

ORIGINAL

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COURT OF CLAIMS  
OF OHIO

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IN THE OHIO COURT OF CLAIMS

STEVEN LISS,

Plaintiff,

vs.

CLEVELAND STATE UNIVERSITY,

Defendant.

) CASE NO.: 2013-00139

) JUDGE PATRICK M. McGRATH

) MAGISTRATE HOLLY T. SHAVER

) PLAINTIFF'S MOTION FOR LEAVE TO

) FILE A REPLY IN SUPPORT OF HIS

) MOTION TO COMPEL DEFENDANT TO

) PRODUCE DR. BERKMAN FOR

) DEPOSITION

Plaintiff Steven Liss respectfully moves the Court for an Order for leave to file, *instanter*, the reply brief attached hereto in support of his motion to compel the deposition of Dr. Ronald Berkman. Defendant Cleveland State University filed a memorandum in opposition to Liss's Motion. The Opposition contains misstatements of law and fact, makes derogatory and unsupported accusations with respect to Liss's intention in seeking certain discovery, and includes evidence and argument that Liss did not anticipate and therefore was unable to address in his Motion. In such circumstances, leave for a reply is appropriately granted.<sup>1</sup>

For the limited purpose of addressing the misstatements and baseless malicious assertions in Defendant's Opposition, objecting to the improper evidence and refuting an unanticipated argument, Liss respectfully requests leave to file the attached reply brief.

ON COMPUTER

<sup>1</sup> See, e.g., *Eng'g & Mfg. Servs., LLC v. Ashton*, 387 Fed. Appx. 575, 583 (6th Cir. 2010) (holding trial court abused its discretion in denying motion for leave to file sur-reply where reply brief presented new arguments); *Zindroski v. Parma City Sch. Dist. Bd. of Educ.*, 8th Dist. Cuyahoga No. 93583, 2010-Ohio-3188, 2010 Ohio App. LEXIS 2659, ¶10 (noting court previously granted leave for a sur-reply for purposes of "responding to the Board's new arguments [in its reply brief].").

Respectfully submitted,



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### **CERTIFICATE OF SERVICE**

A true and accurate copy of the foregoing was served via electronic and U.S. Mail, on  
this 29th day of August 2014 to:

Randall W. Knutti, Esq.

Amy S. Brown, Esq.

Emily M. Simmons, Esq.

Ohio Attorney General's Office

Court of Claims Defense Section

150 East Gay Street, Floor 18

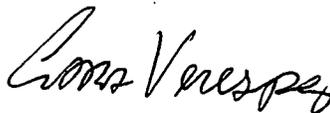
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*Attorneys for Defendant*



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*Attorney for Plaintiff Steven Liss*

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) **DEPOSITION**

Defendant failed to seek a protective order from this Court, thereby waiving its right to object to Dr. Berkman's deposition. Even if Defendant had sought a protective order, Liss is entitled to the deposition of Dr. Berkman because Defendant identified him as someone with knowledge and Defendant does not dispute that he has knowledge no one else can provide, including why he commissioned a second consulting report with respect to the Department of Student Life subsequent to the first consulting report, which Defendant claims led to Liss's termination. Dr. Banks's relationship with the author of the first consultant report is highly probative as to the validity and impartiality of that report and questions on this issue are entirely appropriate. Defendant's claim that Rule 30 is not the proper mechanism to compel Dr. Berkman's attendance and that Liss must subpoena him is simply wrong. Finally, a deposition is needed to test Dr. Berkman's self-serving affidavit.

For all these reasons, as well as those set forth in the motion to compel, Liss respectfully requests that the Court enter an Order compelling Dr. Berkman to appear for a deposition not to exceed four hours and to occur at his place of work.

**LAW & ARGUMENT**

**I. Defendant Failed to Seek a Protective Order Thereby Waiving All Objections.**

"[A] party who decides not to appear for a deposition . . . should apply for a protective order. By waiting until a motion for immediate sanctions has been made, he waives his

objections to the discovery sought.”<sup>1</sup> There is no dispute that Defendant did not seek a protective order with respect to Dr. Berkman’s properly noticed deposition and Defendant offers no excuse for its failure to do so. The Court’s inquiry can end here and the motion to compel should be granted.

**II. Defendant Admits That Dr. Berkman Has Knowledge Concerning the Consulting Reports That Are Relevant to Liss’s Claims.**

Defendant does not dispute that Dr. Berkman signed Liss’s termination letter, that Dr. Berkman personally denied Liss’s internal appeal and that Dr. Berkman was identified by Defendant as someone with knowledge. Moreover, Defendant does not even address the undisputed fact that following the consulting report that Defendant claims was the basis for Liss’s termination, Dr. Berkman commissioned a second consulting report on the same subject matter addressed in the first report. Nor does Dr. Berkman’s self-serving affidavit provide any information concerning why he commissioned this report. Only deposition testimony can reveal Dr. Berkman’s thought process with respect to commissioning that report, which likely will show that the first report and the basis for Liss’s termination was faulty.

**III. Defendant Wholly Misses the Point With Respect to Dr. Banks’s Relationship With the Consultant Who Authored the First Report.**

Dr. Banks’s relationship with the consultant he recommended Defendant engage to study the Department Dr. Banks is in charge of is relevant. In fact, it is “spectacularly” relevant, contrary to Defendant’s claim otherwise.<sup>2</sup> It cannot be disputed that Dr. Banks’s personal relationship with the consultant, at a minimum, brings into question the validity of the report. That coupled with correspondence showing that Dr. Banks directed the consultant as to what the report should recommend and the fact that a second report was commissioned all suggest that the first report, which Defendant claims was the basis for Liss’s termination, was defective.

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<sup>1</sup> *American Sales v. Boffo*, 71 Ohio App. 3d 168, 174, 593 N.E.2d 316, 320 (1991).

<sup>2</sup> Opposition at p.11 (claiming that Dr. Banks’s relationship with the consultant is “spectacularly irrelevant.”).

Engaging in an unwarranted and malicious personal attack on Liss because his counsel sought to explore the relationship between Dr. Banks and the consultant is inappropriate and simply misses the point.

**IV. Dr. Berkman's Affidavit Should Be Disregarded.**

Dr. Berkman's affidavit should not be considered in connection with the motion to compel. Indeed, depositions exist for the very purpose of testing self-serving statements like those found in Dr. Berkman's affidavit.<sup>3</sup>

**V. Defendant's Own Admissions Establish That Dr. Berkman's Deposition May Be Noticed Under Rule 30.**

“[A] deposition notice, unaccompanied by a subpoena, is ordinarily sufficient to compel the appearance of a corporate opponent's officers, directors, and managing agents at a deposition.”<sup>4</sup> Defendant's Opposition makes much ado about Dr. Berkman's role at CSU and even goes as far as suggesting that his absence from campus for four hours will bring CSU to a standstill.<sup>5</sup> He thus is certainly the equal of corporate “officers, directors, and managing agents[.]” As such, a deposition by notice is proper and a subpoena is not required.

Moreover, courts do not permit parties to claim a subpoena is required where the parties' course of conduct has indicated that a notice is sufficient. *See, e.g., EEOC v. Tepro, Inc.*, E.D. Tenn. No. 4:12-cv-75, 2014 U.S. Dist. LEXIS 112590, \*8-9 (Aug. 14, 2014) (granting motion to compel deposition and rejecting the plaintiff's argument that a subpoena was required, and reasoning, in part, “the parties' customary discovery practices included the production of EEOC employees without the issuance of subpoenas.”). Here Defendant has permitted Liss to proceed with the depositions of at least six CSU employees without requiring a subpoena. The

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<sup>3</sup> *Cf. Burt v. Harris*, 10th Dist. Franklin No. 03AP-194, 2004-Ohio-756, \*11 (holding an affidavit that contradicts deposition testimony should be disregarded) (internal citations omitted). *See also Richardson v. Potter*, E.D. La. No. 03-1581, 2004 U.S. Dist. LEXIS 7871, \*12-13 (May 3, 2004) (holding motion for summary judgment premature because “[w]hile the government has attached the self-serving affidavits of their key witnesses, none of them have been tested through adversarial deposition.”).

<sup>4</sup> *EEOC v. Honda of Am. Mfg., Inc.*, 2007 U.S. Dist. LEXIS 14496, 4-6 (S.D. Ohio Feb. 28, 2007).

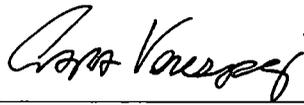
<sup>5</sup> *See, e.g., Opposition* at p.3 (claiming CSU requires “constant leadership” from Dr. Berkman).

parties' course of conduct establishes that Liss was well within his rights to notice Dr. Berkman's deposition and a subpoena is not required.

**CONCLUSION**

For all these reasons, Plaintiff Steven Liss respectfully requests that the Court grant the motion to compel and order Defendant to produce Dr. Berkman for a deposition at CSU not to exceed four hours.

Respectfully submitted,



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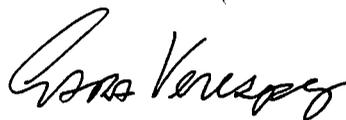
*Attorneys for Plaintiff Steven Liss*

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this 29th day of August 2014 to:

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*Attorneys for Defendant*



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*Attorney for Plaintiff Steven Liss*

TPG

THORMAN PETROV GRIFFIN

August 29, 2014

**Via Regular U.S. Mail**

The Ohio Judicial Center  
Court of Claims of Ohio  
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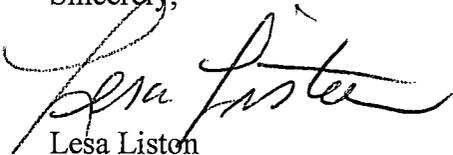
Re: *Liss v. Cleveland State University-Case No.: 2013-00139*

Dear Sir/Madam:

I have enclosed an original and two copies of *Plaintiff's Motion for Leave to File a Reply in Support of his Motion to Compel Defendant to Produce Dr. Berkman for Deposition* for the above referenced matter. The original is for filing with the Clerk and the two other copies we would like to have time-stamped. Please return the time-stamped copies to me in the enclosed self-addressed postage-prepaid envelope. *lac*

Thank you for your attention to this matter. Please do not hesitate to call me should you have any questions.

Sincerely,



Lesa Liston  
Paralegal  
[liston@tpgfirm.com](mailto:liston@tpgfirm.com)

Enclosures

cc: Randall W. Knutti, Esq.  
Amy S. Brown, Esq.  
Emily M. Simmons, Esq.

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