UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

STEPHANIE BIEDIGER, KAYLA LAWLER ERIN OVERDEVEST, and KRISTEN CORINALDESI, individually and on behalf of those similarly situated; LESLEY RIKER, on behalf of her minor daughter, L.R., individually and on behalf of those similarly situated; and ROBIN LAMOTT SPARKS, individually,	:	**Civil Action No. 09 CV 621 (SRU)**
PLAINTIFFS,	:	
v.	:	
QUINNIPIAC UNIVERSITY,	:	
DEFENDANT.	:	**MAY 14, 2009**

DEFENDANT'S MOTION TO STRIKE TESTIMONY OF GERMAINE FAIRCHILD

Defendant, Quinnipiac University (hereinafter "Quinnipiac" or the "Defendant'), hereby respectfully submits this Motion and Memorandum of Law to Strike the testimony of Plaintiff's fact witness, Germaine Fairchild, taken on May 13, 2009.

PERTINENT BACKGROUND FACTS

As the Court is aware, this matter included expedited discovery over the course of three weeks. At or around May 1, 2009, counsel for the parties discussed their anticipated witness list. During this discussion, witness Germaine Fairchild was not mentioned. The Court set a deadline for submissions of a Pre-Trial Memorandum; initially May 6, the day prior to the pre-trial conference. For a variety of reasons, this deadline was extended right up to the time of the pre-trial conference; i.e., 3:30 p.m. on May 7. Ms. Fairchild was not mentioned. During the pre-trial conference, the Court went through, in painstaking and detailed fashion, the witness and exhibit

lists, among other issues pertinent to the conduct of the hearing. Ms. Fairchild was not mentioned.

It was not until the day before the hearing, Friday, May 8, during the late morning hours, that Ms. Fairchild was added to Plaintiffs' witness list for the first time. The description of the anticipated substance of her testimony was vague, generic, and, in a word, evasive. As a result, Defendant was compelled to "scramble" and "guess" what the substance of the testimony might be, and to secure and prepare other potential witnesses. On May 11, Plaintiffs were asked to explain the untimely and eleventh hour addition of a witness, particularly in view of Defendant's representation that it would have noticed her deposition during the expedited discovery phase. The response was, in sum, the wholly unsupportable "fear of retaliation" against Ms. Fairchild, and equally vague statements about her knowledge of "roster management". The Court, at that time, reserved decision as to whether or not this late addition would be permitted.[1]

At the conclusion of testimony on May 12, the Court indicated that it would permit the testimony of Ms. Fairchild, as well as Defendant's other witnesses. Defendant requested an opportunity to depose Ms. Fairchild that evening, to which Plaintiffs responded that Defendant could have "simply interviewed" her. Emphasizing the fact that such a move would have been unwise, to say the least, given the outlandish allegations of potential retaliation, Defendant nevertheless agreed to waive that right, in consideration of a one hour interview with Ms. Fairchild with Plaintiffs' counsel present.

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[1] This is not the first time Plaintiffs have unduly delayed witness disclosure. Indeed, the Court may recall the controversy surrounding the untimely disclosure of an expert witness whose schedule would neither permit a real Rule 26 disclosure (which ultimately had to be ordered and via telephone), nor her presence in Court during the actual hearing. Further, her schedule compelled the parties to conduct her trial deposition starting at 4 p.m. and lasting until midnight. Defendant further advised this Court that, despite the order for a Rule 26 disclosure, albeit verbally, a number of documents Plaintiffs introduced at the expert's deposition had not been specifically identified during the "disclosure call."

The interview was scheduled for 8:00 a.m. May 13. This would have provided Defendant with at least some time to discern whether other witnesses should be called in rebuttal, and other documents brought to the hearing by Defendant. However, it became patently clear that Ms. Fairchild had been advised she should withhold information unless the undersigned's questions were "specific". For example, Ms. Fairchild was asked what statements she made to Plaintiffs or their attorneys regarding roster management at Quinnipiac. Her answer was that Defendant's counsel had to "ask specific questions." Knowing Defendant's counsel is not an athletic coach, when asked a simple question about seasons, Ms. Fairchild proceeded to be evasive and finally asked "do you want me to explain this to you?" After some substantive response, Ms. Fairchild then proceeded to lecture the undersigned, stating "you have to be specific when you talk to coaches about seasons." Additional examples of the evasive and obstructive nature of this witness were placed on the record by Defendant on May 13. In short, the untimely disclosure of this witness; the deliberately vague description of her anticipated testimony; and the interview, which was purposefully evasive, all amount to a deliberate design by Plaintiffs to deprive this Defendant of a full and fair opportunity to obtain the anticipated testimony in advance and prepare adequately to refute it if necessary. In short, Plaintiffs' counsel and Ms. Fairchild accomplished their goal.[2]

After Ms. Fairchild testified (and notably exhibited much of the same demeanor in Court toward Defendant's counsel), Defendant's counsel was obviously restrained from discussing the specifics with the other witnesses (who, again, were selected based on speculation and guessing about Ms. Fairchild's anticipated testimony). Indeed, Ms. Fairchild provided answers to questions which would have been easily refuted with other witnesses (e.g., comments regarding

[2] In fact, during the interview, the undersigned, clearly exasperated, asked for Plaintiffs' counsel present, Alex Hernandez, to assist. Mr. Hernandez refused, saying "you have to ask her specific

budget issues in 2007-08, and the like), prepared for the specific purpose, and potentially with additional documents. In short, this is not the first time Plaintiffs' tactics have deprived the Defendant of a full and fair opportunity to prepare for and refute testimony proffered by their witnesses. However, in this instance, the deliberate delay by Plaintiffs in disclosing the identity of a witness was exacerbated beyond the pale with the carefully crafted demeanor toward the undersigned during the interview which was supposed to provide Defendant with necessary information.

ARGUMENT

Fed. R. Civ. Proc. 16 (b) provides that the Court issues scheduling orders to control the deadlines in a civil litigation. This rule further empowers the District Court to conduct pretrial conferences which are designed to, among other things, "improve [ ] the quality of the trial through more thorough preparation." Fed.R.Civ.P. 16(a). "The rule provides the district courts with a powerful mechanism to organize and expedite litigation. The pretrial conferences contemplated by the Rule create an indispensable opportunity to clarify and delimit issues to be tried and to establish a timetable for the proceedings as a whole ." Potthast v. Metro-North R.R., 400 F.3d 143, 153-54 (2d Cir.2005) (quoting Senra v. Cunningham, 9 F.3d 168, 170 (1st Cir.1993)). Fed. R. Civ. Proc. 26(a) further empowers the Court to schedule a deadline by which the parties must disclose all witnesses before trial. See Fed.R.Civ.P. 26(a)(3)(I); Patterson v. Balsamico, 440 F.3d 104, 116 (2d Cir.2006). A party is not allowed to use any witness disclosed after the Rule 26(a) deadline unless the party's failure to comply was substantially justified or is harmless. See Fed.R.Civ.P. 37(c)(1); Patterson, 440 F.3d at 117.

In determining whether to exclude a witness, the Court considers the following factors: (1) the party's explanation for the failure to comply with the discovery order; (2) the importance of

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questions."

the testimony of the precluded witness; (3) the prejudice suffered by the opposing party as a result of having to prepare to meet the new testimony; and (4) the possibility of a continuance." Softel, Inc. v. Dragon Med. & Sci. Communs., 118 F.3d 955, 961 (2d Cir.1997); Brown v. City Of Bridgeport, 2008 WL 155047, *4 (D.Conn. 2008)(court granted motion to strike a witness not on the ore-trial memo that party sought to add as witness one week before start of trial.); Applera Corp. v. MJ Research Inc. 220 F.R.D. 13 (D.Conn. 2004) (precluding testimony of expert disclosed on eve of trial); Haas v. Del. & Hudson Ry. Co., 2008 U.S.App. LEXIS 13417, *6-*8, 2008 WL 2566699, *2-*3 (2d Cir.2008) (affirming exclusion of plaintiff's witness' affidavit where "[p]laintiff's counsel does not explain why he failed to identify" the witness.)

There was no justifiable reason offered by Plaintiffs for this deliberately delayed disclosure. This intent was confirmed tenfold during the so-called interview of this witness. No Defendant should be forced to follow the procedural rules, while Plaintiffs are permitted to avoid an important deadline such as disclosure of a fact witness. Noteworthy in this regard, this Court may recall its offer on May 1 to postpone the hearing several days in order for the parties to accommodate the initial problems with the expert disclosure. Plaintiffs repeatedly refused—and worked that refusal to their advantage several times during the course of this case to date.

CONCLUSION

For the foregoing reasons, Defendant respectfully requests that the Court strike the testimony of Germaine Fairchild in its entirety, together with such other and further relief as the Court deems just and proper.

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CERTIFICATE OF SERVICE

I hereby certify that on May 14, 2009 the foregoing Defendant's Memorandum of Law in Support of its Motion to Strike Testimony of Germaine Fairchild was filed electronically, and 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, and specifically to the following counsel of record:

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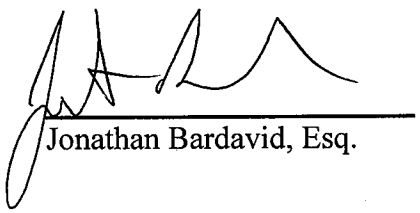

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