IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

STEPHANIE BIEDIGER, KAYLA LAWLER, ERIN OVERDEVEST, KRISTEN CORINALDESI, and LOGAN RIKER, individually and on behalf of all those similarly situated; and ROBIN LAMOTT SPARKS, individually,	:	CIVIL ACTION NO: 3:09-CV-00621 (SRU)
Plaintiffs,	:	March 15, 2010
against	:	
QUINNIPIAC UNIVERSITY,	:	
Defendant.	:	

MEMORANDUM OF LAW IN OPPOSITION TO
PLAINTIFFS' MOTION FOR CLASS CERTIFICATION

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PRELIMINARY STATEMENT

With little or no evidence, much less the preponderance of the evidence required in this Circuit, Plaintiffs Stephanie Biediger, Erin Overdevest, Kristen Corinaldesi, Kayla Lawler, and Logan Riker (collectively, the "Student-Plaintiffs") seek to certify a class under Rule 23 despite the fact that they cannot establish the required elements. Plaintiffs' motion should be denied for several reasons: (1) plaintiffs' present no evidence to establish that there are other members of the class, much less that they are numerous enough to merit class treatment; (2) the Student-Plaintiffs cannot adequately represent the interests of the class because their interests are in direct conflict with those of a significant portion of the purported class, namely the competitive cheer, indoor track, and outdoor track athletes, whose teams they seek to discredit; and (3) the members of the proposed class cannot be identified based upon any objective criteria and, thus, the class is not ascertainable.

STATEMENT OF FACTS

The five Student-Plaintiffs are all members of the Quinnipiac University volleyball team. They seek to certify a class of

> "all present, prospective, and future female students at QU who are harmed by and want to end QU's sex discrimination in: (a) the allocation of athletic participation opportunities; (b) the allocation of athletic financial assistance; (c) the allocation of benefits provided to varsity athletes; and all females who are deterred from enrolling at QU because of the sex discrimination in its athletic program." (Plaintiffs' Memorandum of Law in Support of Motion for Class Certification, hereinafter "Pl. Mem.", at 23 ¶ 1.)

ARGUMENT

PLAINTIFFS CANNOT MEET THE REQUIREMENTS FOR CLASS CERTIFICATION

Rule 23(a) requires proof of four elements: that the class is sufficiently numerous to justify class treatment; that the class shares a commonality of factual and legal issues; that the named plaintiffs' claims are typical of those they purport to represent; and that the plaintiffs and their counsel will be adequate class representatives. Fed. R. Civ. P. 23(a)(1)-(4). In addition, the class must be ascertainable such that its membership can be determined based on objective criteria. Plaintiffs cannot meet these requirements.

I.

THE APPLICABLE LEGAL STANDARD

Ignoring recent Second Circuit law, plaintiffs urge the Court to construe Rule 23's requirements liberally and assume the allegations in the Amended Complaint to be true in evaluating their motion. (Pl. Mem. at 7.) In accordance with the Second Circuit's decision in Miles v. Merrill Lynch & Co. (In re Initial Pub. Offering Sec. Litig.), 471 F.3d 24 (2d Cir. 2006), however, a district court adjudicating a motion for class certification under Rule 23 must conduct a "rigorous analysis" to determine whether the plaintiffs have satisfied all of the requirements of Federal Rule 23(a) and one of the subsections of Rule 23(b). The moving party cannot rest on pleadings, but must show by a preponderance of the evidence that each requirement of Rule 23 has been met. Teamsters Local 445 Freight Div. Pension Fund v. Bombardier, Inc., 546 F.3d 196, 202 (2d Cir. 2008). Counter to plaintiffs' contentions, "some showing" that Rule 23's requirements have been met is not sufficient. *IPO*, 471 F.3d at 42 (disavowing in relevant part, inter alia, *Caridad v. Metro-North Commuter R.R.*, 191 F.3d 283 (2d Cir.

1999); see also Hendricks v. J.P. Morgan Chase Bank, N.A., 3:08-CV-613, 2009 U.S. Dist. LEXIS 117375 at *31 (D. Conn. Dec. 15, 2009) (recognizing change in legal landscape after *IPO* and burden on moving party to adduce evidence to meet Rule 23's requirements). Rather, Plaintiffs must offer up enough evidence, by affidavits, documents or testimony to establish that class treatment is appropriate. See Blank v. Jacobs, No. 03-CV-2111, 2009 U.S. Dist. LEXIS 91605, at *6-7 (E.D.N.Y. Sept. 30, 2009) (denying class certification where plaintiffs failed to produce affidavits establishing typicality of their claims). Plaintiffs simply do not meet this standard. The declarations upon which they rely are general and formulaic and do not provide any evidentiary basis to support their motion.

Apparently seeking to distract the Court from the inadequacy of the evidence presented, plaintiffs cite numerous cases in which classes were certified, but these cases are not persuasive because many of them make reference to a certified class with no analysis or discussion and they all precede the preponderance of the evidence standard established by the Second Circuit in IPO. (See Pl. Mem. at 6.)

II.

PLAINTIFFS HAVE NOT PROVEN NUMEROSITY BY A PREPONDERANCE OF THE EVIDENCE

Plaintiffs define the proposed class as "current, prospective, and future female students at Quinnipiac University ("QU") who are harmed by and want to end QU's sex discrimination in: (1) the allocation of athletic participation opportunities; (2) the allocation of athletic financial assistance; (3) the allocation of benefits provided to varsity athletes. They similarly file this action on behalf of females who are deterred from enrolling at QU because of the sex discrimination in QU's athletic program, including its

failure to offer the varsity sports in which they want to participate (despite QU's failure to provide equal athletic participation… ." (Emphasis added.)

Plaintiffs do not present any evidence that there are any individuals other than themselves who claim to be "harmed by and want to end" QU's alleged sex discrimination. Interestingly, although Plaintiffs repeatedly stated their intent to add additional plaintiffs before filing their amended complaint, they did not do so. (Excerpts from the Transcript of the October 22, 2009 Court Conference, annexed hereto as Exhibit 1, at 32-33.) They have not submitted any declarations or affidavits from any other female Quinnipiac students or prospective students who have been denied the opportunity to participate in athletics or who purport to be harmed by any alleged inequitable distribution of scholarships and resources among male and female athletes.

Plaintiffs argue that they showed at the preliminary injunction hearing that Defendant must add 150 or more opportunities to reach compliance. (Pl. Mem at 10.) Putting aside the fact that plaintiffs present absolutely no evidence or explanation to support this contention and that it is wholly unsupportable, even if it were true, it does not necessarily follow that there would be 150 women in the class. As defined, the class includes only those women who are harmed by and seek to end the alleged discrimination, and there has been no showing that there are actual women who seek to utilize those allegedly lacking participation opportunities. There is nothing on the record to indicate that anyone other than the volleyball players would participate in Quinnipiac athletics if other teams were added. Similarly, there is nothing in the record to indicate that any of the current female student athletes at Quinnipiac claim to have been harmed

by the alleged unequal distribution of scholarship funding and athletic benefits and support.

Plaintiffs go on to argue that prospective, future, and deterred female students are "members of the proposed class because all are harmed by or imminently will be harmed by the sex discrimination in QU's athletic department", but they provide no evidentiary showing to support this contention. (Pl. Mem. at 10.) Just as plaintiffs have made no showing that there are other members of the class, they have presented no evidence to indicate that there are any other individuals who are considering filing similar claims against the University; therefore, there is no evidence that there is any risk of inconsistent rulings, as plaintiffs contend.

Plaintiffs' motion for class certification should be denied because they do not present any evidence to establish numerosity, much less a preponderance of the evidence.

III.

THE PLAINTIFFS ARE NOT ADEQUATE CLASS REPRESENTATIVES

Even if plaintiffs could meet the numerosity requirement, they cannot be adequate class representatives because their interests are in direct conflict with those of a substantial number of the potential members of the proposed class. In determining whether the representative parties will fairly and adequately protect the interests of the class, the Court must determine whether "plaintiff's interests are antagonistic to the interest of other members of the class." Central States Southeast & Southwest Area Health & Welfare Fund v. Merck-Medco Managed Care, *LLC*, 504 F.3d 229, 245 (2d Cir. 2007) (internal quotations and citation omitted). In support of plaintiffs' first claim

regarding a lack of participation opportunities for women, they have argued, and it appears they plan to argue at trial, that women's competitive cheer cannot be treated as a varsity sport and indoor track and outdoor track are not legitimate sports at Quinnipiac. (See Exhibit 1 at 31.) These arguments are completely contrary to the interests of the athletes on those teams. If the plaintiffs are successful in challenging the authenticity of the participation opportunities that these teams provide, there is a substantial question whether, in a world of limited resources for athletics, the University will be able to sponsor these sports if the participation opportunities cannot be counted for purposes of Title IX. The athletes on the competitive cheer, indoor track, and outdoor track teams have a fundamental interest in continuing to have the opportunity to compete in their chosen sport(s) at the varsity intercollegiate level; an interest which the Student-Plaintiffs will have to undermine in order to succeed in their participation claim. The Student-Plaintiffs, therefore, cannot represent the interests of the class, and class certification should be denied. See Alston v. Virginia High School League, Inc., 184 F.R.D. 574, 580 (W.D. Va. 1999) (denying class certification on the grounds that the plaintiffs' interests were in conflict with those of a substantial portion of the class who did not want the allegedly discriminatory scheduling practice changed).

This conflict cannot be solved by the creation of a subclass because in order to prove liability, the plaintiffs must pursue a course of action that is directly contrary to the interests of the members of the competitive cheer, indoor track, and outdoor track teams and to the interests of any future or prospective students who seek to compete on those teams. This case is distinguishable from Boucher v. Syracuse University, 164 F.3d 113 (2d Cir. 1999) where the Court ordered that subclasses could be certified to

address the conflict that resulted from the fact that the remedy might require the addition of one sport over another to achieve proportionality. In that case the plaintiffs all had a common interest in proving liability, and the plaintiffs strategy for proving such liability did not compromise the interests of any other class members; the only conflict was over who would benefit most from the remedy. Here, the only way for the plaintiffs to succeed in their participation claim is to seek the elimination of the competitive cheer team and/or the indoor track and outdoor track teams. Moreover, even if a subclass could resolve the conflict, there is no named plaintiff who could represent such a subclass, as all of the named plaintiffs are members of the volleyball team.

Plaintiffs seek to certify the class pursuant to 23(b)(2); therefore the class members will not have the opportunity to opt out. (Pl. Mem. at 20-23.) It would be a violation of the due process rights of the competitive cheer, indoor track, and outdoor track athletes to allow them to be represented by Plaintiffs who seek to eliminate and/or challenge the integrity of their sports. See Hansberry v. Lee, 311 U.S. 32, 45 (1940). Similarly, there may be other members of the class who object to the elimination of existing athletic opportunities for women in competitive cheer, outdoor track, indoor track, and cross country, and the rights of those individuals must be protected.

In addition to the reasons set forth above, plaintiffs are not adequate class representatives with respect to Claim Three (for equitable distribution of benefits) because they fail to state a claim. In order to state a claim, Plaintiffs must provide factual allegations sufficient "to raise a right to relief above the speculative level." Goldstein v. Pataki, 516 F.3d 50, 56 (2d Cir. 2008). The Student-Plaintiffs themselves do not even allege that they have suffered any injury-in-fact as a result of Defendant's

alleged inequitable provision of benefits to male and female athletes. Neither in their First Amended Class Action Complaint, nor in the declarations that they submitted in support of this motion for class certification, do they identify any specific benefits or resources that they claim to have been denied. The First Amended Class Action Complaint simply sets forth the requirements of Title IX and then states "on information and belief" that the University has not increased the benefits it has provided proportionately with the increase in participation opportunities for women and that "Defendant fails to provide equal athletic benefits in some or all of the categories set forth in the Regulations and the Policy Interpretation" and then sets out the laundry list of benefits that universities can provide their athletes. (Complaint ¶¶ 130-35.) (Emphasis added.) Even assuming *arguendo* that the University did not provide benefits equitably on the whole, if the volleyball players are getting all of the benefits available, then they cannot assert a claim because they are not suffering any harm. In their declarations in support of the motion for class certification, the plaintiffs say only that they "believe that QU provides more benefits to male athletes than to female athletes" and that they "filed this action to investigate this belief and to require QU to provide female athletes with the same and/or comparable benefits as it provides to male athletes." (Declaration of Stephanie Biediger ¶ 4; Declaration of Kayla Lawler ¶ 4.) (See also Declaration of Erin Overdevest ¶ 4 and Declaration of Kristen Corinaldesi ¶ 4 stating "I understand that it is a violation of Title IX for QU to provide more or better benefits to male athletes than female athletes.") Apart from vague references to lost educational opportunities, lost competitive advantage, and less quality in participation opportunities, they do not identify any injury-in-fact. Plaintiffs cannot parrot the

requirements of Title IX in their complaint and then expect the Court to open the doors to discovery without any reasonable basis from which to infer that the Plaintiffs suffered any actual harm. See Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007) and Ashcroft v. Iqbal, 129 S. Ct. 1937 (2009). In order to have standing to state a claim, one must know that she suffered an actual harm. Plaintiffs have not identified any actual harm and thus, cannot state a claim, much less adequately represent a class of individuals seeking to assert similar claims. Defendant intends to file for judgment on the pleadings pursuant to Fed. R. Civ. P. 12(c) with respect to Claim Three.

IV.

THE PROPOSED CLASS IS NOT ASCERTAINABLE

Even if Plaintiffs could meet the four prongs of Rule 23(a), which they cannot, their motion for class certification must still be denied because the proposed class is not ascertainable. In addition to the specific criteria set forth in Rule 23 for class certification, plaintiffs must identify a class and that class must be "ascertainable." Mike v. Safeco Insurance Company of America, 223 F.R.D. 50, 52-53 (D. Conn. 2004). The members of the class must be readily identifiable so that the court can determine who is bound by the ruling. The class description must be "sufficiently definite so that it is administratively feasible for the court to determine whether a particular individual is a member." Mike, 223 F.R.D. at 52-53 (quoting 7A Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice and Procedure § 1760, at 120-21 (2d ed. 1986).

The class that plaintiffs seek to certify cannot meet the ascertainability standard because membership in the class is dependent upon the state of mind of the individual. Plaintiffs define the proposed class as "current, prospective, and future female students at Quinnipiac University ("QU") who are harmed by and want to end QU's sex

discrimination in: (1) the allocation of athletic participation opportunities; (2) the allocation of athletic financial assistance; (3) the allocation of benefits provided to varsity athletes. They similarly file this action on behalf of females who are deterred from enrolling at QU because of the sex discrimination in QU's athletic program, including its failure to offer the varsity sports in which they want to participate... ." (Emphasis added.) (Pl. Mem. at 2). Not only is it impossible to ascertain the actual members of the class, it is not possible to identify the potential members of a class, which includes all "prospective" and "future" female students at Quinnipiac. Theoretically, any female in the world could apply, be admitted, and enroll at Quinnipiac and thus all would be potential members of the class. Even if this Court were willing to entertain such a wide-ranging potential class, in order to identify actual members of the class, the Court would have to determine which of those women was "harmed by and want[s] to end" the alleged sex discrimination. The only way to do so would be to make an inquiry as to whether each woman ever had any interest in participating in athletics, whether she had any ability to do so, and whether she wants to end any alleged discrimination. An individual who never had an interest in participating in intercollegiate athletics or one who had an interest but had absolutely no ability to do so cannot claim to have been harmed by the alleged lack of participation opportunities and therefore would not be a member of the class. Similarly, to identify those who were discouraged from attending Quinnipiac because of the alleged lack of athletic opportunities, the Court would have to determine who would have applied but for the alleged lack of athletic opportunities, which is a largely impossible task. See also Harris v. Initial Security, 05 Civ. 3873, 2007 U.S. Dist. LEXIS 18397at *11, (S.D.N.Y. Mar. 7, 2007) (denying class certification,

deeming class of "dark-skinned employees" unascertainable). *Cf.* *Taylor v. Housing Authority of New Haven*, 257 F.R.D. 23, 27 (D. Conn. 2009); Norflet v. John Hancock Life Insurance, No. 3:04 CV 1099, 2007 WL 2668936 (D. Conn. Sept. 6, 2007).

Where, as here, defining membership in the proposed class would involve individual inquiries, certification of the class would create substantial administrative burden that is completely incongruous with one of the principal goals of a class action, to create efficiency. See *White v. Williams*, 208 F.R.D. 123, 129-30 (D.N.J. 2002) (denying certification of the class where "[a]doption of this definition would require the Court to conduct a number of mini-trials or to employ some other screening mechanism prior to defining the class."); Mueller v. CBS, Inc., 200 F.R.D. 227, 233 (W.D. Pa. 2001) (finding that the proposed class definition was untenable because each individual plaintiff would have to first demonstrate that he or she had been terminated in order to prevent him or her from collecting employee benefits); Kline v. Security Guards, Inc., 196 F.R.D. 261, 266-68 (E.D. Pa. 2000) ("Because it would be impossible to definitively identify class members prior to individualized fact-finding and litigation, the proposed class fails one of the basic requirements for a class action under Rule 23").

The fact that other courts may have certified classes that included future or prospective students should have no bearing here because the case law does not indicate that the issue of ascertainability was raised by the parties or considered by the court in those cases. Moreover, precious few of the cases cited by Plaintiffs provide any analysis of the class issue. (Pl. Mem. at 6.) Most simply make reference to the fact that a class was certified, which in and of itself is not instructive.

CONCLUSION

Plaintiffs' motion for class certification should be denied because they have not, and they cannot, meet the standards of Rule 23.

Dated: March 15, 2010

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CERTIFICATE OF SERVICE

I hereby certify that on March 15, 2010, a copy of the foregoing Defendant's Memorandum of Law in Opposition to Plaintiffs' Motion for Class Certification was filed electronically. Notice of this filing will be sent by e-mail to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

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