

CI2018-12368

Index #: EF2018-0409

STATE OF NEW YORK
SUPREME COURT – TOMPKINS COUNTY

In the Matter of the Application of

WAJ MEDIA LLC,

**AFFIRMATION OF
WILLIAM J. TROY III**

Petitioner,

Index. No.

For a Protective Order and to Quash A Subpoena for
Journalist Records Served in a Foreign Action by

RJI No.

OBERLIN COLLEGE,

Presiding Justice:

Respondent.

WILLIAM J. TROY, III, an attorney admitted to practice law in the State of New York,
declares under penalty of perjury as follows:

1. I am an attorney representing WAJ Media LLC (“WAJ Media”). I submit this
affirmation in support of WAJ Media’s application pursuant to the New York Press Shield
Law, Civil Rights Law §79-h and CPLR 3103 for a protective order and to quash a document
titled “Subpoena Duces Tecum” (Exhibit "A") seeking journalist records, served by Oberlin
College, Oberlin, OH.

2. Upon information and belief, WAJ Media is a for-profit New York LLC that does
business as the “Legal Insurrection” website, at the web address <https://legalinsurrection.com/>,
with its registered business address in Ithaca, New York. William A. Jacobson, a Clinical
Professor of Law at Cornell Law School, is the founder of Legal Insurrection. WAJ Media was
incorporated in or about June 2014. Prior to that incorporation date, upon information and
belief, Legal Insurrection was operated as a sole proprietorship by Jacobson since in or about
October 2008.

3 Personally, I am a reader of Legal Insurrection for the past several years. Legal Insurrection is a well-known politics and law website, with several regular and guest authors and frequently is cited and linked by other websites.

4. WAJ Media, through Legal Insurrection, is in the business of journalism, including regularly engaging in investigative reporting, news reporting, news aggregation, news analysis, and opinion, on matters related to politics and law.

5. Upon information and belief, and according to publicly available statistics generated by Quantcast, Legal Insurrection receives over 1 million views and over 200,000 “unique” visits each month. See <https://www.quantcast.com/legalinsurrection.com>.

6. Upon information and belief, a regular focus of Legal Insurrection’s reporting are matters related to college and university campuses on issues such as free speech, social justice activism, Title IX, and academic freedom.

7. Legal Insurrection has covered events at Oberlin College in Oberlin, OH, frequently, with almost 100 articles related to Oberlin College. See <https://legalinsurrection.com/tag/oberlin/>.

8. Among other things, Legal Insurrection has engaged in reporting on the following issues related to Oberlin College:

- 2013 racism hoax (e.g., <https://legalinsurrection.com/2013/08/the-great-oberlin-college-racism-hoax-of-2013/>);
- Disruptions of speakers (e.g., <https://legalinsurrection.com/2015/04/oberlin-radical-feminists-freak-out-at-christina-hoff-sommers/>);
- “Social justice” activism (e.g., <https://legalinsurrection.com/2015/12/oberlin-college-students-circulate-14-page-demand-list/>);

- Anti-Israel activism on campus (e.g., <https://legalinsurrection.com/2016/01/oberlin-college-alums-anti-israel-fanaticism-creating-hostile-environment-for-jews/>);
- A now-terminated Oberlin College professor who posted openly anti-Semitic conspiracy theories on Facebook (e.g., <https://legalinsurrection.com/2016/03/oberlin-anti-semitic-rant-prof-hosting-bds-event-this-week/>);
- A lawsuit brought by an expelled male Oberlin College student alleging that the Title IX hearing process at Oberlin College was biased resulting in a 100% conviction rate (e.g., <https://legalinsurrection.com/2017/12/lawsuit-by-expelled-oberlin-male-student-sexual-assault-hearing-process-rigged-100-conviction-rate/>); and
- Financial and enrollment problems at Oberlin College related to campus activism and turmoil (e.g., <https://legalinsurrection.com/2017/09/radical-fallout-oberlin-college-enrollment-drops-causing-financial-problems/>).

9. In addition to the issues listed above, upon information and belief, Legal Insurrection also has reported on a dispute between Oberlin College and a local bakery, Gibson's Bakery, in Oberlin, Ohio. Legal Insurrection has reported on the arrest of three African-American Oberlin College students at the bakery for shoplifting, protests by students, faculty and staff of Oberlin College alleging racial profiling, boycotts of Gibson's by the Oberlin College community including by the college itself, Oberlin town community reaction to the protests, the eventual conviction of the three students, and a lawsuit brought by Gibson's Bakery against Oberlin College and its Dean of Students, Meredith Raimondo.

10. Upon information and belief, the Gibson's Bakery lawsuit has been filed in Ohio and is pending in the Court of Common Pleas, Lorain County, and is captioned: *GIBSON BROS INC V/S OBERLIN COLLEGE*, Case Number 17CV193761 (the "Gibson's lawsuit" or "the

Ohio case"). The docket is available electronically at http://cp.onlinedockets.com/loraincp/case_dockets/Docket.aspx?CaseID=384279.

11. A true and correct copy, upon information and belief, of the Complaint in the Gibson's lawsuit is attached hereto as Exhibit "B" and the Answer as Exhibit "C".

12. WAJ Media is not a party to and has not participated in or submitted itself to the jurisdiction of the Ohio case. The sole role that WAJ Media may have played with respect to the events giving rise to and the litigation regarding the Ohio case is that of journalists reporting on the events and court proceedings.

13. The following articles, among others, were published at Legal Insurrection regarding the Gibson's dispute and lawsuit:

- *Bakery targeted by Oberlin College #BlackLivesMatter fights back* (<https://legalinsurrection.com/2016/11/oberlin-bakery-targeted-by-college-blacklivesmatter-fights-back-with-community-support/>)
- *Oberlin College halted purchases from Gibson's Bakery targeted by #BlackLivesMatter, but may reconsider* (<https://legalinsurrection.com/2016/11/oberlin-college-halted-purchases-from-bakery-targeted-by-blacklivesmatter-but-may-reconsider/>)
- *Gibson's Bakery sues Oberlin College over racial profiling accusations, Oberlin cuts business ties* (<https://legalinsurrection.com/2017/11/gibsons-bakery-sues-oberlin-college-over-racial-profiling-accusations-oberlin-cuts-business-ties/>)
- *Oberlin College lashes out at Gibson's Bakery, portrays itself as victim* (<https://legalinsurrection.com/2017/12/oberlin-college-lashes-out-at-gibsons-bakery-in-court-filing-portrays-itself-as-victim/>)
- *Court: Gibson's Bakery lawsuit against Oberlin College can continue in full* (<https://legalinsurrection.com/2018/01/court-gibsons-bakery-lawsuit-against-oberlin-college-can-continue-in-full/>)
- *Oberlin College: We can't get a fair trial in our home county* (<https://legalinsurrection.com/2018/03/oberlin-college-we-cant-get-a-fair-trial-in-our-home-county/>)
- *Judge rejects Oberlin College request to move town-gown lawsuit to another county* (<https://legalinsurrection.com/2018/04/judge-rejects-oberlin-college-request-to-move-town-gown-lawsuit-to-another-county/>)

14. Earlier this year, upon information and belief, Oberlin College requested that the venue of the trial of the Gibson's lawsuit be moved out of Lorain County, arguing that Oberlin

College could not receive a fair trial in its home county due to alleged prejudicial pre-trial publicity. As detailed in Oberlin College’s motion to transfer venue, the Gibson’s controversy received widespread local and national media coverage. See, <https://legalinsurrection.com/wp-content/uploads/2018/03/Gibsons-Bakery-v.-Oberlin-College-Oberlin-Motion-To-Transfer-Venue.pdf>. The court electronic docket in the Gibson’s lawsuit reflects that the motion to transfer venue was denied:

Date	Type	Description
04/16/2018	N/A	Defendants' Motion to Transfer Venue is DENIED. See Journal. IT IS SO ORDERED.

15. In the Gibson’s lawsuit, upon information and belief, Oberlin College served subpoenae duces tecum upon counsel for Gibson’s Bakery, seeking, among other things, communications between Gibson Bakery’s lawyers and the media. Attached hereto are the following documents obtained from the Clerk’s Office of the Court of Common Pleas, Lorain County, Ohio, and believed to be true and correct records of court papers filed therein:

- Oberlin College’s Motion to Compel compliance with Subpoena Duces Tecum served on Plaintiff’s Counsel (Exhibit D hereto).
- Plaintiff’s Attorneys’ Opposition to Motion to Compel, and Motion for a Protective Order (Exhibit E hereto).
- Oberlin College’s Opposition to Motion for a Protective Order (Exhibit F hereto)

16. As reflected in the Subpoenae Duces Tecum which were the subject of the motion practice in the Ohio case, Oberlin College sought, among other things, the following records:

Produce any and all Documents that refer, relate or pertain to the following:

- 1) All communications between You and the News Media concerning the Lawsuit.
- 2) All documents that You sent to or received from the News Media concerning the Lawsuit.

- 3) All communications between You and the Plaintiffs regarding requests for information or comment from the News Media.
- 4) All communications between You and the Plaintiffs regarding responding to requests for information or comment from the News Media.
- 5) All communications between You and the Plaintiffs regarding releasing any information to the News Media.
- 6) All communications between or among partners, members, shareholders, associates, paralegals, staff, employees, representatives or agents of the Krugliak Law Firm regarding requests for information or comment from the News Media concerning the Lawsuit.
- 7) All communications between or among partners, members, shareholders, associates, paralegals, staff, employees, representatives or agents of the Krugliak Law Firm regarding responding to requests for information or comment from the News Media concerning the Lawsuit.
- 8) All communications between or among partners, members, shareholders, associates, paralegals, staff, employees, representatives or agents of the Krugliak Law Firm regarding releasing any information concerning the Lawsuit to the News Media.
- 9) All communications between You and any Person concerning the Lawsuit.

17. As reflected in the court filings attached as Exhibits D-F hereto, the parties in the Ohio case submitted to the Ohio Court their respective arguments, including arguments by Oberlin College and Gibson’s attorneys, respectively, as to whether the documents sought by the Subpoenae Duces Tecum were material and necessary to the claims and defenses in the Gibson’s lawsuit.

18. The Court docket in the Gibson’s lawsuit reflects that the Court denied Oberlin College’s motion to compel, and granted plaintiffs’ attorneys’ motion for a protective order:

04/18/2018 N/A

Defendants Oberlin College and Meredith Raimondo's Motion to Compel Production of Documents in Response to Subpoenas Duces Tecum Issued to Plaintiffs' Counsel is granted in part and denied in part. Plaintiffs' counsel shall provide the names of any news media entities to which communications pertaining to the subject matter of this lawsuit were issued by plaintiffs' counsel. Beyond this, the subpoenas are quashed and the request for a protective order is granted. See Journal. IT IS SO ORDERED.

Upon information and belief, there is no separate Order or Opinion other than what is set forth on the electronic docket. It is unknown if an appeal could have been taken by Oberlin College from this decision.

19. Accordingly, the court in the Ohio case denied Oberlin College access to communications between the attorneys for Gibson's Bakery and the media, even though such communications were in the possession of such attorneys in Ohio. Those communications to which Oberlin College was denied access would have included the communications Oberlin College seeks in the Subpoena at issue in this case.

20. Upon information and belief, on June 13, 2018, Oberlin College served the Subpoena Duces Tecum that is the subject of this application, by leaving a copy for Professor Jacobson with an administrative assistant at Cornell Law School.¹ It is respectfully submitted that such an attempt at service is improper.

21. In addition, the Subpoena purports to seek records to which the Ohio court already has denied Oberlin College access, even though those records are in the possession of counsel for Gibson's Bakery, namely, communications between the attorneys for Gibson's Bakery and WAJ Media. The Subpoena at issue here seeks:

Produce any and all Documents that refer, relate or pertain to the following:

- 1) All communications between You and the Tzangas Law Firm concerning the Incident, Demonstrations, or the Lawsuit.
- 2) All documents that You sent to or received from the Tzangas Law Firm concerning the Incident, Demonstrations, or the Lawsuit.
- 3) All communications between You and the Krugliak Law Firm concerning the Incident, Demonstrations, or the Lawsuit.
- 4) All documents that You sent to or received from the Krugliak Law Firm concerning the Incident, Demonstrations, or the Lawsuit.

¹ Inexplicably, the Subpoena is captioned as related to an action in the Supreme Court of Ohio. Upon information and belief, there is no case pending between Gibson's Bakery and Oberlin College in the Supreme Court of Ohio. Rather, the case is pending in the Court of Common Pleas.

22. As set forth in the accompanying Memorandum of Law, the records sought by the subpoena are not material and necessary and are not critical to Oberlin College's defense in the Gibson's lawsuit.

23. As set forth in the accompanying Memorandum of Law, it is submitted that Oberlin College is collaterally estopped from arguing that the records sought from WAJ Media are material and necessary, or critical, to the Ohio case, since it made those arguments to the Ohio court and lost.

24. In the motion papers in the Ohio case, Oberlin College cited one aspect of WAJ Media's reporting that it claimed was in issue. In its reporting, WAJ Media included a statement from Gibson Bakery's counsel regarding the litigation. That statement is quoted in Oberlin College's papers, Exhibit "D" hereto at page 5 of Brief in Support of Motion to Compel) as follows:

In fact, Krugliak and/or TPM have issued statements to the news media about this lawsuit. On November 10, 2017, three days after Krugliak and TPM filed the Complaint on behalf of Plaintiffs, the Legal Insurrection blog reported that Owen J. Rarric of Krugliak provided this statement to the blog:

The complaint filed this week identifies Oberlin College's troubling conduct in attempting to bully and financially strangle a century-old local business for refusing to succumb to the College's demand that Gibson's ignore student shoplifting. In response to Gibson's resisting such bullying tactics, the College has further tightened the economic squeeze by cancelling business with Gibson's. The example that Oberlin College is setting is that if an institution is powerful, that institution and its members do not have to follow the Rule of Law.²

2 William A. Jacobson, *Gibson's Bakery sues Oberlin College over racial profiling accusations, Oberlin cuts business ties*, LEGAL INSURRECTION (Nov. 10, 2017, 7: 15 PM), available at <https://legalinsurrection.com/2017/11/gibsons-bakery-sues-oberlin-collegeover-racial-profiling-accusations-oberlin-cuts-business-ties/>.

25. It is clear that Oberlin College does not have any legally-cognizable need for WAJ Media's communications with regard to this statement issued by Gibson's Bakery's counsel, since Oberlin College has a copy of the actual statement as included in WAJ Media's reporting. Even if the statement were relevant to Oberlin College's defense, Oberlin College has the statement and any attempt to pry into WAJ Media's journalistic investigations through the Subpoena is not necessary, much less critical.

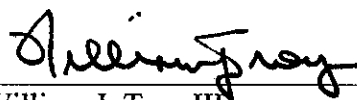
26. Given WAJ Media's extensive and years-long reporting on Oberlin College, permitting Oberlin College to pry into WAJ Media's communications with sources would have a chilling effect on WAJ Media's ability to report and to conduct its journalism.

27. Moreover, as set forth in the accompanying Memorandum of Law, it is respectfully submitted that the records are protected under the New York Press Shield law (Civil Rights Law § 79-h) and New York common law recognizing a New York constitutional protection for journalist records.

Conclusion

28. Because the Subpoena (a) seeks records that are not material and necessary, or critical to Oberlin's defense of the Ohio case, and (b) the court in the Ohio case already granted a protective order as to such records, and (c) the journalist communications are protected by New York law, the Court should issue a protective order and quash the Subpoena.

Dated: Ithaca, New York
July 3, 2018



William J. Troy III