
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 221
Counsel for Respondent

QUESTIONS PRESENTED

- I. Whether Eric Cartman is protected by a qualified reporter's privilege against court-compelled disclosure of the identity of an anonymous source in an online defamation claim.
 - A. Whether the First Amendment creates a qualified reporter's privilege against the court-compelled discovery of sources.
 - B. If A is answered in the affirmative, whether Eric Cartman qualifies as a reporter for the purposes of this defamation suit and is, therefore, entitled to shield the identity of his anonymous source.
- II. Whether Eric Cartman, author of the Internet blog *The Sludge Report*, should be held liable on an actual malice standard in an online defamation claim brought by Ike Broflovski on the grounds that Broflovski is a limited-purpose public figure.

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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 (“Ike”) is the Director of Research and Development at Citrus Electronics, Inc. (“Citrus”). (J.A. at 3.) Citrus CEO, Kyle Broflovski (“Kyle”), goes out of his way to praise his younger brother Ike in the media. (J.A. at 3.) Ike is shy and does not enter the public limelight. (J.A. at 3.) Ike’s hiring was announced at a moderately attended press conference where he made a short comment thanking his brother for the warm introduction. (J.A. at 3.) Ike is rarely seen in public and has given no interviews since being hired at Citrus in 2006. (J.A. at 3.)

Eric Cartman (“Cartman”) is the sole proprietor of Cartman’s Computer World. (J.A. at 4.) Cartman was forced to become a blogger after competition from a recently opened Citrus MegaStore nearly put him out of business. (J.A. at 4.) Cartman is paid by advertisers for each visit his website, *The Sludge Report*, receives. (J.A. at 4.) Cartman’s blog is known for its disdain of large, multinational corporations. (J.A. at 4.) He reserves his most harsh criticism for Kyle and Citrus, whom he blames for nearly driving him out of business. (J.A. at 4.)

Cartman often receives tips from his readers, (J.A. at 4-5), and has made it a practice to treat all of his sources as confidential informants unless they request otherwise. (J.A. at 5.) One of these sources is Professor Chaos (“Professor Chaos”). (J.A. at 5.) Cartman knows the real identity of Professor Chaos, whom he met at an electronics trade show. (J.A. at 5.) In July 2008, Cartman received an e-mail from Professor Chaos that alleged Citrus was engaging in human rights violations. (J.A. at 5.) Chaos attached a photograph to his email in an apparent attempt to substantiate his allegations. (J.A. at 5.)

The next day, without undertaking any type of investigation into the allegations made by Professor Chaos, Cartman published the photograph and a scathing article accusing Ike of having “these poor Indians shackled to their [work] stations at night.” (J.A. at 5-6.) The article went on

to discuss the “slave-like conditions” of the workplace and accused Ike of being “nothing but a slave driver!” (J.A. at 6.) These allegations have led to threats on Ike’s life and have caused him to be depressed. (J.A. at 7.)

Cartman’s unsubstantiated attack on Ike quickly attracted the attention of the mainstream press. (J.A. at 6.) Ike became the recipient of the “Most Heinous Individual in the Galaxy” award from Keith McRiley’s show “The Countdown Factor.” (J.A. at 6.) As a result of the negative press coverage, Citrus’s stock dropped by 25%, numerous retailers pulled Citrus products from their shelves, and Ike has been depressed because of threats against his life. (J.A. at 6-7.)

Ike brought a defamation action, claiming the blog post was libelous, against Cartman in September 2008. (J.A. at 7.) During discovery, Ike Broflovski learned the photograph Cartman received from Professor Chaos was doctored, as his image was superimposed onto the photograph. (J.A. at 7.) Both Citrus and Cartman possess software capable of detecting the forgery. (J.A. at 7.) To determine Professor Chaos’ identity, the Broflovskis interviewed the manager of the Mumbai factory and several other employees. (J.A. at 8.) Additionally, an email requesting information on the source of the leak was sent to all of Citrus’ employees. (J.A. at 8.) Nonetheless, Ike’s efforts to identify Professor Chaos were unsuccessful. (J.A. at 8.) In December, four months after the initial publication of Cartman’s defamatory blog post, Ike submitted an interrogatory requesting the name and contact information of Professor Chaos. (J.A. at 8.) In response to the interrogatory, Cartman invoked a qualified reporter’s privilege against disclosing his source. (J.A. at 8.) Ike filed a motion to compel the identity of Professor Chaos in January. (J.A. at 8.) Cartman filed a countermotion for summary judgment. (J.A. at

8.) The motion for summary judgment was granted. (J.A. at 20.) The Fifteenth Circuit reversed, and this appeal followed. (J.A. at 32.)

SUMMARY OF THE ARGUMENT

The First Amendment does not create a qualified reporter's privilege against the court-compelled discovery. A plain reading of the sentinel case *Branzburg v. Hayes* forecloses on the idea of a constitutionally created journalists' privilege; however, several of the federal circuits have erroneously upheld such a privilege based Justice Powell's concurrence in *Branzburg*. Moreover, the power to create a qualified reporter's privilege lies with the legislatures and neither the Congress nor the State of Silverado has enacted any statute granting such a right. (J.A. at 25.) Lastly, the adoption of a qualified reporter's privilege is unnecessary, as reporters are already entitled to sufficient protections with the procedural recourse provided under the Federal Rules of Civil Procedure and the United States Attorney General Guidelines.

Even if this Court holds that a qualified reporter's privilege does exist, Cartman does not qualify as a reporter for the purposes of this suit and is not entitled to shield the identity of Professor Chaos. Cartman is prohibited from invoking the qualified privilege because he is not a journalist. Furthermore, any right Cartman has to utilize a qualified reporter's privilege can be overridden by the 3-prong balancing test first elucidated in *Garland v. Torre*. Lastly, as a libel defendant, Cartman is not entitled to shield the identity of a source who provided him with the information in controversy.

Under no test promulgated by this Court, or by any other, can Ike Broflovski be labeled a limited-purpose public figure. Ike, as a shy man heading the Research and Development department of a large company while avoiding media attention, is a private figure. This Court cannot properly hold Ike Broflovski is a limited-purpose public figure because the requisite issue

of public concern, mandatory in all circumstances for the finding that an individual is a limited purpose public figure, is absent on the facts before this Court.

Even if this Court is to find that the publication of an altered photograph is sufficient to create an issue of public concern, there is insufficient evidence to find that Ike was sufficiently involved in the controversy to elevate him to the status of a limited purpose public figure. For purposes of ruling on a Motion for Summary Judgment, Rule 56 of the Federal Rules of Civil Procedure mandates that the facts be viewed in the light most favorable to the non-moving party. The facts in this case allow a reasonable trier of fact to conclude that, Cartman either deliberately failed to investigate the veracity of his informant's information, or his publication of the article was negligent. This Court has previously held the deliberate avoidance of the truth is sufficient to establish actual malice. Thus, the appellate court's reversal of the trial court's holding was proper.

Irrespective of whether this court finds Ike Broflovski to be a limited-purpose public figure, there is clear and convincing evidence to prove that Cartman acted with actual malice. *Time, Inc. v. Firestone* establishes that erroneous reporting suffices to prove negligence by clear and convincing evidence. *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.* allows for actual malice to be shown by the content, context and form of the statement. Cartman's subjective antagonism combined with his failure to conduct any investigation into Professor Chaos' allegations provides sufficient context to allow this court to find that Cartman deliberately avoided learning the truth. Consequently, Cartman's purposeful ignorance is sufficient to establish actual malice under the clear and convincing evidence standard.

ARGUMENT

Both the question the existence of a qualified reporters' privilege and of whether the evidence in the record in a defamation case is sufficient to support a finding of actual malice are questions of law reviewed *de novo*. See *Harte-Hanks Comms., Inc. v. Connaughton*, 491 U.S. 657, 685 (1989); *In re Grand Jury Investigation*, 974 F.2d 1068, 1071 (9th Cir. 1992).

I. A QUALIFIED REPORTER'S PRIVILEGE DOES NOT PROTECT CARTMAN FROM THE COURT-COMPELLED DISCLOSURE OF HIS ANONYMOUS SOURCE'S IDENTITY.

A qualified reporter's privilege does not protect Cartman from the court-compelled disclosure of his anonymous source for two reasons: (1) the First Amendment does not create a qualified reporter's privilege, and (2) even if a First Amendment reporters' privilege does exist, Cartman is not journalist entitled to invoke the privilege.

A. The First Amendment Does Not Create a Qualified Reporter's Privilege.

The First Amendment does not create a qualified reporter's privilege against the court-compelled discovery. A plain reading of the sentinel case *Branzburg v. Hayes*, 408 U.S. 665 (1972), forecloses on the idea of a constitutionally created journalists' privilege. Nonetheless, several of the federal circuits have upheld the existence of such a privilege based on flawed legal premises. Moreover, the power to create a qualified reporter's privilege lies with the legislatures and neither the Congress nor the State of Silverado has enacted a statute granting such a right. (J.A. at 25.) Lastly, the adoption of a qualified reporter's privilege is unnecessary, as reporters are already entitled to sufficient protections with the procedural recourse provided under the Federal Rules of Civil Procedure and the United States Attorney General Guidelines.

1. A Plain Reading of Branzburg v. Hayes Forecloses the Idea of a Reporter's First Amendment Privilege to Conceal Sources.

This Court's 1972 ruling in *Branzburg v. Hayes* altered the longstanding presumption of the existence of a federal reporter's privilege to conceal the identities of confidential sources. *Branzburg*, 408 U.S. at 683. In *Branzburg*, group of journalists asked the court to recognize a reporter's right to refuse to identify a confidential source where a previous court order had mandated disclosure of the information. *Id.* at 668. Specifically, one reporter wrote a behind the scenes article on growing marijuana, and a grand jury subpoenaed him to reveal his confidential sources. *Id.* at 669. The reporter refused to divulge the identities of his informants, claiming the information was protected under the First Amendment. *Id.* at 670. The newsmen further asserted that a lack of confidentiality between reporters and their informants would deter future sources from offering valuable information to the media and would essentially impede upon the freedom of the press. *Id.* Despite the journalists' protests, this Court held that the Constitution does not create a reporter's privilege against court-compelled discovery and ordered the journalist to reveal the identity of his anonymous source. *Id.* at 670-71.

Numerous policy reasons support *Branzburg's* refusal to recognize a constitutionally created reporter's privilege. First, laws passed for the public interest must be applicable to newsmen and laymen alike. *Id.* at 663 (citing *Assoc. Press v. NLRB*, 301 U.S. 103 (1937)). Furthermore, the Fifteenth Circuit correctly held that "courts have historically rejected the idea of any presumptive privilege for reporters, even in civil suits." (citing *Garland v. Torre*, 259 F.2d 545, 549-50 (2d Cir. 1958)). Additionally, the news media has no special access to information that is not otherwise available to the public and is therefore not entitled to any additional protections. *N.Y. Times Co. v. United States*, 403 U.S. 713, 728-30 (1971) (Stewart, J., concurring).

Although *Branzburg* held there is no constitutionally based reporter's privilege, *Branzburg*, 408 U.S. at 683, many of the nation's circuit courts have employed dicta in the concurrence to limit *Branzburg*'s effect to criminal proceedings. In his concurrence, Justice Powell wrote that "The court does not hold that newsmen. . . are without constitutional rights with respect to the gathering of news or in safeguarding their sources." *Id.* at 709. (Powell, J., concurring). A plain reading of the case forecloses the idea of a constitutionally created reporter's privilege to conceal their sources; however, Powell's concurrence suggests that journalists are still entitled to other constitutional protections. *See, e.g., Goodale, Reporter's Privilege, supra*, at 173 (citing *In re Seper*, 705 F.2d 1499 (9th Cir. 1983) (holding a reporter may invoke Fifth Amendment right against self-incrimination and refuse to identify a source)); *Coleman v. Texas*, 966 S.W.2d 525 (Tex. Crim. App. 1998) (*en banc*) (holding that a criminal defendant's subpoena for information may be quashed under the Sixth Amendment if the information is not favorable to the defense and material to the case at hand).

The Seventh and Sixth Federal Circuit Courts have followed the *Branzburg* precedent and have properly refused to recognize the existence of reporters' privilege based on the First Amendment. *See, e.g., Thayer v. Chiczewski*, 257 F.R.D. 466 (N.D. Ill. 2009) (observing that "[t]he Seventh Circuit has chosen not to recognize a privilege without moorings independent of the First amendment"); *McKevitt v. Pallasch*, 339 F.3d 530, 533 (7th Cir. 2003) (refusing to recognize a journalists' privilege based solely on the First Amendment); *In re Grand Jury Proceedings*, 810 F.2d 580, 584 (6th Cir. 1987) (holding the First Amendment does not, in and of itself, create a reporter's privilege to conceal otherwise relevant information).

2. The Power to Create Evidentiary Privileges Lies with the Legislature, Not with the Courts.

The federal circuits are split on the issue of whether the First Amendment created a reporters' privilege, yet there is a general consensus that such a privilege may be created or expanded upon by the legislative branch. Despite multiple attempts, no federal law codifies the reporters' privilege at the present time. A majority of the nation's states, on the other hand, have enacted legislation creating a reporters' privilege.

In *Branzburg*, this Court suggested there is "merit in leaving state legislatures free, within First Amendment limits, to fashion their own standards" for journalistic protections. *Branzburg*, 408 U.S. at 706. Consequently, thirty-four states and the District of Columbia have enacted statutes that create a reporter's privilege in the context of litigation. Goodale, *Reporter's Privilege, supra*, at 170. These "shield laws" vary in scope and application, and are markedly different from state to state. *See, e.g., Senna v. Florimont*, 196 N.J. 469, 958 A.2d 427 (2008) (holding that New Jersey's Shield Law provides the strongest possible protection to the newsgathering and news reporting activities of the media).

On a federal level, several bills have been introduced in Congress that, if enacted, would create a statutorily defined federal reporters' privilege. *See, e.g.,* Free Flow of Information Act of 2009, H.R. 985, 111th Congress (2009) (currently tabled for consideration by the House Judiciary Committee) (previously introduced as H.R. 2102 in the 110th Congress). The introduction of this federal legislation weakens the proposition that reporters are constitutionally entitled to special protections. There would be no need to enact redundant legislation if the First Amendment created a journalists' privilege against disclosing sources.

Although the option is readily available, the state of Silverado has not enacted any type of shield law (J.A. at 9.) and no statutes have created a journalists' privilege at the federal level.

Consequently, not only is Cartman not entitled to invoke the reporters' privilege under the First Amendment, he is also unable to call upon any state or federal law granting him the same rights and privileges.

3. Reporters are Sufficiently Protected under Existing Discovery Laws.

A qualified reporter's privilege unnecessarily complicates and undermines the discovery process, as the Federal Rules of Civil Procedure and the United States Attorney General's Guidelines already provide reporters with significant procedural protections. For example, the Federal Rules of Civil Procedure require courts to protect against unduly burdensome requests and to consider the balance of interests in a case before upholding a subpoena against a member of the press. Fed. R. Civ. P. 26(b)-(c) (2009). Additionally, the U.S. Attorney General's office has promulgated a set of guidelines that cautions prosecutors against infringing upon the free flow of information to the press. *See* DOJ Policy with Regard to the Issuance of Subpoenas to Members of the News Media, 28 C.F.R. § 50.10 (2009).

The Federal Rules of Civil Procedure create substantial rights allowing, or restricting, access to information. Federal Courts are required to limit the frequency or extent of otherwise allowable discovery when:

- (i) the discovery sought is *unreasonably cumulative* or duplicative, or *can be obtained from some other source that is more convenient, less burdensome, or less expensive*;**
- (ii) the party seeking discovery has had ample opportunity to obtain the information by discovery in the action; or**
- (iii) the *burden or expense of the proposed discovery outweighs its likely benefit, considering the needs of the case*, the amount in controversy, the parties' resources, *the importance of the issues at stake* in the action, *and the importance of the discovery in resolving the issues*.**

Fed. R. Civ. P. 26(b)(2)(c) (emphasis added). In fact, a court may abuse its discretion in enforcing a subpoena to the press if the requesting party has not exhausted other reasonable alternative sources. *See Shoen v. Shoen*, 5 F.3d 1289, 1299-1302 (9th Cir. 1993) (Kleinfeld, J., concurring). Additionally, Rule 26(d)(2) allows the courts to manipulate the timing of the discovery process, which can allow the court to determine whether the court-compelled discovery of a journalist's source is absolutely necessary and whether the burdens of discovery outweigh the benefits of production. Fed. R. Civ. P. 26(d)(2) (2009); *see also Marrese v. American Academy of Orthopaedic Surgeons*, 726 F.2d 1150, 1161 (7th Cir. 1984) (en banc), *rev'd on other grounds*, 470 U.S. 373 (1985); *Bruno & Stillman, Inc. v. Globe Newspaper Corp.*, 633 F.2d 583, 596-97 (1st Cir. 1980).

In a concerted attempt to reconcile the interests of the press with those of law enforcement, the United States Attorney General's office maintains a set of guidelines for its attorneys to employ when dealing with members of the media.¹ These guidelines are sufficient to protect the journalists' interests, and render the creation of a First Amendment privilege unnecessary. The guidelines reason that "[b]ecause freedom of the press can be no broader than the freedom of reporters to investigate and report the news, the prosecutorial power of the government should not be used in such a way that it impairs a reporter's responsibility to cover as broadly as possible controversial public issues." DOJ Policy with Regard to the Issuance of Subpoenas to Members of the News Media, 28 C.F.R. § 50.10 (2009). The Attorney General's policy requires its attorneys to weigh the needs of law enforcement against those of a free press, to make a reasonable attempt to obtain requested information from all other sources, to negotiate with the media before issuing subpoenas, and to only request information from the media if it is

¹ These guidelines apply to both civil and criminal cases. Goodale, *Reporter's Privilege*, *supra*, at 172.

essential to the outcome of the case. 28 C.F.R. § 50.10(a)-(g). The guidelines also require that the Attorney General approve of any subpoena issued to the press, 28 C.F.R. § 50.10(h)-(k), (n), and limit subpoenas issued under “exigent circumstances” to the verification of published information. 28 C.F.R. § 50.10(h).

The press has access to significant protections under the standing laws of discovery. The adoption of a reporters’ privilege would be a frivolous and unnecessary addition to codified law. Hence, journalists are entitled to sufficient protections during the discovery process, and the promulgation of a reporter’s privilege is therefore both unnecessary and unfounded.

B. Even if a Qualified Reporters’ Privilege Exists, Eric Cartman is Not Entitled I to Invoke the Privilege.

If a qualified reporter’s privilege does exist, Cartman does not qualify as a reporter for the purposes of this suit and is not entitled to shield the identity of Professor Chaos. Cartman is prohibited from invoking this privilege because he is not a journalist. Furthermore, even if this Court finds that Cartman is a reporter, his right to utilize a qualified reporter’s privilege is usurped by the 3-prong balancing test first elucidated in *Garland v. Torre*. Lastly, as a libel defendant, Cartman is not entitled to shield the identity of a source of who provided him with the information in controversy. *Carey v. Hume*, 492 F.2d 631, 637 (D.C. Cir. 1974).

1. Cartman is Not a Reporter and Therefore he Cannot Invoke a Qualified Reporter’s Privilege.

Modern technology now allows any individual with a laptop and internet access to hold themselves out as a journalist, which is a drastic change from the traditional notion of print and television journalism. Over the past few years, courts around the country have struggled over whether to afford bloggers and other “citizen journalists” with the same rights and privileges as

other members of the traditional press corps.² See, e.g., *Von Bulow v. Von Bulow*, 811 F.2d 136 (2d Cir. 1987); *Shoen v. Shoen*, 5 F.3d 1289 (9th Cir. 1993); *In re Madden*, 151 F.3d 125 (3d Cir. 1998)).

The definition of the term “journalist” was relatively simple before the advent of “citizen journalism.” Practically any professional journalist employed by a print or broadcast media outlet could claim a reporter’s privilege, so long as the privilege was supported by either statute or precedent. Goodale, *Reporter’s Privilege*, *supra*, at 182-83 (citations omitted). However, employment by a mainstream media outlet was a prerequisite to be considered a journalist; instead, the scope of the reporter’s privilege has been extended to cover trade publications, public financial analyses, freelance writers and some forms of academic research. See *In re Photo Mktg.*, 120 Mich. App. 527, 327 N.W. 2d 515 (Mich. App. 1982) (trade publication authors); *Summit Tech. v. Healthcare Cap. Grp.*, 141 F.R.D. 381 (D. Mass. 1992). (financial commentary); *In re Van Ness*, 8 Med. L. Rptr. 2563 (Cal. Super. Ct. 1982) (freelance writer who are career journalists); *Von Bulow v. Von Bulow*, 811 F.2d 136 (2d Cir.), *cert. denied*, 481 U.S. 1015 (1987) (investigative academic research). However, the application of a journalist’s privilege to bloggers has created a dangerous precedent of widespread protection that can only continue to spurn out of control.

Expanding the definition of a journalist to cover any individual who operates a blog is a dangerous precedent. See Berger, *Shielding the Unmedia*, *supra*, at 1378-1380. Such an extension of scope would essentially allow anyone to sidestep the legal system’s procedural and

² For example, the rise of the “unmedia” or “blogosphere” has altered the way government entities “who gets a press pass, who gets to be in the courtroom or on a press plane, and what institutions are members of “the press” for some forms of taxation and other statutory regulations and privileges.” 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, 1379-1380 (2003) (citing David A. Anderson, *Freedom of the Press*, 80 Tex. L. Rev. 429, 528-30 (2002)).

evidentiary requirements by withholding evidence or testimony that is otherwise relevant and admissible. *Id.* After all, an ordinary citizen with no training or support staff can create a blog and promulgate what they claim is news. See *In re Grand Jury Subpoena, Judith Miller*, 397 F.3d 964, 979 (D.C. Cir. 2005). Consequently, if “anyone can be a journalist, it may be impossible to decide who should be protected by the ‘journalist’s’ privilege afforded by thirty-one states and, in most federal circuits, by the First Amendment.” Berger, *Shielding the Unmedia, supra*, at 1373. Thus, this Court must create some sort of rational limitation on who can constitute a journalist in order to preserve the standards of professionalism and integrity that are the basis of the journalistic profession.

2. *Broflovski can Defeat Cartman’s Qualified Privilege under the Three-Prong Balancing Test.*

Even if this Court determines that Cartman is a journalist for the purposes of this suit, Ike Broflovski can defeat Cartman’s qualified privilege by satisfying the three-part balancing test first adopted by the Second Circuit in the case of *Garland v. Torre*, 259 F.2d 545, 550-51 (2d Cir.), *cert. denied*, 358 U.S. 910 (1958). See also *Zerilli v. Smith*, 656 F. 2d 705, 713-14 (D.C. Cir. 1981). To satisfy the *Garland* test and override the qualified privilege, the Plaintiff must make an affirmative showing that the requested information: (1) is highly material and relevant, (2) is critical to the maintenance or heart of the claim, and (3) all other reasonable means to obtain the information have been exhausted.³ See, e.g., *U.S. v. Burke*, 700 F.2d 70 (2d Cir. 1983); *LaRouche v. Nat. Broadcasting Co., Inc.*, 780 F.2d 1134 (4th Cir. 1986); *Silkwood v.*

³ To protect against claimants who might bring frivolous actions simply to gain access to the inner workings of the media, several jurisdictions have expanded the *Garland* test to require a fourth prong of either the viability of the claim, e.g., *Zerilli v. Smith*, 656 F.2d 705 (D.C. Cir. 1981); *Bruno & Stillman, Inc. v. Globe Newspaper Co.*, 633 F.2d 583, 597 (1st Cir. 1980), or a *prima facie* showing of falsity and injury before testimony or documents are compelled from a reporter who is a defendant in the action. See *Mitchell v. Superior Court*, 37 Cal. 3d 268, 690 P.2d 625, 208 Cal. Rptr. 152 (1984).

Kerr–McGee Corp., 563 F.2d 433 (10th Cir. 1977); *U.S. v. Caporale*, 806 F.2d 1487 (11th Cir. 1986).

This test balances First Amendment press freedoms with the litigant’s right to evidence. Ike Broflovski can easily satisfy all three prongs of this test, as: (1) Professor Chaos’ identity is highly material and relevant to whether Cartman acted negligently or with actual malice, (2) proving actual malice or negligence is determinative to the success of Broflovski’s defamation claim, and (3) Broflovski has exhausted all other reasonable means possible to obtain this information.

a) Professor Chaos’ identity is highly material and relevant to Ike Broflovski’s defamation claim.

To override a qualified reporter’s privilege, a Plaintiff must first demonstrate that the information sought is highly material and relevant to the underlying claim. *See Garland*, 259 F.2d at 550-51. Relevance refers “to the logical relationship between the evidence and the ultimate issue to which it is claimed to relate.” Goodale, *Reporter’s Privilege, supra*, at 190. In a defamation claim, the identity of a source is especially important, to proof whether the reporter had used a reliable source. *Carey*, 492 F.2d at 637.

Here, Professor Chaos’ identity is inarguably relevant to whether Ike Broflovski can prevail on his action, as the claim requires a showing that Cartman acted negligently or with actual malice. *See Restatement (Second) of Torts §580A (2009)*. The discovery of Professor Chaos’ identity is absolutely integral in the determination of whether Cartman disseminated the information he received from Chaos with a knowing or intentionally reckless disregard for the veracity of the information. *See New York Times Co. v. Sullivan*, 376 U.S. 254, 279-80 (holding that proof of actual malice in a defamation claim requires that the publication of false information was either knowing or intentional or that the defendant published the information

recklessly without considering the veracity of the allegations). It is indisputable that the identity of Professor Chaos is highly material and relevant to the underlying defamation claim against Cartman.

b) Professor Chaos' identity is necessary or critical to the maintenance of the defamation claim.

The second prong of the *Garland* test requires the Plaintiff to demonstrate that the information sought is necessary or critical to the maintenance of the claim. *See Garland*, 259 F.2d at 550-51. This requirement is often referred to as the “heart of the claim” requirement. While relevance refers to the information’s relationship to the ultimate issue, the term “critical” is used to “describe the need for the particular information in the context of the entire case.” *Goodale, Reporter’s Privilege, supra*, at 190. Here, information is deemed to be critical if the claim “virtually rises or falls with the admission or exclusion of the proffered evidence.” *In re Application to Quash Subpoena to Nat. Broadcasting Co., Inc.*, 79 F.3d 346, 351 (2nd Cir. 1996) (quoting *United States v. Marcos*, No. 87 CR 598, 1990 WL 74521, at *3 (S.D.N.Y. June 1, 1990)). In the instant case, Broflovski’s defamation claim virtually rises or falls based on the identity of Professor Chaos, as Chaos’ identity is a quintessential fact needed to prove Cartman’s negligence or actual malice.

An overwhelming amount of precedent holds that the identity of a confidential source is “critical” and “necessary” to the success of a Plaintiff’s libel claim against a newsgathering defendant. *See, e.g., Garland*, 259 F.2d 545 (the identity of a confidential source in a libel claim is critical to establish the “heart of the claim”). In the sentinel case of *Carey v. Hume*, the D.C. Circuit Court of Appeal held that the identity of an anonymous source in a libel action goes to the very heart of the claim. *Carey*, 492 F.2d at 636-37. *Carey* held that it would be virtually

impossible to prove actual malice or negligence on the reporter's behalf without the source's identity. *Id.* at 637. Analogously, Professor Chaos' identity is necessary to establish whether Cartman acted with the essential element of actual malice or negligence and it exceptionally more difficult for Ike to prevail on his defamation claim without this information.

c) Ike Broflovski has exhausted all other reasonable means of obtaining Professor Chaos' identity.

The third prong of the *Garland* test requires that the requesting party exhaust all other reasonable sources before circumscribing the reporters' privilege. *Garland*, 259 F.2d at 550; *see also Clyburn v. News World Comms., Inc.*, 903 F.2d 29 (D.C. Cir. 1990) (holding that if a libel plaintiff exhausts all reasonable alternative means of identifying the source, the qualified privilege may yield). "[E]ven when the information is crucial to a litigant's case, reporters should be compelled to disclose their sources only after the litigant has exhausted every reasonable alternative source of information." *Zerilli*, 656 F.2d at 713. Nonetheless, a Plaintiff's obligation to pursue alternative sources does have its limits. *Id.* at 714.

Based on Cartman's assertion that Professor Chaos was a Citrus employee, (J.A. at 6.) Ike Broflovski tried to independently discover Chaos' identity. Broflovski deposed the manager of the Mumbai factory and several of the factory's top engineers. (J.A. at 8.) Furthermore, Kyle Broflovski, who is not a party to this litigation, sent an email to all Citrus employees requesting information on the source of the leak. *Id.* Broflovski submitted an interrogatory to Cartman requesting the identity of Professor Chaos **only after these independent attempts failed.** *Id.* (emphasis added).

3. Cartman's Status as a Newsgathering Libel Defendant Prohibits, or at Least Irreparably Weakens, his use of a Qualified Reporters' Privilege.

Precedent clearly indicates that a reporter's status as a newsgathering defendant in a libel action forecloses, or at least impairs, the journalist's privilege against the court-compelled disclosure of confidential information. *See, e.g., SEC v. Seahawk Deep Ocean Tech.*, 166 F.R.D. 268, 271 (D. Conn. 1996); *U.S. v. Markiewicz*, 732 F.Supp. 316, 319 (N.D.N.Y. 1990); *Zerilli v. Smith*, 656 F.2d 705, 713-14 (D.C. Cir. 1981). Although the loss of a reporter's privilege is not absolute, *Cervantes v. Time, Inc.*, 464 F.2d 986, 993 (8th Cir. 1972), the courts usually **presume the libellee has a justifiable need for the information the libellant possesses**. *Id.* at 994. (emphasis added). This premise is especially true where the confidential informant provided the reporter with the controversial information. *Carey*, 492 F.2d at 637 (D.C. Cir. 1974).

The oft-cited holding in *Carey* contained a set of facts parallel to the present controversy. In *Carey*, a reporter invoked the privilege and refused to disclose the identity of the source who provided him with information upon which his allegedly libelous newspaper article was based. *Id.* at 631. In the instant case, Cartman is also newsgathering defendant in a libel action who based his allegedly libelous article on information he received from an undisclosed source.

This Court should therefore presume that Ike Broflovski has a justifiable need to obtain information concerning Professor Chaos' identity. *See Cervantes*, 464 F.2d at 994. Furthermore, the presumption of compelled disclosure is heightened by the fact that Professor Chaos purportedly provided Cartman with the controversial—and fraudulent—photo in question. Based on the aforementioned precedent and the unmistakable similarities between the present controversy and *Carey*, this Court must find that Cartman's status as a libel defendant precludes him from invoking the qualified reporter's privilege.

II. THE APPELLATE COURT CORRECTLY APPLIED THE PRIVATE FIGURE NEGLIGENCE STANDARD BECAUSE IKE BROFLOVSKI IS NOT A LIMITED-PURPOSE PUBLIC FIGURE.

A plaintiff in a defamation suit who is not a public figure, is “not required by the First Amendment to meet the actual malice standard of *New York Times Co.*” in order to recover damages from the defendant. *Wolston v. Reader’s Digest Assoc., Inc.*, 443 U.S. 157, 161 (1979). As a private figure plaintiff in a defamation suit, Ike Broflovski need only prove negligence in order to prevail on his claim. The rationale behind this recognizes that “private individuals are ... more vulnerable to injury, and the state interest in protecting them is correspondingly greater.” *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 344. However, Ike is still entitled to recover damages from Cartman under the *New York Times Co. v. Sullivan* public figure test, which requires a showing of actual malice. This Court possesses the authority to review the existing record in its entirety to determine the appropriateness of the lower court’s judgment. *N.Y. Times Co. v. Sullivan*, 376 U.S. at 285.

A. The Record Establishes that Ike Broflovski is Not a Limited-Purpose Public Figure.

There is no standard definition for what constitutes an issue of public concern. *See generally Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 345-46 (1968) (the states retain substantial latitude in their efforts to enforce a legal remedy for defamatory falsehoods). A Circuit split has resulted in a variety of tests that can determine whether an issue of public concern, also called a public controversy, exists. The Trial and Appellate courts below considered a three-prong test used by the Eleventh Circuit, and a four-prong test used by the Second Circuit.⁴ (J.A. at 16, 29.)

⁴ For the sake of brevity, Respondent’s brief only analyzes these two tests. Other Circuits have promulgated tests which vary slightly from these, however, the main requirements of an issue of public concern, and the plaintiff’s involvement in that issue are key to all tests.

Upon review of the record this Court shall find, by clear and convincing evidence, that Ike Broflovski is not a limited-purpose public figure when applying either test.

1. The Trial Court's Three-Prong Test Fails to Establish Ike Broflovski is a Limited-Purpose Public Figure.

To be considered a limited-purpose public figure, the three-prong test adopted by the trial court requires “that (1) the relevant controversy be a **matter of public concern**; (2) the plaintiff **play more than a tangential role** in the controversy; and (3) the defendant’s **remarks be relevant** to the controversy.” (J.A. at 16) (emphasis added) (quoting *Silvester v. Am. Broad. Cos.*, 839 F. 2d 1491, 1494 (11th Cir. 1988)). This test is conjunctive; only the first two prongs are contested. The third prong is satisfied. However, Ike cannot be considered to be a public figure if any of the prongs are not proven.

a) Publication of an altered photograph is insufficient to create an issue of public concern.

Issues of public concern are not concretely defined, but are generally considered to be broad topics capable of spanning many different areas. The publication of a doctored photograph does not create an issue of public concern for two primary reasons. First, media attention does not transform Ike into a limited-purpose public figure. Second, the content, context, and form of Cartman’s statements fail to establish Ike’s involvement in the controversy.

Wolston v. Reader's Digest Association held that a matter of public concern is not created by media attention, reasoning that “[a] private individual is **not automatically transformed into a public figure just by becoming involved in or associated with a matter that attracts public attention.**” *Wolston*, 443 U.S. at 167 (emphasis added). In *Wolston*, this Court held that a man accused of being a Soviet spy by the FBI was not a limited-purpose public figure despite the fact that his situation generated a substantial amount of media attention. The instant case is

analogous to *Wolston*. Ike has been accused of human rights violations by a blogger who received his information from an anonymous source. (J.A. at 5.) Allegations of human rights violations are, concededly, at least as newsworthy as the allegations that Mr. Wolston was a Soviet spy. *Wolston*, 443 U.S. at 159. However, newsworthiness alone is insufficient to establish the existence of an issue of public concern. *Id.* at 167.

Moreover, whether statements address an issue of public concern must be determined by an evaluation of its context, form, and content. *Dun & Bradstreet*, 472 U.S. at 761. The factual context surrounding Cartman's defamatory statements, combined with the contents of those statement, show that there is no issue of public concern. The fabricated photograph, published during a battle for market share between competing companies, is insufficient in the ambit of *Dun & Bradstreet* to establish a public concern.

b) Ike Broflovski played no more than a tangential role in the controversy.

A limited-purpose public figure must play more than a merely tangential role in the public controversy; thus Ike is not a limited-purpose public figure because he played no role in the controversy. *See generally Silvester*, 839 F.2d at 1494 (11th Cir. 1988) (in order to be a limited-purpose public figure one must play more than a tangential role in the controversy.) A plaintiff has played more than a merely tangential role in a controversy when he "either (1) must purposefully try to influence the outcome of the public controversy, or (2) could be realistically have been expected ... to have an impact on its resolution." *Id.* at 1496.

The only evidence of Broflovski's involvement in the present controversy is the altered photograph Cartman published on *The Sludge Report*. However, Ike's image was superimposed onto the photograph. The image Cartman posted therefore offers absolutely no proof of his involvement with Citrus' alleged human rights violations. In fact, the only action taken by Ike has been to have his attorney make a statement denying Cartman's defamatory allegations. (J.A.

at 7.) Ike's only involvement has been to issue a statement through his attorney denying his involvement and proclaiming the photograph to be a fake.

Furthermore, Ike's position as Director of Research and Development at Citrus does not realistically place him in a position to control the working conditions of employees in an international facility. The factory's working conditions would not be under Ike's supervision. Thus the record cannot establish that Ike played more than a merely tangential role in the present controversy and, consequently, Ike cannot be a limited-purpose public figure.

2. The Fifteenth Circuit Correctly Found that Ike Broflovski was a Private Figure Under the Four-Prong Test Established by Lerman v. Flynt Distribution Co.

Ike does not qualify as a limited-purpose public figure under the four-prong test utilized by the appellate court. To be a limited-purpose public figure under this four-prong test, the plaintiff must have “(1) successfully **invited public attention** prior to the remarks litigated; (2) **voluntarily injected himself into the relevant public controversy**; (3) took on a **position of prominence** within the controversy; and (4) **maintains regular and continuing access to the media** in order to combat the defamatory remarks.” *Lerman*, 745 F. 2d at 136-37 (emphasis added).

a) Ike Broflovski did not successfully invite public attention before Cartman published the defamatory statements.

Ike is not a limited-purpose public figure because he did not successfully invite public attention before the defamatory statements were made. *Silvester*, cited as controlling by the trial court, holds that, in order to be a public figure, “the plaintiff must have been a public figure **prior to** the publication of the particular defamatory speech which is the issue of the litigation.” *Silvester*, 839 F.2d at 1496 (emphasis added). Ike cannot be a limited-purpose public figure, as he never successfully invited public attention before Cartman's defamatory blog post.

Multiple facts in the record negate a finding that Ike successfully invited public attention. For example, the record clearly states that “Ike [was] shy and [did] not enter the public limelight.” (J.A. at 3.) In fact, the only time Ike interacted with the press before Cartman’s article was at the perfunctory press conference that announced his hiring at Citrus. *Id.* The brief statement Ike made at one “moderately attended” perfunctory press conference does not constitute a successful inviting for public attention.

Since the aforementioned press conference, Ike has given no interviews and has rarely been seen in public. (J.A. at 3.) Beyond a standard photograph and biography on Citrus’ website, in fact Ike has had essentially no public presence. (J.A. at 4.) Ike’s minimal level of exposure to the public is directly comparable to that of the plaintiff in *Wolston* and simply cannot be used to establish Ike as a public figure. *See generally Wolston v. Reader’s Digest Assoc., Inc.*, 443 U.S. 157 (plaintiff who led a thoroughly private existence before the controversy, had no general fame or notoriety, and assumed no role of special prominence in society was not a limited-purpose public figure).

b) Ike Broflovski did not voluntarily inject himself into the controversy.

Ike Broflovski did not voluntarily inject himself into the present controversy. Instead, he was forced to bring this action in order to clear his name. This Court has held that when a plaintiff is forced into the spotlight, not by any desire of their own, but by circumstances that necessitated their personal response to an issue directly affecting them, the plaintiffs were not limited-purpose public figures. *Firestone*, 424 U.S. at 545; *Wolston*, 443 U.S. at 168.

In *Wolston v. Reader’s Digest Association, Inc.*, the plaintiff was dragged into the spotlight by a government investigation into Soviet espionage activity. *Wolston*, 443 U.S. at 166. Ike was, analogously, pushed into the spotlight by Cartman’s defamatory blog post. (J.A.

at 5-6.) Similarly, Ike's involuntary entrance into the public spotlight weighs against finding that he is a limited-purpose public figure.

Despite of a degree of media coverage, in the case of *Time, Inc. v. Firestone*, this Court found no issue of public concern in the dissolution of the marriage between the head of the wealthy Firestone family and his wife. *Firestone*, 424 U.S. at 455 n.3. Instead, this Court held that the wife did not "freely choose to publicize" her marital issues; and that she was "compelled to go to court" in order to obtain a legal remedy. *Id.* at 454. Expounding upon its decision, this Court reasoned that "resort to the judicial process ... [was] no more voluntary in a realistic sense than that of a [person] called upon to defend his interest in court" and found that the dissolution of marriage was not an issue of public concern. *Id.* Likewise, in the instant case, Ike Broflovski was forced to utilize the judicial process to debunk Cartman's defamatory claims. Ike was forced to utilize the judicial process in order to obtain a legal remedy. As such, he simply cannot be described as a public figure who **voluntarily** injected himself into the present controversy.

c) Ike Broflovski has not assumed a position of prominence in the issue of public concern.

To be considered a limited-purpose public figure under the third prong of the Second Circuit test, the plaintiff must assume a position of prominence in the controversy. *Lerman*, 745 F.2d at 136-37 (requiring that the plaintiff assume a position Ike's only involvement in this case is that of an ancillary casualty). If the photograph was unaltered, and Ike had truly overseen human rights violations, his position of prominence in the controversy would be undeniable. However, the photograph is a forgery (J.A. at 7.) and Ike, along with Citrus' stock, is merely the victim. The trial court's taking of the contents of the altered photograph as true directly conflicts with Federal Rule of Civil Procedure 56 which mandates that the Court "draw all justifiable inferences in favor of the non-moving party, including ... the weight to be accorded particular

evidence.” *Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496, 521 (1991) (citing Fed. R. Civ. P. 56 (2009)). In accordance with both the Federal Rule of Civil Procedure and its own precedent, this Court must draw all inferences regarding the photograph in favor of Ike; and must assume, for purposes of summary judgment, that Ike’s image was fraudulently superimposed onto the photo.

d) Ike Broflovski does not maintain regular and continual contact with the media.

Evidence in the record is insufficient for the Petitioner to establish the fourth prong of the *Lerman* test, which requires that a limited-purpose public figure maintain regular media contact to combat defamatory statements. *Lerman*, 745 U.S. at 136-37. *Foretich v. Capitol Cities/ABC, Inc.* is illustrative in determining what constitutes regular access to the media. *See generally Foretich v. Capitol Cities/ABC, Inc.*, 37 F. 3d 1541 (4th Cir. 1994). In *Foretich*, the plaintiffs responded to allegations of sexual abuse by holding a press conference, appearing on television, and giving interviews. *Id.* at 1543. Despite their regular and continuing access to the media, the Fourth Circuit found these efforts did not elevate the plaintiffs to limited-purpose public figure status because the only reason they engaged the media was to “[do] no more than defend themselves.” *Id.* at 1550. Here, Ike Broflovski’s contact with the media was limited to his attorney’s general denial of the veracity of the accusations against him. (J.A. at 8.) Consequently, Ike has not maintained regular and continual access to the media, and cannot be identified as a limited-purpose public figure.

B. Clear and Convincing Evidence in the Record Establishes Eric Cartman’s Negligence in Publishing the Photograph.

Cartman was negligent in publishing Professor Chaos’ photograph as he failed to verifying its veracity. Cartman possessed the requisite authentication software necessary to

verify the photograph before publication. (J.A. at 7.) Doing so would have been a minimal burden. (J.A. at 7.) This Court’s own precedent holds that erroneous reporting is clear and convincing evidence of negligence in gathering the news. *Firestone*, 424 U.S. at 462. For purposes of ruling on a Rule 56 Motion, this Court must view the blog post that accused Ike Broflovski of engaging in human rights violations as erroneous. The photograph was a fake. (J.A. at 7.) Even the trial court, in granting the motion for summary judgment, recognized that the photograph was not what it appeared to be. (J.A. at 18.)

While the publication of the altered photograph is insufficient for establishing actual malice, it is more than sufficient to establish negligence. *Firestone*, 424 U.S. at 462. Insofar as Ike Broflovski is, as demonstrated above, a private figure, the lower negligence standard is appropriate. In applying this lower standard, the trial court’s entry of summary judgment was improper, as sufficient evidence exists in the record for the plaintiff to prove negligence by clear and convincing evidence.

C. Even if Ike Broflovski is a Limited-Purpose Public Figure, there is Clear and Convincing Evidence in the Record to Support a Finding of Actual Malice.

Even if this Court finds that Ike Broflovski is a limited-purpose public figure, Cartman is still liable for defamation, as clear and convincing evidence supports a finding of actual malice in accordance with this Court’s landmark decision in *New York Times Co. v. Sullivan*. See generally *N.Y. Times Co. v. Sullivan*, 376 U.S. 254 (1964) (where plaintiff is a public figure, actual malice must be shown to sustain a cause of action for defamation).

1. *New York Times Co. v. Sullivan* Establishes the Appropriate Standard of Review.

New York Times Co. v. Sullivan established that defamation of a public figure may only be proven by a showing of actual malice. *Id.* at 279. The *New York Times* actual malice standard requires the statement be made “with actual malice – that is, with knowledge that it was

false **or** with reckless disregard of whether it was false or not.” *Id.* at 280 (emphasis added). The test promulgated in *New York Times* is disjunctive, and is satisfied if **either element** is proven. *Id.* (emphasis added). While the record does not establish that Eric Cartman had actual knowledge of the falsity of his blog post, a plethora of evidence that supports the finding that Cartman acted with actual malice when he published the controversial blog post with reckless disregard for its veracity. On that point, the Restatement (Second) of Torts provides “if a statement is published regarding a public figure which is not defamatory on its face so that its defamatory character becomes apparent only to a person who has a knowledge of certain extrinsic facts, the defendant would be liable only if he ... published the statement in reckless disregard of their existence.” Rest. 2d Torts § 580A.

New York Times Co. v. Sullivan requires “an independent examination of the whole record” of the proceedings below before judgment can be made regarding the merits of a case. *Id.* at 285. When looking at the record in its entirety, the facts support a finding by clear and convincing evidence that Cartman acted with actual malice. These facts include: Cartman’s subjective antagonism towards Citrus, Cartman’s failure to verify the information from his anonymous source, and Cartman’s motive for wanting to negatively impact Citrus’ market share. (J.A. at 4-7.) *See Harte-Hanks*, 491 U.S. 657 (holding the proposition that the record as a whole may establish a reckless disregard to the truth or falsity of allegations and therefore may provide clear and convincing proof of actual malice).

2. Clear and Convincing Evidence Establishes that Cartman Acted with Actual Malice.

In analyzing the record, the ultimate finding as to actual malice should be based upon the content, context, and form of the defamatory statements. *Dun & Bradstreet*, 472 U.S. at 761. In analyzing the content, context, and form of the statements at issue, the cases of *Harte-Hanks v.*

Communications, Inc. v. Connaughton, and *Masson v. New Yorker Magazine, Inc.*, are illustrative of pertinent facts this Court should consider. In *Harte-Hanks*, the Court analyzed the reporter's motive for publishing false allegations of judicial corruption, and found that the motive to influence a judicial election, in conjunction with the falsity of the allegations, was sufficient to establish actual malice. *See Harte-Hanks*, 491 U.S. 657.

Alternatively, in *Masson v. New Yorker Magazine*, this Court looked to a different set of factors. In *Masson*, this Court evaluated whether content of altered quotations conveyed meaning not intended by the speaker. If the quotations were so altered as to effect their meaning, then actual malice could be established. *See Masson*, 501 U.S. at 496.

a) A finding, by clear and convincing evidence, of actual malice is justified based on the content, context, and form of the defamatory statement.

In determining whether a defendant in a defamation case acted with actual malice, the context of the statement, content of the statement, and form of the statement are all useful. *Dun & Bradstreet*, 472 U.S. at 761. The FBI source in *Wolston* was undoubtedly more trustworthy than the anonymous source used by Cartman, yet the journalist's use of the erroneous information was not protected by the higher limited-purpose public figure standard. *Wolston*, 443 U.S. at 161. The failure to investigate a story where the sole source is an anonymous tip supports a finding of reckless disregard, *St. Amant v. Thompson*, 390 U.S. 727, 732 (1968), because of how little contextual support the contents of the statement possess. In *Wolston*, this Court found that the plaintiff was a private figure, even in light of content, context, and form of attention his actions brought upon him. *Wolston*, 443 U.S. at 169.

Actual malice may also be shown by the publication of a quotation altered to the point of a material change in the meaning it conveys. *Masson*, 501 U.S. at 517. This Court has ruled, regarding quotations, which are directly comparable to photographs in that both are meant to

convey a specific message, that “a deliberate alteration of the words uttered by [or photo taken of] a plaintiff does not equate with knowledge of falsity for purposes of *New York Times Co. v. Sullivan* unless the alteration results in a material change in the meaning of the message conveyed by the statement [or photograph].” *Id.* Where the alteration of the photograph materially changed the meaning conveyed by the photograph, actual malice may, by analogy to *Masson*, be established by the publication of the photo.

b) A finding, by clear and convincing evidence, of actual malice is justified based on Cartman’s motive for publishing the defamatory statements considered within the totality of the circumstances surrounding the publication.

When taking into account the content, context, and form of the defamatory statements made by Cartman, “several key pieces of information strongly support the inference that [Cartman] acted with actual malice in [publishing his] false and defamatory statements.” *Harte-Hanks*, 491 U.S. at 681-82. These pieces of information include: Cartman’s bias against Citrus, the battle between Citrus and Cartman’s Computer World for market share, Cartman’s motive to impugn Citrus by defaming Ike, and Cartman’s subjective dislike of the Broflovski brothers. (J.A. at 4-7.) A thorough analysis of these factors shows that Cartman acted with actual malice.

In *Harte Hanks*, the **defendant was "singularly biased** in favor of the [beneficiary of the defamatory statement] and prejudiced against [the victim of the defamatory statement] **as evidenced by the ... relationship that existed** between [the beneficiary of the defamatory statement] and [the writer of the defamatory article].” *Harte-Hanks*, 491 U.S. at 665 n.6 (emphasis added). In the case at bar, Cartman is the sole owner of Cartman’s Computer World, an electronics store that lost a significant amount of business after a Citrus store opened nearby.

(J.A. at 4.) Cartman is singularly biased against Ike and Citrus, as his own company stands ready to benefit from Citrus' loss of market share.

The battle for market share strikes additional parallels between *Harte-Hanks* and the instant controversy. The parties in both cases were involved in a battle for market share, during which the author of the defamatory statements at issue strongly criticized its opponent in an attempt to usurp a greater share of the relevant market. (J.A. at 4.) *see also Harte-Hanks*, 491 U.S. at 665 n.6. Moreover, in both *Harte-Hanks* and the case at bar, the defendant's defamatory statement about the victim effectively impugned the credibility of the market share and weakened their participation in the market. *Harte-Hanks*, 491 U.S. at 665 n.6. (J.A. at 6-7.)

Furthermore, in both *Harte-Hanks* and the instant case "the initial expose of the questionable [conduct] was a high profile news attraction of great public interest and notoriety." *Harte-Hanks*, 491 U.S. at 665 n.6. (J.A. at 5-6.) In deciding *Harte-Hanks*, this Court held "the evidence adduced at trial demonstrated that the [defendant] was motivated to publicize the ... allegations, not only by a desire to...report[...]... the news, but also by a desire to aid the [beneficiary of the defamatory statement]." *Harte-Hanks*, 491 U.S. at 665 n.6. There is ample evidence in the record to establish that, in publishing the controversial defamatory allegations about Broflovski, Cartman was influenced by personal bias and motivated by his own selfish financial aspirations.

There is "unquestionably ample evidence in the record to support a finding that [Cartman's] principle charges were false." *Id.* at 681. The totality of the circumstances clearly indicates that Cartman published defamatory remarks about Ike Broflovski based on his own bias and selfish financial justifications. Thus, there is clear and convincing evidence that Cartman

acted with actual malice when he published the blog post that defamed Ike Broflovski. *Id.* at 681-82.

CONCLUSION

For the reasons set forth above, the Respondent, Ike Broflovski, respectfully requests that this Court affirm the decision of the United States Court of Appeals for the Fifteenth Circuit, reversing the trial court's grant of summary judgment.

Respectfully Submitted,

Team 221
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