IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

STEPHANIE BIEDIGER, *et al.*, individually and on behalf of all those similarly situated; and ROBIN LAMOTT SPARKS, individually,	)	Case No. 3:09-CV-621(SRU)
v.	)	
QUINNIPIAC UNIVERSITY	)	April 7, 2010

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

Plaintiffs submit this brief in response to Defendant Quinnipiac University's March 15, 2010 "Memorandum of Law in Opposition to Plaintiffs' Motion for Class Certification" ("Def. Mem.") (D.E. No.123). For the reasons set forth below, the Plaintiffs respectfully submit that the Defendant's arguments are without merit, and Plaintiffs' motion for class certification should be granted.

I. Plaintiffs Have Established by A Preponderance of the Evidence that Class Certification is Appropriate

Defendant argues first that Plaintiffs have failed to demonstrate by a preponderance of the evidence that class treatment is appropriate. Without addressing their substance, Defendant dismisses Plaintiffs' Declarations as "general and formulaic." (Def. Mem., 3) But the Declarations, together with the record of sworn testimony and the Defendant's Responses to Plaintiffs' Requests for Admissions, sufficiently establish all of the elements required by Rule 23(a).[1]

[1] *See* the accompanying Supplemental Declaration of Attorney Alex V. Hernandez and its Exhibit A, a copy of the relevant portion of Defendant's Responses to Plaintiff's Requests for Admissions, referred to hereinafter as "Adm'n" followed by the relevant paragraph number(s).

A. Established Facts Relevant to Class Certification

Student Plaintiffs Biediger, Corinaldesi, Lawler, Overdevest, and Riker are presently female students at Quinnipiac University ("QU") and members of the volleyball team.[2] (D.E.s 115-18, ¶¶ 1&2; Verified Complaint, ¶¶ 11-16) Each of the named Student Plaintiffs has demonstrated the interest and ability to continue competing in college varsity volleyball until her eligibility ends.[3] (Tr. 5/11/09, 38, 40, 49, 68, 115-17)

Defendant QU is an educational institution located in Hamden, Connecticut which offers a 4-year, co-educational undergraduate college program and which receives federal funds.[4] (Ruling 4, 5; Verified Complaint, ¶18) The Defendant sponsors a number of varsity men's and women's sports programs (Tr. 5/11/09), and is required to comply with Title IX's requirement that it provide competitive sports opportunities to its male and female students on a nondiscriminatory basis. (Ruling, 1-2) QU claims to satisfy this requirement by providing such opportunities in proportion to the gender composition of the undergraduate student body. (Ruling, 6, 21, 23-4, 31)

At the hearing on their Motion for Preliminary Injunction, Plaintiffs established, among other things, that in the 2008-09 academic year, QU's athletic participation opportunities were apportioned 47.43% for men and 52.57% for women. (Ruling, 6) Those percentages were not in proportion to the undergraduate enrollment for that year which was comprised of 38.3% male and 61.7% female students. (Ruling, 5) Thus, the

---

[2] References to the Declarations of the Student Plaintiffs are designated by their Docket Entry ("D.E.") Number, followed by the relevant paragraph number(s).

[3] Hereinafter, references to the hearing transcripts are designated by the date of testimony followed by the relevant page number(s).

[4] References to this Court's May 22, 2009 "Ruling and Order Granting Preliminary Injunction" (Docket Entry Number 51), are designated "Ruling" followed by the relevant page number(s).

Plaintiffs established that QU already discriminated against its female athletes in the academic year 2008-09, when it attempted to eliminate women's volleyball. (Tr. 5/11/09, 169-70, 215; Ruling, 6, 10, 16-7)

Women's volleyball Coach Robin Sparks testified that there is interest in the Northeast among female high school student athletes in volleyball competition at the collegiate level. (Tr. 5/11/09, 134, 152, 155-57, 159) As part of her duties, Coach Sparks recruits female high school volleyball players in Connecticut, the Northeastern United States, and across the country. (Tr. 5/11/09, 146-49, 153, 154, 206)[5] The Defendant, which "enrolls students from all 50 states and the District of Columbia," (Adm'n 72) has admitted "that, by continuing to recruit high school varsity volleyball players, the University could enroll enough female students with the interest and ability to play varsity, intercollegiate volleyball to maintain," a volleyball team in the coming 2010-11 academic year. (Adm'n 50, 94)

The Defendant's athletics teams compete (with certain exceptions) in the Northeast Conference ("NEC"). (Ruling, 5, 6) There is a demonstrated interest and ability among female high school students in Connecticut and in the Northeast to compete in a number of sports that are sponsored by the NEC and/or recognized by the NCAA, but in which QU does not field teams: *e.g.*, gymnastics, golf, swimming, bowling, rowing, fencing, and equestrian. (Adm'n 60-93; Ruling, 5) Thus, the Plaintiffs have demonstrated that there is a large number of female student athletes who currently attend Quinnipiac and are victims of discrimination, and/or who would attend

[5] For example, when this lawsuit was commenced in April 2009, Plaintiff Logan Riker was a minor, prospective student identified as "L.R." who had been recruited from her high school in Ohio to play volleyball at QU. (Tr. 5/11/09, 93, 102, 105; Ruling, 3)

Quinnipiac if it provided additional meaningful competitive opportunities for female student athletes. Potential members of the class are numerous and their joinder would be impracticable.

Each of the student Plaintiffs has stated in her Declaration that she is prepared to represent current and prospective female students at Quinnipiac who wish to participate in varsity athletics on a nondiscriminatory basis. (D.E.'s 115-18, ¶ 2) They have satisfied the requirement that they are willing to represent the interests of others who are similarly situated and will do so with vigor.

Although Defendant urges the Court to disregard them as unpersuasive, the numerous decisions in which district and appellate courts have endorsed class treatment and certified similar classes in Title IX cases are certainly instructive. *See*, *e.g*. *Communities for Equity v. Mich. High Sch. Athletic Assoc.*, 192 F.R.D. 568, 572 (W.D. Mich. 1999) (certifying, after "rigorous analysis" and probing "behind the pleadings," a class of present and future students who participate in or are deterred from participating in athletics), and Section IV, below. The Plaintiffs have established by a preponderance of the evidence that class certification is appropriate here. To the extent the Court believes that additional evidence is required, Plaintiffs request a hearing on their Motion for Class Certification to present such evidence.

II. The Plaintiffs Have Established Numerosity

The Defendant asserts that the 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." (Def. Mem., 4) This is a semantic argument that can be addressed, if necessary, in the class definition. Moreover, "[i]t is not 'fatal if some

members of the class prefer not to have violations of their rights remedied.'" *Lanner v. Wimmer*, 662 F.2d 1349, 1357 (10th Cir. 1981); *see Int'l Molders' & Allied Workers' Local Union No. 164 v. Nelson*, 102 F.R.D. 457, 464 (N.D. Cal. 1983) (holding that some class members' belief that the defendants' conduct was not objectionable did not defeat class certification); *see also* 5 MOORE'S FEDERAL PRACTICE § 23.25[2][6][iii] (3d. Ed. Supp. 2008) ("[A] court will not refuse to certify a class solely because some of the class members prefer to have their rights unremedied"); H. Newberg and A. Conte, 1 Newberg on Class Actions, § 3:30 (4th Ed. 2008) ("[T]he class member who wishes to remain a victim of unlawful conduct does not have a legally cognizable conflict with the class representative.").

Rather, the initial inquiry under Rule 23(a) is whether the class is sufficiently numerous that joinder of all members individually is "impracticable." Fed. R. Civ. P. 12(a) (1); *see Communities for Equity*, 192 F. R. D. at 571 ("Numbers alone are not dispositive when the numbers are small, but will dictate impracticability when the numbers are large.") "The requirement does not demand that joinder would be impossible, but rather that joinder would be extremely difficult or inconvenient." 5 MOORE'S FEDERAL PRACTICE § 23.22[1] (3d Ed. 2003).

According to its EADA reports, Quinnipiac had 235 varsity female athletes in academic year 2008-09 (Ruling, 16-7), all of whom were victims of the Defendant's discrimination. In the same year, again according to the EADA reports, there were a total of 447 competitive opportunities for men and women at QU. Keeping the total number of athletic opportunities unchanged, the Defendant would have had to offer 276 opportunities to women (0.617 X 447 = 276), an increase of 40 genuine competitive

opportunities, to comply with Title IX in that year.[6] Given the admitted interest in the Northeast and around the country in women's athletic opportunities, it is reasonable to infer that there are women who would have filled those slots if they had been available. They are also victims of QU's discrimination. There are women who would play volleyball at Quinnipiac next year (academic year 2010-11) if Coach Sparks could assure them that QU will field a team, and women who would play other recognized sports if QU would offer them. All of these potential QU student athletes are victims of QU's ongoing sex discrimination. It seems apparent that Rule 23(a)'s numerosity requirement is satisfied in these circumstances. Further, where, as here, declaratory or injunctive relief is sought, the numerosity requirement may be relaxed "so that even speculative or conclusory allegations regarding numerosity are sufficient to permit class certification." 5 MOORE'S FEDERAL PRACTICE § 23.22[3] [b] (3d Ed. Supp. 2008); *see also Goodnight v. Shalala*, 837 F. Supp. 154, 1582 (D. Utah 1994).

There is ample evidence to support the Plaintiffs' contention that there is a large number of female student athletes who presently compete at QU and have been forced to do so in a discriminatory institution, who would like to compete at QU but have not had the opportunity, and/or who will be discouraged from applying to QU because QU does not offer sufficient athletic participation opportunities for women, in violation of Title IX. Certainly the class of potential plaintiffs is large enough to make joinder "impracticable." The record supports a finding that Plaintiffs have established

[6] If QU were to maintain its male-to-female ratio of 38.3 to 61.7 from academic year 2008-09, and the 212 male athletic opportunities were also to go unchanged, the Defendant would have to raise its total number of athletic opportunities to 554 (212 ÷ 0.383 = 553.5). Leaving the number of male athletic opportunities unchanged, therefore, would require QU to add no fewer than 107 female athletic opportunities (107 + 235 ÷ 554 = 0.61).

numerosity. *See Boucher v. Syracuse University,* 164 F.3d 113, 119 and fn11 (2d Cir. 1999) (instructing district court, on remand, if University did not make good on its promise to establish women's varsity softball team, to certify a class of current and future female students interested in playing varsity softball, and noting that numerosity requirement would be satisfied because "[j]oinder of all relevant parties – when the class includes current female high school students weighing the decision to attend Syracuse based on its athletic offerings – is clearly impracticable.")

III. The Plaintiffs are Adequate Class Representatives

The Defendant also contends that the Plaintiffs "cannot be adequate class representatives because their interests are in direct conflict with those of a substantial number of potential members of the proposed class." (Def. Mem. 5) At its core, the argument relies on the misapprehension that Plaintiffs "seek to eliminate and/or challenge the integrity" of Quinnipiac's competitive cheer, outdoor track, indoor track, and cross country teams. *Id.* But this is not accurate. Plaintiffs will contend that competitive cheer cannot currently be counted as a varsity sport for Title IX compliance purposes, and will contend that Quinnipiac's triple counting of women who participate in cross country, indoor track ,and outdoor track distorts the true number of varsity athletic participation opportunities it offers to women. Plaintiffs will further contend that QU does not currently offer genuine participation opportunities to female indoor and outdoor track athletes because it does not field full teams in either case. While Plaintiffs may challenge whether these participation opportunities may properly be counted for Title IX purposes, they do not seek the elimination of competitive cheer, track, or any women's teams at QU. Rather, as set forth in their Declarations, the Plaintiffs "want to make sure

that QU provides female students with as many legitimate (not contrived) athletic participation opportunities as possible." (D.E. Nos. ¶2). Thus, the interests of the proposed class representatives do not conflict with any member of these teams.

Further, "to the extent that the underlying issue here is one of unequal treatment and discrimination, the matter of whether to sanction a particular sport appears to be one relating to relief, rather than liability." *Communities for Equity*, 192 F.R.D. at 574. A conflict may arise at the remedy stage, if any, of the litigation due to the limited availability of resources and the necessity of choice between teams that may be selected for varsity status. *Boucher v. Syracuse Univ.*, 164 F.3d 113, 118-119 (2d Cir. 1998). This conflict, however, may be resolved by the creation of subclasses. *Id*. However, because the liability determination here is particularly well-suited to class treatment, the Court should "defer consideration of any subclasses to the relief stage, if any, of this litigation." *Communities for Equity*, 192 F.R.D. at 574 (citing H. Newberg and A. Conte, 1 Newberg on Class Actions, § 3.25 (3d. Ed. 1992) ("Potential conflicts relating to relief issues which would arise only if the plaintiffs succeed on common claims of liability on behalf of the class will not bar a finding of adequacy and may be resolved, when the need arises, by the formation of subclasses at the relief stage.").

Finally, if the Court believes that there are irreconcilable conflicts between the named Plaintiffs as class representatives and those class members who participate or hope to participate in competitive cheer at QU that could not be solved by the creation of a subclass at the remedy stage, the Court may modify the proposed class definition to explicitly exclude the competitive cheer athletes. Under Rule 23(c)(1) of the Federal Rules of Civil Procedure, the court retains the authority to redefine or decertify the class

until the entry of final judgment on the merits. *In re Unisys Savings Plan Litigation*, 1997 WL 230789 (E.D.Pa. 1997), *Marlo v. United Parcel Service, Inc.*, 251 F.R.D. 476 (C.D. Cal. 2008).

IV. The Class is Ascertainable

Finally, the Defendant asserts that the proposed class does not satisfy the requirement that a class be ascertainable, "because membership in the class is dependent upon the state of mind of the individual." (Def. Mem., p. 9) Once again, QU elevates form over substance, playing semantic games with the class definition. The argument fails for at least three reasons.

First, as set forth above, the subjective state of mind of any potential or actual class member is not dispositive of whether the class may be certified. "[I]t is not 'fatal if some members of the class prefer not to have violations of their rights remedied.'" *Lanner,* 662 F.2d at 1357 (10th Cir. 1981). Thus all current female students at QU who participate in sports or would participate in sports if the University complied with Title IX are members of the class.

Second, the fact that the proposed class includes "prospective" and "future" female students at QU, and is thus a "wide-ranging" group, Def. Mem. at 10, is also not dispositive. Courts have routinely recognized the inherently class-based nature of Title IX claims for injunctive relief and have certified classes including present, prospective, future, and deterred female students. *See, e.g., Cohen v. Brown Univ.*, 991 F.2d 888, 893 (1st Cir. 1993) (class of "all present and future Brown University women students and potential students who participate, seek to participate, and/or are deterred from participating in intercollegiate athletics funded by Brown"); *Favia v. Indiana University of*

Pennsylvania, 7 F.3d 332, 335-36 (3rd Cir. 1993) (class of "all present and future women students at I.U.P. who participate, seek to participate, or are deterred from participating in intercollegiate athletics at the University"); *Haffer v. Temple Univ.*, 678 F. Supp. 517, 521 (E.D. Pa. 1987) (class of "all current women students at Temple University who participate, or who are or have been deterred from participating because of sex discrimination in Temple's intercollegiate athletic program."). *See also Boucher v. Syracuse University*, 164 F.3d 113, 119 (2nd Cir. 1999) (instructing district court, on remand, if University did not make good on its promise to establish women's varsity softball team, to certify a class of current and future female students interested in playing varsity softball); *Paton v. New Mexico Highlands University*, 275 F.3d 1274 (10th Cir. 2002); *Ridgeway v. Montana High School Ass'n*, 633 F. Supp. 1564, 1567 (D. Mont. 1986), *aff'd* 858 F.2d 579 (9th Cir. 1988); *Bucha v. Illinois High School Ass'n*, 351 F. Supp. 69 N. D. Ill. 1982); *Leffel v. Wisconsin Inter-scholastic Athletic Ass'n*, 444 F. Supp. 1117, 1119 (E.D. Wis. 1978); *Communities for Equity v. Michigan High School Athletic Association*, 192 F.R.D. 568 (W.D.Mich. 1999); *Brust v Regents of the University of California*, E.D. Cal. Case No. 2:07-cv-1488 FCD/EF; *James v. Virginia Polytechnic Institute and State University*, W.D.Virginia Case No. 94-0031; *Sanders v. University of Texas at Austin, N.D.*, Texas Case No. 92-CA-405.

Although the Plaintiffs submit that the proposed class is appropriate, under Rule 23(c)(1) of the Federal Rules of Civil Procedure, the court retains the authority to redefine or decertify the class until the entry of final judgment on the merits. *Marlo v. United Parcel Service, Inc.*, 251 F.R.D. 476 (C.D. Cal. 2008).

CONCLUSION

Based upon the foregoing, and upon the totality of the record developed to date, Plaintiffs respectfully urge the Court to grant their motion for Class Certification. If the Court deems any part of the factual record in support of class certification to be deficient, the Plaintiffs respectfully request an evidentiary hearing.

Respectfully submitted,

THE PLAINTIFFS

By: /s/ Alex V. Hernandez

Alex V. Hernandez (ct08345)
Jonathan B. Orleans (ct05440)
Pullman & Comley
850 Main Street
Bridgeport, CT 06601
(203) 330-2129 (phone)
(203) 576-8888 (fax)
jorleans@pullcom.com
ahernandez@pullcom.com

Kristen Galles
Equity Legal
10 Rosecrest Avenue
Alexandria, VA 22301
(703) 683-4491 (phone)
(703) 683-4636 (fax)
kgalles@comcast.net

David McGuire (ct27523)
ACLU Foundation of Connecticut
2074 Park Street, Suite L
Hartford, CT 06106
(860) 523-9146 (phone)
(860) 586-8900 (fax)
jmatthews@aclu-ct.org

Their Attorneys

CERTIFICATION OF SERVICE

I hereby certify that on the date hereon, a copy of the foregoing *REPLY TO DEFENDANT'S MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFFS' MOTION FOR CLASS CERTIFICATION* was filed electronically and served by mail on anyone unable to accept electronic filing. Notice of this filing will be sent by e-mail to all parties by operation of the Court's electronic filing system or by mail to anyone unable to accept electronic filing as indicated on the Notice of Electronic Filing. Parties may access this filing through the Court's CM/ECF System.

/s/ Alex V. Hernandez
Alex V. Hernandez (ct08345)

ACTIVE/73061.1/AHERNANDEZ/2106220v1