STATE OF NEW YORK
SUPREME COURT – TOMPKINS COUNTY

In the Matter of the Application of

WAJ MEDIA LLC, Index. No.

Petitioner, RJI No.

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

OBERLIN COLLEGE,

Respondent.

MEMORANDUM OF LAW IN SUPPORT OF APPLICATION FOR PROTECTIVE ORDER AND TO QUASH SUBPOENA SEEKING JOURNALIST RECORDS

WAJ Media LLC ("WAJ Media"), d/b/a the "Legal Insurrection" website, submits this Memorandum of Law in support of its 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 (the "Subpoena") served in New York State by Oberlin College in an action pending in Ohio (the "Gibson's lawsuit" or the "Ohio case").

The facts relevant to this application are set forth in the accompanying Affirmation of William J. Troy III, Esq., and the exhibits thereto, which we incorporate by reference.

To summarize, the Subpoena seeks journalist records of WAJ Media, a professional journalism company that, through the "Legal Insurrection" website, has reported extensively about issues at Oberlin College, including the Gibson's lawsuit. The records sought in the Subpoena are communications between WAJ Media and the plaintiffs' attorneys in the Gibson's lawsuit. Oberlin College thus seeks to intrude on WAJ Media's investigative

journalism, which would cause a chilling effect on WAJ Media's ability to continue to report about Oberlin College.

The records Oberlin College seeks from WAJ Media are in the possession of the attorneys for Gibson's in Ohio. Oberlin College previously served subpoenae duces tecum on Gibson's attorneys for such records, but the Ohio court in the Gibson's lawsuit quashed those subpoenae and granted a protective order.

Having lost in the Ohio case on access to such communications, Oberlin College now makes a second attempt to get access to the records by serving the Subpoena at issue in this case on WAJ Media. As set forth in the Troy Affirmation and *infra*, a protective order should be granted, and the Subpoena quashed because the records sought are protected by the New York common law and constitutional privilege for journalist records, including as codified in the New York Press Shield Law, Civil Rights Law §79-h.

THE RECORDS ARE PROTECTED BY THE NEW YORK REPORTERS' PRIVILEGE AND THE NEW YORK PRESS SHIELD LAW

To the extent the Subpoena is read to require WAJ Media to produce all of its communications with Gibson's attorneys, such a request violates WAJ Media's privilege under the New York constitution and common law, and New York Press Shield Law, Civil Rights Law § 79-h.

In cases not governed by the NY Press Shield Law, the standard for obtaining discovery in New York from non-parties, such as under CPLR 3119, is that the discovery is "material and necessary" in the out-of-state action. *Kapon v. Koch*, 23 N.Y.3d 32, 37, 11 N.E.3d 709, 714, 988 N.Y.S.2d 559, 564 (2014). Oberlin College cannot meet this "material and necessary" test because to the extent the public statement issued by Gibson's counsel included in WAJ Media's reporting is relevant (which is doubtful in itself) to Oberlin College's defenses in the

Ohio case, it is the statement itself which is the material and necessary evidence. Oberlin College already has the statement, WAJ Media's other records are not material and necessary.

Here, however, there is a much higher standard than "material and necessary" that Oberlin College must meet in order to subpoena WAJ Media's journalist records, since New York courts have long recognized a privilege protecting journalists' records. Oberlin College must show that the evidence is so crucial that its defense rises or falls with or without such evidence, and that the evidence is not available elsewhere. Oberlin College cannot meet this test.

In *O'Neill v. Oakgrove Constr.*, 71 N.Y.2d 521, 524, 523 N.E.2d 277 528 N.Y.S.2d 1 (1988), the Court of Appeals reviewed the history and scope of the privilege:

> Article I, § 8 of the New York State Constitution and, we believe, the First Amendment of the Federal Constitution as well, provide a reporter's privilege which extends to confidential and nonconfidential materials and which, albeit qualified, is triggered where the material sought for disclosure--the photographs here--was prepared or collected in the course of newsgathering....
>
> The ability of the press freely to collect and edit news, unhampered by repeated demands for its resource materials, requires more protection than that afforded by the disclosure statute (CPLR 3101). The autonomy of the press would be jeopardized if resort to its resource materials, by litigants seeking to utilize the newsgathering efforts of journalists for their private purposes, were routinely permitted *(see, Miller v Mecklenburg County,* 602 F Supp 675, 679; *Maurice v National Labor Relations Bd.,* 7 Med L Rptr 2221, 2223 [SD NY], *vacated on other grounds* 691 F2d 182; *Wilkins v Kalla,* 118 Misc. 2d 34, 35). Moreover, because journalists typically gather information about accidents, crimes, and other matters of special interest that often give rise to litigation, attempts to obtain evidence by subjecting the press to discovery as a ***527** nonparty would be widespread if not restricted on a routine basis. The practical burdens on time and resources, as well as the consequent diversion of journalistic effort and disruption of newsgathering activity, would be particularly inimical to the vigor of a free press....
>
> As formulated by the decisions of these courts, the privilege bars coerced disclosure of resource materials, such as photographs, which are obtained or otherwise generated in the course of newsgathering or newspreparing activities, unless the moving litigant satisfies a tripartite test which is more demanding than the requirements of CPLR 3101

(a). Under the tripartite test, discovery may be ordered only if the litigant demonstrates, clearly and specifically, that the items sought are (1) highly material, (2) critical to the litigant's claim, and (3) not otherwise available. Accordingly, if the material sought is pertinent merely to an ancillary issue in the litigation, not essential to the maintenance of the litigant's claim, or obtainable through an alternative source, disclosure may not be compelled *(see, e.g., In re Petroleum Prods. Antitrust Litig.,* 680 F2d 5, 9 [2d Cir], *cert denied sub nom. Arizona v McGraw-Hill, Inc.,* 459 US 909; *Riley v City of Chester,* 612 F2d 708, 717 [3d Cir]; *Silkwood v Kerr-McGee Corp., supra,* at 438 [10th Cir]; *Baker v F & F Inv.,* 470 F2d 778, 784 [2d Cir], *cert denied* 411 US 966; *Montezuma Realty Corp. v Occidental Petroleum Corp.,* 494 F Supp 780 [SD NY]).

This common law constitutional protection was codified in the New York Press Shield Law, Civil Rights Law § 79-h. See, e.g., *Matter of Beach v. Shanley*, 62 N.Y.2d 241, 245, 465 N.E.2d 304, 476 N.Y.S.2d 76 (1984) ("In enacting the so-called "Shield Law," the Legislature expressed a policy according reporters strong protection against compulsory disclosure of their sources or information obtained in the news-gathering process."); *Morgan Keegan & Co., Inc. v. Eavis* 37 Misc.3d 1058 955 N.Y.S.2d *715* (Sup. Ct. NY Co. 2012) ("These requirements subsequently were incorporated into an amended Civil Rights Law § 79–h, which affords an absolute privilege for confidential news gathering materials, N.Y. Civ. Rights Law § 79–h(b), and a qualified privilege for non-confidential new gathering materials. N.Y. Civ. Rights Law § 79–h(c). To overcome the privilege for non-confidential materials, the party seeking the evidence still must meet the statute's three-pronged test formulated by the Court of Appeals. *O'Neill v. Oakgrove Constr.,* 71 N.Y.2d at 527, 528 N.Y.S.2d 1, 523 N.E.2d 277.")

Civil Rights Law § 79-h provides, in pertinent part (emphasis added):

(a) Definitions. As used in this section, the following definitions shall apply:

* * *

(6) "**Professional journalist**" shall mean one who, for gain or livelihood, is engaged in gathering, preparing, collecting, writing, editing, filming, taping or photographing of news intended for a newspaper, magazine, news agency, press association or wire service **or other professional medium or agency which has as one of its regular**

functions the processing and researching of news intended for dissemination to the public; such person shall be someone performing said function either as a regular employee or as one otherwise professionally affiliated for gain or livelihood with such medium of communication.

* * *

(8) "News" shall mean written, oral, pictorial, photographic, or electronically recorded information or communication concerning local, national or worldwide events or other matters of public concern or public interest or affecting the public welfare.

(b) Exemption of professional journalists and newscasters from contempt: **Absolute protection for confidential news**. Notwithstanding the provisions of any general or specific law to the contrary, no professional journalist or newscaster presently or having previously been employed or otherwise associated with any newspaper, magazine, news agency, press association, wire service, radio or television transmission station or network or other professional medium of communicating news or information to the public shall be adjudged in contempt by any court in connection with any civil or criminal proceeding, or by the legislature or other body having contempt powers, nor shall a grand jury seek to have a journalist or newscaster held in contempt by any court, legislature or other body having contempt powers for refusing or failing to disclose any news obtained or received in confidence or the identity of the source of any such news coming into such person's possession in the course of gathering or obtaining news for publication or to be published in a newspaper, magazine, or for broadcast by a radio or television transmission station or network or for public dissemination by any other professional medium or agency which has as one of its main functions the dissemination of news to the public, by which such person is professionally employed or otherwise associated in a news gathering capacity notwithstanding that the material or identity of a source of such material or related material gathered by a person described above performing a function described above is or is not highly relevant to a particular inquiry of government and notwithstanding that the information was not solicited by the journalist or newscaster prior to disclosure to such person.

(c) Exemption of professional journalists and newscasters from contempt: **Qualified protection for nonconfidential news**. Notwithstanding the provisions of any general or specific law to the contrary, no professional journalist or newscaster presently or having previously been employed or otherwise associated with any newspaper, magazine, news agency, press association, wire service, radio or television transmission station or network or other professional medium of communicating news to the public shall be adjudged in contempt by any court in connection with any civil or criminal proceeding, or by the legislature or other body having contempt powers, nor shall a grand jury seek to have a journalist or newscaster held in contempt by any court, legislature, or other body having contempt powers for refusing or failing to disclose any unpublished news obtained or prepared by a journalist or newscaster in the course of gathering or obtaining news as provided in subdivision (b) of this section, or the source of any such news, where such news was not obtained or received in

> confidence, **unless the party seeking such news has made a clear and specific showing that the news: (i) is highly material and relevant; (ii) is critical or necessary to the maintenance of a party's claim, defense or proof of an issue material thereto; and (iii) is not obtainable from any alternative source**. A court shall order disclosure only of such portion, or portions, of the news sought as to which the above-described showing has been made and shall support such order with clear and specific findings made after a hearing. The provisions of this subdivision shall not affect the availability, under appropriate circumstances, of sanctions under section thirty-one hundred twenty-six of the civil practice law and rules.
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> * * *
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> (e) No fine or imprisonment may be imposed against a person for any refusal to disclose information privileged by the provisions of this section.
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> (f) The privilege contained within this **section shall apply to supervisory or employer third person or organization** having authority over the person described in this section. * * *

It is clear that common law, constitutional and statutory privileges all protect WAJ Media's communications with sources, including attorneys in lawsuits that are the subject of WAJ Media's news reporting. Oberlin College cannot meet the test to obtain these records. E.g.,

In re American Broadcasting Companies, Inc., 189 Misc.2d 805, 735 N.Y.S.2d 919 (Sup Ct. NY Co. 2001):

> Thus, the provision of the Civil Rights Law at issue is not satisfied absent clear and specific proof "that the claim for which the information is to be used 'virtually rises or falls with the admission or exclusion of the proffered evidence.' " (*In re Application to Quash Subpoena to National Broadcasting Company, et al. v. Graco Children Products, Inc.*, 79 F.3d 346, 351 [2d Cir.1996]) (citation omitted). "The test is not merely that the material be helpful or probative, but whether or not the defense of the action may be presented without it."(*Id.* quoting *Doe v. Cummings*, No. 91–346, 1994 WL 315640, at *1 [Sup.Ct. St. Lawrence Cty. Jan. 18, 1994]; *see also, Flynn v. NYP Holdings Inc.*, 235 A.D.2d 907, 652 N.Y.S.2d 833 (3rd Dept.1997); *In re Grand Jury Subpoenas to Jennifer Maguire*, 161 Misc.2d 960, 965, 615 N.Y.S.2d 848 [Cty. Ct. Westchester Cty.1994]). Thus, it follows that when the legislature speaks of unpublished news being critical or necessary to the proof or a claim or defense, it does not have in mind general and ordinary impeachment material or matters which might arguably bear on the assessment of credibility of witnesses. To permit that might well

> result in the piercing of the privilege far more often and with far less basis than the legislative history suggests is appropriate. Rather, the privilege may yield only when the party seeking the material can define the specific issue, other than general credibility, as to which the sought after interview provides truly necessary proof (*See, United States v. Burke,* 700 F.2d 70 [2nd Cir.1983]; *cf. United States v. Cutler,* 6 F.3d 67 [2nd Cir.1993]) ("[T]he evidence that Cutler seeks from the Reporters and the T.V. Stations is probably the *only* significant proof regarding his assertedly criminal behavior.") (emphasis in the original).

WAJ Media's journalist records are not "highly material and relevant" to Oberlin's defenses in the Gibson's lawsuit. What is relevant, if anything, to Oberlin College's defenses is the public statement made by Gibson's attorneys. Oberlin College does not need WAJ Media's records for that, because Oberlin College has the public statement itself. Oberlin College cannot demonstrate that its defense in the Ohio case is "critical" for similar reasons.

Moreover, Oberlin College is estopped from claiming the WAJ Media records are critical to its defense of the Ohio case. If such records were truly critical to Oberlin College, the Ohio court presumably would not have granted Gibson's lawyers a protective order that covered, in scope, such records.

That Ohio court grant of a protective order is binding on Oberlin College, and Oberlin College is estopped from now claiming that it has a legally cognizable need for the records. The issue was fully and actually litigated in the Ohio case (see exhibits to Troy Affirmation), and the claims of necessity were decided. E.g., *Schwartz v. Public Adm'r of Bronx County,* 24 N.Y.2d 65, 71 246 N.E.2d 725, 729, 298 N.Y.S.2d 955, 960 (1969) ("New York Law has now reached the point where there are but two necessary requirements for the invocation of the doctrine of collateral estoppel. There must be an identity of issue which has necessarily been decided in the prior action and is decisive of the present action, and, second, there must have been a full and fair opportunity to contest the decision now said to be controlling.")

Also, Oberlin College cannot meet the third part of the test, that the records are not available elsewhere. Gibson's attorneys have the records. That the Ohio court granted a protective order against Oberlin College obtaining the records certainly cannot be used to Oberlin College's advantage here, where WAJ Media has independent New York State constitutional and statutory protections.

Conclusion

For the reasons set forth above and in the Troy Affirmation, we respectfully request that the court grant a protective order and quash the Subpoena for journalist records.

Dated: Ithaca, New York
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Respectfully submitted,

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