

No. 09-2701

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*In the Supreme Court of the United States*

OCTOBER TERM, 2009

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**ERIC CARTMAN,**

*Petitioner,*

**v.**

**IKE BROFLOVSKI,**

*Respondent.*

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

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**BRIEF FOR RESPONDENT**

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## 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 when Cartman relied on a false photograph and did not use available software to verify its authenticity before disseminating it as news.
  - a. Whether the First Amendment creates a qualified reporter's privilege against the court-compelled discovery of sources in civil claims.
  - b. If there is a qualified privilege, whether Eric Cartman qualifies as a reporter for the purposes of this defamation suit as a party to a defamation claim and is, therefore, entitled to shield the identity of Professor Chaos.
  
- II. Whether an actual malice standard should be used to adjudicate Ike Broflovski's defamation claim against Eric Cartman on the grounds that Broflovski was a limited-purpose public figure when Cartman published information about Broflosvski on his internet blog, *The Sludge Report*.

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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.

## **STANDARD OF REVIEW**

This Court must determine questions of both law and fact in the issues of whether a qualified privilege exists and whether discovery may be compelled. A question of law falls under Federal Rules of Civil Procedure Rule 26(b)(5) and concerns the existence of the privilege; and the question of fact falls under Federal Rules of Civil Procedure Rule 37 and concerns the deferential abuse of discretion standard in a motion to compel discovery. Thus, because this Court must review mixed questions of law and fact, the standard of review is *de novo* for both the privilege and for reviewing the denial of summary judgment on appeal. *See In re Grand Jury Investigation*, 974 F.2d 1068, 1071 (9th Cir. 1992); *United States v. Diebold, Inc.* 369 U.S. 654, 655 (1962).

## STATEMENT OF THE CASE

Ike Broflovski, the introverted younger brother of Citrus CEO Kyle Broflovski, is the Director of Research & Development for Silverado-based Citrus Electronics, Inc. (“Citrus”). (J.A. at 2, 3). Kyle hired Ike, a Ph.D graduate of the Massachusetts Institute of Technology, to oversee the development of the Fortune 500 company’s new ePlay Touché. (J.A. at 2, 3). At an August 7, 2006 news conference on Citrus’ campus, Kyle announced the hiring and acknowledged his brother’s important, but behind-the-scenes role in the company, stating, “Ike’s a little shy, but one day might just be as famous as I am. Luckily, our customers don’t care about personalities; they care about quality consumer electronics. So pay no attention to the man behind the curtain!” (J.A. at 3). Reflecting his disinterest in the limelight, Ike quickly thanked his brother for the welcome and briefly stated to the press his desire to push Citrus to new heights. (J.A. at 3). Ike was briefly mentioned in an Associated Press article about Citrus’ new line of products and the story also appeared in a few newspapers, but that was the last of Ike’s voluntary news spotlight. (J.A. at 3).

Since Ike’s arrival, Kyle occasionally praised his little brother’s work in interviews. (J.A. at 3). Respecting Ike’s innovations, a few employees at Citrus Megastores also wore homemade “I like Ike” buttons. (J.A. at 3, 4). Beyond this limited praise, and his contact information and picture on the Citrus website (standard for all company executives), no other attention was paid to Ike until a July 8, 2008 blog posting catapulted him into the spotlight. (J.A. at 4).

Eric Cartman, the sole proprietor of Washoe-based Cartman’s Computer World, lost nearly all business to Citrus when the company opened a Megastore across from his strip-mall storefront. (J.A. at 4). So in June 2005, he started blogging for profit. (J.A. at 4). Every day, he updated his nationalist-toned blog, *The Sludge Report*, with news items from the Internet along

with his accompanying commentary. (J.A. at 4). *The Sludge Report* also became Cartman's soapbox for his disgust toward Citrus and Kyle Broflovski, whom he blames for his lost business and "the systematic oppression of the peoples of the Third World." (J.A. at 4).

With an audience now of 100,000, Cartman receives muckraking help from like-minded readers who send story leads to his personal email address. (J.A. at 4, 5). One such informant is an alleged Citrus employee who calls himself "Professor Chaos", but whose true identity Cartman knows. (J.A. at 5). A personal acquaintance for several years, Professor Chaos has supplied insider stories about Citrus' product releases for Cartman's blog. (J.A. at 5). Most recently, he sent a digital photograph allegedly showing Ike Broflovski engaged in human rights abuses at a Mumbai, India Citrus factory. (J.A. at 5). The day after receiving it, as part of a lead story entitled, "Citrus Engaging in Acts of Modern-Day Slavery?," Cartman posted the photo with the caption, "Ike Broflovski surveys his minions...but where's the whip, Ike?" (J.A. at 5, 6). Among other commentary about allegedly slave-like conditions at the Indian factory, Cartman wrote, "I wouldn't be surprised if Ike didn't have these poor Indians shackled to their stations at night...The Broflovskis and their capitalist oppression are a danger to humanity! If the image I am showing you depicts what I think it does, then I'm telling you the truth, Ike Broflovski is nothing but a slave driver!" (J.A. at 6).

The story spread rapidly and earned Ike the "Most Heinous Individual in the Galaxy" award on a top-rated news show, "The Countdown Factor". (J.A. at 6). Crediting Cartman for the story, the host instructed his many viewers to boycott Citrus. (J.A. at 6). Citrus' stock immediately dropped by 25%, and many retailers, such as Q-Mart, pulled its products from their stores. (J.A. at 6, 7). Save for a statement through his attorney denying the photograph's authenticity, Ike refused to respond to the news media's request for response. (J.A. at 7).

Ike filed a defamation suit against Cartman on September 20, 2008 in Silverado Superior Court, citing Cartman's libelous writings and his depression from resultant death threats. Cartman removed on diversity ground to the United States District Court for the Western District of Silverado.

When discovery commenced, Ike stipulated to visiting Mumbai, India, but not the factory, and a Citrus Photo Works software scan revealed that Ike's image was superimposed on the photograph. (J.A. at 7). Discovery also revealed evidence showing Cartman had newly installed forgery-detecting scanning software on his own computer but had used it on all other *Sludge Report* photographs except this one. (J.A. at 7).

To learn Professor Chaos' identity, the Broflovskis deposed the Mumbai factory manager and his top engineers, and Kyle also e-mailed all Citrus employees and followed up on the few leads. (J.A. at 8). Their efforts proved fruitless, so with no other reasonable alternatives after three months, Ike submitted an interrogatory to Cartman asking him to identify the full name and contact information of Professor Chaos. (J.A. at 8). Cartman responded two weeks later that he "invoke[d] a qualified privilege under the First Amendment, as a news reporter, against the disclosure of his source." (J.A. at 8). Ike in turn filed a motion on January 8, 2009 to compel Cartman to reveal the information, and Cartman attempted to block it by filing his January 16 motion in opposition. Alleging that the limelight-shunning Ike is a public figure who had not demonstrated actual malice by the tabloid-blogger, Cartman also filed a counter motion for summary judgment on the defamation claim.

### **SUMMARY OF THE ARGUMENT**

The First Amendment does not recognize a qualified reporter's privilege, nor is Ike Broflovski a limited-purpose public figure. Therefore Eric Cartman is not entitled to use either

the First Amendment or the public figure doctrine to shield himself from liability for his defamatory blog posting about Ike Broflovski.

A qualified reporter's privilege is a testimonial privilege that a majority of jurisdictions recognize as a shield for anonymous sources. However, a plain reading of *Branzburg v. Hayes*, as well as holdings in the Sixth and Seventh Circuits tell a different story. The First Amendment was never intended to trump the public's right to evidence, and not every incidental burdening of the press violates First Amendment rights. Testimonial privileges, like the one Cartman invoked to shield Professor Chaos' identity, only frustrate our court system. They also result in irreparable damage to private citizens like Broflovski who are merely trying to recover from the irresponsible and vindictive actions of rogue "reporters."

Additionally, reporters in Cartman's position are not without remedy just because they cannot invoke a qualified reporter's privilege. They may still file a motion to prevent discovery on relevancy grounds or plead Fifth Amendment privileges against compelled self-incrimination. They may also file a motion under Fed. R. Civ. P. 26(c), which blocks discovery requests that are onerous or are undue because of the other party's lack of effort to discover the information himself.

Moreover, even if a qualified reporter's privilege does exist, Cartman is not a reporter for purposes of this defamation suit because he is not only the libellant in this action, but also the only person who knows the actual identity of Professor Chaos. Thus, he cannot shield himself from the courts of justice because (1) libellee Broflovski has a justifiable need for the information; (2) the identity of the source is a key factor in determining whether Professor Chaos is a reliable source; and (3) that information will determine whether Cartman was negligent, if not reckless, in disseminating the story.

Additionally, Ike Broflovski is not a limited-purpose public figure because he did not voluntarily inject himself into a public controversy. Therefore, Cartman is subject to an ordinary negligence standard, and as such, a jury could reasonably conclude that he was negligent.

The public figure doctrine is designed to allow reporters the freedom to disseminate information vital to the survival of the concept of a free marketplace of ideas, without fear of legal action for mistaken reporting. It is not designed, however, to permit reporters like Cartman to attack private citizens like Broflovski with impunity. Furthermore, Broflovski is not even a limited-public figure under either the *Lerman* or *Waldbaum* tests that other circuits have applied. Consequently, evidence—such as Cartman’s failure to corroborate Professor Chaos’ story by scanning the photo, exhibited irresponsible reporting amounting to at least ordinary negligence. As such, summary judgment was improper in this case.

Finally, *even if* Broflovski is a limited-purpose public figure, an actual malice analysis indicates that Cartman intentionally or recklessly defamed him. Specifically, because Cartman lost business to Citrus, had an anti-Citrus sentiment through *The Sludge Report*, and published an unverified damaging photograph that was not “hot news,” he either recklessly or intentionally defamed Broflovski. As such, Cartman should be compelled to disclose Professor Chaos’ identity, and the Court of Appeals’ order denying Cartman summary judgment should be upheld.

## ARGUMENT

### **I. THE FIRST AMENDMENT DOES NOT CREATE A QUALIFIED REPORTER’S PRIVILEGE AGAINST COURT-COMPELLED DISCLOSURE OF PROFESSOR CHAOS IDENTITY; EVEN IF IT DID, CARTMAN DOES NOT QUALIFY AS A REPORTER IN THIS CASE.**

There is no qualified reporter’s privilege implicit in the United States Constitution’s First Amendment because having such a privilege would override our courts’ ability to administer

justice. The First Amendment provides in pertinent part that “Congress shall make no law...abridging the freedom of...press....,” U.S. Const. amend. I. While the drafters designed Freedom of the Press to protect the newsmen from governmental control and to allow people access to reliable information, they did not intend to make that right absolute. *Garland v. Torre*, 259 F.2d 545, 549 (2d Cir. 1958). The public has a “right to every man’s evidence” in the administration of justice, *Branzburg v. Hayes*, 408 U.S. 665, 702 (1972), and testimonial exclusionary rules and privileges contravene that fundamental principle, *United States v. Bryan*, 339 U.S. 323, 331 (1950), *as cited in Trammel v. United States*, 445 U.S. 40, 50 (1980). With the ability of almost anyone to be a “reporter”—be they a “lonely pamphleteer” or today’s internet blogger (*see Lovell v. Griffin*, 303 U.S. 444, 452 (1938))—as well as the ability to obtain sufficient reliable information from *named* sources, the drafters could not have intended a qualified reporter’s privilege to trump our basic need for justice in our courts. If they did, our justice system would be severely compromised. Thus, if a qualified reporter’s privilege truly did exist constitutionally, no private citizen would be protected from the “lonely pamphleteer” who holds a grudge and a keyboard.

A. The District Court Misread *Branzburg*; The First Amendment Does Not Create A Qualified Reporter’s Privilege Because It Would Result In An Insurmountable Obstacle To Justice.

The theory that the First Amendment left no room, under any circumstances, for compelling a newsmen to identify his source is erroneous. “That is clearly not the law after *Branzburg* with respect to criminal proceedings, and it appears to us that *Branzburg*, in language if not in holding, left intact, insofar as civil litigation is concerned, the approach taken in *Garland*.” *Carey v. Hume*, 492 F.2d 631, 636 (D.C. Cir. 1972) (concluding that a reporter who made one phone call to appellant to determine veracity of defamatory story before printing could

not successfully assert a qualified reporters privilege). The approach in *Garland* (a defamation case by actress Judy Garland) to which the *Carey* court refers is a case-by-case approach in which the facts are analyzed in order to determine whether the testimony at issue outweighs a newsman's claim "that the public's right to know is impaired." 259 F.2d 545; *Carey*, 492 F.2d at 631. This approach strikes a fair balance between preserving the Freedom of the Press and preserving our justice system's integrity and the right of private citizens to hold libellants accountable. Here, weighing Broflovski's need for Professor Chaos' identity against the notion that a news reporter must protect his sources for the integrity of the newsgathering process makes one thing clear: justice will only be served by compelling Cartman to disclose Professor Chaos' identity.

Moreover, even though a few recent cases have recognized some form of constitutional testimonial privilege for newsmen, *see e.g.*, *State v. Knops*, 183 N.W.2d 93 (Wis.1971) (dictum); *In re Grand Jury Witnesses*, 322 F.Supp. 573 (Cal. Dist. Ct. App. 1970), a plain reading of *Branzburg*—that there is no constitutionally-based testimonial privilege for newsman—still prevails in the Sixth and Seventh Circuits (*see McKevitt v. Pallasch*, 339 F.3d 530, 533 (7th. Cir. 2003); *In re Grand Jury Proceedings*, 810 F.2d at 584. The *Branzburg* view is much more persuasive than the idea, as the Appellate Court put it, of a "novel constitutional barrier to the discovery of relevant evidence in the course of litigation." (J.A. at 24). *See also United States v. Bryan*, 339 U.S. at 331.

**1. The press is not immune from laws of general applicability, such as defamation, nor are they free to publish whatever they choose.**

Freedom of the Press was incorporated into the First Amendment to protect the press from governmental control, to allow government censure, and to inform the people. *New York*

*Times Co. v. United States*, 403 U.S. 713, 717 (1971). However, the First Amendment is not a cloak under which the press is protected from every incidental burden to it. *Branzburg*, 408 U.S. at 682; *see also Grosjean v. American Press Co.*, 297 U.S. 233, 249 (1936). Violating laws of general applicability by printing devastating news stories still carry punishments for offenders, even if First Amendment rights are incidentally burdened. *Branzburg*, 408 U.S. at 665. This Court has correctly emphasized that a newspaper publisher enjoys no immunity from generally applicable laws. *Associated Press v. NLRB*, 301 U.S. 103, 132-133 (1937) (as cited in *Branzburg*, 408 U.S. at 683). “[The publisher] has no special privilege to invade the rights and liberties of others.” *Id.* Consequently, if a newspaper publisher does not have “special immunity” from generally applicable laws, our respondent blogger, Cartman, does not either.

Defamation is a law that applies generally to all people, including the press. *See New York Times Co. v. Sullivan*, 376 U.S. 254, 279-280 (1964). Consequently, the press may *not* circulate knowing or reckless falsehoods or intentionally defamatory material that are damaging to private reputation without subjecting itself to liability for damages or even criminal prosecution. *See New York Times*, 376 U.S. at 279-280; *Garrison v. Louisiana*, 379 U.S. 64, 74 (1964); *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 147 (1967) (opinion of Harlan, J.); *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 277 (1971). Here, Cartman did just that, but expected to hide behind his assumed constitutional shield. He had ready access to software to scan the photograph in order to determine its veracity—which he had previously used—but he chose not use it. (J.A. at 7). Instead, he ignored his responsibilities as a “newsman” and recklessly posted uncorroborated, unsubstantiated and defamatory material.<sup>1</sup>

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<sup>1</sup> Cartman even admitted to knowing that the image and/or accompanying story was potentially falsified (“If the image I am showing you depicts what I *think* it does...”)(emphasis added), yet he still published it because it fit within the anti-Citrus agenda he promulgated through *The Sludge Report*. (J.A. at 6).

**2. Reporters were intended to have only those privileges also enjoyed by other citizens and there are other remedies available to Cartman.**

Although the Founding Fathers gave the press First Amendment protection, it was not intended to be absolute. *Garland*, 259 F.2d at 548. As a result, it has generally been held that the First Amendment does not guarantee the press a constitutional right of special access to information that is not available to the general public. For example, in *In the Matter of United Press Assns. v. Valente*, 123 N.E.2d 777, 778, (N.Y. 1954), the press was denied access to courtrooms that were closed to the general public because the press did not have a greater right to access the information than the public, even though public interest was great in a case involving compulsory prostitution. *Id.*; see also *Zemel v. Rusk*, 381 U.S. 1, 16-17 (1965); *New York Times Co. v. United States*, 403 U.S. at 728-730; *Tribune Review Publishing Co. v. Thomas*, 254 F.2d 883, 885 (3d. Cir. 1958).

Similar to *Valente*, alleged human rights violations by such a large company as Citrus are also of great public interest, but, just like the closed courtroom, any information about them are unavailable to the general public. Here, Cartman, the “newsman,” is the only person who has access to Professor Chaos. Therefore, if Cartman does not release Professor Chaos’ identity, the public, including Broflovski will not be able to verify both the truthfulness of Cartman’s story, and Cartman’s reasonableness in relying on Professor Chaos. Without disclosure, that “story,” will remain nothing more than illegal libel, which is *not* constitutionally protected speech. *Beauharnais v. People of State of Ill.*, 343 U.S. 250, 267 (1952).

Additionally, as much as Freedom of the Press is recognized to be vital and basic to a democratic society, *and* newsmen/bloggers like Cartman *are* generally protected in their “truth” gathering, courts of justice are equally as important. *Garland*, 259 F.2d at 548. Their own ability

to gather truth lies primarily in their ability to compel testimony. As the *Garland* court pointed out, “[t]he concept that it is the duty of a witness to testify in a court of law has roots fully as deep in our history as does the guarantee of a free press.” 259 F.2d at 548; *see also Schneider v. State of New Jersey*, 308 U.S. 147, 161(1939); *American Communications Ass'n, C.I.O. v. Douds*, 339 U.S. 382, 400 (1950) (asserting, “[w]hat must be determined is whether the interest to be served by compelling the testimony of the witness in the present case justifies some impairment of this First Amendment freedom”). The First Amendment Freedom of Press protection was not intended, then, to give bloggers like Cartman testimonial privileges not enjoyed by other citizens. The only testimonial privilege rooted in the Constitution is the Fifth Amendment. *In re Grand Jury Proceedings*, 810 F.2d 580, 583 (6th. Cir. 1987). “We are asked to create another by interpreting the First Amendment to grant newsmen a testimonial privilege that other citizens do not enjoy. This we decline to do.” *Id.* Accordingly, Cartman has other remedies at his disposal besides non-existent First Amendment protections. *See also Branzburg*, 408 U.S. at 707-08.

Some other remedies available to Cartman, aside from the Fifth Amendment,<sup>2</sup>are Rule 26(c) of the Federal Rules of Civil Procedure<sup>3</sup> (“Rule 26(c)”), (J.A. at 24), or filing a motion to quash if the information sought is irrelevant, *United States v. Homer*, 411 F. Supp 972, 981 (1976). Here, under Rule 26(c), Cartman would fail. Like the plaintiff in *Garland*, Broflovski *did* make reasonable efforts to learn Professor Chaos’ identity—he deposed the Mumbai factory

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<sup>2</sup>The Fifth Amendment applies in criminal matters.

<sup>3</sup> Fed. R. Civ. Proc. 26 (c)(1), says in pertinent part, “A party or any person from whom discovery is sought may move for a protective order in the court where the action is pending....The court may, for good cause, issue an order to protect a party or person from *annoyance, embarrassment, oppression, or undue burden or expense....*”(emphasis added).

manager and his top engineers, and his brother sent out a company-wide email which met no success. (J.A. at 8). The District Court suggested that Broflovski should depose every employee at Citrus, and/or pull all files and do an e-mail sweep of the servers. (J.A. at 13-14). To accomplish this would simply be too great a burden, especially since he does not likely have the same access to those resources as his CEO brother, *and* he is only representing himself in the lawsuit, not Citrus. Nonetheless, if Cartman believes that Broflovski's discovery inquiry does not go to the heart of the matter of this case, Cartman could still bring about a motion to quash the request and a neutral judge would decide whether or not the information sought was necessary to bring about justice. *Homer*, 411 F. Supp. at 981 (1976) (*stating*, "The newsman should not be required to make disclosure where it appears that the subject to be disclosed is irrelevant or immaterial to the matter before the court.") Cartman would also fail on that motion; the discovery request for Professor Chaos' identity goes *directly* to the heart of the matter since without it, there is no way to verify whether he is a reliable source and whether there is any truth to Cartman's claims of human rights abuses at Broflovski's direction.

**3. The privilege would protect almost anyone claiming to be a reporter and thus, the pathway to justice would be severely obstructed.**

Our justice system operates "under the longstanding principle that "the public has a right to every man's evidence," *Trammel*, 445 U.S. at 50, and one reason for not instituting the privilege is the difficulty in interpreting who would be protected. "[T]o define those categories of newsmen who qualified for the privilege [is] a questionable procedure in light of the traditional doctrine that liberty of the press is the right of the lonely pamphleteer...just as much as of the large metropolitan publisher." *In re Grand Jury Witnesses*, 322 F. Supp. at 574; *see also Lovell*

*v. City of Griffin*, 303 U.S. at 452; *Mills v. Alabama*, 384 U.S. 214, 219 (1966); *Murdock v. Pennsylvania*, 319 U.S. 105, 111 (1943). (As cited in *Branzburg*, 408 U.S. at 703).

Thus, a qualified reporter's privilege would extend from a New York Times reporter endlessly working to uncover information of legitimate societal interest, down to the modern Twitter blogger who disseminates any piece of information, corroborated or not, that is consistent with his political or social point of view. The Constitution could not have intended to protect the latter "reporter" from the courts of justice, and therefore Cartman, most analogous to the aforementioned Twitter blogger, must be held accountable for his actions by revealing Professor Chaos' identity.

**4. If the First Amendment created a qualified privilege, states would not have enacted statutory shield laws protecting reporters.**

Finally, if the Constitution truly did contain a qualified reporter's privilege in the First Amendment, thirty-four states and the District of Columbia would not have had to adopt statutory shield laws to protect their reporters against compelled disclosure of their sources. *See* James C. Goodale et. al., *Reporter's Privilege*, 952 PLI/Pat 161, 170 (2008). Additionally, as the District Court pointed out, Congress tried and failed to adopt a similar federal statute. (J.A. at 9); *See also* Free Flow of Information Act, H.R. 2102, 110<sup>th</sup> Cong. (2007). The federal government's failure speaks just as clearly as the states' enactments above that the Constitution does not acutely set forth the kind of a testimonial privilege Cartman invoked.

It would be peculiar, as well, for the Constitution to create a privilege considering that is normally the job, and choice, of the states. *See* James Thomas Tucker & Stephen Wiernel, *Enacting a Reasonable Federal Shield Law: A Reply To Professors Clymer and Eliason*, 57 Am. U. L. Rev. 1291, 1297-98 (2008). The State of Silverado still does not have such a law, which neither admits of a constitutionally-based privilege nor denies it. However, its absence does not

mean that one already exists or, as the Court of Appeals pointed out, one must be adopted. (J.A. at 25).

B. Even If A Qualified Reporter's Privilege Exists, Cartman Does Not Qualify As A Reporter In This Case; Therefore, He Must Disclose Professor Chaos' Identity.

Even if there is a qualified reporter's privilege, it will not protect every person claiming to be a reporter. Applying the District Court's test, Cartman would not succeed. (J.A. at 12). The moving party must affirmatively demonstrate three things to overcome the privilege against compelled disclosure: First, the evidence sought must be "clearly relevant to the litigation;" second, there must exist "a compelling interest in obtaining the information that sufficiently outweighs the invocation of the privilege (i.e. it is absolutely necessary to maintain the claim);" and finally, the party must have "exhausted all means reasonably available to obtain the information." (J.A. at 12); *see also Zerilli v. Smith*, 665 F.2d 705, 713-714 (D.C. Cir. 1981); *Silkwood v. Kerr-McGee Corp.*, 563 F.3d 433, 438 (10th Cir. 1977).

Under the first prong, the information sought is clearly relevant because it goes directly to the heart of the claim: Professor Chaos' identity would prove whether Cartman reasonably on him. The *Carey* court noted that "the identity of the source will in most cases provide some evidence of his relative trustworthiness," and will probably tell whether the information given was true at all, thereby proving the libel. (J.A. at 27). *See Carey*, 492 F.2d at 637. Under the second prong, a compelling interest exists because without the disclosure of Professor Chaos' identity, Mr. Broflovski could not prove his claim of libel and remedy the defamation. In fact, the *Garland* court expanded on this point when it noted that when the information sought goes to the heart of the claim, justice will only be served

by releasing that information. 259 F.2d at 549; *see also Zerilli*, 656 F.2d at 713-14; *Silkwood v. Kerr-McGee Corp.*, 563 F.2d at 438. Justice would not be served if Cartman is permitted to print uncorroborated, libelous stories.

Finally, Mr. Broflovski exhausted all reasonable means to access the information without compelling disclosure by deposing the manager of the Mumbai factory and his top engineers, as well as having his brother send out company-wide emails. (J.A. at 8). Given that neither method supplied valuable information, (J.A. at 8), to probe deeper would require too much time and money on the part of a company who is (a) not as financially stable as it used to because of Cartman's actions; (b) not a party to this suit; and (c) cannot spend its shareholders' money defending a CEO's sibling. (J.A. at 6-7). Hence, the information is relevant, there is a compelling interest to reveal it, and it is inaccessible by any other reasonable means. The privilege therefore does not apply to Cartman.

Additionally, as the Appellate Court noted, where the plaintiff in a libel action seeks the source of the information upon which the defamation is based, there is no First Amendment protection unless the action is patently frivolous or meritless. (J.A. at 27); *Carey*, 492 F.2d at 636; *see also*, Romualdo P. Eclavea, *Privilege of Newsgatherer Against Disclosure of Confidential Sources or Information*, 99 A.L.R. 3d 37, section 10. Here, Cartman based his entire commentary on a forged photograph, resulting in severe damage to Mr. Broflovski's professional reputation and the company's financial health. (J.A. at 6-7). Clearly, then, this action is not frivolous or meritless.

Furthermore, even though the District Court interpreted Justice Powell's concurrence in *Branzburg* to mean that a qualified reporters privilege may only be overcome during grand jury proceedings, 408 U.S. at 689; (J.A. at 10), other jurisdictions have recognized that a libellee in a

civil case *also* has a justified need for court-compelled disclosure and examination of anonymous sources, often well before the trial phase. See *Dow Jones & Co. v. Superior Court*, 303 N.E.2d 847 (Mass. 1973). As a result, when the reporter asserts an immensely improbable story, like in this case, it makes pretrial disclosure of sources even more important. *Cervantes v. Time*, 464 F.2d 986, 994 (8th Cir. 1972). By comparison, the *Cervantes* court did *not* find that the defendant reporter doubted the truth of his allegedly defamatory article, nor was there evidence of the inherent improbability of the matters published because he had *extensively researched* his story before publishing it.

Here, Mr. Cartman's published assertions are so inherently improbable that there are strong reasons to doubt the story's veracity. The photograph was forged and Professor Chaos was the only source. Thus, unlike the *Cervantes* defendant whose article had been prepared "over a period of many months," (*Cervantes*, 464 F.2d at 994), Cartman quickly posted the story. For these reasons, Cartman cannot be comparably called an investigator reporter.

Assuming that a privilege did exist, he still is not a reporter for purposes of this suit. The *Gonzales* test that the District Court applied provides that a person is a reporter subject to the privilege if he "(1) intends to use information from an anonymous source in the dissemination of news; and (2) such intent existed when the information was obtained," (J.A. at 11); *Gonzales v. NBC*, 194 F.3d 29, 35 (2d Cir. 1998); *Cf. von Bulow v. von Bulow*, 811 F.2d 136, 142-143 (2d Cir. 1987). First, Cartman received this information at a personal email address. (J.A. at 4, 5). If Cartman really did intend to disseminate "news," he probably would have dedicated an email address for that purpose. Because he did not, it was equally as likely that he was gathering information as much for his own personal gratification as he was for informing the public about important current events. Second, because Cartman was "blogging for profit," and "streaming

advertisements on the website generate[d] revenue proportional to the daily number of hits the page receive[d],” Cartman needed a hook to increase his readership in order to increase his profits. (J.A. at 5). Broflovski’s story provided that hook. There is no proof that Cartman’s intention *when* he received the photograph was to use it to disseminate news. As a result, he is not a reporter under the *Gonzales* test.

In summary, Cartman acted irresponsibly<sup>4</sup> by posting an incredibly libelous story about Ike Broflovski because he did not scan the photograph or independently verify the alleged human rights abuses. As there is no qualified reporter’s privilege implied in the First Amendment, and even if there was, he would not be protected, justice will only be served by compelling Cartman to reveal the identity of Professor Chaos.

**II. THIS COURT SHOULD AFFIRM THE COURT OF APPEALS’ ORDER BECAUSE CARTMAN CANNOT USE THE PUBLIC FIGURE DOCTRINE TO SHIELD HIMSELF FROM LIABILITY SINCE BROFLOVSKI IS NOT A LIMITED-PURPOSE PUBLIC FIGURE.**

Cartman cannot use the First Amendment of the United States Constitution to shield himself from liability after defaming Broflovski on his internet blog, *The Sludge Report*. The First Amendment protects the principle that, “debate on public issues should be uninhibited, robust and wide-open...” *New York Times Co. v. Sullivan*, 376 U.S. 254, 271 (1964). In adhering to this principle, this Court in *New York Times* “constitutionalized” the law of defamation by prohibiting a “public official” from maintaining an action of defamation “unless he proves that the statement was made with ‘actual malice’ –that is, with knowledge that it was

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<sup>4</sup> The concurrence in *Carey v. Hume* addressed a constitutional responsibility that it says exists in First Amendment Freedom of the Press privileges: “The constitutional privilege contemplates a responsible press. To grant the media what as a practical matter amounts to absolute immunity- absolute privilege- would tend to lead to irresponsible journalism which would be, to paraphrase Walter Lippmann, ‘corrupting to the whole journalistic process.’” 492 F.2d at 641, citing a *Washington Post* article from March 25, 1973.

false or with reckless disregard of whether it was false or not.” 376 U.S. at 279-280. This Court then extended the actual malice standard to “public figures” in *Curtis Publishing Co v. Butts.*, 388 U.S. 130, 164 (1967), and further defined who constituted a public figure in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 345, 351 (1974). This public figure doctrine in turn provided the press “breathing space” that is so essential to its “fruitful exercise.” *See Id.* at 342; *see also NAACP v. Button*, 371 U.S. 415, 433 (1963).

Though existent, this “breathing space” is limited. The First Amendment protections are not absolute since such protection for the media would completely sacrifice the competing values served by defamation law. *Gertz*, 418 U.S. at 341. The press also “does not have special First Amendment immunity or privilege to invade the rights and liberties of others”, so it is certainly not free to publish with anything it desires. *See Associated Press v. NLRB*, 301 U.S. 103, 132-133 (1937). Moreover, unverified stories, like the one Cartman posted, cannot be protected because “[n]either the intentional lie nor the careless error materially advances society's interest in ‘uninhibited, robust, and wide-open’ debate on public issues. *See Gertz*, 418 U.S. at 341 (quoting from *New York Times*, 376 U.S. at 270.)

Despite these limitations, defamation defendants like Cartman attempt to bootstrap themselves into the realm of First Amendment protection. But defamation defendants “cannot, by their own conduct, create their own defense by making the claimant a ‘public figure’ who...must prove actual malice...in order to recover.” *Hutchinson v. Proxmire*, 443 U.S. 111, 135 (1979). The mere fact that Broflovski is associated with a publicized matter does not automatically make him a public figure. *See Wolston v. Reader's Digest Ass'n, Inc.*, 443 U.S. 157, 167 (1979).

As such, this Court should not allow Petitioner to shield himself from liability, and uphold the Court of Appeals' order denying Cartman summary judgment. Summary judgment is appropriate where "there are no genuine issues as to any material fact and . . . the moving party is entitled to summary judgment as a matter of law." Fed. R. Civ. P. 56(c); *Celotex v. Catrett*, 477 U.S. 317, 322 (1986). Specifically, a genuine issue exists if "the evidence is such that a reasonable jury could return a verdict for the non-moving party," and material facts are those "that might affect the outcome of the suit under the governing law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986). Moreover, in determining a motion for summary judgment, all reasonable inferences from the evidence must be drawn in favor of the non-moving party. *Id.* at 242.

Here, summary judgment was improper for the following reasons. First, Broflovski is not a limited-purpose public figure because he did not voluntarily inject himself into a public controversy. Second, since Broflovski is not a limited-purpose figure, his defamation claim must be reviewed under a negligence standard. Finally, even if Broflovski is a limited-purpose public figure, an actual malice standard analysis reveals that Cartman intentionally or recklessly made defamatory statements about Broflovski. For these reasons, this Court should affirm the Court of Appeals' order.

A. Broflovski Is Not A Limited-Purpose Public Figure Because He Did Not Voluntarily Inject Himself Into A Public Controversy; Therefore, His Defamation Claim Must Be Reviewed Under a Negligence Standard.

Ike Broflovski is not a limited-purpose public figure since he did not thrust himself into a public controversy to influence the resolution of the issues involved. As such, he should not be required to prove the demanding actual malice standard. In determining whether Broflovski is a limited-purpose public figure, this Court can look to the parameters it established in *Gertz*, which

focused on two concerns: (1) that he “voluntarily injects himself or is drawn into a particular public controversy” and (2) what “the nature and extent of an individual’s participation in the particular controversy [is that] giv[es] rise to the defamation” *Gertz*, 418 U.S. at 351-352. This Court can also look to two leading tests that have emerged as a result of balancing the concerns raised in *Gertz*: (1) the *Lerman* four-part test, *Lerman v. Flynt Distrib. Co.*, 745 F.2d 123, 136-37 (2d Cir. 1984); and (2) the *Waldbaum* three-part test, *Waldbaum v. Fairchild Publ’ns, Inc.*, 627 F.2d 1287, 1292 (D.C. Cir. 1980). Regardless of which approach this Court uses, the conclusion yields the same result: Broflovski is not a limited-purpose public figure in this case.

**1. Broflovski is not a limited-purpose public figure under the parameters established by this Court in *Gertz*.**

Broflovski does not fit within the limited-purpose public figure framework that this Court established in *Gertz*. Specifically, *Gertz* identified two types of public figures: (1) general-purpose public figures<sup>5</sup> and (2) limited-purpose public figures. 418 U.S. at 345, 351. A general purpose public figure must “achieve such pervasive fame or notoriety that he becomes a public figure for all purposes and in all contexts.” *Id.* at 351. To qualify as a limited-purpose public figure, an individual must have “voluntarily inject[ed] himself or [have been] drawn into a particular public controversy.” *Id.* In addition, *Gertz* noted that both general and limited-purpose public figures “invite attention and comment.” *Id.* at 345.

Voluntarily associating oneself with a public controversy, by itself, is insufficient to make a person a limited-purpose public figure; more is required. *See Gertz*, 418 U.S. at 352; *see also Wolston*, 443 U.S. at 167. Courts must focus on the “nature and extent of an individual’s participation in the particular controversy giving rise to the defamation.” *Gertz*, 418 U.S. at 352.

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<sup>5</sup> Petitioner has conceded that Broflovski is not a general-purpose public figure. (J.A. at 18).

For example, in *Gertz*, this Court held that an attorney was not a public figure even though he voluntarily associated himself with a case that was certain to receive extensive media exposure. *Id.* The attorney limited his participation to representing his client and did not discuss the case with the press; therefore he “did not thrust himself into the vortex of this public issue, nor did he engage the public's attention in an attempt to influence its outcome.” *Id.* Here, Broflovski is not a limited-purpose public figure since he was not actively involved in the public controversy. His limited participation in the controversy was through fulfilling his duties to develop new products as Citrus’ Research & Development Director. (J.A. at 3). In fact, like the petitioner in *Gertz* who never discussed his case with the press, Broflovski never gave any interviews to the press. (J.A. at 3). Thus, holding Broflovski as a limited-purpose public figure will directly contradict *Gertz*.

Moreover, just because a private individual is associated with or involved in a publicized matter does not make him a public figure. *Wolston*, 443 U.S. at 167. In *Wolston*, the petitioner failed to respond to a grand jury subpoena regarding espionage activities, but that did not mean he drew “attention to himself in order to invite public comment or influence the public with respect to any issue.” *Id.* at 168. This Court held that because the petitioner was not a limited-purpose public figure within the *Gertz* framework, he was not required to prove “actual malice.” *Id.* at 166.

*Wolston* further illustrates that an individual cannot become a limited-purpose public figure involuntarily. 443 U.S. at 166. Thus, *Wolston*’s holding remained within the confines of *Gertz*’s idea that truly involuntary figures are the rare exception, rather than the rule. *See Gertz*, 418 U.S. at 345 (*stating*, “it may be possible for someone to become a public figure through no purposeful action of his own, but the instances of truly involuntary public figures must be exceedingly rare”); *see also Time, Inc. v. Firestone*, 424 U.S. 448 (1976) (ruling that Firestone

Tire Corporation owner's wife did not become a public figure by holding press conferences). Similarly, Broflovski cannot become a limited-purpose public figure through his involvement in a public controversy Cartman created. Like the petitioner in *Wolston* who was "dragged unwillingly into the controversy," Broflovski was thrown into the limelight when Cartman posted an uncorroborated and forged photograph with accompanying commentary. (J.A. at 5-6).

Accordingly, Broflovski is not a limited-purpose public figure under the parameters established by this Court in *Gertz*. Holding otherwise will have the impermissible effect of reinstating the rule announced in *Rosenbloom v. Metromedia*, 403 U.S. 29, 44 (1971), which required private figures to prove actual malice in defamation cases if the matter involved a public concern. Therefore, requiring Broflovski, who is a private figure, to prove actual malice, will accept the reasoning advanced by *Rosenbloom*, which this Court has consistently rejected. *See Wolston*, 443 U.S. at 167; *Gertz*, 418 U.S. at 335; *Firestone*, 424 U.S. at 454.

**2. Broflovski is also not a limited-purpose public figure under either the *Lerman* or *Waldbaum* tests.**

Broflovski is also not a limited-purpose public figure under the two leading tests that emerged to give a more precise application of the doctrine: (1) the *Lerman* four-part test, *see Lerman*, 745 F.2d at 136-37; and (2) the *Waldbaum* three-part test, *see Waldbaum*, 627 F. 2d at, 1292. In remaining faithful to *Gertz*, both tests balanced the two concerns this Court raised: that a person must voluntarily inject himself into a public controversy, and that the nature and extent of the person's involvement in the controversy must be great. 418 U.S. at 351-352. Since Broflovski is not a limited-purpose public figure under the rationale of *Gertz*, he is likewise not a limited-purpose public figure under either test.

Although this Court is not bound by the tests<sup>6</sup>, it can look to the *Lerman* test determine whether Broflovski is a limited-purpose public figure. The Court of Appeals correctly held that Broflovski is not a limited-purpose public figure, and this Court should do the same.

Under the *Lerman* test, an individual is a limited-purpose public figure if he: “(1) successfully invited public attention to his or her views in an effort to influence others prior to the incident that is the subject of litigation; (2) voluntarily injected himself or herself into a public controversy related to the subject of the litigation; (3) assumed a position of prominence in the public controversy; and (4) maintained regular and continuing access to the media.” *Lerman*, 745 F. 2d at 136-37.

The *Lerman* test’s first prong adheres to the principle announced in *Gertz* that limited-purpose public figures “invite attention and comment.” The plaintiff in *Lerman*, who was a renowned author, sought “publicity both for herself and her books [as] part [of] her professional endeavors....” 745 F.2d 123 at 136. Broflovski, on the other hand, did not invite public attention to his views prior to this litigation. He shunned public attention so much that he was “rarely seen in public.” (J.A. at 4). In fact, he never even spoke with the press since his hiring at Citrus. (J.A. at 4). Thus, Broflovski fails the first prong of the *Lerman* test.

Directly following one of the main concerns in *Gertz*, the second prong requires a *voluntary* injection into the public eye. The *Lerman* plaintiff, for example, voluntarily injected herself into a public controversy about “[t]he relations between the sexes and public nudity” because she wrote on the subject. 745 F.2d 123 at 138. Broflovski, however, did *not* voluntarily

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<sup>6</sup>, “Although *Waldbaum* ”provides us with useful analytic tools[,] nevertheless, the touchstone remains [the standard the Supreme Court set forth [in *Gertz*]for classifying an individual as a public figure... See *Lohrenz v. Donnelly*, 350 F.3d 1272, 1280 (D.C. Cir. 2003).

inject himself into any public controversy, let alone human rights violations. In fact, Broflovski “was dragged unwillingly into the controversy” by Cartman who was interested only in smearing Citrus and broadening his blog readership. *Wolston*, 443 U.S. at 166, as cited in *Lerman*, 745 F.2d 123 at 136. Thus, Broflovski fails the second prong.

The *Lerman* test’s third prong addresses the nature and extent of the individual’s participation in the public controversy. Just like the first two prongs, the *Lerman* plaintiff unquestionably assumed a position of prominence in the public controversy by virtue of her career. 745 F. 2d 123 at 136. However, while Broflovski’s image appeared in a photo allegedly showing human rights abuses at a Citrus factory, he did not assume a position of prominence in them. First, a Citrus PhotoWorks scan revealed his image had been superimposed on the photo of the factory workers, which means he was not present at that time. (J.A. at 7). Additionally, while he may have made trips to Mumbai, there is no indication he ever visited the factory. (J.A. at 7). Moreover, even if he *had* visited the factory, the photo was taken of the *night* shift workers. Nighttime is a strange time of day for an executive to be there, and the alleged abuses may have occurred only at that time. (J.A. at 7). Finally, as the above analysis indicates, Broflovski’s role in any abuses is purely speculative and based on circumstantial evidence. The more prominent character in the controversy is Citrus, as a whole, and Ike’s brother, Kyle: Citrus’ CEO and public face. Thus, Broflovski did not assume a position of prominence in the controversy.

The *Lerman* test’s fourth prong also addresses the nature and extent of the individual’s participation in the public controversy. Again, by virtue of her career, the *Lerman* plaintiff had to maintain regular and continuing access to the media. Here, however, Broflovski accessed the media only two times: his speaking a few words at a moderately attended press conference

following his hiring and his attorney's denial statement following Cartman's defamatory blog posting. (J.A. at 3, 7). His attorney's statement, of course, falls under the common law right of reply. *See Foretich v. Capital Cities/ABC, Inc.*, 37 F.3d 1541, 1559-60 (4th Cir. 1994).

Nonetheless, Broflovski had to access the media more than once or twice to satisfy this prong since, by comparison the *Lerman* plaintiff made an "organized and ongoing effort to maintain media access." Thus, Broflovski fails the fourth and final prong of the *Lerman* test.

As the *Lerman* court noted (*citing from James v. Gannett Co.*, 353 N.E.2d 834, 840 (N.Y. 1976)), "The essential element underlying the category of public figures is that the publicized person has taken an affirmative step to attract public attention." *Lerman*, 745 F. 2d at 137. In this regard alone Ike Broflovski cannot be considered a limited-purpose public figure because the record is replete with examples of his shunning the limelight. Since he has also failed all four prongs of the *Lerman* test, Ike Broflovski is not a limited-purpose public figure.

Moreover, this Court can also look to the *Waldbaum* test to determine whether Broflovski is a limited-purpose public figure. In applying the *Waldbaum* test to the facts of this case, Broflovski still would not be a limited-purpose public figure. The district court improperly applied the *Waldbaum* test in reaching the conclusion that Broflovski is a limited-purpose public figure, so a correct application would reveal the opposite, and thus proper, result.

Under the *Waldbaum* test, an individual is deemed a limited-purpose public figure if the following factors are present: (1) the controversy at issue must be public both in the sense that people are discussing it and people other than the immediate participants in the controversy are likely to feel the impact of its resolution; (2) the plaintiff must have more than a "trivial or tangential" role in the controversy; and (3) "the alleged defamation [must be] germane to the plaintiff's participation in the controversy." (J.A. at 16); *Waldbaum*, 627 F.2d at 1292; *see also*

*Silvester v. Am. Broad. Cos.*, 839 F.2d 1491, 1494 (11th Cir. 1988); *Trotter v. Jack Anderson Enters., Inc.*, 818 F.2d 431, 433-34 (5th Cir. 1987); *Tavoulareas v. Piro*, 817 F.2d 762, 773 (D.C. Cir. 1987) (noting that executive status in a large company does not itself qualify one as a public figure under *Waldbaum*).

In *Waldbaum*, the chief executive officer and president of Green Belt Consumer Services, Inc. sued Fairchild Publications, Inc. alleging that they published an article falsely stating Waldbaum was fired for losing Greenbelt's money. 627 F.2d at 1290. The trial court granted summary judgment on the grounds that Waldbaum was a limited-purpose public figure, and thus could not prove the defendants acted with actual malice. *Id.* at 1289. The Court of Appeals affirmed, holding that Waldbaum "was a public figure for the limited range of issues concerning "Greenbelt's unique position within the supermarket industry and Waldbaum's efforts to advance that position." *Id.* at 1291. That court also noted that "Walbaum played an active role..." and "held several meetings to which press and public were invited." *Id.* at 1290. Consequently, his "actions generated considerable comment...in trade journals and general-interest publications." *Id.* Based on these facts and a comparison to the present case, applying the *Waldbaum* test reveals that Broflovski is not a limited-purpose public figure because he only satisfies two of the test's three prongs.

The first prong addresses part of the first concern of this Court in *Gertz*, that there must be an actual public controversy. The *Waldbaum* plaintiff's controversy involved whether or not he had been fired as a result of his such a large company's money. Because Waldbaum advanced Green Belt's position in the supermarket industry, the court determined that the public was discussing the controversy and would feel the effects of its resolution. In Broflovski's case, the public controversy is alleged human rights violations that also involve a large, international

company. (J.A at 2). It is undisputed that people are discussing it since the mainstream media picked up the story after it traveled quickly throughout the blogosphere. (J.A at 6).

Additionally, since Q-mart resultantly decided not to carry Citrus' products, other people will likely feel the effects of its resolution. (J.A at 7). Thus, Broflovski satisfies the first prong..

The third prong addresses the concern of this Court in *Gertz* about the nature and extent of the plaintiff's participation in the controversy by determining whether the alleged defamation is germane to the public controversy. Just like the *Waldbaum* plaintiff whose alleged firing was germane to whether he had caused his company to lose money, there would be no suit if Cartman had not attached Broflovski's name and image to Citrus' alleged human rights violations. Therefore, Cartman's defamation is likely germane to Broflovski's participation in the controversy, which satisfies the third prong. This test, however, requires the satisfaction of all three prongs, so Broflovski is still not a public figure because he fails the second prong.

The *Waldbaum* test's second prong also addresses this Court's concern in *Gertz* about the nature and extent of the plaintiff's participation in the controversy. The *Waldbaum* plaintiff's participation in the controversy was more than trivial or tangential because as the president and CEO of the company—the company's primary player—the very security of his company depended on his maintaining, not compromising, the financial integrity of it. By comparison, the primary player in the alleged human rights violations controversy is actually Citrus, itself, since only Broflovski's image was forged in the photograph, not the night shift workers' image. (J.A. at 7). Broflovski therefore did *not* have more than a trivial or tangential role in the controversy, and he fails the second prong because there is no proof he went to the factory except for a forged photograph. (J.A. at 7). Thus, Broflovski does not satisfy the *Waldbaum* test and he is still not a limited-public figure for purposes of this suit.

B. Since Broflovski Is A Private Figure, His Defamation Claim Must Be Reviewed Under A Negligence Standard.

Since Broflovski is not a limited-purpose public figure, the common law negligence standard must be applied to Cartman's actions to determine whether summary judgment should be denied. The Silverado Supreme Court adopted the common law standard for defamation as announced in the Second Restatement of Torts,<sup>7</sup> which basically sets forth the same standard as in all torts: did the defendant act as a "reasonably prudent person in the circumstances?" Restatement (Second) of Torts § 580(B). (J.A. at 14).

In applying the negligence standard, there are several factors this court must look to in order to determine whether Cartman was in fact negligent. Restatement (Second) of Torts § 580(B). cmt. h. The first factor is time: Did the communication require "prompt publication to be useful," or was there sufficient time to investigate thoroughly? *Id.* In other words, was it "hot news<sup>8</sup>?" *Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496, 521 (1991) (holding that a tight deadline did not mean the reporter had "hot news.>"). Here, Citrus' human rights abuses may be newsworthy, but only following an investigation. The blog contained at best speculative "news," so it was not yet a matter of public interest. *Cf. Bressler v. Fortune Magazine*, 971 F.2d 1226, 1233 (6th Cir. 1992) (a magazine relying upon multiple corroborated sources did not defame Tennessee Valley Authority officials in reporting on allegations of covered-up safety violations). Therefore, the time factor fails because Cartman did not verify the photograph's veracity.

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<sup>7</sup>Restatement (Second) of Torts, §580(B) provides in relevant part, "One who publishes a false and defamatory communication concerning a private person... is subject to liability if, but only if, he (a) knows that the statement is false and that it defames the other, (b) acts in reckless disregard of these matters, or (c) acts negligently in failing to ascertain them.

<sup>8</sup> The "hot news" doctrine is intended to protect for the news-gatherer time-sensitive news from free-riders before the news-gatherer has had the opportunity to reap the benefit of its dissemination. *See generally, The Heist of Feist: Collections of Information and the Possible Federalization of "Hot News," 21 Cardozo L. Rev. 871, 924 (1999).*

The second factor is the nature of the interest that Cartman promoted in publishing the photograph and his commentary. Restatement (Second) of Torts § 580(B). cmt. h. Was it an important democratic interest, or was it less important gossip? *Id.* Here, the record states that Cartman was not only upset at Citrus for nearly sinking his business, but he also had a populist/nationalist agenda, too, indicating he may be willing to spread false information for his cause. (J.A. at 4). Additionally, without research into the allegations' truth, the Citrus human rights violations was still merely speculative "news" at best and thus gossip. That Cartman had recently installed forgery-detecting software on his computer but chose not to use it further supports this conclusion. Thus, the interest here was gossip designed to aid Cartman's agenda.

The third factor is "the extent of the damage to the plaintiff's reputation or the injury to his sensibilities that would be produced if the communication proves to be false." (Second) of Torts § 580(B). cmt. h. Here, the extent of damage to our plaintiff was great. Broflovski, a timid young man who avoided the limelight and the public eye at almost all costs, was named Keith McRiley's "Most Heinous Individual in the Galaxy" nightly award recipient. Consequently, he received death threats and suffered severe depression. (J.A. at 6, 7). Even if the photograph and human rights abuses are conclusively proven false, there can be no doubt that Broflovski's reputation and sensibilities are still irreparably damaged. Thus, Cartman clearly acted negligently in disseminating this communication and summary judgment was not proper.

C. Even If Broflovski Is A Limited-Purpose Public Figure, An Actual Malice Standard Analysis Reveals Clear And Convincing Evidence that Cartman Intentionally Or Recklessly Made False And Defamatory Statements Against Broflovski.

If Broflovski *is* a limited-purpose public figure, Cartman acted with actual malice when he intentionally or recklessly published false and defamatory statements about him in *The Sludge*

*Report*. To establish libel under the Silverado Supreme Court’s adopted standard for defamation, the plaintiff must prove: “(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.” (J.A at 14); Restatement (Second) of Torts § 558 (1977) (emphasis added). The only element at issue here, however, is the fault element; the trial court will determine all other issues. (J.A. at 27).

In giving “fault” a constitutional meaning, this Court in *New York Times* held that the First Amendment “prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with ‘actual malice’ -- that is, with knowledge that it was false or with reckless disregard of whether it was false or not.” *New York Times* 376 U.S. at 279-280. This actual malice standard also applies to “public figures,” *Curtis*, 388 U.S. at 160. To establish actual malice, false statements must be made “with [a] high degree of awareness of their probable falseness,” *Garrison v. Louisiana*, 379 U.S. 64, 74 (1964), or by “entertain[ing] serious doubts as to the truth of [the] publications,” *St. Amant v. Thompson*, 390 U.S. 727, 731-32 (1968).

In *Curtis*, the Saturday Evening Post published an article alleging that the University of Georgia athletic director—a public figure—had fixed a game. 388 U.S. at 135-36. All of the evidence pointed to a shoddy investigation of these grave charges: The witness’ statement was unsubstantiated, the article’s author was on probation for bad checks, and no one at the Post had either reviewed game tapes or checked the author’s notes before publication. *Id.* at 157-58. This was clear and convincing evidence “of highly unreasonable conduct constituting an extreme

departure from the standards of investigation and reporting ordinarily adhered to by responsibly publishers,” and therefore actual malice. *Id.* at 155.

Here, *if* Broflovski is a limited-purpose public figure, there is clear and convincing evidence of actual malice by Cartman. Just like the *Curtis* defendant, Cartman did not attempt to corroborate Professor Chaos’ story with other witnesses’ accounts. (J.A. at 5). Rather, he recklessly published a photograph without checking it with his forgery-detecting software, and his loss of business to Citrus leaves little doubt as to his motivations for quickly publishing a story with such damning implications. (J.A. at 4, 7). As such, Cartman acted intentionally or recklessly in the dissemination of this story through the *Sludge Report*, and his defamatory statements against Ike Broflovski deserve no protection. Accordingly, summary judgment is inappropriate since a finder of fact could not find conclusively in Cartman’s favor.

### **CONCLUSION**

For the reasons set forth above, Ike Broflovski, Respondent, respectfully requests that this Court affirm the decision of the United States Court of Appeals for the Fifteenth Circuit, denying Cartman’s motion for summary judgment.

Respectfully Submitted,

Team 225  
Counsel for Respondent