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

Nearly six (6) months after Defendants[1] filed a redacted version of their Combined Reply in Support of Motions for Summary Judgment and filed under seal Exhibit G to that brief (the "Confidential Materials"), Defendants now seek to un-redact and unseal those materials. However, in their Motion, Defendants failed to provide a complete and accurate account to the Court. To clarify the record, Plaintiffs[2] file this response in opposition. For the following reasons, Defendants' Motion must be denied:

- ***First***, the true purpose of Defendants' Motion is to seek permission to facilitate an abuse of process and invasion of a non-party's privacy. During trial, Defendants made no effort to offer the Confidential Materials, which are from a private social media account, into evidence. Unhappy with the jury's verdict, Defendants now seek to exploit these materials obtained pursuant to a subpoena on a non-party in a further effort to harass and smear the Gibson family and brand;

- ***Second***, the Court preliminarily determined the Confidential Materials were inadmissible at trial, other than as alleged evidence regarding Plaintiffs' reputations. But Defendants ***did not even attempt to introduce the Confidential Materials at trial*** and thereby waived any argument that these materials were admissible. Because summary judgment briefs may only rely on evidence that is admissible at trial and Defendants failed to preserve an argument that the materials were admissible at trial,

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

Defendants could not have relied upon the Confidential Materials during summary judgment and the same should be kept under seal as inadmissible evidence;

- ***Third***, Defendants have waived their right to challenge the designation of the Confidential Materials because they waited over six (6) months since they received the documents and after the parties have fully tried this case to a Lorain County jury before filing their Motion; and

- ***Finally***, Defendants' Motion fails to show how the balancing test in *Adams v. Metallica, Inc.*, 143 Ohio App.3d 482, 758 N.E.2d 286 (1st Dist.2001) (which the Court adopted within its April 3, 2019 Entry and Ruling as the applicable test for determining whether to remove confidential designations) favors unsealing the Confidential Materials.

Therefore, Defendants' Motion must be denied.

I. INTRODUCTION

One must ask, why have Defendants filed this Motion? Defendants suggest two, paper thin reasons: (1) because Plaintiffs prevailed, in part, on their previous motion to unseal and (2) Defendants do not want to file redacted appellate briefs. Neither reason justifies unsealing private, personal social media information from a non-party who was using a private social media account unrelated and unconnected to Plaintiffs. Unlike those materials discussed within Plaintiffs' motion to unseal, the Confidential Materials are wholly those of non-party Allyn D. Gibson ("ADG"). Furthermore, Defendants have failed to show that these materials are not personal to ADG's social media account, i.e. that these materials were visible to persons other than the author and the author's friends or others with permission to view the statements.

It appears that Defendants are using their Motion as an improper collateral attack on the jury's verdict. In essence, because Defendants are unhappy with the jury's decision, they are seeking to unseal ADG's private social media account, so they are able to publish these documents to the media without threat of the Court's contempt power in an effort to continue the smear and defamation of Plaintiffs' name and brand. Defendants' attempted abuse of process should not be

permitted.

II. LAW & ARGUMENT

A. Standard of Review

As the Court correctly held within its April 3, 2019 Entry and Ruling on Plaintiffs' Motion to Immediately Unseal (the "Entry"), "[t]he standard of review applied to a decision on a motion to unseal is abuse of discretion."

Moreover, before the Court will unseal confidential or redacted materials, the Court must be satisfied that the balancing test articulated in *Adams v. Metallica, Inc.*, 143 Ohio App.3d 482, 758 N.E.2d 286 (1st Dist.2001) weighs in favor of unsealing. [Entry, p. 2]. The *Adams* court articulated the following non-exhaustive list of factors:

> As noted by the court in Philip Morris, a nonexhaustive list of these factors would include "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. at 492, quoting *State v. Philip Morris, Inc.*, 606 N.W.2d 676, 687 (Minn.App.2000).

B. The true purpose of Defendants' Motion is to facilitate an abuse of process and an invasion of a non-party's privacy.

As will be discussed further below, Defendants failed to offer the Confidential Materials as evidence at trial. So, why do Defendants now seek to 'unseal' these materials that were attached to a reply brief they filed nearly 6 months ago? Defendants have ulterior motives. Defendants undoubtedly wish to take these unauthenticated materials from a non-party's private social media account (obtained only through use of a subpoena) and exploit them publicly in a vengeful effort to harass and smear the Gibson family.

A party's use of a judicial procedure, such as a motion to unseal, is not permissible merely because the procedure exists. An abuse of process exists when an otherwise legitimate judicial

proceeding is ***"perverted to accomplish <u>an ulterior motive</u> for which it was not designed***…" *Levey & Co. v. Oravecz*, 9th Dist. Summit No. 21768, 2004-Ohio-3418, ¶ 8 (emphasis added).[3]

At page 4 of their Motion, Defendants appear to suggest the Confidential Materials relate to a truth defense to libel. In actuality, ***Defendants did not present any evidence supporting their truth defense at trial, including the Confidential Materials***. Defendants' silence on the truth defense speaks volumes as to the motive behind this motion – to present yet another smear against Plaintiffs. Obviously, had the Confidential Materials been relevant to an alleged truth defense, ***Defendants would have sought to introduce them at trial***. Defendants' efforts present a dangerous potential for abuse of process. When responding to subpoenas, non-parties would no longer be secure in the belief that their private and sensitive information is protected by a Stipulated Protective Order if all such information is released following trial (including documents that are *irrelevant, inadmissible* and *not even proffered* at trial!).

Further, Defendants' summary judgment reply brief used these materials solely for the argument that Plaintiffs were public figures or limited public figures. [See Defendants' MSJ Reply, pp. 10-12]. Those issues were determined by the Court and would never have been presented to the jury because the determination of the Plaintiffs' status is a question of law, not fact.

Defendants' sole motive in seeking to unseal the Confidential Materials is to continue the smear on Plaintiffs' name and brand. They should not be permitted to do so.

C. Defendants are not permitted to rely upon the Confidential Materials for any purpose, including summary judgment briefing, because they were determined to be inadmissible at trial.

The Court should also keep the Confidential Materials sealed because it later determined,

[3] *See also, Automation Tool Die, Inc. v. Cook*, 9th Dist. Medina No. 02CA0015-M, 2002-Ohio-7325, ¶ 16 ("In a typical case, the abuse of process does not arise out of the same transaction or occurrence that is the subject matter of the underlying claim, but arises from events occurring during the course of the underlying litigation.").

as a matter of law, that the Confidential Materials were inadmissible at trial. The fact that the Confidential Materials were attached to a summary judgment brief does not mean they should be *ipso facto* viewed by the public. In particular, private, ***inadmissible*** evidence should not be viewed by the public. Defendants' Motion is nothing more than an end-run around the Court's decision on the parties' motions *in limine*.

It is blackletter law in Ohio that only evidence that would be admissible at trial may be submitted and considered during summary judgment proceedings. *Gerry v. Saalfield Square Properties*, 9th Dist. Summit No. 19172, 1999 WL 66204, *2; *Wesley v. Walraven*, 4th Dist. Washington No. 12CA18, 2013-Ohio-473, ¶ 21; *Chase Bank, USA v. Curren*, 4th Dist. No. 10CA2, 191 Ohio App.3d 507, 2010-Ohio-6596, 946 N.E.2d 810, ¶ 16; *Clifton v. Johnson*, 4th Dist. Pickaway No. 15CA30, 2016-Ohio-8120, ¶ 13; *Pennisten v. Noel*, 4th Dist. Pike No. 01CA669, 2002-Ohio-686; *Brady Fray v. Toledo Edison Co.*, 6th Dist. Lucas No. L-02-1260, 2003-Ohio-3422, ¶ 30. Thus, evidence which is inadmissible at trial is also inadmissible during the summary judgment stage, meaning it should not be considered by the Court or the public.

Defendants have conceded, during this litigation, that the Confidential Materials are inadmissible evidence. Defendants failed to proffer any of the Confidential Materials at trial and have thus waived any objection to the Court's preliminary ruling that the materials were inadmissible. An order on 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 made a preliminary determination that the Confidential Materials were inadmissible, unless Defendants could show a legitimate use:

> **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 satisfied all other issues relating to admissibility. Defendants did not seek to do so and thus, they have waived any objection or argument that the materials were admissible at trial. 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.

Indeed, Defendants' failure to seek to introduce these materials at trial means the materials are inadmissible under the Court's preliminary ruling. Because Defendants conceded their

inadmissibility at trial, the materials are also inadmissible during summary judgment. Therefore, the Court and any appellate court cannot consider these materials. As a result, there is no legitimate purpose for unsealing these materials.

D. Defendants have waived their right to challenge the Confidential Materials' designation by waiting over six (6) months from when they received the materials, until after the Court's order on motions *in limine,* and until after the conclusion of a six-week jury trial.

Defendants knew that the confidential designations on the Confidential Materials were in dispute in March of 2019 and intentionally decided against challenging the designation before or during trial. As a result, they have waived the right to challenge them now. A waiver is a voluntary relinquishment of a known right. *Chubb v. Ohio Bur. of Workers' Comp.*, 81 Ohio St.3d 275, 1998-Ohio-628, 690 N.E.2d 1267 (1998), citing *State ex rel. Athens Cty. Bd. of Commrs. v. Gallia, Jackson, Meigs, Vinton Joint Solid Waste Mgt. Dist. Bd. of Directors*, 75 Ohio St.3d 611, 1996-Ohio-68, 665 N.E.2d 202 (1996).

When a protective order does not specify a time for a party to challenge a confidential designation, the parties are permitted to challenge at any time ***prior to trial***. *Baughman v. State Farm Mut. Auto. Ins. Co.*, 9th Dist. No. 22316, 160 Ohio App.3d 642, 2005-Ohio-1948, 828 N.E.2d 211, ¶ 10[4] (When dealing with a protective order governing pretrial discovery (like the protective order in our case) and which did not provide a specific deadline for challenging confidential designations, the Ninth District held: "Thus, implicitly the parties had the right to contest confidentiality under the agreement until trial began."[5]).

[4] The protective order in *Baughman* specified that when a motion challenging a designated document is filed, the party who designated the document had the burden to show why the document should remain confidential. The protective order in the present case presents no such burden-shifting provision.

[5] Although *Baughman* held that no waiver occurred, the facts are distinguishable from the present case. In *Baughman*, the case was decided on summary judgment. 2005-Ohio-1948, ¶ 12. In this case, a trial was actually held over the course of approximately six (6) weeks. Thus, Defendants, unlike the litigants in *Baughman*, waived any challenge because they failed to contest the confidential designations ***before the trial began***.

A finding of waiver is supported by the events that occurred between the parties' March 2019 correspondence and the filing of the Motion. Defendants were aware in March of 2019 that Plaintiffs would retain the designations. Defendants specifically raise this issue with Plaintiffs in March and Plaintiffs did not agree, at that time, to remove the designations. The parties thereafter prepared for trial, including attending a pretrial and filing numerous motions *in limine* (some of which covered the Confidential Materials). Defendants never challenged the designations for the Confidential Materials before trial, which was the period governed by the protective order. [See Stipulated Protective Order, ¶ 1 ("**Scope.** All documents produced in the course of discovery…") (Emphasis original.)]. Defendants failed to raise this issue during trial, either by formally challenging the designations or by seeking to introduce the materials at trial.

The discussion of Plaintiffs' March 20, 2019 letter at page 5 of Defendants' Motion focuses on purely irrelevant material. In the March 20, 2019 letter, Plaintiffs made a specific offer to Defendants – in exchange for Defendants agreeing to Plaintiffs' motion to unseal, Plaintiffs would agree to remove the confidential designations on the Confidential Materials. [See Exhibit 4 to Defendants' Motion]. Defendants did not agree to the proposal and thus, it was made null and void. Moreover, such an offer has no bearing on whether Defendants are able to challenge the confidential designations following trial.

Based on the foregoing, Defendants waived their right to challenge the confidential designations of the Confidential Materials by not asserting the challenge prior to trial.

E. Because the Confidential Materials are those of a private, non-party individual on a private Facebook account discussing private matters, they are distinguishable from those materials subject to Plaintiffs' motion to unseal and should remain sealed under the *Adams* test.

At page 4 of their Motion, Defendants admit the Confidential Materials "consist almost entirely of" nonparty ADG's purported communications. They are not the statements of any of

the Plaintiffs. They are not contained on any of Plaintiffs' electronic devices or social media accounts. Defendants have failed to submit any evidence that ADG made any of these statements during the course and scope of his employment and in furtherance of that employment. *Gerry*, 1999 WL 66204, *2 (party attempting to meet the statement-by-employee/agent hearsay rule bears the burden "demonstrating that the statement concerned a matter within the scope of the employment of the declarant…"). Indeed, Defendants failed to present any evidence that ADG made the statements at all, as the Facebook messages have not been authenticated and were not presented at trial. Thus, these statements are quite different from those discussed within Plaintiffs' previously filed motion to unseal.

Moreover, Defendants have not made the case that the *Adams* factors favor unsealing. Specifically, two factors stand out in support of why the materials should remain sealed – the nature of the material for which protection is sought and the need for continued privacy. Several courts have provided heightened privacy protections to social media accounts, such as Facebook. See *Georgel v. Preece,* E.D. Kentucky No. 0:13-cv-57, 2014 WL 12647776, *3 (Feb. 28, 2014) (discussing numerous such cases). Here, the Confidential Materials come from the private account of ADG, a non-party. ADG clearly has a need for continued privacy of his ***private*** Facebook account[6]. Defendants have not shown that these materials are within the public purview, which makes sense because if they were, Defendants could have obtained them without issuing a subpoena. The Confidential Materials do not involve Plaintiffs because they were not made by Plaintiffs. Further, Defendants failed to make any showing that these materials meet the hearsay exception for employees or agents,[7] or any other hearsay exception. Defendants know they cannot

[6] This obviously assumes Defendants could actually authenticate the Confidential Materials and prove they are ADG's statements (which they have not attempted to do).

[7] Hearsay is inadmissible during summary judgment. *Carter v. Gerbec*, 9th Dist. Summit No. 27712, 2016-Ohio-

make that showing and are thus using the Motion to collaterally attack Plaintiffs.

Furthermore, the public interest in obtaining the Confidential Materials is nonexistent, or extremely minimalistic, for the simple reason the materials were used in connection with a ***legal issue decided by the Court*** on summary judgment and were not used during the proceeding through which the public has the greatest interest – the trial. Defendants could have attempted to introduce the Confidential Materials at trial and thereby permit a live witness (ADG) to testify about them. Defendants chose not to and now they want to use these unsworn, inadmissible statements, take them out of context, and further smear Plaintiffs. The Court should not permit them to do so.

Additionally, it should be noted that Ohio courts have examined Facebook content with great skepticism and caution, particularly in the area of admissibility. *State v. Gibson*, 6th Dist. Lucas No. L-13-1222, 2015-Ohio-1679, ¶¶ 34-35; *State v. Oldaker*, 4th Dist. Meigs No. 16CA3, 2017-Ohio-1201, ¶ 22, appeal not allowed, 150 Ohio St.3d 1432, 2017-Ohio-7567, 81 N.E.3d 1272, ¶ 22 (2017). The Sixth District has described Facebook, and the evidentiary minefields it creates, as follows:

> Facebook has been described as "a widely-used social-networking website * * * that allows users to connect and communicate with each other." *Ehling v. Monmouth–Ocean Hosp. Service. Corp.*, 961 F.Supp.2d 659, 662 (D.N.J.2013). "Every Facebook user must create a Profile Page, which is a webpage that is intended to convey information about the user." *Id*. An individual's "Profile Page can include the user's contact information; pictures; biographical information, such as the user's birthday, hometown, educational background, work history, family members, and relationship status; and lists of places, musicians, movies, books, businesses, and products that the user likes." *Id* . [sic] In addition to a profile page, each user has a "News Feed." *Id*. "The News Feed aggregates information that has recently been shared by the user's Facebook friends." Facebook pages are public, by default. *Id*. "However, Facebook has customizable privacy settings that allow users to restrict access to their Facebook content." *Id*.

4666, ¶ 42 (" Hearsay is inadmissible in the summary judgment context, unless an exception to the hearsay rule applies.").

> Facebook users often "post content—which can include text, pictures, or videos—to that user's profile page" delivering it to the user's subscribers. *Parker v. State*, 85 A.3d 682, 686 (Del.2014). *** Authentication concerns arise in regard to printouts from Facebook "because anyone can create a fictitious account and masquerade under another person's name or can gain access to another's account by obtaining the user's username and password," and, consequently, "[t]he potential for fabricating or tampering with electronically stored information on a social networking sight" is high. *Griffin v. State*, 419 Md. 343, 19 A.3d 415, 421 (2011). *See also Campbell v. State*, 382 S.W.3d 545, 550 (Tex.App.2012) ("Facebook presents an authentication concern * * * because anyone can establish a fictitious profile under any name, the person viewing the profile has no way of knowing whether the profile is legitimate."); *Smith v. State*, 136 So.3d 424, 433 (Miss.2014) (in regard to Facebook, authentication concerns arise "because anyone can create a fictitious account and masquerade under another person's name.").

Gibson, supra. Thus, when examining whether to admit content from Facebook, courts should exercise caution due to the inherent possibility that the content may be fraudulent or otherwise untrustworthy. Defendants took no steps to assuage these concerns, such as, for example, having ADG authenticate the Facebook messages through live testimony at trial.

Moreover, even under the Court's prior admonition that keeping filed discovery materials from the public's view is done so only when good cause exists (see Entry, p. 2), good cause exists here because Defendants have failed to articulate any reason why the public should see materials that Defendants should not have filed in the first instance, which were not admissible at trial, which consequently are also not admissible in connection with the motions for summary judgment, and which Defendants decided were not important enough to even try to introduce at trial.

III. CONCLUSION

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

DATED: September 11, 2019

Respectfully submitted,

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