IN THE COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO

M.R., a Cincinnati Police Officer	Case No. A2002596
Plaintiff,	Judge Shanahan
v.	
Julie Niesen, et al.	RENEWED MOTION FOR PRELIMINARY INJUNCTION
Defendants.	

Plaintiff, M.R., by and through counsel, pursuant to Civ. R. 65, hereby moves this Court to issue a Preliminary Injunction against Defendants, Julie Niesen, James Noe, Terhas White and Friends of Bones in the form attached hereto as Exhibit 1. This Motion is supported by the Complaint, the First Affidavit of M.R., the evidence to be presented at hearing and the attached Memorandum of Law.

Respectfully submitted,

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MEMORANDUM

I. Introduction

On June 22, 2020, Plaintiff, M.R., a white Cincinnati police officer, filed a Motion for Temporary Restraining Order ("TRO"), requesting this Court to order Defendants Julie Neisen, James Noe, Terhas White and Friends of Bones to 1. remove all postings on social media that falsely portrayed Plaintiff as a "white supremacist" and refrain from making similar posts in the future; and 2. refrain from publicizing Plaintiff's personal identifying information on social media and other channels.

As background for Plaintiff's motion, Defendants made a series of social media posts that falsely portrayed Plaintiff as racist. For example, On June 25, 2020, Defendant Neisen published a social media post portraying Plaintiff as a white supremacist. On the same date, Defendant Noe referred to Plaintiff on social media as a "limped dick POS" [piece of shit] and claimed that Plaintiff was flashing the "white power symbols to Black speakers"; he included in this post a deceptively edited photograph intending to portray Plaintiff as a "white supremacist". The other Defendants made similar posts.

In response, on June 22, 2020, Plaintiff filed a Complaint seeking a TRO, Preliminary and Permanent Injunctive Relief and damages, accompanied by a Motion for TRO. In his Complaint, Plaintiff asserts claims for false light invasion of privacy, defamation and negligent/reckless conduct based on the Defendants' social media posts. After an initial hearing on June 24, 2020, the Court granted Plaintiff's request in part, issuing a TRO to prohibit the Defendants from disseminating Plaintiff's identifying personal information on social media and other channels. But the Court denied Plaintiff's request to order the

Defendants to remove existing social media posts and prohibit them from making future postings of a similar nature, citing First Amendment grounds.

In preparation for the hearing on his request for a Preliminary Injunction, Plaintiff offers this Memorandum of Law in support of his request for this Court to order the removal and future prohibition of Defendants' social media posts characterizing him as a racist or white supremacist.

II. Law

A. Defendants' statements do not constitute protected opinion under the First Amendment of the Ohio Constitution

Section 11, Article I of the Ohio Constitution provides that "Every citizen may freely speak, write, and publish his sentiments on all subjects, being responsible for the abuse of the right; and no law shall be passed to restrain or abridge the liberty of speech, or of the press." In *Scott v. News-Herald*, 25 Ohio St.3d 243, 244, 496 N.E.2d 699 (1986), the Ohio Supreme Court held that expressions of opinion are generally protected by this Section. Subsequently, in *Vail v. The Plain Dealer Publishing Co.*, 72 Ohio St.3d 279, 649 N.E.2d 182 (1995), syllabus, the Court held that when determining whether speech is protected opinion, a court must consider the totality of circumstances, which includes:

- the specific language at issue;
- whether the statement is verifiable;
- the general context of the statement; and
- the broader context in which the statement appeared.

In *Vail*, the Court distinguished Ohio's First Amendment protection from that afforded to its federal counterpart by the United State Supreme Court in *Milkovich v. Lorain Journal Co.,* 110 S.Ct. 2695, 497 U.S. 1, 111 L.Ed.2d 1 (1990), paragraph 1 of the syllabus. In *Milkovich*, the Court refused to adopt a separate "opinion" privilege limiting the application of state defamation laws. But while noting that the "the Ohio Constitution provides a separate and independent guarantee of protection for opinion ancillary to freedom of the press," the Court in *Vail* did not perceive this distinction between federal and state law to be "as great as it may appear." The Court noted, in citing to Justice Brennan's dissent in *Milkovich*, that the factors used by the Supreme Court to determine whether a statement implies actual facts were the "same indicia that lower courts have been relying on * * * to distinguish between statements of fact and statements of opinion: the type of language used, the meaning of the statement in context, whether the statement is verifiable, and the broader social circumstances in which the statement was made." *Vail* at 281, quoting *Milkovich* at 24. So in Ohio, while the method of analysis shifts to whether the statement was fact or opinion, this may be a "distinction without a difference" from the federal approach. *Vail*, 72 Ohio St.3d 281-2822. Note that in *Wampler v. Higgins*, 93 Ohio St.3d 111, 752 N.E.2d 962 (2001), syllabus, the Ohio Supreme Court extended the exception in *Vail* to statements made by Ohio citizens generally.

Thus, under Ohio law, courts employ the four-pronged, totality-of-the-circumstances test to determine whether a statement is fact or opinion. *Vail* at 282. "Each prong provides a different parameter for making that assessment, and it is within this fact/opinion paradigm that courts have continued to use it." *Boulger v. Woods*, 917 F.3d

471, 483 (6th Cir. 2019). The analysis focuses on the "the common meaning ascribed to the words by an ordinary reader." *Vail* at 282. Accordingly, it is a reasonable **reader's** perception of the statement--not the perception of the publisher—that distinguishes fact from opinion in this context. *McKimm v. Ohio Elections Comm*., 89 Ohio St.3d 139, 729 N.E.2d 364, 2000-Ohio-118, (2000):

> As *Milkovich*, *Masson*, *Vail*, and *Harper* demonstrate, then, the law charges the author of an allegedly defamatory statement with the meaning that the reasonable reader attaches to that statement. See, also, 3 Restatement of the Law 2d, Torts (1977), Section 563 ("The meaning of a communication is that which the recipient correctly, or mistakenly but reasonably, understands that it was intended to express."). If the law were otherwise, publishers of false statements of fact could routinely escape liability for their harmful and false assertions simply by advancing a harmless, subjective interpretation of those statements.

Analyzing these 4 factors, Defendants' social media posts are clearly not opinions worthy of protection under Ohio's Constitution. Rather, they are false factual statements made by Defendants with the intent to harm Plaintiff. The first factor focuses on the specific language at issue, "the common meaning ascribed to the words by an ordinary reader." *Toledo Heart Surgeons, Inc. v. Toledo Hosp.*, 154 Ohio App.3d 694, 2003-Ohio-5172, 798 N.E.2d 694, ¶ 29 (6th Dist.). Defendants' social media posts accuse Plaintiff of being a "white supremacist," and flashing the "white power" sign at a public event. These words are neither ambiguous (*Dudee v. Philpot*, 1st Dist. Hamilton No. C-180280; 2019-Ohio-3939, ¶ 55) nor "loosely definable or variously interpretable" (*Toledo Hosp.*, ¶ 29), and therefore are factual in nature. Further, these Defendants did not mince their words; they made no attempt to indicate that these descriptions were merely suggestions or opinions. See, for example,

*Committee to Elect Straus Prosecutor v. Ohio Elections Com*mission,10th Dist. Franklin No. 07AP-12, 2007-Ohio-5447, ¶ 11.

Under the second factor, the Defendants' statements can easily be verified, and are therefore factual. "Because opinion, as a matter of law, cannot be proven false, the remarks must be measured to see whether they are capable of proof or disproof." *Toledo Hosp*., ¶ 30. When a speaker "represents that he has private, first-hand knowledge which substantiates the opinions he expresses," those opinions become as damaging as facts. *Dudee v. Philpot*, 1st Dist. Hamilton No. C-180280, 2019-Ohio-3939, ¶ 61, quoting *Scott v. News-Herald*, 25 Ohio St.3d 243, 251, 496 N.E.2d 699 (1986).

Plaintiff has already offered his own testimony that the statements are false – that his hand signal was meant to convey the commonly used "O.K." sign in response to an inquiry about the security guard. (See Plaintiff's Affidavit, separately filed.) Defendants may want to dispute Plaintiff's account, but that does not mean that the statements are not verifiable.

Under the third factor and fourth factors, the court evaluates "the general objective and subjective context in which the statements were published as well as the broader context." *Sturdevant v. Likley*, 9th Dist. Medina C.A. 12CA0024-M, ¶ 14, quoting *Scott* at 252. This includes an analysis of the "general tenor" of the speech. *Sturdevant* ¶ 14, quoting *Vail* at 282. Defendants posted these statements on their social media platforms, accusing Plaintiff of being a white supremacist in a climate of severe hostility toward police officers. Further, at least one Defendant threatened to ***dox*** Plaintiff-to reveal his personal identifying information online—seemingly for sport. Other posts include, "Fuck SWAT," "Fuck 12,"

"ACAB", "1312" and many similar statements evidencing the Defendants' hatred and malice toward the police, including the Plaintiff.

B. Defendants' statements are not protected against Plaintiff's false light invasion of privacy claim

In *Welling v. Weinfeld*, 113 Ohio St.3d 464, 2007-Ohio-2451, 866 N.E.2d 1051, syllabus, the Ohio Supreme Court recognized a cause of action for false light invasion of privacy:

> One who gives publicity to a matter concerning another that places the other before the public in a false light is subject to liability to the other for invasions of privacy if a. the false light in which the other was placed would be highly offensive to a reasonable person and b. the actor had knowledge of or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the other would be placed. (Restatement of the Law 2d, Torts (1977), Section 625E, adopted.)

This tort is distinct from Plaintiff's defamation claim. See *Dudee v. Philpot*, 1st App. Dist. C0180280, 2019-Ohio-3939, ¶ 82:

> While related, false light and defamation are different causes of action. False light often serves as an additional or alternative remedy for defamatory statements, but a plaintiff need not be defamed to have a cause of action for false-light invasion of privacy. Restatement of the Law 2d, Torts, Section 652(E) (1977). False-light claims are separate and distinct from defamation because they protect a different interest—harm to character, reputation or trade (defamation) vs. publicity of false information (false light). A claim for false-light invasion of privacy is not an avenue for plaintiffs to get into court due to their failure to otherwise set forth a defamation claim.

The Court in *Welling* adopted this false light invasion of privacy claim not because it wanted plaintiffs to have an alternative cause of action when they could not sustain a defamation claim. Rather it wanted to give plaintiffs the ability to protect their interests against having false information publicized about them. *Dudee*, ¶ 84, quoting *Welling*, ¶¶ 39, 50, 60.

Plaintiff's false light claim is based on Defendants' portrayal of him as a racist white police officer who was signaling a white power symbol in public. This false portrayal of a police officer, particularly in this climate and moment in history, is "highly offensive to a reasonable person." See *Welling*, ¶ 55, quoting Restatement of the Law 2d, Torts, Section 652E: "It is only when there is such a major misrepresentation of his character, history, activities or beliefs that serious offense may reasonably be expected to be taken by a reasonable man in his position, that there is a cause of action for invasion of privacy."

Further, Defendants acted with reckless disregard about the truth of these matters when they posted these falsehoods on social media. In fact, their threats to dox Plaintiff (reveal his personal identity) demonstrate their desire to portray Plaintiff in a false light in public, or at least recklessly disregarded the high likelihood that Plaintiff would be portrayed so based on the social media posts.

Regarding the First Amendment, the Court in *Welling*, ¶ 60, acknowledged that in modern times, the existing constitutional protections in place are adequate to protect defendants on false light claims:

> Adequate First Amendment protections are in place in regard to a cause of action for false-light invasion of privacy. The world has changed since *Renwick*, one of the early decisions in which the court refused to recognize false-light claims due in part to First Amendment concerns. In *Renwick*, 310 N.C. 312, 312 S.E.2d 405, the court stated that the right to privacy had first been developed during the period of the excesses of yellow journalism and that formal training in journalism and ethics had ameliorated the concerns of the early leading legal lights as to the damage that could be done to individuals by the press. Id. at 325, 312 S.E.2d 405. At the time of *Renwick* in 1984, Greener's law--"Never argue with a man who buys ink by the barrel"--still applied. **Today, thanks to the accessibility of the Internet, the barriers to generating publicity are slight, and the ethical standards regarding the acceptability of certain discourse have been lowered. As the ability to do harm has grown, so must the law's ability to protect the innocent**. (emphasis added)

Under the facts presented and to be presented at the hearing, Plaintiff has made a sufficient showing of likelihood of success on the false light claim, and Defendants' social media posts are not worthy of protection.

III. Conclusion

Based on the above arguments, Plaintiff respectfully requests this Court to issue an injunction in the form of Exhibit 1.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was served via U.S. Regular mail and/or electronic mail this the 11th day of August 2020 upon the following:

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