

**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

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**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. Smilly* (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 *Yeager*, 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 Plaintiffs' 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.

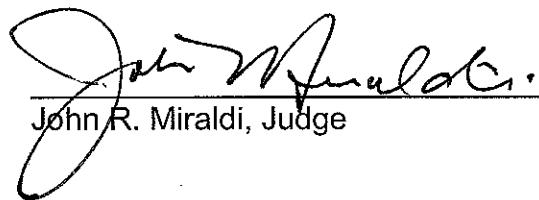
After weighing the evidence in Plaintiffs' favor, there are genuine issues of material fact with regard to Plaintiffs' trespass claims. Therefore Defendants' Motion for Summary Judgment on Count Eight of Plaintiffs' Complaint is denied.

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