

IN THE OHIO COURT OF CLAIMS

STEVEN LISS,	)	CASE NO.: 2013-00139
	)	
Plaintiff,	)	JUDGE PATRICK M. McGRATH
	)	
vs.	)	MAGISTRATE HOLLY T. SHAVER
	)	
CLEVELAND STATE UNIVERSITY,	)	<b><u>PLAINTIFF'S BRIEF IN OPPOSITION TO</u></b>
	)	<b><u>DEFENDANT'S MOTION TO COMPEL</u></b>
Defendant.	)	

Without “mak[ing] a reasonable effort to resolve the matter *through discussion*[,]”<sup>1</sup> Defendant Cleveland State University (“CSU”) filed a motion to compel related to a document that is not in the possession of Plaintiff Steven Liss. The motion should be denied for two reasons: (1) CSU failed to comply with Rule 37, which requires advance consultation between counsel prior to the filing of a motion to compel, and (2) the affidavit attached hereto provides the information CSU seeks in the motion.

Rule 37 requires that prior to filing a motion to compel, the moving party “make a reasonable effort to resolve the matter through discussion with the attorney . . . from whom discovery is sought[.]” and that in the motion to compel the party provide “a statement reciting the efforts made to resolve the matter in accordance with this section.”<sup>2</sup> CSU’s motion fails to recite any *discussion* with Liss’s counsel concerning the subject matter of the motion. As such, the motion violates Rule 37 and it should be denied as premature.

A separate and independent reason for denial of the motion is that Liss’s affidavit, attached hereto as Exhibit 1, provides the details sought in CSU’s motion—*i.e.* “explain[s] what happened to [the document].”<sup>3</sup> Specifically, Liss created the document on a CSU computer and

<sup>1</sup> Civ. R. 37(E) (emphasis added).  
<sup>2</sup> *Id.*  
<sup>3</sup> Defendant’s motion to compel at p. 1.

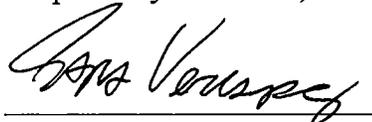
ON COMPUTER

saved the document to the secured drive CSU provided for him.<sup>4</sup> Upon termination, he lost access to the secured drive.<sup>5</sup> He has searched for the document but was not able to find it.<sup>6</sup>

Liss subsequently created a second document, at the request of his counsel and in anticipation of litigation, that contained some of the same or similar information as contained in the "log of incidents."<sup>7</sup> That document transmitted between client and attorney for the purpose of seeking legal advice is a privileged attorney-client communication.<sup>8</sup>

CSU did not comply with Rule 37 and therefore the motion is premature; and Liss has provided the information CSU seeks. For these reasons, Liss respectfully requests that the Court deny CSU's motion to compel.

Respectfully submitted,



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*Attorneys for Plaintiff Steven Liss*

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<sup>4</sup> *Affidavit of Steven Liss* at ¶5.

<sup>5</sup> *Id.* at ¶7.

<sup>6</sup> *Id.* at ¶¶3-4.

<sup>7</sup> *Id.* at ¶8.

<sup>8</sup> To the extent that CSU seeks this second document, Liss requests an *in camera* review.

**CERTIFICATE OF SERVICE**

A true and accurate copy of the foregoing was served via electronic mail, on this 8th day  
of October 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  
Columbus, OH 43215  
[Randall.Knutti@OhioAttorneyGeneral.gov](mailto:Randall.Knutti@OhioAttorneyGeneral.gov)  
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*Attorneys for Defendant*

  
\_\_\_\_\_  
*Attorney for Plaintiff Steven Liss*

STATE OF OHIO )  
 ) ss. AFFIDAVIT OF STEVEN LISS  
COUNTY OF CUYAHOGA )

Now comes Affiant, Steven Liss, and after being duly sworn according to law attests that:

1. I have personal knowledge of the facts set forth in this affidavit and am competent to testify as to these facts.
2. I have reviewed the transcript of my deposition in the matter *Liss v. Cleveland State University*, Ohio Court of Claims Case No. 2013-00139, including my testimony concerning a "log of incidents."<sup>1</sup>
3. I have searched for the document I referred to in my testimony.
4. However, I cannot find the document.
5. I created and edited the document on computers at CSU, and saved the document in a secured computer drive assigned to my name that was provided and controlled by CSU.
6. I believe that the original document file is in the possession of CSU.
7. When I was terminated, I lost access to the CSU computer system, including the secured computer drive and the hard drive of my CSU computer.
8. At the request of my counsel and in anticipation of litigation, I prepared a separate document that included some of the same or similar information as the document I referred to in my testimony.
9. I assert attorney-client privilege over this document that I created for counsel.

[left intentionally blank]

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<sup>1</sup> Liss Dep. 116:6.



St Liss

STEVEN LISS

Sworn to before me and subscribed in my presence this 8 day of October  
2014.

Danica S. Houle

NOTARY PUBLIC

Danica S. Houle, Notary Public, State of Ohio,  
Cuy. Cty. My commission expires Feb. 27, 2016.

TPG

THORMAN PETROV GRIFFIN

October 8, 2014

**Via UPS Overnight Mail**

The Ohio Judicial Center  
Court of Claims of Ohio  
65 South Front Street  
Third Floor  
Columbus, OH 43215

FILED  
COURT OF CLAIMS  
OF OHIO

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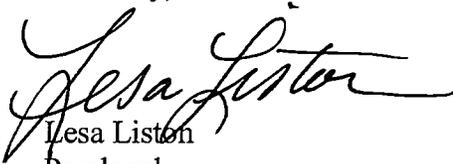
Re: *Liss v. Cleveland State University-Case No.: 2013-00139*  
*Russell v. Cleveland State University-Case No.: 2013-00138*

Dear Sir/Madam:

I have enclosed an original and two copies of *Plaintiff's Opposition to Defendant's Motion to Compel* for the cases referenced above. 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. *lao*

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

Sincerely,



Lesia Liston  
Paralegal  
[lleston@tpgfirm.com](mailto:lleston@tpgfirm.com)

Enclosures

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