

**UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF FLORIDA**

JAMES TRACY,	)	
	)	
Plaintiff,	)	
	)	Case No. 9:16-cv-80655-RLR-JMH
v.	)	
	)	
FLORIDA ATLANTIC UNIVERSITY	)	
BOARD OF TRUSTEES, a/k/a FLORIDA	)	
ATLANTIC UNIVERSITY, et al.	)	
	)	
	)	
Defendants.	)	

**PLAINTIFF’S MOTION TO CONTINUE RULE 30(b)(6) DEPOSITION OF  
DEFENDANT FLORIDA ATLANTIC UNIVERSITY**

Plaintiff JAMES TRACY, by and through the undersigned, hereby respectfully submits this Motion to Continue Rule 30(b)(6) Deposition of Defendant Florida Atlantic University (“Defendant University”). In support of his motion, Plaintiff states as follows:

1. As outlined below, this Motion is occasioned by Defendant University’s failure to comply with Federal Rules of Civil Procedure by failing to prepare its designated corporate representative for her Rule 30(b)(6) deposition on July 28, 2017.
2. On June 30, 2017, the Court granted Plaintiff permission to take a limited 30(b)(6) deposition, not to exceed three and one-half (3.5) hours.
3. On July 28, 2017, Plaintiff conducted the limited 30(b)(6) deposition of the Defendant University’s corporate designee, Defendant Diane Alperin (hereinafter “Alperin”).
4. The Plaintiff designated seventeen (17) topics for Defendant University to designate the person(s) having knowledge of the matters sought and to prepare those persons in order that they can answer fully, completely, unequivocally, the questions posed as to the relevant subject matters. (See Exhibit “A”).

5. Defendant University did not designate a person with knowledge of all of the topics and matters sought in the 30(b)(6) Notice, nor did Defendant University prepare Alperin to answer fully, completely, and unequivocally, the questions posed as to the relevant subject matters. In fact, Alperin testified that she was not given the notice with the designated topics until *the day before* the deposition. (See Exhibit “B”, FAU Dep. Tr. 5:22-6:15).

6. Furthermore, Alperin testified that she only reviewed a handful of documents in preparing for the 30(b)(6) deposition (FAU Dep. Tr. 8:3-9:13). *See In re Brican Am. LLC Equip. Lease Litig.*, 10-MD-02183, 2013 WL 5519969 at 11 (S.D. Fla. Oct. 1, 2013)(holding that a 30(b)(6) deponent is insufficiently prepared when having reviewed only a few documents).

7. When asked questions regarding some of the topics noticed, like blogging, Alperin testified that she “really can’t speak to that”, and lacked knowledge of the topic, and the Defendant University’s policies on blogging, if any. (See FAU Depo. Tr. 10:12-10:21-13:7; 14:11-14:14).

8. When asked about the “Conflict of Interest/Outside Activities” Policy (“Policy”), another topic in the 30(b)(6) Notice, Alperin testified that she had no knowledge as to what the Defendant University’s deans, chairs or directors provided the faculty with in terms of instructions or guidance. (See FAU Depo. Tr. 33:2-34:12; 45:25-46:19; 48:9-49:8).

9. When asked about definitions used by the Defendant University in connection with reporting “outside activities” pursuant to the Policy, Alperin testified that she would have to review documents that she had not looked at in at least a year to answer the questions. (See FAU Depo. Tr. 128:21-129:11).

10. When asked about when there was a discussion at the Defendant University as to whether Plaintiff's blogging activity was a reportable activity, Alperin testified that she did not know. (See FAU Depo. Tr. 215:10-215:13).

11. When asked about whether the Defendant University was aware of similarly situated faculty members' bloggings and whether they had been disciplined for failing to report their blogs pursuant to the "Conflict of Interest/Outside Activities" Policy, Alperin testified that she did not know. (FAU Depo. Tr. 219:18-219:22). Alperin then testified that this topic of questions was no longer her responsibility or role at Defendant University. (See FAU Depo. Tr. 220:9-221:11).

12. When asked about how the Defendant University explained the "Conflict of Interest/Outside Activities" Policy to Plaintiff, Alperin testified that she did not know. (FAU Depo. Tr. 155:8-155:16).

13. Several times throughout the deposition, either purposefully, or due to lack of preparation, Alperin refused to and/or could not answer questions about topics set forth in the 30(b)(6) Notice, severely hindering Plaintiff's counsel's ability to conduct the deposition or cover all the topics noticed. Additionally, Defendant University's counsel made improper speaking objections as a result of Alperin's unpreparedness. (FAU Depo. Tr. 209:3-212:19).

14. Defendant University was required to "make a conscientious good-faith endeavor to designate the persons having knowledge of the matters sought and to prepare those persons in order that they can answer fully, completely, unequivocally, the questions posed as to the relevant subject matters". *In re Brican Am. LLC Equip. Lease Litig.*, 2013 WL 5519969 at 3. "The duty to prepare a Rule 30(b)(6) designee goes beyond matters personally known to the witness or to matters in which the designated witness was personally involved. The duty to produce a

prepared witness on designated topics extends to matters not only within the personal knowledge of the witness but on matters reasonably known by the responding party.” *Id.* at 4. Thus, Defendant University “must prepare its Rule 30(b)(6) designee to the extent matters are reasonably available, whether from documents, past employees, or other sources.” *Id.*

15. “A district court has broad discretion to impose sanctions, which is derived from the court's inherent power to manage its own affairs and to achieve the orderly and expeditious disposition of cases.” *Id.* at 5; *Flury v. Daimler Chrysler Corp.*, 427 F.3d 939, 944 (11th Cir. 2005). “Federal Rule of Civil Procedure 37(d) permits the imposition of sanctions when a party or person designated under Rule 30(b)(6) fails, after being served with proper notice, to appear for that person's deposition.” “Courts have held that producing an unprepared witness is tantamount to a failure to appear at a deposition.” *In re Brican* at 5; *Cherrington Asia Ltd. v. A & L Underground, Inc.* 263 F.R.D. 653, 658 (D.Kan.2010) (holding when a Rule 30(b)(6) witness is not adequately prepared to testify about topics properly identified in a notice to take the deposition, the court may impose various types of sanctions, including the imposition of reasonable attorney's fees and expenses).

16. Because Defendant University waited until the day before the deposition to provide its designee with the 30(b)(6) Notice, the designee could have never gained the requisite knowledge needed in such a short amount of time to be prepared for the deposition, as is evidenced by the fact that Defendant Alperin only reviewed a handful of documents, but failed to review many of the documents which would have been necessary to testify about the subject matter designated in the notice of deposition, i.e FAU's policy on blogging, the reportability of outside activities, instructions given to faculty members pertaining to FAU's “Conflict of

Interest/Outside Activities” Policy, definitions used in connection with FAU’s “Conflict of Interest/Outside Activities” Policy, FAU’s disciplinary procedures, the discipline of Plaintiff, etc.

17. As a result of Defendant University’s willful and purposeful failure to make a conscientious good-faith endeavor to designate persons having knowledge of the matters sought and to prepare those persons in order that they can answer fully, completely, unequivocally, the questions posed as to the relevant subject matters, Plaintiff has incurred unnecessary attorneys’ fees and costs, Defendant University should be sanctioned, and required to produce a witness with sufficient knowledge to testify about the topics set forth in Plaintiff’s 30(b)(6) Notice.

WHEREFORE, for the foregoing reasons, Plaintiff respectfully requests that the Court enter an Order continuing the 30(b)(6) deposition of a designee knowledgeable on the topics provided in Plaintiff’s Notice. Plaintiff also respectfully requests any and all further relief as is just and proper, including an award of sanctions, including attorneys’ fees and costs incurred by Plaintiff in connection with FAU’s failure to produce a prepared 30(b)(6) deponent and the present motion.

**LOCAL RULE 7.1 (A)(3) CERTIFICATION**

Pursuant to Local Rule 7.1 (A)(3), undersigned counsel certifies that his office has conferred with the Defendant University’s counsel in a good faith effort to resolve the issues raised in this motion, and has been unable to do so. Plaintiff’s counsel has requested a continued 30(b)(6) deposition and Defendant University’s production of a witness with sufficient knowledge of the matters set forth in Plaintiff’s 30(b)(6) Notice, and Defendant University has refused.

Dated: August 1, 2017

/s/ Louis Leo IV \_\_\_\_\_  
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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on 1st day of August, 2017, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF to be served this day per the attached Service List.

/s/ Louis Leo IV, Esq.

## SERVICE LIST

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