COURT OF APPEALS OF OHIO
NINTH APPELLATE DISTRICT
LORAIN COUNTY, OHIO

GIBSON BROS., INC, et al.,	)	**CASE NO. 20CA011648**
Plaintiffs-Appellees,	)	
v.	)	
OBERLIN COLLEGE, et al.	)	
Defendants,	)	**STATEMENT OF WEWS-TV IN RESONSE TO MAGISTRATE'S ORDER**
and	)	
WEWS-TV	)	
Appellant.	)	

In accordance with the June 17, 2020 Magistrate's Order, WEWS-TV respectfully submits this statement addressing the Court's jurisdiction to consider WEWS-TV's appeal of the Entry and Ruling on Non-Parties' Motion for Access to Sealed Case Document issued by the Lorain County Court of Common Pleas on April 29, 2020 and journalized on May 5, 2020. *See* **Ex. 1.** Additionally, the Magistrate's Order requested (1) a time-stamped copy of the complaint and any other pleadings that assert claims, cross-claims, or counterclaims, and (2) time-stamped copies of all orders that dispose of claims and parties to the action, other than the order appealed. Attached as Exhibits 9 through 15 are time-stamped copies of those requested documents from the underlying lawsuit. As explained below, the claims and rulings reflected in Exhibits 9-15 were fully resolved by the trial court and are not at issue in the instant appeal.

FACTUAL BACKGROUND

On November 7, 2017, Gibson Bros. Inc., David R. Gibson, and Allyn W. Gibson (collectively, "Gibson") filed suit against Oberlin College and Dr. Meredith Raimondo (collectively, the "Oberlin Parties") in the Lorain County Court of Common Pleas, Case No. 17CV193761 (the "Lawsuit"). In June 2019, a jury issued a verdict in Gibson's favor. *See* **Ex. 11** (Judgment Entry reducing jury verdict damages award). The Oberlin Parties appealed the verdict to this Court on October 8, 2019. Gibson filed a cross appeal and conditional cross appeal on October 18, 2019.

Appellant WEWS-TV is an ABC-affiliated television station, owned by E.W. Scripps Company, which serves the greater Cleveland metropolitan area, and which has reported extensively on the Lawsuit. *See, e.g.*, *Jury Awards $11 Million in Lawsuit Over Ohio College Dispute*, NEWS 5 CLEVELAND (June 8, 2019), https://www.news5cleveland.com/news/local-news/oh-lorain/jury-awards-11-million-in-lawsuit-over-ohio-college-dispute.

On October 31, 2019, after all claims between Gibson and the Oberlin Parties in the Lawsuit were resolved in the Lorain County Court of Common Pleas, WEWS-TV, Advance Ohio, and the Ohio Coalition for Open Government (collectively, the "Media Movants") filed a separate motion in the Lorain Country Court of Common Pleas pursuant to Ohio Superintendence Rule 45(F) (the "Motion") seeking to unseal an exhibit to the Oberlin Parties' combined summary judgment reply brief ("Exhibit G"). Media Movants filed this motion in accordance with the public's presumptive right of access to judicial documents under the First Amendment, the Ohio Constitution, and Ohio Superintendence Rule 45 (the "Motion"). *See* **Ex. 2.** The Media Movants' Motion is wholly unrelated to the underlying claims litigated by plaintiffs and defendants in the Lawsuit. Gibson and nonparty Allyn D. Gibson (collectively, the

"Gibson Parties") jointly opposed the Motion on December 2, 2019. *See* **Ex. 3.** The Oberlin Parties made no response to the Motion. Media Movants filed a timely reply to the Gibson Parties' opposition on December 9, 2019. *See* **Ex. 4.**

On February 20, 2020, the court issued an order inviting supplemental briefing with respect to the court's jurisdiction to decide the Motion. *See* **Ex. 5.** The court was concerned that it could not hear Media Movants' request because the Lawsuit was already with the Court of Appeals. Media Movants and the Gibson Parties each filed such a supplemental brief on March 11, 2020. *See* Exs. **6 & 7**. In their supplemental brief, the Gibson Parties argued that the court did not have jurisdiction to decide Media Movants' request until the pending appeal was completed "because the parties do not know whether Defendants will seek to overturn or otherwise modify the Court's September 16, 2019 Journal Entry denying Defendants' previous attempt to unseal the materials covered by the Motion." **Ex. 7** at p. 1-2. In response to this assertion in the Gibson Parties' supplemental brief, the Oberlin Parties filed a notice with the court clarifying that they would not be appealing the September 16, 2019 order of the court denying a motion to unseal Exhibit G filed by the Oberlin Parties on August 28, 2019. *See* **Ex. 8.** The Oberlin Parties took no further action with respect to the Motion.

On April 29, 2020, the court issued an Entry and Ruling on Non-Parties' Motion for Access to Sealed Case Document (the "Order") denying the Motion for access to Exhibit G. *See* **Ex. 1.** At the time of its ruling, the court had already disposed of the substantive claims asserted in the Lawsuit. The court's April 29, 2020 ruling on the Motion disposes of the separate and distinct issue as to whether Media Movants are entitled to access a sealed court document in accordance with the public's presumptive right of access to judicial documents under the First Amendment, the Ohio Constitution, and Ohio Superintendence Rule 45. The entry was

journalized and served on May 5, 2020. *Id.* WEWS-TV filed a timely notice of appeal on June 4, 2020.

ARGUMENT

A final order "is one disposing of the whole case ***or some separate and distinct branch thereof.***" *Lantsberry v. Tilley Lamp Co.*, 27 Ohio St. 2d 303, 306, 272 N.E.2d 127, 129 (1971) (emphasis added). The General Assembly has provided that: "Every final order, judgment, or decree of a court and, when provided by law, the final order of any administrative officer, agency, board, department, tribunal, commission, or other instrumentality may be reviewed on appeal by a court of common peas, a court of appeals, or the Supreme Court, whichever has jurisdiction." R.C. § 2305.03(A).

The concept of "final orders" is based on the fact that a court making non-final (or interlocutory) orders retains jurisdiction for further proceedings. *Lantsberry*, 27 Ohio St.2d at 306. But in this case, the trial court had already lost jurisdiction of the plaintiffs and defendants' claims vis-à-vis each other. The trial court's jurisdiction at the time it issued the Order here was limited to collateral issues. *See* **Ex. 7.** As numerous courts have explained, the "right of access to judicial records and documents is independent of the disposition of the merits" of a case. *FutureFuel Chem. Co. v. Lonza, Inc.*, 756 F.3d 641, 648 (8th Cir. 2004) (quoting *Stone v. Univ. of Md. Medial Sys. Corp.*, 855 F.2d 178, 180 n. * (4th Cir. 1988)). The Order was thus upon a summary application in an action after judgment, and is final and appealable for that simple reason. R.C. § 2505.02(B)(2).

In determining whether a court order is final and appealable, Ohio appellate courts apply a two-prong test: first, the order must constitute a final order pursuant to Ohio R.C. 2505.02, and, in situations where a decision is rendered "with respect to fewer than all of the parties or to fewer

than all of the claims," it must also satisfy the requirements of Ohio Civ.R. 54(B). *Chef Italiano Corp. v. Kent State Univ.*, 44 Ohio St. 3d 86, 88, 541 N.E.2d 64, 67 (1989). Both prongs are met here.

A. The Order is a final order pursuant to Ohio R.C. 2505.02.

Here, the Order is final for multiple reasons. A court order is final under R.C. 2505.02(B)(2) when it "affects a substantial right made in a special proceeding or upon a summary application in an action after judgment." Satisfying only one of these grounds is required. The Order here satisfies both. The Order is a final order for the separate and additional reason that the Order "determines the action and prevents a judgment" as to the relief sought by Media Movants.

The Order is a final order because it affects a substantial right made in a special proceeding. A "substantial right" is defined as "a right that the United States Constitution, the Ohio Constitution, a statute, the common law, or a rule of procedure entitles a person to enforce or protect." R.C. 2505.02(A)(1). The Media Movants' right affected by the Order is all of these.

Exhibit G was filed with the court as an exhibit to the Oberlin Parties' combined reply brief in support of their motions for summary judgment. As such, it falls squarely within the category of judicial documents to which a presumption of access applies under the First Amendment and the Ohio Constitution. *State ex rel. Beacon Journal Pub'g Co. v. Bond*, 98 Ohio St.3d 146, 2002-Ohio-7117, ¶ 14 (holding that the "open courts" provision of the Ohio Constitution creates an equivalent right of public access to court proceedings and records as "that accorded by the Free Speech and Free Press Clauses of the First Amendment to the United States Constitution"); *Lugosch v. Pyramid Co. of Onondaga,* 435 F.3d 110, 124 (2d Cir.2006) (finding a "First Amendment right of access to documents submitted to the court in connection with a

summary judgment motion"); *Rushford v. New Yorker Magazine, Inc.*, 846 F.2d 249, 252–53 (4th Cir.1988) (finding that "[b]ecause summary judgment adjudicates substantive rights and serves as a substitute for a trial" the First Amendment presumption of access attaches to "documents filed in connection with a summary judgment motion in a civil case"). Moreover, as an exhibit that was "submitted to a court or filed with a clerk of court in a judicial action or proceeding," it constitutes a "case record" to which a presumption of openness applies under Ohio Superintendence Rule 45. Media Movants are entitled to enforce these rights of access. Indeed, Media Movants filed the Motion expressly for that purpose. Thus, the Order unquestionably "affects . . . substantial right[s] in an action." R.C. 2505.02(B)(1).

The Media Movants' request constitutes a "special proceeding." "A '[s]pecial proceeding' is 'an action or proceeding that is specially created by statute and that prior to 1853 was not denoted as an action at law or a suit in equity.'" *State v. Horsley*, Jackson App. No. 18CA4, 2018-Ohio-4203, ¶ 6 (4th Dist.)(quoting R.C. § 2505.02(A)(2)). Media Movants' request was not denoted as an action at law or a suit in equity prior to 1853. Moreover, Media Movants' right to public access was specially created by statute pursuant to Ohio's Public Records Act, and in 2009 the Ohio Supreme Court promulgated its own rules to govern the release of public records held by the judiciary. *State ex rel. Parisi v. Dayton Bar Association Certified Grievance Committee*, 2019-Ohio-5157, ¶ 16-19.

The Order is a final order because it was issued upon a summary application in an action after judgment. The term "summary application" is not specifically defined in the statute, "but it seems to fit situations like the present, which arise after judgment and do not involve lengthy trial court proceedings." *State v. McBroom*, 2015-Ohio-4719, 49 N.E.3d 785, ¶ 3 (2nd Dist.), citing *State v. Wilkinson*, 2d Dist. Montgomery No. 18286, 2000 WL 1644135, *1–2 (Sept. 25,

2000) and *State v. Branham*, 6th Dist. Huron App. No. H–95–066, 1995 WL 704100 (Nov. 27, 1995); *see also MBNA Am. Bank, N.A. v. Bailey*, 9th Dist. Summit No. 22912, 2006-Ohio-1550 (order issued in response to motion for garnishment was an order in summary application after judgment)

The Court also has jurisdiction under Section 2505.02(B)(1) because the Order "determines the action and prevents a judgment." The Ohio Supreme Court has consistently held that where, as here, "the cause has been disposed of and there is nothing left for the determination of the trial court," an order determines an action and prevents a judgment. *See Natl. City Commercial Capital Corp. v. AAAA at Your Serv., Inc.*, 114 Ohio St.3d 82, 83, 868 N.E.2d 64, 663, 666 (2007); *see also Lantsberry*, 272 Ohio St.2d at 306 ("A final order . . . is one disposing of the whole case or some separate and distinct branch thereof."). Not only did the trial court deny Media Movant's motion to unseal Exhibit G, finding that "continued restriction of public access is warranted," it also foreclosed the possibility of a less restrictive alternative to complete sealing, such as redaction. *See* **Ex. 1** at p. 2 ("Because of the nature of the information at issue in Exhibit G . . . there is no less restrictive alternative to complete restriction."). For these reasons, the Order constitutes a final order pursuant to R.C. 2505.02.

B. Rule 54(B) is inapplicable here.

Once an order is deemed final for purposes of R.C. 2505.02, courts must next consider whether Civ.R. 54(B) applies and, if so, whether its requirements have been met. *Chef Italiano Corp.*, 44 Ohio St. 3d at 88, 541 N.E.2d at 67. Civ.R. 54(B) is applicable "where there is more than one claim for relief presented or multiple parties are involved in an action, and where the lower court has rendered a final judgment, pursuant to R.C. 2505.02, with respect to fewer than

all of the parties or to fewer than all of the claims." *Id.* In such circumstances, a court order will not be considered final and appealable absent an express determination by the court that "there is no just reason for delay." Civ.R. 54(B).

Although the Order contains no such express determination, it need not do so to be final and appealable, as Civ.R. 54(B) is inapplicable here. Media Movant's request was the only action remaining at the time of the Order. The trial court had already decided the underlying Lawsuit, and all other issues and claims were already with the Court of Appeals. *See* **Exs. 9-15.**

Media Movants' Motion consisted of only one claim for relief: specifically, Media Movants' request to unseal Exhibit G pursuant to the public's rights of access to judicial documents. Media Movants' request for access to Exhibit G is a collateral matter separate and distinct from the claims in the Lawsuit and "independent of the disposition of the merits of a case." *FutureFuel Chem. Co. v. Lonza, Inc.*, 756 F.3d 641, 648 (8th Cir. 2014) (quoting *Stone v. Univ. of Md. Medical Sys. Corp.*, 855 F.2d 178, 180 n. * (4th Cir.1988)); *see also* **Ex. 6** at p. 2–3. The Order rendered a final decision as to Media Movants' request for access to Exhibit G and the Gibson Parties' claims in opposition. The Oberlin Parties did not file an opposition to the Motion within the 14 days allotted under Rule 9(B) of the Lorain County Court of Common Pleas' Local Rules, nor did they file a response to the Motion at any time. Indeed, the only action taken by the Oberlin Parties in this matter was to file a notice with the court clarifying that they would not be appealing the court's order denying the Oberlin Parties' prior, separate motion to unseal Exhibit G. The court therefore could not be expected to consider the Oberlin Parties as parties to the issues raised in the Motion or delay ruling on the Motion. *See* Lorain County Court of Common Pleas L.R. 9(B) ("[T]he motion shall be deemed submitted for ruling" upon expiry of the deadlines for submitting opposition and reply briefs).

Because "the lower court has rendered a final judgment, pursuant to R.C. 2505.02" with respect to "all of the parties" and "all of the claims," *Chef Italiano Corp.*, 44 Ohio St.3d at 88, 541 N.E.2d at 67, Civ.R. 54(B) does not apply. The Order constitutes "a final order that may be reviewed, affirmed, modified, or reversed, with or without retrial," R.C. 2505.02(B), this Court has jurisdiction over WEWS-TV's appeal of the Order. Pursuant to this Court's June 17, 2020 *See* **Exs. 9-15.**

It should be noted that this Court would also have jurisdiction to hear WEWS-TV's claim as a mandamus action. Pursuant to Ohio Rule of Superintendence Rule 47(B), WEWS-TV could have, in the alternative, elected to file a writ of mandamus. *See* Sup.R. 47(B) ("A person aggrieved by the failure of a court or clerk of court to comply with the requirements of Sup. R. 44 through 47 may pursue an action in mandamus pursuant to Chapter 2731. of the Revised Code."); R.C. 2731.02 ("The writ of mandamus may be allowed by the supreme court, the court of appeals, or the court of common pleas and shall be issued by the clerk of the court in which the application is made. Such writ may issue on the information of the party beneficially interested.").[1]

[1] While Sup.R. 47(B) permits an aggrieved party to seek redress via a writ of mandamus, it does not make it the exclusive form of remedy: "[a] person aggrieved by the failure of a court or clerk of court to comply with the requirements of Sup. R. 44 through 47 *may* pursue an action in mandamus." Sup.R. 47(B) (emphasis added). *See* R.C. 2503.03 ("Every final order, judgment, or decree of a court . . . may be reviewed on appeal by a court of common pleas, a court of appeals, or the supreme court, whichever has jurisdiction."). *Cf. S.C. Appellee v. T.H. Appellant*, Summit App. No. 29594, 2020-Ohio-2698, ¶ 8 (citing cases which erroneously conclude, without analysis, that mandamus is the exclusive remedy when a trial court denies a person's motion under Sup. R. 45(E). Significantly, the Ohio Revised Code provides that a "writ of mandamus must not be issued when there is a plain and adequate remedy in the ordinary course of the law," R.C. 2731.05, and the Ohio Supreme Court has held that mandamus is not appropriate when a direct appeal is available. *Sate ex rel. Pontillo v. Pub. Emp. Retirement Sys. Bd.*, 98 Ohio St.3d 500, 2003-Ohio-2120, ¶ 23-35 (rejecting mandamus petition because petitioner failed to pursue a direct appeal).

CONCLUSION

For the foregoing reasons WEWS-TV respectfully submits that this Court has jurisdiction to consider the WEWS-TV's appeal of the Lorain County Court of Common Pleas' Entry and Ruling on Non-Parties' Motion for Access to Sealed Case Document.

Dated: July 7, 2020

Respectfully submitted,

Melissa D. Bertke (0080567)
BAKER & HOSTETLER LLP
Key Tower
127 Public Square, Suite 2000
Cleveland, OH 44114
Phone: (216) 861-7865
Fax: (216) 696-0740

Katie Townsend (*pro hac vice pending*)
THE REPORTERS COMMITTEE FOR
FREEDOM OF THE PRESS
1156 15th St. NW, Suite 1020
Washington, DC 20005
Phone: (202) 795-9300
Fax: (202) 795-9310

Counsel for Media Movants

CORRECTED PROOF OF SERVICE

I hereby certify that a copy of the foregoing was served on July 7, 2020, via email, pursuant to App.R. 13(C)(6) of the Appellate Rules of Civil Procedure, upon the following:

Terry A. Moore
Jacqueline Bollas Caldwell
Owen J. Rarric
Matthew W. Onest
KRUGLIAK, WILKINS, GRIFFITHS & DOUGHERTY CO., L.P.A.
4775 Munson Street, NW
P.O. Box 36963
Canton, OH 44735
tmoore@kwgd.com
jcaldwell@kwgd.com
orarric@kwgd.com
monest@kwgd.com

Attorneys for Plaintiffs-Appellees Gibson Bros., Inc., David R. Gibson, and Allyn W. Gibson

Lee E. Plakas
Brandon W. McHugh
Jeananne M. Wickham
TZANGAS, PLAKAS, MANNOS & RAIES
220 Market Avenue South, 8th Floor
Canton, OH 44702
lplakas@lawlion.com
bmchugh@lawlion.com
jayoub@lawlion.com

Attorneys for Plaintiffs-Appellees Gibson Bros., Inc., David R. Gibson, and Allyn W. Gibson

James N. Taylor
JAMES N. TAYLOR CO., L.P.A.
409 East Avenue, Suite A
Elyria, OH 44035
taylor@jamestaylorlpa.com

Attorney for Plaintiffs-Appellees Gibson Bros., Inc., David R. Gibson, and Allyn W. Gibson

Benjamin C. Sassé
Irene Keyse-Walker
TUCKER ELLIS LLP
950 Main Avenue, Suite 1100
Cleveland, OH 44113
benjamin.sasse@tuckerellis.com
ikeyse-walker@tuckerellis.com

Attorneys for Defendants Oberlin College and Dr. Meredith Raimondo

Ronald D. Holman, II
Julie A. Crocker
Cary M. Snyder
William A. Doyle
Josh M. Mandel
TAFT STETTINIUS & HOLLISTER LLP
200 Public Square, Suite 3500
Cleveland, OH 44114-2302
rholman@taftlaw.com
jcrocker@taftlaw.com
csnyder@taftlaw.com
wdoyle@taftlaw.com
jmandel@taftlaw.com

Attorneys for Defendants Oberlin College and Dr. Meredith Raimondo

Richard D. Panza
Matthew W. Nakon
Malorie A. Alverson
Rachelle Kuznicki Zidar
Wilbert V. Farrell IV
Michael R. Nakon
WICKENS HERZER PANZA
35765 Chester Road
Avon, OH 44011-1262
RPanza@WickensLaw.com
MNakon@WickensLaw.com
MAlverson@WickensLaw.com
RZidar@WickensLaw.com
WFarrell@WickensLaw.com
MRNakon@WickensLaw.com

Attorneys for Defendants Oberlin College and Dr. Meredith Raimondo

Seth Berlin
Lee Levine
BALLARD SPAHR LLP
1909 K St., NW
Washington, D.C. 20006
berlins@ballardspahr.com
levinel@ballardspahr.com

Attorneys for Defendants Oberlin College and Dr. Meredith Raimondo

Joseph Slaughter
BALLARD SPAHR LLP
1675 Broadway, 19th Floor
New York, NY 10019
slaughterj@ballardspahr.com

Attorney for Defendants Oberlin College and Dr. Meredith Raimondo

Melissa D. Bertke (0080567)
BAKERHOSTETLER LLP
Key Tower
127 Public Square, Suite 2000
Cleveland, OH 44114
Telephone: 216.861.7865
Facsimile: 216.696.0740
Email: mbertke@bakerlaw.com

Counsel for Media Movants

From:	Traci Orlando
To:	ktownsend@rcfp.org; Farrell, Michael; benjamin.sasse@tuckerellis.com; Matthew Nakon; Julie Crocker; Ronald D. Holman, II; orarric@kwgd.com; Terry Moore; Lee Plakas; James Taylor; Bertke, Melissa D.
Subject:	Fw: GIBSON BROS VS OBERLIN COLLEGE (17CV193761)
Date:	Tuesday, May 05, 2020 1:21:28 PM
Attachments:	20200505131437284.pdf

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<DO_NOT_REPLY@JUDGEMIRALDI_SCANNER.COM>
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ORIGINAL

LORAIN COUNTY COURT OF COMMON PLEAS
LORAIN COUNTY, OHIO

TOM ORLANDO, Clerk
JOURNAL ENTRY
John R. Miraldi, Judge

Date 4/29/20 Case No. 17CV193761

GIBSON BROS INC
Plaintiff

JACQUELINE BOLLAS CALDWELL
Plaintiff's Attorney ()-

VS

OBERLIN COLLEGE
Defendant

JOSH M MANDEL
Defendant's Attorney ()-

ENTRY AND RULING ON NON-PARTIES' MOTION FOR ACESS TO SEALED CASE DOCUMENT

This matter comes before the Court upon non-parties WEWS-TV, Advance Ohio, and the Ohio Coalition for Open Government's Motion for Access to Sealed Case Document, seeking an order unsealing Exhibit G to the Affidavit of Attorney Cary M. Snyder, counsel for Oberlin College and Meredith Raimondo in the above-case. The above case has concluded, and an appeal of the judgment is pending before the Ninth District Court of Appeals.

Following the conclusion of the trial in this matter, the Defendants filed a similar motion which the Court denied on September 8, 2019. Now, the above-mentioned non-parties have filed a motion arguing that under Sup. R. 45, the Court should unseal the exhibit. The exhibit at issue contains unauthenticated Facebook postings purportedly belonging to non-party Allyn D. Gibson. After the movants initial motion, the Court asked the parties to brief the issue of jurisdiction in light of the pending appeal. Each party then submitted a short brief regarding jurisdiction over the unsealing in addition to their briefing on the movants initial motion to unseal.

Ohio Sup. R. 45 addresses public access to Court records in a variety of different contexts. Ohio Sup. R. 45(F) states:

1. Any person, by written motion to the court, may request access to a case document or information in a case document that has been granted restricted public access pursuant to division (E) of this rule. The court shall give notice of the motion to all parties in the case and, where possible, to

the non-party person who requested that public access be restricted. The court may schedule a hearing on the motion

2. A court may permit public access to a case document or information in a case document if it finds by clear and convincing evidence that the presumption of allowing public access is no longer outweighed by a higher interest. When making this determination, the court shall consider whether the original reason for the restriction of public access to the case document or information in the case document pursuant to division (E) of this rule no longer exists or is no longer applicable and whether any new circumstances, as set forth in that division, have arisen which would require the restriction of public access.

Here, access was originally restricted to Exhibit G under the parties' Mutual Protective Order. That order was agreed-to by the parties and approved and entered by the Court on June 8, 2018. The contents of Exhibit G and their admissibility was at issue during pretrial motions in limine, at which time, a preliminary ruling was issued that these materials could not be utilized as character evidence, but the Court withheld ruling on their admissibility for other purposes. The Defendants made no attempt to introduce the contents of Exhibit G for any reason, nor did they call or attempt to call non-party Allyn D. Gibson as a witness during trial.

At this juncture, the Court, under Ohio Sup. R. 45(F)(2) must consider whether the original reason for restricting public access no longer exists, and whether any new circumstances identified in Sup. R. 45(E) have arisen which would require the continued restriction of public access. The Court, having considered all of the factors in Sup. R. 45(E), hereby finds that the continued restriction of public access is warranted. Of particular importance is Sup. R. 45(2)(c), which includes the risk of injury to persons, individual privacy rights and interests, and fairness of the adjudicatory process. Because of the nature of the information at issue in Exhibit G, the Court also finds that there is no less restrictive alternative to complete restriction.

IT IS SO ORDERED.

John R. Miraldi, Judge

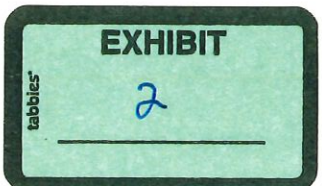
cc: All Parties

IN THE COURT OF COMMON PLEAS
LORAIN COUNTY, OHIO

GIBSON BROS., INC, et al.,	)	
	)	**CASE NO. 17CV193761**
Plaintiffs,	)	
	)	**JUDGE JOHN R. MIRALDI**
v.	)	
	)	
OBERLIN COLLEGE, et al.	)	
	)	
Defendants.	)	

MOTION OF WEWS-TV, ADVANCE OHIO, AND THE OHIO COALITION FOR OPEN GOVERNMENT FOR ACCESS TO SEALED CASE DOCUMENT AND MEMORANDUM OF LAW IN SUPPORT THEREOF

WEWS-TV, Advance Ohio, and the Ohio Coalition for Open Government (collectively, the "Media Movants") hereby move this Court, pursuant to Ohio Superintendence Rule 45(F), for access to certain sealed materials in the above-captioned matter (the "Lawsuit"). Specifically, Media Movants seek an order unsealing Exhibit G to the affidavit of Cary M. Snyder, which was filed with defendants' combined reply brief in support of their motions for summary judgment ("Exhibit G"). Court records in Ohio are presumptively open and may be sealed, or remain under seal, only if a court, via specific, on-the-record factual findings concludes that, by a showing of clear and convincing evidence, a higher interest outweighs the right of the press and the public to access the records. Sup. R. 45; *Vindicator Printing Co. v. Wolff*, 132 Ohio St. 3d 481, 2012-Ohio-3328, 974 N.E.2d 89, ¶ 24. Such findings were never made with respect to Exhibit G, and no higher interest outweighs the news media's and the



public's constitutional right of access. Accordingly, the Court should grant Media Movants' request to issue an order unsealing Exhibit G.[1]

INTRODUCTION AND FACTUAL BACKGROUND

In November 2016, a group of Oberlin College ("Oberlin") students participated in a protest of Gibson's Bakery (the "Bakery"), following an altercation between Bakery employee Allyn D. Gibson, Jr. and an African American Oberlin student. *See* Defendant Oberlin College's Motion for Summary Judgment ("MSJ"), at 4-5. Flyers distributed by Oberlin students in connection with the protest referred to the Bakery as "a racist establishment with a long account of racial profiling and discrimination." Complaint at ¶ 36; MSJ at 6. The Oberlin Student Senate subsequently published a resolution stating the same. Complaint at ¶ 48; MSJ at 6. On November 7, 2017, plaintiffs filed this Lawsuit against Oberlin and Oberlin Dean Meredith Raimondo alleging that they, *inter alia*, aided and encouraged Oberlin students in the publishing of allegedly libelous statements regarding the Bakery. Complaint at ¶¶ 100-09.

For purposes of facilitating discovery, the parties entered into a Stipulated Protective Order on June 6, 2018 (the "Protective Order"), permitting a party to designate documents as confidential "upon making a good faith determination" that the documents contained information that should be protected from disclosure. Protective Order at ¶ 3. The Protective Order stated that such party-level determinations, however, were not to "be construed or presented as a judicial determination that any documents or information designated CONFIDENTIAL by

[1] As noted below, Defendants filed an appeal from the verdict on the merits on October 8, 2019. However, this does not deprive the Court of ongoing jurisdiction over collateral matters, including the Media Movants' request to unseal at issue here. *See Yee v. Erie County Sheriffs Dept.*, 553 N.E.2d 1354, 1355 (Ohio 1990) ("When a case has been appealed, the trial court retains all jurisdiction not inconsistent with the court of appeals' jurisdiction to reverse, modify, or affirm the judgment.").

counsel or the parties is subject to protection . . . until such time as the Court may rule upon a specific document or issue." Protective Order at ¶ 16.

Among the discovery documents designated as "confidential" by plaintiffs was a forensic image of Allyn D. Gibson, Jr.'s Facebook account. *See* Brief in Support of Motion to Unseal Exhibit G of Defendants' Combined Summary Judgment Reply Brief ("Defendants' Motion"), at 4. A portion of that Facebook account—which defendants contend contains information regarding Mr. Gibson's views as to the Bakery's reputation and its alleged racial profiling—was filed under seal as Exhibit G to defendants' combined summary judgment reply brief. *Id.*

Defendants' motions for summary judgment were granted in part and denied in part. *See* Entry and Ruling on Defendants' Oberlin College and Meredith Raimondo's Motions for Summary Judgment, at 29. The case proceeded to trial on the remaining claims. *Id.* In June 2019, a jury found in favor of plaintiffs, awarding $11 million dollars in compensatory damages and $33 million dollars in punitive damages. *Market Awarded $44 Million in Racism Dispute with Oberlin College*, NEWS 5 CLEVELAND (last updated June 14, 2019), https://www.news5cleveland.com/news/local-news/oh-lorain/market-awarded-44m-in-racism-dispute-with-oberlin-college. The Court later reduced the compensatory and punitive damages awards to a total of $25 million dollars and awarded plaintiffs an additional $6.5 million dollars in attorneys' fees. *See* Judgment Entry on Award of Attorneys' Fees and Litigation Expenses; *Judge Reduces Jury Awards in Dispute With Oberlin College*, WALL STREET JOURNAL (June 28, 2019), https://www.wsj.com/articles/judge-reduces-jury-awards-in-dispute-with-oberlin-college-11561752684. Defendants have appealed the verdict. Mary Kilpatrick, *Oberlin College Appeals $31 Million Gibson Bakery Decision,* CLEVELAND.COM (Oct. 8, 2019),

https://www.cleveland.com/metro/2019/10/oberlin-college-appeals-31-million-gibson-bakery-decision.html.

The Lawsuit was highly publicized and covered by media outlets throughout Ohio and across the country, including by the Media Movants. *See, e.g.*, Talal Ansari, *Ohio Bakery Awarded $44 Million in Libel Verdict Against Oberlin College*, WALL STREET JOURNAL (June 14, 2019), https://www.wsj.com/articles/ohio-bakery-awarded-44-million-in-libel-case-against-oberlin-college-11560528172; Jenni Fink, *Oberlin College President $44 Million Dollar Price Tag on Free Speech Should Worry Conservatives, Too*, NEWSWEEK (June 27, 2019), https://www.newsweek.com/oberlin-bakery-lawsuit-raimondo-gibson-verdict-1446305; Phillip Morris, *Oberlin College Protest Farce Comes with Heavy Cost*, CLEVELAND.COM (June 26, 2019), https://www.cleveland.com/morris/2019/06/oberlin-college-protest-farce-comes-with-a-heavy-cost-phillip-morris.html; Alan Neuhauser, *A Liberal College Campus, a Local Bakery and a Multimillion Dollar Defamation Verdict Exposes National Fault Lines,* U.S. NEWS & WORLD REPORT (July 3, 2019), https://www.usnews.com/news/politics/articles/2019-07-03/oberlin-college-president-fights-back-against-defamation-verdict.

On August 28, 2019, Oberlin moved the Court for an order unsealing Exhibit G. The Court denied the request, in part, on the basis of the Protective Order. *See* Entry and Ruling on Defendants' Motion to Unseal Exhibit G of Defendants' Combined Summary Judgment Reply Brief. The Court made no factual findings as to whether the continued sealing of Exhibit G was necessary to serve a compelling interest or whether continued sealing of the entirety of Exhibit G was the least restrictive means of preserving any such interest. *Id.*

WEWS-TV is an ABC-affiliated television station, owned by Scripps Media, Inc., which serves the greater Cleveland metropolitan area and which broadcasts nearly 40 hours of locally

produced newscasts each week. Advance Ohio is the publisher of cleveland.com and the online home of the *Plain Dealer*, the largest daily newspaper in Ohio. Both reported extensively on the Lawsuit and continue to report on Oberlin's pending appeal. *See, e.g.*, *Oberlin College Appeals Verdict that Awarded Bakery More Than $31 Million*, NEWS 5 CLEVELAND (last updated Oct. 9, 2019), https://www.news5cleveland.com/news/local-news/oh-lorain/oberlin-college-appeals-verdict-that-awarded-bakery-44-million; *Jury Awards $11 Million in Lawsuit Over Ohio College Dispute*, NEWS 5 CLEVELAND (last updated June 8, 2019), https://www.news5cleveland.com/news/local-news/oh-lorain/jury-awards-11-million-in-lawsuit-over-ohio-college-dispute; Emily Bamforth, *Gibson's Bakery Awarded More than $11 Million in Years-Long Legal Battle with Oberlin College*, CLEVELAND.COM (June 7, 2019), https://www.cleveland.com/news/2019/06/gibsons-bakery-awarded-more-than-11-million-in-years-long-legal-battle-with-oberlin-college.html; Editorial Board, *What are the Ramifications of the Gibson's Bakery v. Oberlin College Verdict*, CLEVELAND.COM (June 27, 2019), https://www.cleveland.com/opinion/2019/06/what-are-the-ramifications-of-the-gibsons-bakery-v-oberlin-college-verdict-editorial-board-roundtable.html. The Ohio Coalition for Open Government is a nonprofit corporation whose supporters include citizens, Ohio newspapers, Ohio broadcasters, local news websites and others who share a common interest in enforcing and studying Ohio's open records laws, including the right of access to court records. The coalition was formed in 1992 by the Ohio News Media Foundation, a nonprofit corporation affiliated with the Ohio News Media Association.

The First Amendment, Ohio Constitution, and Ohio Superintendence Rule 45 afford members of the media, like Media Movants, and the public a presumptive right of access to judicial records and documents. *See State ex rel. Cincinnati Enquirer v. Winkler*, 101 Ohio St.

3d 382, 2004-Ohio-1581, 805 N.E.2d 1094, ¶¶ 8-9. The existence of a stipulated protective order entered into between litigants does not vitiate these rights. *See Shane Grp., Inc. v. Blue Cross Blue Shield of Mich.*, 825 F.3d 299, 305-06 (6th Cir. 2016). Accordingly, for the reasons set forth herein, the Media Movants respectfully request that the Court enter an order unsealing Exhibit G.

ARGUMENT

I. The press and the public have a presumptive right of access to Exhibit G.

Openness is "an indispensable attribute" of our judicial system. *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 569 (1980); *see also Brown & Williamson Tobacco Corp. v. FTC*, 710 F.2d 1165, 1177 (6th Cir. 1983) (noting that openness "has been a fundamental feature of the American judicial system"); Ohio Const. Article I, Section 16 ("All courts shall be open...."). It guards against unfairness and inequity in the application of laws, giving "assurance that established procedures are being followed and that deviations will become known." *Press-Enter. Co. v. Superior Court*, 464 U.S. 501, 508 (1984) ("*Press-Enterprise I*"). The U.S. Supreme Court has long-recognized that the press plays a vital role in facilitating public monitoring of the judicial system, acknowledging that "[w]hile media representatives enjoy the same right of access as the public," they often "function[] as surrogates for the public" by, for example, attending proceedings, reviewing court documents, and reporting on judicial matters to the public at large. *Richmond Newspapers*, 448 U.S. at 573.

Particularly in cases of significant public interest and concern, like this one, the ability of the press and the public "to review the facts presented to the court" is necessary to assure public confidence in the administration of justice. *Brown & Williamson*, 710 F.2d at 1178; *see also Rudd Equip. Co., Inc. v. John Deere Constr. & Forestry Co.*, 834 F.3d 589, 593 (6th Cir. 2016)

("In civil cases, as much as in criminal matters, the resolution of private disputes frequently involves issues and remedies affecting third parties or the general public, and secrecy serves only to insulate the participants, mask impropriety, obscure incompetence, and conceal corruption.") (internal quotations and citations omitted). And, because "court records often provide important, sometimes the only, bases or explanations for a court's decision," the presumption of openness applies just as strongly to the accessibility of court documents—like exhibits filed in support of motions for summary judgment—as it does to court proceedings. *Brown & Williamson*, 710 F.2d at 1177; *see also, State ex rel. Beacon Journal Pub'g Co. v. Bond*, 98 Ohio St.3d 146, 2002-Ohio-7117, ¶ 15 (recognizing presumptive right of access to juror questionnaires). "Only the most compelling reasons can justify non-disclosure of judicial records." *In re Knoxville News-Sentinel Co., Inc.*, 723 F.2d 470, 476 (6th Cir. 1983).

A. The First Amendment and the Ohio Constitution afford the Media Movants a qualified right of access to judicial records that is applicable to Exhibit G.

The Ohio Supreme Court has recognized that the right of access guaranteed by the First Amendment and by Article I, Section 16 of the Ohio Constitution extends to judicial documents. *Winkler*, 101 Ohio St. 3d at 384 ("Article I of the Ohio Constitution guarantees the public's right to open courts. This right of access found in both the federal and state Constitutions includes records and transcripts that document the proceedings."); *see also Dream Fields, L.L.C. v. Bogart*, 175 Ohio App. 3d 165, 2008-Ohio-152, 885 N.E.2d 978, ¶ 2 ("Courts have traditionally recognized the right of the public to inspect judicial records."). Because the "open courts" provision of the Ohio Constitution creates an equivalent right of public access to court proceedings and records as "that accorded by the Free Speech and Free Press Clauses of the First Amendment to the United States Constitution," *Bond* at ¶ 14 (quoting *Cleveland v. Trzebuckowski*, 709 N.E.2d 1148 (1999)), to determine whether the constitutional right applies to

a specific judicial record, Ohio courts look to the same complementary and related considerations of "experience" and "logic" recognized by the U.S. Supreme Court in *Press-Enter. Co. v. Superior Court*, 478 U.S. 1, 8 (1986) ("*Press-Enterprise II*"). *See Bond* at ¶ 38; *see also, e.g., State ex rel. Scripps Howard Broad. Co. v. Cuyahoga Cty. Court of Common Pleas, Juv. Div.*, 73 Ohio St. 3d 19, 652 N.E.2d 179 (1995); *State ex rel. Cincinnati Enquirer v. Bronson*, 191 Ohio App. 3d 160, 2010-Ohio-5315, 945 N.E.2d 551.

In applying these considerations to Exhibit G, courts around the country have consistently held that "documents submitted to a court for its consideration in a summary judgment motion are—as a matter of law—judicial documents to which a strong presumption of access attaches, under . . . the First Amendment." *Lugosch v. Pyramid Co. of Onondaga*, 435 F.3d 110, 121 (2d Cir.2006); *see also San Jose Mercury News, Inc. v. U.S. District Court*, 187 F.3d 1096, 1102 (9th Cir.1999) ("the unbroken string of authorities . . . leaves little doubt" that the "right of public access extends to materials submitted in connection with motions for summary judgment in civil cases prior to judgment"); *Rushford v. New Yorker Magazine, Inc.*, 846 F.2d 249, 252–53 (4th Cir.1988) (finding that "[b]ecause summary judgment adjudicates substantive rights and serves as a substitute for a trial" the presumption of access attaches to "documents filed in connection with a summary judgment motion in a civil case"). Indeed, as the Sixth Circuit recently explained, "briefs . . . filed with the court, *as well as any reports or exhibits that accompan[y] those filings*, are the sort of records that would help the public assess for itself the merits of judicial decisions . . . [and] therefore subject to the strong presumption in favor of openness." *In re Nat'l Prescription Opiate Litig.*, 927 F.3d 919, 939 (6th Cir. 2019). Moreover, the strong presumption in favor of access to documents, like Exhibit G, submitted in support of a dispositive motion is not dependent on "the extent to which they

were relied upon in resolving the motion." *Lugosch*, 435 F.3d at 123 ("documents used by parties moving for, or opposing, summary judgment should not remain under seal *absent the most compelling reasons.*") (quoting *Joy v. North*, 692 F.2d 880, 893 (2d Cir. 1982)); *see also*, *Wolff*, 132 Ohio St.3d 481, 2012-Ohio-3328, 974 N.E.2d 89, ¶ 27 ("There is no requirement . . . that a record or document must be used by the court in a decision to be entitled to the presumption of public access.").

Where, as here, the constitutional right applies, the presumption of access can be overcome only if "specific, on the record findings are made demonstrating that 'closure is essential to preserve higher values and is narrowly tailored to serve that interest.'" *Press-Enterprise II*, 478 U.S. at 13–14 (quoting *Press–Enterprise I*, 464 U.S. at 510). In the context of civil litigation "only trade secrets, information covered by a recognized privilege (such as the attorney-client privilege), and information required by statute to be maintained in confidence (such as the name of a minor victim of a sexual assault) is typically enough to overcome the presumption of access." *Shane Grp.*, 825 F.3d at 308 (internal quotations and citation omitted). The party seeking closure or sealing bears a "heavy burden" to overcome such scrutiny, and must "analyze in detail, document by document, the propriety of secrecy, providing reasons and legal citations." *Id.* at 305–06.

B. Ohio Superintendence Rule 45 affords the Media Movants a qualified right of access to Exhibit G.

In addition to the constitutional presumption of access, Ohio Superintendence Rule 45(A) also recognizes a fundamental presumption of open access to all judicial documents, including the summary judgment exhibit at issue here. Sup. R. 45 ("Court records are presumed open to public access."); *see also* Sup. R. 44(B) and (C)(1) (defining "court records" to include, in part, "a document and information in a document submitted to a court or filed with a clerk of court in

a judicial action or proceeding, including exhibits, pleadings, motions, orders, and judgments . . .."). According to the Ohio Supreme Court, "the Rules of Superintendence regarding public access to court records should enjoy a broad judicial construction in favor of access to records, which promotes openness, transparency of process, and accountability." *State ex rel. Cincinnati Enquirer v. Lyons*, 140 Ohio St.3d 7, 2014-Ohio-2354, 14 N.E.3d 989, ¶ 14.

Pursuant to Superintendence Rule 45, a court may restrict public access to all or part of a court record only "if it finds by clear and convincing evidence that the presumption of allowing public access is outweighed by a higher interest." Sup. R. 45(E)(2); *State ex rel. Cincinnati Enquirer v. Hunter*, 1st Dist. Hamilton No. C-130072, 2013 WL 558750, 2013-Ohio-4459, ¶ 11 (granting release of juvenile court records in the absence of "clear and convincing evidence that the presumption of allowing public access is outweighed by a higher interest").

Prior to doing so, the court must consider:

> (a) Whether public policy is served by restricting public access;
>
> (b) Whether any state, federal, or common law exempts the document or information from public access;
>
> (c) Whether factors that support restriction of public access exist, including risk of injury to persons, individual privacy rights and interests, proprietary business information, public safety, and fairness of the adjudicatory process.

Sup. R. 45(E)(2)(a)-(c); *Wolff*, 132 Ohio St.3d 481, 2012-Ohio-3328, 974 N.E.2d 89, at ¶¶ 32-34.

In the event the court finds it necessary to restrict public access, it must do so using "the least restrictive means available," which typically requires "[r]edacting the information rather than limiting public access to the entire document." Sup. R. 45(E)(3).

II. The presumptions in favor of public access to Exhibit G are not overcome; Exhibit G should be unsealed.

Exhibit G was filed as an exhibit to defendants' combined reply in support of their motions for summary judgment. As such, it falls squarely within the category of judicial records and documents to which a presumption of openness attaches under the First Amendment and the Ohio Constitution. Moreover, as an "exhibit" that was "submitted to a court or filed with a clerk of court in a judicial action or proceeding," it constitutes a "case record" to which a presumption of openness applies under Superintendence Rule 45.

Here, Exhibit G was filed under seal on the basis of the parties' stipulated Protective Order. However, the Protective Order was designed to facilitate *discovery* by allowing the parties to determine in the first instance the appropriate level of confidentiality applicable to documents exchanged between the parties during the course of discovery. "'There is a stark difference between so-called 'protective orders' entered pursuant to . . . discovery . . . on the one hand, and orders to seal court records, on the other." *Shane Grp.*, 825 F.3d at 305. While "[s]ecrecy" may, in many cases, be " fine at the discovery stage," once the document is filed with the court, the presumptions of public access apply; the press and the public have "a strong interest in obtaining the information contained in the court record." *Id.* (internal quotations and citations omitted); *see also Cincinnati Enquirer v. Dinkelacker*, 144 Ohio App.3d 725, 730-31, 761 N.E.2d 656, 659-660 (1st Dist. 2001) (holding that "discovery material becomes a public record when it becomes part of the court record.").

A party may not waive the *public's* rights to access court records by filing a document under seal pursuant to a stipulated protective order. *See Rudd Equip. Co.*, 834 F.3d at 595. The "court's obligation to keep its records open for public inspection is not conditioned on an objection from anybody." *Shane Grp.*, 825 F.3d at 307. Nor may a party rely on a stipulated

protective order to relieve it of its burden under the First Amendment, Ohio Constitution, or Superintendence Rule 45 to articulate the compelling interests that it contends justify sealing. *See In re Nat'l Prescription Opiate Litig.*, 927 F.3d at 940-41 (remanding to district court to make specific factual findings as to pleadings filed under seal pursuant to a protective order, and advising the court "to bear in mind that the party seeking to file under seal must provide a compelling reason to do so and demonstrate that the seal is narrowly tailored to serve that reason").

Because Exhibit G was filed under seal purportedly on the basis of the parties' Protective Order, the Court was not asked to and did not make the requisite specific, on the record findings as to whether sealing was "essential to preserve higher values" and, if so, whether wholesale sealing of Exhibit G was narrowly tailored to serve any such interest. *See Press-Enterprise II*, 478 U.S. at 13–14. Nor, prior to sealing, did the Court make a finding as to whether "by clear and convincing evidence . . . the presumption of allowing public access [under Sup. R. 45(A)] is outweighed by a higher interest" and, if so, whether sealing the document would be "the least restrictive means available" to protect the interest, per the mandates of Sup. R. 45(E)(2)-(3).

Public interest in this Lawsuit and, specifically, its allegations of discrimination and racial profiling by a century-old neighborhood bakery, on the one hand, and of alleged impropriety on the part of a large educational institution on the other, is substantial. The case has garnered significant media attention from both local and national news outlets. *See, e.g.*, EJ Dickson, *How a Small-Town Bakery in Ohio Became a Lightning Rod in the Culture Wars*, ROLLING STONE (July 18, 2019), https://www.rollingstone.com/culture/culture-features/oberlin-gibson-bakery-protest-defamation-suit-controversy-culture-war-850404/; Conor Friedersdorf, *From Public Shame to the Courtroom*, THE ATLANTIC (June 15, 2019),

https://www.theatlantic.com/ideas/archive/2019/06/the-publicly-shamed-sue-oberlin-college-verdict/591379/; *Oberlin Helped Students Defame a Bakery, a Jury Says*, NEW YORK TIMES (June 14, 2019) https://www.nytimes.com/2019/06/14/us/oberlin-bakery-lawsuit.html; Sammy Westfall & Asha Prihar, *Oberlin Libel Trial Rattles Community, Raises Questions About Free Speech,* TOLEDO BLADE (June 15, 2019), https://www.toledoblade.com/local/education/2019/06/15/oberlin-college-gibsons-bakery-libel-lawsuit-race-community-free-speech/stories/20190614189. Interest in the Lawsuit is likely to remain high as the case proceeds on appeal.

Based on documents filed with the Court, Exhibit G is believed to contain information directly related to the allegations of racial profiling that spurred the student protest that is at the heart of this Lawsuit and, about which, the public has a right to know. Defendants' Motion, at 4. Indeed, "[t]he remedies or penalties imposed by the court will be more readily accepted, or corrected if erroneous, if the public has an opportunity to review the facts presented to the court." *Brown & Williamson*, 710 F.2d at 1178.

Continued sealing of Exhibit G cannot be justified. Plaintiffs have not met their burden under the First Amendment, Ohio Constitution, or Superintendence Rule 45, and the Court has not weighed the purported interests in favor of sealing against the public's strong, presumptive right to inspect this judicial record. For these reasons, Exhibit G should be unsealed. Even assuming, *arguendo*, that the Court were to determine—via specific, on-the-record factual findings— that countervailing interests overcome the public's rights of access to Exhibit G, any continued restrictions must be "narrowly tailored to serve that interest" and must be "the least restrictive means available," for example, "[r]edact[ion] . . . rather than limit[ed] public access to the entire document." *See* Sup. R. 45(E)(3); *see also Press-Enterprise I*, 464 U.S. at 511, 513

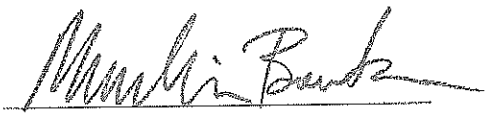
(noting that where jurors have a privacy interest in their answers during *voir dire*, "[t]he trial judge should seal only such parts of the transcript as necessary to preserve the anonymity of the individuals sought to be protected"); *Frisby v. Schultz*, 487 U.S. 474, 485 (1988) (narrow tailoring "targets and eliminates no more than the exact source of the 'evil' it seeks to remedy").

CONCLUSION

For the foregoing reasons, the Media Movants respectfully request that the Court unseal Exhibit G to defendants' combined summary judgment reply brief.

Dated: October 31, 2019

Respectfully submitted,



Michael K. Farrell (0040941)
Melissa D. Bertke (0080567)
BAKER & HOSTETLER LLP
Key Tower
127 Public Square, Suite 2000
Cleveland, OH 44114
Phone: (216) 861-7865
Fax: (216) 696-0740

Katie Townsend (*pro hac vice pending*)
THE REPORTERS COMMITTEE FOR
FREEDOM OF THE PRESS
1156 15th St. NW, Suite 1020
Washington, DC 20005
Phone: (202) 795-9300
Fax: (202) 795-9310

Counsel for Media Movants

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was served this 31st day of October, 2019, via e-mail, pursuant to Civ.R. 5(B)(2)(f) of the Ohio Rules of Civil Procedure, upon the following:

Owen J. Rarric
Jacqueline Bollas Caldwell
Terry A. Moore
Matthew W. Onest
Krugliak, Wilkins, Griffiths & Dougherty Co., L.P.A.
4775 Munson Street, NW
P.O. Box 36963
Canton, OH 36963
orarric@kwgd.com
jcaldwell@kwgd.com
tmoore@kwgd.com
monest@kwgd.com

Lee E. Plakas
Brandon W. McHugh
Jeananne M. Ayoub
Tzangas, Plakas, Mannos & Raies
220 Market Avenue South
8th Floor
Canton, OH 44702
lplakas@lawlion.com
bmchugh@lawlion.com
jayoub@lawlion.com

James N. Taylor
James N. Taylor Co., L.P.A.
409 East Avenue, Suite A
Elyria, OH 44035
taylor@jamestaylorlpa.com

Attorneys for Plaintiffs

Ronald D. Holman, II
Julie A. Crocker
Cary M. Snyder
William A. Doyle

Josh M. Mandel
Taft Stettinius & Hollister LLP
200 Public Square, Suite 3500
Cleveland, OH 44114-2302
rholman@taftlaw.com
jcrocker@taftlaw.com
csnyder@taftlaw.com
wdoyle@taftlaw.com
jmandel@taftlaw.com

Irene Keyse-Walker
Benjamin C. Sassé
TUCKER ELLIS LLP
950 Main Avenue, Suite 1100
Cleveland, OH 44113
jkeyse-walker@tuckerellis.com

Richard D. Panza
Matthew W, Nakon
Rachelle Kuznicki Zidar
Malorie A. Alverson
Wilbert V, Farrell, IV
Michael R. Nakon
Wickens, Herzer, Panza, Cook & Batista Co
35765 Chester Road
Avon, OH 44011-1262
RPanza@WickensLaw.com
NNakon@WickensLaw. com
RZidar@WickensLaw.com
MAlverson@WickensLaw.com
WFarrell@WickensLaw.com
MRNakon@WickensLaw.com

Co-Counsel for Defendants Oberlin College aka Oberlin College and Conservatory, and Meredith Raimondo

Melissa D. Bertke
Counsel for WEWS-TV, Advance Ohio, and the Ohio Coalition for Open Government

IN THE COURT OF COMMON PLEAS
LORAIN COUNTY, OHIO

GIBSON BROS., INC., et al.,

Plaintiffs,

-vs.-

OBERLIN COLLEGE, et al.,

Defendants.

Case No.: 17CV193761

Judge: Hon. John R. Miraldi

Magistrate: Hon. Joseph Bott

PLAINTIFFS' & NONPARTY ALLYN D. GIBSON'S BRIEF IN OPPOSITION TO MOTION FOR ACCESS TO SEALED CASE DOCUMENTS

-or, in the alternative-

REQUEST TO HOLD DECISION IN ABEYANCE UNTIL COMPLETION OF THE APPELLATE PROCESS

I. INTRODUCTION

After suffering *three (3) years* of defamatory conduct, Plaintiffs[1] and Nonparty Allyn D. Gibson ("ADG") are again being subjected to potential embarrassment, ridicule, and defamation by Movants[2] who are seeking to unseal inadmissible discovery papers that Defendants[3] did not even attempt to introduce as evidence at the trial of this matter. Movants' Motion should be denied for the following reasons:

- ***First***, any constitutional arguments must be dismissed out of hand as Movants do not have standing to assert those arguments;
- ***Second***, even if the Court considers Movants' constitutional arguments (it should not), the sealed documents sought by Movants are not entitled to constitutional protection as they were irrelevant and not admitted as evidence in the trial of this matter;

[1] "Plaintiffs" refers collectively to Gibson Bros., Inc. ("Gibson's Bakery"), David R. Gibson ("Dave Gibson"), and Allyn W. Gibson ("Grandpa Gibson").

[2] "Movants" refers collectively to WEWS-TV ("WEWS"), Advance Ohio ("Advance"), and the Ohio Coalition for Open Government ("OCOG").

[3] "Defendants" refers to Oberlin College & Conservatory ("Oberlin College") and Meredith Raimondo ("Dean Raimondo").

- *Third*, considering the factors listed in Ohio R. Sup. 45, public policy requires continued restricted access to the sealed documents; and
- *Fourth*, at a minimum, the Court should hold its decision on Movants' motion in abeyance until the appellate process for this case is completed.

II. BACKGROUND

After presiding over a nearly six (6) week trial, the Court is well-aware of the facts and circumstances underlying this litigation, and Plaintiffs will not take the time to rehash them here. But some attention must be paid to the circumstances surrounding the specific document sought by Movants.

A. The Documents Sought by Movants are Unauthenticated Social Media Messages that Allegedly Came from a Court-Ordered Mirror-Image of Nonparty ADG's Private Facebook Account.

ADG is a nonparty to this case. He is not one of the Plaintiffs and was not awarded any damages as part of the jury verdict. Defendants chose not to: (1) call him as a witness; (2) introduce any of his deposition testimony; or (3) introduce any social media communications allegedly attributed to his account. Any claim of tangential relevancy for this motion arises out of ADG being served with a substantially overbroad subpoena by Defendants in 2018 and subjected to ***days*** of deposition testimony. As part of the subpoena, ADG was ***ordered*** to provide Defendants' counsel with a mirror image copy of his Facebook account. (See, Feb. 21, 2019 Order). Importantly, the Facebook account is not connected to Gibson's Bakery, Dave Gibson, or Grandpa Gibson. Instead, it was ADG's ***private, personal Facebook account***. Exhibit G attached to the affidavit of Attorney Cary Snyder, one of Defendants' attorneys, is a grouping of ***unauthenticated, private*** Facebook messages that allegedly came from the mirror image of ADG's Facebook account ("Exhibit G"). In a preliminary ruling on motions *in limine*, the Court ***specifically excluded*** these documents from admission at trial to the extent Defendants sought to use them as

character evidence for ADG. (May 8, 2019 Entry and Ruling on All Motions *in Limine*, pp. 1-2). And, as the Court noted, "***Defendants made no attempt to introduce these materials as evidence***" of any other issue during trial. (Sep. 16, 2019 Order [emphasis added]).

Interestingly, during the course of discovery, the Plaintiffs requested private communications from the social media accounts of Defendant Dean of Students and Vice President Raimondo and other high-ranking administration officers of Oberlin College, but Oberlin College refused to provide any social media communications for those individuals.

B. The Court has Already Rejected Arguments that Exhibit G Relates to Defendants' Purported Truth Defense.

This Court has already dealt with Defendants' false post-trial contention that Exhibit G somehow supports Defendants' non-existent and waived truth defense to Plaintiffs' libel claim. At page 3 of the Motion, Movants parrot that same claim: "A portion of that Facebook account which defendants contend contains information regarding Mr. Gibson's views as to the Bakery's reputation and its alleged racial profiling was filed under seal as Exhibit G to defendants' combined summary judgment reply brief." However, Defendants' summary judgment reply brief used these materials solely for the argument that Plaintiffs were public figures or limited public figures. (See Defendants' MSJ Reply, pp. 10-12). Those issues were determined by the Court and would never have been presented to the jury because the determination of the Plaintiffs' status is a question of law, not fact.

In actuality, ***Defendants did not present any evidence supporting their purported truth defense at trial, including Exhibit G.*** Movants' efforts present a dangerous potential for abuse of process. When responding to subpoenas, nonparties would no longer be secure in the belief that their private and sensitive information is protected by a Stipulated Protective Order if all such information is released following trial (including material that was *irrelevant*, *inadmissible* and

not even proffered at trial!).

C. The Circumstances Suggest that Movants' Intent in Seeking Exhibit G is Part of a Collaborative Public Relations and Business Crisis Management Campaign by the Defendants to Continue the Defamation of Plaintiffs.

Movants appear to be acting under the guise of independent media outlets. But the true motivation behind their Motion is not so clear.

It may be helpful to note the advertised nature of the business of Advance Ohio, which offers its services for marketing in various industries, including four-year state universities, local community colleges, and retailers. In large text on its website, Advance Ohio claims, "Great Creative, The Right Message, And A Terrific Strategy."[4]

Further, compared to the daily media attention from other outlets, Advance Ohio, through cleveland.com, and WEWS-TV paid very little attention to this case until after the jury issued its verdicts in June of 2019. By Plaintiffs' count, both outlets have published approximately ten (10) stories on this case, combined. And of those, several were only picked up by Movants from the Associated Press.[5] With Movants having such little interest in this case while the trial was ongoing, there is significant reason to suspect the true collaborative purpose and source of efforts to expend resources ***months later*** to gain access to documents that were irrelevant and not admitted as evidence at trial. Perhaps more troubling, Movants have ***only requested access to documents marked confidential by Plaintiffs***. While the text of Plaintiffs' response in opposition to Defendants' motions for summary judgment along with the embedded documents and deposition excerpts were unsealed by this Court (see, April 3, 2019 Entry and Ruling), numerous documents

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[4] Advance Ohio's website on marketing can be found at https://www.advance-ohio.com/product/campaign-strategy/.

[5] *See, e.g., Market awarded $44M in racism dispute with Oberlin College*, News 5 Cleveland (June 13, 2019) (https://www.news5cleveland.com/news/local-news/oh-lorain/market-awarded-44m-in-racism-dispute-with-oberlin-college); *Judge slashes Gibson's Bakery $44 million settlement*, cleveland.com (June 28, 2019) (https://www.cleveland.com/news/2019/06/judge-slashes-gibsons-bakery-44-million-settlement.html).

and deposition exhibits that were filed with Plaintiffs' summary judgment response brief remain under seal.

Is there reason to suspect the motivation and timing of the instant motion by Movants, who had little interest in this case while it was ongoing, seeking access to documents marked confidential by Plaintiffs while ignoring the vast trove of Defendants' documents that remain under seal? Could the answer to that question be that there are substantial connections between Defendants and Movants? Indeed, Defendants' lead attorney, Ron Holman, II, *was a television legal analyst for Movant WEWS-TV for more than ten (10) years*:

> . For more than a decade, he appeared as a legal analyst and commentator on News Channel 5 – WEWS-TV

(Ex. 1, p. 1).[6] With this convenient connection, and with the Movants seeking only Exhibit G out of all the sealed filings, it appears that Defendants are attempting to leverage nonparty media contacts to circumvent the Court's previous orders for the purpose of doxing[7] ADG and further smearing Plaintiffs' reputation and brand.

Movants want access to private, personal, and unauthenticated social media messages that were irrelevant and inadmissible at trial. Neither the First Amendment, the Ohio constitution, nor Ohio R. Sup. 45 support such blatant invasions of privacy. Thus, Movants' Motion must be denied.

III. LAW & ARGUMENT

A. Movants do not have Standing to Seek Access to the Exhibit G Under the First Amendment or Ohio Constitution.

At the outset, Plaintiffs submit that the Court should deny Movants' arguments under

[6] A true and accurate copy of the attorney bio page for Attorney Ron Holman, II is included herein as **Exhibit 1.**

[7] "Doxing" is a slang term meaning "to publicly identify or publish private information about (someone) especially as a form of punishment or revenge" as defined by Merriam-Webster. https://www.merriam-webster.com/dictionary/dox

federal and state constitutional law because Movants lack standing to raise those arguments in their Motion.

Ohio R. Sup. 45(F)(1) provides standing to any person to seek access to sealed documents under the procedures and factors outlined by the Ohio Rules of Superintendence. But, Rule 45(F)(1) ***does not grant standing to nonparties to assert state or federal constitutional challenges to a trial court decision restricting access to case documents.*** Sup.R. 45(F)(1) [emphasis added] ("Any person, by written motion to the court, may request access to a case document or information in a case document that has been granted restricted access ***pursuant to division (E) of this rule.***"). Movants are not parties to this case and have never moved to intervene in this case. As a result, the Movants lack standing to challenge the parties' stipulated protective order, including the propriety of designations made thereunder, under the Ohio and federal constitution. Additionally, Movants are not seeking some sort of extraordinary relief, such as mandamus. As a result, the Court should deny the Motion as it relates to federal and state constitutional law because Movants lack standing to assert those arguments.

B. The First Amendment and Ohio Constitution do not Provide a Right of Access for Inadmissible Discovery Papers like Exhibit G.

1. Because Exhibit G is nothing more than pretrial discovery materials from a nonparty, Ohio law does not create a presumption of access in favor of Movants.

Under both Ohio and federal law, discovery materials have "historically never been open to the public." *Adams v. Metallica, Inc.*, 143 Ohio App.3d 482, 487, 758 N.E.2d 286 (1st Dist.2001); *Speece v. Speece*, 11th Dist. Geauga No. 2016-G-0100, 2017-Ohio-7950, ¶ 25.

While discussing discovery within the criminal context, the Ohio Supreme Court specifically held that discovery materials should not be subject to public access: "We agree with the foregoing that discovery should be encouraged and that public disclosure would have a chilling

effect on the parties's [sic] search for and exchange of information pursuant to the discovery rules." *State ex rel. WHIO-TV-7 v. Lowe*, 77 Ohio St.3d 350, 354, 1997-Ohio-271, 673 N.E.2d 1360 (1997). The *Lowe* Court, relying on First Amendment precedent from the United States Supreme Court, further expounded on the dangers to be posed by presuming discovery materials are accessible to the public by stating:

> The Supreme Court noted that the danger of abusing the liberal pretrial discovery rules by publicly releasing information that is irrelevant and could be damaging to reputation and privacy is great and thus the court held that the governmental interest in preventing such abuse is substantial. *** The court also noted that pretrial discovery is not a public component of a trial and any controls on the discovery process do not prevent the public dissemination of information gathered through means other than discovery. *** Accordingly the court held that the limitation on " 'First Amendment freedoms [is] no greater than is necessary or essential to the protection of the particular governmental interest involved,' " *** and thus the protective order did not violate the First Amendment. [Internal citations omitted.].

Id. citing *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 33, 104 S.Ct. 2199, 81 L.Ed.2d 17 (1984).[8]

The reasoning underlying *Lowe* is fully applicable to civil litigation. *Adams*, 143 Ohio App.3d at 489 ("While Lowe concerned only discovery in a criminal case, the logic of Lowe would appear to apply with equal, if not more, force to civil discovery in a private lawsuit. Discovery exchanged by a prosecutor in a criminal case is clearly a governmental activity to which the Act would otherwise appear to apply, whereas discovery in a private lawsuit does not involve any government activity other than judicial supervision.").

Additionally, Ohio does not provide an unqualified right to access those materials *merely because they are filed with the court. Id.* at 490. ("In sum, there appears to be no clear, unqualified public right to inspect pretrial discovery materials, ***even when they are filed with the trial court***, under either the First Amendment, the common law, the "open courts" provision of the Ohio Constitution, or the Ohio Public Records Act.") (Emphasis added.).

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[8] Plaintiffs discuss *Seattle Times*'s applicability to the Motion in greater detail below. *See, infra* Sec. III(B)(2)(a).

Here, there must be no mistake – Exhibit G is nothing more than discovery materials attached to one brief but were not admitted or even proffered as evidence during trial. They consist of a few messages and/or postings from the private Facebook account of a nonparty. Attaching a document to a summary judgment motion does not, in and of itself, transform the document into admissible evidence. In fact, those documents are subject to the same standards of admissibility as trial evidence. *Knoth v. Prime Time Marketing Mgt., Inc.*, 2nd Dist. Montgomery No. 20021, 2004-Ohio-2426, ¶ 13 ("It is fundamental that the evidence offered by affidavit in support of or in opposition to a motion for summary judgment must also be admissible at trial, albeit in a different form, in order for the court to rely on it."); *Buckeye Lake Firebells v. Leindecker*, 5th Dist. Licking No. 2010-CA-100, 2011-Ohio-1792, ¶ 34 (holding that inadmissible hearsay evidence submitted on summary judgment must be disregarded); *Carter v. Gerbec*, 9th Dist. Summit No. 27712, 2016-Ohio-4666, ¶ 42 (holding that inadmissible hearsay evidence is prohibited in the summary judgment context).

Defendants cannot meet this standard on the facts at hand, as Defendants, the party attempting to meet the statement-by-statement employee/agent hearsay rule, bear the burden to demonstrate "that the statement concerned a matter within the scope of the employment of the declarant. . . ." *Gerry v. Saalfield Square Properties*, 9th Dist.Summit No. 19172, 1999 WL 66204, *2.[9] Defendants adduced no evidence to so demonstrate.

[9] *Gerry*, *2. "Gerry bore the burden of demonstrating that the statement concerned a matter within the scope of the employment of the declarant, "Little Steve." *Brock v. Gen. Elec. Co.* (Jan. 30, 1998), Hamilton App. No. C-970042, unreported, 1998 Ohio App. LEXIS 251, at *12-*13. The only evidence in the record is that "Little Steve" was a maintenance man employed by Saalfield. There is no evidence that the maintenance of the freight elevator was within the scope of employment of "Little Steve." Absent such evidence, the statement is inadmissible hearsay. See *Shumway v. Seaway Foodtown, Inc.* (Feb. 24, 1998), Crawford App. No. 3-97-17, unreported, 1998 Ohio App. LEXIS 1131, at *6-*7 (statements of supermarket cashier as to whether store's freezer had recently experienced problems not within Evid.R. 801[D][2][d] absent evidence that freezer maintenance was within scope of cashier's employment); *Brock, supra*, at *13 (statements of supervisor as to cause for employee's termination not within Evid.R. 801[D][2][d] absent evidence that supervisor had any input into decision to terminate employee). See, also, *Hill v. Spiegel, Inc.* (C.A.6 1983), 708 F.2d 233, 237 (statements by "managers" not within Fed.R.Evid. 801[d][2][D] where no evidence that

As discussed below, *see infra* Sec. III(B)(2), the attachment of discovery materials to a motion for summary judgment cannot act as some sort of magic wand to create a constitutional right of access.

Based on the foregoing, Ohio law does not give Movants a presumptive right to access Exhibit G.

2. There is no consensus under federal law that any and all materials attached to summary judgment briefs are immediately subject to a presumption of access.

Contrary to Movants' claim, there is not a consensus among the federal courts that a right for public access to a document is created merely by attaching the document to a motion for summary judgment.

a. The United States Supreme Court distinguishes between those materials that are not ultimately admitted as evidence and those that are admitted as evidence when deciding whether a right of public access exists.

In *Seattle Times Co. v. Rhinehart*, the United States Supreme Court reviewed a defamation lawsuit wherein the lower court restricted the defendants-newspapers ability to disseminate materials it obtained during discovery. 467 U.S. 20, 104 S.Ct. 2199, 81 L.Ed.2d 17 (1984). Specifically, the lower court's order restricted the dissemination of the plaintiffs' financial information, the names and addresses of numerous nonparties, and various contributors and clients associated with the plaintiffs' religious organization. *Id.* at 27.

Discussing discovery materials, generally, the Court first acknowledged that a party gains discovery materials solely through the civil justice system's discovery processes. *Id.* at 32. Because of this, the First Amendment does not protect a litigant's right to obtain or otherwise access materials for purposes of litigating its case. *Id.*, citing *Zemel v. Rusk*, 381 U.S. 1, 85 S.Ct. 1271,

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managers had input into termination of employee)."

14 L.Ed.2d 179 (1965). Given the long history of keeping discovery materials away from public view, discovery materials which are obtained by a party ***but which are not yet admitted as evidence in the trial*** are not subject to public access. *Id.* at 33 [emphasis added] ("Much of the information that surfaces during pretrial discovery may be unrelated, or only tangentially related, to the underlying cause of action. Therefore, ***restraints placed on discovered, but not yet admitted, information are not a restriction on a traditionally public source of information***.").

b. The admitted versus not admitted standard properly balances competing interests during discovery.

To permit the public to obtain discovery materials merely because they are filed is indeed a slippery slope:

> It is clear from experience that pretrial discovery by depositions and interrogatories has a significant potential for abuse. This abuse is not limited to matters of delay and expense; ***discovery also may seriously implicate privacy interests of litigants and third parties***. The Rules do not distinguish between public and private information. Nor do they apply only to parties to the litigation, as relevant information in the hands of third parties may be subject to discovery.
>
> There is an opportunity, therefore, for litigants to obtain—incidentally or purposefully—information that not only is irrelevant but if publicly released could be damaging to reputation and privacy. The government clearly has a substantial interest in preventing this sort of abuse of its processes.

Id. at 35-36. As a result, the trial court does not lose the ability to restrict public access merely because a discovery document was filed in the case. *Id.* at fn. 19 ("Thus, to the extent that courthouse records could serve as a source of public information, access to that source customarily is subject to the control of the trial court."). In fact, the threshold issue is whether the materials attached to a filed motion are in fact admissible evidence.

In re Reporters Committee for Freedom of the Press, a libel case, discussed at length whether documents attached to a dispositive motion were presumptively accessible to the public. 773 F.2d 1325, 1326 (D.C.Cir.1985). In *In re Reporters Committee*, like this case, the appellants

were not parties to the lawsuit but were members of the press who sought access to certain exhibits filed under seal in the case, including those attached to a summary judgment motion. *Id.*[10]

The court first determined that there has never been a practice of permitting the public to access prejudgment records, *i.e.* those records submitted to the court before a final judgment is rendered:

> Because of their sparseness, the authorities discussed above are perhaps weak support for a general common law rule of nonaccess to pre-judgment records in private civil cases. But when laid beside our inability to find any historical authority, holding or dictum, to the contrary, they are more than enough to rule out a general tradition of access to such records.

Id. at 1335-36.

Most importantly, the Court held that the First Amendment does not confer onto the public the right to access inadmissible materials merely because they are attached to motions before the court:

> It is true that in the present case the reporters were only seeking those pretrial materials that could have been considered by the court in its disposition of the Rule 56(c) motion—what they call the "summary judgment record." Chief Justice Burger's analysis[11] does not make any such distinction, though it would be an obvious one to make if it were relevant. ***We are certainly unaware of any tradition of public access (pre- or post-judgment) to all documents consulted (or, as appellants would have it, consultable) by a court in ruling on pre-trial motions. If such a tradition existed, public files would presumably be filled with complaints stricken as scurrilous and with proffered evidence ruled inadmissible. The passage of Seattle Times which cites Chief Justice Burger's analysis with approval evidently considers the admission of evidence the touchstone of a First Amendment right to public access***: "Therefore, restraints placed on discovered, but not yet admitted, information are not a restriction on a traditionally public source of information." 104 S.Ct. at 2208 (emphasis added). ***Even if one were to expand this perception to include all admissible evidence, it would still lead to the conclusion that material placed before the court in connection with summary***

[10] Although the district court had eventually unsealed all documents and made the same available to the public, the Court of Appeals determined that appellants' appeal, in part, was not moot under the "capable of repetition, yet evading review doctrine." 773 F.2d at 1328–30.

[11] Referring to Chief Justice Burger's concurring opinion in *Gannett Co. v. DePasquale*, 443 U.S. 368, 99 S.Ct. 2898, 61 L.Ed.2d 608 (1979).

> ***judgment motions is not constitutionally required to be open to the public—unless we are to subject trial courts to the constitutional necessity of ruling, either pre-trial or post-trial, on the admissibility of voluminous material that is filed, and perhaps even referred to in the summary judgment motion, but not sought to be introduced.***

Id. at 1337 [emphasis added].

In this case, Exhibit G was not and is not admissible evidence. (See, Plaintiffs' Sep. 11, 2019 Resp. in Opp. to Defs' Motion to Unseal Exhibit G of Defs' Combined Summary Judgment Reply Brief, pp. 4-7). As a result, the First Amendment does not provide Movants' with a presumptive right to access the document.

c. Movants' cited cases do not undermine the holdings and analysis of *Seattle Times* and *In re Reporters Committee for Freedom of the Press.*

Unlike the on-point federal precedent cited by Plaintiffs, Movants' federal precedent is distinguishable.

Movants cite *Richmond Newspapers v. Virginia*, 448 U.S. 555, 580, 100 S.Ct. 2814, 65 L.Ed.2d 973 (1980) at several points in their motion. However, it is important to note that the United States Supreme Court has not extended the right of access discussed and conferred in that decision outside of criminal proceeding. *See, United States v. Miami Univ.*, 91 F.Supp.2d 1132, 1156 (S.D.Ohio.2000), aff'd, 294 F.3d 797 (6th Cir.2002) ("However, the Supreme Court has not extended this right of access outside the realm of criminal trials and related criminal proceedings."); *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 611, 102 S.Ct. 2613, 73 L.Ed.2d 248 (1982) (O'Connor, J., concurring) (stating that "neither *Richmond Newspapers* nor the Court's decision today carry any implications outside the context of criminal trials.").

Brown & Williamson Tobacco Corp. v. F.T.C., is distinguishable because it involved a district court sealing the entire record of the case, as opposed to a single inadmissible exhibit

attached to a single summary judgment brief. 710 F.2d 1165, 1177–81 (6th Cir.1983). Moreover, the concerns about the consequences caused by restricting the public's access to a trial expressed by the *Brown & Williamson* court are not present here. For instance, the court was concerned with the possibility that witnesses may be more willing to perjure themselves if the public is not able to attend the trial. *Id.* at 1178. No such concerns are present before this Court because the parties had a six-week long jury trial that was ***open to the public***, the Defendants never attempted to introduce this document, and the relevant person (ADG) was not called as a witness at trial.

The court was also concerned with the "community catharsis" which comes from the public watching and participating in the trial. *Id.* at 1179. Once again, in this case the public, including Movants, was permitted to watch and participate in the open trial. Indeed, reporters from two media outlets were present for nearly every day of trial. Movants, on the other hand, ignored this case until after the jury's verdicts during the compensatory phase of trial. Moreover, the *Brown & Williamson* court was concerned with the possibility that "secrecy insulates the participants, masking impropriety, obscuring incompetence, and concealing corruption." *Id.* Movants cannot reasonably claim that keeping a single exhibit from a summary judgment brief filed months before trial somehow masks alleged impropriety, incompetence, or corruption. Additionally, keeping this single exhibit sealed would not insulant a participant in the litigation because ***ADG is not a party and did not testify at trial.***

Finally, Exhibit G actually meets one of the exceptions to access discussed by the *Brown & Williamson* court, specifically the protection of "privacy rights of participants or ***third parties***..." *Id.* To permit Exhibit G, which consists solely of private social media information from a nonparty, to be unsealed would serve no purpose other than to harass and potentially defame a nonparty. It most certainly would invade ADG's protected privacy rights. As a result, *Brown &*

Williamson does not support Movants' position.

Rudd Equip. Co., Inc. v. John Deere Construction & Forestry Co. is distinguishable because the party alleging potential harm from the unsealing of records was the plaintiff. 834 F.3d 589, 594 (6th Cir.2016). In our case, Exhibit G consists solely of materials from a nonparty. Moreover, much like *Brown & Williamson*, the court originally sealed the entire case, as opposed to certain documents within the record. *Id.* at 591. And perhaps most importantly, the plaintiff failed to "point to any trade secret, or ***privacy right of third parties***, that a seal might legitimately protect." *Id.* at 594 (emphasis added). As detailed above, the privacy rights of a third-party are directly impacted by Exhibit G.

In re Knoxville News-Sentinel Co., Inc. is likewise distinguishable because the district court had sealed the entire record. 723 F.2d 470, 471–72 (6th Cir.1983). Eventually, the record was unsealed, with the exception of two exhibits which contained information about various loans between a bank and numerous private citizens, both of which were ordered to be removed from the court's records and separately maintained for the appellate court's potential review. *Id.* Ultimately, the appellate court upheld the district court's restriction on access to the two exhibits because those exhibits contained private information for nonparties. It relied on the fact that the records involved nonparties, thereby creating a compelling government interest which justifies sealing the records. *Id.* ("Unlike the protected party in *Brown & Williamson*, who sought to deny public access because of the adverse business effect disclosure might cause, the individuals protected by the closure order here are third parties who were not responsible for the initiation of the underlying litigation. These individuals possessed a justifiable expectation of privacy that their names and financial records not be revealed to the public."). The interests of third-parties justify limiting public access to records relating to the third-parties: *Id.* at 478.

San Jose Mercury News, Inc. v. U.S. Dist. Court--Northern Dist. (San Jose) is distinguishable because it specifically declined to address the First Amendment and instead relied solely upon federal common law and the Federal Rules of Civil Procedure. 187 F.3d 1096, 1102 (9th Cir.1999) ("We leave for another day the question of whether the First Amendment also bestows on the public a prejudgment right of access to civil court records."). As discussed above, the First Amendment gives Movants' no presumptive right to access Exhibit G.

The holding and analysis in *Rushford v. New Yorker Magazine, Inc.* ignores the United States Supreme Court's decision in *Seattle Times* and creates an absurd standard, wherein a party could merely file all discovery materials, regardless of their admissibility, and then subject the opposing party and nonparties to public scrutiny. The *Rushford* court claimed that "[o]nce the documents are made part of a dispositive motion, such as a summary judgment motion" they are no longer discovery materials and become accessible by the public. 846 F.2d 249, 252–54 (4th Cir.1988). As discussed above, such a standard is precluded under the *Seattle Times* decision and repudiated by the thorough analysis in *In re Reporters Committee for Freedom of the Press.*

Shane Group, Inc. v. Blue Cross Blue Shield of Michigan is distinguishable because it involves a class action which affected more than 60% of the Michigan commercial health insurance market. 825 F.3d 299 (6th Cir.2016). The litigation ultimately settled, but numerous members of the class objected to the proposed settlement, citing, in part, the heavy redactions to the documents in the record. *Id.* at 304. The district court had "sealed most of the parties' substantive filings from public view, including nearly 200 exhibits and an expert report upon which the parties based a settlement agreement that would determine the rights of those millions of citizens." *Id.* at 302.

Ultimately, the appellate court found the district court had not undertaken a vigorous enough review before sealing the vast majority of the record. The court relied, in part, on the fact

that "[a]s a practical matter, therefore, both the general public and the class were able to ***access only fragmentary information*** about the conduct giving rise to this litigation, and next to nothing about the bases of the settlement itself." *Id.* at 306. In our case, the public's rights were not adjudicated in this litigation and the public was not restricted from seeing most of the record. Additionally, the *Shane Group* court reaffirmed the importance of protecting the private information of nonparties: "Finally, the point about third parties is often one to take seriously; 'the privacy interests of innocent third parties should weigh heavily in a court's balancing equation.'" *Id.* at 308, quoting *United States v. Amodeo*, 71 F.3d 1044 (2d Cir. 1995). Exhibit G consists of information from the private social media account of a nonparty, thereby weighing heavily in favor of restricting public access.

d. Because the vast majority of records from this case are unsealed, including the entire trial record, there is no concern about a lack of public access.

The lack of public access and participation are the overriding concerns and bases for analysis in the cases cited by Defendants. *See e.g., Brown & Williamson*, 710 F.2d at 1178 ("***Without access to the proceedings***, the public cannot analyze and critique the reasoning of the court. The remedies or penalties imposed by the court will be more readily accepted, or corrected if erroneous, if the public has an opportunity to review the facts presented to the court."). As the Ohio Supreme Court acknowledged, the purposes served by open court proceedings is "(1) ensuring that proceedings are conducted fairly, (2) discouraging perjury, misconduct of participants, and unbiased decisions, (3) providing a controlled outlet for community hostility and emotion, (4) securing public confidence in a trial's results through the appearance of fairness, and (5) inspiring confidence in judicial proceedings through education on the methods of government and judicial remedies." *State ex rel. Beacon Journal Publishing Co. v. Bond*, 98 Ohio St.3d 146,

2002-Ohio-7117, 781 N.E.2d 180, ¶ 43 (2002), citing *Richmond Newspapers*, 448 U.S. at 580.

But these are not concerns in this case. The ***vast majority*** of the records from this case, including the ***entire record from the six-week trial***, are available for public consumption. Newspaper and other reporters and members of the public were present for nearly every day of trial. Indeed, the Court even permitted camera crews in the courtroom. This is not a scenario where the Court has sealed a large portion of the record. Instead, Movants' complain and seek access to a few pages of discovery materials that were attached to Defendants' summary judgment reply brief and ultimately found to be inadmissible at trial. Frankly, Movants' admission that this case has been extensively covered by numerous media outlets cuts against any claim that the public was not adequately kept abreast of the proceedings merely because a single summary judgment exhibit was sealed.

C. Movants are not Entitled to Access Exhibit G Under Ohio R. Sup. 45.

1. Movants bear the burden to show, by *clear and convincing evidence*, that Exhibit G is no longer entitled to protection.

Movants seem to misunderstand the procedural posture of Exhibit G. Throughout their Motion, they assume, without analysis, that Plaintiffs or ADG bear the burden on restricting access to Exhibit G. Without citing a single relevant authority, Movants claim that records may only be sealed if a court makes "specific, on-the-record factual findings" that access should be restricted. That is not the case. In fact, Sup.R. 45(E)(1) specifically leaves the decision to hold a hearing in the sound discretion of the trial court. *See,* Sup.R. 45(E)(1) [emphasis added] ("The court ***may*** schedule a hearing").

The Rules of Superintendence also clearly state that when documents have already been ordered sealed, the party seeking access bears the burden to show that the restricted documents should be made available for public consumption:

> A court may permit public access to a case document or information in a case document if it finds by ***clear and convincing evidence*** that the presumption of allowing public access is no longer outweighed by a higher interest. When making this determination, the court shall consider whether the original reason for the restriction of public access to the case document or information in the case document pursuant to division (E) of this rule no longer exists or is no longer applicable and whether any new circumstances, as set forth in that division, have arisen which would require the restriction of public access.

Sup.R. 45(F)(2) [emphasis added]. By order and entry dated September 16, 2019, the Court held that Exhibit G must remain restricted. (See, Sep. 16, 2019 Order, p. 2 "Defendants' Motion to Unseal Exhibit G ... is hereby ***denied.***").

Thus, Movants bear the burden to show by clear and convincing evidence that the public should have access to Exhibit G.

2. Even considering the factors in Ohio R. Sup. 45(E)(2), Exhibit G should not be available to the public.

Regardless of who carries the burden of persuasion, Exhibit G should not be available to the public. Pursuant to Sup.R. 45(E)(2), documents should be sealed if by clear and convincing evidence, the presumption of public access is outweighed by a higher interest. Courts consider three factors when making this determination:

> (a) Whether public policy is served by restricting public access;
>
> (b) Whether any state, federal, or common law exempts the document or information from public access; [and]
>
> (c) Whether factors that support restriction of public access exist, including risk of injury to persons, individual privacy rights and interests, proprietary business information, public safety, and fairness of the adjudicatory process.

Sup.R. 45(E)(2)(a)-(c). Factors (a) and (c) weigh heavily in favor of restricting public access to Exhibit G.

a. Public policy requires restricting access to Exhibit G.

For several reasons, public policy requires restricted access to Exhibit G:

First, one of the primary policy reasons behind access to court records is that "[w]hen a litigant brings his or her grievance before a court, that person must recognize that our system generally demands the record of its resolution to be available for review." *Woyt v. Woyt*, 8th Dist. Cuyahoga No. 107312, 2019-Ohio-3758, ¶ 67. This policy makes sense for relevant documents exchanged between parties to litigation that are later admitted as evidence at trial. It does not apply to Exhibit G.

ADG is a nonparty to this litigation. He was served with a subpoena by Defendants and forced to comply under penalty of contempt. *See,* Civ.R. 45(E) ("Failure by any person ... to obey a subpoena served upon that person may be deemed a contempt of the court from which the subpoena issued."). Thus, ADG was forced, against his will, to produce private and personal social media messages. Unquestionably, as a nonparty to this litigation, ADG has a substantial privacy interest in Exhibit G. *See, e.g. Lawson v. Love's Travel Stops & Country Stores, Inc.*, M.D. Penn. No. 1:17-cv-1266, 2019 WL 5622453 at *6 (Oct. 31, 2019) [emphasis added] ("social media is at once both ubiquitous and often ***intensely personal***, with persons sharing through social media, and storing on electronic media, the most intimate personal details on a host of matters").[12]

In essence, Movants are requesting unlimited access to a nonparty's private information based solely on the fact that an adversary[13] attached the private documents as an exhibit to a summary judgment motion. Considering the extremely broad scope of civil discovery,[14] under

[12] Indeed, the U.S. Supreme Court has recognized a strong privacy interest not only in social media but in all forms of electronic media storage and communication. *See, Riley v. California*, 573 U.S. 373, 134 S.Ct. 2473 (2014) (substantially restricting warrantless searches of smartphones due to the fact that "many of the more than 90% of American adults who own a cell phone keep on their person a digital record of nearly every aspect of their lives – from the mundane to the intimate.").

[13] While ADG was not party to this litigation, Defendants spent the entire pre-trial portion of the case attempting to smear and demonize ADG. (See, Def. First. Am. Answer, pp. 1-2).

[14] While Exhibit G was produced in response to a subpoena, the "'scope of discovery under a subpoena is the same as the scope of discovery under Rule 26.'" *Tcyk, LLC v. Does*, No. 2:13-cv-688, 2013 WL 12130354 at *3 (S.D. Ohio

such a rule, there would be no limit to the invasive and public airing of private information.

The scope of discovery is much broader than the scope of admissible evidence. Civil litigation creates an upside-down funnel effect. Discovery begins at the top of the funnel and makes up the majority of the funnel because the scope of discovery is extremely broad. *See,* Civ.R. 26(B)(1).[15] The bottom of the funnel and the smallest portion of the funnel is the scope of trial evidence, which requires all evidence to meet numerous hurdles for admissibility, including hearsay and relevancy. The point here is that parties receive significant portions of discovery materials which ultimately are inadmissible at trial. And the reason most civil cases do not take decades to complete is that discovery is intended to be agreeable and reciprocal, i.e. a voluntary free flow of responsive information without the need for constant court intervention. *See,* 1994 Staff Notes to Civ.R. 37 ("The purpose of the amendment is to endorse and enforce the view that, in general, discovery is self-regulating and should require court intervention only as a last resort.").

Accepting Movants' position that all discovery materials filed with the court are thereby accessible by the public undoes the current structure of discovery. Parties and nonparties would need to decide whether to: (1) produce materials during discovery and thereby risk the public's access merely because the other party may file the materials in court; or (2) file for protective orders at every turn. This would create a chilling effect on discovery by causing parties to not produce responsive materials and would grind the courts' dockets to a halt by exponentially

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Nov. 25, 2013), quoting *Hendricks v. Total Quality Logistics, LLC*, 275 F.R.D. 251, 253 (S.D. Ohio 2011). While not limitless, the scope of discovery is extremely broad. *See, Conti v. Am. Axle & Mfg., Inc.*, 326 F. App'x 900, 904 (6th Cir. 2009) ("[T]he scope of discovery under the Federal Rules of Civil Procedure is traditionally quite broad, [and] the limits set forth in Fed. R. Civ. P. 26 must be construed broadly to encompass any matter that bears on, or that reasonably could lead to other matters that could bear on, any issue that is or may be in the case.").

[15] Civ.R. 26(B)(1) ("Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action ... It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.").

increasing the number of discovery motions.

This case provides a prime example for why Movants' interpretation of federal and Ohio law is incorrect and potentially dangerous. If Movant's overreach were the rule, it would certainly have given ADG the strong incentive to be an obstructionist because there would have been a substantial risk that his private materials (which were ultimately inadmissible at trial) would be disseminated to the world and splashed across the media. This is not and should not be the rule in Ohio. This is particularly true where there are no restrictions on the documents a litigant may include in summary judgment briefing. And without question, the Movants have ***every intention*** of blasting ADG's private information in the public sphere.

Second, and relatedly, Exhibit G has absolutely no relevance to the issues in this case. This has been conclusively decided not only by the Court's order restricting the presentation of character evidence at trial,[16] but, more importantly, by the fact that ***Defendants did not attempt to introduce Exhibit G at trial and did not even call ADG as a witness to testify at trial***. Thus, granting Movants' request would inevitably lead to the public dissemination of not only private information but clearly ***irrelevant*** private information.

Additionally, Movants misrepresent the reason Defendants attached Exhibit G to their summary judgment reply brief. At page 3 of their Motion, Movants parrot back a false claim by Defendants in post-trial briefing that Exhibit G contains reputational evidence related to Gibson's Bakery. This is a false narrative. In fact, Defendants' own summary judgment reply brief used these materials solely for the argument that Plaintiffs were public figures or limited public figures. (See Defendants' MSJ Reply, pp. 10-12). Defendants had the option to attempt to introduce Exhibit G during trial as reputational evidence, and they chose not to do so.

[16] (See, May 8, 2019 Entry and Ruling on All Motions *in Limine*, pp. 1-2).

Third, there are strong implications that Movants' Motion is nothing more that a backdoor attempt by Defendants to continue the smear campaign against Plaintiffs and dox ADG. On September 16, 2019, this Court denied Defendants' Motion to Unseal the same exact materials:

> Specifically, on May 8, 2019, the Court issued a preliminary ruling excluding the presentation of Allyn D. Gibson's Facebook content as character evidence, but withheld ruling on the question of whether it could be introduced to reflect the reputation of Gibson's Bakery in the community. At trial, the Defendants made no attempt to introduce these materials as evidence of the Bakery's reputation in the community. With this procedural context and at this juncture, the Court is not persuaded by the Defendants' arguments that it should make a post-trial order regarding materials that the Defendants opted to file under seal nearly six months ago in accordance with an agreed protective order that they drafted and stipulated to.

(Sep. 16, 2019 Order, p. 2). While the current motion was not filed by Defendants, there are substantial connections between Movants and Defendants' counsel, including the fact that Defendants' lead counsel, Ron Holman, II, was a television legal analyst for Movant WEWS-TV for ***more than ten (10) years***. (See, Ex. 1, p. 1). Thus, it appears that Defendants are attempting to use nonparties to this litigation to circumvent the Court's orders. They should not be permitted to do so.

b. Numerous additional factors support restricted access to Exhibit G.

Rule 45(E)(2)(c) asks Courts to consider whether factors other than public policy favor restricted access, including "risk of injury to persons, individual privacy rights and interests, proprietary business information, public safety, and fairness of the adjudicatory process." Several of these identified factors favor restricting access to the Exhibit G:

First – risk of injury to persons. As confirmed by the deposition and trial testimony, the entire Gibson family were subjected to significant threats of violence during and after the defamatory protests in November of 2016. ADG specifically was the victim of vicious threats of

harm and actual physical injury. During his deposition, ADG testified that after the protest, he was the target of death threats and defamatory statements:

> A. I tried to stay away from the college.
> Q. And why is that?
> A. Because people don't treat me well when I'm in that area.
> Q. What do you mean by that? How do they not treat you well?
> A. I've had people harass me and threaten to hurt me, spit at me, say they're going to kill me, threaten my family.
> Q. And does this happen when you go on Oberlin College's campus?
> A. Yes.

(A. D. Gibson Dep. Vol. I, p. 43). In addition to verbal threats, ADG was assaulted behind Gibson's Bakery during the protests. (Id. Vol. II, p. 368).

And ADG was not the only person subject to assaults during and after the protests. Numerous other individuals were subjected to threats of violence, damaged property, and actual physical injury:

- During the protests, the Oberlin Police Department had to escort then 89-year-old Grandpa Gibson home because he was receiving death threats (Ptl. Shoemaker Dep., p. 30-32);
- Gibson's Bakery employee Constance Rehm's tires were slashed in the parking lot behind Gibson's Bakery (May 16, 2019 Tr. Trans., p. 112);
- Gibson's Bakery head baker Shane Cheney's car tires were punctured while it was parked in the Gibson's Bakery parking lot (May 15, 2019 Tr. Trans., pp. 105-06) and
- Worst of all, in the middle of the night six months after the protests, individuals pounded on Grandpa Gibson's front door and, after he fell and broke his neck, left him lying in the doorway of his apartment with a life altering injury (May 16, 2019 Tr. Trans., pp. 29-33).

The protests and defamation of Plaintiffs created a substantial risk of injury and property damage not only to the Gibson family but also to individuals associated with Gibson's Bakery. Movants' attempt to publicly release ADG's private social media messages and to continue the defamation of the Gibson family will create the same risks.

Second – individual privacy rights and interests. As explained in substantial detail above, ADG has a strong privacy interest in restricting public access to his private, personal social media messages. *See, supra* Sec. III(D)(2)(a). Particularly where the documents to be publicly released hold no relevance whatsoever to the issues in this litigation. *See, id.*

Third – fairness of the adjudicatory process. The irrelevance of Exhibit G also calls into question Movants' motive. Because Exhibit G had no relevance at trial, what is the point in attempting the public disclosure of the documents months after the trial concluded? The only logical conclusion is that Movants, likely working in concert with Defendants, *see supra* Sec. III(D)(2)(a), are attempting to continue the defamation of Plaintiffs during the appellate process to hopefully sway potential jurors should Defendants succeed on appeal.

Therefore, Movants' Motion should be denied.

D. In the Alternative, this Motion should be Held in Abeyance Until the Completion of the Appellate Process.

At a minimum, should the Court decide not to deny Movants' Motion outright, it should hold its decision in abeyance until the conclusion of the appellate process.

Clearly, Movants' request for the release of Exhibit G is not time sensitive because if it was, they would not have waited nearly ***seven (7) months*** after Exhibit G was presented to the Court to file their Motion. The appellate process in this case is well under way. The Lorain County Clerk of Courts recently submitted the record to the Ninth District Court of Appeals and briefing will begin in the very near future. To avoid any potential prejudice and continued defamation of

the Plaintiffs, it makes sense to withhold ruling on this issue until after the completion of the appeal.

IV. CONCLUSION

Therefore, for the foregoing reasons, Plaintiffs and nonparty ADG respectfully request that this Court deny Movants' motion in its entirety or, in the alternative, request that this Court withhold ruling on Movants' Motion until after the completion of the appellate process.

DATED: December 2, 2019

Respectfully submitted,

TZANGAS | PLAKAS | MANNOS | LTD

Jeanne Wickham

Lee E. Plakas (0008628)
Brandon W. McHugh (0096348)
Jeananne M. Wickham (0097838)
220 Market Avenue South
Eighth Floor
Canton, Ohio 44702
Telephone: (330) 455-6112
Facsimile: (330) 455-2108
Email: lplakas@lawlion.com
bmchugh@lawlion.com
jwickham@lawlion.com

-and-

KRUGLIAK, WILKINS, GRIFFITHS & DOUGHERTY CO., L.P.A.

Terry A. Moore (0015837)
Jacqueline Bollas Caldwell (0029991)
Owen J. Rarric (0075367)
Matthew W. Onest (0087907)
4775 Munson Street, N.W.
P.O. Box 36963
Canton, Ohio 44735-6963
Telephone: (330) 497-0700
Facsimile: (330) 497-4020
Email: tmoore@kwgd.com
jcaldwell@kwgd.com
orarric@kwgd.com

monest@kwgd.com

-and-

JAMES N. TAYLOR CO., L.P.A.

James N. Taylor (0026181)
411 East Avenue
Elyria, Ohio 44035
Telephone: (440) 323-5700
Email: taylor@jamestaylorlpa.com

Counsel for Plaintiffs

PROOF OF SERVICE

A copy of the foregoing was served on December 2, 2019, pursuant to Civ.R. 5(B)(2)(f) by sending it by electronic means to the e-mail addresses identified below:

Ronald D. Holman, II
Julie A. Crocker
Cary M. Snyder
William A. Doyle
Josh M. Mandel
Taft Stettinius & Hollister LLP
200 Public Square, Suite 3500
Cleveland, OH 44114-2302
rholman@taftlaw.com;
jcrocker@taftlaw.com;
csnyder@taftlaw.com
wdoyle@taftlaw.com
jmandel@taftlaw.com
Co-Counsel for Defendants Oberlin College aka Oberlin College and Conservatory, and Meredith Raimondo

Richard D. Panza
Matthew W. Nakon
Malorie A. Alverson
Rachelle Kuznicki Zidar
Wilbert V. Farrell, IV
Michael R. Nakon
Wickens, Herzer, Panza, Cook & Batista Co.
35765 Chester Road
Avon, OH 44011-1262
RPanza@WickensLaw.com;
MNakon@WickensLaw.com;
MAlverson@WickensLaw.com;
RZidar@WickensLaw.com;
WFarrell@WickensLaw.com;
MRNakon@WickensLaw.com
Co-Counsel for Defendants Oberlin College aka Oberlin College and Conservatory, and Meredith Raimondo

Benjamin C. Sassé
Irene Keyse-Walker
Tucker Ellis, LLP
950 Main Avenue, Suite 1100
Cleveland, OH 44113
benjamin.sasse@tuckerellis.com;
ikeyse-walker@tuckerellis.com
Appellate Counsel for Defendants Oberlin College aka Oberlin College and Conservatory, and Meredith Raimondo

Jeananne Wickham

Jeananne M. Wickham (0097838)
Counsel for Plaintiffs

Ronald D. Holman II

PARTNER / CLEVELAND
E: rholman@taftlaw.com
T: (216) 706-3829
F: (216) 241-3707

Ron is a business litigator and partner at Taft who defends litigation and class actions, including matters involving commercial disputes, unfair and deceptive consumer sales practices, fraud, violations of statutory law, employment law and workers' compensation issues.

Ron provides customized legal services throughout Ohio and the Midwest to his national, state, and local clients. In his class action work, Ron develops and executes successful defense strategies that are tailored to the needs of clients and their in-house counsel. Because of his track record, corporate clients have retained Ron to protect their interests in class actions involving hundreds of millions of dollars of potential exposure. He also has significant experience in a wide range of other commercial controversies, including those generating significant media exposure or threatening long-term reputational harm.

Ron's passion for solving clients' problems makes him an invaluable business partner. He views each engagement with an eye toward achieving the client's business objectives expeditiously and cost-effectively. Ron also serves as a trusted advisor to his clients in evaluating and minimizing risk, and views successful client representation as a business partnership.

Ron has represented clients before state and federal courts, Ohio appellate courts, the Supreme Court of Ohio, and the United States Court of Appeals for the Sixth Circuit, among other courts.

Outside of his practice, Ron has been appointed by the Chief Judge of the Northern District of Ohio to the federal court's Civil Justice Reform Act Advisory Group and Magistrate Selection Panel. Ron served on the transition committees for City of Cleveland Mayors Jane Campbell and Frank Jackson. He also has served as board chair for numerous nonprofit agencies. Ron served on the board of directors for a financial institution for 10 years. For more than a decade, he appeared as a legal analyst and commentator on News Channel 5 – WEWS-TV

Practices
Class Action, Derivative and Multi-Party Litigation
Commercial Litigation
Employment Law
Labor and Employment Litigation

Education
Columbia Law School (1986)
Dartmouth College (1982)

Admissions
State - Ohio
Federal - Northern District of Ohio
Federal - 6th Circuit Court of Appeals
Federal - Southern District of Ohio
Federal - Eastern District of Kentucky

(the Cleveland ABC news affiliate).

Notable Matters

- Obtained summary judgment of all class claims in a consumer class action (challenging discount advertising) for one of the nation's largest retailers, which led Plaintiff to voluntarily dismiss the action for a nominal settlement.
- Successfully defended state turnpike commission in $800 million dispute challenging the federal and state constitutionality of toll increases, leading to a dismissal of all state and federal claims.
- Obtained the dismissal of all class claims in a consumer class action challenging a national TV retailer's "Buy One Get One Free" advertising, including those involving violation of a consumer protection statute, fraud, and unjust enrichment.
- Secured dismissals of three class actions challenging different workers' compensation practices of state agency, all of which were affirmed by the Supreme Court of Ohio.
- Successfully petitioned the Sixth Circuit Court of Appeals to reverse District Court's ruling on proper standard to apply in calculating damages for purposes of removal under the Class Action Fairness Act.
- Procured the dismissal of 15 claims for a gaming client in a suit alleging claims for breach of contract, libel, slander, and constitutional violations.
- Obtained summary judgment for a national client and its top executives in a gender and age discrimination dispute, which was affirmed on appeal.
- Demanded and secured voluntary dismissal (with prejudice) of an employment action after taking Plaintiff's deposition.
- Procured the voluntary dismissal (with prejudice) of one of the world's largest food and beverage companies and all Defendants in a premises liability action after deposing Plaintiff.
- Successfully settled a class action representing one of the nation's leading providers of eye care services, after obtaining dismissals of multiple claims (including those for class relief).
- Obtained summary judgment of all claims (including age, race and national origin discrimination, and retaliation) in favor of a university, which was affirmed by the Sixth Circuit Court of Appeals.
- Secured a dismissal of a collective action and class action under the Fair Labor Standards Act for one of the nation's largest luxury vehicle dealerships.

Professional Affiliations

- Cleveland Metropolitan Bar Association
  Member

- Ohio State Bar Association
  Member
- American Bar Association
  Member
- U.S. District Court
  Former Member, Northern Division Magistrate Selection Panel
  Former Member, Civil Reform Selection Panel
- Nisi Prius
  Member

Community Involvement

- Centers for Families and Children
  Former President
- North Coast Community Homes
  Former President
- Florence Crittenden Services of Greater Cleveland
  Former President
- Park View Federal Savings Bank
  Former Director, Board of Directors
- Sigma Pi Phi
  Member

IN THE COURT OF COMMON PLEAS
LORAIN COUNTY, OHIO

GIBSON BROS., INC, et al.,	)	**CASE NO. 17CV193761**
Plaintiffs,	)	**JUDGE JOHN R. MIRALDI**
v.	)	
OBERLIN COLLEGE, et al.	)	
Defendants.	)	

REPLY OF WEWS-TV, ADVANCE OHIO, AND THE OHIO COALITION FOR OPEN GOVERNMENT TO PLAINTIFFS' OPPOSITION TO THEIR MOTION FOR ACCESS TO SEALED CASE DOCUMENT[1]

In their Opposition to the Motion of WEWS-TV, Advance Ohio, and the Ohio Coalition for Open Government (collectively, the "Media Movants") for access to Exhibit G to defendants' combined summary judgment reply brief, Gibson Bros., Inc., David R. Gibson, Allyn W. Gibson and Allyn D. Gibson (collectively, "Plaintiffs") make no attempt to satisfy the rigorous standards that must be met in order to overcome the public's presumptive right to access judicial records under the First Amendment, the Ohio Constitution, and the Ohio Rules of Superintendence. Plaintiffs completely ignore controlling Ohio Supreme Court case law holding that documents "submitted to a court or filed with a clerk of court in a judicial action or proceeding, including

[1] Rule 6(C)(1) of the Ohio Rules of Civil Procedure, as amended in July 2019, provides that "[a] movant's reply to a response to any written motion may be served within seven days after service of the response to the motion." The Staff Notes to Rule 6 state that these provisions "supersede and replace the differing deadlines for responding to motions imposed by the numerous local rules of Ohio trial courts, thereby eliminating confusion and creating consistency by providing uniform statewide deadlines." Though Rule 6(C)(1), as amended, contemplates the filing of a reply as a matter of right, to the extent the Court finds that Media Movants must be granted leave to file this Reply, Media Movants hereby request such leave.

[an] exhibit . . ." are judicial records to which a presumption of public access applies, regardless of the extent to which they are relied upon in resolving the action or proceeding. *See State ex rel. Vindicator Printing Co. v. Wolff*, 132 Ohio St. 3d 481, 2012-Ohio-3328, 974 N.E.2d 89. Plaintiffs further disregard the Court's obligation to make "specific, on the record findings" that a compelling interest outweighs the public's constitutional right of access to Exhibit G, and that any continued sealing of that judicial record be narrowly tailored to that interest. *Press-Enter. Co. v. Superior Court*, 478 U.S. 1, 13–14 (1986) ("*Press-Enterprise II*"); *see also* Sup. R. 45(E)(3). None of the hodgepodge of meritless arguments asserted by Plaintiffs—which rely on inapposite authority and are directed at inapplicable legal standards—provide any basis to deny the press and the public access to Exhibit G. For the reasons set forth in their Motion and herein, Media Movants respectfully request that the Court grant their Motion and unseal Exhibit G.

I. Media Movants Have Standing to Request that Exhibit G be Unsealed.

As an initial matter, Plaintiffs blatantly misrepresent Sup. R. 45(F) by claiming that it "does not grant standing to nonparties to assert state or federal constitutional challenges to a trial court decision restricting access to case documents." Opp. at 6. In reality, Sup. R. 45(F) does exactly that. Sup. R. 45(F)(1) provides that "[a]ny person, by written motion to the court" may request access to "case documents" sealed by a trial court. And, indeed, since the enactment of the Rules of Superintendence in 2009, Ohio courts have routinely heard motions by nonparties—including, as here, members of the press—seeking access to sealed case documents on statutory and constitutional grounds. *See, e.g.*, *State ex rel. Cincinnati Enquirer v. Lyons*, 140 Ohio St. 3d 7, 2014-Ohio-2354, 14 N.E.3d 989; *State ex rel. Cincinnati Enquirer v. Hunter*, 2013-Ohio-4459; *Wolff*, 132 Ohio St. 3d 481, 2012-Ohio-3328, 974 N.E.2d 89.

Further, Plaintiffs fundamentally misconstrue both Media Movants' Motion and the presumption of openness that governs here by arguing that "Movants lack standing to challenge the parties' stipulated protective order, including the designations made thereunder, under the Ohio and federal constitutions." Opp. at 6. Media Movants do not seek to vacate or modify the parties' stipulated protective order;[2] nor have Media Movants raised constitutional challenges to "confidential" designations made by the parties pursuant to that stipulated protective order (which restricts public access to documents merely exchanged during discovery that were never filed with the Court). Rather, Media Movants seek to unseal Exhibit G to defendants' combined summary judgment reply brief—a judicial document that, under clear Ohio and federal constitutional law, cannot be sealed on the basis of a stipulated protective order.

Not only do Media Movants have standing pursuant Sup. R. 45(F), but because Media Movants have a presumptive right of access to Exhibit G under the First Amendment and the Ohio Constitution as described further below, Media Movants also have constitutional standing to request that the Court unseal Exhibit G. "[U]nder traditional standing principles" a party has standing if it has suffered "(1) an injury that is (2) fairly traceable to the . . . allegedly unlawful conduct, and (3) likely to be redressed by the requested relief." *State ex rel. Walgate v. Kasich*, 2016-Ohio-1176, ¶ 18, 147 Ohio St. 3d 1, 7, 59 N.E.3d 1240, 1247. Here, the Media Movants have been, and continue to be, denied their constitutional right of access to Exhibit G due to the Court's continued sealing of Exhibit G and have requested, upon written motion to this Court, that the Court unseal Exhibit G to redress the injury suffered by Media Movants.

[2] But to be clear, contrary to Plaintiffs' assertions, nonparties (including members of the media) do have standing to challenge protective orders that restrict the public right of access to court records. *See, e.g., In re Nat'l Prescription Opiate Litig.*, 927 F.3d 919 (6th Cir. 2019).

Media Movants have a presumptive right of access to Exhibit G under the Rules of Superintendence, the First Amendment, and the Ohio Constitution and have standing to request that this Court unseal Exhibit G in accordance therewith.

II. A Summary Judgment Exhibit is Not Mere "Discovery Material"; the Presumptive Right of Access Afforded by the First Amendment, the Ohio Constitution, and Superintendence Rule 45 Applies to Exhibit G.

Both the Ohio Rules of Superintendence and the Ohio Supreme Court have recognized that a document "submitted to a court or filed with a clerk of court in a judicial action or proceeding, including [an] exhibit . . ." constitutes a judicial record to which a presumption of open public access applies under Sup. R. 45(A). *See* Sup. R. 44(C)(1); *Wolff*, 974 N.E.2d at 98. As set forth in detail in Media Movants' Motion, the press and the public are also afforded a presumptive right of access to judicial documents under the First Amendment and the Ohio Constitution. *See State ex rel. Cincinnati Enquirer v. Winkler*, 101 Ohio St. 3d 382, 2004-Ohio-1581, 805 N.E.2d 1094, ¶ 8. The public's right of access applies in both civil and criminal cases. *Brown & Williamson Tobacco Corp. v. F.T.C.*, 710 F.2d 1165, 1179 (6th Cir. 1983) ("The policy considerations discussed in *Richmond Newspapers* apply to civil as well as criminal cases . . . The concern of Justice Brennan that secrecy eliminates one of the important checks on the integrity of the system applies no differently in a civil setting."); *see also Rudd Equip. Co., Inc. v. John Deere Constr. & Forestry Co.*, 834 F.3d 589, 593 (6th Cir. 2016) ("We have long recognized a 'strong presumption in favor of openness' regarding court records.") (quoting *Brown*, 710 F.2d at 1179).

Where the constitutional right applies, the presumption of access can only be overcome if specific, "on the record findings are made demonstrating that 'closure is essential to preserve higher values and is narrowly tailored to serve that interest.'" *Press-Enterprise II*, 478 U.S. at

13–14 (quoting *Press-Enter. Co. v. Superior Court*, 464 U.S. 501, 510 (1984) ("*Press-Enterprise I*")). Such findings were not made in this case; Exhibit G was filed under seal pursuant to the stipulated protective order. The parties to an action cannot waive the press and the public's right of access to judicial records by stipulating to a protective order or otherwise. Contrary to Plaintiffs' assertions, Exhibit G is not mere discovery material subject to a stipulated protective order; it is distinguishable from documents merely exchanged between the parties during discovery and not filed with any court. Rather, Exhibit G was filed with this Court in connection with a potentially dispositive motion for summary judgment. As a result, it is a judicial document to which a presumptive right of public access applies.

A. Exhibit G is not unfiled discovery material; Plaintiff's claim that Exhibit G is not entitled to a presumptive right of access is unsupported.

Plaintiffs devote nearly half of their Opposition to an attempt to cast doubt upon the press and the public's constitutional right of access to Exhibit G. But these arguments are unavailing.

Plaintiffs' assertion that Exhibit G is "discovery material" that has "historically never been open to the public" finds no support, even in the cases relied on by Plaintiffs. Opp. at 6. Though the lead case Plaintiffs cite in support of this proposition, *Adams v. Metallica, Inc.*, 143 Ohio App. 3d 482, 490–91, 758 N.E.2d 286, 292 (2001), states that "there appears to be no clear, unqualified public right to inspect pretrial discovery materials" it goes on to clarify that this "does not mean that trial courts should feel free to seal them from inspection . . . ." As the appellate court in *Adams* explained, "[t]he Civil Rules clearly contemplate that discovery documents *on file with the court* shall not be sealed from the public absent "good cause shown," *thus creating a presumption in favor of public access to such materials*." *Id.* (italics added.)

Plaintiffs' reliance on *Seattle Times Co. v. Rhinehart*, 467 U.S. 20 (1984) is similarly misplaced. The *Seattle Times* Court was not asked to consider the press and the public's

presumptive First Amendment right of access to court documents. Rather, defendant newspaper—a party to the litigation—challenged the trial court's protective order prohibiting the newspaper from disseminating information it obtained through discovery as an impermissible prior restraint on expression under the First Amendment. *Id.* at 30–31. Media Movants are not a party to this case, are not subject to a protective order, and do not seek access to unfiled discovery material. Simply put, the public's presumptive right to access court documents was not at issue in *Seattle Times* and the case has no application here.

Likewise, Plaintiffs' citation to *In re Reporters Comm. for Freedom of the Press*, 773 F.2d 1325, 1331 (D.C. Cir. 1985) is unavailing. The passage quoted in Plaintiffs' Opposition is merely *dicta* and, in any event, the D.C. Circuit's discussion of a U.S. Supreme Court decision which "did not involve a claim by the public to *access*, but rather a claim by one of the parties of the right to *disseminate* information acquired in the course of pretrial discovery" is not relevant to Media Movants' Motion to unseal a summary judgment exhibit filed with the Court. Plaintiffs' attempts to mischaracterize Exhibit G as equivalent to unfiled discovery materials not filed with a court is both incorrect and unsupported by case law.

B. Exhibit G is a judicial document to which a presumption of public access applies regardless of the extent to which it was relied upon by the Court.

Plaintiffs attempt to make much of the fact that Exhibit G was not proffered as evidence at trial and, purportedly, was not relied upon by defendants to support their truth defense. Opp. at 2–3. For this reason, Plaintiffs contend that the presumption of public access that applies to judicial documents does not apply to Exhibit G. But this reasoning was flatly rejected by the Ohio Supreme Court in *State ex rel. Vindicator Printing Co. v. Wolff*.

In *Wolff*, nonparty media organizations challenged a trial court decision that certain documents filed under seal with the court "were not entitled to presumptive public access,

because they were not used by [the court] to render a decision in the cases." 974 N.E.2d at 98. The Supreme Court rejected this argument and vacated the judge's sealing decision, holding that "[t]here is no requirement under the Superintendence Rules that a record or document must be used by the court in a decision to be entitled to the presumption of public access specified in Sup.R. 45(A)." *Id.; see also Lugosch v. Pyramid Co. of Onondaga*, 435 F.3d 110, 123 (2d Cir. 2006) (concluding that judicial documents should not be afforded "different weights of presumption based on the extent to which they were relied upon in resolving the motion."). Rather, "to qualify as a case document that is afforded the presumption of openness for court records, the document or information contained in a document must merely be 'submitted to a court or filed with a clerk of court in a judicial action or proceeding' and not be subject to the specified exclusions [in Sup. R. 44(C)(2)]." *Wolff*, 974 N.E.2d at 98.

Here, as in *Wolff*, Exhibit G was "filed with a clerk of the court in a judicial action or proceeding"—specifically, as an exhibit to defendants' combined summary judgment reply. It is not subject to any of the exceptions set forth in Sup. R. 44(C)(2). Therefore, under Sup. R. 45(A), the presumption of openness applies to Exhibit G. Moreover, because Exhibit G is a document filed in connection with a summary judgment motion, the presumption of openness "is of the highest" order. *See Lugosch*, 435 F.3d at 123 ("documents used by parties moving for, or opposing, summary judgment should not remain under seal *absent the most compelling reasons.*") (quoting *Joy v. North*, 692 F.2d 880, 893 (2d Cir. 1982)).

III. Perhaps Because of This Clear Mandate Plaintiffs Make No Attempt to Demonstrate a Compelling or Higher Interest that Overcomes the Public's Presumptive Right of Access to Exhibit G.

Plaintiffs erroneously attempt to shirk their burden to justify continued sealing of Exhibit G by claiming that "when documents have already been sealed, the party seeking access bears

the burden to show that the restricted documents should be made available for public consumption." Opp. at 17. Yet, again, Plaintiffs' reliance on the stipulated protective order as a purported justification for the sealing of Exhibit G is misplaced. Plaintiffs simply misapprehend the presumption of access afforded by the First Amendment, the Ohio Constitution, and the Rules of Superintendence, as well as the inquiry now before the Court.

Because Exhibit G was filed under seal pursuant to the stipulated protective order, the parties did not present arguments to the Court to justify sealing. Accordingly, the Court did not make the requisite "specific, on the record findings" demonstrating that a compelling interest outweighs the public's constitutional rights of access to Exhibit G and that sealing it in its entirety is narrowly tailored to serve that interest. *Press-Enterprise II*, 478 U.S. at 13–14. For the same reason, the Court also did not make the requisite findings "by clear and convincing evidence that the presumption of allowing public access is outweighed by a higher interest" so as to justify sealing pursuant to Sup. R. 45(E)(2).

Plaintiffs' contention that the Court's order denying defendants' motion to unseal Exhibit G represents an order sealing the document for purposes of Sup. R. 45(E) is incorrect. In denying that motion, the Court made no findings with regard to the *public's* right of access to Exhibit G under the factors set forth in Rule 45(E)(2). Rather, the Court denied defendants motion, in part, due to the fact that defendants "opted to file" Exhibit G "in accordance with an agreed protective order that they drafted and stipulated to." *See* Entry and Ruling on Defendants' Motion to Unseal Exhibit G of Defendants' Combined Summary Judgment Reply Brief.

Contrary to Plaintiffs' assertions, to the extent any countervailing interest exists that could overcome the public's right of access here, the proper remedy is not automatic wholesale

sealing of the document. Because a constitutional presumption of access applies to Exhibit G, any sealing of that document must be "narrowly tailored"—*i.e.*, no broader than necessary to serve the compelling interest—and the Court must consider alternatives to blanket sealing. *See Press-Enterprise II*, 478 U.S. at 13–14. Likewise, Sup. R. 45(E)(3) requires that if a court finds it necessary to restrict public access, it must use "the least restrictive means available," for example, redacting information "rather than limiting public access to the entire document."

IV. Media Movants' Motion Should Not Be Held in Abeyance; Any Delay in Deciding Media Movants' Motion Constitutes Irreparable Harm.

Finally—without citing any supporting authority—Plaintiffs ask "in the alternative" that the Court hold its decision on the Media Movants' Motion in abeyance until the conclusion of appellate proceedings. Opp. at 24. This "alternative" relief should be rejected. The delay sought by Plaintiffs flies in the face of well-established case law holding that when the public has a right of access to a court document access must be contemporaneous, and delaying access constitutes irreparable harm. *See Doe v. Pub. Citizen*, 749 F.3d 246, 272–73 (4th Cir. 2014) ("the public and press generally have a contemporaneous right of access to court documents and proceedings when the right applies" and the "court therefore must make on-the-record findings . . . as expeditiously as possible"); *Grove Fresh Distributors, Inc. v. Everfresh Juice Co.*, 24 F.3d 893, 897 (7th Cir. 1994) ("In light of the values which the presumption of access endeavors to promote, a necessary corollary to the presumption is that once found to be appropriate, access should be immediate and contemporaneous . . . To delay or postpone disclosure undermines the benefit of public scrutiny and may have the same result as complete suppression."); *Paulsen v. County of Nassau*, 925 F.2d 65, 68 (2d Cir.1991) ("[T]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.") (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976)); *Nebraska Press Ass'n v. Stuart*, 423 U.S. 1327, 1329 (1975)

("[E]ach passing day [that access is delayed] may constitute a separate and cognizable infringement of the First Amendment.")

In support of their attempt to delay resolution of Media Movants' Motion, Plaintiffs point to nothing more than a purported desire to "avoid" some unidentified "potential prejudice[.]" Opp. at 24-25. But it is Media Movants and the public who will be prejudiced by continued sealing of Exhibit G while appellate proceedings are pending. Not only are Media Movants prejudiced by the continued sealing of Exhibit G as a legal matter, but the public is prejudiced as a practical matter, having already been denied access to the document for nearly seven months. Such ongoing prejudice clearly cuts against Plaintiffs' argument that the release of Exhibit G is not "time sensitive." Opp. at 24.

As reflected by the significant national and local media attention cited in Media Movants' Motion surrounding the jury verdict and the defendants' appeal, public interest in this case has continued to grow since the time of the verdict. Interest in the case should remain high as the case proceeds on appeal. Yet the logical conclusion to Plaintiffs argument would seem to be that the best way to deal with the fact that the public has been denied access to a newsworthy court record for nearly seven months is to continue to deny the public access to that record until such an as-yet-undetermined time when appellate proceedings conclude and the public's ability to contemporaneously monitor developments in the case has passed.

Moreover, even if proceedings in the case were not still ongoing, the length of time that a document has been under seal does not dictate the newsworthiness of the document or serve as a means of assessing the present public interest in the document. *See In re Pineapple Antitrust Litigation*, 2015 WL 5439090, *2 (S.D.N.Y. Aug. 10, 2015) ("The decision whether a potential investigatory story is newsworthy is ultimately for the journalist to make; it is not for the subject

of the investigation or the court to decide."). Indeed, the public only recently became aware that Exhibit G was filed under seal when the Court denied defendants' motion to unseal the document. *See, e.g.*, William A. Jacobson, *Judge Denies Oberlin College's Request to Unseal Gibson Bakery Clerk's Facebook Records*, Legal Insurrection (Sept. 24, 2019), https://legalinsurrection.com/2019/09/judge-denies-oberlin-colleges-request-to-unseal-gibson-bakery-store-clerks-facebook-records/.

The continued sealing of Exhibit G—absent any specific on the record findings that a compelling or higher interest outweighs the public's presumptive right of access—cannot be justified. To hold the Court's decision in abeyance for months, or potentially years, would be an impermissible violation of the press and the public's constitutional right of access and would result in irreparable injury to the Media Movants and the public. Accordingly, Media Movants respectfully request that the Court grant their pending Motion expeditiously.

CONCLUSION

For the foregoing reasons, and those in the Media Movants' Memorandum in Support of their Motion for Access, the Court should grant Media Movants' motion and unseal Exhibit G to defendants' combined summary judgment reply brief.

Dated: December 9, 2019

Respectfully submitted,

Michael K. Farrell (0040941)
Melissa D. Bertke (0080567)
BAKER & HOSTETLER LLP
Key Tower
127 Public Square, Suite 2000
Cleveland, OH 44114
Phone: (216) 861-7865
Fax: (216) 696-0740

Katie Townsend (*pro hac vice pending*)
THE REPORTERS COMMITTEE FOR
FREEDOM OF THE PRESS
1156 15th St. NW, Suite 1020
Washington, DC 20005
Phone: (202) 795-9300
Fax: (202) 795-9310

Counsel for Media Movants

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was served this 9th day of December, 2019, via e-mail, pursuant to Civ.R. 5(B)(2)(f) of the Ohio Rules of Civil Procedure, upon the following:

Owen J. Rarric
Jacqueline Bollas Caldwell
Terry A. Moore
Matthew W. Onest
Krugliak, Wilkins, Griffiths & Dougherty Co., L.P.A.
4775 Munson Street, NW
P.O. Box 36963
Canton, OH 36963
orarric@kwgd.com
jcaldwell@kwgd.com
tmoore@kwgd.com
monest@kwgd.com

Lee E. Plakas
Brandon W. McHugh
Jeananne M. Ayoub
Tzangas, Plakas, Mannos & Raies
220 Market Avenue South
8th Floor
Canton, OH 44702
lplakas@lawlion.com
bmchugh@lawlion.com
jayoub@lawlion.com

James N. Taylor
James N. Taylor Co., L.P.A.
409 East Avenue, Suite A
Elyria, OH 44035
taylor@jamestaylorlpa.com

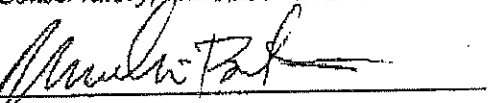
Attorneys for Plaintiffs

Ronald D. Holman, II
Julie A. Crocker
Cary M. Snyder
William A. Doyle
Josh M. Mandel
Taft Stettinius & Hollister LLP
200 Public Square, Suite 3500
Cleveland, OH 44114-2302
rholman@taftlaw.com
jcrocker@taftlaw.com
csnyder@taftlaw.com
wdoyle@taftlaw.com
jmandel@taftlaw.com

Irene Keyse-Walker
Benjamin C. Sassé
TUCKER ELLIS LLP
950 Main Avenue, Suite 1100
Cleveland, OH 44113
jkeyse-walker@tuckerellis.com

Richard D. Panza
Matthew W, Nakon
Rachelle Kuznicki Zidar
Malorie A. Alverson
Wilbert V, Farrell, IV
Michael R. Nakon
Wickens, Herzer, Panza, Cook & Batista Co
35765 Chester Road
Avon, OH 44011-1262
RPanza@WickensLaw.com
NNakon@WickensLaw. com
RZidar@WickensLaw.com
MAlverson@WickensLaw.com
WFarrell@WickensLaw.com
MRNakon@WickensLaw.com

Co-Counsel for Defendants Oberlin College aka Oberlin College and Conservatory, and Meredith Raimondo



Mélissa D. Bertke
Counsel for WEWS-TV, Advance Ohio, and the Ohio Coalition for Open Government

TO THE LORAIN COUNTY CLERK OF COURT, GENERAL DIVISION:

THE ATTACHED DOCUMENT IS BEING OFFERED FOR FILING PURSUANT TO LOCAL R. 3.

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# of Pages, including cover: 14 (NOT TO EXCEED 20 PAGES)

CASE NUMBER: 17-CV-193761

CAPTION: Gibson Bros., Inc. et al., v. Oberlin College, et al.

JUDGE: Judge John R. Miraldi

Will original exhibit(s) be filed separately? ○ Yes ◉ No

(If "yes" box is checked, insert a page describing the exhibit(s) after this cover page.)

DESCRIPTION OF DOCUMENT ATTACHED:

Reply of WEWS-TV, Advance Ohio, and the Ohio Coalition for Open Government to Plaintiffs' Opposition to Their MOtion for Access to Sealed Case Document.

ORIGINAL

LORAIN COUNTY COURT OF COMMON PLEAS
LORAIN COUNTY, OHIO

TOM ORLANDO, Clerk
JOURNAL ENTRY
John R. Miraldi, Judge

Date 2/10/20 Case No. 17CV193761

GIBSON BROS INC
Plaintiff

JACQUELINE BOLLAS CALDWELL
Plaintiff's Attorney ()-

VS

OBERLIN COLLEGE
Defendant

JOSH M MANDEL
Defendant's Attorney ()-

This matter comes before the Court upon the filing of non-parties, WEWS-TV, Advance Ohio, and the Ohio Coalition for Open Government's ("Movants") Motion for Access to Sealed Case Document – specifically, Exhibit G of the Defendants, Oberlin College and Meredith Raimondo's combined reply brief in support of their motions for summary judgment.

The Plaintiffs, Gibson Bros., Inc., Allyn W. Gibson, and David R. Gibson[1], and non-party Allyn D. Gibson filed a brief in opposition and the Movants submitted a reply brief in support of their motion. When a case is appealed, the trial court generally loses jurisdiction except to take action in aid of the appeal. *See Pietrangelo v. Avon Lake*, 2016-Ohio-8201, ¶ 17 (Ohio Ct. App. 9th Dist.). A trial court may retain jurisdiction over collateral matters that are not inconsistent with the appellate court's ability to review, affirm, modify, or reverse the appealed judgment. *Id.* The parties and non-parties shall have thirty (30) days to submit a limited brief on the issue of whether the Court has jurisdiction to rule on the Movants' request while the appeal is pending.

IT IS SO ORDERED.

John R. Miraldi, Judge

cc: All Parties
Attys Michael Farrell/Melissa Bertke – Counsel for Movants

[1] Since the briefing was completed, the Court is aware that a motion is pending with the Court of Appeals to substitute Lorna J. Gibson as the estate representative for the Estate of David R. Gibson in place of David R. Gibson.

EXHIBIT
5

IN THE COURT OF COMMON PLEAS
LORAIN COUNTY, OHIO

GIBSON BROS., INC, et al.,	)	
	)	CASE NO. 17CV193761
Plaintiffs,	)	
	)	JUDGE JOHN R. MIRALDI
v.	)	
	)	
OBERLIN COLLEGE, et al.	)	
	)	
Defendants.	)	

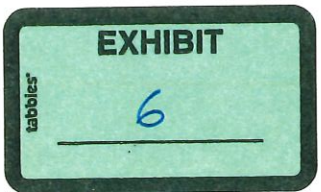
SUPPLEMENTAL BRIEF OF WEWS-TV, ADVANCE OHIO, AND THE OHIO COALITION FOR OPEN GOVERNMENT TO PLAINTIFFS' OPPOSITION TO THEIR MOTION FOR ACCESS TO SEALED CASE DOCUMENT

In accordance with the Court's February 10, 2020 order, WEWS-TV, Advance Ohio, and the Ohio Coalition for Open Government (collectively, the "Media Movants") respectfully submit this supplemental brief addressing the Court's jurisdiction to decide their motion to unseal Exhibit G to defendants' combined summary judgment reply brief ("Exhibit G").

ARGUMENT

I. Media Movants' request for access to Exhibit G is a collateral issue under Ohio law.

The Ohio Supreme Court has long held that although a trial court generally loses jurisdiction over a case once it is appealed, the trial court retains jurisdiction "over issues not inconsistent with that of the appellate court to review, affirm, modify or reverse the appealed judgment, such as the collateral issues like contempt, appointment of a receiver and injunction." *State ex rel. Special Prosecutors v. Judges, Court of Common Pleas*, 378 N.E.2d 162, 165 (Ohio 1978); *see also In re S.J.*, 829 N.E.2d 1207, 1209 (Ohio 2005); *Yee v. Erie County Sheriffs Dept.*, 553 N.E.2d 1354, 1355 (Ohio 1990). Other such collateral issues have been found to include



requests for attorney's fees and costs,[1] motions for prejudgment interest,[2] imposition of sanctions,[3] and modifications of child custody orders.[4] While there is no bright-line rule as to the categories of issues that constitute collateral matters over which the trial court retains jurisdiction, the most "important consideration" is "whether the trial court's action [would be] inconsistent with the appellate court's ability to review, affirm, modify, or reverse the appealed judgment." *Pietrangelo v. Avon Lake*, 2016-Ohio-8201, ¶ 17 (Ohio Ct. App. 9th Dist.).

Here, a decision by this Court on Media Movants' pending request to unseal Exhibit G would have no bearing on the appellate court's ability to "review, affirm, modify, or reverse the appealed judgment," as Media Movants' request does not implicate the merits of the case or any of the issues raised on appeal. To the contrary, the "right of access to judicial records and documents is *independent* of the disposition of the merits" of a case. *FutureFuel Chem. Co. v. Lonza, Inc.*, 756 F.3d 641, 648 (8th Cir. 2014) (quoting *Stone v. Univ. of Md. Medical Sys. Corp.*, 855 F.2d 178, 180 n. * (4th Cir.1988)) (emphasis added).

Though it does not appear that any state or federal court in Ohio has had occasion to decide the precise question of whether a trial court retains jurisdiction over a motion to unseal judicial documents in a case in which an appeal is pending, decisions from courts in other jurisdictions are instructive. For example, in *FutureFuel Chem. Co. v. Lonza, Inc.*, the Eighth Circuit held that the district court retained jurisdiction to consider FutureFuel's objections to the court's stated intention to unseal documents in the case, despite a pending appeal challenging the district court's grant of summary judgment, because the "right of access to judicial records and

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[1] *State ex rel. Neff v. Corrigan*, 661 N.E.2d 170 (Ohio 1996).
[2] *Enyart v. Columbus Metro. Area Community Action Org.*, 685 N.E.2d 550 (10th Dist. Franklin Cty. 1996).
[3] *Middleton v. Luna's Rest. & Deli, L.L.C.*, 2012-Ohio-348 (Ohio Ct. App. 7th Dist.).
[4] *In re Kessler*, 628 N.E.2d 153 (6th Dist. Huron Cty. 1993).

documents is independent of the disposition of the merits of a case" and therefore collateral to the issues on appeal. 756 F.3d at 648.

In *Expedited, Inc. v. TransAm Trucking Inc.*, No. 16-CV-0052-LTS, 2018 WL 9880439 at *2 (N.D. Iowa Oct. 9, 2018), the district court found the reasoning in *FutureFuel* to apply "with equal force" to the question of whether the court retained jurisdiction over a third party's motion to unseal judicial documents: "[A] motion to intervene for the limited purpose of accessing records is collateral to a merits appeal and . . . therefore the notice of appeal [of the court's summary judgment decision] does not divest this court's jurisdiction to rule on the intervention motion." *Id.* Similarly, the district court in *MetLife, Inc. v. Fin. Stability Oversight Council*, No. CV 15-0045 (RMC), 2016 WL 3024015, at *3 (D.D.C. May 25, 2016), *rev'd on other grounds*, 865 F.3d 661 (D.C. Cir. 2017), found that a third party's motion to intervene for the purpose of unsealing judicial documents "was not mooted by this Court's disposition of the case on the merits or by [defendant]'s subsequent appeal." (citing *FutureFuel*, 756 F.3d at 648).

Indeed, Media Movants are aware of only one case in which a court declined to exercise jurisdiction over a request for access to sealed judicial documents due to a pending appeal. And, in that case, the district court failed to address the question of whether the request to unseal was independent of the disposition of the matters on appeal. At issue in *Abdelal v. Kelly*, No. 13CV04341ALCSN, 2017 WL 1843291 (S.D.N.Y. May 5, 2017), were two letter requests from *The New Yorker* magazine for access to certain sealed documents. *Id.* at *1. Electing to treat the letters as a motion to intervene, the district court denied the motion for lack of jurisdiction. *Id.* at *2. Unlike the decisions in *FutureFuel*, *Expedited*, and *MetLife*, the district court did not consider—as Ohio courts must—whether the magazine's request for access to judicial documents was a collateral matter over which the court retained jurisdiction. Instead, the court

focused on the narrow question of whether lower courts retain jurisdiction over motions to intervene in general and, thus, neglected to give consideration to the collateral nature of the request underlying the intervention.[5] Indeed, as the *Expedited* court correctly recognized when finding *Abdelal* unpersuasive, all of the cases cited by *Abdelal* for the proposition that the court was divested of jurisdiction involved matters *not* collateral to the issues on appeal. *See Expedited*, 2018 WL 9880439 at *2 (collecting cases and describing the jurisdictional issues considered in each). For example, in one such case, the jurisdictional question arose not in the context of (as here) a third party's motion with respect to an issue independent of the underlying decision appealed, but rather in the context of whether the court could rule on a potential intervenor's motion after the intervenor filed a notice of appeal of the court's "constrictive denial" of said motion. *See Doe v. Pub. Citizen*, 749 F.3d 246, 258 (4th Cir. 2014). The district court's ruling in *Abdelal*, made without the benefit of any briefing from the magazine or the parties in the case on the issue of jurisdiction,[6] has no application here.

Ohio law makes clear that the court's most "important consideration" in determining whether it retains jurisdiction over a pending motion is "whether the trial court's action [would be] inconsistent with the appellate court's ability to review, affirm, modify, or reverse the appealed judgment." *Pietrangelo*, 2016-Ohio-8201, ¶ 17. Here, the weight of authority shows that a third party's request to unseal judicial documents is precisely the type of collateral issue "independent of the disposition of the merits of a case" that has no bearing on the issues raised

[5] Here, no motion to intervene is at issue, as Ohio Sup. R. 45(F) permits "any person" to request access to restricted judicial documents without requiring the requestor to move to intervene.

[6] Noting that the court's own research had "not identified a case in which the . . . motion of intervention was made by a media organization for the limited purpose of modifying a protective order," the court invited any party aggrieved of its decision, including the magazine, to file a motion to reconsider pointing to "controlling decisions or other data that the court overlooked." *Abdelal*, 2017 WL 1843291 at *2.

on appeal or the appellate court's ability to review, affirm, modify, or reverse the appealed judgment.

II. The Court retains jurisdiction over Media Movants' motion.

As discussed in detail in Media Movants' Memorandum in Support of their Request for Access and Reply in Support of their Request for Access, Media Movants have a presumptive right of access to Exhibit G under the First Amendment and the Ohio Constitution. Such a right of access to judicial records and documents is independent of the disposition of the merits of a case. *FutureFuel*, 756 F.3d at 648. Because Media Movants' request is limited solely to the unsealing of Exhibit G, and does not involve any of the issues on appeal, an order of this Court unsealing Exhibit G would not impede, or be inconsistent with, the appellate court's ability to "review, affirm, modify or reverse" the appealed judgment in this case.

"Absent a patent and unambiguous lack of jurisdiction, a court having general subject-matter jurisdiction can determine its own jurisdiction, and a party challenging the court's jurisdiction has an adequate remedy at law by appeal." *State ex rel. Enyart v. O'Neill*, 646 N.E.2d 1110, 1112 (Ohio 1995). There is plainly no "patent and unambiguous lack of jurisdiction" here. Media Movants' request for access to Exhibit G is a collateral issue which has no bearing on the merits of the underlying case. As such, this Court retains jurisdiction over Media Movants' motion to unseal during the pendency of the appeal.

CONCLUSION

For the foregoing reasons, and for the reasons set forth in Media Movants' Memorandum in Support of their Request for Access and Reply in Support of their Request for Access, Media Movants respectfully request that this Court grant their motion to unseal Exhibit G to defendants' combined summary judgment reply brief.

Dated: March 11, 2020

Respectfully submitted,

/s/

Michael K. Farrell (0040941)
Melissa D. Bertke (0080567)
BAKER & HOSTETLER LLP
Key Tower
127 Public Square, Suite 2000
Cleveland, OH 44114
Phone: (216) 861-7865
Fax: (216) 696-0740

Katie Townsend (*pro hac vice pending*)
THE REPORTERS COMMITTEE FOR
FREEDOM OF THE PRESS
1156 15th St. NW, Suite 1020
Washington, DC 20005
Phone: (202) 795-9300
Fax: (202) 795-9310

Counsel for Media Movants

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was served this 11th day of March, 2020, via e-mail, pursuant to Civ.R. 5(B)(2)(f) of the Ohio Rules of Civil Procedure, upon all known parties and attorneys of record, including the following:

Owen J. Rarric
Jacqueline Bollas Caldwell
Terry A. Moore
Matthew W. Onest
Krugliak, Wilkins, Griffiths & Dougherty Co., L.P.A.
4775 Munson Street, NW
P.O. Box 36963
Canton, OH 36963
orarric@kwgd.com
jcaldwell@kwgd.com
tmoore@kwgd.com
monest@kwgd.com

Lee E. Plakas
Brandon W. McHugh
Jeananne M. Ayoub
Tzangas, Plakas, Mannos & Raies
220 Market Avenue South
8th Floor
Canton, OH 44702
lplakas@lawlion.com
bmchugh@lawlion.com
jayoub@lawlion.com

James N. Taylor
James N. Taylor Co., L.P.A.
409 East Avenue, Suite A
Elyria, OH 44035
taylor@jamestaylorlpa.com

Attorneys for Plaintiffs

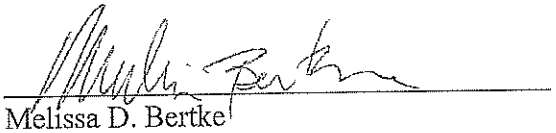
Ronald D. Holman, II
Julie A. Crocker
Cary M. Snyder
William A. Doyle
Josh M. Mandel

Taft Stettinius & Hollister LLP
200 Public Square, Suite 3500
Cleveland, OH 44114-2302
rholman@taftlaw.com
jcrocker@taftlaw.com
csnyder@taftlaw.com
wdoyle@taftlaw.com
jmandel@taftlaw.com

Irene Keyse-Walker
Benjamin C. Sassé
TUCKER ELLIS LLP
950 Main Avenue, Suite 1100
Cleveland, OH 44113
jkeyse-walker@tuckerellis.com

Richard D. Panza
Matthew W, Nakon
Rachelle Kuznicki Zidar
Malorie A. Alverson
Wilbert V, Farrell, IV
Michael R. Nakon
Wickens, Herzer, Panza, Cook & Batista Co
35765 Chester Road
Avon, OH 44011-1262
RPanza@WickensLaw.com
NNakon@WickensLaw. com
RZidar@WickensLaw.com
MAlverson@WickensLaw.com
WFarrell@WickensLaw.com
MRNakon@WickensLaw.com

Co-Counsel for Defendants Oberlin College aka Oberlin College and Conservatory, and Meredith Raimondo



Melissa D. Bertke
Counsel for WEWS-TV, Advance Ohio, and the Ohio Coalition for Open Government

IN THE COURT OF COMMON PLEAS
LORAIN COUNTY, OHIO

GIBSON BROS., INC., et al.,

Plaintiffs,

-vs.-

OBERLIN COLLEGE, etc., et al.,

Defendants.

Case No.: 17CV193761

Judge: Hon. John R. Miraldi

Magistrate: Hon. Joseph Bott

PLAINTIFFS' & NONPARTY ALLYN D. GIBSON'S BRIEF REGARDING THE COURT'S JURISDICTION TO DETERMINING PENDING MOTION FOR ACCESS TO SEALED CASE DOCUMENTS

I. INTRODUCTION

Plaintiffs[1] and Non-party Allyn D. Gibson ("ADG") submit this Brief pursuant to the Court's February 10, 2020 Journal Entry which requested briefing on whether the Court had jurisdiction to rule on Movants'[2] Motion for Access to Sealed Documents (the "Motion").

As to the question of jurisdiction, Plaintiffs and ADG submit the Court does not have jurisdiction until the pending appeal is completed because the parties do not know whether

[1] "Plaintiffs" refers collectively to Gibson Bros., Inc. ("Gibson's Bakery"), David R. Gibson ("Dave Gibson"), and Allyn W. Gibson ("Grandpa Gibson").

[2] "Movants" refers collectively to WEWS-TV ("WEWS"), Advance Ohio ("Advance"), and the Ohio Coalition for Open Government ("OCOG").

Defendants[3] will seek to overturn or otherwise modify the Court's September 16, 2019 Journal Entry denying Defendants' previous attempt to unseal the materials covered by the Motion.

Moreover, even if the Court has jurisdiction to consider the Motion, the Court should still exercise its considerable discretion by either denying the Motion or, at least, holding the Motion in abeyance until the pending appeal is completed.

II. LAW & ARGUMENT

A. The Court does not have jurisdiction to consider any matter that is inconsistent with the Ninth District's jurisdiction.

There is a pending appeal of Plaintiffs' judgment against Defendants and as a result, the Court's jurisdiction is very limited. The Court is "divested of jurisdiction over matters that are inconsistent with the reviewing court's jurisdiction to reverse, modify, or affirm the judgment." *State ex rel. Rock v. School Emp. Retirement Bd.*, 96 Ohio St.3d 206, 2002-Ohio-3957, 772 N.E.2d 1197, ¶ 8. See *State ex rel. Florence v. Zitter*, 106 Ohio St.3d 87, 2005-Ohio-3804, 831 N.E.2d 1003 (2005). The trial court and appellate court cannot assert jurisdiction over the same matter or issue. *Lambda Research v. Jacobs*, 1st Dist. No. C-050464, 170 Ohio App.3d 750, 2007-Ohio-309, 869 N.E.2d 39, ¶ 21, citing *Kane v. Ford Motor Co.*, 17 Ohio App.3d 111, 477 N.E.2d 662 (8th Dist.1984). As a result, the trial court retains jurisdiction only over those issues not involved with the subject matter of the appeal. *Id.*

At present, no appellate briefs have been filed with the Ninth District and thus, the parties to that appeal have yet to fully define the scope of their requested appellate relief. This means the Court, Plaintiffs, and ADG do not yet know whether Defendants' will seek to reverse or modify the Court's September 16, 2019 Journal Entry denying Defendants' previous attempt to unseal the materials at issue. We do know that Defendants submitted a notice of appeal to the Ninth

[3] "Defendants" refers to Defendants, Oberlin College and Meredith Raimondo.

District which shows Defendants have retained the ability to challenge that previous order. While Defendants did not specifically list the September 16, 2019 Journal Entry within their notice of appeal, they ended the notice by saying they intended to appeal "all interlocutory orders merged into the judgment." The September 16, 2019 Journal Entry certainly falls within that broad category of interlocutory orders.

There indeed is a risk for inconsistent treatment of the sealed materials. For instance, the Ninth District could affirm the Court's denial of the previous unsealing attempt. This Court could separately decide (although Plaintiffs and ADG still contend the merits are lacking) the Motion should be granted and order the materials unsealed. These are inconsistent positions and as a result, the Court cannot entertain the Motion until such time as the pending appeal is fully adjudicated.

B. Even if the Court has jurisdiction, the Court should exercise its considerable discretion by denying the Motion.

Plaintiffs and ADG submit that Movants failed to meet their burden of having the materials at issue unsealed. The merits, or in this case the lack of merits, for the Motion have already been fully briefed by the parties, and Plaintiffs and ADG will not re-hash them here.

As detailed within the parties' previously filed briefs, the Court has significant discretion on whether to unseal the previously sealed materials. Movants have a high burden to meet under either theory presented to the Court – constitutional arguments and Ohio R. Sup. 45. Movants have failed to meet their burden for both arguments. Thus, the Court should exercise that discretion by denying the Motion.

Moreover, the Court's review of the Motion should be shaped by a critical fact which Movants failed to deny when Plaintiffs and ADG raised the same. Plaintiffs and ADG asserted and supported the existence of substantial connections between Movants and Defendants'

counsel, including the fact that Defendants' lead counsel, Ron Holman, II, was a television legal analyst for Movant WEWS-TV for more than ten (10) years. (See, Ex. 1 attached to Plaintiffs and ADG's BIO to Mtn, p. 1). It appears Defendants are attempting to use nonparties to this litigation to circumvent the Court's previous denial of Defendants' similar motion to unseal these materials. Movants did not refute these assertions or the evidence supporting the same. Defendants did not separately move to dispel these assertions. As a result, these assertions are correct – Defendants are using the Movants to accomplish what they themselves failed to do. The Court should not permit this to occur.

In the end, the Motion appears to be nothing more than a backdoor attempt by Defendants to continue the smear campaign against Plaintiffs and dox ADG. As the Court may recall, the entire Gibson family were subjected to significant threats of violence during and after the defamatory protests in November of 2016. ADG specifically was the victim of vicious threats of harm and actual physical injury. Movants did nothing to dispel this notion and as a result, the Court should exercise its discretion by denying the Motion.

III. CONCLUSION

Therefore, for the foregoing reasons, Plaintiffs and nonparty ADG respectfully submit that the Court does not have jurisdiction to consider the Motion at present but must wait until the pending appeal has been fully adjudicated. However, if the Court were to conclude that it has jurisdiction, it should exercise its considerable discretion by denying the Motion or, at least, holding the Motion in abeyance until the pending appeal is completed.

DATED: March 11, 2020

Respectfully submitted,

KRUGLIAK, WILKINS, GRIFFITHS & DOUGHERTY CO., L.P.A.

s/ Owen J. Rarric

Terry A. Moore (0015837)
Jacqueline Bollas Caldwell (0029991)
Owen J. Rarric (0075367)
Matthew W. Onest (0087907)
4775 Munson Street, N.W. / P.O. Box 36963
Canton, Ohio 44735-6963
Phone: (330) 497-0700 / Fax: (330) 497-4020
Email: tmoore@kwgd.com
jcaldwell@kwgd.com
orarric@kwgd.com
monest@kwgd.com

-and-

TZANGAS | PLAKAS | MANNOS | LTD

Lee E. Plakas (0008628)
Brandon W. McHugh (0096348)
Jeananne M. Wickham (0097838)
220 Market Avenue South
Eighth Floor
Canton, Ohio 44702
Phone: (330) 455-6112 / Fax: (330) 455-2108
Email: lplakas@lawlion.com
bmchugh@lawlion.com
jwickham@lawlion.com

-and-

JAMES N. TAYLOR CO., L.P.A.

James N. Taylor (0026181)
409 East Avenue, Suite A
Elyria, Ohio 44035
Phone: (440) 323-5700
Email: taylor@jamestaylorlpa.com

Counsel for Plaintiffs

PROOF OF SERVICE

A copy of the foregoing was served on March 11, 2020, pursuant to Civ.R. 5(B)(2)(f) by sending it by electronic means to the e-mail addresses identified below:

Ronald D. Holman, II
Julie A. Crocker
Cary M. Snyder
William A. Doyle
Josh M. Mandel
Taft Stettinius & Hollister LLP
200 Public Square, Suite 3500
Cleveland, OH 44114-2302
rholman@taftlaw.com
jcrocker@taftlaw.com
csnyder@taftlaw.com
wdoyle@taftlaw.com
jmandel@taftlaw.com
Co-Counsel for Defendants Oberlin College aka Oberlin College and Conservatory, and Meredith Raimondo

Benjamin C. Sassé
Irene Keyse-Walker
Tucker Ellis, LLP
950 Main Avenue, Suite 1100
Cleveland, OH 44113
benjamin.sasse@tuckerellis.com
ikeyse-walker@tuckerellis.com
Appellate Counsel for Defendants Oberlin College aka Oberlin College and Conservatory, and Meredith Raimondo

Katie Townsend (*pro hac vice pending*)
The Reporters Committee for Freedom of the Press
1156 15th Street NW, Suite 1020
Washington, DC 20005
ktownsend@rcfp.org
Counsel for Media Movants

Richard D. Panza
Matthew W. Nakon
Malorie A. Alverson
Rachelle Kuznicki Zidar
Wilbert V. Farrell, IV
Michael R. Nakon
Wickens, Herzer, Panza, Cook & Batista Co.
35765 Chester Road
Avon, OH 44011-1262
RPanza@WickensLaw.com
MNakon@WickensLaw.com
MAlverson@WickensLaw.com
RZidar@WickensLaw.com
WFarrell@WickensLaw.com
MRNakon@WickensLaw.com
Co-Counsel for Defendants Oberlin College aka Oberlin College and Conservatory, and Meredith Raimondo

Michael K. Farrell
Melissa D. Bertke
Baker & Hostetler LLP
Key Tower
127 Public Square, Suite 2000
Cleveland, OH 44114
mfarrell@bakerlaw.com
mbertke@bakerlaw.com
Counsel for Media Movants

s/ Owen J. Rarric
Owen J. Rarric (0075367)), of
KRUGLIAK, WILKINS, GRIFFITHS
& DOUGHERTY CO., L.P.A.
Counsel for Plaintiffs

TX Result Report

P 1
03/11/2020 09:53
Serial No. AA1R011007864
TC: 624

Addressee	Start Time	Time	Prints	Result	Note
914403282416120000000	03-11 09:50	00:03:30	007/007	OK	ORG

Note TMR:Timer TX, POL:Polling, ORG:Original Size Setting, FME:Frame Erase TX, DPG:Page Separation TX, MIX:Mixed Original TX, CALL:Manual TX, CSRC:CSRC, FWD:Forward, PC:PC-FAX, BND:Double-Sided Binding Direction, SP:Special Original, FCODE:F-code, RTX:Re-TX, RLY:Relay, MBX:Confidential, BUL:Bulletin, SIP:SIP Fax, IPADR:IP Address Fax, I-FAX:Internet Fax

Result OK: Communication OK, S-OK: Stop Communication, PW-OFF: Power Switch OFF, TEL: RX from TEL, NG: Other Error, Cont: Continue, No Ans: No Answer, Refuse: Receipt Refused, Busy: Busy, M-Full:Memory Full, LOVR:Receiving length Over, POVR:Receiving page Over, FIL:File Error, DC:Decode Error, MDN:MDN Response Error, DSN:DSN Response Error, PRINT:Compulsory Memory Document Print, DEL:Compulsory Memory Document Delete, SEND:Compulsory Memory Document Send.

TO THE LORAIN COUNTY CLERK OF COURT, GENERAL DIVISION:

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CASE NUMBER: 17CV193761

CAPTION: Gibson Bros., Inc., et al. vs. Oberlin College, etc., et al.

JUDGE: John R. Miraldi

Will original exhibit(s) be filed separately? ○ Yes ◉ No

(If "yes" box is checked, insert a page describing the exhibit(s) after this cover page.)

DESCRIPTION OF DOCUMENT ATTACHED:

PLAINTIFFS' & NONPARTY ALLYN D. GIBSON'S BRIEF REGARDING THE COURT'S JURISDICTION TO DETERMINING PENDING MOTION FOR ACCESS TO SEALED CASE DOCUMENTS

** SENDING NOTIFICATION : FAX SENT SUCCESSFULLY **

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www.taftlaw.com

FAX TRANSMISSION

From: Cary Snyder **Date: March 30, 2020**

Direct Line: 216-706-3932

To: Hon. John R. Miraldi; Staff Attorney Joseph Bott
Lorain County Court of Common Pleas

Fax: 440-328-2416

No. of Pages (w/cover sheet): 4

If you do not receive all pages satisfactorily, please call my assistant, Sarah Scheid at 216-706-3931.

Message:

Enclosed for filing is *Defendants' Notice that They Are Not Appealing the Court's September 16, 2019 Denial of Their Motion to Unseal Exhibit G of Their Combined Summary Judgment Reply Brief*, related to the following information:

- **Case number:** 17CV193761
- **Caption of the case:** Gibson Bros., Inc., et al. v. Oberlin College, et al.
- **Assigned Judge:** Judge John R. Miraldi

Sent By: _____ Time: _____

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CONFIRMED BY FAX OPERATOR _____, TX/RX # _____

IN THE COURT OF COMMON PLEAS
LORAIN COUNTY, OHIO

GIBSON BROS., INC., et al.,	)	**CASE NO. 17CV193761**
	)	
Plaintiffs,	)	**JUDGE JOHN R. MIRALDI**
	)	
v.	)	
	)	
OBERLIN COLLEGE, et al.,	)	
	)	
Defendants.	)	

DEFENDANTS' NOTICE THAT THEY ARE NOT APPEALING THE COURT'S SEPTEMBER 16, 2019 DENIAL OF THEIR MOTION TO UNSEAL EXHIBIT G OF THEIR COMBINED SUMMARY JUDGMENT REPLY BRIEF

Plaintiffs and Allyn D. Gibson ("ADG") asserted in their brief that this Court does not have jurisdiction to rule on the Media Movants' motion to unseal Exhibit G because (a) the Court and the parties "do not yet know" whether Defendants Oberlin College and Dr. Meredith Raimondo will seek in the pending appeal to reverse or modify the Court's September 16, 2019 Journal Entry that denied Defendants' motion to unseal Exhibit G, and (b) if both this Court and the Ninth District Court of Appeals were to assert jurisdiction over the sealing of Exhibit G, it would create a risk for inconsistent treatment of Exhibit G. (Brief of Pls.' and ADG, at 1-3 (filed March 11, 2020).)

For the avoidance of any doubt, Defendants confirm through this Notice that, in the pending appeal before the Ninth District, they are not challenging the Court's previous denial of their motion to unseal Exhibit G, as reflected in the September 16, 2019 Journal Entry.

Respectfully submitted,

/s/ Cary M. Snyder

Ronald D. Holman, II (0036776)
rholman@taftlaw.com
Julie A. Crocker (0081231)
jcrocker@taftlaw.com
Cary M. Snyder (0096517)
csnyder@taftlaw.com
William A. Doyle (0090987)
wdoyle@taftlaw.com
Josh M. Mandel (0098102)
jmandel@taftlaw.com
TAFT STETTINIUS & HOLLISTER LLP
200 Public Square, Suite 3500
Cleveland, OH 44114-2302
Phone: (216) 241-2838
Fax: (216) 241-3707

Richard D. Panza (0011487)
RPanza@WickensLaw.com
Matthew W. Nakon (0040497)
MNakon@WickensLaw.com
Malorie A. Alverson (0089279)
MAlverson@WickensLaw.com
Rachelle Kuznicki Zidar (0066741)
RZidar@WickensLaw.com
Wilbert V. Farrell IV (0088552)
WFarrell@WickensLaw.com
Michael R. Nakon (0097003)
MRNakon@WickensLaw.com
WICKENS HERZER PANZA
35765 Chester Road
Avon, OH 44011-1262
Phone: (440) 695-8000
Fax: (440) 695-8098

Co-Counsel for Defendants Oberlin College
and Dr. Meredith Raimondo

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was served this 30th day of March, 2020, via e-mail, pursuant to Civ.R. 5(B)(2)(f) of the Ohio Rules of Civil Procedure, upon the following:

Terry A. Moore
Jacqueline Bollas Caldwell
Owen J. Rarric
Matthew W. Onest
KRUGLIAK, WILKINS, GRIFFITHS
& DOUGHERTY CO., L.P.A.
4775 Munson Street, NW / P.O. Box 36963
Canton, OH 44735
tmoore@kwgd.com
jcaldwell@kwgd.com
orarric@kwgd.com
monest@kwgd.com

Lee E. Plakas
Brandon W. McHugh
Jeananne M. Wickham
TZANGAS PLAKAS MANNOS LTD.
220 Market Avenue South
Eighth Floor
Canton, OH 44702
lplakas@lawlion.com
bmchugh@lawlion.com
jwickham@lawlion.com

James N. Taylor
JAMES N. TAYLOR CO., L.P.A.
409 East Avenue, Suite A
Elyria, OH 44035
taylor@jamestaylorlpa.com

Attorneys for Plaintiffs Gibson Bros., Inc.,
David R. Gibson, and Allyn W. Gibson

Michael K. Farrell
mfarrell@bakerlaw.com
Melissa D. Bertke
mbertke@bakerlaw.com
BAKER & HOSTETLER LLP
Key Tower
127 Public Square, Suite 2000
Cleveland, OH 44114

Katie Townsend
ktownsend@rcfp.org
THE REPORTERS COMMITTEE FOR
FREEDOM OF THE PRESS
1156 15th St. NW, Suite 1020
Washington, DC 20005

Counsel for Media Movants

/s/ Cary M. Snyder
One of the Attorneys for Defendants
Oberlin College and Dr. Meredith Raimondo

IN THE COURT OF COMMON PLEAS
LORAIN COUNTY, OHIO

17 CV 193761

GIBSON BROS., INC.
23 West College Street
Oberlin, OH 44074

and

DAVID R. GIBSON
20 Hawthorne Drive
Oberlin, OH 44074

and

ALLYN W. GIBSON
189 West College St., Apt. E
Oberlin, OH 44074

Plaintiffs,

vs.

OBERLIN COLLEGE aka OBERLIN COLLEGE AND CONSERVATORY,
c/o Carmen Twillie Ambar, president
173 W Lorain St.
Oberlin, OH 44074

And

MEREDITH RAIMONDO
256 Shipherd Cir.
Oberlin, OH 44074

Defendants.

CASE NO. _____

JUDGE JUDGE JOHN R. MIRALDI

TYPE: LIBEL/ SLANDER/ TORTIOUS INTERFERENCE WITH BUSINESS RELATIONSHIPS/ TORTIOUS INTERFERENCE WITH CONTRACT/ DECEPTIVE TRADE PRACTICES/ INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS/ NEGLIGENT HIRING/ RETENTION/ SUPERVISION/ TRESPASS

JURY DEMAND ENDORSED HEREON

01837109-2 / 12000.00-0027

COMPLAINT

Plaintiffs, Gibson Bros., Inc. (herein "Gibson's Bakery"), David R. Gibson, and Allyn W. Gibson (hereinafter collectively "Plaintiffs"), by and through counsel, for their Complaint against the Defendants, Oberlin College aka Oberlin College and Conservatory (hereinafter "Oberlin College") and Meredith Raimondo ("Raimondo") state the following:

PARTIES AND INTRODUCTION

1. Plaintiff, Gibson's Bakery, is, and at all times relevant to this action was, a corporation in good standing organized under the laws of the State of Ohio and operating at 23 West College St., Oberlin, Ohio.

2. Plaintiff David R. Gibson is an Ohio resident and is an owner and employee of Gibson's Bakery.

3. Plaintiff Allyn W. Gibson is an Ohio resident and is an owner and employee of Gibson's Bakery.

4. Upon information and belief, Oberlin College is a corporation incorporated by special legislative act and located at 173 W Lorain St, Oberlin, OH 44074, and is also known as and/or referred to as Oberlin College and Conservatory.

5. Upon information and belief, Raimondo is an Ohio resident and is the Vice President and Dean of Students of Oberlin College and has been in that position since approximately April 2016.

6. Gibson's Bakery has been a local, family-owned and operated business for well over a century.

7. In 1885, David Gibson's great-grandfather started the business with a pushcart, and the business has been at its present location in Oberlin since 1905.

8. Throughout its existence, Gibson's Bakery has worked to maintain its reputation as a community-minded family business providing quality product and service to the Oberlin community, including Oberlin College students, faculty, staff, and visitors.

OBERLIN COLLEGE CAMPUS TURMOIL

9. In recent years, Oberlin College has found itself at the center of controversies that threatened the reputation and financial welfare of the college.

10. As part of its business plan and public relations campaign to benefit its image and attract students, Oberlin College markets itself as having a legacy of being a strong advocate for and a strong supporter of African-American students and racial minorities.

11. In approximately December 2015, Oberlin College came under pressure for its treatment of African-American students.

12. In approximately December 2015, students sent a 14-page list of demands to Oberlin College's Board of Trustees, Oberlin College's President Marvin Krislov, and Oberlin College's senior leadership.

13. As part of that 14-page list of demands, the students asserted that:

> Oberlin College and Conservatory is an unethical institution...In the 1830s, this school claimed a legacy of supporting its Black students. However, that legacy has amounted to nothing more than a public relations campaign initiated to benefit the image of the institution and not the Africana people it was set out for.

14. One of the students' demands was that Oberlin College offer "guaranteed tenure" to Joy Karega, an African-American professor who had written articles claiming that Israeli and U.S. Intelligence agencies fund ISIS and that Israel planned the September 11, 2001 attacks in the U.S. At the time, Joy Karega was an Assistant Professor of Rhetoric & Composition at Oberlin College.

15. The students warned Oberlin College that failure to comply with the students' demands would "result in a full and forceful response from the community you fail to support."

16. The students' list of demands and condemnation of Oberlin College and administration as a disingenuous and exploitative organization received extensive media attention, both locally and nationally.

17. In approximately April 2016, Oberlin College appointed Raimondo, with limited experience, to serve as interim Vice President and Dean of Students in an effort to better market itself as a strong advocate for and a strong supporter of African-American students and racial minorities. Raimondo had previously been special assistant to the President for Diversity, Equity, and Inclusion.

18. In September 2016, as the students continued to criticize Oberlin College and its administration and as the controversies and tensions plaguing Oberlin College continued to subsist and garner negative media attention, President Marvin Krislov announced that he would resign as President of Oberlin College at the end of the 2017 academic year.

19. Oberlin College conducted hearings concerning the continued employment of Professor Karega and, by early November 2016, Oberlin College made its determination that it would be terminating Karega's employment, notwithstanding demands from its student organizations.

20. Defendants were aware that termination of Professor Karega would prove unpopular with students on campus, including those who supported the African-American students' list of demands that called for Karega's "guaranteed tenure."

ATTEMPTED ROBBERY AT GIBSON'S BAKERY

21. On November 9, 2016, David Gibson and his son, Allyn D., were working at Gibson's Bakery.

22. At approximately 4:45 p.m. on November 9, 2016, individuals later identified as Jonathan Aladin, Cecelia Whettston, and Endia J. Lawrence, entered Gibson's Bakery with the knowledge or intent that Jonathan Aladin would attempt to steal wine or otherwise illegally obtain wine.

23. Jonathan Aladin, Cecelia Whettston, and Endia J. Lawrence were immediately charged as a result of their conduct on November 9, 2016. Jonathan Aladin was charged with robbery, which is a second-degree felony. Cecelia Whettston and Endia J. Lawrence were each charged with first-degree misdemeanor assault.

OBERLIN COLLEGE AWARE OF UNDISPUTED ROBBERY

24. Upon information and belief, one or more Oberlin College administrators were present at many hearings and other proceedings associated with the criminal prosecution of Jonathan Aladin.

25. The details of the attempted theft and use of a fake identification, leading to the arrest of Jonathan Aladin, Cecelia Whettston, and Endia J. Lawrence, were made available to the general public shortly after their arrest and at all times relevant, Defendants were fully aware of those facts.

26. The nature of and facts surrounding the charges against Jonathan Aladin, Cecelia Whettston, and Endia J. Lawrence were read in open court and made publicly available. Importantly, the facts surrounding the charges, as read in open court, have never been denied.

27. Soon after his arrest, Jonathan Aladin offered to plead guilty to the charge of attempted theft in open court in the Oberlin Municipal Court.

28. The Oberlin College administration was aware that Mr. Aladin offered to plead guilty to the charge of attempted theft.

29. Upon information and belief, a board of trustee member for Oberlin College paid a retainer for legal services to a criminal defense attorney for purposes of retaining that attorney in the defense of one or more of the defendants.

30. Upon information and belief, soon after the attempted robbery, Oberlin College paid for a limo service for Jonathan Aladin to be transported to Columbus, Ohio, to meet with a high profile criminal defense lawyer.

OBERLIN MUNICIPAL COURT RECOGNIZES THAT ADMITTED CRIMINAL CONDUCT SHOULD NOT BE EXCUSED BECAUSE OF THREATS OF PUBLIC PROTESTS AND ECONOMIC BOYCOTTS

31. David Gibson, feeling great pressure upon himself, his family and his business, indicated his approval of the plea deal, noting that he thought it was in the best interest of the community.

32. However, the Oberlin Municipal Court Judge refused to accept that plea deal, foreshadowing the devastating impact upon Gibson's Bakery and the Gibson family. The Judge explained, in a December 14, 2016 Judgment Entry:

> Defendant was charged with Robbery, a felony of the 2nd degree. The case was scheduled for Preliminary Hearing on December 14, 2016.
>
> A Motion to Dismiss the felony charge was submitted with a proposed plea bargain that: (a) The felony Robbery charge be dismissed; (b) A [new] charge be filed as a 2nd degree misdemeanor Attempted Theft; (c) Mr. Aladin enter a guilty plea to the Attempted Theft charge and be placed on Diversion and; (d) Upon successful completion of Diversion the case be dismissed.

The prosecutor represents that "the charge [of robbery] was appropriate and supported by the facts as a whole as determined by the Oberlin Police Department."

The reasons for the plea bargain given by the Prosecutor are set forth in a written Motion to Dismiss. The court, as always, appreciates the written presentation by the Oberlin Prosecutor. **From a reading of the motion the court understands that the reasons for the motion are:**

1. **The incident was followed by protests by Oberlin College students and others and accusations of racism were leveled at Gibson's by some of the protestors.**

2. **Oberlin College determined not to do business with Gibson's and continues not to buy product from that store.**

3. **The situation has created a certain amount of ill-will among segments of the community.**

4. Jonathan Elijah Aladin has no prior adult criminal record [no mention or representation is made regarding whether Mr. Aladin has a juvenile record] and is a student at Oberlin College.

5. Mr. Aladin wishes to plead guilty to attempted theft and thereby to publicly acknowledge his culpability in this matter.

6. David and Allyn Gibson have been consulted and agree with the resolution of the case in this manner, and believe that it is in the best interest of the community.

Based upon the circumstances the court is uncomfortable accepting the proposal for the following reasons:

1. The state legislature has defined categories of crimes. The main categories are felonies and misdemeanors. Within the categories are degrees. The most serious felonies are 1st degree felonies. The charge in this case is a 2nd degree felony the second most serious category. There are also 3rd, 4th, and 5th degree felony categories. Lesser offenses are labeled misdemeanors. The most serious offense is a 1st degree misdemeanor. The next most serious a 2nd degree misdemeanor. The proposal is to dismiss the 2nd degree felony, re-file [or file] a charge of Attempted Theft, a 2nd degree misdemeanor, and that Mr. Aladin plead guilty to the Attempted Theft charge, be placed on Diversion with the expectation that the charge be dismissed.

2. According to the Motion to Dismiss the [proprietors] of the Gibson Bakery have been consulted and agree to the resolution of the case in this manner and

"believe that it is in the best interest of the community." **Gibson Bakery has been accused of racism according to the motion and an economic sanction has been leveled against Gibson Bakery for their participation in the alleged robbery. The College has decided that they are not going to do business with Gibson's Bakery because of their involvement in the alleged robbery. A conclusion may be drawn that the [alleged] victims of the robbery have little choice but to assent in this proposal under penalty of a permanent economic sanction.** While it is commendable that the Gibson's profess that they believe this to be in the best interests of the community, the court is concerned about the potential precedent setting of permitting a business owner under these circumstances to assent to such an agreement where such a serious crime is alleged.

3. With regard to the reason that the situation has created a certain amount of ill-will among segments of the community the court is unsure which segment of the community is referred to and whether this proposal will cure the ill-will and/or will cause ill-will among other segments of the community if this proposal is accepted. **What rightly should alleviate ill-will in the community is a full and complete open disclosure [perhaps a public trial] where all interested members of the community can witness the events that transpired and draw their own conclusions as to whether the ill-will is justified. Lack of transparency breeds anger and mistrust.** Perhaps full disclosure and a public trial accurately and openly reported would be in the best interests of the community.

Although neither the prosecutor nor the Gibson's nor Mr. Aladin or his attorney are subject to rules regarding public opinion of a judicial decision or ruling the judge must follow Rule 2.4(A) of the Ohio Code of Judicial Conduct that reads: "A judge shall not be swayed by public clamor or fear of criticism." The judge knows that every case, especially cases of public interest will come with criticism and possible public clamor. It is part of the job. This case is an example. The judge cannot consent to an agreement just to avoid public criticism or placate or prefer one segment or another segment of society. **It would be a precarious and potentially dangerous precedent if a public protest would be a factor in a decision of a judge.**

4. With regard to the reason that Jonathan Elijah Aladin has no prior adult criminal record [no mention or representation is made regarding whether Mr. Aladin has a juvenile record] and is a student at Oberlin College. **Although a person's [lack of] criminal record certainly is considered a factor in determining whether a person is a good candidate for Diversion this does not appear to be a case where a person was allegedly caught stealing and peacefully admitted the transgression when confronted. Something happened that caused the police and prosecutor to charge and pursue a 2nd degree**

felony. The effect of the plea bargain is tantamount to a dismissal of a 2nd degree felony. (Emphasis added.)

33. The "economic sanctions" that the Oberlin Municipal Court Judge was referring to was a massive demonstration, the dissemination of a libelous flyer, and defamatory statements against Gibson's Bakery that Defendants orchestrated, incited, organized and controlled.

THE DEFAMING OF GIBSON'S BAKERY AND THE GIBSON FAMILY

34. Following the arrest of Jonathan Aladin, Cecelia Whettston, and Endia J. Lawrence, Oberlin College staff, including deans and professors, and students engaged in demonstrations in front of Gibson's Bakery.

35. There, Oberlin College representatives, including Raimondo, handed out hundreds of copies of the flyer to Oberlin College faculty, staff, and students, the Oberlin community, and media representatives stating that Gibson's Bakery and its owners racially profiled and discriminated against Aladin, Whettston, and Lawrence.

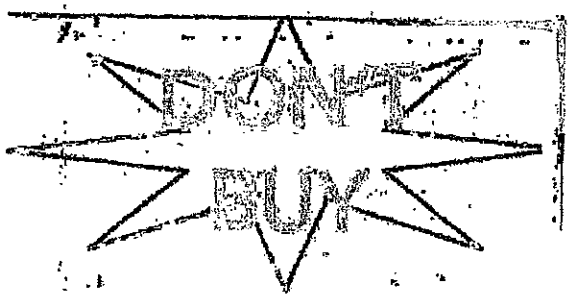
36. The flyer stated that Gibson's Bakery "is a RACIST establishment with a LONG ACCOUNT of RACIAL PROFILING and DISCRIMINATION".

THE ECONOMIC BOYCOTT OF GIBSON'S BAKERY

37. The flyer also encouraged customers to avoid Gibson's Bakery:

a. **"Today we urge you to shop elsewhere in light of a particularly heinous event involving the owners of this establishment and local law enforcement."**

38. The flyer is reproduced below:



This is a RACIST establishment with a LONG ACCOUNT of RACIAL PROFILING and DISCRIMINATION. Today we urge you to shop elsewhere in light of a particularly heinous event involving the owners of this establishment and local law enforcement.

PLEASE STAND WITH US

A member of our community was assaulted by the owner of this establishment yesterday. A nineteen y/o young man was apprehended and choked by Allyn Gibson of Gibson's Food Mart & Bakery. The young men, who was accompanied by 2 friends was choked until the 2 forced Allyn to let go. After the young man was free, Allyn chased him across College St. and into Tappan Square. There, Allyn tackled him and restrained him again until Oberlin police arrived. The 3 were racially profiled on the scene. They were arrested without being questioned, asked their names, or read their rights. 2 were released shortly after and charged with assault. The young man is being held in Lorain County Jail, charged with robbery. No bail until his arraignment this Friday 8:30 AM, 65 S Main.

If you have been victimized by this establishment in any capacity, we urge you to stand with us in support of our community members.

If you have any additional information, video or photo evidence of this event, please contact [redacted]

39. The flyer also identified ten (10) competitor businesses where the demonstrators, including Oberlin College, urged Gibson Bakery's customers to shop instead;

Item	Better places to get it
Bagels	The Local
Alcohol	Johnny's, Mickey Mart, IGA, Drug Mart
Cigarettes	Johnny's, Mickey Mart
Cold/flu meds	CVS, Ben Franklin, Drug Mart
Baked goods (large amnts)	Hilltop Bakery, The Oberlin Market, IGA, Wilma's
Toiletries	Ben Franklin, CVS, Drug Mart
Snack food	ben franklin, CVS
Fruits	IGA
School supplies	Ben Franklin, CVS
Dry Goods	Oberlin Market

OBERLIN COLLEGE FACILITATED, ENCOURAGED, AND PROMOTED THE ILLEGAL DEFAMATION AND ECONOMIC BOYCOTT

40. Defendants were involved in the preparation, review, copying, dissemination, and publication of the defamatory flyer.

41. Upon information and belief, Oberlin College agents, including the Associate Dean for Academic Affairs, copied the flyer on Oberlin College copier machines, so that they could be distributed to large numbers of people.

42. Raimondo distributed the flyer to Oberlin College students, faculty, the public and even the media.

43. Upon information and belief, Raimondo and other Oberlin College professors, including Tita Reed, the assistant to the President of Oberlin College, raised their fists in support of the demonstration, while shouting the defamatory statements on a bullhorn, thereby assuring that a large audience would hear their defamatory statements.

44. To further encourage and perpetuate the defamatory statements, Oberlin College suspended classes to allow students to attend protests and demonstrations outside Gibson's Bakery.

45. Oberlin College encouraged students to demonstrate outside Gibson's Bakery in lieu of attending scheduled classes and provided credit to the students who attended and participated in the demonstration(s).

46. Oberlin College ordered its employees to supply the demonstrators, who were shouting the defamatory statements espoused by Defendants, with free food and drink.

47. Oberlin College's intent was to create a large gathering of persons who were willing to shout defamatory statements against Gibson's Bakery, which were intended to interfere with the business of Gibson's Bakery.

48. On November 10, 2016, the Oberlin Student Senate published a resolution, utilizing the equipment and facilities of the college, consistent with the defamatory flyer, stating that "Gibson's has a history of racial profiling and discriminatory treatment of students and residents alike."

49. Upon information and belief, one or more Oberlin College administrators and faculty assisted and encouraged the Oberlin Student Senate to prepare such statements. That encouragement included Oberlin College Department of Africana Studies posting on a publicly available Facebook page the following message:

> **"Very Very proud of our students! Gibson's has been bad for decades, their dislike of Black people is palpable. Their food is rotten and they profile Black students. NO MORE!"**

50. Oberlin College provided the Student Senate with assistance and encouragement even though the Student Senate's actions violated the Student Code of Conduct, which prohibits defamation, libel, and slander and which classifies said conduct as constituting harassment.

OBERLIN COLLEGE IGNORES OFFICIAL POLICE RECORDS DEBUNKING RACISM CLAIMS, PERPETUATES THE DEFAMATION, AND INITIALLY IGNORES THE POLICE REQUEST TO RETURN EVIDENCE RELEVANT TO CRIMINAL CONDUCT AT ISSUE

51. In response to the Defendants', and other demonstrators', rampant accusations of Plaintiffs' racial profiling, the Oberlin Police Department conducted an investigation and found a complete lack of any evidence of racism. By way of example, the Oberlin Police Department explained that of the 40 adults arrested for shoplifting at Gibson's Bakery in the past five (5) years, only six (6) were African-American suspects.

52. Defendants consciously ignored the facts and findings of the Oberlin City Police Department because such ignorance allowed them to continue their agenda against Gibson's Bakery and the Gibsons. Defendants consciously ignored the facts because such intentional disregard of the truth and instead the adoption and promulgation of fake facts and fake news allowed them to continue their strategic business plan and public relations agenda for Oberlin's own financial and public relations benefit and to the detriment of Gibson's Bakery and the Gibsons.

53. Upon information and belief, Defendants refused to return evidence that they had obtained in error from the Oberlin City Police Department. Upon information and belief, an Oberlin College administrator was present at Jonathan Aladin's criminal booking. Upon information and belief, a member of the Oberlin Police Department accidently gave the administrator the fake identification card used by Jonathan Aladin during the attempted robbery

and theft of Gibson's Bakery. Upon information and belief, the Oberlin Police Department later asked Oberlin College to return the fake identification, because it was evidence of a crime and because it had been given to the college in error. Upon information and belief, Oberlin College refused to return the evidence on several different occasions. Upon information and belief, Oberlin College eventually returned the evidence only after the City of Oberlin Police Department threatened to pursue obstruction of justice charges against Oberlin College.

54. Rather than retract Defendants' defamatory statements, or attempt in any way to discourage the continued defamation of, and damage to, the Plaintiffs, Defendants responded in writing to the Oberlin Student Senate by again perpetuating the defamatory claim that the Gibsons unlawfully discriminated against the criminal defendants -- Jonathan Aladin, Cecelia Whettston, and Endia J. Lawrence. In a public letter sent to all students, professors, and administrators, President Krislov and Raimondo stated:

> Regarding the incident at Gibson's, we are deeply troubled because we have heard from students that there is more to the story than what has been generally reported. We will commit every resource to determining the full and true narrative, including exploring whether this is a pattern and not an isolated incident. We are dedicated to a campus and community that treats all faculty, staff and students fairly and without discrimination. We expect that our community businesses and friends share the same values and commitments.

OBERLIN COLLEGE INSTITUTES ITS OWN ECONOMIC BOYCOTT

55. Soon thereafter, on November 14, 2016, Oberlin College publicly pronounced that it was ceasing any further purchases from Gibson's Bakery.

56. Prior to that announcement, Gibson's Bakery had a long-time contract with Bon Appetit Management Company for the supply of baked goods to Oberlin College. Bon Appetit Management Company is a food services subcontractor for Oberlin College. Prior to the termination of the contract between Gibson's Bakery and Bon Appetit Management Company,

Gibson's Bakery had not received complaints from Bon Appetit or Oberlin College's administration about the quality of the bakery's service or goods.

57. On or before November 14, 2016, Vice-President Raimondo approached the Oberlin College Director of Dining Services Michelle Gross and demanded that she instruct Bon Appetit to cease from engaging in any business with Gibson's Bakery.

58. Because Gibson Bakery's contract was with Bon Appetit Management Company, Oberlin College, as directed by Raimondo, instructed Bon Appetit Management Company to cancel its contract with Gibson's Bakery, which it reluctantly did, which resulted in extreme emotional distress of Michelle Gross causing her to take a leave of absence and then early retirement.

59. Upon information and belief, Michelle Gross was deeply disturbed by the demand from Raimondo as Gibson's Bakery had had a longtime, positive relationship with the college and she did not want to damage and adversely impact Gibson's Bakery.

OBERLIN COLLEGE COVETS GIBSON'S WELL-SITUATED LAND

60. Upon information and belief, Oberlin College desires to harm and/or acquire the Gibson Bakery business, the Gibson Bakery property, and the real property owned by Off Street Parking, Inc. ("OSP"). David Gibson recently acquired the controlling interest in OSP. OSP is the owner of the parking lot immediately contiguous to Oberlin College, and it is supposed to be for the exclusive use of patrons of the downtown businesses, including Plaintiffs' business.

61. Oberlin College has encouraged, facilitated, and permitted its professors, administrators, faculty, students, and third party contractors to use the parking lot notwithstanding that OSP has advised the individuals and Oberlin College to stop parking in the lot, issued parking notice violations to offenders, and has had vehicles towed.

62. During most of the month of August 2017, Oberlin College instructed its construction contractors to park vehicles and large construction equipment and otherwise use the parking lot, obstructing access to the parking lot and parking spaces within the lot.

OBERLIN COLLEGE DEMANDS THAT GIBSON'S BAKERY OFFER STUDENTS A "FIRST-TIME SHOPLIFTER'S PASS"

63. Approximately a week after Oberlin College caused Gibson's contract to be canceled, David Gibson sat down with President Krislov and Tita Reed and advised the representatives of Oberlin College that defamation, boycotts, demonstrations, and refusal to do business with Gibson's Bakery was having a devastating effect on Gibson's Bakery and the Gibson family.

64. David Gibson requested that Oberlin College immediately retract the defamatory statements and reinstate its contracts with Bon Appetit.

65. Defendants represented that they would consider reinstating business relations with Gibson's Bakery on a long-term basis, but only if Gibson's Bakery would agree that "Gibson's would not push criminal charges against first-time shoplifters."

66. David Gibson explained how unworkable and unacceptable it would be to give free passes to all so-called "first-time shoplifters."

67. It would be difficult to know whether someone was a "first-time shoplifter" or whether it was simply their first time getting caught.

68. Gibson's Bakery already loses thousands of dollars a year due to stolen merchandise, and such losses would certainly multiply if students learned they could steal without repercussion.

69. In a subsequent meeting between Raimondo and David Gibson, Oberlin College also insisted that Gibson's Bakery call Raimondo when students are caught stealing rather than informing the police.

70. David Gibson believed the policy would be inconsistent with his core belief that an educational institution of higher learning should be teaching its students not to commit robbery and theft, instead of sheltering and excusing that criminal activity.

71. Again, David Gibson did not agree to such a request and Oberlin College continued to attempt to steamroll and intimidate Gibson's Bakery and refused to retract its defamatory statements or reinstate its business with Gibson's Bakery.

72. Thus, Oberlin College took a position that sacrificed the commitment to the rule of law and the safety of the Oberlin community in favor of its desire to promote the business and marketing plan and public relations image of Oberlin College. In doing so, Oberlin College by example, words, and conduct exploited its students and taught them that it is permissible to harm community members without fear of repercussion. For instance, Oberlin College's demand for the "first-time offender" rule also promoted large scale thefts because if students would not be prosecuted for their first theft offense, they would be encouraged to steal as much merchandise as possible during each offense until caught for the first time.

73. Additionally, Oberlin College's request about first-time shoplifters was particularly egregious under the circumstances, considering Gibson's Bakery was not dealing with a shoplifting incident. As the Oberlin Municipal Court pointed out, Jonathan Aladin was charged with robbery of the 2nd degree which is the second most serious category assigned to felonies.

74. Similarly, Oberlin College participated and encouraged students and student organizations to defame a long-time community member in an effort to advance its own corporate business purposes, which violates Oberlin College's policies and procedures.

THE DAMAGE TO THE GIBSONS PERSISTS

75. Oberlin College eventually allowed Bon Appetit to reinstate its business with Gibson's Bakery in February 2017; however, Defendants refused to retract the defamatory statements that had been made.

76. Over the years prior to the defamation described herein, a substantial portion of Gibson Bakery's revenue derived from direct purchases by students, professors, and administrators of Oberlin College. At all times relevant, Defendants were fully aware of that fact.

77. As a direct result of Defendants' conduct, as described herein, Gibson's Bakery has suffered a severe and sustained loss of student, professor, administrative, and college department business and continued losses are further perpetuated by Oberlin College.

78. For example, during campus tours – sponsored by Oberlin College – Oberlin College's guides advise prospective and future students and their families not to shop at Gibson's Bakery because it is a "racist establishment" that "assaults students."

79. Upon information and belief, Defendants are fully aware that the guides, who are the Defendants' agents, are making these statements and Defendants have encouraged the same.

80. Even after the plea bargains of Jonathan Aladin, Cecelia Whettston, and Endia J. Lawrence, wherein they admitted to committing crimes against Plaintiffs and admitted that Plaintiffs had not committed discrimination, Oberlin College also continues to prominently display the defamatory statements that Gibson's assaulted a black student and has a history of racial profiling and discriminatory conduct.

81. For example, Oberlin College continues to display statements that "Gibson's has a history of racial profiling and discriminatory treatment of students and residents alike" in a prominent showcase on the walls of Wilder Hall Student Union.

82. Oberlin College has intentionally, willfully, wantonly and/or recklessly kept these postings up in Wilder Hall, with the foreseeable result that the defamatory actions will continue to damage Gibson's Bakery and the Gibson Family to an entirely new incoming freshmen class starting in the fall of 2017.

83. According to Oberlin College's website, Wilder Hall "serves as a gathering place for students, faculty, staff, alumni, and guests." Wilder Hall "offers several community meeting, rooms, office space for student organizations, a student lounge, a performance venue, and a café and market." It also houses the student mailroom and Raimondo's office.

84. As the Oberlin Municipal Court Judge foresaw, Oberlin College's conduct has resulted in a "permanent economic sanction" against Gibson's Bakery and the Gibson Family.

85. In addition to the financial devastation that Plaintiffs have incurred, David Gibson and Allyn Gibson have also suffered a severe emotional and physical toll.

86. Defendants have created a hostile community environment resulting in numerous forms of harassment and threats against Gibson's Bakery, its employees, and its owners.

87. Employees of Gibson's Bakery have been threatened and had their automobile tires punctured, including the use of a drill bit being drilled into a tire.

88. David Gibson's residence was damaged on one or more occasions, including one attempt to kick in his back door resulting in severe structural damage to the door.

89. Students who support Gibson's Bakery have routinely been harassed and threatened, including through use of pointing a finger at them in such a manner to mimic the use of a firearm.

90. Additionally, Defendants promoted such a hostile environment against Plaintiffs that certain persons came to the apartment of Allyn W. Gibson, who is 89 years-old, late one night and loudly banged on his door and windows while he slept. During that incident, Allyn Gibson, who feared for his safety, was startled and fell as he was attempting to determine who was banging on his door and windows. That fall caused him to suffer life threatening injuries, including a broken neck and multiple fractured vertebrae. Allyn Gibson required an extended hospital stay and will require the use of a neck brace for the rest of his life.

91. The overall campus environment has resulted in a substantially reduced patronage by students, professors, administrators, and other college constituents, as well as created a chilling effect upon persons that would normally support and patronize Gibson's Bakery.

ALADIN, LAWRENCE, AND WHETTSTON PLEAD GUILTY TO CRIMES AT GIBSON'S BAKERY AND CONFIRM THAT GIBSON'S RESPONSE TO THEIR CRIMINAL CONDUCT WAS NOT RACIALLY MOTIVATED

92. On August 11, 2017, Aladin, Lawrence and Whettston pled guilty to charges that the State of Ohio brought against them for their conduct at Gibson's Bakery.

93. Jonathan Aladin pleaded guilty to counts of attempted theft and aggravated trespass.

94. Likewise, Endia Lawrence and Cecelia Whettston pleaded guilty to counts of attempted theft and aggravated trespass.

95. At their sentencing hearings, Aladin, Lawrence, and Whettston acknowledged that Plaintiffs were within their rights to detain Jonathan Aladin following the November 9th attempted theft and that Plaintiffs' actions were not racially motivated.

96. Aladin's written statement read:

> On November 9, 2016, I entered Gibson's Market in Oberlin Ohio and attempted to purchase alcohol with a fake ID. When the clerk recognized the fake ID, I struggled with the clerk to recover the fake ID. The clerk was within his legal rights to detain me, and I regret presenting a fake ID in an attempt to obtain alcohol.
>
> This unfortunate incident was triggered by my attempt to purchase alcohol. I believe the employees of Gibsons actions were not racially motivated. They were merely trying to prevent an underage sale.

97. The written statement for Lawrence and Whettston read as follows:

> On November 9, 2016, I entered Gibson's Market in Oberlin Ohio, in an effort to acquire alcohol via Jonathan Aladin's fake ID. When the clerk recognized the fake ID, he and Aladin began to struggle. I physically intervened on Aladin's behalf. I recognize that Gibson's employees were within their legal rights to detain Elijah for an attempted underage purchase.
>
> This unfortunate incident was triggered by an attempt to purchase alcohol. I believe the employees of Gibson's actions were not racially motivated. They were merely trying to prevent an underage sale.

98. Unlike Aladin, Lawrence, and Whettston, the Defendants continue to refuse to offer such an acknowledgement or retract their defamatory statements, despite multiple requests by Plaintiffs.

99. The Defendants' conduct, described herein, has resulted in severe and permanent economic damage as well as substantial distress.

COUNT ONE
(Libel)

100. Plaintiffs reincorporate by reference all of the allegations of this Complaint as if the same were fully rewritten herein.

101. From on or about November 9, 2016 to present, Defendants have carried out a campaign to defame Plaintiffs. Defendants have carried out their malicious campaign to permanently harm and damage the Plaintiffs through publishing false statements of fact online, through circulating the flyer which contains false statements of fact, through sending emails which contain false statements of fact, through making verbal false statements of fact, and by other means of publication.

102. From on or about November 9, 2016 to present, Defendants published on the flyer, emails, and other means of publication, false statements of fact regarding Plaintiffs, which include, but are not limited to, affirmative statements that Plaintiffs are racists, that Gibson's Bakery is a "racist establishment with a long account of racial profiling and discrimination," and that Plaintiffs commit hate crimes against minorities.

103. Oberlin College published defamatory statements against Plaintiffs through its agents, which include, but are not necessarily limited to: Krislov, Raimondo, and other professors and staff members. Such agents were acting within the course and scope of their employment with Oberlin College at all relevant times, and the agents' acts were calculated to facilitate or promote the business, interests, and agenda of Oberlin College. Oberlin College encouraged the defamatory conduct and approved and ratified the conduct of its agents, and adopted those false statements as its own statements. These false statements were part of and fueled Oberlin College's campaign against Plaintiffs.

104. Said written statements concerning the Plaintiffs are false and defamatory, they import a charge of an indictable offense involving moral turpitude or infamous punishment, they injure the Plaintiffs' trade, business, or occupation, and they subject Plaintiffs to public hatred, ridicule, or contempt.

105. Said written statements concerning the Plaintiffs attack their competence and ability to manage a local business in the city of Oberlin.

106. Said written statements were published with malice and were intended to injure Plaintiffs' business reputation and their personal standing within the community, or at a minimum, Defendants were negligent when they made the disparaging statements.

107. Defendants' statements constitute libel per se and therefore, Ohio law presumes that Plaintiffs have suffered damages. Furthermore, as a direct and proximate result of Defendants' defamatory statements, Plaintiffs have suffered actual and special damages, including, without limitation, loss of business earnings, injury to their personal and business reputations, and mental anguish and humiliation.

108. Defendants' conduct was performed with actual malice and/or reckless disregard of the Plaintiffs' rights.

109. As a direct and proximate result of Defendants' actions, Plaintiffs are entitled to judgment against Defendants, jointly and severally, in a sum in excess of $25,000 for compensatory damages, a sum in excess of $25,000 for exemplary and punitive damages, to be determined at trial, injunctive relief, plus interest at the statutory rate per annum, attorneys' fees, costs of suit, court costs, and such other and further relief as the Court may deem just and proper.

COUNT TWO
(Slander)

110. Plaintiffs reincorporate by reference all of the allegations of this Complaint as if the same were fully rewritten herein.

111. From on or about November 9, 2016 to present, Defendants have carried out a campaign to slander Plaintiffs. Defendants have carried out their malicious campaign to permanently harm and damage the Plaintiffs through publishing false statements of fact online,

through circulating the flyer which contains false statements of fact, through sending emails which contain false statements of fact, through making verbal false statements of fact, and by other means of publication.

112. Defendants' false and defamatory statements regarding Plaintiffs include, but are not necessarily limited to, affirmative spoken statements that Plaintiffs are racists, that Gibson's Bakery is a "racist establishment with a long account of racial profiling and discrimination," and that Plaintiffs commit crimes against minorities.

113. Defendants' statements concerning the Plaintiffs are false and defamatory, they import a charge of an indictable offense involving moral turpitude or infamous punishment, and they tend to injure the Plaintiffs' trade, business, or occupation.

114. Said statements concerning the Plaintiffs attack their competence and ability to manage a local business in the city of Oberlin.

115. Said spoken statements were published with malice and were intended to injure Plaintiffs' business reputation and their personal standing within the community, or at a minimum, Defendants were negligent when they made the spoken statements.

116. Oberlin College's agents who made such defamatory statements were acting within the course and scope of their employment with Oberlin College at all relevant times, and the agents' acts were calculated to facilitate or promote the business, interests, and agenda of Oberlin College. Oberlin College encouraged the defamatory conduct and approved and ratified the conduct of its agents.

117. Defendants' statements constitute slander per se and therefore, Ohio law presumes that Plaintiffs have suffered damages. Furthermore, as a direct and proximate result of Defendants' defamatory statements, Plaintiffs have suffered actual and special damages,

including, without limitation, loss of business earnings, injury to their personal and business reputations, and mental anguish and humiliation.

118. Defendants' conduct was performed with actual malice and/or reckless disregard of the Plaintiffs' rights.

119. As a direct and proximate result of Defendants' actions, Plaintiffs are entitled to judgment against Defendants, jointly and severally, in a sum in excess of $25,000 for compensatory damages, a sum in excess of $25,000 for exemplary and punitive damages, to be determined at trial, injunctive relief, plus interest at the statutory rate per annum, attorneys' fees, costs of suit, court costs and such other and further relief as the Court may deem just and proper.

COUNT THREE
(Tortious Interference with Business Relationships)

120. Plaintiffs reincorporate by reference all of the allegations of this Complaint as if the same were fully rewritten herein.

121. Plaintiffs held certain business relationships with third-parties. Specifically, Gibson's Bakery had a contract to provide goods and services to Bon Appetit Management Company, who in turn provided services to Oberlin College and has business relationships with its customers.

122. At all times relevant, Defendants had knowledge of the business relationships of Plaintiffs, Bon Appetit Management Company, and Plaintiffs' customers.

123. Upon information and belief, Oberlin College and Dean Raimondo intentionally and improperly interfered with the contractual and business relationship between Gibson's Bakery and Bon Appetit Management Company, causing such relationship to cease.

124. Upon information and belief, Oberlin College and Dean Raimondo intentionally and improperly interfered with the contractual and business relationship between Gibson's Bakery and its customers, causing customers to cease doing business with Gibson's Bakery.

125. Defendants have also intentionally and improperly interfered with other business relationships of Gibson's Bakery, including but not limited to Oberlin College students and visitors.

126. Defendants' interference has substantially damaged the amount of business that Gibson's Bakery receives from Oberlin College students, professors, administrators, and departments of Oberlin College.

127. Oberlin College acted through its agents in tortiously interfering with Plaintiffs' business relationships and Oberlin College adopted its agents' statements and actions as its own. Oberlin College's agents were acting within the course and scope of their employment with Oberlin College at all relevant times, and the agents' acts were calculated to facilitate or promote the business, interests, and agenda of Oberlin College. Oberlin College encouraged the tortious interference and approved and ratified the conduct of its agents.

128. Upon information and belief, the tortious interference against Plaintiffs is part of Oberlin College's long-standing agenda against the Plaintiffs and helps support Oberlin College's attempt to force Plaintiffs out of the community and attempt to acquire the Plaintiffs' land.

129. Defendants, without justification, intentionally, or negligently, interfered with Plaintiffs' business relationships by contacting Plaintiffs' customers and/or prospective customers and Defendants attempted to have those parties cease using Plaintiffs' services through threats and other coercive actions.

130. As a direct and proximate result of Defendants' tortious interference, Plaintiffs have been damaged in excess of $25,000, including their attorney fees and lost profits for the interference, to be determined at trial, and Defendants, jointly and severally, are liable for those damages.

131. Defendants' conduct was performed with actual malice and/or reckless disregard of the Plaintiffs' rights, such that the Plaintiffs should be awarded punitive damages against the Defendants in excess of $25,000, injunctive relief, plus interest at the statutory rate per annum, attorneys' fees, costs of suit, court costs, and such other and further relief as the Court may deem just and proper.

COUNT FOUR
(Tortious Interference with Contracts)

132. Plaintiffs reincorporate by reference all of the allegations of this Complaint as if the same were fully rewritten herein.

133. Plaintiffs have various contracts and business dealings with third-parties.

134. At all relevant times, Defendants had knowledge of those contracts and business dealings.

135. Defendants intentionally sought and/or procured the breach of those contracts and business dealings by the conduct described herein.

136. Oberlin College's agents were acting within the course and scope of their employment with Oberlin College at all relevant times, and the agents' acts were calculated to facilitate or promote the business, interests, and agenda of Oberlin College. Oberlin College encouraged the tortious interference and approved and ratified the conduct of its agents.

137. As a direct and proximate result of Defendants' tortious interference, Plaintiffs have been damaged in excess of $25,000, including their attorney fees and lost profits for the

interference, to be determined at trial, and Defendants, jointly and severally, are liable for those damages.

138. Defendants' conduct was performed with actual malice and/or reckless disregard of the Plaintiffs' rights, such that the Plaintiffs should be awarded punitive damages against the Defendants in excess of $25,000, injunctive relief, plus interest at the statutory rate per annum, attorneys' fees, costs of suit, court costs, and such other and further relief as the Court may deem just and proper.

COUNT FIVE
(Deceptive Trade Practices)

139. Plaintiffs reincorporate by reference all of the allegations of this Complaint as if the same were fully rewritten herein.

140. As discussed above, Defendants disparaged Plaintiffs' business or businesses and the Gibsons, personally, through false representations of fact. Those false representations include, but are necessarily not limited to, representations that Plaintiffs are racists, that Gibson's Bakery is a "racist establishment with a long account of racial profiling and discrimination," and that Plaintiffs commit crimes against minorities.

141. Each of the Defendants is a "person" as defined in R.C. 4165.01.

142. Defendants' actions constitute a "deceptive trade practice" pursuant to R.C. 4165.02(A).

143. Defendants' actions were all conducted within the course of the Defendants' business, vocation, or occupation.

144. Based upon Defendants' deceptive trade practices, Plaintiffs have a private cause of action actual damages pursuant to R.C. 4165.03.

145. Defendants willfully committed one or more deceptive trade practices and as a result, Plaintiffs are entitled to an award of reasonable attorneys' fees against the Defendants, jointly and severally.

146. Oberlin College's agents were acting within the course and scope of their employment with Oberlin College at all relevant times, and the agents' acts were calculated to facilitate or promote the business, interests, and agenda of Oberlin College. Oberlin College encouraged the deceptive trade practices and approved and ratified the conduct of its agents.

147. Defendants' conduct was performed with actual malice and/or reckless disregard of the Plaintiffs' rights.

148. As a direct and proximate result of Defendants' actions, Plaintiffs are entitled to actual damages in an amount in excess of $25,000, to be determined at trial, and Defendants, jointly and severally, are liable for those damages, and an award of reasonable attorneys' fees against the Defendants, jointly and severally, and injunctive relief, plus interest at the statutory rate per annum, costs of suit, court costs, and such other and further relief as the Court may deem just and proper.

COUNT SIX
(Intentional Infliction of Emotional Distress)

149. Plaintiffs reincorporate by reference all of the allegations of this Complaint as if the same were fully rewritten herein.

150. Defendants intended to cause emotional distress to Plaintiffs David R. Gibson and Allyn W. Gibson or should have known that their actions would result in serious emotional distress to these Plaintiffs.

151. As a direct and proximate result of Defendants' conduct, these Plaintiffs have suffered great distress concerning the damage to their reputation, economic welfare, community

standing, ability to continue to employ hard-working members of the community, and fear of physical harm.

152. Defendants' conduct was so extreme and outrageous as to go beyond all possible bounds of decency and was utterly intolerable in civilized society.

153. Defendants' actions were the proximate cause of Plaintiffs' psychic and physical injuries.

154. The mental anguish suffered by Plaintiffs was serious and of a nature that no reasonable person could be expected to endure it.

155. As a direct and proximate result of Defendants' actions, Plaintiffs David R. Gibson and Allyn W. Gibson are entitled to actual damages in an amount in excess of $25,000, to be determined at trial, and Defendants, jointly and severally, are liable for those damages, and an award of reasonable attorney's fees against the Defendants, jointly and severally, and injunctive relief, plus interest at the statutory rate per annum, costs of suit, court costs, and such other and further relief as the Court may deem just and proper.

156. Defendants' conduct was performed with actual malice and/or reckless disregard of the Plaintiffs' rights, such that the Plaintiffs should be awarded punitive damages against the Defendants in excess of $25,000, plus attorneys' fees.

COUNT SEVEN
(Negligent Hiring, Retention, Supervision)

157. Plaintiffs reincorporate by reference all of the allegations of this Complaint as if the same were fully rewritten herein.

158. Oberlin College's employees, including but not limited to Meredith Raimondo, were not competent to perform their duties and Oberlin College had actual or constructive knowledge of such incompetence.

159. The actions of Oberlin College's employees, including but not limited to Meredith Raimondo, caused the Plaintiffs' damages as described herein.

160. Oberlin College was negligent in hiring, supervising, and retaining such employees, and such negligence proximately caused Plaintiffs' damages in an amount in excess of $25,000, to be determined at trial.

COUNT EIGHT
(Trespass)

161. Plaintiffs reincorporate by reference all of the allegations of this Complaint as if the same were fully rewritten herein.

162. As previously discussed, Plaintiffs have a possessory and/or use right for the parking lot located behind Gibson's Bakery.

163. All of Defendants' actions on the parking lot since Plaintiffs acquired rights to use the same have been without the consent and permission of the Plaintiffs. As a result, Defendants have trespassed on the parking lot, including interfering with Plaintiffs' right to use the same, by including, without limitation, permitting faculty, administrators, and students to park in the lot, even though they are not permitted to do so and by parking large construction equipment on the lot in such a manner to block the entrance to the lot.

164. Oberlin College's agents were acting within the course and scope of their employment with Oberlin College at all relevant times, and the agents' acts were calculated to facilitate or promote the business, interests, and agenda of Oberlin College. Oberlin College encouraged the trespass and approved and ratified the conduct of its agents.

165. As a direct and proximate result of Defendants' trespass, Plaintiffs have been damaged in excess of $25,000, including their attorneys' fees and lost profits for the interference, to be determined at trial, and Defendants, jointly and severally, are liable for those damages.

166. Defendants' conduct was performed with actual malice and/or reckless disregard of the Plaintiffs' rights, such that the Plaintiffs should be awarded punitive damages against the Defendants in excess of $25,000, injunctive relief, plus interest at the statutory rate per annum, attorneys' fees, costs of suit, court costs, and any other relief this Court deems just and equitable.

WHEREFORE, Plaintiffs demand judgment against the Defendants, jointly and severally, in an amount in excess of $25,000, to be determined at trial, an award of punitive damages in excess of $25,000, to be determined at trial, injunctive relief, plus interest at the statutory rate per annum, attorneys' fees, costs of suit, court costs, and any other relief this Court deems just and equitable.

Lee E. Plakas (0008628)
TZANGAS PLAKAS MANNOS LTD.
220 Market Avenue South
Eighth Floor
Canton, OH 44702
Telephone: (330) 455-6112
Fax: (330) 455-2108
E-mail: lplakas@lawlion.com
ATTORNEYS FOR PLAINTIFFS

Terry A. Moore (0015837),
Owen J. Rarric (0075367), and
Matthew W. Onest (0087907), of
KRUGLIAK, WILKINS, GRIFFITHS
& DOUGHERTY CO., L.P.A.
4775 Munson Street, N.W./P.O. Box 36963
Canton, Ohio 44735-6963
Phone: (330) 497-0700/Fax: (330) 497-4020
tmoore@kwgd.com; orarric@kwgd.com;
monest@kwgd.com
ATTORNEYS FOR PLAINTIFFS

JURY DEMAND

Plaintiffs hereby demand, pursuant to Civ.R. 38, that a jury be impaneled to try all issues contained herein.

Terry A. Moore (0015837),
Owen J. Rarric (0075367), and
Matthew W. Onest (0087907), of
KRUGLIAK, WILKINS, GRIFFITHS
& DOUGHERTY CO., L.P.A.
ATTORNEYS FOR PLAINTIFFS

INSTRUCTIONS FOR SERVICE

TO THE CLERK OF COURTS:

Please issue Summons together with a copy of the foregoing Complaint to be served upon the Defendants at the addresses as set forth in the above caption by certified mail (Civ.R. 4.1(A)(1)(a)), return receipt requested, and make the same returnable according to law.

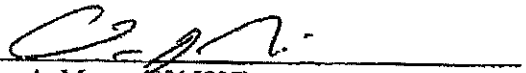
Further, please issue Summonses, together with a copy of the foregoing Complaint, to be served upon the Defendants Oberlin College aka Oberlin College and Conservatory, and Meredith Raimondo, at the following addresses:

Oberlin College aka
Oberlin College and Conservatory
Office of the General Counsel and Secretary
Cox Administration Building, Room 100
70 North Professor Street
Oberlin, OH 44074

and

Meredith Raimondo
Wilder Hall
135 W. Lorain St.
Oberlin, OH 44074

by certified mail (Civ.R. 4.1(A)(1)(a)), return receipt requested, and make the same returnable according to law..



Terry A. Moore (0015837),
Owen J. Rarric (0075367), and
Matthew W. Onest (0087907), of
KRUGLIAK, WILKINS, GRIFFITHS
& DOUGHERTY CO., L.P.A.
ATTORNEYS FOR PLAINTIFFS

ORIGINAL

ENTERED

IN THE COURT OF COMMON PLEAS
LORAIN COUNTY, OHIO

FILED
LORAIN COUNTY

2020 FEB 26 P 12: 22

COURT OF COMMON PLEAS
TOM ORLANDO

GIBSON BROS., INC., et al.,

Plaintiffs,

Case No.: 17CV193761

Judge: Hon. John R. Miraldi

Magistrate: Hon. Joseph Bott

-vs.-

OBERLIN COLLEGE, et al.,

Defendants.

STIPULATED ORDER GRANTING:
PLAINTIFFS' MOTIONS TO AMEND COMPLAINT TO REMOVE COUNTS IV & VIII

-and-

DEFENDANTS' MOTION FOR PARTIAL DIRECTED VERDICT

This matter is before the Court to journalize rulings on three (3) oral motions that were made to and granted by the Court on May 9, 2019 (prior to trial) and June 5, 2019 (prior to closing arguments during the compensatory phase of trial).

For the first motion, Plaintiffs[1] moved the Court to amend their Complaint to remove Count VIII, which contained claims by each Plaintiff against each Defendant for civil trespass. This motion was not opposed by Defendants[2] and thus granted by the Court. (See, Tr. Trans. Vol. II, pp. 44-45). For the second motion, Plaintiffs moved the Court to amend their Complaint to remove Count IV, which contained claims by each Plaintiff against each Defendant for tortious interference with contract. (See, Tr. Trans. Vol. XIX, p. 4). Defendants did not object to this motion, and it was granted by the Court. (Id.). For the third motion, Defendants moved the Court for directed verdict on David R. Gibson's claim for tortious interference with business relationships against each Defendant and on Allyn W. Gibson's claim for tortious interference

[1] "Plaintiffs" refers to Gibson Bros., Inc., David R. Gibson, and Allyn W. Gibson.
[2] "Defendants" refers to Oberlin College & Conservatory and Meredith Raimondo.

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EXHIBIT
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with business relationships against each Defendant. (Id., pp. 4-5). Plaintiffs did not object to this motion, and it was granted by the Court. (Id., p. 5).

This Order journalizes the Court's May 9, 2019 and June 5, 2019 decisions granting each motion. Plaintiffs' Complaint is hereby amended and Counts IV and VIII are dismissed. In addition, the Court enters judgment for Defendants on David R. Gibson and Allyn W. Gibson's claim for tortious interference with business relationships (Count III).

IT IS SO ORDERED.

Per Civ.R. 58(B), the Clerk of Courts is directed to serve upon all parties not in default for failure to appear notice of the judgment and its date of entry upon the journal.

HON. JOHN R. MIRALDI

Approved by:

JAMES N. TAYLOR CO., L.P.A.

James N. Taylor (0026181)
409 East Avenue, Suite A
Elyria, Ohio 44035
Telephone: (440) 323-5700
Email: taylor@jamestaylorlpa.com
-and-

TAFT STETTINIUS & HOLLISTER LLP

Ronald D. Holman, II (0036776)
Julie A. Crocker (0081231)
Cary M. Snyder (0096517)
William A. Doyle (0090987)
Josh M. Mandel (0098102)
200 Public Square
Suite 3500
Cleveland, Ohio 44114
Telephone: (216) 241-2838
Facsimile: (216) 241-3707
Email: rholman@taftlaw.com
jcrocker@taftlaw.com
csnyder@taftlaw.com
wdoyle@taftlaw.com
-and-

TZANGAS | PLAKAS | MANNOS | LTD

Lee E. Plakas (0008628)
Brandon W. McHugh (0096348)
Jeananne M. Wickham (0097838)
220 Market Avenue South
Eighth Floor
Canton, Ohio 44702
Telephone: (330) 455-6112
Facsimile: (330) 455-2108
Email: lplakas@lawlion.com
bmchugh@lawlion.com
jwickham@lawlion.com
-and-

KRUGLIAK, WILKINS, GRIFFITHS & DOUGHERTY CO., L.P.A.

Terry A. Moore (0015837)
Jacqueline Bollas Caldwell (0029991)
Owen J. Rarric (0075367)
Matthew W. Onest (0087907)
4775 Munson Street, N.W.
P.O. Box 36963
Canton, Ohio 44735-6963
Telephone: (330) 497-0700
Facsimile: (330) 497-4020
Email: tmoore@kwgd.com
jcaldwell@kwgd.com
orarric@kwgd.com
monest@kwgd.com

Counsel for Plaintiffs

WICKENS HERZER PANZA

Richard D. Panza (0011487)
Matthew W. Nakon (0040497)
Malorie A. Alverson (0089279)
Rachelle K. Zidar (0066741)
Wilbert V. Farrell IV (0088552)
Michael R. Nakon (0097003)
35765 Chester Road
Avon, Ohio 44011
Telephone: (440) 695-8000
Facsimile: (440) 695-8098
Email: RPanza@WickensLaw.com
MNakon@WickensLaw.com
MAlverson@WickensLaw.com

Counsel for Defendants

ORIGINAL

LORAIN COUNTY COURT OF COMMON PLEAS
LORAIN COUNTY, OHIO

TOM ORLANDO, Clerk
JOURNAL ENTRY
John R. Miraldi, Judge

Date 6/27/19 Case No. 17CV193761

GIBSON BROS INC
Plaintiff

JACQUELINE BOLLAS CALDWELL
Plaintiff's Attorney ()-

VS

OBERLIN COLLEGE
Defendant

JOSH M MANDEL
Defendant's Attorney ()-

JUDGMENT ENTRY

Pursuant to Ohio Revised Code Section 2315.18 (Compensatory Damages in Tort Actions) and Ohio Revised Code Section 2315.21 (Punitive or Exemplary Damages) the Court hereby reduces the jury's verdicts to judgment as follows:

On June 6, 2019, the parties stipulated and agreed that Oberlin College would be vicariously, jointly, and severally liable for any verdict or judgment rendered against Meredith Raimondo, regardless of whether a separate verdict or judgment was entered against Oberlin College.

On June 7, 2019, the jury returned a compensatory damages verdict in favor of David R. Gibson in the amount of $5,800,000.00, which included $4,000,000.00 in non-economic damages and $1,800,000.00 in economic damages. The jury completed an interrogatory further specifying that $4,800,000.00 of the $5,800,000.00 was awarded to David R. Gibson and against Oberlin College and Meredith Raimondo on the libel claim, and that the remaining $1,000,000.00 was awarded to David R. Gibson and against Oberlin College on the intentional infliction of emotional distress claim. On June 13, 2019, the jury returned a punitive damages verdict in favor of David R. Gibson in the amount of $17,500,000.00.

IT IS HEREBY ORDERED, ADJUDGED, and DECREED that:

Judgment is hereby rendered against Defendants and in favor of David R. Gibson for compensatory damages for economic loss in the amount of $1,800,000.00.

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Judgment is hereby rendered against Defendants in favor of David R. Gibson for compensatory damages for noneconomic loss in the amount of $600,000.00. ($350,000.00 on the libel claim and $250,000.00 on the intentional infliction of emotional distress claim)

Judgment is hereby rendered against Defendants and in favor of David R. Gibson for punitive damages in the amount of $11,600,000.00 (two times the amount the jury awarded to the plaintiff for compensatory damages in accordance with Ohio Revised Code Section 2315.21).

TOTAL DAMAGES FOR DAVID R. GIBSON: $14,000.000.00

On June 7, 2019, the jury returned a compensatory damages verdict in favor of Allyn W. Gibson in the amount of $3,000,000.00 in non-economic damages and $0.00 in economic damages. The jury completed an interrogatory further specifying that $2,000,000.00 of the $3,000,000.00 was awarded to Allyn W. Gibson and against Oberlin College and Meredith Raimondo on the libel claim, and that the remaining $1,000,000.00 was awarded to Allyn W. Gibson and against Oberlin College on the intentional infliction of emotional distress claim.

One June 13, 2019, the jury returned a punitive damages verdict in favor of Allyn W. Gibson in the amount of $8,750,000.00.

IT IS HEREBY ORDERED, ADJUDGED, and DECREED that:

Judgment is hereby rendered against Defendants and in favor of Allyn W. Gibson for compensatory damages for noneconomic loss in the amount of $500,000.00. ($250,000.00 on the libel claim and $250,000.00 on the intentional infliction of emotional distress claim)

Judgment is hereby rendered against Defendants and in favor of Allyn W. Gibson for punitive damages in the amount of $6,000,000.00 (two times the amount the jury awarded to the plaintiff for compensatory damages in accordance with Ohio Revised Code Section 2315.21).

TOTAL DAMAGES FOR ALLYN W. GIBSON: $6,500.000.00

On June 7, 2019, the jury returned a compensatory damages verdict in favor of Gibson Bros., Inc. in the amount of $2,274,500.00 in economic damages. The jury completed an interrogatory further specifying that $1,137,250.00 was awarded to Gibson Bros., Inc. and against Oberlin College and Meredith Raimondo on the libel claim, and that the remaining $1,137,250.00 was awarded to Gibson Bros., Inc. and against Meredith Raimondo on the intentional interference with business relations claim.

On June 13, 2019, the jury returned a punitive damages verdict in favor of Gibson Bros., Inc., on the libel claim only, in the amount of $6,973,500.00.

IT IS HEREBY ORDERED, ADJUDGED and DECREED that:

Judgment is rendered against Defendants and in favor of Gibson Bros., Inc. for compensatory damages for economic loss in the amount of $2,274,500.00. ($1,137,250.00 on each claim: libel and intentional interference with business relations).

Judgment is rendered against Defendants and in favor of Gibson Bros., Inc. for punitive damages in the amount of $2,274,500.00 (two times the amount the jury awarded to the plaintiff for compensatory damages in accordance with Ohio Revised Code Section 2315.21).

TOTAL DAMAGES FOR GIBSON BROS. INC.: $4,549,000.00

IT IS SO ORDERED.

VOL____PAGE____

John R. Miraldi, Judge

cc: All Parties

LORAIN COUNTY COURT OF COMMON PLEAS
LORAIN COUNTY, OHIO

TOM ORLANDO, Clerk
JOURNAL ENTRY
John R. Miraldi, Judge

Date 4/22/19 Case No. 17CV193761

GIBSON BROS INC
Plaintiff

JEANANNE M AYOUB
Plaintiff's Attorney (330)455-6112

VS

OBERLIN COLLEGE
Defendant

JOSH M MANDEL
Defendant's Attorney ()-

ENTRY AND RULING ON DEFENDANTS OBERLIN COLLEGE AND MEREDITH RAIMONDO'S MOTIONS FOR SUMMARY JUDGMENT

This matter came to be heard upon Defendants Oberlin College and Meredith Raimondo's Motions for Summary Judgment; Plaintiffs Gibson Brothers Inc., David R. Gibson, and Allyn W. Gibson's Combined Response in Opposition; and Defendants' Combined Reply Brief. After considering the above filings, their attached or referenced exhibits, and for the reasons that follow, Defendants' Motions for Summary Judgment are granted in part and denied in part.

I. Factual Background

Though the Court is not required to make specific findings of fact in ruling on Defendants' Motions for Summary Judgment, the Court believes that the factual landscape is an important foundation to the analysis herein. *See* Ohio Civ. R. 52.

On the afternoon of November 9, 2016, an incident took place involving three African-American Oberlin College Students – Jonathan Aladin, Cecelia Whettstone, and Endia Lawrence, and Allyn D. Gibson – an employee of Plaintiff Gibson Bros. Inc., the entity that operates Gibson's Food Market and Bakery ("Gibson's"). Allyn D. Gibson suspected that Mr. Aladin was attempting to steal wine from Gibson's while purchasing other wine with fake identification. After confronting Mr. Aladin in the store, Mr. Gibson pursued Mr. Aladin out of the store into nearby Tappan Square, and at some point, engaged in a physical altercation with Mr. Aladin. The details of the physical altercation are in dispute, but as a result of the physical altercation, Mr. Gibson detained Mr. Aladin until Oberlin Police officers arrived on scene.

The three students were the only individuals arrested. On August 11, 2017, Mr. Aladin pled to attempted theft, aggravated trespass, and underage consumption in Lorain County Common Pleas Case No. 17CR096081. On the same date, Ms. Lawrence and Ms. Whettstone both pled to attempted theft and aggravated trespass in Lorain County Court of Common Pleas Case Nos. 17CR096083 and 17CR096082 respectively.

On the evening of November 9, 2016, efforts were made to organize a protest outside Gibson's Food Market and Bakery the following day. Members of Oberlin College Staff and Administration were made aware of these efforts, and Dean of Students and named Defendant, Meredith Raimondo communicated with other faculty and staff members about having a meeting on November 10, 2016 in advance of the scheduled protests. Some of the individuals included in that communication were present at the protests. The morning of November 10, 2016, Oberlin College community affairs liaison, Tita Reed, notified the Oberlin Police Department and other local businesses of the coming protests.

The protests began on November 10, 2016 at approximately 11:00 AM and proceeded for approximately two days. Present at the protests were members of the media and general public, police officers, and an estimated crowd of a few hundred people that included Oberlin College students as well as some members of Oberlin College's faculty, staff, and administration. Included among those present was Dean Meredith Raimondo, a party to this lawsuit.

During the protest, protesters held signs, chanted, and distributed a flyer that stated in part that Gibson's is "a RACIST establishment with a LONG ACCOUNT of RACIAL PROFILING and DISCRIMINATION." Some of the specific facts regarding distribution of the flyer are in dispute, but deposition testimony was presented indicating protesters and Oberlin College staff distributed copies of the flyer and/or utilized college copy machines to make additional copies of the flyer. Also during the protests, Meredith Raimondo handed a copy of the flyer to Jason Hawk, a reporter from the Oberlin News Tribune.

On November 10, 2016 members of the Oberlin Student Senate released a written resolution that stated in part that "Gibson's has a history of racial profiling and discriminatory treatment of students and residents alike [...]." The resolution called upon Oberlin College students to stop supporting Gibson's Food Market and Bakery. It also called upon then college President Marvin Krislov and Dean of Students Meredith Raimondo to "condemn by written promulgation the treatment of students of color by Gibson's Food Market and Bakery [...]." Following its release, the resolution was posted in Wilder Hall on Oberlin College's Campus for a period of at least one year.

On November 11, 2016, Marvin Krislov and Meredith Raimondo sent a joint statement via email to all Oberlin College students that outlined the administration's plan to address the events of November 9, 2016.

On November 12, 2016 the then-department head for Oberlin College Department of Africana Studies published a Facebook Post on the department's Facebook page that read: "Very Very proud of our students! Gibson's has been bad for decades, their dislike for Black people is palpable. Their food is rotten and they profile Black students. NO MORE!"

From November 14, 2016 through January 30, 2017 Oberlin College suspended all business with Gibson's. This included a prohibition of purchasing Gibson's items with any college funds, and prohibited business between Gibson's and Oberlin College Dining Services or Bon Appetit Management Company, a separate food service provider for Oberlin College.

On January 30, 2017, Oberlin College resumed business with Gibson's until the instant lawsuit was filed on November 7, 2017.

Plaintiffs eight (8) count complaint asserted the following causes of action against Oberlin College and Meredith Raimondo, the College's Vice President and Dean of Students:

Count 1: Libel

Count 2: Slander

Count 3: Tortious Interference with Business Relationships

Count 4: Tortious Interference with Contracts

Count 5: Deceptive Trade Practices

Count 6: Intentional Infliction of Emotional Distress

Count 7: Negligent Hiring, Retention, and Supervision

Count 8: Trespass

After voluminous discovery, Defendants filed Motions for Summary Judgment seeking judgment in their favor on all the above claims.[1]

[1] Defendant Meredith Raimondo separately filed a Motion for Summary Judgment that shares exhibits with Oberlin College's motion. In fact, though filed separately, Oberlin College's motion actually incorporates Raimondo's motion by reference. The arguments of both Defendants' motions are addressed herein.

II. Summary Judgment Standard

In *Ponder v. Culp*, 2017-Ohio-168, ¶¶ 9-10 (Ohio Ct. App. 9th Dist.), the Ninth District Court of Appeals set forth the standard in ruling on motions for summary judgment:

> Summary judgment is only appropriate where (1) no genuine issue of material fact exists; (2) the movant is entitled to judgment as a matter of law; and (3) the evidence can only produce a finding that is contrary to the non-moving party. Civ.R. 56(C). Before making such a contrary finding, however, a court must view the facts in the light most favorable to the non-moving party and must resolve any doubt in favor of the non-moving party.
>
> Summary judgment consists of a burden-shifting framework. To prevail on a motion for summary judgment, the party moving for summary judgment must first be able to point to evidentiary materials that demonstrate there is no genuine issue as to any material fact, and that the moving party is entitled to judgment as a matter of law. Once a moving party satisfies its burden of supporting its motion for summary judgment with sufficient and acceptable evidence pursuant to Civ.R. 56(C), Civ.R. 56(E) provides that the non-moving party may not rest upon the mere allegations or denials of the moving party's pleadings. Rather, the non-moving party has a reciprocal burden of responding by setting forth specific facts, demonstrating that a "genuine triable issue" exists to be litigated for trial.
>
> (Internal citations omitted).

Additionally, Civ.R. 56(C) provides that the court may only consider pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact timely filed in the action.

III. Application of Law

A. Count One: Libel

A defamation claim is comprised of five elements: "(1) a false and defamatory statement, (2) about plaintiff, (3) published without privilege to a third party, (4) with fault of at least negligence on the part of the defendant, and (5) that was either defamatory *per se* [...] or caused special harm to the plaintiff." *See Gilbert v. WNIR 100 FM*, 142 Ohio App.3d 725, 735 (Ohio Ct. App. 9th Dist. 2001).

When ruling on a motion for summary judgment in a defamation action, "[...] the court must apply the standard of clear and convincing evidence as to the element of fault [...] but the standard of proof for all of the other elements of a private plaintiff's defamation claim is preponderance of the evidence." *See Id. at* 734–35 (*internal citations omitted).*

Plaintiffs offer four (4) allegedly libelous statements – 1) a protest flyer handed out at the protests outside Gibson's Bakery in November of 2016; 2) a November 11, 2016 Oberlin College Student Senate Resolution addressing the incidents of November 9, 2016, 3) a November 11, 2016 email responding to the Student Senate Resolution sent by then-Oberlin College President, Marvin Krislov and Vice President and Dean of Students, Meredith Raimondo; and 4) a November 12, 2016 Facebook Post published by then-Oberlin College Africana Studies Department Chair on the Africana Studies Department's Facebook page.

1. **Plaintiffs' Status under Ohio Defamation Law**

As part of the summary judgment analysis, Court must determine Plaintiffs' status under Ohio Defamation Law. Plaintiffs' status is a question of law for the Court's determination. *See Id.* at 735 (*internal citations omitted).*

Plaintiffs have participated in a local bakery business located in Oberlin, Ohio for over 100 years. Plaintiffs have not achieved the level of pervasive fame, notoriety, power, and/or influence required to find they are general purpose public figures. *See Gilbert*, at 736 ("In some instances an individual may achieve such pervasive fame or notoriety that he becomes a public figure for all purposes and in all contexts."); *see also Worldnet Software Co. v. Gannett Satellite Info. Network, Inc.*, 122 Ohio App.3d 499, 508 (Ohio Ct. App. 1st Dist. 1997) ("A general purpose public figure is one who occupies a position 'of such persuasive power and influence' and 'pervasive fame or notoriety' in the community that he assumes 'special prominence in the resolution of public questions' and 'in the affairs of society.'").

Likewise, Plaintiffs are also not limited-purpose public figures. If a plaintiff voluntarily injects themselves or is drawn into a particular public controversy, they become a limited-purpose public figure for a limited range of issues. *See Gilbert*, at 738 (quoting *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 351 (1974) and citing *Hutchinson v. Proxmire*, 443 U.S. 111, 135 (1979) ("[c]learly, those charged with defamation cannot, by their own conduct, create their own defense by making the claimant a public figure.")).

Defendants argue Plaintiffs became limited-purpose public figures when Allyn D. Gibson – a non-party employee of Plaintiff Gibson Bros., Inc. and relative of the individual Plaintiffs Allyn W. Gibson and David R. Gibson – publically pursued an individual he believed committed a theft offense while Gibson was working at the family's store. The pursuit resulted in a physical altercation in the town square involving Allyn D. Gibson and the alleged shoplifter(s) on November 9, 2016. Defendants argue Allyn D. Gibson acted on behalf of *all Plaintiffs* and thereby voluntarily injected all of them into a public

controversy. Plaintiffs argue they are not limited-purpose public figures because they believe the Defendants' actions created or facilitated the public controversy.

In deciding if an individual is a limited-purpose public figure, the Ninth District Court of Appeals considers a plaintiff's *voluntary* participation in the controversy and whether they have obtained general notoriety in the community based on that participation. *See Gilbert*, at 738-39; *see also Young v. Morning Journal*, 129 Ohio App.3d 99, 103 (Ohio Ct. App. 9th Dist.). Allyn D. Gibson, an employee of the plaintiffs, reasonably believed that a theft offense had been committed within the store. He pursued the alleged offender in order to thwart a criminal offense. Plaintiffs, through the act of their employee, did not voluntarily inject themselves into the public controversy that arose out of the events of November 9, 2016. Accordingly, the Court finds that they are not limited-purpose public figures.

2. The Protest Flyer

a. There are issues of material fact regarding whether Defendants published the flyer.

Defendants argue that Plaintiffs have presented no evidence that either Oberlin College or Meredith Raimondo published the flyer. Under Ohio law, publication constitutes "[a]ny act by which the defamatory matter is communicated to a third party [...]." *Gilbert*, at 743 (quoting *Hecht v. Levin*, 66 Ohio St.3d 458, 460 (Ohio 1993)).

"As a general rule, all persons who cause or participate in the publication of libelous or slanderous matter are responsible for such publication. Hence, one who requests, procures, or aids or abets, another to publish defamatory matter is liable as well as the publisher." *Cooke v. United Dairy Farmers, Inc.*, 2003-Ohio-3118, ¶ 25 (Ohio Ct. App. 10th Dist.) (citing *Scott v. Hull* (1970), 22 Ohio App.2d 141, 144, 259 N.E.2d 160 and 53 Corpus Juris Secundum 231, Libel and Slander, Section 148). "Thus, liability to respond in damages for the publication of defamation must be predicated on a positive act." *Id.* "Nonfeasance, on the other hand, is not a predicate for liability. Mere knowledge of the acts of another is insufficient to support liability." *Id.*

Here, it is undisputed that Meredith Raimondo presented at least one individual, Jason Hawk, with a copy of the protest flyer. The remaining evidence surrounding the distribution of the flyer, and the explanations for doing so, are in dispute. But Plaintiffs have presented testimony from individuals who say they observed Raimondo and other Oberlin College employees handing out flyers at the protest. Further, Plaintiffs offered evidence that Defendants permitted the protesters to make copies of the flyer on the Oberlin College Conservatory's Office's copy machine during the protests and provided protesters with refreshments and gloves for use during the protests. Weighing all of this

evidence in Plaintiffs' favor, the Court finds there are genuine issues of material fact regarding whether Defendants published the flyer.

b. There are issues of material fact regarding the falsity of the statements in the flyer.

Defendants briefly allege that they are entitled to summary judgment on account of the flyer restating a matter of public knowledge that Plaintiffs cannot prove to be false. More succinctly stated, when allegedly defamatory statements made about a private individual involve a matter of public concern, the plaintiff bears the burden of proving the falsity of the statements by preponderance of the evidence. *See Gilbert*, at 740 (citing *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 776 (1986)).

In this case, the allegations of racial profiling with a long account of discrimination are matters of public concern. But in support of their argument, Defendants only pointed to Exhibits GG and LL of Allyn D. Gibson's deposition and a single Yelp review. This evidence is insufficient to meet Defendants' initial burden of pointing to evidence tending to show there are no issues of material fact regarding the falsity of the statements in the flyer. Even if Defendants had met their burden, Plaintiffs offered witness testimony disputing the allegations that they are a "racist establishment with a long account of racial profiling and discrimination", and that evidence would be sufficient to create an issue of material fact.

c. The protest flyer statements are not protected opinions

Defendants argue that Plaintiffs cannot rely on the contents of the protest flyer as evidence of their libel claim because the flyer statements are protected opinions. The Court disagrees.

A "totality of the circumstances" approach is utilized to determine whether a statement is opinion or fact. *See Scott v. News-Herald*, 25 Ohio St.3d 243, 251 (1986). Ohio courts are to analyze the following four (4) factors to determine whether a statement is opinion or fact:

- The specific language used;
- Whether the statement in question is verifiable;
- The general context of the statement; and
- The broader context in which the statement appeared. Id

The required "perspective" for analysis of these factors is that of a "reasonable reader." A court should not isolate a specific statement if, only by doing so, such isolation causes

a statement of opinion to appear factual. *See McKimm v. Ohio Election Comm'n*, 89 Ohio St.3d 139, 145 (2000) (internal citation omitted). The four-pronged analysis does not constitute a "bright-line test. Each of the four factors should be addressed and the weight to be given to any one will vary depending on the circumstances presented." *Sturdevant v. Likley*, 2013-Ohio-987, ¶¶ 8-9 (Ohio Ct. App. 9th Dist.) (*citing Scott*).

Concluding that a statement is an opinion does not automatically make it non-actionable. Expressions of opinion may often imply an assertion of objective fact. *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 18, 110 S.Ct. 2695, 2706 (1990) (overruled by *Scott* on other grounds). If a reader could reasonably conclude that the communication is stating a fact that could be verified, the communication will not be considered an opinion, especially if it is sufficiently derogatory to hurt the subject's reputation. In addition, a communication that is presented in the form of an opinion may be considered defamatory if it implies that the opinion is based on defamatory facts that have not been disclosed. *See Id.* at 2705-06 ("Even if the speaker states the facts upon which he bases his opinion, if those facts are either incorrect or incomplete, or if his assessment of them is erroneous, the statement may still imply a false assertion of fact.").

FACTOR ONE: SPECIFIC LANGUAGE:

The specific language of the protest flyer was:

> DON'T BUY. This is a RACIST establishment with a LONG ACCOUNT of RACIAL PROFILING AND DISCRIMINATION. Today we urge you to shop elsewhere in light of a particularly heinous event involving the owners of this establishment and local law enforcement. PLEASE STAND WITH US. A member of our community was assaulted by the owner of this establishment yesterday. A nineteen y/o young man was apprehended and choked by Allyn Gibson of Gibson's Food Mart & Bakery. The young man, who was accompanied by 2 friends was choked until the 2 forced Allyn to let go. After The [sic] young man was free, Allyn chased him across College St. and into Tappan Square. There, Allyn tackled him and restrained him again until the Oberlin police arrived. The 3 were racially profiled on the scene. They were arrested without being questioned, asked their names, or read their rights. 2 were released shortly after and charged with assault. The young man is being held in Lorain County Jail, charged with robbery. No bail until his arraignment this Friday 8:30 AM, 65 S. Main.

The flyer begins with the following statement and the following words in all capital letters: "DON'T BUY. This is a RACIST establishment with a LONG ACCOUNT of RACIAL PROFILING AND DISCRIMINATION." To the average reader, this is the headline of the flyer. The specific language that "[Gibson's] is a RACIST establishment with a LONG ACCOUNT of RACIAL PROFILING and DISCRIMINATION" is pejorative. The specific language factor weighs in favor of actionability. *See Lennon v. Cuyahoga Cty. Juvenile Court*, 2006 WL 1428920 at ¶ 30 (Ohio Ct. App. 8th Dist. 2006) ("One co-worker told another co-worker that appellant was a racist [...] we cannot think of a scenario in which these words are not pejorative.").

The flyer also states that the owner was involved in a "particularly heinous event, when a member of our community was assaulted by the owner of this establishment." The flyer goes on to describe the assault to include the choking of another person until the assailant was forced to let go. Assault is a crime (O.R.C. 2903.13) and thus the flyer asserts that the owner of Gibson's committed a crime by choking the victim. Written words accusing a person of committing any crime are libelous *per se*. *Akron–Canton Waste Oil v. Safety–Kleen Oil Serv., Inc.* (1992), 81 Ohio App.3d 591, 601, 611 N.E.2d 955, 962, citing *State v. Smily* (1881), 37 Ohio St. 30.

The flyer continues with: "After The [sic] young man was free, Allyn chased him across College St. and into Tappan Square. There, Allyn tackled him and restrained him again until the Oberlin police arrived. The 3 were racially profiled on the scene." Thus, the flyer indicates that after the initial assault of choking by Allyn, a second assault occurred when Allyn tackled the young man and restrained him until the police arrived. The three (the alleged student thief and two acquaintances) were racially profiled on the scene. The flyer does not specifically exclude Allyn from participation in the racial profiling. Although the reasonable reader could infer that the police were also involved in the racial profiling, the accusation in the flyer against Gibson's includes "...a long account of racial profiling."

FACTOR TWO: IS THE STATEMENT IN QUESTION VERIFIABLE?

With respect to factor two: the Supreme Court of Ohio in *Scott* stated that "[i]f an author represents that he has private, first-hand knowledge which substantiates the opinion he expresses, the expression of opinion becomes as damaging as an assertion of fact." *Scott*, at 251-252. The Supreme Court of Ohio also stated in *Scott* that "[w]here the statement lacks a plausible method of verification, a reasonable reader will not believe that the statement has specific factual content." *Id.* at 252. Stated differently, the method of verification must be plausible.

In analyzing the statement "with a LONG ACCOUNT of RACIAL PROFILING AND DISCRIMINATION," "account" is defined in part in Webster's dictionary as: "a

description of facts, conditions or events." A noted synonym for account is the word history: defined in part in Webster's as "an established record." Here, the accusation that Gibson's has a "*long account* of racial profiling and discrimination" goes beyond implication and directly tells the reasonable reader that the author's previous statement that "[Gibson's] is a racist establishment" is supported by a lengthy and potentially documented record of racial profiling and discrimination. To the average reader, the statement of a LONG ACCOUNT OF RACIAL PROFILING AND DISCRIMINATION suggests that the publisher has knowledge of a documented past history of such activity. The "LONG ACCOUNT" language implies to the reasonable reader that the publisher's statement is based on defamatory facts that have not been disclosed. *See Id.* at 251-52. The implication of the undisclosed facts supporting the statements of the flyer make them as damaging as an assertion of fact. *See Scott*, at 251-52.

A letter from the Defendants also supports verifiability. On November 11, 2016, and in response to the events at Gibson's Bakery on November 9, 2016, Marvin Krislov, then-President of Oberlin College and Meredith Raimondo, Dean of Students, issued a joint statement. In the context of the alleged racially charged incident, they said: "We will commit every resource to determining the full and true narrative, including exploring whether this is a pattern and not an isolated incident." The Defendants indicate a willingness to "commit every resource" to determine "if this [racial discrimination] by the plaintiffs is "a pattern and not an isolated incident." The Defendants' willingness to commit resources is probative of their belief that a pattern of racial discrimination by the Plaintiffs is in fact verifiable. In this Court's view, a "pattern of racial discrimination" and "a long account of racial discrimination" are synonymous and plausibly verifiable.

The statements alleging criminal conduct (criminal assault) by the owner of Gibson's (Plaintiffs) are verifiable. *See Scott*, at 252 (A statement that an individual committed perjury is "[...] certainly verifiable by a perjury action with evidence adduced from the transcripts and witnesses present at the hearing."); *see Condit v. Clermont Cty. Review*, 110 Ohio App.3d 755, 761 (Ohio Ct. App. 12th Dist. 1996) ("A classic example of a statement with a well-defined meaning is an accusation of a crime because such statements are laden with factual content that may support an action for defamation.");

FACTOR THREE: THE GENERAL CONTEXT

General context involves an analysis of the larger objective and subjective context of the statement. Objective cautionary terms, or "language of apparency" places a reader on notice that what is being read is the opinion of the writer. Terms such as "in my opinion" or "I think" are highly suggestive of opinion but are not dispositive, particularly in view of the potential for abuse. *See Scott*, at 252.

Nowhere in the flyer is there any language of apparency. The only term that could be construed as opinion is the term racist and heinous. However as previously discussed, racist was used in conjunction with "a long account of racial profiling and discrimination."

In analyzing a statement's context, the Court must also consider the gist and general tone of the statement. The general tone of the statement is that Plaintiffs are racists and that they have a long account of racial profiling and discrimination. That statement is followed by a perceived factual account of an incident that is intended to support the previous statement. The account includes statements that an owner of this business assaulted a member of the Oberlin College Community and supports it with the following statements:

> A nineteen year old young man was apprehended and choked by Allyn Gibson of Gibson's Food Mart & Bakery. The young man, who was accompanied by 2 friends was choked until the 2 forced Allyn to let go. After The [sic] young man was free, Allyn chased him across College St. and into Tappan Square. There, Allyn tackled him and restrained him again until the Oberlin police arrived. The 3 were racially profiled on the scene. They were arrested without being questioned, asked their names, or read their rights. 2 were released shortly after and charged with assault. The young man is being held in Lorain County Jail, charged with robbery. No bail until his arraignment this Friday 8:30 AM, 65 S. Main.

The general context of this flyer is that the Plaintiffs are racists with a long account of racial profiling and discrimination, and the events that happened yesterday substantiate the general context of the statement.

FACTOR FOUR: THE BROADER CONTEXT IN WHICH THE STATEMENT APPEARED

The fourth concern is with the broader context of the allegedly defamatory remarks. It has been remarked that "[d]ifferent types of writing have widely varying social conventions which signal to the reader the likelihood of a statement's being either fact or opinion." *Ollman v. Evans*, 750 F.2d 970, 979 (D.C. Cir. 1984) (citing *Natl. Assn. of Letter Carriers, supra,* 418 U.S. at 286, 94 S.Ct. at 2782).

The previously discussed statements appeared in a written flyer. The purpose of the flyer was to inform people and to persuade them into action. The information conveyed was that the plaintiff business owners were racist with a long account of racial profiling and discrimination. The action sought was unity in the form of a boycott of the business; "DON'T BUY...shop elsewhere...STAND WITH US." Because this flyer

sought to inform and rally the reader to act, this Court finds that the reasonable reader would be less inclined to believe that the statements were opinions rather than fact.

This Court, having construed the evidence in a light most favorable to the non-moving party, has analyzed the flyer utilizing the four factors as required by *Scott, supra*. The result of the Court's analysis is that many factors weigh in favor of actionability. Based on a totality of the circumstances and construing the evidence in the light most favorable to Plaintiffs, the non-moving party, it is this Court's view that the statements made in the flyer are not constitutionally protected opinion.

3. The Student Senate Resolution

a. There are issues of fact regarding the falsity of the Student Senate Resolution

Defendants challenge Plaintiffs ability to prove the falsity of the statements in the resolution. Where a plaintiff is a private individual and the matter is of public concern, the plaintiff bears the burden of proving the falsity of the statements by preponderance of the evidence. *See Gilbert*, at 740 (citing *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 776 (1986)). Here, though Plaintiffs are private figures, the nature of the controversy – allegations of racial profiling and discrimination – are matters of public concern, and Plaintiffs must therefore prove the falsity of the purported statements by preponderance of the evidence. The relevant portions of the senate resolution include:

> Yesterday evening, reports of an incident involving employees of Gibson's Food Market and Bakery and current Oberlin College students began to circulate. After further review today, consisting of conversations with students involved, statements from witnesses, and a thorough reading of the police report, we find it important to share a few key facts.
>
> A Black student was chased and assaulted at Gibson's after being accused of stealing. Several other students, attempting to prevent the assaulted student from sustaining further injury, were arrested and held by the Oberlin Police Department. In the midst of all this, Gibson's employees were never detained and were given preferential treatment by police officers.
>
> Gibson's has a history of racial profiling and discriminatory treatment of students and residents alike."

***

> Gibson's Food Market and Bakery has made their utter lack of respect for community members of color strikingly visible [...].

Defendants believe Plaintiffs cannot prove the statements are false because the statements are consistent with selected witness statements provided by individuals that witnessed the events of November 9, 2016. In response, Plaintiffs have submitted statistics and deposition testimony from several witnesses they believe prove the statements are false. Weighing the evidence in Plaintiffs' favor, there is an issue of material fact with regard to the falsity of the statements.

b. There are issues of fact regarding whether Defendants published the Student Senate Resolution.

Proof of publication of defamatory matter is also an essential element to defamation that must be proven by clear and convincing evidence. Publication is "communication intentionally or by a negligent act to one other than the person defamed." *Gilbert*, at 743. Raimondo separately argues that Plaintiffs cannot show she created or published the resolution. But as described in the preceding paragraph, Plaintiffs have shown circumstantial evidence of Defendants' participation in the creation, circulation, and public posting of the resolution in Wilder Hall, a prominent central hub of student activity on Oberlin College's Campus for a significant period of time. (See Plaintiffs' Opp., p. 53; citing Krislov Vol. I, Ex. 10). Weighing this evidence in Plaintiffs' favor, there is an issue of material fact regarding whether Defendants published the resolution.

c. The Student Resolution Statements are not protected opinions

Defendants argue that Plaintiffs cannot rely on the contents of the Student Senate Resolution as evidence of their libel claim because the statements are protected opinions. The Court disagrees.

The Court will engage in a "totality of the circumstances" approach to analyze the following four (4) factors and determine whether or not the statement is an opinion or fact. *See Scott v. News-Herald*, 25 Ohio St.3d 243 (1986). (Though Defendants did not specifically analyze the November 10, 2016 Oberlin College Student Senate Resolution under the applicable framework, they did allege generally that it was a protected opinion. The resolution is therefore subject to the same analysis).

FACTOR ONE: SPECIFIC LANGUAGE:

The specific language of the resolution states:

> Dear Oberlin Community,
>
> It is with great regret that we write you expressing deep abhorrence towards violence against students. Oberlin is no stranger to acts of hatred, bigotry, and anti-Black violence. As stewards of justice, we are called to acknowledge, repudiate, and actively reject violence in all forms, especially as it affects our own.
>
> Yesterday evening, reports of an incident involving employees of Gibson's Food Market and Bakery and current Oberlin College Students began to circulate. After further review today, consisting of conversations with students involved, statements from witnesses, and a thorough reading of the police report, we find it important to share a few key facts.
>
> A Black student was chased and assaulted at Gibson's after being accused of stealing. Several other students, attempting to prevent the assaulted student from sustaining further injury, were arrested and held by the Oberlin Police Department. In the midst of all this, Gibson's employees were never detained and were given preferential treatment by officers.
>
> Gibson's has a history of racial profiling and discriminatory treatment of students and residents alike. Charged as representatives of the Associated Students of Oberlin College, we have passed the following resolution:
>
> WHEREAS, Oberlin College Students regularly engage and support the commerce of the City of Oberlin; and
>
> WHEREAS, Oberlin College Students stand boldly against racialized violence in the United States, abroad, and in our own community; and
>
> WHEREAS, Gibson's Food Market and Bakery has made their utter lack of respect for community members of color strikingly visible; therefore be it

RESOLVED that the Students of Oberlin College immediately cease all support, financial and otherwise, of Gibson's Food Market and Bakery; and be it further

RESOLVED that the students of Oberlin College call on President Marvin Krislov, Dean of Students Meredith Raimondo, all other administrators and the general faculty to condemn by written promulgation the treatment of students of color by Gibson's Food Market and Bakery; and be it further

RESOLVED that the students of Oberlin College further work toward creating a community in which all students are respected, not met with hate due to the color of their skin.

Here, the specific language used includes a statements that "A Black student was chased and assaulted at Gibson's after being accused of stealing [...] Gibson's has a history of racial profiling and discriminatory treatment of students and residents alike [...] Gibson's Food Market and Bakery has made their utter lack of respect for community members of color strikingly visible", an inference that Plaintiffs engaged in "racialized violence", and an implication that students are "met with hate due to the color of the skin" at Gibson's bakery.

Much like the protest flyer, the resolution statement alleges criminal conduct of assault by Plaintiffs. Written words accusing a person of committing any crime are libelous *per se*. *See Akron–Canton Waste Oil, supra,* at 601 (citing *State v. Smily* (1881), 37 Ohio St. 30.). The accusations of racism, racialized violence, and a history of discrimination along with the implication that students of color are met with hate are pejorative. *See Lennon, supra.* These statements are placed in paragraphs after the introduction of the resolution. A reasonable reader would conclude that the pejorative statements and allegations of criminal conduct come after the Student Senate conducted a "further review" of the incident.

FACTOR TWO: IS THE STATEMENT IN QUESTION VERIFIABLE?

The statement that "Gibson's has a history of racial profiling and discriminatory treatment of students and residents alike" implies that the authors have additional information supporting their accusation. As previously discussed the word "history" is defined and implies a proven record of such conduct. Furthermore, these statements follow the introduction of the resolution. A reasonable reader would conclude that the pejorative statements and allegations of criminal conduct come after the Student Senate

conducted a "further review" of the incident. This review included speaking with the students involved, reviewing witness statements, and reading the police report. As a result a few key facts will be shared with the reader. Here, the author represents that he/she has private, first-hand knowledge which substantiates the opinion expressed, specifically racial profiling and hate toward people of color. As a result, the expression of opinion becomes as damaging as an assertion of fact." *Scott*, at 251-252.

In addition, a letter from the Defendants supports verifiability. See this Court's reference to the November 11, 2016 joint statement of Marvin Krislov, President of Oberlin College and Meredith Raimondo, Dean of Students, contained in the verifiability analysis of the flyer.

FACTOR THREE: THE GENERAL CONTEXT

The general context was a formal senate resolution that was drafted and adopted by the Student Senate and then electronically sent to the school president, dean of students, and the entire student body. The purpose of the statement was to be persuasive – to convince college leadership and the student body to join them in ceasing all support of Plaintiffs' business because Gibson's has a history of racial profiling and discriminatory treatment of students and residents alike; Gibson's Food Market and Bakery has made their utter lack of respect for community members of color strikingly visible; because Gibson criminally assaulted a black member of our community; and because students are met with hate at Gibson's due to the color of their skin.

FACTOR FOUR: THE BROADER CONTEXT IN WHICH THE STATEMENT APPEARED

The fourth concern is with the broader context of the allegedly defamatory remarks. It has been remarked that "[d]ifferent types of writing have [...] widely varying social conventions which signal to the reader the likelihood of a statement's being either fact or opinion." *Ollman, supra,* at 979.

As discussed, these statements were contained in a formal Student Senate resolution following "further review" by the Student Senate of the incident in question. This was not an opinion piece by the student newspaper. This was a "declaration" demanding a call to action and alleging first-hand knowledge of facts to support their actionable pejorative statements toward the Plaintiffs.

This Court, having construed the evidence in a light most favorable to the non-moving party, has analyzed statements in the senate resolution utilizing the four factors as required by *Scott, supra*. The result of the Court's analysis is that many factors weigh in

favor of actionability. Based on a totality of the circumstances and construing the evidence in the light most favorable to the non-moving party, it is this Court's view that the statements made in the Student Senate resolution are not constitutionally protected opinions.

4. Marvin Krislov and Meredith Raimondo's November 11, 2016 joint statement

a. There are no issues of material fact regarding whether the joint statement contains false statements

On November 11, 2016 and in response to the events at Gibson's Bakery on November 9, 2016, then college president, Marvin Krislov and Meredith Raimondo, dean of students, issued a joint statement. The statement was issued in both their names on November 11, 2016, sent to students and staff from the College Communications Department email address, and was also published in the *Oberlin Review* – a student run Oberlin College newspaper. The entirety of the statement reads:

> Dear Students,
>
> This has been a difficult few days for our community, not simply because of the events at Gibson's Bakery, but because of the fears and concerns that many are feeling in response to the outcome of the presidential election. We write foremost to acknowledge the pain and sadness that many of you are experiencing. We want you to know that the administration, faculty, and staff are here to support you as we work through this moment together.
>
> Regarding the incident at Gibson's, we are deeply troubled because we have heard from students that there is more to the story than what has been generally reported. We will commit every resource to determining the full and true narrative, including exploring whether this is a pattern and not an isolated incident. We are dedicated to a campus and community that treats all faculty, staff and students fairly and without discrimination. We expect that our community businesses and friends share the same values and commitments.
>
> Accordingly, we have taken the following steps: 1) Dean Meredith Raimondo and her team have worked to support students and families affected by these events, and will continue to do so. 2) Tita Reed, Special Assistant for Government and Community Relations, has reached out to

Mr. Gibson to engage in dialogue that will ensure that our broader community can work and learn together in an environment of mutual respect free of discrimination. We will continue to work on these matters in the coming days to make sure that our students, staff, and faculty can feel safe and secure throughout our town.

We are grateful for the determination of our students and for the leadership demonstrated by Student Senate. Thanks to all who have contacted us with suggestions and concerns.

Marvin Krislov
President

Meredith Raimondo
Vice President and Dean of Students

Defendants argue that Raimondo and Krislov's Joint Statement was not defamatory because it contains, at most, implied statements that Plaintiffs are racists and/or engaged in discrimination, and Ohio does not recognize actionable defamation based on implied statements. In support, Defendants cite *Krems v. Univ. Hosp. of Cleveland*, 133 Ohio App.3d 6, 12 (Ohio Ct. App. 8th Dist. 1999). While *Krems* does state "Ohio does not recognize libel through implied statements", the Court in *Krems* cited *Ashcroft v. Mt. Sinai Med. Ctr.* (1990), 68 Ohio App.3d 359, 588 N.E.2d 280 as support for that holding. But *Ashcroft* actually makes no mention of implied statements. Instead, the *Ashcroft* Court found that unspecific allegations based on "rumors by way of the grapevine" were insufficient to survive summary judgment. *See Ashcroft*, at 365.

Plaintiffs take issue with two statements in the joint statement. The first is the statement "[w]e are dedicated to a campus and community that treats all faculty, staff and students fairly and without discrimination. We expect that our community businesses and friends share the same values and commitments." Plaintiffs view this statements as an implication that they are racist. But this statement outlines Krislov and Raimondo's expectations of *all* community businesses and friends. The fact that it was released in the context of the days following the protests does not make it apply only to Plaintiffs.

The second statement is "[w]e are grateful for the determination of our students and for the leadership demonstrated by Student Senate." Plaintiffs see this statement as an implied endorsement of the statements in the Student Senate Resolution. Plaintiffs read the joint statement in conjunction with the resolution, but the average reader may not even know the resolution existed. Krislov and Raimondo's vague, general

applauding of the Student Senate is not a false statement, and the resolution cannot make the otherwise non-defamatory joint statement defamatory.

Even weighing the evidence in Plaintiffs' favor, the Court finds the joint statement is not defamatory.

5. The Statements in the Department of Africana Studies Facebook Post are Protected Opinions

Defendants have challenged Plaintiffs ability to utilize a Facebook post published by a faculty member on the Department of Africana Studies's Facebook Page because it is a protected opinion. The Court agrees.

The Court will engage in a "totality of the circumstances" approach and analyze the following four (4) factor to determine whether or not the statement is an opinion or fact: *See Scott v. News-Herald*, 25 Ohio St.3d 243, 251 (1986).

FACTOR ONE: SPECIFIC LANGUAGE:

The post was published online November 12, 2016 and the specific language was: "Very Very proud of our students! Gibson's has been bad for decades, their dislike for Black people is palpable. Their food is rotten and they profile Black students. NO MORE!"

The specific language about being "bad for decades" and the "food is rotten" weigh toward opinion speech. The only questionable language is the portions stating that Plaintiffs dislike black people and profile black students. These statement are pejorative.

FACTOR TWO: IS THE STATEMENT IN QUESTION VERIFIABLE?

Unlike the flyer or the student resolution, the Facebook post would not lead the reasonable reader to conclude that the author had first-hand actual knowledge of facts, or undisclosed facts to support the opinion. There is no reference to a "long account" or "history" of racial profiling. There is no allegation of criminal conduct and the term racist is not used. The statement does indicate that the Plaintiffs "dislike" black people. The statement that the Plaintiffs "profile black students" may be verifiable. See this Court's reference to the November 11, 2016 joint statement of Marvin Krislov, President of Oberlin College and Meredith Raimondo, Dean of Students, contained in the verifiability analysis of the flyer.

FACTOR THREE: THE GENERAL CONTEXT

General context involves an analysis of the larger objective and subjective context of the statement. This Facebook post appeared on November 12, 2016, after the flyer and protest, the senate resolution, and a day after the joint statement by Marvin Krislov and Meredith Raimondo. The context of the post can generally be construed as a stamp of approval regarding the previous activity.

FACTOR FOUR: THE BROADER CONTEXT IN WHICH THE STATEMENT APPEARED

The fourth concern is with the broader context of the allegedly defamatory remarks. It has been remarked that "[d]ifferent types of writing have [...] widely varying social conventions which signal to the reader the likelihood of a statement's being either fact or opinion." *Ollman, supra,* at 979 (internal citation omitted).

These statements appeared in a Facebook post. Under current social conventions, a statement on Facebook generally signals to the reasonable reader that it is the author's opinion rather than a fact.

All of the factors and totality of the circumstances weigh in favor of finding that the Facebook Post is an opinion. The specific language is vague and hyperbolic. The allegation that Gibson's "profile[s] Black students" is certainly pejorative, but the entirety of the post includes the hyperbolic and vague claim that the food is "rotten" and the protest or rallying cry language of "NO MORE" would lead a the reasonable reader to believe they were reading the author's subjective opinion. The general and broader context are indicative that the post is a statement of opinion.

Even weighing all of this evidence in Plaintiffs' favor, the totality of the circumstances weighs in favor of finding the statements in the Facebook post are protected opinions.

6. Clear and Convincing Evidence of Fault:

In a private-figure defamation action such as this, the plaintiff must prove by clear and convincing evidence that the defendant failed to act reasonably in attempting to discover the truth or falsity or defamatory character of the publication. *Lansdowne v. Beacon Journal Pub. Co.*, 32 Ohio St.3d 176, 180-181 (Ohio 1987). Clear and convincing evidence is that which will produce in the mind of the trier of facts a firm belief or conviction as to the facts sought to be established. *Id.* at 180-181 (citing *Cross v. Ledford*, 161 Ohio St. 469 (Ohio 1954)).

This Court has concluded that the flyer and student resolution contained actionable defamatory statements made about Plaintiffs. Specifically that the Plaintiffs are racists,

that the Plaintiffs have a long account and a history of racial profiling and discrimination; and statements that the Plaintiffs committed crimes of assault.

A question of fact exists as to whether or not the defendants acted reasonably in attempting to discover the truth or falsity or defamatory character of their publications. Defendants failed to offer any evidence that they considered the law of protection of property before they alleged that the owner of plaintiffs' business committed the crime of assault. With respect to the statements that the plaintiffs are racists and that they have a long account and a history of racial profiling and discrimination, the November 11, 2016 from President and Dean of Students sets forth their commitment "to determining the full and true narrative, including exploring whether this is a pattern and not an isolated incident." Perhaps this is something they should have done prior to publishing the defamatory statements concerning the plaintiffs.

B. Count Two: Slander

Plaintiffs slander claim is based on chants of "[expletive] the Gibsons" and "Gibson's is racist" directed at Plaintiffs and their employees during the protests, and statements allegedly made about Plaintiffs by Oberlin College Tour Guides during new student tours. Because the chants are protected opinions and the hearsay evidence relating to the alleged tour guide statements is too tenuous to sustain a claim for slander, Defendants are entitled to judgment as a matter of law as to Count 2 of Plaintiffs' Complaint.

1. The Protest Chants are Opinions

The protest chants directed at Plaintiffs included statements like "[expletive] the Gibsons" and "Gibson's is racist." Applying the *Scott* factors and considering the totality of the circumstances, the chants are protected opinions. The content is pejorative and weighs in favor of actionable defamation. Verifiability weighs in favor of finding the statements are opinions. The key distinction between the statements in the flyer and the resolution is that the former contained implications of additional information or factual support for the statements. Here, there is no such implication tending to make the statements sound more verifiable. Likewise, the context and tone of the chants are more likely to be perceived by the average listener to be expressions of opinion. Even when weighing the above evidence in Plaintiffs' favor, there are no issues of fact regarding whether the protest chants are protected opinions.

2. The Alleged Statements of Tour Guides are Insufficient to maintain a claim for slander

Plaintiffs likewise cannot rely on the alleged statements of unidentified tour guides as evidence of its defamation claims against Defendants. The hearsay evidence

surrounding these statements is insufficient, and the attempt to tie these statements to Defendants is too tenuous. Even if there were additional details or evidence related to these statements, they are likely protected opinions for the same reasons that the protest chants and Facebook post are protected opinions.

The only evidence of these statements is the testimony of Oberlin College employee, Ferdinand Protzman. Mr. Protzman also testified that he recalled hearing from unknown persons that unidentified student tour guides had told incoming or prospective students on Oberlin College tours not to shop at Gibson's and/or that Gibson's racially profiled and discriminated against minorities. Mr. Protzman states that he heard this might have happened two to three times, and that Oberlin College Senior Staff took action to prevent it from happening in the future. (Protzman Dep. pp. 232, lines 11-13; 233, lines 4-10). Mr. Protzman also testified in his deposition that tour guides are paid by Oberlin College and receive minimal training that includes suggested routes and talking points (Protzman Dep. pp. 228, lines 5-17; 230-231). This evidence standing alone is insufficient to maintain a claim for slander.

Plaintiffs also cannot avoid summary judgment on their slander claims by simply stating that "Plaintiffs are by no means saying that [the statements of protesters and tour guides] are the only statements which form the basis of Plaintiffs' slander claim." Pltf. Opposition, p. 90. Summary judgment is a burden-shifting framework, and Defendants have met their burden of pointing to evidentiary materials showing there is not an issue of material fact with regard to Plaintiffs' slander claim. By only presenting evidence related to the protected protest chants and unspecific, rumored tour guide statements, Plaintiffs have failed to meet their reciprocal burden.

After weighing the evidence in Plaintiffs' favor, there are no genuine issues of material fact with regard to Plaintiffs' slander claims. Defendants are entitled to judgment as a matter of law as to Count Two of Plaintiffs' Complaint.

C. Counts Three and Four: Tortious Interference with Contract and/or Business Relationships

The elements of tortious interference with contract are "1) the existence of a contract, 2) the wrongdoer's knowledge of the contract, 3) the wrongdoer's intentional procurement of the contract's breach, 4) the lack of justification, and 5) resulting damages." *Fred Siegel Co., L.P.A. v. Arter & Hadden*, 85 Ohio St.3d 171, 176, 1999-Ohio-260 (Ohio 1999). Tortious interference with a business relationship occurs when a wrongdoer's interference, rather than procuring a contract breach, causes a third party to not enter into or continue a business relationship. *See Deems v. Ecowater Sys., Inc.*, 2013-Ohio-2431 at ¶ 26 (Ohio Ct. App. 9th Dist.) (internal citations omitted). Defendants argue there are no issues of material fact with regard to the first, second, and fourth elements.

The Existence of a Contract and/or Business Relationship

Defendants first argue the lack of a written contract between Bon Appetit and Plaintiffs is fatal to Plaintiffs' claim. But at least one Ohio court has held that an action for tortious interference can be maintained on a valid oral contract. *See Martin v. Jones*, 2015-Ohio-3168, ¶ 64 (Ohio Ct. App. 4th Dist.). As evidence of a contract between Bon Appetit and Plaintiffs, Plaintiffs presented witness testimony and affidavits showing that Gibson's Bakery had an annual "standing order" of items it wished to receive from Plaintiffs on a daily basis throughout the year, and that they were utilized by Bon Appetit as a vendor or provider of goods for decades. Weighing the evidence in Plaintiffs' favor, there is an issue of material fact regarding the existence of a contract between Bon Appetit and Plaintiffs.

Alternatively, Defendants argue they cannot be liable because they would be a party to any contract or business relationship with Plaintiffs by means of Bon Appetit being an agent of Oberlin College. *See Boyd v. Archdiocese of Cincinnati*, 2015-Ohio-1394, ¶ 31 (Ohio Ct. App. 2nd Dist.) (citing *Dorricott v. Fairhill Ctr. for Aging*, 2 F.Supp.2d 982, 989–990 (N.D.Ohio 1998), and *Miller v. Wikel Mfg. Co., Inc.*, 46 Ohio St.3d 76, 79, 545 N.E.2d 76 (1989) (The wrongdoer in a tortious interference with contract or business relationship claim cannot be a party or agent of the party to the contract or business relationship.) But under Ohio law, the existence of an agency relationship is a question of fact. *See Brainard v. Am. Skandia Life Assur. Corp.*, 432 F.3d 655, 661 (6th Cir. 2005).

Here, the parties' respective interpretations of the agreement and relationships between Plaintiffs, Bon Appetit and Oberlin College reflect the existence of issues of material fact.

Defendants' Knowledge of the Contract and/or Business Relationship

There is likewise an issue of material fact as to whether Defendants knew about the purported contract and/or business relationship between Plaintiffs and Defendants. Defendants claim that "no one at Oberlin College ha[d] knowledge of any such contract" with Plaintiffs. But Plaintiffs presented evidence that Meredith Raimondo and Marvin Krislov knew enough about the relationship between Bon Appetit and Gibsons to order Bon Appetit to cease engaging all business with Plaintiffs. Weighing Defendants' actions, the longevity of the purported contract and/or business relationship, and the evidence in Plaintiffs' favor, there is at least an issue of material fact as to whether Defendants had knowledge of a contract and/or business relationship between Bon Appetit and Plaintiffs.

Lack of Justification

Ohio law imposes the burden of proving 'lack of privilege' or 'improper interference' on the plaintiff. *See Kenty v. Transamerica Premium Ins.*, 72 Ohio St.3d 415, 417, 650 N.E.2d 863, 866 (1995). In determining whether Defendants' purported interference lacks justification – or was done without privilege – the Court must apply the following factors:

(a) the nature of the actor's conduct,
(b) the actor's motive,
(c) the interests of the other with which the actor's conduct interferes,
(d) the interests sought to be advanced by the actor,
(e) the social interests in protecting the freedom of action of the actor and the contractual interests of the other,
(f) the proximity or remoteness of the actor's conduct to the interference and
(g) the relations between the parties.

Deems v. Ecowater Sys., Inc., 2016-Ohio-5022, ¶ 27 (Ohio Ct. App. 9th Dist.).

Applying the above factors to this case is extremely difficult because of the amount of factual disputes that riddle each factor. Both Plaintiffs and Defendants summarize and describe Defendants' conduct and motive in completely opposite ways. They also describe Plaintiffs' interests and the social interests at stake in completely opposite ways. Given this disputed factual landscape, there are clearly issues of material fact that make it impossible to find as a matter of law at this juncture that Defendants were justified in their purported interference with Plaintiffs' contract and/or business relationship.

After weighing the evidence in Plaintiffs' favor, there are genuine issues of material fact with regard to Plaintiffs' tortious interference claims. Therefore Defendants' Motion for Summary Judgment on Counts Three and Four of Plaintiffs' Complaint is denied.

D. Count Five: Deceptive Trade Practices

Plaintiffs' Ohio Deceptive Trade Practices Act claim is a separate cause of action based on the same statements at issue in Plaintiffs' defamation claims. Specifically, Plaintiffs allege a violation of Ohio Revised Code § 4165.02(A)(10) which states: (A) A person engages in a deceptive trade practice when, in the course of the person's business, vocation, or occupation, the person does any of the following: [...] 10) Disparages the goods, services, or business of another by false representation of fact.

Though the elements are similar, Ohio Courts have made important distinctions between the two causes of action. For example, in *Blue Cross & Blue Shield of Ohio v.*

Schmidt, 1996 WL 71006 at *3 (Ohio Ct. App. 6th Dist. 1996) (unreported), the Court stated "[a] deceptive trade practices claim is a separate tort from defamation. When the *integrity or credit* of a business has been impugned, a claim may be asserted under a defamation theory; when the *quality* of goods or services has been demeaned, a commercial disparagement claim may be asserted." *See also Fairfield Mach. Co., Inc. v. Aetna Cas. and Sur. Co.*, 2001 WL 1665624 at *6, 2001-Ohio-3407 (Ohio Ct. App. 7th Dist. 2001) (citing and quoting *Blue Cross* in making the same distinction in a different factual context).

Further, protected opinions are not actionable under the Deceptive Trade Practices Act. *See White Mule Co. v. ATC Leasing Co., LLC*, 540 F.Supp.2d 869, 895 (N.D. Ohio 2008) (Applying *Scott* factors to determine if statement supporting Deceptive Trade Practices Act claim was an actionable false assertion of fact or a protected statement of opinion).

Here, all of the purportedly defamatory statements except for one speak to Plaintiffs' integrity, rather than the quality of their goods, services, or business. The exception is the Department of Africana Studies Facebook Post that included the statement "[t]heir food is rotten [...]". But the Court previously held this statement was a protected opinion, and the same analysis precludes Plaintiffs from relying on it as evidence of a violation of the Deceptive Trade Practices Act. *See White Mule Co., supra* at 895.

After weighing the evidence in Plaintiffs' favor, there are no genuine issues of material fact with regard to Plaintiffs' Deceptive Trade Practices Act claims. Therefore Defendants' Motion for Summary Judgment on Count Five of Plaintiffs' Complaint is granted.

E. Count Six: Intentional Infliction of Emotional Distress

A claim for intentional infliction of emotional distress ("IIED") is comprised of the following elements:

> (1) [t]he defendant intended to cause emotional distress, or knew or should have known his actions would result in serious emotional distress, (2) the defendant's conduct was so extreme and outrageous that it went beyond all possible bounds of decency, and can be considered completely intolerable in a civilized community, (3) the defendant's actions proximately caused psychic injury to the plaintiff, and (4) the plaintiff suffered serious mental anguish of the nature no reasonable [person] could be expected to endure.
>
> *Teodecki v. Litchfield Twp.*, 2015-Ohio-2309, ¶ 28 (Ohio Ct. App. 9th Dist.) (internal citations omitted).

In their respective briefs, the parties dispute the applicability of *Yeager v. Local Union 10, Teamsters, Chauffers, Warehousemen, & Helpers of America*, 6 Ohio St.3d 369 (1983) and *Vail v. The Plain Dealer Publ'g Co.*, 1995-Ohio-187, 72 Ohio St.3d 279 (Ohio 1995).

Plaintiffs believe *Yeager* establishes that IIED claims are not contingent upon the survival of related defamation claims and that the holding in *Vail* should not apply. In *Yaeger*, the Supreme Court of Ohio affirmed an appellate court's decision granting summary judgment on a defamation claim, but reversed and remanded the court's simultaneous award of summary judgment on a claim for IIED. *Yeager*, at 375-76. But the key distinction in *Yeager* is that the IIED claim survived because it arose out of different events than the defamation claim. Specifically, the Court held: "[w]e reverse the court of appeals in part and remand the cause to the trial court for further proceedings on the cause of action for intentional infliction of emotional distress *arising from the alleged incident in appellant's office on March 31, 1978.*" *Id.* at 370, 375-76 (Earlier, in the *Yeager* opinion, the Court had identified that the statements at issue in the defamation claim happened at a separate incident on June 5, 1979.).

Defendants argue that *Vail* requires dismissal of IIED claims where the statements underlying the IIED claims do not constitute actionable defamation. In *Vail*, the Court reasoned that where the only statements supporting defamation and IIED claims were determined to be protected opinions, summary judgment on both claims was appropriate. *See Vail*, at 283. But *Vail* is also distinguishable to this case because this Court has only found that *some* of the statements underlying Plaintiffs' defamation claims are protected opinions. Because Defendants have not been awarded judgment as a matter of law on Plaintiffs' defamation claims, *Vail* does not require summary judgment on Plaintiffs' IIED claim.

Whether Plaintiffs can prove each of the elements of their IIED claim at trial depends on resolution of questions of fact. But at this juncture all of the evidence presented regarding Defendants' conduct and Plaintiffs resulting damages has to be weighed in Plaintiffs' favor.

After weighing the evidence in Plaintiffs' favor, there are genuine issues of material fact with regard to Plaintiffs' intentional infliction of emotional distress claims. Therefore Defendants' Motion for Summary Judgment on Count Six of Plaintiffs' Complaint is denied.

F. Count Seven: Negligent Hiring, Retention, Supervision

To prove a claim of negligent hiring and retention, Plaintiffs must show "(1) [t]he existence of an employment relationship; (2) the employee's incompetence; (3) the

employer's actual or constructive knowledge of such incompetence; (4) the employee's act or omission causing the Plaintiffs' injuries; and (5) the employer's negligence in hiring or retaining the employee as the proximate cause of Plaintiffs' injuries." *Zanni v. Stelzer*, 2007-Ohio-6215, ¶ 8 (Ohio Ct. App. 9th Dist.) (internal citations omitted). Additionally, Plaintiffs must prove that the employee's actions were reasonably foreseeable to Defendants – i.e. Oberlin College knew or should have known of the employee's "propensity to engage in similar criminal, tortious, or dangerous conduct." *See Jevack v. McNaughton,* 2007-Ohio-2441, ¶ 21 (Ohio Ct. App. 9th Dist.) (internal citations omitted).

As an initial matter, Defendants have argued that there are no issues of material fact regarding Plaintiffs' claim for negligent hiring, retention, and supervision against Meredith Raimondo because she is not "an employer". This was not disputed by Plaintiffs, who focused their briefing on the claim against Oberlin College for negligent hiring, retention, and supervision of its employees – including Meredith Raimondo, Tita Reed, and Julio Reyes. Because it is undisputed that Meredith Raimondo is not an employer, Defendants are entitled to summary judgment on Count Seven as it relates to Meredith Raimondo only.

Applying the above elements to Oberlin College, Plaintiffs have met their burden of establishing there are issues of material fact that preclude summary judgment for Oberlin College on Count Seven of Plaintiffs' Complaint.

Defendants only challenge and analyze the third element – Oberlin College's actual or constructive knowledge of their employees' incompetence. In support, Defendants point to Plaintiffs' deposition testimony wherein Plaintiffs indicated they had no knowledge of Dean Raimondo's background before she was employed at Oberlin College. Defendants argue that Plaintiffs have not shown any evidence of any incident involving any of Defendants' employees prior to November 10, 2016 that would put Defendants on notice that the acts complained of were reasonably foreseeable.

Defendants see the actions subsequent to November 10, 2016 as one action. But Plaintiffs pointed to pending lawsuits that contain allegations related to Raimondo's competence. Further, Plaintiffs have alleged and presented evidence showing that a number of separate actions were taken by Meredith Raimondo, Oberlin College, and/or Oberlin College employees subsequent to November 9, 2016. While it may be that the majority of evidence post-dates November 10, 2016, weighing the evidence in Plaintiffs' favor at this juncture, there is sufficient evidence to create an issue of material fact regarding whether Oberlin College employees were incompetent and whether Oberlin College had actual or constructive knowledge of that incompetence.

After weighing the evidence in Plaintiffs' favor, there are genuine issues of material fact with regard to Plaintiffs' negligent hiring, retention, and supervision claims. Therefore

Defendants' Motion for Summary Judgment on Count Seven of Plaintiffs' Complaint is denied.

G. Count Eight: Civil Trespass

Plaintiffs' trespass claim involves a parking lot adjacent to Gibson Bros. Inc. that was the site of the protests. Plaintiffs' complaint summarizes the trespass as "[a]ll of Defendants actions on the parking lot since Plaintiff acquired rights to use [the parking lot]" which includes "permitting faculty, administrators, and students to park in the lot even though they are not permitted to do so and by parking large construction equipment on the lot in such a manner to block the entrance to the lot", and that these actions were "approved and ratified" by the Oberlin College and "calculated to facilitate or promote the business, interests, and agenda of Oberlin College." Pltfs. Compl. ¶¶ 163-64.

To prove a trespass claim, Plaintiffs must show that: (1) they had a possessory interest in the property; and (2) the offending party entered the property without consent or proper authorization or authority. *Bell v. Joecken*, 2002-Ohio-1644, 2002 WL 533399, *2 (Ohio Ct. App. 9th Dist.); *see also City of Kent v. Hermann*, 1996 WL 210780 at *2 (Ohio Ct. App. 11th Dist. Mar. 8, 1996) (Describing trespass as "an invasion of [...] possessory interest [...] not an invasion of title" and that property owners sacrifice their possessory interest to tenants).

With regard to the first element, Plaintiffs have established through deposition testimony that there is an issue of fact as to whether they have a possessory interest in the parking lot. It is undisputed that Off Street Parking, Inc. – a non-party entity – is the owner of the parking lot. But Plaintiffs have asserted that they and other businesses have been granted usage of the parking lot as tenants, thereby giving them a possessory interest in the parking lot. Plaintiffs maintain that they utilize the parking lot year round in conjunction with other tenants. Importantly, Ohio law does not require Plainitiffs' possessory interest to be exclusive. *See Northfield Park Assocs. V. Ne. Ohio Harness*, 36 Ohio App.3d 14, 18 (Ohio 1987) (Where various lessees of a racing track had the right to operate a track during specific times of the year, only the lessee with permission to use the track during the time of the alleged trespass had the right to bring a trespass action because it was the only tenant with a possessory interest at that specific time).

To survive summary judgment Plaintiffs must also present evidence showing there is an issue of material fact as to whether Defendants intentionally entered their land or caused another thing or person to do so. *See Bonkoski v. Lorain Cty.*, 2018-Ohio-2540, ¶ 14 (Ohio Ct. App. 9th Dist.); *see also Biomedical Innovations Inc. v. McLaughlin*, 103 Ohio App.3d 122, 127 (Ohio Ct. App. 10th Dist. 1995) ("Generally, a person is not liable for trespass unless it is committed by that person or by a third person on his orders.").

In support, Plaintiffs cite the deposition testimony of David Gibson during the Gibson Bros. Inc. 30(b)(5) deposition and the deposition testimony of Henry Wallace – a long-time Oberlin Police Department Auxiliary Officer that patrolled and enforced parking violations in the parking lot. This testimony collectively asserted that the parking lot has been wrongfully utilized by Oberlin College employees, Oberlin College students, and contractors doing construction for Oberlin College. It does not conclusively establish that Defendants intentionally instructed, ordered, or caused these individuals to intentionally invade Plaintiffs' purported possessory interest, but at this juncture, it is sufficient to create an issue of material fact that precludes summary judgment in Defendants' favor.

After weighing the evidence in Plaintiffs' favor, there are genuine issues of material fact with regard to Plaintiffs' trespass claims. Therefore Defendants' Motion for Summary Judgment on Count Eight of Plaintiffs' Complaint is denied.

7. Conclusion

Defendants are entitled to judgment as a matter of law on Count Two (Slander) as to both Defendants; Count Five (Deceptive Trade Practices) as to both Defendants; and Count Seven (Negligent Hiring, Retention, Supervision) as to Defendant Meredith Raimondo only. Plaintiffs' remaining claims will proceed subject to the above limitations.

IT IS SO ORDERED.

VOL____PAGE____

John R. Miraldi, Judge

cc: All Parties

LORAIN COUNTY COURT OF COMMON PLEAS
LORAIN COUNTY, OHIO

TOM ORLANDO, Clerk
JOURNAL ENTRY
John R. Miraldi, Judge

Date 7/17/19 Case No. 17CV193761

GIBSON BROS INC
Plaintiff

JACQUELINE BOLLAS CALDWELL
Plaintiff's Attorney ()-

VS

OBERLIN COLLEGE
Defendant

JOSH M MANDEL
Defendant's Attorney ()-

JUDGMENT ENTRY ON AWARD OF ATTORNEYS' FEES & LITIGATION EXPENSES

On July 10, 2019 a hearing was held in the above matter to determine the amount of Plaintiffs' reasonable attorney fees. On June 13, 2019 the jury concluded its deliberations and returned a verdict awarding the Plaintiffs both punitive damages and reasonable attorneys' fees. The jury was instructed prior to deliberating that if attorneys' fees were awarded, the Court would determine the amount. On June 27, 2019, the Court, per the statutory damage caps, reduced the jury verdict for compensatory and punitive damages to judgment and scheduled an attorneys' fees hearing on July 10, 2019 at 1:30 PM by separate entry.

Prior to the hearing on July 10, 2019, Defendants filed a Motion for Reconsideration, asking the Court to reconsider its June 27, 2019 ruling applying the punitive and compensatory damages caps in Ohio Revised Code §§ 2315.18 and 2315.21. Defendants' Motion for Reconsideration is denied. Defendants also filed a written Renewed Motion to Continue the Hearing on Attorney Fees which they presented on the record prior to the attorney's fees hearing. The Court denied Defendants' motion to continue the hearing and cited the reasons therefore on the record.

At the hearing, Plaintiffs presented evidence in the form of the testimony and expert report of Attorney Dennis Landsdowne, the billing invoices and advanced costs invoices of the Plaintiffs' three law firms – Tzangas, Plakas, Mannos Ltd.; Krugliak, Wilkins, Griffiths, & Dougherty Co., L.P.A.; and James Taylor Co., L.P.A.; as well as the billing statements and costs advanced invoices of Defendants' counsel. Defendants presented evidence in the form of the testimony and expert report of Attorney Eric

Zagrans. Each party also briefed the issue of attorneys' fees[1] and attached several exhibits outlining their arguments. After considering all of the evidence presented and applicable precedent the Court makes the following ruling regarding Plaintiffs' attorney's fees:

I. Applicable Standard

The Supreme Court of Ohio has adopted a two-step method for determining reasonable attorney's fees. *See State ex. rel. Harris v. Rubino*, 2018-Ohio-5109, ¶ 3 (Ohio 2018) (citing *Bittner v. Tri-Cty. Toyota*, 58 Ohio St.3d 143, 145 (Ohio 1991). The analysis begins by multiplying a reasonable hourly rate by the number of hours reasonably expended. *Id.* This "lodestar" number "provides an initial estimate of the value of the lawyers' services." *Id.* Next, the Court can adjust the lodestar number upward or downward by applying the factors listed in Prof. Cond. R. 1.5(a). *Id.* ("Ultimately, what factors to apply and what amount of fees to award are within [the Court's] sound discretion.").

Because of the overlap of the lodestar calculation and the Prof. Cond. R. 1.5(a), a Court, in its discretion, may choose not to adjust the lodestar number when the relevant factors are subsumed by the lodestar calculation. *See Id.* at ¶ 12 (citing *Miller v. Grimsley*, 197 Ohio App.3d 167, 173 (Ohio Ct. App. 11th Dist. 2011)).

Ultimately, there is no requirement that the fee be linked or proportionate to the underlying award. *See Welch v. Prompt Recovery Servs., Inc.*, 2015-Ohio-3867, ¶ 16 (Ohio Ct. App. 9th Dist.) ("The Supreme Court has refused to establish a rule linking reasonable attorneys' fees to the underlying monetary award."); *see also Grimsley*, at ¶16 ("Proportionality is not synonymous with reasonableness. A 'reasonable' fee must be related to the work reasonably expended on the case and not merely to the amount of the judgment awarded.").

II. Application of Law

Plaintiffs filed an Application for Attorneys' Fees and Litigation Expenses in an amount between $9.5 million and $14.5 million. This proposed amount is based on a lodestar amount of $4,855,856.00 and a multiplier of 2 to 3 times the lodestar. Plaintiffs' counsel also believes the Court should award them $404,129.22 in litigation expenses.

[1] On July 9, 2019, Plaintiffs filed an Application for Attorneys' Fees and Litigation Expenses with exhibits, and on July 12, 2019, Defendants filed their Brief in Opposition to Plaintiff's application with exhibits. Plaintiffs' also filed a Motion for Leave to file a reply brief instanter on July 15, 2019, but that motion is hereby denied.

Defendants requested that the Court not award fees, but if it does, to award fees only related to Plaintiffs' successful claims, and to exclude any fees related to experts that were not permitted to testify at the trial. Defendants' counsel and Defendants' expert opined that a reasonable attorneys' fee would be between $2,000,000.00 and $2,250,000.00 and that the combined litigation expenses should be reduced to $241,247.84. (Ex. 2 to Defs. Brief in Opposition to Pltfs. Application).

A. Attorneys' Fees

a. Reasonable Hourly Rate

The reasonable hourly rate "[...] is the prevailing market rate in the relevant community, given the complexity of the issues and the experience of the attorney." *See Harris*, at ¶ 4 (internal citations omitted). Plaintiffs presented evidence of hourly rates for their attorneys and paralegal/support staff that ranged from $675.00 per hour on the high end and $115.00 per hour on the low end, creating an average hourly rate of $395.00 per hour. Defendants' average hourly rates for attorneys and paralegals/support staff ranged from $400.00 per hour on the high end and $100.00 on the low end, creating an average hourly rate of $250.00 per hour. The Court hereby finds that a reasonable average hourly rate in this community, given the complexity of the issues and experience of the attorneys handling the case, is $290.00 per hour.

b. Hours Reasonably Expended

Next the Court must calculate the hours reasonably expended. Hours not properly billed to a client are also not properly billed to an adversary. *See Id.* at ¶ 5. In calculating the hours reasonably expended, it follows that the Court must exclude "[...] hours unreasonably expended, e.g., hours that were redundant, unnecessary, or excessive in relationship to the work done." *Grimsley*, at ¶ 14.

In sum, Plaintiffs tallied 14,417 hours of billed hours in this matter. At the hearing Plaintiffs argued that all of their hours were reasonable, and referenced the fact that Defendants' counsel – who did not bear the burden of proof – tallied 15,626 hours (1,209 more billed hours than Plaintiffs' counsel).

Defendants argued that Defendants' counsel's hours were not relevant to the reasonableness of Plaintiffs' counsel's hours simply because Defendants' counsel was not seeking to have their attorneys' fees awarded. The Court fails to understand the distinction, particularly given the fact that both Defendants' and Plaintiffs' counsel's fees are subject to the reasonableness standard of Prof. Cond. R. 1.5(a). The Court's lodestar analysis is not limited to a comparison with Defendants' fee bills, it just serves as a helpful reference point to the lodestar analysis because Defendants' counsel prepared for and tried the same case. Defendants also asserted that Plaintiffs'

counsel's invoices utilize block-billing, a practice recently criticized by the Supreme Court of Ohio in *Rubino*. *See Rubino*, at ¶ 7 (citing *Tridico v. Dist. Of Columbia*, 235 F.Supp.3d 100, 109 (D.D.C. 2017). In *Rubino*, the Supreme Court stated that it "will no longer grant attorney-fee applications that include block-billed time entries." This appears at first glance to be a bright-line rule, but the Supreme Court's citation of *Tridico*, and the Court's later statement that "[a]pplications failing to meet these criteria [i.e. that are block-billed] *risk* denial in full", leaves the door open for a trial Court to determine, on a case by case basis and in its' discretion, whether any block-billed time renders all or part of an attorney fee unreasonable. *See Id.* (emphasis added). The concern in both *Rubino* and *Tridico* was that certain methods of block-billing – generally those that involve large chunks of time (more than 5 hours), and multiple tasks (particularly unrelated tasks) – may render the Court unable to determine the reasonableness of the hours expended on the case. *See Rubino*, at ¶¶ 6-9; *see also Tridico*, at 109-110.

But here, the Court has no such concern with Plaintiffs' hours. Though the case was not filed until November 2017, Plaintiffs' counsel's invoices reflect that this case began for Plaintiffs in April of 2017. After the complaint was filed, nearly every phase of the case was vigorously contested, including the trial which encompassed twenty-four days over the course of nearly six weeks. Plaintiffs' counsel's billing invoices are reflective of, and consistent with, a case of this magnitude.

Furthermore, the Court finds that due to the nature of claims at issue in this case, it is not possible to separate the time spent on recoverable punitive damage claims (or related litigation expenses for experts) from non-recoverable punitive damage claims. *See Bittner*, at 145. The Court therefore finds that Plaintiffs' counsel's 14,417 billable hours were hours reasonably expended on the case.

c. Calculation of the Lodestar

Applying the above, Plaintiffs' counsel's reasonable hourly rate ($290.00 per hour) times the number of hours reasonably expended (14,417) equates to a lodestar amount of $4,180,930.

d. Application of the Factors for Enhancement or Reduction

Having calculated the lodestar number, the remaining issue is whether or not the lodestar should be reduced or multiplied for enhancement based on the factors in Ohio Prof. Cond. R. 1.5(a). Ohio Prof. Cond. R. 1.5(a) provides in relevant part: the factors to be considered in determining the reasonableness of a fee include the following:

> (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;

(2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;

(3) the fee customarily charged in the locality for similar legal services;

(4) the amount involved and the results obtained;

(5) the time limitations imposed by the client or by the circumstances;

(6) the nature and length of the professional relationship with the client;

(7) the experience, reputation, and ability of the lawyer or lawyers performing the services;

(8) whether the fee is fixed or contingent.

The parties strongly debated the appropriateness of a multiplier. Plaintiffs' counsel believes the lodestar should be multiplied 2 to 3 times, which would result in a total fee between $8,361,860 and $12,542,790 (using the Court's lodestar amount in Paragraph C above). Plaintiffs' argument for enhancement lies in the application of factors (1), (4), (7), and (8).

Defendants believe the Court should not utilize a multiplier because the relevant 1.5(a) factors are subsumed by the lodestar analysis and based on the United States Supreme Court's decision in *Perdue v. Kenny A. ex rel Winn*, 559 U.S. 542 (2010).

In *Perdue*, the Supreme Court issued a decision that addressed lodestar fee enhancements in the context of a federal civil rights case and 42 U.S.C.A. § 1988. In *Perdue* and its progeny, the United States Supreme Court opined that the lodestar amount is presumptively reasonable and that enhancements (or multipliers) should not be based on factors that are accounted for in the lodestar analysis. *Id.* at 552-553 (citing *City of Burlington v. Dague*, 505 U.S. 557, 562 (1992) ("We have established a 'strong presumption' that the lodestar represents the "reasonable" fee [...].") (internal citations omitted). Recently, the Supreme Court of Ohio accepted a limited appeal[2] on the issue of fee enhancements or multipliers in *Phoenix Lighting Group LLC v. Glenlyte Thomas Group LLC*, Ohio S.Ct. Case No. 2018-1076, 2018-Ohio-4092 (Ohio 2018). *Phoenix* has been set for an oral argument on September 10, 2019. This Court cannot speculate as to the future holding or rationale of *Phoenix*. In *Rubino*, less than one year

[2] Specifically, the proposition of law accepted for appeal states: "Because there is a strong presumption that the loadstar [sic] method yields a sufficient attorney fee, enhancements should be granted rarely and only where the applicant seeking the enhancement can produce objective and specific evidence that an enhancement is necessary to compensate for a factor not already subsumed within the Court's loadstar calculation. (Perdue v. Kenny A., ex rel. Winn, 559 U.S. 542 (2010), followed.)

ago, the Supreme Court of Ohio considered the appropriateness of a lodestar multiplier. *See Rubino*, at ¶ 12. It follows then, that the Court in its discretion can adjust the lodestar amount upward or downward, if the 1.5(a) factors are not entirely subsumed within the lodestar calculation.

Here, the Court has determined that not all of the factors are entirely subsumed within the lodestar calculation precluding enhancement. Here, factor (1) - the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly, while a component of the lodestar calculation, it was not entirely subsumed by it. The case presented extraordinary challenges for the plaintiffs. Similarly, factor (7) – the experience, reputation, and ability of the lawyer or lawyers performing the services – was a component of the lodestar calculation. But when considered with other relevant factors such as factor (3) – the fee customarily charged in the locality for similar legal services, factor (4) – the amount involved and the results obtained; and factor (8) – whether the fee is fixed or contingent, the Court believes a multiplier of one and a half (1.5) times the lodestar calculation is appropriate and necessary.

The Court therefore finds that the Plaintiffs' should be awarded $6,271,395.00 in reasonable attorneys' fees.

B. Litigation Expenses

In addition to attorneys' fees, Plaintiffs' also seek $404,139.22 in litigation expenses. Defendants and their expert believe Plaintiffs' proposed expenses are excessive and that several categories are not properly includable as expenses. Defendants believe the proper amount of litigation expenses total $241,247.84. This Court agrees that the expenses should be limited, albeit not to the extent requested by Defendants. In calculating the amounts below, the Court included expenses for discovery transcripts, witness fees, focus groups, video discovery, trial transcripts, mediation services, expert witness fees, filing fees, travel for Marvin Krislov's deposition, and process server fees. The Court makes the following ruling regarding each Plaintiffs' firms' litigation expenses:

- Plaintiffs are awarded litigation expenses advanced by Krugliak, Wilkins, Griffiths, & Dougherty Co., L.P.A's in the amount of $213,835.05 (reduced from $272,645.02);
- Plaintiffs are awarded litigation expenses advanced by James N. Taylor Co., L.P.A. in the amount of $796.00;

- Plaintiffs are awarded litigation expenses advanced by Tzangas, Plakas, Mannos Ltd. in the amount of $79,505.74 (reduced from $117,081.44).

Therefore, in addition to attorneys' fees of $6,271,395.00, Plaintiffs are hereby awarded the above litigation expenses, which total $294,136.79. In addition court costs are assessed to the Defendants. Case closed.

IT IS SO ORDERED.

John R. Miraldi, Judge

cc: All Parties

TO THE CLERK: THIS IS A FINAL APPEALABLE ORDER PLEASE SERVE UPON ALL PARTIES NOT IN DEFAULT FOR FAILURE TO APPEAR, NOTICE OF THE JUDGMENT AND ITS DATE OF ENTRY UPON THE JOURNAL.

LORAIN COUNTY COURT OF COMMON PLEAS
LORAIN COUNTY, OHIO

TOM ORLANDO, Clerk
JOURNAL ENTRY
John R. Miraldi, Judge

Date 9/9/19 Case No. 17CV193761

GIBSON BROS INC
Plaintiff

JACQUELINE BOLLAS CALDWELL
Plaintiff's Attorney ()-

VS

OBERLIN COLLEGE
Defendant

JOSH M MANDEL
Defendant's Attorney ()-

ENTRY AND RULING ON DEFENDANTS' MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT

This matter comes before the Court upon Defendants Oberlin College and Meredith Raimondo's Ohio Civ. R. 50 Motion for Judgment Notwithstanding the Verdict filed August 14, 2019. Plaintiffs Gibson Bros., Inc., Allyn W. Gibson, and David R. Gibson filed a *Response in Opposition* on August 28, 2019. An Ohio Civ. R. 50(B) motion for judgment notwithstanding the verdict is reviewed under the same standard as an Ohio Civ. R. 50(A) motion for a directed verdict. *See Goodrich Corp. v. Commercial Union Ins. Co.*, 2008-Ohio-3200, ¶ 11 (Ohio Ct. App. 9th Dist.). Judgment notwithstanding the verdict is only appropriate where, when the evidence is construed most strongly in favor of the non-moving party, reasonable minds can come to one conclusion, and that conclusion is adverse to the non-moving party. *See McMichael v. Akron General Medical Center*, 2017-Ohio-7594, ¶ 10 (Ohio Ct. App. 9th Dist.); *see also Goodrich*, at ¶ 11.

The Court has reviewed and considered the parties' respective briefs and applicable precedent and, after construing the evidence most strongly in Plaintiff's favor, the Court does not find that the Defendants are entitled to judgment notwithstanding the verdict. Accordingly, Defendants' Motion for Judgment Notwithstanding the Verdict is denied.

IT IS SO ORDERED.

John R. Miraldi, Judge

cc: All Parties

LORAIN COUNTY COURT OF COMMON PLEAS
LORAIN COUNTY, OHIO

TOM ORLANDO, Clerk
JOURNAL ENTRY
John R. Miraldi, Judge

Date 9/10/19 Case No. 17CV193761

GIBSON BROS INC
Plaintiff

JACQUELINE BOLLAS CALDWELL
Plaintiff's Attorney ()-

VS

OBERLIN COLLEGE
Defendant

JOSH M MANDEL
Defendant's Attorney ()-

ENTRY AND RULING ON DEFENDANTS' MOTION FOR NEW TRIAL OR REMITTITUR

This matter comes before the Court upon the Defendants Oberlin College and Meredith Raimondo's Ohio Civ. R. 59 Motion, in the Alternative to Judgment Notwithstanding the Verdict, for a New Trial or Remittitur, filed August 14, 2019. The Plaintiffs Gibson Bros., Inc., Allyn W. Gibson, and David R. Gibson filed a Response in Opposition on August 28, 2019.

Ohio Civ. R. 59(A) empowers a trial court to grant a new trial when a party has been awarded "[e]xcessive or inadequate damages, appearing to have been given under the influence of passion or prejudice". *Tesar Indus. Contractors, Inc. v. Republic Steel*, 2018-Ohio-2089, ¶¶ 31 (Ohio Ct. App. 9th Dist.) (internal citations omitted).

Having considered the parties respective briefs and arguments and applicable precedent, the Court finds that the amount awarded is not manifestly excessive nor does it appear to be influenced by passion or prejudice. Accordingly, Defendants' Motion for a New Trial or Remittitur is denied.

IT IS SO ORDERED.

John R. Miraldi, Judge

cc: All Parties