent of the Founders was that a "free press would advance 'truth, science, morality and arts in general.'" *Curtis Publ'g Co. v. Butts*, 388 U.S. 130, 147 (1967). The statements by Petitioner do not advance any such topics but only the selfish desire to ruin the reputation of Respondent. The First Amendment protection balances the need for freedom of press and speech with a state's legitimate interest in redressing the injury of libelous statements.

Gertz v. Welch, 418 U.S. 323, 342 (1973). To address this genuine concern the State of Silverado adopted the language of the Restatement (Second) of Torts to establish a cause of action for libel. (J.A. at 14.) In this case, Respondent can prove he is a private citizen and that the First Amendment actual malice standard does not apply. Therefore, the need to redress Respondent's injured reputation is greater than the need of Petitioner to publish defamatory statements. Thus, this Court should affirm the decision of the Fifteenth Circuit Court of Appeals and find Petitioner was negligent in issuing the false statement and forged photograph.

A. The conduct of Respondent does not place him into the role of a limited-purpose public figure.

This Court has established four views of the plaintiff in a defamation cause of action. In *New York Times Co. v. Sullivan*, the public official received its own category as a plaintiff, which included a heightened standard of actual malice in order to recover. 376 U.S. 254 (1964). Later, this Court recognized a public figure status defined as a person with an independent amount of public interest and, by position or purposeful activity, has pushed themselves into a public controversy. *Curtis*, 388 U.S. at 154-55. The public figure status can be attained by assuming a role of special prominence in the affairs of society. *Gertz*, 418 U.S. at 345. This position is one of persuasion and influence. *Id.* This Court defined a public figure as one who commands a substantial amount of independent public interest at the time of publication. *Curtis*, 388 U.S. at 154-55. The public figure must also establish actual malice on the part of the defendant in order to recover. *Harte-Hanks Commc'ns, Inc. v. Connaughton*, 491 U.S. 657 (1989). Additionally, the Court divided the public figure into two categories: the general-purpose public figure and the limited-purpose public figure in *Gertz v. Welch*. 418 U.S. at 351. The general-purpose public figure has attained such public notoriety as to become a public figure in all contexts. *See [Johnny] Carson v. Allied News Co.*, 529 F.2d 206 (7th Cir.1976). The limited-purpose public

figure has placed themselves “to the forefront of particular public controversies in order to influence the resolution of the issues involved.” *Gertz*, 418 U.S. at 345. Ultimately, this Court applied the actual malice standard to all classifications of public figures. *Harte-Hanks Commc’ns*, 491 U.S. at 657.

The last view of the plaintiff is the private citizen, who lacks the effective opportunities and channels of communication for repudiation. This Court has set the minimum standard of fault in a defamation suit, involving a private citizen, for state courts at negligence. *Gertz*, 418 U.S. at 348-49. The status of Respondent in this case should be a private citizen and not a limited-purpose public figure. Under this status, Respondent is subject to the State of Silverado’s negligence standard and can satisfy this burden.

To determine the status between a limited-purpose public figure and private citizen, this Court has set out general guidelines and the Circuit courts, in interpretation, have expanded the analysis. In *Gertz*, this Court stated it was “preferable to reduce the public-figure question to a more meaningful context by looking to the nature and extent of an individual’s participation in the particular controversy giving rise to the defamation.” *Id.* at 352. The District Circuit court has broken this question into three parts: (1) whether there is a public controversy; (2) what the plaintiff’s role, if any, was in the public controversy; and (3) whether the defamation related to the plaintiff’s role. *Waldbaum v. Fairchild Publ’ns, Inc.*, 627 F.2d 1287, 1296-98 (D.C. Cir. 1980); *See e.g. Lohrenz v. Donnelly*, 350 F.3d 1272 (D.C. Cir. 2003); *Dameron v. Washington Magazine, Inc.*, 779 F.2d 736 (D.C. Cir. 1985); *Clyburn v. News World Commc’ns, Inc.*, 903 F.2d 29 (D.C. Cir. 1990).

1. There is no public controversy because Petitioner created the controversy by the publication of the defamatory statements and photo.

As to the first question, the *Waldbaum* court stated a public controversy must be a real dispute in which the outcome affects the general public and not simply a matter of interest to the public. 627 F.2d at 1296. The controversy is public by the fact that people were actually discussing it and “persons beyond the immediate participants in the dispute [are likely] to feel the impact of its resolution.” *Tavoulareas v. Piro*, 817 F.2d 762, 772-73 (D.C.Cir. 1987). This Court suggested there is no public controversy unless it contains issues subject to a debate. *Wolston v. Readers Digest Assn., Inc.*, 443 U.S. 157, 166 n.8 (1979). In *Wolston*, there was no public controversy surrounding the appeal “of permitting Soviet espionage in the United States because all responsible U.S. citizens were opposed to it.” *Id.* Another example, this Court found the dissolution of marriage, through the judicial proceedings, is not a public controversy even though there may be public interest. *Time, Inc. v. Firestone*, 424 U.S. 448, 454 (1976). The public controversy in this case would be the human rights violations in over-seas factories of Citrus. Undoubtedly, this topic is of interest to the public and people have discussed human rights violations in general; however, this issue is not truly debatable because the majority of Americans would agree about opposing human rights violations. In considering whether the resolution would affect others, these alleged violations took place in a foreign country with Indian workers, and adjudication would not affect the welfare of the American public. Prior to Petitioner’s blog post, the American public was not discussing human rights violations by Citrus or Respondent at over-seas factories. The alleged violations involve Citrus as a company more than they involve Respondent; especially, due to the fact that Respondent was forged into the photograph. The evidence of the forgery takes Respondent not only out of the photograph but also out of the other blog statements. The public controversy is a fabrication by Petitioner, as

evidenced through the forgery, and is not a real dispute in which the outcome affects the general public.

2. Respondent did not act or conduct himself as a limited-purpose public figure.

The second question begins to involve the plaintiff and the nature and extent of his participation in this particular controversy. This Court has articulated the plaintiff must voluntarily place himself into a public controversy. *Gertz v. Welch*, 418 U.S. 323, 351-52 (1973). By placing himself in the public controversy, the public figure strives to influence the resolution and voluntarily exposes himself to increased risk of injury from libelous action against him. *Id.* at 345. This status was either attained on his own or by his own purposefully activity amounting to a “thrusting of his personality into the vortex of an important public controversy.” *Curtis Publ’g Co. v. Butts*, 388 U.S. 130, 154-55 (1967). Limited-purpose public figures are individuals that become involved in a public controversy and are thereby transformed into public figures only with regard to that particular controversy. *Gertz*, 418 U.S. at 345. Respondent did not participate in any way to become involved with or resolve any controversy. By neither his role as a Director for Citrus, nor his personality, did Respondent voluntarily place himself at the center of a public controversy.

It is vital for a court to examine all the factors of whether a person is a public figure as they exist before the defamatory statements because it is possible the press converted the person into a public figure by publication. *Hutchinson v. Proxmire*, 443 U.S. 111 (1979). In *Hutchinson*, this Court found that merely receiving federal funds for research projects, despite being a writer for professional journals, did not make a limited public figure. *Id.* at 135-36. Also this Court in *Wolston v. Reader’s Digest Assn., Inc.*, found a person was not a limited public figure for refusing to participate in a grand jury proceeding about Soviet espionage. 443 U.S.

157, 158 (1979). Petitioner's blog post and ensuing media coverage converted Respondent into a public figure.

In the blog posting, Petitioner alleges Citrus generated profits from over-worked factory employees in Mumbai, India. (J.A. at 7.) Nevertheless, Petitioner takes it another step and places Respondent into the discord by forging a photograph with his person at the factories in Mumbai, India and stating that Respondent is in control of these alleged inhumane conditions. Through the discovery process of the Western District Court of Silverado, Respondent has shown his image was placed into Petitioner's photograph. (J.A. at 7.) This lawsuit is focused on Respondent and not Citrus; therefore, whether the photograph without the forged image is true or not, does not matter for Respondent's libel action. Petitioner involuntarily put Respondent into a narrow public controversy involving Citrus and its business practices in India.

Prior to *The Sludge Report*, Respondent was not connected to the media or Petitioner and did not seek the attention of general public. Respondent attended one press conference where Kyle Broflovski, CEO of Citrus, announced the employment of Respondent, and the related articles only gave this news one line at the bottom. (J.A. at 3.) The role Respondent had at Citrus did not make him a limited-purpose public figure. Citrus had subsumed a large market for its products, and therefore, did not depend on the addition of Respondent for notoriety. Citrus wanted Respondent for his knowledge and creativity. As Director of Research and Development, Respondent did create new products, but he did not seek public attention for his innovations. Although Respondent may receive respect for his work at Citrus by a few sales representatives, this does not represent the public at large. After employment at Citrus, Respondent chose to stay out of the public eye despite the ability to join his brother Kyle Broflovski in the limelight. (J.A. at 3.) The level of public awareness of Respondent is demonstrated in Petitioner's own post "For

those of you who don't know who this man is, . . ." (J.A. at 6.) At the time of the publication, Respondent had been with Citrus for almost two years and yet Petitioner must explain who Respondent is to the public at large. Also, Petitioner only named Citrus in the title of the blog and did not mention Respondent. Respondent did not act in a way that placed himself into the alleged public controversy or attempt to influence an outcome. The conduct of Respondent demonstrates an intention to keep the media and the general-public at a distance.

3. Respondent had no role in the alleged public controversy; therefore, the defamatory statements and photography are not related.

Under the last part of the analysis, the court examines the defamatory statements to find if there is any connection to plaintiff's role in the public controversy. Respondent had no role in the public controversy Petitioner constructed. As stated above, Petitioner unwillingly put Respondent into an alleged public controversy. Prior to the post on *The Sludge Report*, Respondent was not involved in any public controversies, and definitely, not a controversy about human rights violations in Mumbai, India. The defamatory statements and photograph Petitioner posted are not directly related because he fabricated the entire blog to create the public controversy.

Respondent has demonstrated through the limited-purpose public figure test that despite allegation of human rights violations in an overseas factory, he was involuntarily put into the forefront of the public controversy. The nature and extent of his involvement in the public controversy the Petitioner fabricated. Moreover, his conduct and role at Citrus did not make him a limited-purpose public figure. This Court should find Respondent was not a limited-purpose public figure in the public controversy Petitioner created.

B. Respondent as a private citizen need only prove a standard of negligence.

This Court found they needed to create a different standard for public figures than private citizens because they have a sustainable remedy of self-help, and they have exposed themselves, by chosen position, to a greater risk of injury from defamatory falsehood. *New York Times Co. v. Sullivan*, 376 U.S. 254, 344-45 (1964). The private citizen has less access to channels of effective communication and less realistic opportunity to counteract false statements. *Gertz*, 418 U.S. at 344. As opposed to the public figure, who has greater access to the media and can demonstrate their effective channels of communication by showing by their preexisting media exposure. *Waldbaum v. Fairchild Publ'ns, Inc.*, 627 F.2d 1287, 1291 (D.C. Cir. 1980)(citing *Gertz*, 418 U.S. at 344). Respondent has no realistic method for repairing his damaged reputation.

At the time of publication on July 8, 2008, Respondent did not command his own personal amount of public interest. Respondent, unlike his CEO brother, did not make public appearances or interviews prior to the publication by Petitioner. (J.A. at 3.) Citrus's employment of Respondent does not suffice attaining the status of public figure on his own. After his employment, Respondent intentionally avoids the public eye and refuses to give any interviews to the press. (J.A. at 3.) Even at the announcement of Respondent's hiring, Kyle Broflovski, brother and CEO of Citrus said Respondent was shy and to "pay no attention to the man behind the curtain." (J.A. at 3). Respondent has suffered substantial harm as a result of the publication. Personally, Respondent has suffered depression from the continuous threats to his life. Professionally, Citrus stocks have dropped twenty-five percent and continue falling, while numerous retailers are pulling their products off the shelves. (J.A. at 6.)

Respondent made one response to the defamatory remarks by Petitioner through his attorney, Terrence Phillips. (J.A. at 7.) Undoubtedly, Respondent had access to a channel of communication through his brother Kyle Broflovski. However, Respondent's access was not effective in the aspect of being able to properly dispel the defamatory statements. Prior to the publication, Respondent not interacted with the press and avoided any involvement with the public in general. (J.A. at 6.) Respondent had no realistic opportunity to deal with Petitioner's statements. The label "Most Heinous Individual in the Galaxy" given by a top-rated news show could hardly be responded to by any private citizen. (J.A. at 6.) Even if Respondent satisfied demands by news media, the discussion would have centered on the Citrus factory in India and not repairing his reputation.

1. As a private citizen, Respondent can establish Petitioner was negligent in publishing the blog post "Citrus Engaging in Acts of Modern-Day Slavery?".

In *Gertz v. Welch*, this Court held the state has a legitimate interest in protecting the reputation of private citizens as against the need of the press. 418 U.S. 323, 323 (1973). Respondent has proven he is a private citizen and deserves protection and a remedy for his injured reputation. The State of Silverado has adopted the common law tort of defamation through the Restatement (Second) of Torts. (J.A. at 14.) Respondent is able to prove his defamatory case by showing the elements: "(a) a false and defamatory statement concerning another; (b) an unprivileged publication to a third party; (c) fault amounting to at least negligence on the part of the publisher; and (d) 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). Petitioner made a defamatory statement towards Respondent in *The Sludge Report*, which is a blog site on the worldwide web, on July 8, 2008. (J.A. at 4.) The defamatory photography was published despite a doctoring of the image to portray Respondent

inside the picture. (J.A. at 7.) The statements and photograph portray Respondent as a “slave-driver” shackling his workers to their stations. (J.A. at 6.) Petitioner received the photograph on July 7, 2008, and on July 8, 2008 placed it on his website *The Sludge Report*. (J.A. at 6.) Petitioner had the time to run the photograph for accuracy and time to check the accuracy of his article. The material contained in the article was not of such a type that required immediate dissemination. The forgery was detectable through a simple procedure and using equipment possessed by Petitioner. (JA at 7.) As a result of the posting on *The Sludge Report*, Respondent received death threats and fell into a deep depression. (J.A. 7.) Additionally, the nature of the statements affected the employer of Respondent and caused a drop of twenty-five percent in the stock price and the loss of distributors, such as Q-Mart. (J.A. at 6-7.)

2. Even if Respondent is a limited-purpose public figure, the conduct Petitioner meets the standard of actual malice.

Should this Court choose to place Respondent as a limited-purpose public figure, Petitioner is liable under the *New York Times* standard. The actual malice standard is proven by clear and convincing evidence that the statements were made “with knowledge that it was false or with reckless disregard of whether it was false or not.” *New York Times Co. v. Sullivan*, 376 U.S. 254, 279-80 (1964). This Court intended the actual malice standard, not to be the same concept as an evil intent or “ill will” on the part of the defendant, but rather a purposeful avoidance of the truth. *Harte-Hanks Commc’ns, Inc. v. Connaughton*, 491 U.S. at 666. In *Mason v. New Yorker Magazine*, the analysis of what proves falsity included whether the statement “would have a different effect on the mind of the reader from that which the pleaded truth would have produced.” 501 U.S. 498, 517 (1991). After determining if the statements would produce a different effect, the court must then determine whether the actual statements were made with

actual malice. *Id.* at 517-18. Petitioner published the photograph with reckless disregard of accuracy.

Under the reckless disregard standard, the defendant must have made the false publication with a “high degree of awareness of probable falsity.” *Garrison v. State of Louisiana*, 379 U.S. 64, 74 (1964). The plaintiff must demonstrate subjective awareness on the part of the defendant and that he must have entertained serious doubts as to the truth of his publication. *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968). As to the defendant, the publication must be in good faith that the statements were true. *Id.* at 732. For example in *Harte-Hanks*, this Court found actual malice in the “publisher’s failure to consult a key witness and listen to a readily available tape recording of a contested conversation.” *Bressler v. Fortune Magazine*, 971 F.2d 1226, 1233 (6th Cir. 1992)(citing *Harte-Hanks Commc’ns, Inc. v. Connaughton*, 491 U.S. 657, 691-92). Respondent can demonstrate a subjective awareness on the part of the Petitioner because he failed not only to consult with his only source Professor Chaos but with any other source.

First, due to the level of danger inherent in the type of information Petitioner published, he should have corroborated it with other sources. Prior to the publication on July 8, 2008, Petitioner has received information from his informant, Professor Chaos, about release of Citrus products. This information does not damage Citrus’s reputation, though they might inconvenience them. The publication of human rights violations by Citrus is in a different range of risk as compared to releasing information about products becoming available by Citrus. This information carries criminal implications and serious business repercussions. The information was of such a caliber that Petitioner should have relied on more than one resource. The discovery process proved Petitioner did not check the photograph before creating his posting on *The Sludge*

Report. (J.A. at 7.) There should have been doubts as to how Professor Chaos obtained such information because he had not provided anything like this in the past.

Petitioner likely knew how dangerous this information would be to Citrus and published it with the intent to destroy their business. In the past, Petitioner has posted harsh criticism of Kyle Broflovski even accused Citrus of being engaged “the systematic oppression of the peoples of the Third World.” (J.A. at 4.) The photograph, subtitle to the photograph, and statements regarding Respondent’s conduct at the factory are false. There is no evidence to establish that Respondent has ever visited the factory in Mumbai, India. Respondent is the Director of Research and Development, not a manager at the factory in Mumbai, India. (J.A. at 3.) Petitioner published the blog with the reckless disregard for the truth.

CONCLUSION

The First Amendment provides no protection to Petitioner. No decision of this Court supports the reasoning behind Petitioner’s resistance to Respondent’s motion to compel. Even if this Court breaks new ground and recognizes the existence of a qualified reporters privilege in the First Amendment, Petitioner is unable to assert the privilege under any viable reporter’s privilege theory. Respondent is not a limited-purpose public figure, but rather a private citizen. Therefore, Respondent only has to prove the standard of negligence against Petitioner and not actual malice. Since the court could reasonably infer that Petitioner’s statements were negligent and defamatory a genuine issue of material fact exists, summary judgment is improper. This Court should affirm the Fifteenth Circuit Court of Appeals decision to denial Petitioner’s summary judgment and grant Respondent’s motion to compel.