



January 13, 2020

VIA ELECTRONIC FILING

Honorable David J. Smith
Clerk, Eleventh Circuit Court of Appeals
56 Forsyth Street, NW
Atlanta, Georgia 30303

**Re: *Tracy v. Florida Atlantic University*
Case No. 18-10173-GG: Appellees' Rule 28(j) Response to
Appellant's Supplemental Submission**

Dear Mr. Smith:

Appellant's submission of January 7, 2020 is not an appropriate submission under FRAP 28(j). First, it is not an *authority*, which is the only type of material that may be properly filed under Rule 28(j). *Trans-Sterling, Inc. v. Bible*, 804 F. 2d 525, 528 (9th Cir. 1986) (Rule 28(j) "permits a party to bring new *authorities* to the attention of the court) (emphasis in original). Appellant's submission is of an excerpt from a book in which the author opines on a variety of lawsuits and, Appellant asserts, questions the jury verdict in this case. Such a submission is neither a legal, nor any other type of, *authority*. Instead, it is an improper attempt

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to supplement the record with irrelevant opinion evidence that was never submitted to the trial court (and never could have been properly admitted).

Case law addressing similar attempted Rule 28(j) submissions have uniformly denied supplementation. *See Bowman v. City of Franklin*, 980 F. 2d 1104, n. 1 (7th Cir. 1993) (Court granted motion to strike Rule 28(j) submission consisting of certain reports; the Court observed that the documents were never presented to the district court, that Rule 28(j) deals “only with citation of supplemental *authority*,” and ruled that such proposed additional evidence could not properly be submitted) (emphasis in original); *Boston Carrier, Inc. v. Interstate Commerce Commission*, 746 F. 2d 1555, n. 5 (D. C. Cir. 1984) (wherein Court concluded that Petitioner had abused Rule 28(j) by attempting to file supplemental papers that constituted untested would-be evidence and not authority).

Although other Courts have stricken similar Rule 28(j) submissions, Appellees submit that it would be appropriate for this Court to simply treat Appellant’s submission as a motion to supplement the record and deny it as improper under Rule 28(j). *See, e.g. Trans-Sterling, supra*, at 528 (denying motion to supplement record with evidence of actions taken by the federal government).

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Alternatively, Appellees leave for the Court to determine how to address Appellant's submission.

Respectfully submitted,

/s/Jack J. Aiello

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this letter complies with the word limit of Fed.

R. App. P. 28(j) because the body of the letter contains 325 words.

/s/ Jack J. Aiello

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CERTIFICATE OF SERVICE

I hereby certify that on January 13, 2020, I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system, and the foregoing document is being served on all counsel of record identified on the attached service list via transmission of Notices of Electronic Filing generated by CM/ECF.

/s/ Jack J. Aiello

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