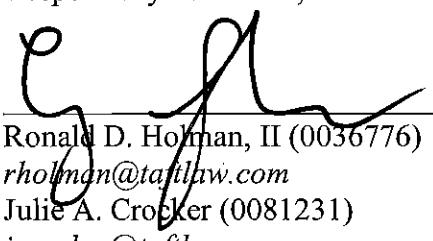
IN THE COURT OF COMMON PLEAS
LORAIN COUNTY, OHIO

GIBSON BROS., INC., et al.,	)	**CASE NO. 17CV193761**
	)	
Plaintiffs,	)	**JUDGE JOHN R. MIRALDI**
	)	
v.	)	
	)	**DEFENDANTS' MOTION TO UNSEAL**
OBERLIN COLLEGE, et al.,	)	**EXHIBIT G OF DEFENDANTS'**
	)	**COMBINED SUMMARY JUDGMENT**
Defendants.	)	**REPLY BRIEF**

Pursuant to Section 12 of the parties' Stipulated Protective Order and well-settled Ohio law, among other authority, Defendants Oberlin College and Dr. Meredith Raimondo hereby move this Court to unseal the portions of their summary judgment reply brief that remain under seal. A brief in support of this motion is attached hereto and incorporated herein by reference.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I further certify that a copy of the foregoing was served this 28th day of August, 2019, via e-mail, pursuant to Civ.R. 5(B)(2)(f) of the Ohio Rules of Civil Procedure, upon the following:

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OBERLIN COLLEGE, et al.,	)	
	)	
Defendants.	)	
	)	

DEFENDANTS' BRIEF IN SUPPORT OF MOTION TO UNSEAL EXHIBIT G OF DEFENDANTS' COMBINED SUMMARY JUDGMENT REPLY BRIEF

I. INTRODUCTION.

Defendants Oberlin College and Meredith Raimondo ("Defendants") move to unseal portions of their summary judgment reply brief in accordance with well-settled law confirming that court records should in almost all circumstances be public, especially where those records form the basis of an adjudication of the merits of a case. Defendants bring this motion now for three reasons: (1) to correct Plaintiffs' improper designation of documents as "confidential" under the parties' Stipulated Protective Order ("SPO");[1] (2) to comply with Ohio's strong presumption that court documents be made available to the public; and (3) to eliminate unnecessary burdens required by the SPO to additional court filings or proceedings.

[1] A copy of the SPO is attached hereto as Exhibit 1.

Defendants ask the Court to fix the double standard that currently exists in the public's access to the summary judgment record. The Court previously ordered that internal Oberlin College emails, private text messages sent and received on the personal cell phones of administrators and faculty, and content from the personal Facebook accounts of Oberlin professors should be unsealed.[2] In contrast, portions of Defendants' Combined Reply Brief in Support of Their Motions for Summary Judgment ("Defendants' Combined Reply") remain under seal, including the entirety of EXHIBIT G to the affidavit of Cary M. Snyder ("EXHIBIT G"), which consists of materials from the Facebook account of Allyn D. Gibson ("Allyn Jr.").[3]

Allyn Jr. is an employee of Plaintiff Gibson Bros., Inc. ("Gibson's Bakery"), the son and grandson of Plaintiffs David Gibson and Allyn W. Gibson, respectively, and a key participant in events that precipitated the student and community protest and boycott of Gibson's Bakery in November 2016. The materials in EXHIBIT G to Defendants' Combined Reply—which are also cited in Defendants' recently filed motion for a new trial[4]—speak directly to the allegations that are at the heart of this matter and that the Court has held constitute "matters of public concern." (*See* April 22, 2019 Entry and Ruling on Defendants' Motions for Summary Judgment ("4/22/19 Order"), at p. 7; *see also id.*, at p. 12 ("[T]he nature of the controversy—allegations of racial profiling and discrimination—are matters of public concern[.]") EXHIBIT G and references to it in Defendants' Combined Reply remain the only portion of the summary judgment or trial

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[2] *See* April 3, 2019 Entry and Ruling on Plaintiffs' Motion to Immediately Unseal Plaintiffs' March 15, 2019 Combined Response in Opposition to Defendants' Motions for Summary Judgment ("4/3/19 Order"), attached hereto as Exhibit 2; *see also e.g.*, Plaintiffs' Combined Response in Opposition to Defendants' Motions for Summary Judgment, at pp. 19, 23-25, 33, 66, 86, 88-89 ("Plaintiffs' MSJ Opposition") (quoting and pasting internal Oberlin emails, private cell phone text messages, and content from the personal Facebook accounts of non-party College employees) (filed April 5, 2019).

[3] A courtesy copy of EXHIBIT G is being provided to the Court's chambers along with this Motion.

[4] *See* Defendants' Motion, in the Alternative to Judgment Notwithstanding the Verdict, For a New Trial or Remittitur ("Defendants' Motion for New Trial"), at pp. 17, 19-20.

record—with the exception of discrete personal information such as phone numbers—that remains under seal.

The materials in EXHIBIT G do not qualify as "confidential" under the parties' SPO. Plaintiffs even produced a host of other materials from Allyn Jr.'s Facebook account—including messages, posts, and comments—in November 2018 without marking any of them "confidential" under the SPO. As a result, Defendants publicly filed some of those documents with the Court.

Moreover, independent from the SPO, this Court previously recognized that "there is a presumption in favor of public access to . . . materials filed by parties with the Court" and that the Court should "use the power to restrict public access 'judiciously and sparingly' and only in situation[s] where good cause exists." (*See* 4/3/19 Order (quoting *Adams v. Metallica, Inc.*, 143 Ohio App.3d 482, 490 (1st Dist. 2001).) The public's right to access judicial records filed in connection with motions for summary judgment is no different than access to trial exhibits or proceedings because "summary judgment adjudicates substantive rights and serves as a substitute for a trial[.]" *Rushford v. New Yorker Magazine, Inc.*, 846 F.2d 249, 252 (4th Cir. 1988). Accordingly, the Court should level the playing field of public access to documents that involve highly publicized matters of public concern and order that EXHIBIT G be unsealed.

II. BACKGROUND.

The SPO entered by the Court on June 6, 2018, enabled the parties to restrict the disclosure of materials produced in discovery for "good cause" by marking them "confidential" based on a "good faith determination" that the documents should not be disclosed. (SPO, ¶¶ 1, 3.) However, given Ohio's strong presumption in favor of open access to court records, the parties and the Court agreed that the SPO "shall be strictly construed in favor of public disclosure and open proceedings whenever possible." (*Id.*, ¶ 1.) To help further this objective,

the SPO permits a party to challenge the designation of materials marked "confidential" under the SPO. (*Id.*, ¶ 11.) If a pleading or brief refers to a document marked "confidential" or uses it as an exhibit, then the pleading or brief must be filed with the Court under seal or in redacted form to prevent disclosure of the "confidential" material. (*Id.*, ¶ 10.)

In response to Defendants' motion to compel—and following Plaintiffs' muddled and incomplete production of documents in November 2018 on behalf of Allyn Jr.—the Court on February 21, 2019, ordered Plaintiffs to produce a forensic image of Allyn Jr.'s Facebook account (the "Forensic Image").[5] The Forensic Image contains more than 300,000 files and, upon production, Plaintiffs designated the entire Forensic Image as "confidential" under the SPO because *they did not have time to review its contents prior to production and they were concerned about the inclusion of material of a romantic nature.*[6]

Defendants narrowed the content of the Forensic Image to just 35 pages that they planned to use as EXHIBIT G in support of their Combined Reply. The documents in EXHIBIT G consist almost entirely of Allyn Jr.'s views—***in his own words***—concerning minorities, how Gibson's Bakery treats its customers, and his awareness that the Bakery has a history—dating to at least 2012—of being accused of racial profiling and discrimination. Of the 35 pages in EXHIBIT G, 34 pages consist of Facebook messages, the functional equivalent of text messages or emails that the Court already ordered must be unsealed. The remaining page is a post from Allyn Jr. to his Facebook friends. Plaintiffs previously produced this Facebook post and many of the comments to it in November 2018 ***without marking it "confidential"*** under the SPO. This

[5] *See* February 21, 2019 Entry and Ruling on Defendants' Motion to Compel Production of Forensic Image.

[6] *See* Plaintiffs' Notice of Compliance (filed Feb. 22, 2019); Feb. 22, 2019 Letter from O. Rarric, attached hereto as Exhibit 3.

post is publicly available at Exhibit 3 to Defendants' Motions for Summary Judgment.[7]

Plaintiffs refused to remove the "confidential" designation from EXHIBIT G unless Defendants also removed the "confidential" designation on documents that Plaintiffs pasted within, cited to, or attached to their brief in opposition to Defendants' motions for summary judgment.[8] On April 3, 2019, the Court granted Plaintiffs' motion to unseal their MSJ Opposition and, with the exception of certain personal information such as phone numbers, ordered it to be publicly filed. Plaintiffs' MSJ Opposition includes content, similar to EXHIBIT G, from the personal Facebook accounts and cell phones of Oberlin College professors who—like Allyn Jr.—are employees of a party to this action.[9]

Defendants cite to materials in EXHIBIT G in their Motion for a New Trial, which Defendants filed on August 14, 2019.[10] This recent filing prompted Defendants to revisit the issue of unsealing EXHIBIT G with Plaintiffs. In lieu of filing this motion, Defendants met and conferred with Plaintiffs and asked for their consent to unseal the Combined Reply.[11] Plaintiffs declined to do so.[12]

III. ARGUMENT.

A. This Court should correct Plaintiffs' improper designation of EXHIBIT G materials as "confidential" under the SPO.

Plaintiffs' counsel improperly marked the documents in EXHIBIT G "confidential" under the SPO and they cannot meet their burden for requiring those documents to remain under seal.

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[7] *Compare* Ex. 3 to Defendants' Motions for Summary Judgment (filed March 1, 2019) *with* the final page of EXHIBIT G, a Facebook post from Allyn Jr. dated April 24, 2012.
[8] *See* March 20, 2019 Letter from O. Rarric, attached hereto as Exhibit 4.
[9] *See* 4/3/19 Order; Plaintiffs' MSJ Opposition, at pp. 19, 23-25, 33, 66, 86, 88-89.
[10] Defendants' Motion for New Trial, at pp. 17, 19-20.
[11] *See* Aug. 12, 2019 Letter from C. Snyder, attached hereto as Exhibit 5.
[12] *See* Aug. 16, 2019 Letter from B. McHugh, attached hereto as Exhibit 6; *see also* Aug. 17, 2019 Letter from C. Snyder, attached hereto as Exhibit 7.

Further, Plaintiffs have not treated similar documents as confidential.

1. EXHIBIT G does not contain "confidential" information as defined by the SPO.

The Court can resolve this motion in short shrift on the basis that the documents in EXHIBIT G do not qualify as materials that may be designated "confidential" under the SPO. Under the SPO, a party may only designate materials as "confidential" after it makes a "good faith determination" that a document contains information protected from disclosure by statute or that contains "confidential personal information, trade secrets, personnel records, student records or other such sensitive commercial information that is not publicly available." (SPO, ¶ 3.) EXHIBIT G does not fall under any of these categories.

The documents at issue are not "confidential personal information, trade secrets, personnel records, student records" or commercial information, let alone "sensitive commercial information." Further, no statute prohibits their disclosure. The same is true with the messages from Allyn Jr.'s Facebook "friends" who informed him about Gibson's Bakery's reputation for how it treats its black customers. These documents should be public, and concerns about their contents is not a basis to rule otherwise. *See e.g.*, *Hechavarria v. City and County of San Francisco*, 2011 U.S. Dist. LEXIS 36649, at *6 (N.D. Cal. Mar. 24, 2011) (sealing of documents related to dispositive motions is a drastic remedy and finding potential embarrassment is insufficient to justify sealing). There is no reason under the SPO why EXHIBIT G should remain under seal, and Plaintiffs only marked the Forensic Image "confidential" because they did not have time to review its more than 300,000 files prior to production.[13]

2. Plaintiffs cannot meet their burden to keep EXHIBIT G under seal.

In support of unsealing their MSJ Opposition, Plaintiffs argued that the party who

[13] Feb. 22, 2019 Letter from O. Rarric.

produces information in discovery "carr[ies] the burden to defend the confidential designation" under the parties' SPO. (*See* Plaintiffs' Limited Reply, at 2 (filed March 28, 2019) (citations omitted).) Plaintiffs cannot meet their burden to show why EXHIBIT G should remain under seal. *See Covington v. The MetroHealth System*, 150 Ohio App.3d 558, 2002-Ohio-6629, ¶ 24 ("In Ohio, the burden of showing that testimony or documents are confidential or privileged rests upon the party seeking to exclude it.") (citing *Lemley v. Kaiser* (1983), 6 Ohio St.3d 258, 263-264, 452 N.E.2d 1304); *see also Shane Group, Inc. v. Blue Cross Blue Shield of Michigan*, 825 F.3d 299, 305 (6th Cir. 2016) (the burden of overcoming the "'strong presumption in favor of openness'" as to court records . . . is borne by the party that seeks to seal them.") (quotation omitted).

In correspondence and a meet and confer session before filing this motion, Plaintiffs declined to explain why EXHIBIT G should remain under seal. Of course, the parties' SPO contains no time limit on a party's ability to challenge a confidentiality designation. (SPO, ¶ 14(a).) In addition, Plaintiffs have acknowledged—as they must—that EXHIBIT G will be part of the record in the event either party files an appeal in this matter,[14] which means that the improper sealing could be repeated. *Cf. Globe Newspaper Co. v. Sup. Ct. for Norfolk County*, 457 U.S. 596, 603 (1982) (the issue of the public's right of access to a trial is not moot upon the conclusion of the trial because of the risk that the public "will someday be subjected to another order" closing the court).

Further, since Defendants filed EXHIBIT G in support of a motion for summary judgment, the public has a presumed right of access to it under both the common law and the First Amendment of the U.S. Constitution. *See Republic of Philippines v. Westinghouse Elec.*

[14] *See* Aug. 16, 2019 Letter from B. McHugh.

Corp., 139 F.R.D. 50, 56 (D.N.J. 1991) ("the presumptive right of access under the common law and the First Amendment is the proper standard" to decide the public's right to access material filed in connection with a summary judgment motion). Appellate courts recognize that "documents used by parties moving for, or opposing summary judgment should not remain under seal absent the most compelling reasons," and that the "adjudication stage" of a lawsuit "should, absent exceptional circumstances, be subject to public scrutiny." *Joy v. North,* 692 F.2d 880, 893 (2d Cir. 1982), *cert. denied* 460 U.S. 1051 (1983).[15] Nor does it matter that no portion of EXHIBIT G was introduced at trial. *See Westinghouse Electric Corp.*, 139 F.R.D. at 58 (the right of public access to court records is not limited to evidence admitted at trial). Further, EXHIBIT G materials remain relevant for pending motions and any future court filings.

Plaintiffs cannot meet their burden under the parties' SPO, the Court's previous ruling to unseal Plaintiffs' summary judgment briefing, *see supra* Section III.B, common law, or the First Amendment as to why EXHIBIT G and the Combined Reply should remain under seal.

3. Plaintiffs have not treated documents similar to those in EXHIBIT G as "confidential."

Plaintiffs have not previously relied on the SPO to maintain the confidentiality of materials within Allyn Jr.'s Facebook account, which likewise warrants unsealing EXHIBIT G. (*See* 4/22/19 Order (extent to which a party previously relied on the protective order is a factor in whether to unseal documents) (citing *Adams*, 143 Ohio App.3d at 490).) In November 2018, Plaintiffs produced more than 3,500 pages of documents in response to the subpoena issued to Allyn Jr., the majority of which contained content from Allyn Jr.'s Facebook account. **Plaintiffs**

[15] *See also e.g.*, *Foltz v. State Farm Mut. Auto. Ins. Co.* (9th Cir. 2003), 331 F.3d 1122, 1135-36 (9th Cir. 2003) (holding that when sealed documents are submitted in respect to a dispositive motion, the proponent of secrecy must show "compelling reasons" to maintain their secrecy); *New Yorker Magazine,* 846 F.2d at 252; *Anderson v. Cryovac, Inc.*, 805 F.2d 1, 8 (1st Cir. 1986) (recognizing that documents submitted as part of motions for summary judgment are subject to public right of access).

did not mark any documents in this production as "confidential" under the SPO. The documents in EXHIBIT G should not be treated any differently.

Plaintiffs marked wholesale the Forensic Image as "confidential," primarily to protect the disclosure of "potentially romantic content" within Allyn Jr.'s Facebook from public disclosure.[16] EXHIBIT G does not contain any "romantic content." If Plaintiffs really believe that EXHIBIT G should be designated "confidential" under the SPO, they would have marked the materials they produced in November 2018 from Allyn Jr.'s Facebook account as "confidential." Further, Plaintiffs did not object during the April 30, 2019 pre-trial hearing when portions of the materials from EXHIBIT G were placed into the hearing record in open court.[17]

B. Ohio's strong presumption that court documents will be open to the public and the public's interest in this case warrant unsealing EXHIBIT G.

As Plaintiffs previously argued, "Ohio courts presume court documents will be publicly disclosed and any restrictions to public access of the documents will be 'narrowly tailored.'"[18] Plaintiffs continued: "The presumption of openness of court proceedings is so strong, that Ohio courts are to *examine* and *apply* protective orders with great skepticism."[19] In ordering that Plaintiffs' MSJ Opposition be unsealed, this Court noted that trial courts "have been instructed to use the power to restrict public access 'judiciously and sparingly' and only in situation[s] where good cause exists." (4/3/19 Order (quoting *Adams*, 143 Ohio App.3d at 490).) Open access to courts is particularly important in cases such as this that involve a controversy within the local

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[16] Plaintiffs' Notice of Compliance (filed Feb. 22, 2019); *see also* Feb. 22, 2019 Letter from O. Rarric.
[17] *See* Hearing Tr., April 30, 2019 at 15:14-18:2, attached as Exhibit 7 to Defendants' Motion for New Trial.
[18] Plaintiffs' Motion to Immediately Unseal Plaintiffs' March 15, 2019 Combined Response in Opposition to Defendants' Motions for Summary Judgment, at p. 4 ("Plaintiffs' Motion to Unseal") (filed March 19, 2019) (citing *In re T.R.*, 52 Ohio St.3d 6, 12, 556 N.E.2d 439 (1990) (quoting *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501, 510 (1984) (noting there is a "presumption of openness" for Ohio courts)).
[19] *Id.* (citations omitted) (emphasis in original).

community:

> The crucial prophylactic aspects of the administration of justice cannot function in the dark; no community catharsis can occur if justice is 'done in a corner [or] in any covert manner.' It is not enough to say that results alone will satiate the natural community desire for 'satisfaction.' A result considered untoward may undermine public confidence, and where the trial has been concealed from public view an unexpected outcome can cause a reaction that the system at best has failed and at worst has been corrupted.

Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 571 (1980) (quotation omitted).[20]

Pursuant to Ohio's strong presumption in favor of public disclosure of judicial records, the SPO provides that it "shall be strictly construed in favor of public disclosure and open proceedings whenever possible." (SPO, ¶ 1.) Further, the SPO adopted a policy of "highly discourage[ing] the filing of any pleadings or documents under seal." (*Id.*, ¶ 10.) The Court should grant this motion to further Ohio's policy of open access to judicial records.

The already "strong presumption that court proceedings, and the filings within those proceedings, will be open to the public"[21] is even stronger in this case due to the pervasive local and national media attention it has received. "'[T]he greater the public interest in the litigation's subject matter, the greater the showing necessary to overcome the presumption of access.'" *In re Natl. Prescription Opiate Litig.*, 927 F.3d 919, 939 (6th Cir. 2019) (quoting *Brown & Williamson*, 710 F.3d at 1181).

The public and news media have covered this case closely and that attention spiked in response to the parties' summary judgment briefing, during trial, and in coverage of the jury's

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[20] The principles announced in *Richmond Newspapers*, a criminal case, apply with equal force in civil cases. "The community catharsis, which can only occur if the public can watch and participate, is also necessary in civil cases." *Brown & Williamson Tobacco Corp. v. F.T.C.*, 710 F.3d 1165, 1179 (6th Cir. 1983).

[21] Plaintiffs' Motion to Unseal, at p. 1.

verdict and subsequent post-trial issues. For example, after the Court ordered that Plaintiffs' MSJ Opposition should be unsealed, *The Chronicle-Telegram*, a daily newspaper of general circulation within Lorain County, wrote an article focused on the content of the private emails and text messages sent to, from and between College employees that the Court ordered unsealed.[22] During trial, Plaintiffs' lead counsel informed the jury that this case was the subject of substantial media scrutiny, with reporting and opinion pieces published in outlets such as the *The New York Times*, *The Washington Post*, Fox News, CNN, and *The Wall Street Journal*, among others.[23] After the jury verdict, as one of many examples of post-trial publicity, Plaintiff David Gibson wrote an op-ed published in *USA Today*.[24]

The extensive and continued media coverage of this case further supports the Court's holding that this case involves issues of "public concern" which the materials in EXHIBIT G reflect. (4/22/19 Order, at pp. 7, 12.) EXHIBIT G should be unsealed.

C. The administrative burdens involved in complying with the SPO warrant unsealing EXHIBIT G.

The SPO requires that briefs or pleadings that refer to or attach documents marked "confidential" must either be redacted or filed under seal. (SPO, ¶¶ 10(f), (g).) Improperly designating material as "confidential," such as Plaintiffs did in EXHIBIT G, creates unnecessary administrative burdens for the parties and the Court in filing redacted briefs or pleadings and maintaining these filings (or portions of filings) under seal. Plaintiffs complained of this same

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[22] *See* Scott Mahoney, *Documents reveal attempts to 'smear the brand' of Gibson's*, THE CHRONICLE-TELEGRAM, April 19, 2019, *available at* https://elyria.mynews360.com/news/81531/documents-reveal-attempts-to-smear-the-brand-of-gibsons/.

[23] Trial Tr., June 12, 2019, at 14:10-18, attached as Exhibit 14 to Defendants' Motion for Judgment Notwithstanding the Verdict (filed Aug. 14, 2019).

[24] David Gibson, Op-Ed, *Oberlin Bakery owner: Gibson's Bakery paid a high cost for an unfairly damaged reputation*, USA Today, June 21, 2019, *available at* https://www.usatoday.com/story/opinion/voices/2019/06/21/oberlin-college-gibson-bakery-lawsuit-column/1523525001/.

burden in seeking to unseal their MSJ Opposition, a request that the Court granted. (*See* Plaintiffs' Limited Reply, at p. 1; 4/3/19 Order.)

Given the public's interest in this case, the full summary judgment record, as well as all documents cited or referred to in Defendants' Motion for New Trial, should be open to the public. In addition, if either party files an appeal, the technical burden of keeping EXHIBIT G under seal will be repeated and—in the event that either party references the material in EXHIBIT G during an appellate oral argument—could lead to closing that entire court proceeding to the public. Unsealing EXHIBIT G will aid the public's important interest in knowing the facts underlying the Court's and any appellate court's rulings, as well as lightening the administrative burdens on the parties and the Court.

IV. CONCLUSION.

The Court should treat the materials that the parties relied on in summary judgment briefing equally with respect to the public's right of access. EXHIBIT G and Defendants' Combined Reply are the only substantive portions of the summary judgment and trial record that remain under seal. To promote the strong presumptive interest in the public's access to court proceedings, and to matters that this Court has held involve issues of public concern, the Court should grant this motion and permit Defendants to file unsealed versions of EXHIBIT G and Defendants' Combined Reply.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I further certify that a copy of the foregoing was served this 28th day of August, 2019, via e-mail, pursuant to Civ.R. 5(B)(2)(f) of the Ohio Rules of Civil Procedure, upon the following:

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DEFENDANTS' BRIEF IN SUPPORT OF MOTION TO UNSEAL EXHIBIT G OF DEFENDANTS' COMBINED SUMMARY JUDGMENT REPLY BRIEF

Gibson Bros., Inc., et al. v. Oberlin College, et al., No. 17CV193761

Filed on August 28, 2019

Index to Exhibits

Exhibit Number	Document Date	Description
1	June 6, 2018	Stipulated Protective Order
2	April 3, 2019	Entry and Ruling on Plaintiffs' Motion to Immediately Unseal Plaintiffs' March 15, 2019 Combined Response in Opposition to Defendants' Motions for Summary Judgment
3	February 22, 2019	Letter from O. Rarric to Defendants' Counsel
4	March 20, 2019	Letter from O. Rarric to Defendants' Counsel
5	August 12, 2019	Letter from C. Snyder to Plaintiffs' Counsel
6	August 16, 2019	Letter from B. McHugh to C. Snyder and J. Mandel
7	August 17, 2019	Letter from C. Snyder to B. McHugh

EXHIBIT 1

ORIGINAL

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.	)	
	)	

STIPULATED PROTECTIVE ORDER

The parties to this Stipulated Protective Order have agreed to the terms of this Order; accordingly, it is ORDERED:

1. **Scope.** All documents produced in the course of discovery, including responses to discovery requests, deposition testimony and exhibits, other materials which may be subject to restrictions on disclosure for good cause and information derived directly therefrom (hereinafter collectively "documents"), shall be subject to this Order concerning confidential information as set forth below. As there is a presumption in favor of open and public judicial proceedings in the Ohio courts, this Order shall be strictly construed in favor of public disclosure and open proceedings wherever possible. The Order is also subject to the Local Rules of this Court and the Ohio Rules of Civil Procedure on matters of procedure and calculation of time periods.

2. **Form and Timing of Designation.** A party may designate documents as confidential and restricted in disclosure under this Order by placing or affixing the words "CONFIDENTIAL" on the document in a manner that will not interfere with the legibility of the

document and that will permit complete removal of the CONFIDENTIAL designation. Documents shall be designated CONFIDENTIAL prior to or at the time of the production or disclosure of the documents. The designation CONFIDENTIAL does not mean that the document has any status or protection by statute or otherwise except to the extent and for the purposes of this Order.

3. **Documents Which May be Designated CONFIDENTIAL.** Any party may designate documents as CONFIDENTIAL upon making a good faith determination that the documents contain information protected from disclosure by statute or that should be protected from disclosure as confidential personal information, trade secrets, personnel records, student records or such other sensitive commercial information that is not publicly available. Public records and other information or documents that are publicly available may not be designated as CONFIDENTIAL.

4. **Confidential Material.** The term "Confidential Material" as referenced herein shall mean and refer to documents or information that are designated as CONFIDENTIAL as defined above.

5. **Depositions.** Deposition testimony shall be designated as Confidential Material only if designated as such. Such designation shall be specific as to the portions of the transcript or any exhibit to be designated as CONFIDENTIAL. Thereafter, the deposition transcripts and any of those portions so designated shall be protected as Confidential Material, pending objection, under the terms of this Order.

6. **General Protections.** Documents designated CONFIDENTIAL under this Order shall not be used or disclosed by the parties, counsel for the parties, or any other persons identified

in Paragraph 7(a), for any purpose whatsoever, other than to prepare for and to conduct discovery and trial in this action, including any appeal thereof.

7. **Disclosure of Information Designated as CONFIDENTIAL.**

(a) Limited Third-Party Disclosures. The parties and counsel for the parties shall not disclose or permit the disclosure of any CONFIDENTIAL documents to any third person or entity except as set forth in subparagraphs (1)-(4) below. Subject to these requirements, the following categories of persons may be allowed to review documents that have been designated CONFIDENTIAL:

(1) **Parties.** Parties and employees of a party to this Order;

(2) **Counsel.** Counsel for the parties and employees and agents of counsel who have responsibility for the preparation and trial of the action;

(3) **Court.** The Court, or to any other court an appeal can be taken, but only under seal;

(4) **Court Reporters and Recorders.** Court reporters and recorders engaged for depositions in the performance of their official duties;

(5) **Consultants, Investigators and Experts.** Consultants, investigators, or experts (hereinafter referred to collectively as "Experts") employed by counsel to assist in the preparation and trial of this action or proceeding, but only to the extent that such disclosure to Experts is reasonably deemed necessary by counsel for the performance of such assistance, and only after such Experts have completed the certification contained in Attachment A, Acknowledgment of Understanding and Agreement to Be Bound; and

(6) **Certain Witnesses.**

a. Individuals who either authored the CONFIDENTIAL documents or who have already viewed the CONFIDENTIAL documents in the past; and

b. Any person whose testimony under oath is taken or to be taken in this litigation. In such a case, a person may only be shown copies of the CONFIDENTIAL documents during his/her testimony and in consultation with counsel, and may not retain any such documents or copies, summaries or

extracts thereof, and only after such non-party has completed the certification contained in Attachment A, Acknowledgement of Understanding and Agreement to Be Bound. The disclosure of CONFIDENTIAL documents during testimony shall not waive the confidential nature of such information.

(7) **Others by Consent.** Other persons only by written consent of the producing party or upon order of the Court and on such conditions as may be agreed or ordered. All such persons shall execute the certification contained in Attachment A, Acknowledgment of Understanding and Agreement to Be Bound.

8. **Documents That May Be Redacted.** Any party may designate portions of documents as CONFIDENTIAL by redacting those portions upon making a good faith determination that the particular portion of the document at issue contains privileged information. The parties agree that if any portion or portions of a document are redacted pursuant to this paragraph, that the redacted document will indicate on its face in a clear and obvious fashion that a redaction of a portion of the document has been made.

9. **Protection of Confidential Material.**

(a) **Control of Documents.** Counsel for the parties shall take reasonable and appropriate measures to prevent unauthorized disclosure of documents designated as CONFIDENTIAL pursuant to the terms of this Order. Counsel shall maintain the originals of the forms signed by persons acknowledging their obligations under this Order for a period of one (1) year after dismissal of the action, the entry of final judgment and/or the conclusion of any appeals arising therefrom.

(b) **Copies.** Prior to production to another party, all copies, electronic images, duplicates, extracts, summaries or descriptions (hereinafter referred to collectively as "copies") of documents designated as CONFIDENTIAL under this Order, or any individual portion of such a document, shall be affixed with the designation "CONFIDENTIAL" if the word does not already

appear on the copy. All such copies shall thereafter be entitled to the protection of this Order. The term "copies" shall not include indices, electronic databases or lists of documents provided these indices, electronic databases or lists do not contain substantial portions or images of the text of Confidential Material or otherwise disclose the substance of the confidential information contained in those documents.

(c) **Inadvertent Production.** Inadvertent production of any document or information without a designation of "CONFIDENTIAL" shall be governed by Rule 26(B)(6)(b) of the Ohio Rules of Civil Procedure or shall be immediately brought to the attention of counsel, who shall return or destroy any such document. The disclosure of a document or information subject to a claim of attorney-client privilege, work-product protection, or any other privilege recognized by Ohio law shall not constitute a specific or subject-matter waiver of such privilege or protection as to that document or information, or any other document or information.

If the disclosing party discovers that an inadvertent disclosure of a document or information subject to a claim of privilege or a designation of "CONFIDENTIAL" has occurred, that disclosing party shall immediately notify the receiving party in writing, or orally if on the record at a deposition or a court proceeding, and shall request that such document or information be returned or destroyed, and the receiving party shall promptly comply with that request and refrain from any use whatsoever of such document or information.

If a receiving party becomes aware that it is in receipt of information or materials which it knows or reasonably should know are privileged, attorneys for the receiving party shall immediately take steps to: (i) stop reading such information or materials; (ii) notify the attorneys for the producing party of such information or materials; (iii) collect all copies of such information

or materials; (iv) destroy or return such information or materials to the producing party; and (v) otherwise comport themselves with the applicable provisions of the Rules of Professional Conduct.

(d) Inadvertent Failure to Designate. Inadvertent production of any document or information without a designation of CONFIDENTIAL does not waive a party's right to later designate (or change the designation of) a document. A party shall not be deemed to be in violation of this Order for any use or disclosure of a document that was permitted under this Order prior to such later designation or re-designation.

10. Filing of Confidential Material Under Seal. The Court highly discourages the filing of any pleadings or documents under seal. To the extent that a brief, memorandum or pleading references any document marked as CONFIDENTIAL, then the brief, memorandum or pleading shall refer the Court to the particular document filed under seal without disclosing the contents of any Confidential Material.

(e) Before any document marked as CONFIDENTIAL is filed under seal with the Clerk, the filing party shall first consult with the party that originally designated the document to determine whether, with the consent of that party, the document or a redacted version of the document may be filed with the Court not under seal.

(f) Where agreement is not possible or adequate, before Confidential Material is filed with the Clerk, it shall be placed in a sealed envelope marked "CONFIDENTIAL MATERIAL", displaying the case name, docket number, a designation of what the document is, the name of the party on whose behalf it is submitted, and the name of the attorney who has filed the Confidential Material or documents containing Confidential Material on the front of the envelope. A copy of any document filed under seal shall also be delivered or sent directly to the judicial officer's chambers.

(g) To the extent that it is necessary for a party to discuss the contents of any Confidential Material in a written brief, memorandum, pleading, or other court filing (a "Court Filing") then such portion of the Court Filing may be filed under seal. In such circumstances, counsel shall prepare two versions of the Court Filing, a public and a confidential version. The public version shall contain a redaction of references to all CONFIDENTIAL documents and information. The public version of the Court Filing shall be filed with the Court in the ordinary and normal fashion. The confidential version shall be a full and complete version of the Court Filing and shall be filed with the Clerk under seal as above. Both the confidential version and the public version of the Court Filing shall be served on counsel for the parties and a copy of the confidential version of the Court Filing shall be delivered or sent directly to the judicial officers' chambers.

11. Challenges by a Party to Designation as Confidential Material. Any CONFIDENTIAL designation is subject to challenge by any party or nonparty with standing to object. Before filing any motions or objections to a confidentiality designation with the Court, the objecting party shall have an obligation to meet and confer in a good faith effort to resolve the objection by agreement. If agreement is reached confirming or waiving the CONFIDENTIAL designation as to any documents subject to the objection, the designating party shall serve on all parties a notice specifying the documents and the nature of the agreement.

12. Action by the Court. Applications to the Court for an order relating to any documents designated as Confidential Material shall be by motion. Nothing in this Order or any action or agreement of a party under this Order limits the Court's power to make any orders that may be appropriate with respect to the use and disclosure of any documents produced or used in discovery or at trial.

13. **Use of Confidential Material at Trial.** All trials are open to the public. Absent order of the Court, there will be no restrictions on the use of any document that may be introduced by any party during the trial. If a party intends to present at trial Confidential Material or documents or information derived therefrom, such party shall provide advance notice to the other party at least 14 days before the commencement of trial by identifying the documents or information at issue as specifically as possible (i.e., by Bates number, page range, deposition transcript lines, etc.) without divulging the actual CONFIDENTIAL documents or information. The Court may thereafter make such orders as are necessary to govern the use of such documents or information at trial.

14. **Obligations on Conclusion of Litigation.**

(a) **Order Remains in Effect.** Unless otherwise agreed or ordered, this Order shall remain in force after dismissal or entry of final judgment not subject to further appeal.

(b) **Return of CONFIDENTIAL MATERIAL.** Within 60 days after dismissal or entry of final judgment not subject to further appeal, all documents treated as Confidential Material under this Order, including copies as defined in ¶ 9(b), shall be returned to the producing party unless: (1) the document has been offered into evidence or filed without restriction as to disclosure; (2) the parties agree to destruction in lieu of return; or (3) as to documents bearing the notations, summations, or other mental impressions of the receiving party, that party elects to destroy the documents and certifies to the producing party that it has done so. Notwithstanding the above requirements to return or destroy documents, counsel may retain attorney work product, including an index which refers or relates to information designated as Confidential Material, so long as that work product does not duplicate verbatim substantial portions of the text or images of confidential documents. This work product shall continue to be

Confidential Material under this Order. An attorney may use his or her work product in a subsequent litigation provided that its use does not disclose or use Confidential Material.

(c) **Return of Documents Filed under Seal.** After dismissal or entry of final judgment not subject to further appeal, the Clerk may elect to return to counsel for the parties or, after notice, destroy documents filed or offered at trial under seal or otherwise restricted by the Court as to disclosure.

15. Order Subject to Modification. This Order shall be subject to modification by the Court on its own motion or on motion of a party or any other person with standing concerning the subject matter.

16. No Prior Judicial Determination. This Order is entered based on the representations and agreements of the parties and for the purpose of facilitating discovery. Nothing herein shall be construed or presented as a judicial determination that any documents or information designated CONFIDENTIAL by counsel or the parties is subject to protection under Rule 26(C) of the Ohio Rules of Civil Procedure or otherwise until such time as the Court may rule on a specific document or issue.

17. Persons Bound. This Order shall take effect when entered and shall be binding upon all counsel and their law firms, the parties, and persons made subject to this Order by its terms. In order to facilitate the exchange of discovery, the parties shall be entitled to rely upon and shall be bound by this Order when it has been signed by the parties' counsel, whether or not this Order has been signed by the Court. Nothing in this Order shall be construed to affect in any way the admissibility of any document, material, testimony or other evidence at a trial of this action.

IT IS SO ORDERED.

Dated: 06/06/2018

JUDGE JOHN R. MIRALDI

WE SO MOVE/STIPULATE AND AGREE TO ABIDE BY THE TERMS HEREIN:

/s/ Matthew W. Onest (with email consent)
Terry A. Moore (0015837),
Owen J. Rarric (0075367), and
Matthew W. Onest (0087907), of
KRUGLIAK, WILKINS, GRIFFITHS
& DOUGHERTY CO., L.P.A.
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tmoore@kwgd.com; orarric@kwgd.com;
monest@kwgd.com

And
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And

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taylor@jamestaylorlpa.com

ATTORNEYS FOR PLAINTIFFS

/s/ Julie A. Crocker
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Julie A. Crocker (0081231)
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rholman@taftlaw.com;
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And

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Matthew W. Nakon (0040497)
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ATTORNEYS FOR DEFENDANTS

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.	)	

ACKNOWLEDGMENT
AND
AGREEMENT TO BE BOUND

The undersigned hereby acknowledges that he/she has read the Protective Order dated _____, 20___, in the above-captioned action and attached hereto, understands the terms thereof, and agrees to be bound by its terms. The undersigned submits to the jurisdiction of the Court of Common Pleas, Lorain County, Ohio in matters relating to the Protective Order and understands that the terms of the Protective Order obligate him/her to use documents designated CONFIDENTIAL in accordance with the Order solely for the purpose of the above-captioned action, and not to disclose any such documents or information derived directly therefrom to any other person, firm or concern.

The undersigned acknowledges that violation of the Protective Order may result in penalties for contempt of court.

Name: _____

Job Title: _____

Employer: _____

Business Address: _____

_____

_____

Date: _____ _____

Signature

EXHIBIT 2

LORAIN COUNTY COURT OF COMMON PLEAS
LORAIN COUNTY, OHIO

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

Date 4/3/19 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 PLAINTIFFS' MOTION TO IMMEDIATELY UNSEAL PLAINTIFFS' MARCH 15, 2019 COMBINED RESPONSE IN OPPOSITION TO DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT

This matter comes before the Court upon the filing of Plaintiffs' motion to immediately unseal Plaintiffs' combined brief in opposition to Defendants' motions for summary judgment. Plaintiffs challenge Defendants' designation of discovery documents referenced in, or attached as exhibits to, their opposition and seek an order unsealing the entire brief and its attached exhibits. Attached to the brief is the stipulated protective order ("SPO") and the back-and-forth correspondence between Counsel over disputed confidential designations. Defendants filed a brief in opposition to the request to unseal, effectively arguing that Plaintiffs should have followed the public filing protocol in Paragraph 10, that Plaintiffs drafted the stipulated protective order at issue, that Plaintiffs have abused the protective order, and that "many of Defendants' produced documents are subject to The Family Educational Rights and Privacy Act ("FERPA") necessitating protection from disclosure. Plaintiffs then filed a motion for leave to file a limited reply instanter that contained a chart identifying the exhibits Defendants designated as confidential. The Court hereby grants Plaintiffs' motion for leave and in rendering this decision also considered that motion's exhibits.

The Parties' SPO requires a party designating a document as confidential to do so after a good faith determination that the documents "contain confidential personal information, trade secrets, personnel records, student records or other sensitive commercial information that is not publicly available." SPO ¶ 3. The SPO strictly prohibits the designation of publicly available documents as confidential. *Id.* At length, Paragraph 10 of the SPO lays out the procedure for filing confidential material under

seal. Notably, the SPO states that filing pleadings or documents under seal is "highly discouraged" by the Court, requires the parties to meet and confer with the designating party about whether a redacted version can be filed publicly, and if no agreement can be reached, file the full version of the brief under seal and then file a redacted public version of the brief as well. *Id.* at ¶ 10. Paragraph 11 of the SPO requires the parties to meet and confer in good faith regarding challenges to a confidential material designation before filing any motions or objections. Aside from the above, the SPO does not designate who bears the burden on a challenge to a party's confidential designation.

In Ohio there is no public right to inspect pretrial discovery materials, but there is a presumption in favor of public access to discovery materials filed by parties with the Court. *See Adams v. Metallica, Inc.*, 143 Ohio App. 3d 482, 490 (2001). In fact, Courts have been instructed to use the power to restrict public access "judiciously and sparingly" and only in situation where good cause exists. *Id.* (internal citations omitted). The standard of review applied to a decision on a motion to unseal is abuse of discretion. *See Baughman v. State Farm Mut. Auto. Ins. Co.*, 2005-Ohio-1948, ¶ 5 (Ohio Ct. App. 9th Dist.); *but see Shane Group, Inc. v. Blue Cross Blue Shield of Michigan*, 825 F.3d 299, 305-09 (6th Cir. 2016) (Compelling discussion of the distinction between protective orders and orders to seal records and the Court's obligations in each regard in the context of Fed. Civ. R. 26 - Ohio Civ. R. 26's federal counterpart.). In exercising this discretion, Courts should employ the balancing test utilized in *Adams* that included "the nature of the protective order, the parties' reliance on it, the ability to gain access to the information in other ways, the need to avoid repetitive discovery, the nature of the material for which protection is sought, the need for continued secrecy, and the public interest involved." *Id.* (internal citations omitted).

Here, the factors weigh in favor of unsealing the opposition in its entirety together with its attached and referenced exhibits. The nature of the SPO is outlined above and clearly contemplates specific, limited information that should be designated as confidential. As to the remaining relevant *Adams* factors, both parties appear to have relied, and perhaps over-relied, on the protective order; much of the information contained in the opposition and its exhibits is accessible to the parties and the public through other means; and the nature of the material is largely not that which was contemplated by the terms of the protective order, thereby alleviating the need for continued secrecy. Perhaps most importantly, the public interest in transparency at this procedural juncture should be afforded great weight.

Here, Exhibits 1 through 10 that are physically attached to Plaintiffs' opposition do not contain confidential information as contemplated by the SPO. Specifically Exhibits 1 through 5 contain public records from the criminal case that arose from the alleged shoplifting that was at the center of the events giving rise to this lawsuit; Exhibits 6 and 9 are affidavits procured by Plaintiffs; Exhibits 7 and 10 are emails sent on Oberlin

College email addresses that are not confidential information as contemplated by the SPO and are accessible on the internet on Oberlin College's website; and Exhibit 8 is a 2016 Oberlin College Student Policies manual that appears to be accessible online as well. It is the order of the Court that Plaintiffs are permitted to file these exhibits publicly.

The confidential deposition exhibits referenced and imbedded in Plaintiffs' opposition are of a similar nature. The Court also finds the factors weigh in favor of their public disclosure with limited exceptions. Amongst the embedded and referenced exhibits there is some information that is personal and/or sensitive and should remain confidential. This includes any personal information that would is not publicly available – for example, the phone numbers on page 41 (cited as confidential exhibit No. 16 to Meredith Raimondo Deposition Transcript Vol. II), page 89 of Plaintiffs' opposition (citing Exhibit 23 to Meredith Raimondo Deposition Transcript Vol. II), in J. Miyake Dep. Exhibits 25 and 27, in J. Walsh Dep. Exhibit 19, and the entire photograph in J. Miyake Dep. Exhibit 22 all should remain confidential and be redacted. Aside from the above exceptions, Plaintiffs are permitted to publicly file the above exhibits to its opposition, provided the exhibits comply with the Court's above instruction.

It is therefore the order of the Court that Plaintiff is permitted to file a full, unsealed copy of its opposition brief and the attached or referenced exhibits publicly, but with the caveat that any personal, sensitive information – like the information identified above – be redacted prior to its filing.

IT IS SO ORDERED.

VOL___PAGE____

John R. Miraldi, Judge

cc: All Parties

EXHIBIT 3

KRUGLIAK, WILKINS, GRIFFITHS
& DOUGHERTY CO., L.P.A. attorneys at law

Owen J. Rarric, Esq.
Direct Line: (330) 244-2869
orarric@kwgd.com

February 22, 2019

VIA EMAIL

Ronald D. Holman, II
Julie A. Crocker
Cary M. Snyder
William A. Doyle
Taft Stettinius & Hollister LLP
200 Public Square, Suite 3500
Cleveland, OH 44114-2302

RE: ***Gibson Bros., Inc., et al. v. Oberlin College, et al.***
Notice of Compliance with February 21, 2019 Entry and Ruling on Defendants' Motion to Compel

Dear Counsel:

Pursuant to the Court's February 21, 2019 Order, we arranged for transmittal of the forensic imaging of Allyn D. Gibson's Facebook account to you, via an email that you received today from Vestige Digital Investigations, with a link for downloading said file. Please note, the entire contents of this production are designated CONFIDENTIAL pursuant to the Stipulated Protective Order. As we are producing the imaging to you exactly how we have received it from the ESI vendor, we are unable to physically mark the contents as "CONFIDENTIAL" but all such contents must be treated as such.

I am also enclosing a Notice of Compliance, which is being filed with the Court, as well.

Very truly yours,

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

Owen J. Rarric
Enc.
c: All Counsel of Record *(via email, w/enc.)*

02241991-1 / 12000.00-0027

EXHIBIT 4

KRUGLIAK, WILKINS, GRIFFITHS
& DOUGHERTY CO., L.P.A. attorneys at law

Owen J. Rarric, Esq.
Direct Line: (330) 244-2869
orarric@kwgd.com

March 20, 2019

VIA EMAIL

Ronald D. Holman, II
Julie A. Crocker
Cary M. Snyder
William A. Doyle
Taft Stettinius & Hollister LLP
200 Public Square, Suite 3500
Cleveland, OH 44114-2302

RE: Gibson Bros., Inc., et al. v. Oberlin College, etc., et al.

Dear Counsel:

I am writing in response to your March 19, 2019 letter in which you request that we remove the confidential designation for certain portions of the forensic image of Allyn D. Gibson's Facebook account provided to you on February 22, 2019. As you know, Plaintiffs have a pending motion to immediately unseal their motion for summary judgment response brief and exhibits based on Defendants' confidential designations.

Plaintiffs will agree to removal of the confidential designations on the documents attached to your letter if Defendants likewise consent to the granting of Plaintiffs' pending motion to immediately unseal their motion for summary response brief and exhibits and Defendants file notice of such consent with the Court. If Defendants do not consent to the granting of the motion to unseal, then Plaintiffs will advise of their decision on your request no later than two (2) days after the Court rules on Plaintiffs' pending motion to unseal.

We look forward to hearing from you.

Very truly yours,

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

Owen J. Rarric

02265714-1 / 12000.00-0027

c: All Counsel of Record *(via email)*

[redacted]

EXHIBIT 5

Taft/

200 Public Square, Suite 3500 / Cleveland, Ohio 44114-2302
Tel: 216.241.2838 / Fax: 216.241.3707
www.taftlaw.com

CARY M. SNYDER
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August 12, 2019

VIA EMAIL TRANSMISSION

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Re: *Gibson Bros., Inc., et al. v. Oberlin College aka Oberlin College and Conservatory, et al.*
Lorain County Court of Common Pleas
Case No. 17CV193761

Dear Counsel:

I write to ask for your consent—in lieu of filing a motion to unseal—for Defendants to publicly file an unsealed version of their Combined Reply Brief in Support of Motions for Summary Judgment ("Combined Reply"). On March 22, 2019, Defendants publicly filed a redacted version of their Combined Reply because you did not consent to removing the "Confidential" designation of selected documents from the forensic image of Allyn D. Gibson's Facebook account, as we requested in Ron Holman's letter dated March 19, 2019. *See* March 20, 2019 Letter from O. Rarric. These Facebook documents are Exhibit G to my affidavit in support of the Combined Reply. For convenience, that Exhibit G is attached hereto.

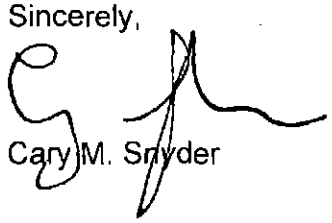
On April 4, 2019, the Court granted Plaintiffs' Motion to Immediately Unseal Plaintiffs' March 15 Combined Response in Opposition to Defendants' Motions for Summary Judgment. As a result, Exhibit G and the portions of the Combined Reply that reference those documents, are the only parts of the summary judgment and trial

records that remain under seal, with the exception of certain personal information pursuant to the Court's April 4, 2019 Entry and Ruling.

Please let us know by 5 p.m. tomorrow—August 13, 2019—whether you consent to Defendants publicly filing an unsealed version of their Combined Reply. In the event you do not consent, pursuant to Section 11 of the parties' Stipulated Protective Order, this letter serves as Defendants' challenge to the "Confidential" designation of the documents in Exhibit G to the Combined Reply so that Defendants can then seek relief from the Court.

We look forward to hearing from you tomorrow. In the interim, please let me know if you have any questions or would like to discuss any of the above.

Sincerely,



Cary M. Snyder

cc: Ms. Marti Wolf

EXHIBIT 6

Tzangas | Plakas
Mannos |Ltd

LEE E. PLAKAS

JAMES G. MANNOS

JAMES M. MCHUGH

GARY A. CORROTO

DAVID L. DINGWELL

DENISE K. HOUSTON

MEGAN J. FRANTZ OLDHAM

EDMOND J. MACK

MARIA C. KLUTINOTY EDWARDS

JOSHUA E. O'FARRELL

COLLIN S. WISE

LAUREN A. GRIBBLE

BRANDON W. MCHUGH

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Deceased

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August 16, 2019

VIA EMAIL

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Re: ***Gibson Bros., Inc., et al. v. Oberlin College aka Oberlin College and Conservatory, et al.*, Lorain Cty. Ct. Cmn. Pleas Case No. 17CV193761**

Cary:

This letter is being sent in follow-up to and to memorialize our discussion during the meet and confer session conducted on August 16, 2019 at 3:00 PM regarding the confidential designation for certain documents from Allyn D. Gibson's ("ADG") Facebook account.

During the meet and confer conference, we asked you to identify the reasoning behind seeking the removal of the confidential designation for ADG's Facebook account. Your response was that it should be part of the public record because Plaintiffs' Combined Response in Opposition to the Motions for Summary Judgment was part of the public record. For several reasons, this is not a legitimate reason for seeking the removal of the confidential designation:

First, these documents are already part of the record that will be submitted to the Ninth District Court of Appeals should Defendants lose their post-trial motions and thereafter further challenge the jury's verdict. Defendants are aware that the trial court had these materials before it when it examined and ruled on Defendants' motions for summary judgment. As a result, there is simply no reason to justify unsealing the materials in connection with the current litigation.

Second, Defendants did not even attempt to introduce ADG's Facebook account as evidence at trial and did not even call ADG as a witness to testify. Clearly, had the Facebook messages at issue been relevant to this case, Defendants would have made some attempt to introduce them as evidence.

Third, Defendants' Reply in Support of the Motions for Summary Judgment was filed nearly five (5) months ago. Plaintiffs are not aware of any reason how a five-month-old brief justifies unsealing ADG's Facebook account, and you could not articulate one.

Thus, it appears that Defendants' sole desire for unsealing ADG's Facebook account is a misguided attempt to continue the smear on Plaintiffs' name and brand. Such conduct could lead to claims for abuse of process.[1]

Additionally, Plaintiffs continue to assert that nonparty ADG's private Facebook account was properly marked as confidential under the protective order.

Because Defendants appear to be seeking the removal of the confidential designation for ulterior purposes, among other reasons, Plaintiffs will oppose any motion filed to unseal Defendants' Reply in Support of the Motions for Summary Judgment.

Best,

/s/ *Brandon W. McHugh*
Brandon W. McHugh
bmchugh@lawlion.com

Cc: Matthew W. Onest, Esq. (*via email*)
Jacqueline B. Caldwell, Esq. (*via email*)

[1] *See, Yaklevich v. Kemp, Schaeffer & Rowe Co., LPA*, 68 Ohio St.3d 294, 298, 1994-Ohio-503, 626 N.E.2d 115.

EXHIBIT 7

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August 17, 2019

VIA EMAIL TRANSMISSION

Brandon W. McHugh, Esq.
Tzangas Plakas Mannos Ltd.
220 Market Avenue South
8th Floor
Canton, OH 44702
bmchugh@lawlion.com

Re: *Gibson Bros., Inc., et al. v. Oberlin College aka Oberlin College and Conservatory, et al.*
Lorain County Court of Common Pleas
Case No. 17CV193761

Dear Brandon:

Your August 16, 2019 letter did not ask me to confirm that it accurately reflects the content of our meet and confer session held earlier in the day regarding Defendants' request that Plaintiffs consent to unsealing Defendants' Combined Reply Brief in Support of Motions for Summary Judgment.

To avoid any misunderstanding, I do not believe that your letter accurately captures our conversation. As one of many omissions and misrepresentations, your letter neglects to acknowledge that you and your colleagues refused to provide any basis as to why the documents in Exhibit G to the Combined Reply qualify as material that may be designated "confidential" under the stipulated protective order.

Your letter, however, does confirm that our efforts to resolve this dispute outside of motion practice have not been successful.

Sincerely,

Cary M. Snyder

cc: Matthew W. Onest, Esq.
Jacqueline B. Caldwell, Esq.
Josh M. Mandel, Esq.

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' RESPONSE IN OPPOSITION TO DEFENDANTS' MOTION FOR NEW TRIAL & MOTION FOR REMITTITUR

After six (6) weeks of evidentiary hearings and trial, a fair and impartial jury of eight (8) Lorain County citizens found that Defendants[1] were responsible for the destructive libel campaign aimed at Gibson's Bakery,[2] David Gibson,[3] and Grandpa Gibson.[4] Now, after hearing the verdict, Defendants challenge the jury's decision based on evidence Defendants failed to introduce during trial, or based on evidence that was introduced without objection by one of Defendants' eleven (11) attorneys.

Defendants' Motion is baseless, incorrectly challenges the jury's verdict, and must be denied for the following reasons:

- ***First***, the Court properly submitted libel actual malice to the jury during the punitive phase. Because Defendants filed a motion to bifurcate the compensatory and punitive phases of trial, libel actual malice was two separate issues that were required to be submitted in both phases of trial. Further, the Court also properly permitted the jury to allocate the compensatory damages to the various claims during the punitive phase, and Defendants failed to identify any prejudice resulting from this procedure;

- ***Second***, the Court's jury instructions on the libel claims properly stated Ohio law.

[1] "Defendants" refers to Oberlin College & Conservatory ("Oberlin College") and Meredith Raimondo ("Dean Raimondo").
[2] "Gibson's Bakery" refers to Plaintiff Gibson Bros., Inc.
[3] "David Gibson" or "David" refers to Plaintiff David R. Gibson.
[4] "Grandpa Gibson" refers to Plaintiff Allyn W. Gibson.

Further, even if the libel instructions were incorrect (they were not), Defendants either failed to properly object to the instructions or failed to identify any prejudice related to the instructions;

- ***Third***, for nearly all the evidentiary issues raised, Defendants either failed to object to the admission of the evidence or failed to correctly proffer the evidence during trial, which resulted in waiver of those arguments. Further, the Court properly excluded and/or admitted the evidence Defendants identified in their Motion;

- ***Fourth***, Defendants waived their previously denied Motion for Change of Venue by not raising the issue during voir dire. Further, even had the issue been raised, the parties were able to seat an impartial jury of Lorain County citizens and the motion would have been denied;

- ***Fifth***, the damages awarded by the jury were based on Plaintiffs' proven damages and Defendants' malice, not the jury's passion or prejudice; and

- ***Finally***, Defendants are not entitled to remittitur as Plaintiffs' damages were based on competent credible evidence and Defendants' malicious conduct. Further, the Court already granted Defendants a de facto remittitur when it reduced Plaintiffs' combined damages by more than $19 million through application of the caps on noneconomic and punitive damages.

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I. INTRODUCTION

The most enduring feature of the American justice system is the jury trial. As the Court recognized during the compensatory phase, participating as a juror is "an incredible duty and act of service." (June 6, 2019 Tr. Trans., p. 81). However, before the trial even concluded, Defendants sent a communication to thousands of people questioning the service and decision of the jury, who sacrificed more than a month of their lives to listen to the evidence and decide this case. During the punitive phase of trial, Oberlin College Vice President and General Counsel Donica Varner testified as follows:

> Q. The position following the jury verdict clearly said that Oberlin College did not agree -- "regretted that the jury did not agree with the clear evidence our team presented." That was one pronouncement publicly, correct?
> A. Correct.
> Q. And in addition, Oberlin College, to thousands of people in the public domain, said that neither Oberlin College nor Dean Raimondo defamed a local business or its owners, correct?
> A. Correct.

(June 12, 2019 Tr. Trans., p. 140).

Defendants have continued this theme of disregarding the jury decisions in their Motion for New Trial and Remittitur. In their Motion, Defendants re-argue ***numerous*** issues this Court has already heard and decided and challenge the jury verdicts based on unpresented and irrelevant evidence or evidence that was introduced without objection. In short, Defendants' Motion is entirely baseless and should be denied out of hand.

II. LAW & ARGUMENT: DEFENDANTS ARE NOT ENTITLED TO A NEW TRIAL OR REMITTITUR

A. Standard of Review.

Ohio R. Civ. P. 59(A) "provides that a trial court 'may' grant a new trial on any of nine specific grounds or for 'good cause shown.'" *Watkins v. Roetzel*, 9th Dist. Medina No. 07CA0024-M, 2008-Ohio-1881, ¶ 8. While granting a motion for new trial rests in the sound discretion of the trial court, "a trial court abuses its discretion when it grants a motion for new trial after a jury verdict where there is substantial evidence to support [the] verdict." *Verbon v. Pennese*, 7 Ohio App.3d 182, 454 N.E.2d 976 (6th Dist. 1982), ¶ 3 of the syllabus.

Defendants' Motion must be denied.

B. The Jury Interrogatories were Proper.

1. The Court properly submitted libel actual malice to the jury during the punitive phase of trial.

Defendants' first argument related to the jury interrogatories regurgitates the same arguments from the JNOV motion regarding the submission of libel actual malice to the jury during the punitive phase of trial. To avoid needless repetition, Plaintiffs incorporate their arguments from the JNOV as if fully restated here. (*See,* Pl. Br. Opposition to JNOV, Sec. III(E)(1)). Because libel actual malice was properly submitted to the jury during the punitive phase of trial, Defendants are not entitled to a new trial.

2. The Court properly permitted the jury to allocate compensatory damages by claim during the punitive phase of trial.

Defendants next claim that the allocation of compensatory damages via jury interrogatories used during the punitive phase of trial entitles them to a new trial. For several reasons, Defendants are wrong:

First, Defendants' arguments are entirely unsupported by relevant case law or other

authorities, and Plaintiffs were unable to locate ***any*** cases where the allocation of damages during the punitive phase of trial was found to be improper.

Second, Defendants' citation to the bifurcation process for punitive damages in R.C. 2315.21 is unavailing. While the statute provides that evidence specific to punitive damages cannot be presented during the compensatory phase, *see,* R.C. 2315.21(B)(1), the statute is silent on the allocation of compensatory damages for purposes of calculating punitive damages. Thus, the statute does not bar allocation of compensatory damages during the punitive phase. Further, this is consistent with the General Assembly's reasoning for creating the statute. The Ohio Supreme Court recognized that bifurcation was enacted to avoid "inflation of noneconomic damages ... due to the improper consideration of evidence of wrongdoing in assessing pain and suffering damages." *Havel v. Villa St. Joseph*, 131 Ohio St.3d 225, 2012-Ohio-552, 963 N.E.2d 1270, ¶ 31 (citations omitted). This has no bearing on allocation because the ***amount of damages was already determined by the jury during the compensatory phase of trial and was not increased during the punitive damage phase.*** The allocation merely assigned the already determined amount of damages to specific claims with no potential of inflation due to the presentation of punitive specific evidence.

Third, even if the allocation was improper (it was not), Defendants were required to show prejudice, and they were unable to do so. When a party challenges the propriety of jury interrogatories or verdict forms, it is required to show prejudice. *See, e.g. Kallergis v. Quality Mold, Inc.*, 9th Dist. Summit Nos. 23651 & 23736, 2007-Ohio-6047, ¶ 12 (declining to grant a new trial based on jury interrogatories where no prejudice was identified). Defendants' attempts to manufacture prejudice are unavailing:

- Defendants first argue that they were prejudiced because the jury completed the allocation after hearing evidence on punitive damages. But, this argument falls flat

because the jury had already determined the ***amount*** of damages. The allocation did not allow the jury to increase or decrease the compensatory damages but instead just asked them to assign the amounts to the various claims.

- Defendants next claim that the delay in the allocation allowed Plaintiffs' counsel to unduly influence the jury's decision. Again, this argument does not reveal any prejudice. Plaintiffs' counsel properly suggested damages amounts not only for the allocation, but also for the overall award of both punitive and compensatory damages. (See, June 5, 2019 Tr. Trans., pp. 45-46; June 13, 2019 Tr. Trans., p. 42).

- Lastly, Defendants claim that the allocation somehow impacted the application of the noneconomic damages cap. (See, Def. Mt. New Trial, p. 6). Defendants argue that Plaintiffs were somehow able to avoid the application of the noneconomic damages cap by suggesting more damages for the libel claim. (Id.). This argument makes even less sense than the others. Indeed, it would only apply to damages awarded to David because the damages for Gibson's Bakery were purely economic and the damages for Grandpa Gibson were purely noneconomic. Regardless, during the compensatory phase, the jury ***specifically identified the amount of economic and noneconomic damages***. Thus, regardless of the allocation during the punitive phase, the application of the damages cap would have been ***identical***. (See, Compensatory Damages for David Gibson Interrogatory, pp. 1-2).

Simply put, there is no rule or law preventing the allocation of compensatory damages during the punitive phase of trial, and, even if there was, Defendants cannot identify any actual prejudice flowing therefrom. Therefore, Defendants' Motion for New Trial must be denied.

C. The Jury Instructions did not Contain any Errors of Law.

Defendants wrongly claim that issues with the jury instructions require a new trial. Similar to an appeal, as the party assigning the error here, Defendants have "the burden of affirmatively demonstrating the error" and also "substantiating its arguments in support." *Tesar Indus. Contractors, Inc. v. Republic Steel*, 9th Dist. No. 16CA010957, 2018-Ohio-2089, 113 N.E.3d 1126, ¶ 24 (citations omitted). Ohio courts hold that where "there is no inherent prejudice in the inclusion of a particular jury instruction," as here, then "prejudice must be ***affirmatively shown*** on the face of the record and it cannot be presumed." *Cromer v. Children's Hosp. Med. Ctr. of Akron*, 142 Ohio St.3d 257, 2015-Ohio-229, 29 N.E.3d 921, ¶ 35, citing *Wagner v. Roche Laboratories*, 85

Ohio St.3d 457, 461–462, 709 N.E.2d 162 (1999) (emphasis added).

Furthermore, where there are alleged errors in jury instructions, "a reviewing court must consider the jury charge as a whole and 'must determine whether the jury charge probably misled the jury in a matter materially affecting the complaining party's substantial rights.'" *Id.*, quoting *Kokitka v. Ford Motor Co.*, 73 Ohio St.3d 89, 93, 652 N.E.2d 671 (1995). The general rule is that even if an instruction is erroneous, it does not necessarily result in a misled jury. *Id.* at ¶ 36. *See also, Cleveland Elec. Illum. Co. v. Astorhurst Land Co.*, 18 Ohio St.3d 268, 274–275, 480 N.E.2d 794 (1985).

In cases where a party moves for new trial based on error, that party "must demonstrate prejudice which requires a showing that the result of the trial was probably changed by the trial court's failure to give the proposed instructions." *Bertsch v. Ohio Savings Association*, 9th Dist. Summit No. 11158, 1983 WL 3932, *3, citing *Smith v. Fleshe*, 12 Ohio St. 2d 107, 233 N.E.2d 137 (1967); *Morgan v. Cole*, 22 Ohio App. 2d 164, 259 N.E.2d 514 (1969).

1. The Court's libel instructions were proper.

a. *The Court's instruction on what it takes to "publish" defamatory materials was proper and Defendants' proposed "deliverer" instruction does not accurately describe Ohio law and was thus properly rejected by the Court.*

Defendants' proposed jury instruction on "the liability of a deliverer of defamatory statements published by a third person," discussed as page 8 of Defendants' Motion for New Trial, does not accurately describe Ohio law and as a result, it would have been error to provide such an instruction. As discussed within Plaintiffs' response to Defendants' Motion for JNOV, the treatises cited by Defendants in support of their contrived "deliverer" instruction has not been adopted by any Ohio court. (See Sec. III(B)(4)(a) of Pl. Br. Opposition to JNOV). Moreover, the single case cited by Defendants, a New York case, does not represent an accurate depiction of Ohio law and

would not even apply here because Defendants were not merely passive conduits for the defamatory statements, but were active defamers. Finally, Defendants' "reason to know" instruction conflicts with the fault standard to be applied to a defamation claim brought by a private person about a public concern. (See Sec. III(B)(4)(a) of Pl. Br. Opposition to JNOV). As a result, Defendants' proposed "deliverer" instructions did not accurately describe Ohio law and were thus properly rejected by the Court.

b. *The Court's aiding and abetting instruction is a correct statement of Ohio law.*

Defendants also challenge the Court's definition of aiding and abetting in the jury instructions. For several reasons, the aiding and abetting instruction was a correct statement of Ohio law:

First, Defendants' initial complaint is that Ohio does not recognize aiding and abetting in civil cases. (Def. Mt. New Trial, p. 10). However, Defendants are conflating two separate concepts. In *DeVries Dairy, LLC v. White Eagle Coop. Assn., Inc.*, 132 Ohio St.3d 516, 2012-Ohio-3828, 974 N.E.2d 1194, ¶ 2, one of the cases relied upon by Defendants, the Ohio Supreme Court found that Ohio does not recognize a claim in accordance with 4 Restatement 2d of Torts, Section 876 (1979), which defines certain tort liability for individuals acting in concert with others. In essence, the *DeVries* case and its progeny have determined that Ohio does not recognize ***a separate claim for aiding and abetting liability***.[5]

Defendants take this concept and, without citing a single case, attempt to extend it to the concept of publication of defamatory materials. This is clearly wrong. As the Ninth District has held: "***Any act by which the defamatory matter is communicated to a third party constitutes***

[5] *See, Wells Fargo v. Smith*, 12th Dist. Brown No. CA2012-04-006, 2013-Ohio-855, ¶ 36 [emphasis added] ("Therefore, Ohio does not recognize a ***cause of action*** for aiding and abetting").

publication." *Gosden*, 142 Ohio App.3d at 743 (emphasis added) (citations omitted). For purposes of publication of defamatory materials, "any act" includes aiding and abetting:

> 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 and abets*** another to publish defamatory matter is liable as well as the publisher.

Cooke v. United Dairy Farmers, Inc., 10th Dist. Franklin No. 02AP-781, 2003-Ohio-3118, ¶ 25 (citations omitted) (emphasis added). *See also, Murray v. Knight-Ridder, Inc.*, 7th Dist. Belmont No. 02 BE 45, 2004-Ohio-821, ¶ 104 (citations omitted) ("a person who requests, procures, or aids or abets in the publication of defamatory matter is liable.").

Defendants even tried to submit their own aiding and abetting instruction:

DEFENDANTS' PROPOSED JURY INSTRUCTION NO. 10

(Aiding, Abetting, and Ratification of Libelous Statements)

(Defs.' Proposed Jury Instructions June 4, 2019, p. 11). However, Defendants proposed instruction was rejected because it added substantial additional language that was unsupported by Ohio law.

Second, Defendants again refer to "deliverer" liability and its alleged incompatibility with aiding and abetting. However, as discussed in detail above [*see supra* Sec. II(C)(1)(a)] and in Plaintiffs response to Defendants' JNOV motion (see Pl. Br. Opposition to JNOV, Sec. III(B)(4)), Ohio does not recognize deliver liability. Thus, this argument is completely irrelevant.

Third, Defendants take issue with the definition of aiding and abetting. Defendants complain that the definition borrows from criminal law concepts and also could allow the jury to find liability where none existed. But this argument is meritless. As an initial matter, Defendants ***failed to specifically object to the Court's definition of aiding and abetting***, which waives the issue. *See, Coyne v. Stapleton*, 12th Dist. Clermont No. CA2006-10-080, 2007-Ohio-6170, ¶ 27. When Plaintiffs identified their requested language, Defendants' ***only objection*** was that the

"correct" definition was already contained in the instructions. (See, June 6, 2019 Tr. Trans., p. 16). However, aiding and abetting ***was not defined***. Thus, the objection is not specific and has no basis. Later during the hearing on jury instructions, Plaintiffs provided a different definition based on *Black's Law Dictionary*, and Defendants did not offer any objection on the record. (See, id., p. 42). Thus, Defendants have waived any objection to the definition of aiding and abetting.

The Court provided a definition of aiding and abetting for one purpose: to assist the jury with understanding terms that are not generally used in everyday life. (See, id., p. 16). The definition provided by the court was simple and taken from *Black's Law Dictionary*: "To aid and abet means to encourage, assist, or facilitate the act or to promote its accomplishment." (See, Comp. Jury Instructions, p. 10). *See, Black's Law Dictionary* (11th ed., 2019), liability.

Defendants further challenge the instruction because the verbs used to describe aiding and abetting could, according to Defendants, lead the jury to find them liable for protected conduct. Specifically, Defendants claim that they are not liable for the transmission of the Student Senate Resolution as the internet service provider. This, again, is a regurgitation of Defendants' arguments regarding publication in their JNOV motion. However, as discussed above [*see supra* Sec. III(B)(4)(a)], Defendants were not held liable for being an internet service provider but rather for their independent tortious conduct.

Fourth, even if the aiding and abetting instruction was incorrect (it was not), any error was harmless because Plaintiffs submitted substantial evidence of Oberlin College administrators, including Dean Raimondo and Julio Reyes, actually distributing copies of the Flyer at the protests:

- Local newspaper reporter Jason Hawk testified that Dean Raimondo retrieved and physical handed him a copy of the defamatory Flyer. (See, May 10, 2019 Tr. Trans., p. 104).
- Gibson's Bakery employee Clarence "Trey" James testified that Dean Raimondo distributed ***numerous*** copies of the Flyer at the protests in addition to instructing

students to make copies of the Flyer at the Oberlin College conservatory building. (See, May 14, 2019 Tr. Trans., pp. 177-79).

- Former Oberlin College Direct of Security Rick McDaniel testified that Oberlin College administrator Julio Reyes had a stack of the defamatory Flyers and was passing them out. (See, May 13, 2019 Tr. Trans., pp. 15-16).

Thus, the Court's aiding and abetting instruction was a proper statement of Ohio law.

c. *Defendants failed to properly raise a specific objection to the negligence instruction, but in any event, the instruction was proper when taken as a whole.*

At the outset, Defendants' argument as it relates to the negligence definition for libel is severely weakened by the fact that Defendants failed to provide a citation for the instruction language they wished to include and further failed to specifically state the grounds of their objection. Under Civ.R. 51(A), "a party may not assign as error the...failure to give any instruction unless the party objects before the jury retires to consider its verdict, stating ***specifically*** the matter objected to ***and the grounds of the objection***." (emphasis added).

While Defendants may have submitted proposed jury instructions, they failed to cite to the Ohio Supreme Court case they now attempt to use, and instead only cited to the Ohio Jury Instructions, which do not contain the language demanded by Defendants. (*See* Defs' Proposed Second Amended Jury Instructions, filed June 5, 2019, p. 15). Even when given the opportunity to specifically object to the instructions, Defendants merely stated, "We object to the inclusion of that definition and believe that the definition provided in defendants' proposed instruction number 13 should be given to the jury." (June 6, 2019 Tr. Trans., p. 26). At no time did Defendants raise an alleged error pursuant to caselaw.

Unfortunately for Defendants, "Ohio courts have routinely held that a party fails to preserve for review an error based upon a given jury instruction where the party raises only a general objection to the instructions at trial and fails to state a specific basis for the objection."

Coyne at ¶ 27; *See e.g., Galmish v. Cicchini,* 90 Ohio St.3d 22, 32, 734 N.E.2d 782, 2000-Ohio-7 (2000); *Hoops v. Mayfield,* 69 Ohio App.3d 604, 607 591 N.E.2d 323 (3rd Dist.1990). Because Defendants only made a general objection to the instruction, the objection has been waived.

But, even if Defendants properly objected to the jury instruction (which did not occur), taken as a whole, the jury instruction was proper. In Ohio, a plaintiff must prove fault in a defamation case by clear and convincing evidence, which is exactly what was instructed by this Court. *See, Gosden v. Louis,* 116 Ohio App.3d 195, 213, 687 N.E.2d 481, 492 (9th Dist.1996). As Ohio courts have also held, "Ohio adopted the ordinary negligence standard as the standard of liability for actions involving a private individual defamed in a matter of public concern." *Gilson v. Am. Inst. of Alternative Medicine,* 10th Dist. No. 15AP-548, 2016-Ohio-1324, 62 N.E.3d 754, ¶ 41, citing *Lansdowne v. Beacon Journal Publishing Co.,* 32 Ohio St.3d 176, 180, 512 N.E.2d 979 (1987).

Defendants argue that this Court was required to use the exact words identified by *Lansdowne*, but ignore that the jury instructions, as a whole, encompass the ordinary negligence standard. Negligence is defined, and was defined by this Court, as "a failure to use reasonable care." OJI-CV 401.01(1). Further, the jury was instructed that it "must also find by clear and convincing evidence that, in publishing the statement, the defendant acted with negligence," i.e. that the Defendant ***lacked reasonable care in publishing the false statement.*** (June 6, 2019 Tr. Trans., p. 60). Put simply, Defendants' requested language is included in the jury instructions on the elements of libel and negligence. As such, the jury instructions here were proper.

And, as if this were not enough, Defendants further failed to demonstrate prejudice, which required that Defendants show that the result of the trial was probably changed by this Court's alleged failure to give their proposed instruction. For all of the above reasons, Defendants' motion

on these grounds must be denied.

d. ***The Court did not err when it provided jury instructions without reiterating its earlier instruction that verbal statements at the protests could not form the basis of a legal claim.***

Defendants next incorrectly argue that the Court should have given a second instruction regarding the verbal statements made during the protests. Defendants are wrong.

First, Defendants fail to cite any case law in support of their theory that the Court had some obligation to reiterate this instruction. There is none.

Second, Defendants themselves "reiterated" the Court's earlier instruction regarding verbal statements at the protest during Defendants' closing argument. There can be no prejudice from a 'lack of reiteration' when the Court's instruction was actually repeated word-for-word to the jury in closing. In closing argument, Attorney Panza directly quoted from the Court's earlier instruction and the jurors actually read the trial transcript containing that instruction:

Now, like it or not, the Court has determined the following -- and this is his direct quote to you at the commencement of the trial, which I know seems like years ago. But trust me, this is a direct quote. Finally -- I'm sorry.

MR. MATTHEW NAKON: It's on the screen.

MR. PANZA: Thank you. Can you see it up there? It's up there?

"Finally, as to any verbal or oral statements, chants or words that were made at the protests on November 10th and 11th of 2016 and that were directed at the plaintiffs, Gibsons or their employees, the Court has determined that those oral or verbal statements are constitutionally protected opinion and therefore cannot form the basis of any legal claim."

(See June 5, 2019 Tr. Trans., pp. 57-58)

Third, Defendants do not argue that the Court's instruction on libel was an incorrect statement of law. Rather, Defendants only contend that in instructing the jury on libel, the Court should have reiterated that libel does not include *verbal* statements made at the protest. "A trial court is not required to give a proposed jury instruction in the precise language requested by its proponent ... Instead, the court has the discretion to use its own language to communicate the ... legal principles." *Henderson v. Spring Run Allotment*, 99 Ohio App.3d 633, 638, 651 N.E.2d 489 (9th Dist.1994). "[I]f the court's instruction correctly states the law pertinent to the issues raised in the case, the court's use of that instruction will not constitute error." *Id.* Here, the Court correctly instructed the jury on the law of libel. Absent an abuse of discretion, the "trial court's judgment on the basis of the wording of jury instructions" will not be disturbed. *Id.* quoting *State v. Chisholm*, 9th Dist. Summit No. 26007, 2012-Ohio-3932.

Fourth, Defendants' suggestion that the jury would be confused by the instructions is woefully weak. The Court's libel instruction clearly identified that the jurors' focus must be on the written statements in the Flyer or senate resolution. In fact, the Court repeatedly instructed the jury that each element of the claim depended on "the statements in the flyer or senate resolution":

(A) you must find by the greater weight of the evidence that:

(1) the statements in the flyer or senate resolution were made; and

(2) the statements in the flyer or the senate, student senate resolution concerned or were about the plaintiff; and

(3) the statements in the flyer or the student senate resolution were false; and.

(4) the statements in the flyer or the student senate resolution were published to a third party other than the plaintiff; and

(See June 6, 2019 Tr. Trans., p. 60).

Finally, "the court has the discretion to refuse to give a proposed jury instruction if that instruction is either redundant or immaterial to the case." *Henderson*, 99 Ohio App.3d at 638. On summary judgment, this Court dismissed Plaintiffs' deceptive trade practices act claim as well as Plaintiffs' slander claim. These claims were therefore immaterial and instructing the jury on claims that have previously been dismissed would only serve to confuse them.

2. The jury instruction on compensatory damages for the IIED claims was straight from OJI and proper. Further, Defendants failed to identify any prejudice as a result of this instruction.

Defendants next claim that the instruction on compensatory damages for the IIED claims was flawed. This assertion is incorrect.

First and foremost, this Court properly used and relied on OJI when crafting the instruction for damages flowing from IIED claims, specifically OJI-CV 429.05 and OJI-CV 315.01. Per the Ohio Supreme Court, "A trial court is obligated to provide jury instructions that correctly and completely state the law," which is exactly what this Court did here. *Cromer*, 142 Ohio St.3d 257,

29 N.E.3d 921 at ¶ 22 (citations omitted).

Defendants do not cite to ***any*** caselaw to support their allegations that this Court improperly or erroneously instructed the jury on the IIED damages. Defendants fail to show any prejudice or potential misleading of the jury given the jury's verdict. Had Defendants reviewed the caselaw, detailed above, they would have realized that they cannot prevail on their quest for a new trial under this theory.

As Defendants admit within their own motion, the jury did not award ***any*** compensatory damages to Grandpa Gibson for economic loss. Thus, Defendants focus only on David to allege and presume that the $1,800,000.00 award for his future economic loss could ***only*** have resulted from the jury instruction. What Defendants ignore is the allocation by the jury that only $1,000,000.00 of the total $5,800,000.00 verdict in favor of David was for the intentional infliction of emotional distress. (*See* Jury Interrogatory #2: Apportionment of Compensatory Damages for David R. Gibson). Defendants also conveniently ignore the testimony by Plaintiffs' expert Frank Monaco that David's economic damages flowed from the Defendants' defamation, not the emotional injuries. (*See,* May 20, 2019 Tr. Trans., pp. 7, 17). This make sense considering the libel claim tries to destroy a plaintiff's reputation with third parties and to stop those parties from conducting business with the plaintiff; whereas, the IIED claim is intended to harm the plaintiff's emotional state. Additionally, the jury instructions and jury charge as a whole clearly show that the jury was not misled. The Court specifically noted in the jury instructions that, when deciding the amount of damages to award for IIED, "you will consider the plaintiff's economic loss and noneconomic loss, ***if any***, proximately and directly caused by the plaintiff's actual injury." (June 6, 2019 Tr. Trans., p. 73, [emphasis added]).

Because Defendants failed to affirmatively demonstrate any error related to the IIED

instruction on compensatory damages, failed to substantiate their arguments in support, and failed to show any prejudice, Defendants' Motion for new trial must be denied.

D. The Court Properly Admitted/Excluded the Evidence Identified in Defendants' Motion. Additionally, Defendants Waived Nearly Every Identified Evidentiary Issue.

1. The Court properly excluded evidence of the November 9, 2016 shoplifting because the facts of that event could not be contested.

At the outset, Defendants have misstated the Court's ruling on Plaintiffs' motion *in limine* to preclude evidence that contradicts the guilty pleas of the three shoplifting students. Defendants claim that the Court "initially ruled that Defendants could not introduce" that evidence. (See Defs.' Motion for New Trial, p. 17). In fact, the Court withheld its ruling on the motion *in limine*:

> **5. Plaintiff's Motion In Limine to preclude introduction of any evidence that conflicts with the criminal convictions of Jonathan Aladin, Endia Lawrence, and Cecelia Whettstone**
>
> The Court withheld ruling on this motion.

(May 8, 2019 Entry and Ruling on All Motions in Limine, p. 2). *See, State v. Brooke*, 113 Ohio St.3d 199, 863 N.E.2d 1024, ¶ 47 (2007) ("The court speaks through its journal entries.").

Moreover, the exclusion of former President Marvin Krislov's testimony about his interaction with Jonathan Aladin was proper. Defendants misconstrue the basis on which the Court excluded Krislov from testifying on this topic. Defendants claim that the Court excluded that testimony based on a broad exclusion for any evidence relating to the incident. In actuality, the Court excluded the testimony on grounds of hearsay because Krislov was not present for the shoplifting and gained all knowledge from the statements of third parties. (May 29, 2019 Tr. Trans., p. 104). Thus, the exclusion was proper. Evid.R. 801(C) ("'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.").

As to Constance Rehm, Defendants have again misconstrued the Court's ruling. The alleged purpose of this line of testimony was to have the witness say that another person entered the bakery on the night of November 9, 2016 and allegedly yelled "You're racists." (May 16, 2019 Tr. Trans., p. 117). During the sidebar, the Court correctly pointed out that Defendants had been distancing themselves from the students throughout the trial and thus, it did not make sense that they would then seek evidence of students' conduct, including shouts of racism. (Id., p. 119). This testimony was completely irrelevant to the claims and would have permitted Defendants to present a confusing dual narrative to the jury and thus, the Court properly excluded that testimony. Additionally, Defendants' questioning sought impermissible hearsay, that being the shouts of a third-party, which would be properly excluded under the hearsay bar.

As to Defendants' closing argument, the Court properly precluded Defendants' counsel from discussing details of the November 9, 2016 incident. Defendants' closing argument would have attacked the integrity of the students' convictions because it would have given credence to Defendants' theory that the students did nothing wrong. While Defendants could not come out and say this to the Court or to the jury given their opening statement wherein their counsel said the three students got what "they deserved," they certainly wanted to create a phantom presence that something more occurred. Furthermore, because Defendants had failed to submit proper evidence on the November 9, 2016 incident, their counsel could not thereafter refer to matters outside evidence. *Wilson v. Ahn*, 1st Dist. Hamilton No. C-020615, 2003-Ohio-4305, ¶ 19 ("When counsel, however, refers to facts that are not in evidence during closing argument, the court has an affirmative duty, even when there is no objection, to intervene *sua sponte* and to instruct the jury to disregard counsel's improper remarks. *** The trial court commits error if it allows counsel to use closing argument to offer unsworn testimony concerning matters that are not in evidence."

(Internal citations omitted.)).

Moreover, Defendants' complaint about Plaintiffs' allegedly opening the door to this type of evidence through the testimony of Victor Ortiz is classic revisionist history. Defendants did not object to the question and answer exchange where Officer Ortiz discussed the arrest of the three shoplifting students. As a result, they have waived any objection to that testimony. *Bolen v. Mohan*, 9th Dist. No. 16CA011000, 2017-Ohio-7911, 98 N.E.3d 956, ¶ 12, appeal not allowed, 152 Ohio St.3d 1424, 2018-Ohio-923, 93 N.E.3d 1004, ¶ 12 (2018). Furthermore, even if Plaintiffs' allegedly opened the door to this type of testimony (which they did not), Defendants do not cite any portions of the transcripts showing that they raised this issue with the Court. As a result, Defendants cannot complain about this issue post-trial.

Finally, evidence surrounding the November 9th shoplifting incident is irrelevant to Plaintiffs' claims and Defendants' defenses because none of the Defendants were present during the actual shoplifting. Pursuant to Evidence Rule 401, "'Relevant evidence' means evidence having any tendency to make the existence of any fact ***that is of consequence to the determination of the action*** more probable or less probable that it would be without the evidence." Evid.R. 401. (Emphasis added.) Evidence that is not relevant is not admissible at trial. See Evid.R. 402 ("Evidence which is not relevant is not admissible."). As a general matter, the relevancy of evidence is a question of experience and logic, not law. See *Harley v. Harley*, 4th Dist. Athens No. 02CA25, 2003-Ohio-232, ¶ 35 (citations omitted) ("Generally speaking, the question of whether evidence is relevant is ordinarily not one of law but rather one . . . based on common experience and logic.").

In this case, based on common experience and logic, evidence contrary to the facts established in the criminal cases is not relevant. All persons or entities that were actually involved

in the November 9, 2016 shoplifting incident (i.e., Plaintiffs, the criminal defendants, and the Oberlin Police Department) believe or have admitted that Aladin, Whettstone, and Lawrence attempted to steal two bottles of wine with a fake ID from Gibson's Bakery and that Gibson's Bakery did not racially profile Aladin, Whettstone, and Lawrence or otherwise stop or detain them on the basis of race. Thus, the evidence was irrelevant and therefore inadmissible. Additionally, the evidence should have been excluded on the separate grounds that it would confuse or mislead the jury or waste judicial resources by presenting a "trial within a trial." *State v. Veliev*, 10th Dist. Franklin No. 09AP-1059, 2010-Ohio-6348, ¶ 24; see *State v. Warren*, 11th Dist. Trumbull 2010-T-0027, 2011-Ohio-4886, ¶ 43 (Ohio courts look very unfavorably on the introduction of evidence that will create a "trial within a trial" because "certain proffered evidence might unnecessarily waste time and/or potentially confuse the jury."); see also *State v. Carroll*, 12th Dist. Warren No. CA84-08-056, 1985 WL 8687 at *5 (May 31, 1985) (affirming the exclusion of extrinsic evidence regarding a collateral matter because the admission would create "a trial within a trial"); *State v. Clark*, 8th Dist. Cuyahoga No. 95928, 2011-Ohio-4109, ¶ 40 (finding that trial courts have the discretion to exclude "the admission of extrinsic evidence that could 'invite a trial within a trial' or lead to 'juror confusion.'").

Based on the foregoing, Defendants are not entitled to a new trial on the basis of the exclusion of certain evidence relating to the November 9, 2016 shoplifting incident.

2. Defendants have waived all arguments relating to the alleged exclusion of Allyn D. Gibson's Facebook materials because Defendants did not seek to offer those materials during trial.

The Court may easily overrule Defendants' complaints about the exclusion of Allyn D. Gibson's Facebook materials, contained at pages 19 and 20 of Defendants' Motion for New Trial, because Defendants failed to proffer that evidence at trial and have thus waived any objection to that preliminary ruling. It is blackletter law that a motion *in limine* is a preliminary ruling, subject

to modification by a court during trial. *State v. Grubb*, 28 Ohio St.3d 199, 503 N.E.2d 142 (1986). Due to the interlocutory nature of such rulings, a party who is temporarily restricted from submitting evidence under a motion *in limine* ruling must seek to introduce "the evidence by proffer or otherwise in order to enable the court to make a final determination as to its admissibility and to preserve any objection on the record for purposes of appeal." Thus, one who fails to make that proffer during trial waives any argument that the preliminary exclusion was erroneous. *Id.*; *Phibbs v. Children's Hosp. Med. Ctr. of Akron*, 9th Dist. Summit No. 22301, 2005-Ohio-3116, ¶¶ 11-12, citing *State v. Maurer*, 15 Ohio St.3d 239, 473 N.E.2d 768 (1984). ("Because a ruling this [sic] motion is only preliminary, a party must seek to introduce the evidence or testimony once the issue is presented at trial, in order to properly preserve the issue for appeal.").

The Court never precluded Defendants from introducing the Facebook materials during trial for the simple reason that Defendants never sought to actually introduce them at trial. On May 8, 2019, the Court issued its ruling on the parties' motions *in limine* and with regard to the Facebook materials stated:

> **2. Plaintiffs' Motion in Limine to preclude introduction of materials from Allyn D. Gibson's Facebook Account**
>
> The Court granted this motion in part and withheld ruling in part. To the extent that any materials from Allyn D. Gibson's Facebook account relate to his character, they are not permitted to be introduced as evidence. To the extent that these materials relate to the reputation of Gibson's Bakery in the community, their introduction is permissible, provided that they do not run afoul of any other applicable rules of evidence.

(May 8, 2019 Entry and Ruling on All Motions *in Limine*, pp. 1-2). The Court left open the possibility that Defendants could seek to introduce these materials for a legitimate purpose, assuming of course the evidence met all issues relating to admissibility. Defendants did not seek to do so and thus, they have waived any objection or complaint about the Facebook materials. Defendants' failure to seek to introduce these materials highlights the key concept for motions in

limine – they are preliminary rulings. Had Defendants attempted to introduce them at trial, Plaintiffs could have objected on several grounds, such as improper character evidence and hearsay. The Court would have had the opportunity to determine those evidentiary issues at trial. No such procedure occurred and Defendants therefore, as a matter of law, irrevocably waived any arguments about the exclusion of these materials.

3. This Court properly excluded inadmissible back-door truth and hearsay evidence from Marvin Krislov and Chris Jenkins, who had not been identified to provide such evidence in discovery.

As discussed in Plaintiffs' bench brief for this Court during trial,[6] Defendants failed to identify witnesses related to their defense of truth within the discovery period and were therefore prohibited from calling such witnesses to the stand. Midway through trial, however, Defendants attempted to change course and change tactics by trying to back-door previously undisclosed evidence.

Defendants attempt to argue that Plaintiffs never requested that "Defendants identify individuals with knowledge of the affirmative defense of truth," a strange argument given that Defendants then note that Plaintiffs ***did*** make the below request:

> **INTERROGATORY NO. 4:** Identify each and every individual who possesses knowledge or information relating to the facts, claims, and defenses involved in this action; and with respect to each person identified, indicate the general area of the knowledge or information possessed by each such person.
>
> **ANSWER:** Objection. This Interrogatory seeks information subject to the attorney-client privilege and work-product doctrine, and is therefore not discoverable. Further objecting, this Interrogatory is overly broad, compound, vague, ambiguous, not relevant, and not reasonably calculated to lead to the discovery of admissible evidence. Subject to and without waiving all objections, Oberlin College states that the following individuals may have knowledge regarding the events giving rise to this action: David Gibson, Allyn D. Gibson, Allyn W. Gibson, and Meredith Raimondo.

(OC Dis. Resp., p. 15).[7] A substantially similar interrogatory was also submitted to Dean

[6] Plaintiffs incorporate their bench brief regarding evidence related to racism, filed on May 28, 2019 ("May 28 Bench Brief"), as if fully restated herein.

[7] "OC Dis. Resp." refers to Oberlin College's Answers and Objections to Plaintiffs' First Set of Discovery, which were served on February 22, 2018.

Raimondo, who identified only three areas of knowledge for the identified individuals: potential knowledge about the arrest, potential knowledge about support provided to arrested students and their families, and potential knowledge that the protests occurred and support for some students involved. (MR Dis. Resp., pp. 15-16).[8] As noted in the May 28 Bench Brief, Defendants identified "truth" as an ***affirmative defense*** and were thus required to prove their defense and respond to the above interrogatory with individuals with knowledge of their defense.

Defendants knew that they had failed to identify ***anyone*** in discovery to support their defense of truth, and so after the close of discovery, which occurred on February 8, 2019, Defendants supplemented their responses to Plaintiff's First Set of Discovery, 20 days later. Then, ***for the very first time***, Defendants attempted to insert new individuals who had not been deposed. So, during hearings on pretrial motions, the Court stated:

> THE COURT: I think we settled this issue. If the witness hasn't been identified prior to the discovery cutoff deadline of February 8th, then they're [excluded] from testifying.

(May 7, 2019 Tr. Trans., p. 67).

Defendants complain that Marvin Krislov could not explain why the College *allegedly* took "neutral" measures and that Chris Jenkins could not explain why he took certain actions. But, for multiple reasons, this Court correctly excluded hearsay evidence from Marvin Krislov and alleged racism evidence from Chris Jenkins, who had not been previously identified. It is well within this Court's discretion to do so.

As noted in the May 28 Bench Brief, a trial court may exclude evidence at trial where the

[8] "MR Dis. Resp." refers to Dean Raimondo's Answers and Objections to Plaintiffs' First Set of Discovery, which were served on June 15, 2018.

evidence was not produced due to intentional non-compliance with the rules of discovery. *See, e.g. Jones v. Murphy*, 12 Ohio St.3d 84, 86, 465 N.E.2d 444 (1984) (excluding an expert from testifying at trial and finding that "[a]n intentional violation of the [Civil Rules] should not be so easily disregarded."). Further, the Court may even exclude evidence at trial for nonproduction where the failure to comply with the rules of discovery was due to "neglect, a change in defense strategy or an inadvertent error." *Huffman v. Hair Surgeon, Inc.*, 19 Ohio St.3d 83, 85, 482 N.E.2d 1248 (1985). Further, the Civil Rules specifically allow for the exclusion of evidence at trial where a party fails to properly supplement discovery responses to identify persons with knowledge or fails to properly answer interrogatories and requests for production of documents. *See*, Civ.R. 37(C)(1), (D)(1)(ii).

While reiterating its concerns that Defendants were attempting to introduce inadmissible hearsay testimony, the Court also acknowledged that a limiting instruction would be insufficient in this case:

> THE COURT: So here's where I am on this. I just -- I just don't know how I can parse it, but here's what I will permit the defense to say. We, the college, did not take a position on racial profiling; and after we gathered information in the community, that was still our position and that's why we did what we did. That's the best I could come up with. Okay? I mean, that's consistent with your discovery.
>
> ***

THE COURT: Okay. I know, Ron, it's going to play out and we will just have to handle it. I just cannot -- my gut is telling me you are trying to backdoor the truth and that's what my gut is telling me. I cannot -- and I'm concerned about that. I don't care what limiting instruction I give, I'm just not going to --

***

THE COURT: There's usually a limiting instruction. Again -- so, but in this case, if Krislov didn't think there was some truth to it, then his conduct wouldn't be affected by it.

(May 28, 2019 Tr. Trans., pp. 7-8).

Indeed, Defendants' counsel confirmed that they were not going to call in witnesses who had personal knowledge one way or the other, but that they were going to try to get that hearsay evidence in through other witnesses:

THE COURT: Just so the record is clear, when you say "witnesses," the defense was not planning on calling any of the witnesses that had personal knowledge that either the Gibsons were racist or weren't racist. You were going to introduce this evidence through other witnesses, specifically staff from Oberlin College, correct?

MS. CROCKER: Correct, Your Honor.

(Id., p. 10).

This admission by Defendants' counsel prior to Defendants' case in chief solidifies the necessity for this Court's rulings to exclude the impermissible hearsay, the out-of-court statements offered to prove the truth of the matter asserted. Evid.R. 801(C). Defendants cite to a few instances to claim that their witnesses should have been permitted to continue testifying, yet had the

witnesses done so, there would have been no way to cure the effects of the prejudicial statements that, according to Defendants, were not to be offered for "truth."

For example, Defendants claim that Marvin Krislov should have been permitted to continue his statement, "Well, what we had heard was very different differing views from a number of people in a very short period of time. People were coming out of the woodwork to --". (May 29, 2019 Tr. Trans., p. 115). While at sidebar to discuss Plaintiffs' objection prior to Krislov making any hearsay statements, Defendants' counsel confirmed to this Court exactly why such information should not be permitted:

> MR. HOLMAN: Sure. And again, for the record, I would make this proffer. That if allowed, President Krislov would talk about what those different views are and how they informed the decisions that were made or were not made in connection with all these events.
>
> MR. PLAKAS: That's of course the basis of our objection that we talked about.
>
> THE COURT: Yeah, we did.

(Id., p. 117).

Similarly, Chris Jenkins, when questioned by Defendants' counsel, twice tried to go into things that students had said to him. (See, May 30, 2019 Tr. Trans., pp. 74, 80). The second time, Chris Jenkins began with, "Well, as I mentioned, as I would say, students certainly had at times reported to me --", which could have only ended in hearsay statements. (Id., p. 80). Following an objection by Plaintiffs' counsel, Jenkins attempted to inject his own alleged experiences that had never been previously disclosed. During sidebar, this Court once again informed Defendants' counsel of its reasoning in excluding any such evidence from Jenkins:

> THE COURT: So here's -- here's my concern. The prejudicial value of that, given the fact this witness hadn't been disclosed as one who is going to speak on that outweighs any probative value. So I'm going to sustain the objection.

(Id.).

Additionally, the suggestion that the inadmissible hearsay testimony of President Krislov and Chris Jenkins is part of Plaintiffs' burden is obviously wrong. As this Court is well aware, Plaintiffs submitted substantial evidence to the jury about the falsity of the defamatory statements within the Flyer and the Student Senate Resolution. The jury heard testimony from Oberlin College's own administrators admitting they had never heard of claims of racism prior to November 2016, and from community members Sharon Patmon, Vicky Gaines, Dr. Roy Ebihara, Eddie Holoway, Rick McDaniel, Lieutenant McCloskey, and Eric Gaines, as well as former Oberlin Police Department Office Henry Wallace –many of whom are people of color and all of whom confirmed that there has never been even a hint of racism at Gibson's Bakery or from David and Grandpa Gibson. (*See*, May 10, 2019 Tr. Trans., pp. 19, 92-94, 140; May 13, 2019 Tr. Trans., p. 35; May 15, 2019 Tr. Trans., pp. 15, 21-23).

For all of the above reasons, this Court properly excluded inadmissible back-door truth and hearsay evidence from Marvin Krislov and Chris Jenkins, who had not been identified to provide such evidence in discovery. As such, Defendants' motion for new trial must be denied.

4. The Court properly excluded the testimony of Carman Ambar about protests which are completely unrelated to the protests at issue because (1) said testimony was cloaked expert testimony and Ms. Ambar did not submit an expert report and (2) the other protests at other institutions are completely irrelevant to the claims, defenses, and issues in this case.

Despite Defendants' claims otherwise, Defendants attempted to back-door in another

expert witness by attempting to have Oberlin College President Carman Ambar testify about the procedures of other protests at other institutions. Ms. Ambar was not present at the November 2016 protests. Her presidency began the following fall. Thus, she was not capable of providing any personal knowledge of how the protests were handled. (See Defs.' Dec. 3, 2018 Brief in Supp. of Motion for Limited Protective Order Regarding the Deposition of President Carman Twillie Ambar, p. 6 ("Plaintiffs have failed to cite to anything in the record that would substantiate that President Ambar—who assumed her role as President approximately 10 months after the events giving rise to this lawsuit occurred—has any personal knowledge regarding Plaintiffs' claims...")).

In its May 8, 2019 motions *in limine* entry the Court stated the following on the issue of expert witness testimony:

> **7. Plaintiffs' Motion in Limine to preclude Defendants' experts from offering new opinions at trial and to preclude Defendants from using experts not previously identified**
>
> The Court granted this motion with one exception. After discussion regarding Plaintiffs' lost business opportunity damages related to certain rental properties, the Court ordered that Defendants' expert witness could submit a supplemental report on this limited issue and/or offer opinions outside of those contained in his or her report during their testimony at trial. *See Local Rule 11.*

The Court clearly saw this potential testimony for what it was – expert testimony on the standard of care:

> THE COURT: I'm leaning toward excluding any standard-of-care testimony from Krislov or any Oberlin College administrator who did not provide a report. They could testify as to personal knowledge of their policies and procedures regarding protests.

(May 1, 2019 Tr. Trans., p. 71).

Ms. Ambar's experience with protests at other institutions, having nothing to do with the

protests at issue and was nothing more than Defendants' attempt to introduce standard of care evidence. Defendants' purpose in seeking to introduce that testimony was to permit them to argue to the jury that how Oberlin College dealt with the protests at issue shared common characteristics with how Ms. Ambar allegedly handled these other protests.

In fact, Defendants' counsel admitted as much when during the sidebar session quoted at page 25 of Defendants' motion he said "I'm going to ask how she dealt with them, whether there was commonality in the way she dealt with them." (May 31, 2019 Tr. Trans., p. 144). Furthermore, Defendants actually admit within their motion that this was the purpose of the testimony, when at page 25 they say: "If President Ambar had testified regarding her personal experiences at other protests, jurors would have been able to ***evaluate whether Defendants' actions paralleled those of administrators, faculty, and/or staff during student protests at other colleges and therefore conclude that Defendants should not be liable for defamation or IIED***." (emphasis added). This is blatant standard of care testimony and thus, expert testimony. *Toth v. Oberlin Clinic, Inc.*, 9th Dist. Lorain No. 01CA007891, 2002-Ohio-2211, ¶ 11 (acknowledging that expert testimony may be necessary to establish standard of care unless it is "so apparent as to be within the comprehension of laymen and requires only common knowledge and experience to understand and judge it.").

There is no dispute that Ms. Ambar did not submit a report on the standard of care applicable to higher educational institutions confronted with protests. As a result, she was barred from offering that standard of care testimony at trial. Local Rule 11(I)(B).

Defendants' attempt to get Ms. Ambar to provide testimony to explain how Defendants' subjective intent during the protests was proper is equally troubling because Defendants' pretrial motion to exclude Dr. John McGrath explicitly stated that such testimony was not proper. In that

pretrial motion, Defendants stated that "[t]he proposed testimony by McGrath as to Defendants' purported knowledge, motivation, intent, state of mind, or purpose in acting or not acting has no basis in any relevant body of knowledge or expertise." (Defs.' Motion to Exclude John McGrath, p. 6). This same defect applies to Ms. Ambar's attempt to compare how Defendants handled the protests at issue. Defendants' further attacked Mr. McGrath by stating that "McGrath's opinions about that which Defendants purportedly knew, were aware of, or should have done, as well as concerning Oberlin College's compliance with its internal policies, must be excluded as improperly asserted legal conclusions." (Id. at p. 7). Again, Defendants were trying to use Ms. Ambar to offer this same type of testimony.

Based on the foregoing, the Court properly excluded Ms. Ambar from testifying about her experience with protests at other institutions.

5. The Court properly admitted Oberlin College's internal text messages and emails, and Defendants waived any arguments regarding the exclusion of these documents by failing to object during trial.

Neither Civ.R. 59(A)(9) nor good cause entitles Defendants to a new trial based on the admission of certain emails and text messages. Subsection (A)(9) allows for a new trial where there was an "[e]rror of law occurring at the trial and brought to the attention of the trial court by the party making the application." However, a party cannot avail themselves of relief under Civ.R. 59(A)(9) where there was a failure to object to the admission of disputed evidence at trial. *Patterson v. Colla*, 7th Dist. Mahoning No. 03 MA 18, 2004-Ohio-3033, ¶ 24.

Defendants reference two emails and two text messages at page 26 of their motion that it claims are examples of evidence that should not have been admitted. The record reveals that except for an email exchange between Tita Reed and College Vice President for Communications, Ben Jones, dated November 23, 2016, Defendants failed to object to any of the evidence it now claims the Court improperly admitted. Further, a review of the basis for the objection as to the November

23, 2016 email reveals Defendants' counsel was merely concerned about the terms being used in the context of Plaintiffs' counsel's questioning about the email and not the use of the email itself. (*See* May 14, 2019 Tr. Trans., p. 30). Finally, these emails and text messages were never even the subject of any of Oberlin's motions *in limine*. The admission of this evidence was not properly challenged at trial and therefore, cannot serve as a basis for a new trial.

At footnote 26, Oberlin identifies additional Plaintiffs' exhibits (internal emails and text messages, among college employees) that it contends are also irrelevant and unfairly prejudicial and that should not have been admitted at trial. These include Plaintiffs' Exhibits Nos. 63, 86, 100, 101, 125, 129, 135, 140, and 248. As with the above referenced evidence, none of these exhibits were the subject of any of Oberlin's motions *in limine*. Further, Oberlin's counsel only objected to the introduction of two of the exhibits (86[9] and 140[10]) during trial. Having failed to object to the introduction of this evidence at trial, Oberlin forfeited the issue of admissibility and cannot now use it as a basis for a new trial. *See Bolen v. Mohan*, 9th Dist. Lorain No. 16CA011000, 2017-Ohio-7911, ¶ 12, citing *Gollihue v. Consol. Rail Corp.*, 120 Ohio App.3d 378, 388, 697 N.E.2d 1109 (3rd Dist.1997) ("A failure to object to evidence at trial constitutes a waiver of any challenge to its admission.").

Oberlin also maintains the emails and text messages have no relevance to any elements of Plaintiffs' claims for libel, tortious interference, or IIED. It concludes the Court should have excluded this evidence under Evid.R. 401, 402, and 403, yet it never raised any evidentiary objections under these rules.

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[9] As to Exhibit 86, Defendants failed to timely object to the exhibit. Vice President Raimondo was asked several questions about the content of this document and Defendants failed to timely object prior to that line of testimony. (See, May 13, 2019 Tr. Trans., pp. 102-105). Additionally, Defendants have not made out a case that a new trial is warranted based on the introduction of this particular exhibit.

[10] Defendants' counsel only objected to Exhibit 140 based on authentication, and the exhibit was quickly authenticated by Dean Raimondo after the objection was made. (See, May 28, 2019 Tr. Trans., pp. 140-43).

Oberlin never objected to the introduction of the emails and text messages as being irrelevant or unfairly prejudicial, confusing or misleading. Evid.R. 103(A)(1) makes clear that "[e]rror may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected; and in case the ruling is one admitting evidence, a timely objection or motion to strike appears of record, stating the specific ground of objection * * *" Oberlin made no timely objection, under Evid.R. 401, 402, or 403 and therefore, cannot challenge the admission of this evidence as a basis for a new trial.

Finally, Oberlin asserts it is entitled to a new trial for good cause. In addition to the nine grounds contained in Civ.R. 59, "a new trial may also be granted in the sound discretion of the court for good cause shown." Oberlin has not suggested what constitutes good cause other than the emails and text messages that it references above – which it never objected to at trial. For all of the reasons discussed above, Oberlin has waived its right to object to the admission of this evidence now as a basis for a new trial. Moreover, there is absolutely no good cause for new trial.

6. Frank Monaco's testimony concerning lost business opportunity and rental income was properly allowed.

a. *David Gibson's rental properties and plan for 549 W. College St.*

David Gibson acquired land at 189 W. College Street in 1996, rezoned it, and constructed apartment units thereon. The apartments at 189 W. College Street were successful and consistently occupied. Given that success, David acquired an additional 4.9 acres of land at nearby 549 W. College Street in 2003. The property at 549 W. College had an existing apartment building. Importantly, the 549 W. College property had sufficient available land to allow David to build two additional apartment buildings in the future. Mr. Monaco, whose expertise and experience includes his role on the Board of the Pro Football Hall of Fame in implementing a billion-dollar building project, identified on an aerial map the significant available space on 549 W. College for additional

buildings. (May 20, 2019 Tr. Trans., pp.13-14, 56-60).

In 2008, David did an expansion of the sanitary sewer lines, storm water lines and sidewalks at 549 W. College St. in order to serve the two additional buildings that would be forthcoming. (Id. at pp. 54-55). Further, the evidence demonstrated that David diligently paid down the mortgage on the rental properties so that they would be debt-free in 2018 and he would be in prime position to proceed with construction of the first additional apartment building on the 549 W. College land. (Id. at pp. 54-55).

The new buildings would be replicas of the 189 W. College St. building and would be built according to the same plans used to construct the building at 189 West College. (Id. at pp. 56-60). Given his experience on Oberlin's planning commission for approximately 30 years, David Gibson was very familiar with the requirements necessary for the development. (*Id.* at pp. 59-60). Further, the current head of the planning commission said that it certainly would be reasonable to assume that David would obtain the necessary zoning change at 549 W. College St. (Id.). In fact, the properties all around the 549 W. College St. property have multi-unit apartment buildings. (Id.). Thus, it would be unreasonable to believe that the rezoning would not occur, and Defendants cite no evidence to dispute this.

b. *Mr. Monaco's testimony concerning the lost opportunities at 549 W. College St. was not improperly speculative.*

Defendants contend that because the zoning change at 549 W. College St. had not yet occurred, any damage claim for the future buildings is speculative. Neither the evidence nor the case law supports Defendants' contention.

Defendants contend that because the zoning change at 549 W. College St. had not yet occurred, any damage claim for the future buildings is speculative. Neither the evidence nor the case law supports Defendants' contention.

In *Masheter v. Kebe*, the Court held that an expert need not confine his valuation testimony to the use permitted under existing zoning regulations. 49 Ohio St.2d 148, 152 (1976) (experts could testify to use for an apartment building even though area currently zoned single-family residences). Instead, an expert may testify to a use that is not permitted under existing zoning regulations even without evidence of a probable change in the zoning within the foreseeable future." *Proctor v. Davison*, 5th Dist. Licking No. 09 CA 122, 2010-Ohio-3273, ¶¶ 39-40, citing *Wray v. Stvartak*, 121 Ohio App.3d 462, 700 N.E.2d 347 (6th Dist.1997) (zoned agricultural/residential and valued as commercial).[11] The *Proctor* court held that the record contained competent, credible evidence from which the trial court could conclude that the likelihood exists that the property would be rezoned and the necessary permits obtained. And, *"[e]ven in the absence of such testimony, it was not error to permit Appellee to present evidence at trial of the highest and best use of the property for a use other than its zoned use." Id.* at ¶ 43.

Likewise, the Ohio Supreme Court has ruled that compensation can properly be based upon the use of the land *even where the land is held under a deed containing restrictions against such use. In re Appropriation of Easement for Highway Purposes v. Thormyer,* 169 Ohio St. 291 (1959) (could base damages on evidence of value for commercial uses notwithstanding that deed contained restrictions against selling land/using land except for children's home).

Defendants incorrectly suggest that when a property owner does not pursue a rezoning prior to the proceeding, it would be speculation to base a damage report on a use for which the property is not currently zoned. However, the Ohio Supreme Court and lower courts dealing

[11] *Bd. of Trustees of Sinclair Community College Dist. v. Farra*, 2010-Ohio-568, 2010 WL 597098 (Ohio Ct. App. 2d Dist. Montgomery County 2010); *Proctor v. King*, 2008-Ohio-5413, 2008 WL 4615990 (Ohio Ct. App. 5th Dist. Licking County 2008); *Proctor v. Dennis*, 2006-Ohio-4442, 2006 WL 2474340 (Ohio Ct. App. 5th Dist. Fairfield County 2006).

directly with this issue have consistently held to the contrary. For instance, eminent domain compensation can properly be based upon a use of land *even if a change in zoning would be required and even without evidence of a probable change in the zoning regulations in the foreseeable future.* O. Jur. 3d Eminent Domain, Section 147.

Although the cases do not require it, in the case at hand, there is competent, credible evidence that the rezoning at issue is not speculative but instead, it is exceedingly likely, if not certain, that the rezoning will be readily obtained.

c. *Mr. Monaco's testimony concerning lost rental income was not impermissibly speculative.*

It is well-known in the community that the apartment buildings at issue belong to David Gibson. The apartments are known as "Gibson's Rentals." The thorough and relentless attack of the Gibsons has resulted in their business—including the bakery and the apartment leasing—being shunned and boycotted. The defamatory flyers disseminated throughout the community identify the Gibsons as the owners of an establishment that racially profiles and discriminates. The Student Senate Resolution proclaims that the Gibsons have "a history of racial profiling and discriminatory treatment of students **and residents** alike." It is no surprise that the vicious lies about the Gibsons have not only resulted in far less people coming through the doors of the bakery, but also *less people willing to live under Gibson's roof.*

Mr. Monaco walked the jury through the financial numbers that clearly showed the declining rental income following the distribution of the flyers and senate resolution. (May 20, 2019 Tr. Trans., pp. 48-52). Mr. Monaco further demonstrated how the declining rental income corresponded with the declining bakery revenues. (Id.). In calculating the lost rental income, Mr. Monaco utilized the well-established "Before and After" Method, which Defendants' own expert acknowledged that the AICPA has recognized as a valid approach in the industry. (Id. at p. 50;

May 31, 2019 Tr. Trans., p. 122). Evidence of past performance "will form the basis for a reasonable prediction as to the future." *AGF, Inc. v. Great Lakes Heat Treating Co.*, 51 Ohio St.3d 177, 181 (1990). Mr. Monaco utilized this well-recognized methodology in determining lost profits resulting from vacancies at 189 and 549 W. College St.

Under Ohio law, a business, even a new business, may establish lost profits with reasonable certainty through the use of evidence such as expert testimony, economic and financial data, market surveys and analyses, business records of similar enterprises, and any other relevant facts. *AGF, Inc.*, 51 Ohio St.3d 177, syllabus ¶ 3. While lost profits may not be too remote or speculative, courts recognize that "damages for lost profits often require some conjecture." *Miami Packaging, Inc. v. Processing Sys., Inc.*, 792 F.Supp. 560, 566 (S.D.Ohio 1991), citing *Jaynes v. Vetel*, 51 Ohio Law Abs. 202, 207, 80 N.E.2d 621 (2d Dist.1948) ("profits must in their very nature be to some extent uncertain and conjectural, so that one cannot on that account, or account of difficulties in the way of proof, be deprived of all remedy.")

All issues raised by Defendants concerning Mr. Monaco's testimony go to the weight, not the admissibility, of the evidence. Defendants cross-examined Mr. Monaco for at least four (4) hours and conducted approximately four (4) hours of direct examination of their own expert on these topics. Reasonable minds could (and did) certainly conclude that the evidence established the future lost profits with reasonable certainty.

7. The Court properly admitted evidence of Grandpa Gibson's May 2017 fall and injury which is relevant and supported by case law.

Neither Civ.R. 59(A) (1), (7), (9) nor good cause entitle Oberlin to a new trial based on the admission of evidence of Grandpa Gibson's fall and injury. First, the issues raised by Defendants in Section III(D)(1) of their Motion for New Trial were also raised through a motion *in limine* by Defendants, including that the evidence is irrelevant under Evid R. 401 and unfairly prejudicial

under Evid.R. 403. On May 8, 2019, the Court denied this Motion *in Limine*, noting specifically that "[i]n so doing, the Court only ruled that preliminary exclusion was not warranted, but the Court did not rule on its admissibility."[12]

Here, Defendants never renewed their motion to exclude this evidence at trial. Defendants made no objections to any of the trial testimony of Grandpa Gibson cited by Defendants. (May 16, 2019 Tr. Trans., pp. 29-35, 40). Likewise, Defendants did not preserve any objection as to the cited trial testimony of Lorna Gibson. (May 15, 2019 Tr. Trans., pp. 132-136). Defendants' sole objection to Lorna Gibson's testimony was to preclude her from giving her personal assessment of Grandpa Gibson's medical condition after the fall. (May 15, 2019 Tr. Trans., pp. 134-135). Plaintiffs' counsel agreed to and abided by this restriction, and thereafter Defendants made no further objections to the testimony that Defendants now claim should have been excluded concerning Grandpa Gibson's fall.

In sum, having failed to renew their objections as to the admissibility of this evidence, the Defendants have waived any such objection.

Likewise, resort to Civ.R. 59(a)(1) fails for the same reason—Defendants failed to object to the admissibility of the evidence at trial. Civ.R. 59(A)(1) would allow a new trial where "[i]rregularity in the proceedings of the court, jury, magistrate, or prevailing party, or any order of the court or magistrate, or abuse of discretion, by which an aggrieved party was prevented from having a fair trial." It is settled law that "[a]n 'irregularity' that would justify a new trial under Civ.R. 59(A)(1) must be 'a departure from the due, orderly and established mode of proceeding therein, where a party, *with no fault on [her] part,* has been deprived of some right or benefit otherwise available to [her].'" *Simon v. Simon,* 9th Dist. Summit No. 2007-06-1815, 2014-Ohio-

[12] *See,* May 8, 2019 Entry and Ruling on All Motions in Limine.

1390 (emphasis added) (because Mother did not provide the Court with doctors' orders that she was not medically able to attend the hearing, Civ.R. 59(A)(1) was not applicable); see also *Frees v. ITT Tech. School,* 2nd Dist. Montgomery No. 23777, 2010-Ohio-5281.

At page 31of their Motion for a new trial, Defendants allege that the evidence of Grandpa Gibson's fall and injury was irrelevant to any pending claim, and on page 32 Defendants allege that they were unfairly prejudiced by the introduction of this evidence. First, because Defendants raised these issues in their motion *in limine* on the fall, but did not thereafter object to admissibility at trial, Defendants waived the objection. Second, regardless of the motion *in limine*, Defendants' failure to object to the evidence at trial constitutes a waiver of any challenge to its admissibility and relevance, and therefore it cannot now be used as a basis for a new trial. *See Bolen v. Mohan*, 9th Dist. Lorain No. 16CA011000, 2017-Ohio-7911, ¶ 12, citing *Gollihue v. Consol. Rail Corp.*, 120 Ohio App.3d 378, 388, 697 N.E.2d 1109 (3rd Dist.1997).

Further, Defendants' failure to object at trial to the introduction of the evidence of Grandpa Gibson's fall and injury as being irrelevant or unfairly prejudicial, confusing or misleading, precludes a new trial based on Evid. R. 401, 402, and 403. Evid.R. 103(A)(1) clearly provides that "[e]rror may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected; and in case the ruling is one admitting evidence, a timely objection or motion to strike appears of record, stating the specific ground of objection * * *" Having made no timely objection under Evid.R. 401, 402, or 403, Defendants cannot use the admission of this evidence as a basis for a new trial.

Moreover, Defendants' argument pursuant to Civ.R. 59(A)(7) cannot withstand scrutiny. Civ.R. 59(A)(7) would allow a new trial if "[t]he judgment is contrary to law." A motion for a new trial based on Civ.R. 59(A)(7) is to decide whether the judge erred as a matter of law; it does not

permit a consideration of the weight of the evidence or credibility of witnesses. *Elwer v. Carrol's Corp.*, 3rd Dist. Allen No. 1-06-33, 2006-Ohio-6085, ¶22; *Pangle v. Joyce*, 76 Ohio St.3d 389, 1996-Ohio-381, 667 N.E.2d 1202 (1996).

In this regard, Defendants erroneously argue that evidence of Grandpa Gibson's fall and injury is simply evidence of unpled and unrecoverable damages that are remote and speculative. Frankly, they overstate the impact of this evidence. To the contrary, this evidence is relevant to and was introduced to prove multiple aspects of both the libel and IIED claims, none of which concern compensatory damages and none of which are subject to any defense based on remote and speculative compensatory damages.[13] Under Ohio law, defamation occurs "when a publication contains a false statement 'made with some degree of fault, reflecting injuriously on a person's reputation, or exposing a person to public hatred, contempt, ridicule, shame or disgrace, or affecting a person adversely in his or her trade, business, or profession.'" *Am. Chem. Soc. v. Leadscope, Inc.*, 133 Ohio St.3d 366, 2012-Ohio-4193, 978 N.E.2d 832, ¶ 77, citing *Jackson v. Columbus*, 117 Ohio St.3d 328, 2008-Ohio-1041, 883 N.E.2d 1060, ¶ 9 (quoting *A & B-Abell Elevator Co. v. Columbus/Cent. Ohio Bldg. & Const. Trades Council*, 73 Ohio St.3d 1, 7, 651 N.E.2d 1283 (1995)). "Under the tort of intentional infliction of emotional distress, '[o]ne who by extreme and outrageous conduct intentionally or recklessly causes serious emotional distress to another is subject to liability for such emotional distress, and if bodily harm to others results from it, for such bodily harm." *Cherney v. Amherst*, 66 Ohio App.3d 411, 413, 584 N.E.2d 84 (9th Dist.1991), quoting *Yeager v. Local Union 20, Teamsters, Chauffeurs, Warehousemen, & Helpers of America*, 6 Ohio St.3d 369, 453 N.E.2d 666, 667 (1983) (abrogated on other grounds by *Welling v. Weinfeld*, 113 Ohio St.3d 464, 2007-Ohio-2451, 866 N.E.2d 1051 (2007)).

[13] *See*, Plaintiffs' Response in Opposition to Defendants' Motion *in Limine* Regarding Evidence of Allyn W. Gibson's Fall and Subsequent Injury.

The Court correctly admitted this evidence to prove the following multiple aspects of Plaintiffs' defamation and IIED claims that are unrelated to damages:

- Defendants' defamatory acts created and exacerbated a charged, hostile environment that injured Plaintiffs' reputations, and exposed Plaintiffs, including Grandpa Gibson, to public hatred, contempt, ridicule, shame, and disgrace, and adversely affected them in their trade, business, or profession;
- The scope and extent of defamation;
- The defamation and hostile environment caused severe emotional distress; and
- Defendants defamation and hostile environment caused significant, substantial, real, and long-lasting impact on the Gibsons, exposing them to public hatred, contempt, ridicule and shame and further exposing them to even physical home invasion at all hours of the day, as well as physical injury long after the statements were made.

Under Ohio law, the Court correctly permitted the jury to determine whether proximate cause existed. Ohio Courts have long held defendants such as Oberlin responsible for negligent/criminal acts of known and unknown third parties where the affirmative acts of the defendant created the situation in which others were likely to commit the act at issue. *See, E.g., Fed. Steel and Wire Corp. v. Ruhlin Constr. Co.*, 45 Ohio St3d 171, 174-178, fn 3 (1989), citing Restatement (Second) Torts, §§448 and 449 (1981).

8. The Court properly admitted evidence of the hostile environment created by Defendants and this evidence is not subject to any defense that compensatory damages are remote and speculative.

Again, neither Civ.R. 59(A)(1), (7), (9), nor good cause entitle Defendants to a new trial based on the admission of evidence of the hostile environment created and exacerbated by Defendants' publication of the defamatory statements—the puncturing of Gibson Bakery employee tires, keying of cars, kicking in David Gibson's back door, and banging on Grandpa Gibson's doors and windows. Of note, Defendants incorrectly argue that this is evidence only of damages and as such is too remote and speculative. To the contrary, Plaintiffs admitted this hostile

environment evidence as evidence of the hatred and ill-will spewed into the environment by Defendants toward Plaintiffs and, as such, it is also relevant (a) as evidence of causation for Plaintiffs' defamation claim, showing that Plaintiffs were in fact subject to hatred and ill-will and (b) as evidence of causation related to Plaintiffs' IIED claim.[14]

Defendants did not object to the testimony of Shane Cheney about the damage to his car tire. (May 15, 2019 Tr. Trans., pp. 105-106). Likewise, Defendants failed to object to the testimony of David Gibson, meaning they waived any objection under Evid.R. 401, 402, or 403. (May 21, 2019 Tr. Trans., p. 212).

As outlined above [*see supra* Sec. II(D)(7)], Defendants cannot avail themselves of relief under Civ.R. 59(A)(9) or Civ.R. 59(A)(1) because they did not object to the admission of the evidence at trial.

Even if the Court were to reach the merits of this argument, this evidence is relevant for non-damages issues to prove elements of Plaintiffs defamation and IIEC that Defendants, including that the hostile environment is evidence of causation related to (a) Plaintiffs' defamation claim by showing that Plaintiffs were, in fact, subject to hatred and ill-will; and (b) Plaintiffs' IIED claim. Plaintiffs also incorporate in full the legal analysis in this regard from the previous section.

Further, Plaintiffs did not attempt to prove, and the jury did not award, any compensatory damages related to the property damage and personal injury damage at issue and therefore the defense that such damages are remote and speculative cannot be used to obtain a new trial.

Finally, Defendants also assert they are entitled to a new trial for good cause. Again, Defendants have not suggested what constitutes good cause for excluding this evidence – which it never objected to at trial. For all of the reasons discussed above, Defendants have waived their

[14] *See,* Plaintiffs' Bench Brief: Presentation of Evidence Related to Hostile Environment.

right to object to the admission of evidence of the hostile environment.

E. The Court Properly Denied Defendants' Motion to Transfer Venue, and Defendants Waived this Issue by Failing to Raise it at the Time of Jury Selection.

In a last-ditch effort, Defendants argue their Motion to Transfer Venue, which was filed and denied more than a year before trial, should have been granted and that they are entitled to a new trial because of it. This argument is obviously wrong, particularly because Defendants waived the issue by not raising it with the Court during jury selection.

As discussed in Plaintiffs' response to Defendants' original motion to transfer venue,[15] a "trial court ***must make a good faith effort to seat a jury before granting a change of venue***." *Burton v. Dutiel*, 5th Dist. No. 14-CA-00024, 2015-Ohio-4134, 43 N.E.3d 874, ¶ 40, *citing State v. Weaver*, 5th Dist. Holmes No. 06CA0001, 2007-Ohio-3357 (emphasis added). This general rule stems from Ohio Supreme Court precedent which holds that "the voir dire process provides the best evaluation as to whether such prejudice exists among community members that precludes the defendant from receiving a fair trial." *Id.*, *citing Burns v. Prudential Securities, Inc.*, 167 Ohio App.3d 809, 857 N.E.2d 621 (3rd Dist.2006) (*citing State v. Swiger*, 5 Ohio St.2d 151, 214 N.E.2d 417 (1966)); *State v. Treesh*, 90 Ohio St.3d 460, 739 N.E.2d 749 (2001).

The parties spent several days engaged in voir dire, including extensive questioning by both the Court and counsel for the parties. Defendants and their counsel did not ***at any point*** raise any objection during or after the voir dire process that the venue of this trial needed to be moved based on an alleged inability to seat an impartial jury. Thus, Defendants waived this argument, and it should be dismissed out of hand.

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[15] Plaintiffs' incorporate their Response in Opposition to Defendants' Motion to Transfer Venue as if fully restated in this brief.

Even if this issue was somehow preserved (it was not), Defendants did not offer even a shred of evidence that there was juror bias necessitating a change of venue. Instead, Defendants blame daily reporting as somehow poisoning the jury pool.[16] This argument is baseless and without merit. The Court conducted ***substantial*** voir dire of the jury pool related to pre-trial media attention. The Court began by questioning every prospective juror in the courtroom on whether they were aware of the facts and circumstances underlying this litigation. (See, May 8, 2019 Tr. Trans., pp. 30-31). For each prospective juror that read an article on this issue, the Court inquired as to whether the prospective juror posted any comments or opinions on any online forum or social media. (See, Id. at pp. 31-34).

The Court also questioned each prospective juror that was familiar with this case as to whether they had formed any opinions or pre-conceived notions on the case prior to trial and dismissed those who had for cause. (See, Id. at pp. 34-81). After the substantial discussion of pre-trial media attention, the vast majority of jurors were found to be impartial and were not challenged for cause by ***either party***. The Defendants' suggestion now that the jurors were biased before trial is simply not true and is a sour-grapes distortion of the trial process in this case.

Additionally, while there was some daily reporting on this case in the media, at the end of every day of trial, the Court cautioned and instructed the jury under threat of ***criminal contempt of court*** to not read, watch, or listen to the reporting on this case:

> Certainly do not get on any social media site and post anything. Do not do any homework, you know, what case you may be a juror on. Do not start looking up old news articles ... And I am giving you a direct order. If you violate it, you will be in contempt of this Court's order. ***I can impose jail time and fines***[.]

[16] Oddly, Defendants seem to imply that the Court's order quashing subpoenas issued to Plaintiffs' counsel that sought blatantly privileged information somehow is to blame for the unsubstantiated allegations of media bias and lack of jury impartiality. (See, Defs.' Mt. New. Tr., p. 34). Defendants conveniently ignore the fact that Plaintiffs were ordered to identify the media outlets they communicated with prior to the filing of the Motion to Transfer Venue.

(Id. at pp. 190-91 [emphasis added]). Defendants' suggestion that threatened criminal action from the Court was insufficient to warn the jury from reviewing media coverage is completely lacking in factual support and insufficient to support any claim that Lorain County was an improper venue for the trial of this matter.

Therefore, Defendants' request for a new trial based on the Court's denial of a motion filed more than a year before the trial occurred is baseless, was waived, and should be denied out of hand.

F. The Damages Awarded by the Jury were Based on the Evidence Presented and Defendants' Malicious Conduct, Not Passion or Prejudice.

The jury did not award "excessive" damages. Defendants continue to shirk responsibility for the impact of their conduct. Instead, Defendants contend that the damages assessed by the jury were merely the "result of passion or prejudice."

It is "well established that the mere size of the jury verdict does not constitute evidence of passion or prejudice." *Gedetsis v. Anthony Allega Cement Contractors, Inc.*, 8th Dist. Cuyahoga No. 64954, 1993 WL 379351, *3, citing *Jeanne v. Hawkes Hosp. of Mt. Carmel*, 74 Ohio App.3d 246, 598 N.E.2d 1174 (10th Dist.1991), cause dismissed, 62 Ohio St.3d 1437, 579 N.E.2d 210 (1991). "Absent evidence to the contrary, it is well established that jury verdicts are presumed to be based on the evidence presented at trial and *uninfluenced* by passion or prejudice." *Id.* (emphasis added). Defendants fall far short of demonstrating their burden of overcoming this presumption.

In this section of their Motion for New Trial, Defendants rehash arguments concerning admission of emails and text messages among Oberlin College administration, Frank Monaco's economic damages testimony, Grandpa Gibson's fall, and slashed tires of the bakery employees' vehicles. Defendants likewise rehash earlier arguments that they should have been able to present additional evidence. Each of these arguments was disposed of above, and the Court properly ruled

on such evidentiary determinations. Moreover, these evidentiary determinations did not result in a verdict improperly influenced by passion or prejudice.

Defendants also contend that statements during closing arguments "wrongfully inflamed the sensibilities of the jury." However, Defendants' arguments fail for a multitude of reasons.

First, Defendants did not object during trial to the statements that they now complain about. When trial counsel fails to object to statements made by opposing counsel during closing arguments, "such failure to object waives one's right to reversal of the judgment unless there is 'gross and persistent abuse of privilege of counsel.'" *Kubiszak v. Rini's Supermarket*, 77 Ohio App.3d 679, 689, (8th Dist.1991) quoting *Eastin v. Eastin–Rossi* (Dec. 1, 1988), Cuyahoga App. No. 54660, 1988 WL 128231. Defendants are not permitted to cull back through the transcripts and cite to statements that they retroactively contend were intended to inflame the passions of the jury. Instead, "[a]n immediate objection is necessary to raise, for review, the question of improper argument of counsel." *State v. Kelly*, 9th Dist. Lorain No. 2227, 1975 WL 180356, *1.

The Ohio Supreme Court further explained the importance of timely objections to statements of counsel during trial:

> Except where counsel, in his opening statement and closing argument to the jury, grossly and persistently abuses his privilege, the trial court is not required to intervene sua sponte to admonish counsel and take curative action to nullify the prejudicial effect of counsel's conduct. Ordinarily, in order to support a reversal of a judgment on the ground of misconduct of counsel in his opening statement and closing argument to the jury, it is necessary that a proper and timely objection be made to the claimed improper remarks so that the court may take proper action thereon.

Snyder v. Stanford, 15 Ohio St.2d 31, 35, 238 N.E.2d 563 (1968) (superseded by statute on other grounds).

Second, none of the remarks that Defendants *now* complain of (after not objecting at trial) are improper. They certainly do not constitute the kind of exceptional, gross and persistent abuses

that Defendants must demonstrate in order to obtain a new trial. See *Wynn v. Gilbert*, 1st Dist. Hamilton No. C-060457, 2007-Ohio-2798, ¶ 33, quoting *Goldfuss v. Davidson*, 79 Ohio St.3d 116 (1997) (proper and timely objections to statements by counsel must be made at trial; otherwise, reversal shall apply "'only in the extremely rare case involving exceptional circumstances where error, to which no objection was made at the trial court, seriously affects the basic fairness, integrity, or public reputation of the judicial process, thereby challenging the legitimacy of the underlying judicial process itself.'").

Moreover, "[t]he initial determination of whether the permissible bounds of argument have been exceeded is a discretionary function of the trial court." *Larissey v. Norwalk Truck Lines*, 155 Ohio St. 207 (1951). Such determination will not be reversed absent an abuse of discretion. *Id.* Likewise, the denial of a motion for new trial on the ground of excessive damages rests within the sound discretion of the trial court and is therefore not disturbed on appeal absent an abuse of discretion. *Phoenix Lighting Group, LLC v. Genlyte Thomas Group, LLC*, 9th Dist. Summit No. 28082, 2018-Ohio-2393, ¶ 61.

The wide latitude permitted to counsel in closing argument is well-established:

> There is nothing wrong with a passionate closing argument within the wide latitude of permissible argument set by the court. Counsel may persuade and advocate to the limit of counsel's ability and enthusiasm so long as counsel does not misrepresent evidence or go beyond the limits of propriety set on the arguments by the trial court in its sound discretion. Thus, it is the privilege of counsel, in the closing argument to the jury, freely to discuss the facts; to arraign the conduct of parties; to impugn, excuse, justify, or condemn motives so far as they are developed by the evidence; and to assail the credibility of witnesses when it is impeached by direct evidence or by the inconsistency or incoherence of their testimony.
>
> Statements of counsel in argument which are descriptively colorful summations of facts in evidence are entirely permissible, as distinguished from other statements of a less factual nature.
>
> The court should not be severe in arresting argument on the ground that the analogy or inference is forced or unnatural, or that the argument is illogical; illustrations

> may be as various as counsel's resources, and argument as full and profound as counsel's learning can make it.

90 Ohio Jur. 3d Trial § 395.

For instance, Defendants now complain about references to "David and Goliath." Defendants' Motion fails to cite to any objection that Defendants lodged during trial to such a reference, because no objection was ever made. In fact, Oberlin College embraced the "David and Goliath" comparison and acknowledged its role as Goliath as early as voir dire:

> MR. PANZA: I want to thank you. That's really, really difficult and I really do appreciate it.
>
> Back to Lady Justice. Equal before the law. Mr. Plakas used David and Goliath yesterday. Well, in this situation, David has sued Goliath for money. So equal before the law. Do you think Goliath deserves the same rights as David?
>
> PROSPECTIVE JURORS: Yes.

(May 9, 2019 Tr. Trans., p. 17)

Oberlin College's powerful influence in the Oberlin community was certainly relevant in this case, as it demonstrated the scope and long-lasting impact of the reputational harm to the Gibsons. Likewise, counsel's reference to the Defendants' own words—"rain fire and brimstone"—cannot be considered wrongful. Defendants also complain about testimony concerning a 91-year-old man's fears that the reputation he had built over a lifetime had been destroyed. Obviously, such testimony concerning reputational harm and ridicule goes to the essence of a defamation claim.

Third, courts must be "particularly circumspect about attributing passion or prejudice to a jury's determination of damages, a matter peculiarly in their province." *Kluss v. Alcan Aluminum*

Corp., 106 Ohio App.3d 528, 539 (8th Dist.1995). This is particularly true in defamation cases where courts must "allow[] the jury wide discretion" in rendering damages due to the nature of the resulting harms to plaintiffs' businesses, standing in the community, personal humiliation, anguish, and suffering. *Id.* at 540 citing *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 94 S.Ct. 2997, 41 L.Ed.2d 789 (1974)

Fourth, the Court properly informed the jury that the arguments and statements of counsel are not evidence. (Trial Tr., June 6, 2019 at 52:7-12).

Fifth, it was Oberlin College who raised the issue of sympathy in its closing argument. In closing rebuttal, Attorney Plakas forcefully confirmed: "The Gibsons do not want any sympathy." (June 5, 2019 Tr. Trans., p. 84). A presumption always exists that the jury has followed the instructions given to it by the trial court. *State v. Fox*, 133 Ohio St. 154 (1938). Here, this Court properly instructed the jury that the law required them to disregard sympathy in rendering their verdict:

> Circumstances in the case may arouse sympathy for one party or the other. Sympathy is a common, human emotion. The law does not expect you to be free from such normal reaction. However, the law and your oath as jurors require us to disregard sympathy and not to permit it to influence your verdict.

(June 6, 2019 Tr. Trans., p. 77)

Sixth, the jury heard significant evidence concerning the severe and long-lasting impact that Defendants' conduct has had on Plaintiffs, in the form of both economic and non-economic damages. For instance, the jury heard Dr. Deborah Owens testify about how negative statements in a small community are so powerfully persistent and difficult to overcome. Likewise, expert Frank Monaco explained (through use of well-recognized accounting principles) the long-lasting

economic damages resulting from Defendants' conduct. Oberlin College's former president, Marvin Krislov, admitted to the jury that "being called a racist is one of the worst things a human being can be called." (May 29, 2019 Tr. Trans., at 179). It cannot be said that the jury, who admirably paid careful attention throughout the 5-week long trial, awarded excessive damages influenced by passion or prejudice.

Finally, Defendants fail to cite to any Ohio case law that would suggest otherwise. Defendants' reference to *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408 (2003) is inapplicable. There, the jury awarded the plaintiff $1 million in non-economic damages and $145 million in punitive damages. Under those particular circumstances, the Court determined that the 145-to-1 ratio of punitive to compensatory damages was too disproportionate. Here, on the other hand, the jury awarded economic damages as well as non-economic damages and this Court has already applied statutory caps to both the non-economic damages and the punitive damages.

Defendants' reference to a district court case in Oklahoma is also off-base. *Moody v. Ford Motor Co.*, 506 F.Supp.2d 823, 838 (N.D. Okla. 2007). There, the district court determined that plaintiff counsel's 'wire-to-wire' misconduct throughout the trial (including repeatedly violating evidentiary orders) resulted in an excessive verdict of $15 million in non-economic damages (without any economic damages). Here, Defendants are unable to identify any misconduct that would result in excessive damages.

G. Defendants are not Entitled to Remittitur.

Lastly, Defendants ask for remittitur of the jury's verdict. However, before issuing a remittitur, the "damages awarded by the jury must be so manifestly against the weight of the evidence to show a misconception by the jury of its duties." *Howard v. City Loan & Sav.*, 2nd Dist. Greene No. 88-CA-39, 1989 WL 33137 at *5 (Mar. 27, 1989) (citations omitted). Indeed, "[t]he damages must not be excessive solely in the mind of the court, the excess must be so great

as to shock sound judgment and a sense of fairness toward the defendant." *Id.* (citations omitted).

For several reasons, Defendants are not entitled to remittitur.

First, Defendants' reliance on R.C. 2315.19 as one of the avenues allegedly supporting a reduction of damages is misplaced. R.C. 2315.19 ***only applies to noneconomic damages***. *See,* R.C. 2315.19(A) [emphasis added] ("Upon a post-judgment motion, a trial court in a tort action shall review the evidence supporting an award of compensatory damages for ***noneconomic loss*** that the defendant has challenged as excessive."). Nearly all of the damages awarded in this case were for ***economic*** or ***punitive*** damages, for which R.C. 2315.19 has no application.

Second, the Court ***already reduced the damages by nearly twenty million dollars through application of the statutory caps on noneconomic and punitive damages***. Combined for all three Plaintiffs, the jury awarded $44.2 million in compensatory and punitive damages. However, after application of the statutory damages caps, *see,* R.C. 2315.18 and R.C. 2315.21, the Court entered judgment on the three verdicts for a total of $25 million in damages, ***which amounts to a reduction of $19.2 million or forty-three percent.*** (June 28, 2019 Order, pp. 2-3). Thus, in essence, Defendants have already been granted a remittitur of the damages awarded by the jury.[17]

Third, Defendants regurgitate former arguments related to the alleged speculative nature of Frank Monaco's testimony on economic damages. But, as Plaintiffs argued in substantial detail above, *see supra* Sec. II(D)(6), Mr. Monaco's testimony on damages was not speculative. Defendants also point to the alleged valuation of Gibson's Bakery provided by their expert and irrelevant economic information as alleged evidence that the verdicts were excessive. However,

[17] At the very end of their Motion, Defendants insist that the Court should "properly apply the statutory damages caps." (Def. Mt. New Trial, p. 42). Because this issue has already been fully briefed by both parties, Plaintiffs will not waste the Court's time to argue it again. Simply put, and as argued in Plaintiffs' June 21, 2019 Bench Brief on Calculation of Compensatory & Punitive Damages, the Court properly applied the statutory damages caps to the extent they are constitutional and apply in this case. Additionally, Plaintiffs incorporate their Bench Brief on Calculation of Compensatory & Punitive Damages as if fully restated herein and again move this Court to not apply the punitive damages caps against Plaintiffs, because to do so would be unconstitutional.

where a jury verdict is based on credible expert testimony, as is the case here, the jury is free to believe the evidence and award damages consistent with the evidence. *See, e.g. Fraysure v. A-Best Products Co.*, 8th Dist. Cuyahoga No. 83017, 2003-Ohio-6882, ¶ 27 ("The jury's award was based on credible evidence and expert testimony. The jury was free to believe the testimony and we cannot say that it was unsupported by the evidence.").

Fourth, the damages awarded by the jury were not excessive. Defendants' entire "argument" for excessive damages is an alleged comparison of other defamation verdicts in Ohio. This is an improper standard. "Each individual case presents unique facts for the jury's determination. ***Comparison with other cases will inevitably result in facially inconsistent results.***" *Betz v. Timken Mercy Med. Ctr.*, 96 Ohio App.3d 211, 222, 644 N.E.2d 1058 (5th Dist. 1994) [emphasis added].[18] This makes logical sense and applies with even more force in this case. This was an extremely unique situation involving the malicious acts of a college and its administrators to publicly shame and destroy a 134-year-old family business. It had devastating effects on the business and the entire Gibson family. Indeed, even if a comparison was proper, none of the cases cited by Defendants involved similarly situated Plaintiffs that were publicly shamed on a national scale.

Furthermore, one must remember that this case involved expert testimony valuing Plaintiffs' ***economic damages*** in excess of $5,000,000.00. And, per Mr. Monaco, that opinion was conservative. The actual economic damages could have gone well above that figure. This proof of economic damages renders Defendants' cases irrelevant. Indeed, for some cases, Defendants falsely recite the relevance facts.[19] *Wayt v. DHSC, L.L.C.*, 155 Ohio St.3d 401, 2018-Ohio-4822,

[18] While R.C. 2315.19(A)(2) allows trial courts to consider other verdicts, that statute only applies to awards of noneconomic damages. Defendants improperly mash everything together when conducting their "comparison."
[19] Some of the cases cited by Defendants, such as *Au v. Yulin* and *Laughman v. Selmeier*, are of little value to the

122 N.E.3d 92 (2018) (no economic damages proven by plaintiff); *Guinn v. Mt. Carmel Health*, S.D.Ohio No. 2:09-CV-226 (no evidence submitted to the Court as to the amount of claimed damages); *Am. Chem. Soc. v. Leadscope, Inc.*, 133 Ohio St.3d 366, 2012-Ohio-4193, 978 N.E.2d 832, ¶ 15 (2012) (jury awarded "$26.5 million in compensatory and punitive damages, plus attorney fees..." and furthermore, the Ohio Supreme Court held that the statements were not actually defamatory, whereas, here the Lorain County jury determined that Defendants' vicious allegations of racist and criminal conduct were false)[20]; *Isquick v. Dale Adams Enterprises, Inc.*, 9th Dist. Summit No. 20839, 2002-Ohio-3988, ¶ 38 ("After hearing Isquick's defamatory comments at a car show, Walther decided not to have Adams restore his Duesenbergs. Mark Bober, a certified public accountant, estimated Adams' loss of future profits at $814,515, with a total economic loss to the company of $1,100,999. Dale Adams also testified that at one time he wrote a column for an automobile collector magazine, but, after Isquick's defamatory statements about his work on the Skiff, he 'resigned in disgrace.'"). Based on the foregoing, Defendants have failed to make the necessary showing for remitter because they have failed to undertake any analysis of the facts of this case versus the facts of the cases they cited within their Motion.

Therefore, Defendants are not entitled to a remittitur of the jury's verdict.

III. CONCLUSION

Therefore, for the foregoing reasons, Plaintiffs request that this Court deny Defendants' Motions for New Trial and Remittitur.

Court's analysis because Defendants have failed to provide any factual discussion of those cases. Instead of actually comparing the facts of these cases to the present case, Defendants attempt to get by purely on an economic comparison. Unfortunately for Defendants, remitter is not based on pure economic comparisons.

[20] Defendants' reference to the Ohio Supreme Court's overturning of the verdict in *Am. Chem. Soc.*, 133 Ohio St.3d 366, is egregiously misleading because the Court overturned the damages because it found that the statements at issue were not defamatory as a matter of law. *Id.* at ¶ 92. The Court was not discussing whether the damage award was excessive.

DATED: August 28, 2019

Respectfully submitted,

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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' RESPONSE IN OPPOSITION TO DEFENDANTS' MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT

After six (6) weeks of evidentiary hearings and trial, a fair and impartial jury of eight (8) Lorain County citizens found that Defendants[1] were responsible for the destructive libel campaign aimed at Gibson's Bakery,[2] David Gibson,[3] and Grandpa Gibson.[4] Now, after hearing the verdict, Defendants challenge the jury's decision based on irrelevant, already decided arguments.

For the following reasons, Defendants' Motion for JNOV must be denied:

- ***First***, Defendants' are not entitled to JNOV on Plaintiffs' libel claims. Defendants' challenge to the libel verdicts consists mostly of regurgitated arguments that this Court already decided during summary judgment briefing and that can be dismissed out of hand. Defendants' other arguments related to evidence of publication and Defendants' degree of fault are also wrong as Plaintiffs submitted substantial evidence of both elements such that reasonable minds could (and did) find that Defendants libeled Plaintiffs;

- ***Second***, Defendants also rehash agency arguments related to Gibson's Bakery's tortious interference with business relationships claim against Dean Raimondo. However, the jury could (and did) find that Bon Appetit is not an agent of Dean Raimondo when it found Dean Raimondo liable for tortious interference. Further, the evidence submitted by Plaintiffs clearly showed that Dean Raimondo was not justified in terminating Plaintiffs' business relationship with Bon Appetit;

[1] "Defendants" refers to Oberlin College & Conservatory ("Oberlin College") and Meredith Raimondo ("Dean Raimondo").
[2] "Gibson's Bakery" refers to Plaintiff Gibson Bros., Inc.
[3] "David Gibson" or "David" refers to Plaintiff David R. Gibson.
[4] "Grandpa Gibson" refers to Plaintiff Allyn W. Gibson.

- ***Third***, reasonable minds could (and did) find that Oberlin College is liable to David and Grandpa Gibson for intentional infliction of emotional distress. Plaintiffs submitted substantial evidence showing that Defendants conduct was extreme and outrageous, and that David and Grandpa Gibson suffered severe and debilitating emotional distress;

- ***Fourth***, Defendants are not entitled to JNOV on Plaintiffs' punitive damages verdicts. Because Defendants filed a motion to bifurcate the compensatory and punitive phases of trial, libel actual malice was two separate issues that were required to be submitted in both phases of trial. Further, Plaintiffs submitted substantial evidence showing that Defendants acted with libel actual malice in defaming Plaintiffs; and

- ***Finally***, Defendants' cannot challenge the amount of damages awarded to David and Grandpa Gibson on the IIED claims through a JNOV motion, and, even if they could, the IIED claims were based on separate animus than the libel claims.

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I. INTRODUCTION

The most enduring feature of the American justice system is the jury trial. As the Court recognized during the compensatory phase, participating as a juror is "an incredible duty and act of service." (June 6, 2019 Tr. Trans., p. 81). However, before the trial even concluded, Defendants sent a communication to thousands of people questioning the service and decision of the jury, who sacrificed more than a month of their lives to listen to the evidence and decide this case. During the punitive phase of trial, Oberlin College Vice President and General Counsel Donica Varner testified as follows:

> Q. The position following the jury verdict clearly said that Oberlin College did not agree -- "regretted that the jury did not agree with the clear evidence our team presented." That was one pronouncement publicly, correct?
> A. Correct.
> Q. And in addition, Oberlin College, to thousands of people in the public domain, said that neither Oberlin College nor Dean Raimondo defamed a local business or its owners, correct?
> A. Correct.

(June 12, 2019 Tr. Trans., p. 140).

Defendants have continued this theme of disregarding the jury decisions in their Motions for Judgment Notwithstanding the Verdict ("JNOV"). In their JNOV motion, Defendants re-argue ***numerous*** issues this Court has already heard and decided. In short, Defendants' JNOV motion is entirely baseless and should be denied out of hand.

II. DEFENDANTS' IMPROPERLY INTERJECT DOCUMENTS AND OTHER MATERIALS IN THEIR JNOV MOTION THAT WERE NOT SUBMITTED AS EVIDENCE DURING TRIAL

As a preliminary matter, in addressing Defendants' Motion JNOV, the Court should not consider the numerous references Defendants make to evidence outside of the record. For example, Defendants ask the Court to consider: (1) an article from *The Oberlin Review* dated April 27, 1990 (fn. 10); Oberlin police body cam footage available on YouTube (fn. 23); (3) the fact that the local newspaper, the *Chronicle-Telegram*, sent a reporter to cover the trial every day (Defs.' JNOV, p. 23); and (4) KWGD's website addressing frequently asked questions about the Gibson Bakery trial (fn. 32).

Case law is clear that when addressing a motion for judgment notwithstanding the verdict, a court is not permitted to rely on evidence outside the record. In *Posin v. A.B.C. Motor Court Hotel, Inc.*, the Court explained that in ruling on a motion for judgment notwithstanding the verdict, a court must review "[t]he evidence adduced at trial and the facts established by admissions in the pleadings and in the record must be construed most strongly in favor of the party against whom the motion is made." 45 Ohio St.2d 271, 275, 344 N.E.2d 334 (1976); *see also Baltimore & O.R. Co. v. Nobil*, 85 Ohio St. 175, 97 N.E. 374 (1911), syllabus, (where the Court held that "[i]n disposing of a motion for judgment notwithstanding the verdict of a jury, the trial court is confined to a consideration of the statements in the pleadings; and the record outside of the statements in the pleadings should not be considered in deciding such motion. [Citation omitted.]").

In line with the above case law, the Court should disregard the above evidence and any other evidence that Oberlin relies upon in support of its motion that is outside of the Court's record in deciding Oberlin's Motion JNOV.

III. LAW & ARGUMENT

A. Standard of Review.

JNOV motions are judged under the same standard as motions for directed verdict. *See,*

Allied Erecting & Dismantling Co., Inc. v. Youngstown, 151 Ohio App.3d 16, 2002-Ohio-5179, 783 N.E.2d 523, ¶ 20 (7th Dist.). Under binding Ninth District case law, JNOV is only proper where "viewing the evidence in a light most favorable to the non-moving party and presuming any doubt to favor the non-moving party reasonable minds could come to but one conclusion, that being in favor of the moving party." *McMichael v. Akron General Medical Center*, 2017-Ohio-7594, 97 N.E.3d 756, ¶ 10 (9th Dist.) (citations omitted). But, "[i]f reasonable minds could reach different conclusions, ***the motion must be denied***." *Magnum Steel & Trading, LLC v. Mink*, 9th Dist. Summit Nos. 26127 & 26231, 2013-Ohio-2431, ¶ 12 (emphasis added) (citations omitted). Importantly, when ruling on a JNOV motion, the trial court ***must not weigh the evidence or test the credibility of the witnesses***. *See, Williams v. Spitzer Auto World Amherst, Inc.*, 9th Dist. Lorain 07CA009098, 2008-Ohio-1467, ¶ 9 (citations and quotations omitted) ("Neither the weight of the evidence nor the credibility of the witnesses is for the court's determination in ruling upon JNOV").

Put another way, without weighing evidence and with all inferences in Plaintiffs' favor, Defendants' JNOV motion ***must be denied*** if reasonable minds could conclude that Plaintiffs' were entitled to judgment on their claims. *See, McMichael* at ¶ 10. Here, unfortunately for Defendants, eight (8) reasonable minds unanimously found that Plaintiffs were entitled to judgment on their libel claims against both Defendants, IIED claims against Oberlin College, and tortious interference claim against Dean Raimondo. Therefore, Defendants' motion for JNOV must be denied.

B. Defendants are not Entitled to JNOV on Plaintiffs' Libel Claims.

Defendants' arguments relating to Plaintiffs' libel claim should sound familiar to the Court considering Defendants have merely rehashed their summary judgment and directed verdict motions. Their JNOV does not present any argument that the Court has not already properly

rejected. The Court should once again tell Defendants they are wrong by denying their JNOV.

Additionally, as Defendants have done throughout this litigation, Defendants ignore the evidence, including the actual content of the defamatory Flyer and the Student Senate Resolution. In Defendants' revisionist history, the defamatory Flyer did not accuse Plaintiffs of having a long, known practice of committing acts of racism, including profiling and discrimination. Judges, attorneys, and litigants involved in employment discrimination cases throughout Ohio should be concerned with Defendants' claim that one cannot prove racial discrimination. In the end, by ignoring the actual content of the libelous statements, Defendants have doomed their arguments on Plaintiffs' libel claim.

1. Plaintiffs' Libel Claim is about Defendants' Speech not the Speech of Students.

Within their JNOV, Defendants repeatedly make the false claim that the speech at issue is the speech of students. (See Defs.' JNOV, p. 4). The evidence undercuts any such claim. As this Court knows, Defendants defamed Plaintiffs through actions independent of the students who stood outside Gibson's Bakery in November of 2016 and shouted against Plaintiffs.

Moreover, Defendants again assert that this case involves fundamental questions of constitutional law under the First Amendment by trying to cloak themselves in the protections afforded to those who criticize public officials. However, this is not a case of defamation relating to the conduct of government or public officials. Instead, it is a case of a small bakery and the family that runs it being defamed for exercising their legal rights as shopkeepers to prevent theft. *See* R.C. § 2935.041. In cases such as this, where private persons and small businesses are subjected to false and defamatory statements, the only recourse to repair reputations is the civil justice system. *See Resenblatt v. Baer*, 383 U.S. 75, 93, 86 S.Ct. 669 (1966) (Stewart, J., concurring) ("The destruction that defamatory falsehood can bring is, to be sure, often beyond the

capacity of the law to redeem. Yet, imperfect though it is, an action for damages is the only hope for vindication or redress the law gives to a man whose reputation has been falsely dishonored."). *See also Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 11, 110 S.Ct. 2695 (1990) (citations omitted) ("Since the latter half of the 16th century, the common law has afforded a cause of action for damage to a person's reputation by the publication of false and defamatory statements.").[5]

While Defendants attempt to cloak themselves in the protections of free speech, this case does not impugn or even impact the freedoms provided by the First Amendment. Instead it involves a small family business and its owners who sought justice for the wrongful destruction of their reputations.

2. Defendants' Defamatory Statements are not Protected Opinions.

Defendants' defense that the defamatory statements at issue are protected opinions is not supported by Ohio law or the facts in evidence. Like it did during summary judgment briefs, Defendants' opinion defense quickly falls apart when one actually examines the entirety of the defamatory statements at issue and the context in which such statements were made, as Ohio law requires. For the reasons to be discussed below, all of the defamatory statements at issue suggest they are supported by verifiable facts, such as a "LONG ACCOUNT of RACIAL PROFILING," and therefore are not opinions.

a. *A plaintiff may bring a defamation claim in Ohio based merely upon being called a racist.*

Contrary to Defendants' suggestion, a publication stating that someone is "racist", in and of itself, can constitute actionable defamation under Ohio law. Defendants know this, considering Plaintiffs made them aware of the applicable Ohio case law on the topic. As Defendants are unable

[5] Indeed, the Ohio constitution specifically states that citizens are responsible for the abuse of the right of free speech: "Every citizen may freely speak, write, and publish his sentiments on all subjects, ***being responsible for the abuse of the right***[.]" Ohio Constitution, Article I, Section 11 (emphasis added).

to cite to supportive Ohio law for their position, Defendants can only point to inapplicable cases from other jurisdictions and seek to hide behind a manufactured protest defense.

In *Lennon v. Cuyahoga Cty. Juvenile Court*, the Eighth District Court of Appeals acknowledged that calling someone a racist may constitute defamation *per se*. 8th Dist. Cuyahoga No. 86651, 2006-Ohio-2587 ¶¶ 26, 30 ("In the instant case, the specific language used is unambiguous. One co-worker told another co-worker that appellant was a racist.").

The court in *Lennon* acknowledged that branding someone a racist can be defamatory on its face and "weighs heavily toward actionability, as we cannot think of a scenario in which these words are not pejorative." *Id.* at ¶ 30. Likewise, former President Marvin Krislov and the current Oberlin College Chief of Staff, Ferdinand Protzman, conceded that being called a racist is one of the worst, most damaging things one can be called. (May 29, 2019 Tr. Trans., p. 179 [Krislov – "Q. You would agree that, in your words, 'being called a racist is one of the worst things a human being can be called, correct? A. Yes."]; May 10, 2019 Tr. Trans., pp. 51-52 [Chief of Staff Ferdinand Protzman would institute college disciplinary proceedings against students who posted accusations of racism on an Oberlin College Facebook page.]).

In considering the totality of the particular circumstances involved in *Lennon*, the court ultimately determined that the accusation of racism was an opinion, because it occurred in the context of mere workplace "water-cooler chitchat" and the speaker did not intimate he possessed any undisclosed facts supporting the statement. *See Lennon* at ¶¶ 30-31. The court acknowledged that, under other circumstances and context, Ohio law certainly supports an actionable defamation claim for a statement that one is racist.

In 2017, the Tenth District Court of Appeals also held that calling someone a racist alone could constitute actionable defamation. In *Webber v. Ohio Dept. of Pub. Safety*, the court explained

that under Ohio law, "'being referred to as racist may, at times, constitute defamation per se.'" 10th Dist. No. 17AP-323, 2017-Ohio-9199, 103 N.E.3d 283, ¶ 36.

Likewise, the Sixth Circuit Court of Appeals has acknowledged that the term "racist" has a well-defined and understood meaning, thereby making it "capable of being defamatory." *Armstrong v. Shirvell*, 596 Fed.Appx. 433, 441 (6th Cir.2015), citing *Milkovich*, 497 U.S. 1 (upholding a defamation verdict for a claim which was based, in part, on an accusation of racism), and *Connaughton v. Harte Hanks Commc'ns, Inc.*, 842 F.2d 825 (6th Cir.1988). Other courts have upheld defamation verdicts or judgments which were based on allegations of racism. *See Afro-Am. Pub. Co. v. Jaffe*, 366 F.2d 649, 653 (D.C.Cir.1966).

Here, Defendants' statements ***went well beyond*** merely referring to Plaintiffs as "racist." The statements proclaimed that Plaintiffs had a "long account" of racial profiling and discrimination and violence against minorities. Defendants' statements were far from mere "water-cooler chitchat." Moreover, each of Defendants' statements intimated that they were based on factual information, including undisclosed facts, within Defendants' possession.

The cases discussed above demonstrate that calling someone a racist can constitute actionable defamation. They also reinforce the need for a court to examine the totality of the circumstances surrounding each defamatory statement.

b. *The determination of whether a statement is an opinion examines the totality of the circumstances surrounding the statement.*

This Court has already properly rejected, as a matter of law, Defendants' theory that the subject statements were merely protected opinion. Ohio has adopted a totality of the circumstances test to determine whether a statement is an opinion or a statement of fact. In describing the test, the Ohio Supreme Court has stated:

> In *Scott* we adopted a totality of the circumstances test to be used when determining whether a statement is fact or opinion. Specifically, the court should consider: the

> specific language used, whether the statement is verifiable, the general context of the statement, and finally, the broader context in which the statement appeared.

Vail v. The Plain Dealer Publishing Co., 72 Ohio St.3d 279, 282, 649 N.E.2d 182 (1995), citing *Scott v. News-Herald*, 25 Ohio St.3d 243, 496 N.E.2d 699 (1986). No one factor is dispositive. *Id.* Instead, the test is "fluid,"

> Every case will present facts that must be analyzed in the context of the general test. Each of the four factors should be addressed, but the weight given to any one will conceivably vary depending on the circumstances presented.

Id.

Here, the circumstances plainly reveal that Defendants' defamatory statements do not constitute mere "opinions."

c. *A statement is not an opinion when the defendant intimates that he or she is basing the statement on nondisclosed facts.*

As will be discussed in greater detail below, the defamatory Flyer, for example, stated: "This [Gibson's Bakery] is a RACIST establishment **with a LONG ACCOUNT of RACIAL PROFILING and DISCRIMINATION.**" (Plaintiffs' Tr. Exh. 263 [Emphasis added.]). Defendants again focus solely on the portion of this sentence preceding the word "with." However, the statement suggests that the claim is supported by a "LONG ACCOUNT" of racial profiling and discrimination. After all, a "long account" suggests that there exists a documented record, and compilation, of a pattern of racial profiling and discrimination events. This makes the entire statement, and each subpart, verifiable, thereby weighing heavily in favor of a determination that they are (false) statements of fact rather than protected opinions. *See Lennon*, 2006-Ohio-2587 at ¶ 30.

Likewise, the defamatory Student Senate Resolution expressly prefaces its defamatory remarks by announcing "we find it important to share a few key facts" before going on to state that "Gibson's has a history of racial profiling and discriminatory treatment of students and residents

alike." (Plaintiffs' Tr. Exh. 35). Again, the publication suggests that its conclusions are based on verifiable facts, thus eliminating the argument that it offers mere opinions.

Additionally, the defamatory Flyer and Resolution go even further to claim that an owner of Gibson's Bakery violently assaulted a member of the Oberlin community. Thus, Defendants accused Plaintiffs of committing a crime.[6] R.C. § 2903.13 (criminalizing assault). None of these statements is ambiguous, thereby weighing heavily in favor of actionability. *See id.*

The Defendants' statements are impactful and highly influential. This is not surprising, as students, faculty, staff, and the community undoubtedly expect an institution of higher learning—which has tremendous resources—to base its public statements on facts, research, and analysis rather than mere off-the-cuff "water-cooler chitchat."

Thus, after examining the actual content of the statements at issue, the Court must once again conclude that the first prong weighs in favor of actionability.

The second prong, whether the statements are verifiable, is also satisfied. Initially, as discussed above, the defamatory statements suggested the claim of racism was supported by known, undisclosed facts, including a "long account" of racial profiling and racial discrimination. This strongly supports holding the statements were verifiable.

Moreover, accusing a business of being a racist establishment or a business owner of being a racist can be verified. In fact, the Oberlin City Police Department conducted a statistical review of the racial makeup of shoplifting arrests at Gibson's Bakery. (Plaintiffs' Tr. Exh. 269). The compilation revealed that the majority of apprehended shoplifters were not racial minorities. (Id.). Of the forty (40) adults arrested for shoplifting at Gibson's Bakery from 2011 through November 14, 2016, ***thirty-two*** (32) were Caucasian. (Id.). The existence of this law enforcement review

[6] Plaintiffs will separately address Defendants' baseless claim that the accusations of assault were clearly directed at non-party Allyn D. Gibson.

weighs heavily in favor of Plaintiffs' position on verifiability.

Further, claiming someone commits discrimination based on a particular characteristic, such as race or disability, is verifiable. To hold otherwise would completely undermine all disability or employment discrimination laws. Courts throughout Ohio, both state and federal, routinely hear cases involving discrimination, including racial discrimination. *See Williams v. Spitzer Auto World Amherst*, Inc., 9th Dist. Lorain No. 07CA009098, 2008-Ohio-1467, ¶ 14.[7] A claim for racial discrimination within an employment context must rely upon evidence of actual discrimination, meaning the plaintiff must prove that he or she was discriminated against based on his or her race. *Id.* at ¶ 15 ("Plaintiffs may show that they were the victims of a discriminatory practice by either direct evidence or indirect evidence...") Regardless of which approach the plaintiff chooses (direct or indirect evidence of discrimination), the trier of fact is tasked with examining the evidence to verify the discriminatory act took place. With regard to the indirect approach, "a plaintiff may make a prima facie showing of discrimination by establishing that he (1) was a member of a protected class, (2) suffered an adverse employment action, (3) was qualified for the position, and that (4) a comparable nonprotected person received better treatment." *Id.* at ¶ 16, citing *Mitchell v. Toledo Hosp.*, 964 F.2d 577 (C.A.6, 1992); *Plumbers & Steamfitters Joint Apprenticeship Committee v. Ohio Civ. Rights Commission*, 66 Ohio St.2d 192, 197, 421 N.E.2d 128 (1981); *Marbley v. Metaldyne Co.*, 9th Dist. Summit No. 21377, 2003-Ohio-2851, ¶¶ 7-13; *Dunlap v. Tennessee Valley Auth.*, 519 F.3d 626, 629–31 (6th Cir.2008). The point here is that racial discrimination cases are subject to verification through direct or indirect evidence. As a result, Defendants' accusation that Plaintiffs discriminate based on race is

[7] "It is an unlawful discriminatory practice for any employer to 'discharge without just cause, to refuse to hire, or otherwise to discriminate against [a] person with respect to hire, tenure, terms, conditions, or privileges of employment, or any matter directly or indirectly related to employment[,]' on the basis of, among other things, race. R.C. 4112.02(A)."

verifiable, and thus, is not an opinion.

Likewise, claiming someone profiles based upon race can be verifiable. For instance, claims of racial profiling are brought with regard to use of preemptory strikes on prospective jurors. *See Hicks v. Westinghouse Materials Co.*, 78 Ohio St.3d 95, 676 N.E.2d 872 (1997); *State v. Hicks*, 6th Dist. Wood No. WD-02-44, 2004-Ohio-2780, ¶¶ 17-20. Courts do not merely decide those claims on a mere allegation of illegal profiling. Instead, they undertake an intensive analysis to verify whether an improper intent lay behind the preemptory strike, meaning they attempt to verify the claim of profiling or discrimination. *Id.*

Defendants' discussion of testimony from Vicky Gaines and Sharon Patmon does nothing to undermine this conclusion. Defendants use two, short segments of testimony about whether a person's feelings of being subjected to racism are a matter of that person's opinion. What these questions and answers do not delve into is whether one could verify whether a person or business has a long history and account of racial profiling or racial discrimination or whether a person has committed an assault. Those questions are at issue when dealing with the defamatory Flyer and Student Senate Resolution.[8] Furthermore, Mrs. Gaines closely interacted with Plaintiffs for decades and never witnessed acts of racial profiling or racial discrimination, thereby indicating that she believed those types of actions were capable of personal observation, i.e. verifiable. (May 13, 2019 Tr. Trans., p. 36). Mrs. Patmon likewise had significant experience with Plaintiffs and never observed any profiling or discrimination. (May 10, 2019 Tr. Trans., pp. 93-94).

Additionally, Defendants' discussion of non-Ohio defamation cases involving allegations of racism at page 10 of their JNOV can easily be dispensed. First, as discussed above, Ohio law

[8] At footnote 10 of their JNOV, Defendants reference a purported Oberlin Review article from nearly 30 years ago (1990) relating to an alleged protest at Gibson's Bakery. This document was never entered into evidence and thus cannot be considered. Furthermore, even if Defendants had attempted to introduce it, it would have constituted inadmissible hearsay.

permits defamation claims based on accusations of racism and racist conduct. Additionally, Defendants' cases are distinguishable.

In *Smith v. School Dist. of Philadelphia*, the plaintiff alleged, under Pennsylvania law, that "defendants Barr and Miller 'made public statements that plaintiff is racist and anti-Semitic which were false and malicious [and] which proximately caused injury to plaintiff's reputation....'" 112 F.Supp.2d 417, 429-30 (E.D.Pa.2000). No other details were pled, thereby justifying judgment on the pleadings to the defendant. As discussed above, Defendants' statements go beyond a mere off-the-cuff labeling of someone as racist. Defendants deliberately, while intimating knowledge of additional facts, stated that Plaintiffs' "racism" was supported by a long account of racial profiling and discrimination.

Ayyadurai v. Floor64, Inc. is distinguishable because it did not involve a claim that the plaintiff was racist, but instead involved a statement that the plaintiff accused those who disagree with him as being racists. 270 F.Supp.3d 343, 364–65 (D.Mass.2017). Several of the defamatory statements challenged the plaintiff's position that people who disagree with plaintiff were racists. *Id.* The statements were alleged that plaintiff's claims of others being racist were defamatory and the case did not seek to answer whether being called a racist was defamatory. Furthermore, the defendant disclosed all information upon which it reached its conclusions and thus, (unlike in this case) the defendant was not suggesting it knew additional undisclosed facts. *Id.*

Carto v. Buckley is distinguishable because it involved a book, not a flyer, and was a true political book, meaning it dealt with politics. 649 F.Supp. 502, 504 (S.D.N.Y.1986). The dispute involved a fight between a political figure and a political publication, meaning the parties were prone to using hyperbolic language. *Id.* The author stated that the publication's "distinctive feature is racial and religious bigotry." *Id.* There were no allegations that the publication had a long history

racial profiling or discrimination.

In re Green involved several letters written by an attorney to a judge, wherein the attorney requested that the judge recuse himself from the pending proceedings. 11 P.3d 1078, 1081–82 (Colo.2000). The letters were sent to the plaintiff-judge. *Id.* The disclosed basis for accusations in the letters were not disputed by any of the parties and thus, the author was not implying he had other undisclosed facts. *Id.* This distinguishes the case from the present lawsuit.

Finally, accusing someone of a crime, such as assault, can be verified. *Jorg v. Cincinnati Black United Front*, 1st Dist. No. C-030032, 153 Ohio App.3d 258, 792 N.E.2d 781, ¶ 18 (1st Dist.2003); *Condit v. Clermont Cty. Rev.*, 110 Ohio App.3d 755, 759–62, 675 N.E.2d 475 (12th Dist.1996) (acknowledging that accusations of criminal misconduct can be verified through a trial).

Based on the foregoing, each of Defendants' defamatory statements is verifiable, thereby weighing heavily in favor of actionability.

d. *The general context of a deliberate and calculated protest directed against plaintiffs weighs heavily in favor of actionability.*

The third prong, the general context in which the defamatory statements were disseminated, also demonstrates an actionable claim for libel. The statements, which initially were contained within the defamatory Flyer, were created for use in a deliberate and calculated campaign directed against specific private citizens. The statements were specifically used to target Plaintiffs' reputation within the Oberlin community, including potential customers. They were used to convey a specific message (that Plaintiffs were racists and violently targeted racial minorities) in hopes of driving business away from Plaintiffs. Defendants were very successful in doing so, as they have acknowledged achieving a complete smearing of Plaintiffs' name and brand. (May 15, 2019 Tr. Trans., pp. 128-129).

Another important consideration under the third prong (general context of the statements), especially in this case, is the financial position of the speaker relative to the community in which the statement is made. In *Mauk v. Brundage*, the Ohio Supreme Court emphasized the importance of a defendant's financial condition when deciding whether a reasonable listener would believe and give weight to that defendant's statements. 68 Ohio St. 89, 67 N.E. 152 (1903).

The Ohio Supreme Court affirmatively held that evidence of a defendant's financial condition is highly relevant in a defamation case because it bears "upon the influence the defendants may have had in the community, and the importance which the people of the community would naturally attach to their utterances." *Id.* at 100. Here, between 2016 and 2018, Oberlin College's endowment was anywhere between $700,000,000 and $900,000,000. (June 12, 2019 Tr. Trans., pp. 58-59). Oberlin College's significant financial position would naturally cause a reasonable listener to attach greater importance to its statements. Oberlin College undoubtedly exerts a great deal of influence within the Oberlin community given its vast real estate holdings. (Plaintiffs' Tr. Exh. 457). Furthermore, Chris Jenkins unabashedly testified that the College considers the properties along W. College Street to be its property (of course, with the exception of Gibson's Bakery). (May 30, 2019 Tr. Trans., p. 87). Again, the fact that the defamatory statements were published by a powerful institution of higher learning, with unlimited resources, weighs heavily in favor of a determination that the statements are actionable rather than mere "water-cooler chitchat opinions."

e. *The broader context also weighs heavily in favor of actionability.*

The final prong, the broader context in which the defamatory statements were published, also favors Plaintiffs. Defendants initially disseminated the statements during the course of a targeted protest and boycott campaign against a private business and private citizens. The statements were not presented as hyperbole or sarcasm, which weighs in favor of actionability.

Vail, 72 Ohio St.3d at 282 ("we must consider the full context of the statements. Is the column characterized as statements of objective facts or subjective hyperbole? The general tenor of the column is sarcastic, more typical of persuasive speech than factual reporting.")

This protest and corresponding boycott were not some broader campaign against governmental actors or society in general, like that in *Jorg*. In *Jorg*, a civil rights organization [defendant] led a boycott campaign against the entire city of Cincinnati. *Jorg*, 153 Ohio App.3d 258, ¶ 2. The defendant was an outspoken critic of the police department and advocate for police reform after an individual died in police custody. *Id.* at ¶ 3. As part of the political advocacy efforts, the defendant distributed written materials to "numerous national performers and organizations that were scheduled to appear in Cincinnati." *Id.* The materials accused the city, generally, of instituting "tyranny and general oppression" against minorities. *Id.* at ¶ 20. The defendant was attempting to highlight "an immediate crisis" within Cincinnati. *Id.*

Jorg differs from our case because we have an educational institution, its faculty, administrators, and employees conducting a targeted campaign to destroy a private family business and private citizens. This case is not a protest against the policies of a governmental entity. It is an attack on the livelihood of private citizens. Furthermore, we have pointed statements claiming racial profiling, racial discrimination, and assaults against particular individuals. The defamatory statements in this case were not used to call attention to broader issues in the city of Oberlin or with a governmental department. Ohio Constitution, Article I, Section 3; *see State v. Kalman*, 4th Dist. No. 16CA9, 2017-Ohio-7548, 84 N.E.3d 1088, ¶ 29, appeal not allowed, 152 Ohio St.3d 1421, 2018-Ohio-923, 93 N.E.3d 1003 (2018). Instead, the statements target private citizens and as a result, the fact that the defamatory statements relate to a protest does not *ipso facto* render them opinions. Instead, each statement was one piece of a larger campaign to destroy Plaintiffs

and intimidate the Oberlin business community.

Arrington v. Palmer is likewise not applicable. 971 P.2d 669 (Colo. App.1998), as amended on denial of reh'g (Dec. 24, 1998). The written materials were postcards distributed during a political campaign and targeted a specific candidate. *Id.* at 672-73. Because the plaintiff was a political candidate who was then running for office, his libel claim was subject to higher scrutiny, as political campaigns are generally understood to use hyperbole. *Id.* In contrast, the defamatory Flyer and the Student Senate Resolution were not political literature. They were materials prepared for the sole purpose of destroying Plaintiffs and their family business.

Furthermore, Defendants' suggestion that making statements during a protest or urging a boycott somehow enhances one's claim that he or she is expressing an opinion lacks merit[9]. As, discussed above, Ohio law applies a totality of the circumstances test to all statements. No single factor is outcome determinative, therefore one cannot give extra protection to statements during protests or statements that urge a boycott, because that would impermissibly elevate the significance of the context prongs, while giving too little weight to the statement content and verifiability prongs. Furthermore, comparing the content of the protests to the content of the two written statements at issue is like comparing apples and oranges because there was no evidence in the record showing the protestors' shouts implied they had additional undisclosed facts upon which their shouts were based. [10]

Moreover, Defendants' reference to the protections afforded to legislators is baffling. First, Defendants are not legislators and thus cannot seek protection under the Speech or Debate clauses

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[9] At page 8 of their JNOV, Defendants make reference to a video of the protests on the *Chronicle-Telegram*'s Facebook page. This video was never entered into evidence nor do Defendants cite to any trial exhibit which contains the same. As a result, the Court cannot consider it at this stage of the case.

[10] Like *Jorg, Maddox Defense, Inc. v. GeoData Systems Mgt., Inc.* is inapplicable here. 8th Dist. Cuyahoga No. 107559, 2019-Ohio-1778. *Maddox* involved statements made on a Ripoff Report website by a party in a business dispute with the plaintiff. The court found that because the statements concerned a business deal gone wrong, and because the plaintiff actually *did* breach that contract, plaintiff's claims were subverted by the truth defense.

of the U.S. or Ohio Constitutions. Second, the Speech or Debate clauses do not give legislators carte blanche to commit defamation. *Hutchinson v. Proxmire*, 443 U.S. 111, 112–13, 99 S.Ct. 2675, 61 L.Ed.2d 411 (1979) ("There is nothing in the history of the Clause or its language suggesting any intent to create an absolute privilege from liability or suit for defamatory statements made outside the legislative Chambers; precedents support the conclusion that a Member may be held liable for republishing defamatory statements originally made in the Chamber."); *Williams v. Brooks*, 945 F.2d 1322, 1330–31 (5th Cir.1991) ("To hold that any statements conceivably within the 'informing function' of members of Congress are absolutely immune from suit for defamation would almost wholly exempt senators and representatives from state defamation laws, and arguably in that respect expand the Speech or Debate Clause."). Finally, even if Defendants could use the clause (which they cannot), the defamatory statements at issue were published outside a legislative session and are thus not covered by the clause. *Hutchinson*, 443 U.S. at 112–13 ("There is nothing in the history of the Clause or its language suggesting any intent to create an absolute privilege from liability or suit for ***defamatory statements made outside the legislative Chambers***...) (emphasis added).

Based on the foregoing, all prongs of the *Scott* test weigh in favor of Plaintiffs' position and as a result, none of the defamatory statements at issue is an opinion.

3. Defendants' Accusations of Assault Were "Of and Concerning" Plaintiffs Because They Accused the Owners of Gibson's Bakery of Committing Assault.

The defamatory Flyer accused the owners of Gibson's Bakery of committing assault. David Gibson and Allyn (Grandpa) Gibson are the only owners of Gibson's Bakery. When a defamatory statement is directed at a small group of individuals, such as owners of a small business or members of a governmental board, any individual member of those groups may bring a claim for libel. *McGuire v. Roth*, 8 Ohio Misc. 92, 94–95, 219 N.E.2d 319, 321 (C.P.1965), citing 33 Amer.Jur.

Section 192 ("It also has been held that where defamatory words are spoken with actual malice of a small group of persons such as a board of public officers, any individual member thereof may maintain an action against the defamer."). Indeed, it has been held that a jury is the proper body for determining whether a publication was intended against a particular plaintiff or an unknown class of persons. *Internatl. Text-Book Co. v. Leader Printing Co.*, 189 F. 86, 89 (C.C.N.D.Ohio 1910) (applying Ohio law).

Further, the statement would not involve Allyn D. Gibson because no one understood him to be an owner of the bakery. Furthermore, the defamatory flyer said "Allyn Gibson" committed the assault. It did not say "Allyn D. Gibson" committed the assault. As a result, those assault allegations were of and concerning Plaintiffs, particularly when read in context with the statements that the owner's establishment had a long account of racial profiling and discrimination.

The Student Senate Resolution also accused the bakery of committing an assault. As the trial testimony established, David Gibson and Grandpa Gibson's names and identities are synonymous with the bakery. As Lorna Gibson testified:

15	Q. I just want to ask generally, can you tell the
16	jury about Gibson's Bakery? What is Gibson's Bakery?
17	A. Gibson's is, it's our life. It's been around
18	since the 1800s. It's just -- I feel like Gibson's is
19	us. We are Gibson's. It's -- we do bakery there, we
20	have ice cream, we have a grocery store, we could just
21	cover a lot of essentials in Oberlin.
22	Q. Has it always been owned by the Gibson family?
23	A. Yes, it has.
24	Q. Has it always had the Gibson name?
25	A. Yes.

(May 15, 2019 Tr. Trans., p. 131). David Gibson separately testified that an attack on the name of

the bakery is the same as an attack on himself and his father. (May 21, 2019 Tr. Trans., pp. 169-170, 184, 202). Thus, the Oberlin Community would know that accusations of improper conduct by the bakery are accusations against David Gibson and Grandpa Gibson.

None of the cases cited by Defendants are applicable here. In *Great Lakes Capital Partners Ltd. v. Plain Dealer Publishing Co.*, the statements did not name the plaintiffs and named companies which did not share plaintiffs' names. 8th Dist. Cuyahoga No. 91215, 2008-Ohio-6495, ¶¶ 47-49. It did not, like in our case, involve allegations against a small family business whose name was the same as its owners and was synonymous with the individuals who owned the business.

The plaintiff in *Ebbing v. Stewart*, was not referred to by name within the alleged statements. 12th Dist. Butler No. CA2016-05-085, 2016-Ohio-7645, ¶¶ 12-17. Instead, the plaintiff would have been identified by reference to the person who was the subject of the article (her husband) and their property. *Id.* at ¶ 16 ("Neither the television news broadcast nor the online article mentions Erin by name. Rather, the only times Erin is identified are in reference to Joseph or the property. Specifically, '[Joseph] said he asked the girl to leave his wife's rental property[,]' and the property 'was owned by Joseph['s] * * * wife.' Erin's interest in the action is limited to the news reports discussion of her husband..."). Additionally, none of the statements within the report were false, providing a separate justification for ruling against the plaintiff.

In *Kassouf v. White*, the defendant made the comment that plaintiff's proposed development project involving a hotel was a "flophouse." 8th Dist. Cuyahoga No. 75446, 2000 WL 235770, *3. The comment named the hotel (Microtel Hotel) and did not mention plaintiff's name. *Id.* Moreover, plaintiff's name was not readily attributable to the hotel.

Finally, *Three Amigos SJL Rest., Inc. v. CBS News Inc.*, actually supports Plaintiffs, despite

applying New York law. 28 N.Y.3d 82, 65 N.E.3d 35, 42 N.Y.S.3d 64 (2016). There, the court acknowledged that a plaintiff need not be necessarily named in the defamatory publication in order to bring a claim of defamation: "Although it is not necessary for the plaintiffs to be named in the publication, they must plead and prove that the statement referred to them and that a person hearing or reading the statement reasonably could have interpreted it as such." *Id.* at 86. The evidence adduced at trial established that the defamatory statements, when placed within their full context (i.e. the use of the term "owner" and the discussion of a "long account" of racially motivated conduct), were of and concerning Plaintiffs and not an unnamed third-party.

Based on the foregoing, Plaintiffs had standing to bring their libel claim for those false statements.

4. The uncontroverted evidence at trial proved that Defendants published multiple libelous statements of or concerning Plaintiffs.

a. *Plaintiffs produced a significant amount of evidence proving Defendants published the Student Senate Resolution.*

The important question is not whether Oberlin College is responsible for the statements of the students. Rather, what Plaintiffs have alleged since the initiation of this litigation is that Oberlin College is responsible for aiding and abetting the publication of the defamatory statements about Plaintiffs (in addition to outright participation and dissemination).

In order to satisfy the "publication" element with regard to the Student Senate Resolution, Plaintiffs simply need to show ***any*** intentional or ***negligent act*** which communicates the defamatory matter to a third party. *Gilbert v. WNIR 100 FM*, 142 Ohio App.3d 725, 743, 756 N.E.2d 1263 (9th Dist. 2001), citing 3 Restatement of the Law 2d, Torts (1965), Section 577(1) ("***Any act*** by which the defamatory matter is communicated to a third party constitutes publication.") (emphasis added); *see Gosden v. Louis*, 116 Ohio App.3d 195, 687 N.E.2d 481 (9th Dist. 1996). A plaintiff may satisfy this element by showing the defendant acted negligently and

that the negligent act caused the publication. *Hecht v. Levin*, 66 Ohio St.3d 458, 460, 1993-Ohio-110, 613 N.E.2d 585. Further, Ohio law recognizes that:

> 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 and abets*** another to publish defamatory matter is liable as well as the publisher.

Cooke v. United Dairy Farmers, Inc., 10th Dist. Franklin No. 02AP-781, 2003-Ohio-3118, ¶ 25 (citations omitted) (emphasis added). *See also, Murray v. Knight-Ridder, Inc.*, 7th Dist. Belmont No. 02 BE 45, 2004-Ohio-821, ¶ 104 (citations omitted) ("a person who requests, procures, or aids or abets in the publication of defamatory matter is liable.").

Contrary to Defendants' claim, the aiding and abetting at issue in this lawsuit is not an independent tort. Instead, within the specific context of a defamation claim, aiding and abetting applies to the publication element, i.e. it provides that one who aids or abets the publication of the statement is treated as being a publisher of the statement.

Plaintiffs submitted substantially probative evidence proving Defendants acted negligently and that their negligence caused the Student Senate Resolution to be published, or that Defendants aided and abetted such publication:

- The Student Senate faculty advisor, Vice President Raimondo, was at the protests all day on November 10, 2016, handing out numerous copies of the defamatory flyer (May 14, 2019 Tr. Trans., p.p. 178-180);

- The Student Senate faculty advisor advises the protestors to get more copies of the defamatory flyer at the College Conservatory office (Id. at pp. 177-178);

- After witnessing their adviser supporting the protests and passing out the defamatory flyer, the Student Senate, including Kameron Dunbar (who, according to Defendants' discovery responses, attended the protests (Def. Raimondo's Answers to Plaintiffs' First Set of Discovery Requests, Interrogatory No. 10)), used the College approved defamatory flyer as a template for the resolution:

  From the defamatory Flyer:

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.

From the Student Senate Resolution:

> 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:

- Defendants are fully aware, the first night of the protests, that the resolution was published to the thousands of Oberlin College students within mere minutes of that publication (May 13, 2019 Tr. Trans., p. 56, Plaintiffs' Tr. Exh. 34);

- Defendants promptly adopt and ratify the content of the Student Senate Resolution through a public statement, designed to give "props" to those who drafted and published the resolution (Plaintiffs' Tr. Exh. 67; Plaintiffs' Tr. Exh. 460, p. 8);

- Defendants permit the Student Senate Resolution to be prominently posted in Wilder Hall, which Defendants know is a high traffic location, for over a year (May 13, 2019 Tr. Trans., pp. 54-56);

- Vice President Raimondo enters Wilder Hall every day because her office is located in that building (May 14, 2019 Tr. Trans., p. 9);

- At all times relevant, Vice President Raimondo had the power to "unleash the students" and the power to leash the students, considering she commanded them to take the resolution down from the display case and they complied with that command (Plaintiffs' Tr. Exh. 211; May 14, 2019 Tr. Trans., pp. 9-10).

Had Defendants acted like the adults in the room at the very early stages of the protests, including by not copying or handing out the defamatory flyer and by telling their students that making false accusations of racism or racist behavior was beyond the pale, the Student Senate Resolution would not have been published and widely disseminated. However, this did not happen.

And based on the totality of the evidence, reasonable minds could also conclude (even though it was not necessary to prove at trial) that Defendants were aware of and participated in the preparation of the Student Senate Resolution. Defendants need not be "caught red-handed" in the act of drafting, editing, and printing the resolution before one could reasonably infer that they participated in its creation. The jury saw evidence that Defendants were aware of the protests in advance. Several high-ranking college officials attended to the protests. Vice President Raimondo had the defamatory Flyers in her hands and passed out flyers. Raimondo further encouraged the copying of the flyers using college-property. Furthermore, as discussed above, these same Flyers (that Raimondo was passing out and encouraging students to copy) were used as a template for the Student Senate Resolution. Reasonable minds could certainly that Raimondo, who happened to be the student senate adviser, was also involved in creation of the Resolution.

Moreover, based on the substantial amount of evidence detailed above, *Kinney v. Kroger Co.* is distinguishable. 146 Ohio App.3d 691, 767 N.E.2d 1220 (10th Dist.2001). In *Kinney*, the plaintiff failed to submit any evidence that a single third party received the alleged defamatory statement. *Id.* at ¶ 27. Unlike the plaintiff in *Kinney*, Plaintiffs have submitted substantially probative evidence on the publication of the Student Senate Resolution to third parties – the Student Senate, with the full support of Defendants, mass distributed the resolution to all Oberlin College students.

Additionally, Defendants cannot prevail by arguing that they were merely passive participants in the dissemination of the Student Senate Resolution. At pages 16 and 17 of their JNOV, Defendants claim they were nothing more than an internet service provider, or ISP. As discussed above, the evidence at trial undercuts such a narrative. Defendants took an active role in the publication of the defamatory statements and actively aided and abetted that publication.

Furthermore, Defendants' student policies provide that Defendants have an active role in the content of messages distributed using College-provided equipment. These facts make *Scott v. Hull* distinguishable. 22 Ohio App.2d 141, 259 N.E.2d 160 (3rd Dist.1970). The defendants in *Scott* were not liable for defamation because they merely owned the building upon which unknown persons placed the defamatory graffiti on the building's exterior. *Id.* at 142. There were no allegations that defendants took any active role with regard to the defamation, which distinguishes it from the present lawsuit. In fact, the *Scott* decision support Plaintiffs. For instance, the *Scott* court acknowledged that if a defendant purchases materials which are then used for defamation (such as materials for making signs), then they are responsible for the publication. *Id.* at 143, citing *In Tidmore v. Mills*, 33 Ala.App. 243, 32 So.2d 769, certiorari denied 249 Ala. 648, 32 So.2d 782. Furthermore, the *Scott* court acknowledges that aiding and abetting a publisher ***is the same as being the publisher***. *Id.* (emphasis added), quoting 53 C.J.S. Libel and Slander s 148, p. 231. As a result, *Scott* is both distinguishable from the case and supportive of Plaintiffs, not Defendants.

Moreover, the present case aligns more closely with two cases discussed by the *Scott* court. In *Hellar v. Bianco*, the California Court of Appeals held that an owner of a tavern was liable for defamatory statements that a third party placed inside the tavern's restroom. 111 Cal.App.2d 424, 244 P.2d 757 (Cal.App.1952). In holding that the tavern owner was responsible for republication of the defamatory statements, the court emphasized that the statements were posted within the tavern, the owner was aware that the statements were in there, and the owner knowingly failed to remove the statements after becoming aware of their existence. *Id.* at 426 ("The theory is that by knowingly permitting such matter to remain after reasonable opportunity to remove the same the owner of the wall or his lessee is guilty of republication of the libel.").

In *Fogg v. Boston & L.R. Co.*, another case referenced in *Scott*, the defamatory materials

were prominently posted within the defendant's Boston building on a bulletin board for 40 days. 148 Mass. 513, 516, 20 N.E. 109 (1889). The court held that the jury could have reasonably concluded that defendant was more than a mere passive conduit for the defamatory statements:

> From the evidence in the case, the jury might have inferred that the defendant's office was used, not merely for advertising tickets, but for advertising and publishing any other information of interest to persons about to purchase tickets, which would be likely to induce them to buy at the defendant's office rather than elsewhere. One who maintains a place of business may be presumed to have general knowledge of what is done there. The jury might properly have found that the defendant, having its principal terminus and the offices of its principal managing agents in Boston, had knowledge from time to time of what kinds of advertisements and notices were posted in its ticket-office there, and that the libel would not have remained so long in that conspicuous place, if the corporation had not originally authorized or afterwards ratified the act of posting it.

Id. at 517.

Here, the Student Senate Resolution was prominently posted on a bulletin board located ***within*** Oberlin College's student center for over a year. It was posted in the exact location where Defendants would have expected such resolutions to be posted. As a result, under the authorities cited by Defendants, they are liable as publishers of the Student Senate Resolution.

And, if Defendants wish to stake their defense on the Restatement, then they should know that the Restatement provides that an owner of land or chattel can be liable if it permits its land or chattel to be used to publish a defamatory statement:

> *Failure to remove defamation.* **One who knows that defamatory matter is exhibited upon land or chattels in his possession or under his control and intentionally and unreasonably fails to remove it, becomes subject to liability for the continued publication.** The basis of the liability is his duty not to permit the use of his land or chattels for a purpose damaging to others outside of the land. Something of an analogy may be found in § 362(c), as to the duty to use reasonable care to remedy a condition upon the defendant's land created by another, which involves unreasonable danger to those outside of the land.
>
> So far as the cases thus far decided indicate, the duty arises only when the defendant knows that the defamatory matter is being exhibited on his land or chattels, and he is under no duty to police them or to make inquiry as to whether such a use is being

> made. He is required only to exercise reasonable care to abate the defamation, and he need not take steps that are unreasonable if the burden of the measures outweighs the harm to the plaintiff. **In extreme cases, as when, for example, the defamatory matter might be carved in stone in letters a foot deep, it is possible that the defendant may not be required to take any action at all. But when, by measures not unduly difficult or onerous, he may easily remove the defamation, he may be found liable if he intentionally fails to remove it.** (Emphasis added.)

Restatement (Second) of Torts § 577 (1977) (emphasis added). As former President Krislov testified, Oberlin College could have easily removed the Student Senate Resolution immediately on November 10, 2016 and its failure to do so for over a year makes it liable for the defamatory statements therein. (May 29, 2019 Tr. Trans., pp. 198-201; May 31, 2019 Tr. Trans., p. 161).

Moreover, Defendants cited authorities are inapplicable to the present case. First, Defendants do not fall under the auspices of 47 U.S.C.A. § 230 because their role in publishing the defamatory statements was not limited to the provision of "computer access by multiple users to a computer server." 47 U.S.C.A §. 230. Second, *Lunney v. Prodigy Services Co.* does not apply Ohio law and involved an email service system where the provider had no editorial control over the messages sent over the system. 94 N.Y.2d 242, 248–51, 723 N.E.2d 539, 701 N.Y.S.2d 684, (1999). The service provider was "merely a conduit" for the messages, making it akin to a telephone company, which under New York is not treated as a publisher. *Id.* Here, Defendants were not merely conduits. They were active participants in the publication of the defamatory statements and the perpetuation of the statements' messages, evidenced by Raimondo's passing out of the defamatory Flyer throughout the protests and providing the template (the Flyer) for the eventual Student Senate Resolution. Furthermore, Ohio law permits a plaintiff to meet the publication element through evidence that the defendant aided and abetted the publisher.

Additionally, the treatises cited by Defendants do not apply because they do not follow Ohio law. Restatement (Second) of Torts § 581 (1977) cites to jurisdictions other than Ohio. After

review, Plaintiffs were unable to locate any Ohio case which has adopted or cited that section of the Restatement. Plaintiffs were likewise unable to find an Ohio case citing to Prosser & Keeton, Law of Torts (5 Ed.1984) 657, Section 113. The treatises cited by Defendants misstate Ohio law, which provides that one can be found to be a publisher of defamatory statements through one's aiding and abetting another publisher. *Cooke*, 2003-Ohio-3118, ¶ 25; *Murray*, 2004-Ohio-821, ¶ 104.

Finally, Defendants' reference to Vice President Raimondo's testimony about when she became aware of the resolution's publication in Wilder Hall is an issue of witness credibility, not an issue for a motion for JNOV. *Posin v. A. B. C. Motor Court Hotel, Inc.*, 45 Ohio St.2d 271, 275, 344 N.E.2d 334, 338 (1976) ("Neither the weight of the evidence nor the credibility of the witnesses is for the court's determination in ruling upon either of the above motions [referring to motions for directed verdict and JNOV]."); *Ruta v. Breckenridge-Remy Co.*, 69 Ohio St.2d 66, 67–68, 430 N.E.2d 935 (1982) (a review of a motion for directed verdict, which is the same standard as applicable for a motion for JNOV, "does not involve weighing the evidence or trying the credibility of witnesses.") Even if one were to review her credibility, one should conclude her testimony is suspect because she was the faculty advisor to the Student Senate and thus, aware of their posting proclivities and because she entered the very building in which the resolution was posted every working day. Still, Oberlin College clearly owns Wilder Hall and it must be inferred that Defendants had presumed knowledge of how that building, including its display cases, was being used. *Gibson v. Drainage Products, Inc.*, 95 Ohio St.3d 171, 2002-Ohio-2008, 766 N.E.2d 982, ¶ 21 (2002) ("Moreover, the party against whom the motion is directed is entitled to have the trial court construe the evidence in support of its claim as truthful, giving it its most favorable interpretation, ***as well as having the benefit of all reasonable inferences*** drawn from that

evidence.") (emphasis added).

Speaking specifically about Plaintiffs' libel claim as it relates to the Student Senate Resolution, Plaintiffs' response brief to Defendants' original motion for directed verdict identified sufficient evidence to submit that claim to the jury. However, additional evidence came to light during Defendants' case-in-chief which lends further support to Plaintiffs' position. Specifically, former President Krislov and current President Ambar testified about Oberlin College's institutional knowledge of the Student Senate's practice of publicly posting its resolutions, i.e. Oberlin College was at all times aware that Wilder Hall was the designated place for posting resolutions. (May 29, 2019 Tr. Trans., pp. 198-201; May 31, 2019 Tr. Trans., p. 161 ["Q. Are they required to seek approval from anyone in the administration before they take one of the resolutions and hang it in their selected bulletin board in the basement of Wilder Hall? A. No, the students are not required to get any recommendation or guidance about ***where they hang their resolutions in their designated space***."] (emphasis added).). Further, Krislov testified that he was "often" in Wilder Hall and that Wilder Hall was "the right place" to achieve maximum exposure to prospective students and their families. (May 29, 2019 Tr. Trans., pp. 198-201). As a result, there was sufficient probative evidence to submit Plaintiffs' libel claim, as it relates to the Student Senate Resolution, to the jury.

b. *There was no evidence to prove, or even suggest, that the statements within the defamatory Flyer were true and thus, there was sufficient evidence for the jury to conclude that Defendants knew it was false when they published it.*

Defendants' statement at page 20 of their brief that "Plaintiffs resort to after-the-fact emails, text messages, and opinions from members of the Oberlin community to suggest Defendants should have known that Plaintiffs were not racist," is simply not true. All of the evidence submitted at trial proved that Plaintiffs were not racist and did not have a long history of

racially-motivated conduct. For instance, Chief of Staff Ferdinand Proztman had never heard in his many years of living and working in Oberlin that Plaintiffs were racists or targeted minorities for negative treatment. (May 10, 2019 Tr. Trans., pp. 13, 20). Other long-term Oberlin College employees, such as Michelle Gross who has resided in Oberlin for over 40 years and who worked for Oberlin College for over 40 years, confirmed the same. (May 14, 2019 Tr. Trans., pp. 74, 82).[11] Thus, even if the "reason to know" standard were an accurate representation of Ohio law (it is not), then the jury could and did properly decide that Raimondo either knew the defamatory Flyer was false or had reason to know. Thus, JNOV would be inappropriate.

Defendants fail to cite any Ohio authority to support their standard for "with reason to know it was false." They again rely on a couple of treatises and a single New York case. As discussed above, Restatement (Second) of Torts § 581 (1977) cites to jurisdictions other than Ohio and Plaintiffs were unable to locate any Ohio case which has adopted or cited that section of the Restatement. The same applies to Prosser & Keeton, Law of Torts (5 Ed.1984) 657, Section 113. And once again, they conflict with Ohio law on the issue of the mental state of the defamer.

In defamation cases involving private figures and public concerns (which the Court determined during summary judgment proceedings), a plaintiff need not prove that the defendant knew or should have known the statement was false. Instead, such a plaintiff need only prove, by clear and convincing evidence, that the defendant was negligent in failing to ascertain the truth of the defamatory statements. *Lansdowne v. Beacon Journal Pub. Co.*, 32 Ohio St.3d 176, 179–80, 512 N.E.2d 979 (1987); *Gilbert v. WNIR 100 FM*, 142 Ohio App.3d 725, 742, 756 N.E.2d 1263,

[11] This testimony is only a sample of the pertinent, unchallenged testimony on whether Defendants' defamatory statements were false. As the Court knows, numerous members of the Oberlin Community, including numerous minorities, testified that they had never heard any complaints about alleged racial profiling or discrimination. And given the relative small size of Oberlin, it stretches the imagination to suggest that these longtime residents would have been unaware of this alleged pervasive problem, if it were true.

(9th Dist.2001); *Gilson v. Am. Inst. of Alternative Medicine*, 10th Dist. No. 15AP-548, 2016-Ohio-1324, 62 N.E.3d 754, ¶ 41 ("Ohio adopted the ordinary negligence standard as the standard of liability for actions involving a private individual defamed in a statement about a matter of public concern.").

The jury is the proper body for determining the credibility of Raimondo and others when dealing with whether Raimondo was aware of the contents of the flyer and whether she passed it out to multiple persons, which provides the basis for removing issues of credibility from the JNOV analysis. The jury clearly determined that Raimondo knew the contents of the defamatory Flyer when she handed it to Jason Hawk and when she continued to distribute it to others in front of the bakery.

Jason Hawk's testimony paints Raimondo as someone with full knowledge as to the content of the defamatory Flyer, or at a minimum, was negligent in ascertaining the truth:

3	Q. Did you go over to those protests on behalf of
4	the Oberlin News-Tribune?
5	A. Yes.
6	Q. And did you go over on both dates, November 10th
7	and November 11th?
8	A. If those are the dates of the protest, yes, I
9	went on those dates.
10	Q. At those protests, did you encounter vice
11	president and dean of students Meredith Raimondo?
12	A. Yes.
13	Q. Tell us how that came about.
14	A. She approached me.
15	Q. Which day, the first day of the protest or the
16	second day?
17	A. The first day.

18	Q. She sought you out, she approached you; is that
19	right?
20	A. Yes, sir.

(May 10, 2019 Tr. Trans., p. 98).

3	Q. Exhibit 263. Mr. Hawk, on the screen there,
4	there is Exhibit 263. Do you recognize that document?
5	A. I do.
6	Q. I've got one here as well. Did you receive a
7	copy of this flyer at the protest?
8	A. Yes.
9	Q. And as we can see, this flyer says, in big bold
10	print, "Don't Buy. This is a racist establishment with
11	a long account of racial profiling and discrimination."
12	That's the flyer that you received at the
13	protest?
14	A. Yes.
15	Q. And on the back side it has a number of
16	businesses and local establishments where they're
17	telling people to shop at these places instead of
18	Gibson's Bakery, correct?
19	A. Yes.
20	Q. Who gave you this flyer?
21	A. Mrs. Raimondo.
22	Q. Now, when she gave you that flyer, was it folded
23	up in her pocket, she pulled it out of her pocket and
24	handed the flyer to you?
25	A. No, sir.

(Id. at p. 103).

6	Q. What did she do then to get you that flyer that
7	talks about Gibson's Bakery having a long history of
8	racism?
9	A. She asked if I had one already. When I said no,
10	she offered to get one for me.
11	Q. Did you initially ask her for a flyer?
12	A. No.
13	Q. It was Vice President Raimondo's idea to give
14	you a flyer?
15	A. Yes.
16	Q. So if she didn't have one in her pocket, what
17	then did she do to make sure there was a flyer in your
18	hands?
19	A. She asked one of the two people she had with her
20	to go get one for me.

(Id. at p. 104).

Thus, the evidence was not that Raimondo was some passive participant who merely acquired the defamatory Flyer, placed it in her pocket without any regard to its contents, and then handed it to Jason Hawk without ever reading it. According to Mr. Hawk, a disinterested third-party observer, Raimondo knew the contents **and** purpose of the defamatory Flyer and chose to publish it to him. Furthermore, Trey James testified that Vice President Raimondo had not one, but a stack of flyers in her hands and that she was handing them out. (May 14, 2019 Tr. Trans., p. 179). The point here is that there was evidence entered at trial which the jury could utilize to determine that Raimondo was at fault when she published the defamatory Flyer. Reasonable minds could certainly conclude that Vice President Raimondo knew exactly what she was mass distributing. As a result, there is sufficient evidence to meet the proper standard of fault, i.e. negligence, and even Defendants' improper standard, i.e. knew or had reason to know of the defamatory flyer's false content.

5. Reasonable minds could (and did) find that Defendants acted with the requisite degree of fault.

Defendants next argue that they are entitled to JNOV because Plaintiffs are public and/or limited purpose public figures and because Plaintiffs failed to show sufficient evidence of negligence during the compensatory phase of trial. Defendants are wrong on both counts.

a. *Plaintiffs are not public figures or limited purpose public figures.*

In a rehash of more issues already ruled upon during summary judgment briefing, Defendants claim that Plaintiffs are either public figures or limited purpose public figures. These arguments are once again wrong.

Under Ohio and federal case law, the degree of fault necessary to support a claim for defamation rests on the determination of whether a plaintiff is a public officer, a public figure, a limited purpose public figure, or a private figure. Where a plaintiff is a public officer, public figure, or limited purpose public figure, the plaintiff must show "actual malice" to succeed on a defamation claim. *See New York Times Co. v. Sullivan*, 376 U.S. 254, 280-281, 84 S.Ct. 710 (1964). For purposes of defamation, actual malice requires proof that the statement was made "with knowledge that it was false or with reckless disregard of whether it was false or not." *Id.* at 281. On the other hand, where a plaintiff is a private figure, the Ohio Supreme Court has ruled that a negligence standard is the correct level of fault: "In cases involving defamation of private persons ... the question which a jury must determine ... is whether the defendant acted reasonably in attempting to discover the truth or falsity or defamatory character of the publication." *Lansdowne*, 32 Ohio St.3d at 178, 512 N.E.2d 979 (citations and quotation marks omitted).

Defendants first argue that Gibson's Bakery is a general-purpose public figure. However, the United States Supreme Court has held that "[a]bsent ***clear evidence*** of general fame or notoriety in the community, and ***pervasive involvement in the affairs of society***, an individual

should not be deemed a public personality for all aspects of his life." *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 352, 94 S.Ct. 2997 (1974). For business plaintiffs, Ohio courts have found that a general-purpose public figure is one "who occupies a position of such pervasive power and influence ... that he assumes special prominence in the resolution of public questions and in the affairs of society." *Worldnet Software Co. v. Gannett Satellite Info. Network, Inc.*, 122 Ohio App.3d 499, 508, 702 N.E.2d 149 (1st Dist.1997). Defendants offer no evidence that Gibson's Bakery has pervasive involvement in the affairs of society short of pointing out that the business has been in operation for a long period of time. This argument was properly rejected by the Court during summary judgment briefing (see, April 22, 2019 Order, pp. 5-6). Further, Defendants offer no evidence that Gibson's Bakery resolved public issues or was involved in the affairs of society. *See, Worldnet* at 508. Clearly, Gibson's Bakery is not a general-purpose public figure.

Nor are Plaintiffs limited-purpose public figures. Under Ohio (and federal) law, a person becomes "a limited purpose public figure if one voluntarily injects himself or is drawn into a particular public controversy, thereby becoming a public figure for a limited range of issues." *Gilbert*, 142 Ohio App.3d 725 at 738, 756 N.E.2d 1263. Defendants recycle the same arguments from summary judgment briefing by claiming that nonparty Allyn D. Gibson's actions voluntary injected Plaintiffs into some sort of controversy. This argument was also properly rejected by the Court in its order on the summary judgment motions (see, April 22, 2019 Order, pp. 5-6).

In their Motion, Defendants try to raise additional evidentiary issues supposedly supporting the limited purpose public figure argument. Plaintiffs discussed the fallacy of Defendants' reliance on these materials above, specifically discussing the fact that the materials were never entered into evidence at trial. [*See, supra* Sec. II]. Plaintiffs will therefore provide a limited response to these materials specifically related to the limited-purpose public figure analysis:

- ***First***, Defendants point to body cam footage on YouTube where David Gibson allegedly states that the store was going to be trashed. (See, Defs.' Mt. JNOV, p. 22). The video is unauthenticated and should be disregarded. Further, the video holds no relevance on the issue of the limited-purpose public figure analysis. Allyn D. Gibson (rightfully) suspected the student of shoplifting at Gibson's Bakery and exercised the statutory right to detain the shoplifter. *See,* R.C. 2935.041(A). Defendants decision to attack Plaintiffs for exercising their rights does not make Plaintiffs limited-purpose public figures.[12]

- ***Second***, Defendants point to a Facebook page called the "Gibson's Bakery Support Page" as somehow making Plaintiffs limited-purpose public figures. Defendants did not provide this Facebook page to the Court and did not offer any evidence that Plaintiffs had any involvement in its creation. Defendants' reliance on this alleged Facebook page should be ignored.

- ***Third***, Defendants next point to prevalent media attention throughout the litigation as evidence that Plaintiffs are limited-purpose public figures. Defendants do not provide ***any*** support for the proposition that media attention during litigation can transform someone into a limited-purpose public figure. Indeed, under Ohio law, "a plaintiff does not become a public figure merely because the allegedly defamatory statements create a controversy; the controversy ***must have existed prior to the statements***." *Worldnet* at 508 (emphasis added).[13]

As the Court has already ruled, Plaintiffs are private figures. To recover damages during the compensatory phase for libel, the jury was only required to find that Defendants acted with negligence to recover damages on the libel claims, which is exactly what the jury did. Thus, the Court should deny Defendants' JNOV motion.

b. *Plaintiffs provided substantial evidence that Defendants acted with negligence in publishing the defamatory Flyer and Student Senate resolution.*

In defamation or libel cases involving private figures, the question of negligence asks, "whether the defendant acted reasonably in attempting to discover the truth or falsity or defamatory

[12] The same argument applies to Defendants unsupported allegation that students warned David Gibson of the ensuing protests. Despite this statement having no basis in fact or existence in the record, it is entirely irrelevant.

[13] Defendants rely on an unauthenticated hearsay 1990 media article written by the *Oberlin Review*, the student newspaper under the control of Oberlin College, as supposed evidence that a controversy existed prior to 2016. However, an article from nearly three decades ago about a couple protesters does not create a "public controversy." Furthermore, it was never entered into evidence.

character of the publication." *Lansdowne*, 32 Ohio St.3d at 178, 512 N.E.2d 979 (citations and quotation marks omitted). Defendants' sole argument opposing the jury decision is that there is no evidence that they were negligent at the time of publication. This is obviously not true.

Defendants claim that they were unaware of the Student Senate Resolution prior to it being emailed to the student body and therefore could not be negligent in its publication. As discussed above, reasonable minds could certainly have concluded otherwise based on the evidence. [*See supra* Sec. III(B)(4)(a)]. *Regardless*, Defendants conveniently ignore that the Student Senate Resolution was posted in Wilder Hall, a place Dean Raimondo enters every single day, ***for an entire year in a very prominent location***. [*See, id.*].

Further, there is substantial evidence showing that Defendants acted negligently, at a minimum, in relation to the truth or falsity of the defamatory Flyer and Student Senate Resolution:

- ***First***, as Grandpa Gibson testified, Plaintiffs have been conducting business with Oberlin College since ***before World War I***. (May 21, 2019 Tr. Trans., p. 180; May 16, 2019 Tr. Trans., pp. 16-17). For that entire period of time, Oberlin College did not hear even a hint of racial profiling or discrimination relating to Gibson's Bakery or the Gibson family. Indeed, numerous college administrators testified to this fact during trial, including Chief of Staff Ferdinand Protzman (May 10, 2019 Tr. Trans., p. 19) and Tita Reed. (Id., p. 76).[14]

- ***Second***, Oberlin College administrators, including Tita Reed, ***specifically rejected evidence that the defamatory statements were false***. On November 11, 2016, ***while the protests were ongoing***, Emily Crawford, the art director working directly for Ben Jones, sent an email with credible evidence showing that Plaintiffs do not have a long history of racial profiling or discrimination:

[14] Trying to circumvent the college's knowledge regarding the falsity of the statements in the Flyer and Resolution, Defendants cite to a case from Illinois for the proposition that the knowledge of employees cannot be imputed to a corporate entity for purposes of actual malice. *See, Reed v. Northwestern Pub. Co.*, 124 Ill.2d 495, 530 N.E.2d 474, 484 (1988). As an initial matter, this statement from the Illinois court is unsupported by any legal authority. Further, an Illinois decision has no bearing on this case, which is proceeding in Ohio under Ohio law. Further, the statement from the Illinois court in *Reed* does not appear to be in line with Ohio law, which will "impute to a corporation knowledge of facts which its directors ought to know, in the exercise of ordinary diligence in the discharge of their official duties." *West and Knock Tp. Farmers' Aid Soc. V. Burkhart*, 7th Dist. Columbiana, 1931 WL 2767 at *6 (Nov. 13, 1931). Regardless, Plaintiffs are not attempting to "pool" employees' knowledge but are instead looking at specific information within the purview of high-ranking officers at Oberlin College.

From: Emily Crawford <ecrawfor@oberlin.edu>
Subject: Re:
Date: November 11, 2016 at 11:42:47 AM EST
To: Ben Jones <bjones@oberlin.edu>

i have talked to 15 townie friends who are poc and they are disgusted and embarrassed by the protest. in their view, the kid was breaking the law, period (even if he wasn't shoplifting, he was underage). to them this is not a race issue at all and they do not believe the gibsons are racist. they believe the students have picked the wrong target.

the opd, on the other hand, IS problematic. i don't think anyone in town would take issue with the students protesting them.

i find this misdirected rage very disturbing, and it's only going to widen the gap btw town and gown.

and sure you can share if you want.

(Plaintiffs' Tr. Exh. 63). High level administrator Tita Reed responded with complete ambivalence:

On Fri, Nov 11, 2016 at 12:25 PM Tita Reed <treed@oberlin.edu> wrote:

Doesn't change a damned thing for me.

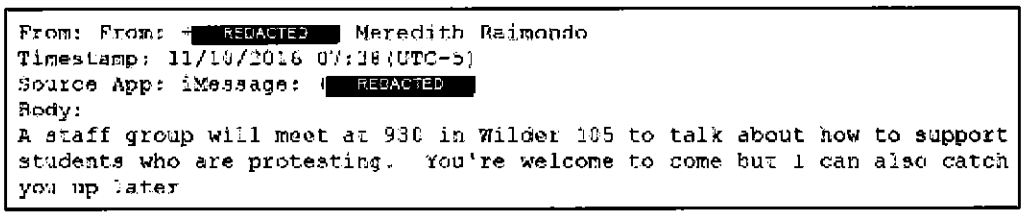
(Id.). Dean Raimondo ***was also included on this email chain***. (Id.). Ms. Crawford's email was sent on November 11, 2016 at 11:42 AM. (See, Plaintiffs' Tr. Exh. 63). November 11, 2016 ***was right in the middle of the protests***, where copies of the Flyer were being distributed, and only a few hours before Vice President Raimondo and President Krislov issued their statement giving "props" to the Student Senate for issuing the defamatory resolution. Despite acknowledging and receiving information strongly indicating there was no history of racial profiling and discrimination at Gibson's Bakery, Defendants published copies of the Flyer and orchestrated the protests, which were centered around the Flyer. (May 10, 2019 Tr. Trans., p. 142).

- ***Third***, Defendants completely ignore the statement in the Flyer accusing Grandpa Gibson and David of assault. The first line of the Flyer states that "[a] member of our community was assaulted by the ***owner*** of [Gibson's Bakery] yesterday." (Plaintiffs' Tr. Exh. 263 [emphasis added]). David clearly testified that only he and Grandpa Gibson were the owners of Gibson's Bakery. (May 21, 2019 Tr. Trans., p. 127). Vice President Raimondo among numerous other Oberlin College administrators knew for certain that neither David nor Grandpa Gibson assaulted anyone. Vice President Raimondo among other administrators were ***present at the police station on November 9, 2016, the night of the arrests***. (May 10, 2019 Tr. Trans., p. 149). Further, Officer Victor Ortiz specifically testified that he explained the charges alleged against the three students and the circumstances of their arrest to Vice President Raimondo and the other administrators. (Id. at pp. 149-150).[15] Thus, when Vice President Raimondo published the Flyer during the protests, at a minimum, she had serious doubts that David or

[15] Tita Reed also received a copy of the police report via email on November 10, 2016. (Id. at p. 73).

Grandpa Gibson assaulted someone on the previous day.

- ***Fourth***, Defendants argue that Dean Raimondo had no reasonable way of determining that the Flyer and Student Senate Resolution were false. However, this is clearly not true. ***The night before the protests began***, Dean Raimondo was notified of the protests and the content of the defamatory statements. Then, the very next morning, on November 10, 2016, Dean Raimondo scheduled a meeting with numerous administrators to discuss supporting the protests:


From: From: +[REDACTED] Meredith Raimondo
Timestamp: 11/10/2016 07:38(UTC-5)
Source App: iMessage: [REDACTED]
Body:
A staff group will meet at 930 in Wilder 105 to talk about how to support students who are protesting. You're welcome to come but I can also catch you up later

(Plaintiffs' Tr. Exh. 25). She had substantial opportunity, including the opportunity to speak with the administrators within the college like Ferdinand Protzman, to determine the truth of the allegations in the Flyer and Student Senate Resolution. She either chose not to or deliberately ignored their statements.

Clearly, reasonable minds could (and did) find that Defendants acted with negligence at the time of publication. Therefore, Defendants' Motion for JNOV must be denied.

C. Dean Raimondo is not Entitled to JNOV on Gibson's Bakery's Tortious Interference with Business Relationship Claim.

Plaintiffs presented sufficient probative evidence to avoid judgment notwithstanding the verdict on their claims for tortious interference with business relationship. And Defendants' only challenges to this claim are two defenses not supported by law or fact: (a) Oberlin College is a party to the business relationship between Bon Appetit and Gibson's Bakery and Raimondo cannot interfere with a contract of her employer; and (b) the interference was justified.

1. Dean Raimondo cannot escape liability for tortious interference under an agency theory because, under Ohio law on the facts at hand, there was no agency relationship between Oberlin College and Bon Appetit.

Dean Raimondo's argument that she cannot interfere with a contract relationship between her employer, Oberlin College and Gibson's Bakery, is based solely on the faulty analysis that Oberlin College is in an agency relationship with Bon Appetit. The very case law

cited by Raimondo dooms her argument. Two of the Ohio Supreme Court decisions relied on by Raimondo confirm that there is no agency relationship between Bon Appetit and Oberlin College, and, therefore, Dean Raimondo's actions constitute interference with the business relationship between Bon Appetit and Gibson's Bakery. *Willoughby Hills Dev. & Distrib., Inc. v. Testa,* 155 Ohio St.3d 276, 2018-Ohio-4488, 120 N.E.3d 836, ¶¶ 33-34 (2018) and *Cincinnati Golf Mgt., Inc. v. Testa*, 132 Ohio St.3d 299, 2012-Ohio-2846, 971 N.E.2d 929, ¶¶ 20, 24 (2012).

Raimondo ignores the analysis in these cases providing that (1) the legal consequences of agency may attach to only a portion of the relationship between two parties("[T]he legal consequences of agency may attach to only a portion of the relationship between two persons" (*see, e.g. Willoughby Hills,* at ¶¶ 29, 34 ("[T]he legal consequences of agency may attach to only a portion of the relationship between two persons")) and (2) in determining whether there is an agency relationship between Oberlin College and Bon Appetit ***for its purchases from*** Gibson's Bakery, the Court must examine the language of the contract between the parties. *Willoughby Hills,* at ¶¶ 29, 33-34 (even if an agent for some purposes, based on the contract provisions, WHDD was not Sunoco's agent for purposes of its contracts to sell gasoline to retailers because it was not authorized to make any commitments or incur any expense or obligation of any kind on behalf of Sunoco unless Sunoco gives its approval); *Cincinnati Golf,* at ¶¶ 26-27 (there is nothing in the express contract provisions that shows that CGMI could directly bind the city when it made the purchases at issue); *Russell Harp of Ohio, Inc. v. Lindley,* 9th Dist. No. 9895, 1981 WL 3979, *2 (May 13, 1981) (contract provided that Harp was the City's agent to operate and manage City's garage, but the contract provisions establish that Harp was not the City's agent when purchasing as contract required Harp to purchase in its own name and on its own credit, and the City was obligated to reimburse Harp only for those purchases approved by City).

Thus, under Ohio law, Oberlin College can only be a party to the Bon Appetit/Gibson's Bakery contract or business relationship for the ***purposes of its purchases from Gibson Bakery***, if, under the Management Agreement, Bon Appetit had ***actual authority*** to bind Oberlin College as the purchaser. Critically, there is nothing in the Management Agreement that shows that Bon Appetit could directly bind Oberlin College to the purchases that it made from Gibson's Bakery. In *Harp,* even though Harp was an agent to manage the city's Garage, the Ninth District Court of Appeals denied Harp status as an agent for purchases on behalf of the city: "regardless of the degree to which Akron reserved the right to control the actions of Harp *in other aspects of this relationship*, the specific purchases were made solely by Harp, billed to Harp, and paid by check" by Harp. The contract provisions showed that Harp did not "possess[] authority as "agent" to contract for purchases based on Akron's credit. *Harp,* at *2-3 (emphasis added).

Cincinnati Gulf, expressly adopting the *Harp* analysis, likewise could not "imput[e] purchase-agent status to CGMI," where '[n]othing in the express contractual provisions offers support to the notion that CGMI could directly bind the city when it made the purchases at issue." *See Cincinnati Golf,* ¶¶ 26, 27 (2012) (binding the principal to agent-made contracts "requires that the agent must make the contract on the principal's behalf *with actual authority to do so.*" (emphasis in original).) *Cincinnati Gulf* then held that a purchase-agent principal/agent relationship, sufficient to make the principal a party to its agent's contracts, does not exist where (1) the purchases were made solely by the alleged agent, (2) the bills were sent solely to the alleged agent, and (3) the invoices were paid directly by the alleged agent. *Id.* at ¶¶ 22-23 (adopting analysis of *Harp,* ***even if the alleged principal and alleged agent have a contract stating that an agency relationship exists for some other purpose***. *See Russell Harp* at **2-3. *Willoughby Hills Dev.,* 155 Ohio St.3d 276, ¶¶ 33-34 (no agent/principal relationship where alleged agent had no

authorization to make commitments/incur obligations on behalf of Sunoco).

Just as the agreements in *Cincinnati Gulf* and *Harp* could not bestow purchase agent status because there was no showing that the alleged agent could bind the alleged principal to the purchases made, the Management Agreement[16] between Oberlin College and Bon Appetit does not permit Bon Appetit to bind Oberlin College to the purchases that Bon Appetit made from Gibson's Bakery—it does not grant Bon Appetit the specific authority to bind Oberlin College to specific vendor contracts. *See Russell Harp* at **2-3. Instead, like the contract at issue in *Willoughby Hills*, the agreement ***specifically states*** that "Bon Appetit shall purchase food and supplies in Bon Appetit's name and shall pay the invoices," and Oberlin College is simply obligated to reimburse Bon Appetit for only those purchases approved by Oberlin College. (Plaintiffs' Tr. Exh. 367, § 6.4). Furthermore, Oberlin College does not pay the wages of Bon Appetit's employees; instead, Oberlin College merely pays a management fee to Bon Appetit and Bon Appetit is responsible for paying its own employees. (Id., § 4.7).

Interestingly, Defendants acknowledged that Bon Appetit is a third-party contractor, not an agent, in their Amended Answer to Plaintiffs' Complaint: "Defendants admit that Bon Appetit Management Company is a food services ***contractor*** for the College." (Defs.' Amend. Answer, ¶ 56).

Moreover, it is ***undisputed*** that Bon Appetit did not have the authority to bind Oberlin College. Michele Gross, then-Director of Dining Services, testified that Bon Appetit managed all aspects of the Gibson's Bakery purchases, including managing the daily standing orders:

[16] Plaintiffs did not introduce this exhibit during their direct or cross examinations of witnesses. However, the exhibit was authenticated and discussed at length during Defendants' cross examination of Michele Gross. (May 14, 2019 Trial Trans., pp. 96-97).

4	Q. And with regard to getting food and goods for
5	dining services, who would be responsible for actually
6	going out and getting those goods from vendors?
7	A. Bon Appétit.
8	Q. And who would actually be responsible for paying
9	those vendors for those goods?
10	A. Bon Appétit.

***

11	Q. And who would be responsible for managing those
12	daily standing orders?
13	A. Usually, it was the manager of the dining hall.
14	Q. And would that be Bon Appétit?
15	A. Yes.

(May 14, 2019 Trial Trans., pp. 78, 80).

David Gibson specifically testified that the daily orders and "tweaks" to those orders were communicated to Gibson's Bakery by employees of Bon Appetit. (May 21, 2019 Tr. Trans., p. 165]. David Gibson also testified that the invoices were given to Bon Appetit and paid directly by Bon Appetit, usually within 15 to 30 days. (Id. at 166). As provided above, Michele Gross confirmed that all financial transactions flowed through, and were handled solely by, Bon Appetit. (May 14, 2019 Trial Trans., pp. 78, 80).

Vice President Raimondo further confirmed this fact when she testified that Oberlin College was only responsible for paying a "management fee" to Bon Appetit, not individual invoices. Vice President Raimondo was reticent to fully admit this fact:

3	Q. Okay. And can we agree that the college pays a
4	fee to Bon Appétit, and for that fee, Bon Appétit places
5	orders with other suppliers and it pays those other
6	suppliers itself for those orders?
7	A. I believe that's correct.

(May 14, 2019 Tr. Trans., p. 53). To help her clarify her understanding, the following excerpt from her 30(B)(5) deposition was played during trial:

1	Q. Yeah. So they -- they go out and place orders
2	directly with vendors like Gibson's Bakery for
3	food items, correct?
4	A. Yes.
5	Q. And they directly pay any sort of bills or
6	invoices from those third parties, correct?
7	A. Yes, the college pays a management fee that covers
8	all of the related expenses from food costs to
9	manager costs, personnel costs.

(M. Raimondo 30(B)(5) Dep., p. 127). Thereafter, she agreed that Oberlin College merely pays a management fee to Bon Appetit, who then goes out on its own to secure and pay for goods. (May 14, 2019 Tr. Trans., pp. 53-54).

Moreover, Dean Raimondo's legal argument, however, does not comport with Ohio law which recognizes that being an agent for one purpose does not make one an agent for purposes of making purchases on behalf of the alleged principal. Instead, Defendants were required to analyze the actual contract language in the contract between Bon Appetit and Oberlin College to determine whether there is agency status for purchasing goods—whether Bon Appetit had the right to bind Oberlin College to the purchases from Gibson's Bakery. follow the analyses of *Willoughby Hills* and *Cincinnati Gulf.* This Defendants did not do. Eliciting testimony from Michelle Gross that Section 1.2 of the Management Agreement between Oberlin College and Bon

Appetit designates Bon Appetit as an agent to manage the food service operations in certain designated dining halls is not relevant to the issue of whether Bon Appetit was Oberlin College's agent for purposes of purchasing from Gibson's Bakery.

As outlined above, the Management Agreement does not permit Bon Appetit to bind Oberlin College to the purchases that Bon Appetit made from Gibson's Bakery—it does not grant Bon Appetit the specific authority to bind Oberlin College to specific vendor contracts. *See Russell Harp* at **2-3. Instead, like the contract at issue in *Willoughby Hills*, the agreement ***specifically states*** that "Bon Appetit shall purchase food and supplies in Bon Appetit's name and shall pay the invoices," and Oberlin College is simply obligated to reimburse Bon Appetit for only those purchases approved by Oberlin College. (Plaintiffs' Tr. Exh. 367, § 6.4). Instead, she merely supports her assertion that Bon Appetit is an agent of Oberlin College with trial testimony of an Oberlin College employee's opinion on whether there is an agency relationship and an unfounded allegation of admissions, and not based on any analysis of the actual contractual relationship between Oberlin College and Bon Appetit as required by Ohio law. (Defs.' JNOV at pp. 29-31). The Ohio Supreme Court in both *Willoughby Hills* and *Cincinnati Gulf* determined that the alleged agent at issue was not endowed with actual authority to bind the alleged principal to contracts with third parties based on the contract language at issue. Likewise, a review of the Management Agreement confirms no agency relationship between Oberlin College and Bon Appetit.

Likewise, Defendants' unfounded attempt to argue at p. 31 that Attorney Plakas admitted that there was no business relationship between Gibson's Bakery and Bon Appetit is also to no avail. There was substantial evidence of the business relationship between Gibson's Bakery and Bon Appetit. Moreover, no statements by an attorney can transform the lack of agency status

under Ohio law into an agency status, and Defendants cite no case law such a proposition.[17] Moreover, it is true that Oberlin College had a century-long and hundred-year long relationship with Gibson's Bakery, sometimes through a direct contract and sometimes through a third party contractual relationship such as with Bon Appetit. In each instance, Defendants have taken the quotes at issue at p. 31 out of context; the questions simply emphasize that Defendants interfered, without justification, with the century-long relationship in which Gibson's Bakery provided quality service to Oberlin College, sometimes through a direct contract and sometimes separate contract with a third-party contractor such as Bon Appetit.

For example, concerning bullet points 2 and 3 on page 31 of the Motion, the immediately preceding testimony outlined that the contract was between Bon Appetit and Gibson's Bakery and then elicited truthful testimony that Gibson's Bakery had been providing baked goods to the College for over a hundred years and that this hundred-year long relationship had been cancelled without justification. (May 21, 2019 Tr. Trans., pp. 157-164; 178).

Particularly egregious, Defendants reference to a "century-long business relationship" is taken completely out of context as the actual quote itself recognized Bon Appetit's role as third party contractor, "And was there any further explanations from the college or Bon Appetit to the sudden cancellation of your century-long business relationship." (Id. at p. 180). The direct examination of Dean Raimondo is the same, where just previously she testified to the exact nature of the third-party contractual relationship between Bon Appetit and Gibson's Bakery (May 14, 2019 Tr. Trans., pp. 49-50). Raimondo then testifies that the College at her direction prohibited Bon Appetit from continuing to order from Gibson's Bakery (Id. at p. 50). Again, the query was to emphasize that there was no justification for terminating the hundred-year long provision of

[17] The lone case cited by Defendants is completely inapposite and discusses only when an opening statement can be used as an admission.

services by Gibson's Bakery. None of the cited quotes in any way an admission that the contract at issue was between the College and Gibson's Bakery.

Thus, under Ohio law, there is no principal/agent relationship between Bon Appetit and Oberlin College for purposes of purchasing product from Gibson's Bakery or other vendors. Therefore, both Oberlin College and Dean Raimondo are third party "strangers" capable of interfering with the Bon Appetit/Gibson's Bakery contract or business relationships, and Dean Raimondo has no employee defense.

Moreover, even if the requisite principal/agent relationship existed (and it does not under Ohio law), Oberlin College and Dean Raimondo would still be liable for tortious interference with the Bon Appetit/Gibson's Bakery contract or business relationships because both Oberlin College and Dean Raimondo acted outside the scope of any principal/agent relationship. Nowhere within the Management Agreement does the principal have the authority to require Bon Appetit to terminate contracts, especially a termination that Oberlin College's own Director of Dining felt was not warranted:

11	Q. Did you feel the termination of that business
12	relationship was justified?
13	A. No.
14	Q. Did you feel that Gibson's had done anything to
15	justify that termination?
16	A. I did not believe so, no.

(May 14, 2019 Tr. Trans., p. 164).

Oberlin College's Chief of Staff, Ferdinand Protzman, separately testified that the highest echelons of College management did not believe the termination was justified. (May 10, 2019 Tr. Trans., p. 13). Even if the Management Agreement provided that Oberlin College could require Bon Appetit ***to use*** the goods and services of local Oberlin or Lorain County vendors (Id. at pp.

99-100), there is no provision within that same section of the Management Agreement which permits Oberlin College to force Bon Appetit to terminate its relationship with its vendors, regardless of whether the particular vendor was identified by Oberlin College. And Defendants did not elicit any testimony to that effect. Once Bon Appetit entered into those relationships with its vendors, Oberlin College and Dean Raimondo did not have the right to interfere with the relationships. *See, e.g. Kuvedina, LLC v. Cognizant Tech. Solutions,* 946 F. Supp.2d 749, 758 (S.D. 2013) (principals and agents become third parties and strangers to contracts when they act outside the scope of the agency at issue or with malice or for an improper purpose); *Parker v. BAC Home Loans Servicing LP,* 831 F.Supp.2d 88, 92-3 (D.C. Dist. 2011); *CSDS Aircraft Sales & Leasing, Inc. v. Lloyd Aereo Boliviano,* 2011 WL 1559823, *5 (S.D. Fla. 2011).

Based on the foregoing, Defendants cannot escape liability for their tortious interference with the Bon Appetit/Gibson's Bakery contract or business relationships by arguing that Oberlin College was a party to that contract or business relationship.

2. Defendants were not justified in terminating Bon Appetit's contract and business relationship with Plaintiffs.

Dean Raimondo next argues that she and Oberlin College were justified in directing Bon Appetit to cease doing business with Plaintiffs because (a) Bon Appetit is the agent of the College so the College could instruct Bon Appetit to do as it requests; (b) neither the College nor Bon Appetit were required to continue placing orders for food products from Gibson's Bakery; and (c) Defendants' decision to temporarily suspend orders was the result of legitimate business and safety concerns and the Bakery suing Defendants.

This is simply subterfuge. The foregoing analysis completely eliminates the purported agency justification. The remaining purported justifications are also belied by the law and facts. To the contrary, Plaintiffs presented probative evidence and the facts show that, without

justification, Oberlin College itself created such a charged environment that property damage was inflicted on Plaintiffs' home and vehicles and employee vehicles. (May 15, 2019 Tr. Trans., pp. 106, 144; May 16, 2019 Tr. Trans., p. 112; May 23, 2019 Tr. Trans., p. 61). Moreover, Defendants were also using their financial power and authority in the community to force David and Grandpa Gibson to ignore the rule of law and drop the criminal prosecutions in exchange for the resumption of business that was wrongfully eliminated in the first place. (May 10, 2019 Tr. Trans., pp. 85-86; Plaintiffs' Tr. Exh. 145). Under Ohio law, Oberlin College is not justified in creating such a hostile environment and then directing Bon Appetit to cease all purchases from Gibson's Bakery in order to resolve the very hostile environment that Oberlin College created and is not justified in using its economic power to coerce the Plaintiffs.

Moreover, Oberlin College employees testified that there was no justification for the discontinuation of the Gibson Bakery order. Ferdinand Protzman testified that Gibson's Bakery was supplying good quality baked goods at a fair price and they were a reliable supplier who would comply with special requests, such as creating a vegan bagel. (May 10, 2019 Tr. Trans., pp. 8-9). He further testified that he and the highest echelons of College management did not believe the termination was justified. (Id. at p. 13).

The Ohio Supreme Court set out the seven factors that courts consider in determining whether a defendant's interference with another's contract or business relations is improper: the nature of the actor's conduct, the actor's motive, the interests of the other with which the actor's conduct interferes, the interests sought to be advanced by the actor, the social interests in protecting the freedom of action of the actor and the contractual interests of the other, the social interests in protecting the freedom of action of the actor, and the contractual interests of the other. *Fred Siegel Co., L.P.A. v. Arter & Hadden*, 85 Ohio St.3d 171, 707 N.E. 2d 853 (1998). Plaintiffs presented

sufficient probative evidence on all of these factors to support the jury's verdict that Dean Raimondo's conduct was improper and not justified. [18]

Fred Siegel and its progeny also negate any defense based on the contract between Bon Appetit and Gibson Bakery being terminable at will. *Only a competitor of Gibson Bakery* (and only after such competitor meets all of the seven factors set out in *Fred Siegel*) can justifiably interfere with a contract based on the fact that it is terminable at will/does not require continuing to place order. *Fred Siegel,* at 179-180 ("where an existing contract is terminable at will, and where all of the elements of Section 768 of the Restatement are met, *a competitor may* take action to attract business, even if that action results in an interference with another's existing contract.") (emphasis added); *Martin v. Jones,* 41 Ohio App.3d 123, 141-42, 2015-Ohio-3168, ¶65; *Stonecreek Dental Care,* 30 N.E.3d 1034, 1045 (12th Dist. 2015) Since Oberlin College is not a competitor with Gibson's Bakery in the sale of baked goods, it has no privilege to interfere with the contract at issue based on the fact that the contract is terminable at will/does not require continuing to place order.

As a result, Defendants' JNOV Motion must be denied.

D. Oberlin College is not Entitled to JNOV on David and Grandpa Gibson's Claims for IIED.

For the third time in as many months, Defendants proffer two arguments allegedly precluding liability for Oberlin College on David and Grandpa Gibson's claims for Intentional Infliction of Emotional Distress ("IIED"): that Oberlin College's conduct was not extreme and

[18] Moreover, in Ohio, even if Oberlin College can establish a qualified privilege to interfere, the analysis does not stop there because a qualified privilege can be overcome by actual malice, *Long V. Mount Carmel Health System,* 93 N.E.2d 436. 445-6, 2017-Ohio-5522, ¶¶28-29, *citing A&B-Abell Elevator Co.,* 73 Ohio St3d 1, 11-12, 651 N.E.2d 1283 (1995).

outrageous, and that David and Grandpa Gibson did not suffer serious mental anguish.[19] Both arguments are wrong, and Defendants are not entitled to JNOV on the IIED claims.

To succeed on a claim for intentional infliction of emotional distress (IIED), the plaintiff must show the following elements:

> (1) that the defendant [intentionally or recklessly caused] the plaintiff serious emotional distress;
>
> (2) that the defendant's conduct was extreme and outrageous; and
>
> (3) that the defendant's conduct was the proximate cause of plaintiff's serious emotional distress.

Phung v. Waste Mgt., Inc., 71 Ohio St.3d 408, 410, 644 N.E.2d 286 (1994) (citations omitted). Because reasonable minds could and did conclude that David and Grandpa Gibson were entitled to judgment against Oberlin College on their IIED claims, Defendants' motion for JNOV must be denied.

1. Reasonable minds concluded that Oberlin College's conduct was extreme and outrageous.

Conduct is "extreme and outrageous conduct" where it is "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." *Yeager v. Local Union 20, Teamsters, Chauffeurs, Warehousemen, & Helpers of America*, 6 Ohio St.3d 369, 375, 453 N.E.2d 666 (1983) (citations omitted), abrogated on other grounds, *Welling v. Weinfeld*, 113 Ohio St.3d 464, 2007-Ohio-2451, 866 N.E.2d 1051, syllabus.

Plaintiffs submitted substantial probative evidence that Oberlin College's conduct, through the acts of its employees, was extreme and outrageous:

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[19] Defendants also argue that the IIED claims should fail because they are derivative of the libel claims. (See, Def. Mt. JNOV, p. 33). However, as explained in substantial detail above, Plaintiffs' libel claims do not fail as a matter of law so the derivative argument is irrelevant. (*See, supra* Sec. III(B)).

First, President Krislov specifically testified that being called a racist is one of the ***worst*** things that can happen to a person:

> Q. You would agree that, in your words, "being called a racist is one of the worst things a human being can be called," correct?
> A. Yes.

(May 29, 2019 Tr. Trans., p. 179). This was confirmed by Oberlin College professor of music theory, Jan Miyake:

> Q. And if I told you that last Friday by video, President Krislov testified under oath that calling someone a racist is one of the worst things that you can do in terms of damage to the reputation --
> A. I was not aware that he said that, no.
> Q. Would you -- would you agree with that sentiment?
> A. Yeah, I would agree it's one of the worse things you can do.

(May 15, 2019 Tr. Trans., p. 126). Despite the acknowledgement that calling someone a racist is one of the ***worst things*** a person can do to someone else, Dean Raimondo,[20] while acting in the course and scope of her employment, published the Flyer to numerous people, accusing Grandpa Gibson and David of having a "LONG ACCOUNT of RACIAL PROFILING and DISCRIMINATION" (See, Plaintiffs' Tr. Exh. 263; May 10, 2019 Tr. Trans., pp. 104-05;[21] May

[20] Defendants erroneously claim that because the jury only found Oberlin College liable for IIED, then Dean Raimondo's conduct is of no import. However, this is untrue. Because Oberlin College acts through its employees and officers, Dean Raimondo's conduct is imputed to the college regardless of the jury's decision on her individual liability.

[21] Local newspaper reporter, Jason Hawk, testified that Dean Raimondo published a copy of the Flyer to him during the protests. (See, id.).

14, 2019 Tr. Trans., p. 179).[22] And Dean Raimondo was not the only college employee distributing defamatory materials. Oberlin College employee Julio Reyes was also in the thick of the protests distributing defamatory Flyers. (See, May 13, 2019 Tr. Trans., pp. 15-18).[23]

The Flyer distributed by Dean Raimondo and Mr. Reyes didn't stop at accusing Plaintiffs of a long account of racial profiling. Indeed, it even accused the owners of Gibson's Bakery, David and Grandpa Gibson, of committing the crime of assault. (See, Plaintiffs' Tr. Exh. 263). The distribution of these materials was extreme and outrageous and should not be tolerated.

Second, Oberlin College's outrageous conduct was not limited to the distribution of defamatory materials. Indeed, the evidence presented in Plaintiffs' case-in-chief shows that Oberlin College's upper-level administrators wanted to use the college's purchasing power from the Gibson's as ***leverage to eliminate the criminal prosecutions of the students caught shoplifting at Gibson's Bakery***. After the initial cancelation of orders, Tita Reed advocated for drafting a contract for the renewal of business that required Plaintiffs to "drop charges" against the three students:

> **From:** Tita Reed <treed@oberlin.edu>
> **Sent:** Friday, December 02, 2016 3:27 PM
> **To:** Marvin Krislov
> **Subject:** Re: The College and Gibson's
>
> So can we draft a legal agreement clearly stating that once charges are dropped orders will resume? I'm baffled by their combined audacity and arrogance to assume the position of victim.

(See, May 10, 2019 Tr. Trans., pp. 85-86; Plaintiffs' Tr. Exh. 145). Defendants even attempted to use Obie dollars, which are a form of student debit card, as ***leverage*** against the Gibsons. (See, May 10, 2019 Tr. Trans., p. 83). In essence, Defendants were using their financial power and

[22] Gibson's Bakery employee Clarence "Trey" James testified that Dean Raimondo passed numerous copies of the Flyer to individuals at the protest for distribution. (See, id.).

[23] Former Oberlin College director of student safety, Rick McDaniel, testified that Julio Reyes was walking around the protest with a stack of Flyers passing them out. (See, id.). Mr. McDaniel also testified that Julio Reyes was belligerently blocking photographs of the protests and refused to stop until the police intervened. (See, id.).

authority in the community to force David and Grandpa Gibson to ignore the rule of law and drop the criminal prosecutions in exchange for the resumption of business that was wrongfully eliminated in the first place.

Defendants disregard these emails and communications and claim that they have no bearing on the IIED claims because they were not disclosed to David and Grandpa Gibson until after this case commenced. This is a blatant misrepresentation. While the emails may not have been disclosed, the demand to ignore the rule of law was communicated to David Gibson on numerous occasions after the protests began. David testified that Tita Reed called him and demanded the dropping of charges in exchange for the resumption of business:

Q. And by Wednesday morning, November 23rd, had you received a follow-up call from special assistant to the president, Tita Reed?
A. Yes, I did. It was two days later in the morning and Tita Reed called me. She asked me, she said, I want to -- I want to fully understand exactly what you're planning on doing with the three students. And I -- then I told her again that -- and she asked, are you dropping the charges? What are you doing with these students? I told her that they would be treated the same as anybody else is. It's not going to be anything more or less. I'm not going to punish them explicitly or anything extra. Everybody gets treated the same. I could hear her anger on the phone with me when she asked me that, and she then simply didn't respond anymore. She hung up on me.

(May 21, 2019 Tr. Trans., pp. 172-73). Indeed, David testified that President Krislov demanded that Gibson's Bakery provide a "first-time-pass" to Oberlin College students caught shoplifting at

the bakery. (See, Id. at p. 172).

Defendants continue to argue (again, for a third time) that the statements directed at the Gibsons were mere insults that society should find tolerable. (See, Defs.' JNOV, pp. 34-35). Defendants even cite to a case finding that calling someone a racist is insufficient conduct for an IIED claim.[24] However, the language in both the Flyer and Student Senate Resolution are ***not mere insults***. Instead, they make specific factual allegations about Plaintiffs' treatment of people of color for the entire 134-year-old duration of the business. These allegations were particularly damaging as they were the exact opposite of the actual history of Gibson's Bakery and the Gibson family.

Thus, reasonable minds could (and did) conclude that Oberlin College's conduct was extreme and outrageous.[25]

2. Plaintiffs presented sufficient evidence of severe and debilitating emotional injury.

To succeed on a claim for IIED, the plaintiff must show serious emotional distress, which is defined as severe and debilitating emotional injury. *See, Paugh v. Hanks*, 6 Ohio St.3d 72, 80, 451 N.E.2d 759 (1983), ¶ 3a of the syllabus.

Defendants continue to beat the same dead horse by arguing that David and Grandpa Gibson's emotional injuries could not be severe and debilitating because they did not receive

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[24] *See, Lennon v. Cuyahoga Cty. Juvenile Ct.*, 8th Dist. Cuyahoga No. 86651, 2006-Ohio-2587 ¶ 23. *Lennon* is highly distinguishable from this case. In *Lennon*, a co-worker merely called the plaintiff a racist on, what appears, one occasion, which is clearly distinguishable from specific factual allegations that a 134-business and its owners practiced racial profiling throughout their history and assault members of a local community. *Id.*

[25] Defendants devote a substantial portion of their brief to *Snyder v. Phelps*, 562 U.S. 443, 131 S.Ct. 1207 (2011), a case dealing with the Westboro Baptist Church wherein church members protested a soldier's funeral. (See, Defs.' JNOV, p. 35). However, this case has no bearing here. While *Snyder* did involve protests and detestable statements, it did not involve specific factual allegations. Instead, the protesters in *Snyder* made broad statements condemning homosexuality and the Catholic church but did not make any specific factual allegations of the soldier who was being memorialized or the soldier's father. *Snyder* at 458. In this case, Oberlin College, through its employees, made ***specific factual allegations*** against Plaintiffs that were defamatory and were not protected by the First Amendment.

medical treatment for the injuries. But, as Plaintiffs have stated on numerous occasions, this is a clear misstatement of Ohio law. In Ohio, "***lay witnesses who were acquainted with the plaintiff, may testify as to any marked changes in the emotional or habitual makeup that they discern in the plaintiff.***" *Id.* at 80 (emphasis added). Thus, the simple fact that Plaintiffs did not receive professional medical treatment does not preclude, or even discount, their IIED claims.

Next, Defendants pull some testimony out of context to detract from the severe emotional injuries David and Grandpa Gibson suffered. However, Plaintiffs submitted substantial evidence supporting their emotional injuries such that reasonable minds could (and did) find in favor of Plaintiffs on the IIED claims:

- Lorna Gibson, David's wife, testified that after the protests and defamation, David was "upset," "devastated," and was withdrawn and unable to speak to friends and community members alike. (May 15, 2019 Tr. Trans., pp. 149-50). Further, Lorna testified that David's injuries were not merely psychological but even manifested in physical form through stomach sickness, lack of eating, lack of sleep, and even heart issues. (Id., p. 150).

- Oberlin community member Eddie Holoway testified that Grandpa Gibson was a completely different person as a result of Defendants' conduct. Before the libel, Mr. Holoway testified that Grandpa Gibson was jovial and in very good spirits. (May 16, 2019 Tr. Trans., p. 56). But, after the protests, Mr. Holoway saw Grandpa Gibson as a marginalized person with substantial pain. (Id., p. 60).

- David's son, Steven Gibson, testified that David was extraordinarily upset when he found out about the libel and that his stress has continued since November of 2016. (May 16, 2019 Tr. Trans., pp. 128, 132).

- Perhaps best capturing the degree of emotional distress Defendants' actions have caused David and Grandpa Gibson, Lorna testified as follows regarding Grandpa Gibson after the defamation:

> A. It upsets him completely. He was so well-known in the community, and now he's made comments to us that that he's ashamed now that when he, when he passes away they're going to put "racist" on his tombstone.

(May 15, 2019 Tr. Trans., p. 153).

All that is required to avoid JNOV is some guarantee of genuineness related to the serious emotion distress. *See, e.g. Schultz v. Barberton Glass Co.*, 4 Ohio St.3d 131, 135, 447 N.E.2d 109 (1983).[26] Considering the testimony of ***numerous*** witnesses and construing the facts most strongly in Plaintiffs' favor, reasonable minds could (and did) find that David and Grandpa Gibson suffered serious emotional distress as a result of Defendants' conduct.

Therefore, Defendants' Motion for JNOV must be denied.

E. Defendants are Not Entitled to JNOV on Plaintiffs' Punitive Damages Verdicts.

1. Libel actual malice was properly submitted to the jury during the punitive phase of trial.

As discussed at length during trial, when a defamation claim involves private persons regarding a matter of public concern, the plaintiff must show actual malice to recover presumed damages and punitive damages. *Gilbert*, 142 Ohio App.3d at 744, 756 N.E.2d 1263. Actual malice for these purposes, which the parties called "libel actual malice," is the same standard taken from *New York Times Co. v. Sullivan*, 376 U.S. 254, 279-80, 84 S.Ct. 710 (1964): publishing a statement "with knowledge that it was false or with reckless disregard of whether it was false or not." In its order on the summary judgment motions, this Court determined that Plaintiffs are private persons but that the defamation involved a public concern. (See, April 22, 2019 Order, p. 7). Thus, to

[26] In the JNOV motion, Defendants cite the same cases as the directed verdict motions. These cases continue to be inapposite as they dealt solely with testimony from the plaintiff regarding the serious emotional distress with no corroborating testimony from third parties or medical experts. Defendants cite to *Oswald v. Fresh Mark/Sugardale, Inc.*, 5th Dist. Stark No. CA-8906, 1992 WL 330282 (Nov. 9, 1992). This case is highly distinguishable as the only evidence underlying the claim for IIED was a self-serving affidavit from the plaintiff regarding his emotional injuries. *Id.* at *4. As detailed above, David and Grandpa Gibson's IIED claims are supported by substantial evidence from numerous sources, including family members and disinterested third-party community members. *Thibodeaux v. B E & K Construction Co.*, 4th Dist. Ross No. 04CA2761, 2005-Ohio-66, ¶ 31 and *Powell v. Grant Med. Ctr.*, 148 Ohio App.3d 1, 2002-Ohio-443, 771 N.E.2d 874, ¶ 17 suffer from the same deficiency as they involve self-serving affidavit or deposition testimony. Because Plaintiffs' IIED claim is supported by numerous third parties, including family and community members, these cases have no application.

receive presumed damages (but not to receive actual damages) and punitive damages, Plaintiffs were required to show libel actual malice.

Defendants seek JNOV, arguing that libel actual malice should not have been submitted in the compensatory and punitive phases. Defendants are wrong for several reasons:

First, in this case, Defendants filed a motion to bifurcate the compensatory and punitive phases of trial pursuant to R.C. § 2315.21(B)(1). As prescribed by the statute, when the Defendants moved for bifurcation, the trial was separated into two phases: the first on compensatory damages and the second on punitive damages. *See,* R.C. § 2315.21(B)(1)(a)-(b). The bifurcation eliminated Plaintiffs' ability to present evidence related to punitive damages during the compensatory phase of trial. *See,* R.C. § 2315.21(B)(1)(a). By bifurcating the trial, Defendants separated libel actual malice into ***two separate issues***. During the compensatory phase, libel actual malice was submitted to the jury for purposes of deciding only presumed damages. Then, during the punitive phase, libel actual malice was submitted to the jury for purposes of deciding punitive damages.

During the compensatory phase, the jury determined that Defendants did not act with libel actual malice but instead found that Defendants acted with negligence. This, in essence, eliminated only Plaintiffs' ability to recover ***presumed*** damages. However, because Plaintiffs submitted substantial evidence of actual damages (See, testimony of Plaintiffs' expert Frank Monaco, May 20, 2019 Tr. Trans., pp. 6-65), the jury awarded Plaintiffs economic and noneconomic damages during the compensatory phase of trial. Then, because it was an issue for punitive damages, libel actual malice was submitted to the jury in the punitive phase, where Plaintiffs submitted substantial additional evidence. Ultimately, during the punitive phase, the jury found that Defendants acted with libel actual malice and awarded Plaintiffs' punitive damages.[27]

[27] In a long footnote (see, Defs.' JNOV, p. 39 n. 40), Defendants claim that "Plaintiffs knew and acted as if they had

Defendants invited the submission of libel actual malice to the jury in both phases by filing the motion to bifurcate. If Defendants did not want two phases of trial, they should not have filed the motion.

Second, Defendants erroneously claim that Section 5, Article I, of the Ohio Constitution, the right to trial by jury, precludes the submission of libel actual malice in both phases of trial, but Defendants are wrong. The text of the provision certainly does not preclude such action as it merely states that "[t]he right of trial by jury shall be inviolate." Defendants did not cite (and Plaintiffs are not aware of) even one Ohio authority stating that the Ohio right to trial by jury prevents the submission of overlapping issues in a bifurcated trial in both phases.[28] This makes sense, as the right preserved by the constitution "was the right to trial by jury as it was recognized by the common law; and within the right thus secured is the right of either party, in an action for the recovery of money only, to demand that the issues of fact therein be tried by a jury." *Dunn v. Kanmacher*, 26 Ohio St. 497, 502-03 (1875). The right as defined contains no limitation based on bifurcated issues at trial.

Third, Defendants' reliance on one federal case, *Greenhaw v. Lubbock Cty. Beverage Assn.*, 721 F.2d 1019, 1025 (5th Cir. 1983),[29] to support their claim that libel actual malice should

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to prove constitutional malice at the liability phase of trial." This is true in a sense: Plaintiffs knew and expected that they were required to prove libel actual malice during the compensatory phase to receive ***presumed damages***. Because Defendants sought bifurcation of the trial, libel actual malice for purposes of punitive damages was not submitted to the jury ***until the punitive phase of trial***.

[28] Defendants, without expressly stating it, are essentially arguing that the decision of the jury during the compensatory phase is preclusive of the issue during the punitive phase. However, in order for issue preclusion to apply under Ohio law, Defendants are required to show that an "identical issue was actually litigated, directly determined, and ***essential to the judgment*** in the prior action." *Price v. Carter Lumber Co.*, 2012-Ohio-6109, 985 N.E.2d 236, ¶ 10 (9th Dist.) [citations omitted]. Importantly, the decision by the jury in the compensatory phase was not a judgment, and, even if it was, it was not essential as Defendants were found liable under a negligence theory for purposes of the defamation claim.

[29] Importantly, *Greenhaw* specifically relied on *Gasoline Products Co. v. Champlin Refining Co.*, 283 U.S. 494, 51 S.Ct. 513 (1931) when it stated that the Seventh Amendment includes "the right to have a single issue decided one time by a single jury." *Greenhaw* at 1025. However, *Gasoline Products* stands for no such proposition. Instead, *Gasoline Products* merely held that when a new trial is ordered at the appellate level, the Seventh Amendment does

not have been submitted during both phases of trial, is misplaced:

- *Greenhaw* is a federal case discussing the Seventh Amendment to the United States Constitution. As Defendants' counsel are no doubt aware, the Seventh Amendment ***has not been incorporated to the states*** and has no application to this case. *See, Walker v. Sauvinet*, 92 U.S. 90, 92 (1875) ("A trial by jury in suits at common law pending in the State courts is not a privilege or immunity of national citizenship which the States are forbidden by the Fourteenth Amendment ... to abridge.").[30]

- Further, even if cases interpreting the Seventh Amendment are persuasive authority for Ohio courts (they are not),[31] the *Greenhaw* court is relying on the Reexamination Clause of the Seventh Amendment, which states that "no fact tried by a jury, shall be otherwise reexamined in any court of the United States, than according to the rules of the common law." Seventh Amendment to the U.S. Constitution. The Ohio right to trial by jury contains no such clause. *See,* Section 5, Article I, Ohio Constitution. Thus, federal cases interpreting the Reexamination Clause are ***not persuasive authority for Ohio courts.***

- In any event, federal interpretations of the Seventh Amendment ***must give way to Ohio statutory provisions requiring bifurcation of specific issues***. *See, Edelstein v. Kidwell*, 139 Ohio St. 595, 41 N.E.2d 564 (1942) (distinguishing *Gasoline Products* based on Ohio statutory authority). Because Defendants moved for bifurcation, libel actual malice became two separate issues that were required to be submitted to the jury in both the compensatory and punitive phases of trial.

Thus, the submission of libel actual malice during the punitive phase of trial was not error and therefore Defendants' JNOV Motion must be denied.

2. Plaintiffs submitted substantial probative evidence supporting the punitive damages award.

Next, Defendants argue that Plaintiffs failed to provide sufficient evidence of libel actual malice. Defendants' sole argument on this issue is that all evidence of fault allegedly post-dated

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not require a new trial on all issues but only those reversed on appeal. *Gasoline Products* at 498. The case has nothing to do with submitting two issues, like here, to the jury.

[30] *See also, Arrington v. Daimler Chrysler Co.*, 9th Dist. Summit Nos. 22108, 22270, 22271, 22272, 22273, 22274, 22284, 22285, & 22311, 2004-Ohio-7180, ¶ 23 [citations omitted] ("One such unincorporated right is the Seventh Amendment right to a civil jury trial; the Fourteenth Amendment does not assure such a right in state court proceedings.").

[31] Defendants cite to *Arbino v. Johnson & Johnson*, 116 Ohio St.3d 468, 2007-Ohio-6948, 880 N.E.2d 420, ¶ 135 (Cupp, J., concurring) for the proposition that cases interpreting the Seventh Amendment "are strongly persuasive" in Ohio courts. However, this idea is taken from a nonbinding concurring opinion and is completely unsupported by any authorities.

publication. However, as discussed in detail above, *see supra* Sec. III(B)(5)(b), Plaintiffs submitted substantial evidence that Defendants acted with knowledge of the falsity of the statements. Indeed, because it was posted in a prominent location in Wilder Hall ***for over a year***, statements after November 10, 2016 are relevant on the issue of actual malice as there was continuous publication of the Resolution until the lawsuit was filed.

Plaintiffs presented the following evidence of libel actual malice:

Trial Testimony May 16, 2019	***90-year-old*** Grandpa Gibson testified that Gibson's Bakery had been doing business with Oberlin College since "before [he] was born." (P17:2-9). No claims of racial profiling or discrimination for that century-long relationship.
EX. 111 [NEW]	On November 16, 2016, while the Student Senate Resolution was posted in Wilder Hall, an Oberlin College alum sent an email that was forwarded to President Krislov and VP Raimondo stating, "***To treat either Mr. Gibson or his business as racist ... seems to us completely inappropriate in multiple ways***."
EX. 161 [NEW]	On December 20, 2016, while the Student Senate Resolution was posted in Wilder Hall, an Oberlin College alum sent President Krislov an email that was forwarded to VP Raimondo stating, "I have known Dave Gibson and his father for more than fifty years. ***They are a family of gentle and fine people***."
EX. 485 [NEW]	On November 11, 2016, during the protests, James Henderson, a long-time resident of Oberlin, sent VP Raimondo an email stating, "My greatest concern is a statement ... that Gibson's bakery and the Gibson family specifically are racists, and that they have a long history of mistreating customers of color. ***That does not sound like the family that I have known for nearly my entire life***[.]"

Trial Testimony May 10, 2019	Chief of Staff Protzman confirmed that ***none of the Oberlin College administrators "thought the Gibsons are racists."*** (P23:19-22)
EX. 458-1 [NEW]	On November 10, 2016, VP Ben Jones sent VP Raimondo a text message relaying that he heard that "the shoplifting was clear and ***there was no racial profiling***."
Trial Testimony May 10, 2019	Chief of Staff Protzman confirmed that ***he "had never heard anything that suggested, prior to November of '16, that the Gibson family or the Gibson's Bakery had a long history of racial profiling***[.]" (P19:17-23).
Trial Testimony May 10, 2019	Special Assistant Tita Reed testified that she has not had ***any*** experience of racism with David Gibson. (P75:22-76:6).
Trial Testimony May 10, 2019	President Krislov confirmed that during his tenure with Oberlin College, "no one had ever suggested to [him] that the Gibson family or Gibson's Bakery was racist[.]" (Ex. 460, pp. 5-6).
Trial Testimony May 13, 2019	Former Oberlin College Director of Security Rick McDaniel confirmed that in his 15 years with the college there was no "issue with racial profiling or racial discrimination by the Gibsons." (P8:8-17).
EX. 63	On November 11, 2016, in the middle of the protests, former Oberlin College employee Emily Crawford sent an email to VP Ben Jones that was forwarded to VP Raimondo, stating, "i have talked to 15 townie friends who are [people of color] and they are disgusted and embarrassed by the protest ... to them this is not a race issue at all and ***they do not believe the gibsons are racist***. they believe the students have picked the wrong target." Tita Reed responded on November 11, 2016 that the information "***Doesn't change a damned thing for me***."

Clearly, reasonable minds could conclude that Defendants acted with libel actual malice sufficient to support the award of punitive damages.

3. Because the jury properly awarded punitive damages on Plaintiffs' libel claims, the punitive damages awarded for David and Grandpa Gibson's IIED claims were appropriate.

Defendants next argue that the punitive damages on the IIED claims fail because the

punitive damages on the libel claims fail because the claims are derivative. However, this argument is completely irrelevant because the jury properly awarded punitive damages on the libel claims.

F. Defendants are not entitled to JNOV as to the $4 million in punitive damages awarded for David Gibson's and Grandpa Gibson's IIED claims.

1. Defendants cannot challenge the jury's award of damages by way of a motion JNOV.

Defendants argue the jury's award of punitive damages is $4 million in excess of what ought to have been awarded because the award allegedly improperly "combined or stacked" punitive damages for the libel and IIED claim, even though these claims arose from the same conduct. (Defs.' JNOV, p. 42). The Ninth District Court of Appeals has consistently held that challenges to a jury's award of damages must be done in a motion for new trial under Civ.R. 59. *Magnum Steel & Trading, L.L.C. v. Mink*, 9th Dist. Summit Nos. 26127, 26231, 2013-Ohio-2431, ¶ 44. For example, in *Mink*, appellant argued the damage award was inadequate. *Id.* The Court explained " '[s]uch an argument is not appropriate on a motion for [JNOV] because Civ.R. 50(B) provides the means to challenge the jury's verdict, not the jury's award of damages." *Id.*, citing *Jemson v. Falls Village Retirement Community Ltd.*, 9th Dist. No. 20845, 2002-Ohio-4155, ¶ 17. See also *Catalanotto v. Byrd*, 9th Dist. Summit No. 27302, 2015-Ohio-277, ¶ 8 ("Yet, an argument that a jury's damage award is contrary to law 'is not appropriate on a motion for [JNOV] because Civ.R. 50(B) provides the means to challenge the jury's verdict not the jury's award of damages.' (Citation omitted.) * * * " 'Instead, Civ.R. 59 provides litigants with an avenue to challenge damage awards in the form of a motion for a new trial.' " (Citation omitted.)) *Id.* at ¶ 8.

Because Defendants did not present this issue to the Court through the proper mechanism (*i.e.* motion for new trial), the Court should deny their JNOV motion. And even if Defendants have raised this issue in their other post-judgment motion, the Court must consider those issues under

the standards applicable there and not under the JNOV standard.

2. The jury's punitive damages award was not based on the same animus.

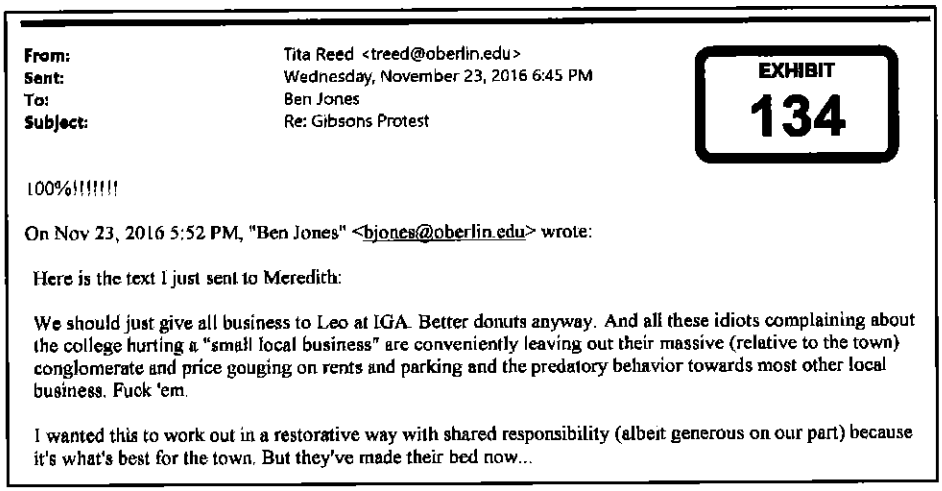
Defendants ask the Court to grant JNOV because David Gibson and Allyn W. Gibson's IIED claims allegedly arose from the same animus and therefore, could not support a separate award of punitive damages. (Defs.' JNOV, p. 42). Defendants ask the Court to reduce the punitive damages award for both Plaintiffs by $4 million. (Id.). In *Digital & Analog Design Corp. v. North Supply Co.*, the Ohio Supreme Court held:

> When a course of events is governed by a single animus, even though a defendant may be liable to compensate plaintiff for the damages occasioned by a number of torts committed in such course of events, a defendant may only be punished once by a single award of punitive damages. Recoveries for multiple claims for punitive damages contained within separately pleaded tort theories, may not be combined, or stacked, when such multiple tort claims arise from the same animus.

44 Ohio St.3d 36, 45, 540 N.E.2d 1358 (1989), at syllabus.

Here, Plaintiffs' IIED claims are not based solely on the conduct that formed the basis of their libel claims. Rather, more than a single animus was involved, which also caused Plaintiffs to separately suffer IIED. Defendants were driven by at least two anima: (1) Plaintiffs confronting of shoplifting Oberlin College students and (2) Plaintiffs' refusal to subvert the criminal justice system on Defendants' command, which was made after the publication of the defamatory statements. As discussed in substantial detail above [*see supra* Sec. III(D)(1)], David and Grandpa Gibson's IIED claims were based on Defendants' attempts to wield their financial power to force Plaintiffs to drop criminal charges, which Plaintiffs had no power to do, in addition to the hostile environment created by Defendants' defamation.

Additionally, Defendants' outrageous conduct included senior level administrators denigrating David and Grandpa Gibson's family business using profane and unprofessional language:



From: Tita Reed <treed@oberlin.edu>
Sent: Wednesday, November 23, 2016 6:45 PM
To: Ben Jones
Subject: Re: Gibsons Protest

EXHIBIT
134

100%!!!!!!!

On Nov 23, 2016 5:52 PM, "Ben Jones" <bjones@oberlin.edu> wrote:

Here is the text I just sent to Meredith:

We should just give all business to Leo at IGA. Better donuts anyway. And all these idiots complaining about the college hurting a "small local business" are conveniently leaving out their massive (relative to the town) conglomerate and price gouging on rents and parking and the predatory behavior towards most other local business. Fuck 'em.

I wanted this to work out in a restorative way with shared responsibility (albeit generous on our part) because it's what's best for the town. But they've made their bed now...

(Plaintiffs' Tr. Exh. 134).

The foregoing evidence demonstrated acts of extreme and outrageous conduct beyond the publication of the defamatory statements at issue. After defaming Plaintiffs, Defendants used their sizable power to both (1) threaten Plaintiffs with having destroyed reputations forever if Plaintiffs did not placate to Defendants' outrageous demand to disrupt criminal proceedings and (2) cut off all financial opportunities for the Plaintiffs, because any reasonable person in Oberlin would know not to cross Oberlin College. As a result, there was evidence at trial which demonstrates a separate animus for the IIED.

Finally, the Ninth District Court of Appeals has declined to follow the *Digital & Analog Design Corp.* case where the evidence did not present a single course of conduct for the jury to award punitive damages. *See Patio Enclosures, Inc. v. Four Seasons Marketing Corp.*, 9th Dist. Summit No. 22458, 2005-Ohio-4933, ¶ 49. In *Patio Enclosures*, the defendant's tortious conduct all related to a single event, the ignoring of its new employee's non-compete and confidentiality agreements with his former employer. *Id.* The Ninth District, applying *Digital & Analog Design Corp.*, held that the evidence of defendant's conduct did not meet the single course of conduct such that only a single punitive damages award was permitted:

> Contrary to Four Seasons' arguments we find that the instant matter involves more than a single animus. The following testimony was presented to the jury: Four Seasons offered Cheney employment even though it knew he had signed a non-compete and confidentiality agreement with PEI, which under the time period of the agreement was still in effect; Four Seasons did not investigate the agreement; it took notes during its initial conversation with Cheney about specific PEI programs and business plans; it actively mislead PEI about its relationship with Cheney; when PEI informed Four Seasons that Cheney was still under an active non-compete and confidentiality agreement with PEI, Four Seasons continued to employ Cheney and again did nothing to investigate the agreement; and it greatly expanded its company owned store operations while Cheney was employed there. Based on the foregoing, we cannot find that the evidence in the instant matter presented only a single course of conduct for the jury to award punitive damages.

Id. Thus, the defendant's tortious conduct was all directly related to the violation of the employment agreements but was still considered to be motivated by multiple anima. Likewise, here, the evidence at trial established a separate animus such as to support a separate award of punitive damages on the claims for libel and IIED. Therefore, the Court should overrule Defendants' JNOV motion as it pertains to the $4 million awarded on the IIED claims.

IV. CONCLUSION

Therefore, for the foregoing reasons, Plaintiffs request that this Court deny Defendants' Motions for JNOV.

DATED: August 28, 2019

Respectfully submitted,

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