IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF CONNECTICUT

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| STEPHANIE BIEDIGER, KAYLA LAWLER, ERIN OVERDEST, and KRISTEN CORINALDESI, individually and on behalf of all those similarly situated; LESLEY RIKER on behalf of her minor daughter, 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, | : | November 17, 2009 |
| against | : | |
| QUINNIPIAC UNIVERSITY, | : | |
| Defendant. | : | |

**DEFENDANT'S OPPOSITION TO PLAINTIFFS' MOTION FOR MISCELLANEOUS RELIEF**

Defendant, Quinnipiac University, submits this memorandum and the accompanying exhibits in opposition to Plaintiffs' Motion for Miscellaneous Relief (Request for Resolution of Scheduling Dispute).

**PRELIMINARY STATEMENT**

Rather than accept the ruling of this Court and negotiate a mutually agreeable schedule with Defendant based on the May 3 trial date, Plaintiffs are seeking to delay the trial until July, relying upon the very same arguments this Court already rejected at the October 22 conference. Not only are Plaintiffs showing disrespect for this Court by referring to the Court ordered trial date as "tentative" and indicating their "willing[ness] to compromise" to a deadline for expert

disclosure that is almost two weeks after the trial date, their motion is filled with inaccuracies and blatant misrepresentations. (Plaintiffs' Motion for Miscellaneous Relief, hereinafter "Pl. Mot.", at 4, 12.) Reading Plaintiffs' papers one might think that it is Defendant that is being unreasonable and ignoring the Court's ruling when it is just the opposite. For the reasons already presented to the Court at the October 22 conference and those contained herein, Plaintiffs' motion to delay the trial should be denied, except to the extent the Court is able to delay the trial one week to accommodate the student plaintiffs' final exam schedule.

## ARGUMENT

### I. Plaintiffs' Claim that Defendant "Insisted" on Its Proposed Schedule Is False

Not having received a proposed schedule from Plaintiffs by November 2, Defendant prepared a proposed schedule working backward from the trial date set by the Court, as the Court had instructed. (A copy of the Transcript of the October 22, 2009 Court Conference, hereinafter "Transcript", is attached as Exhibit 1. *See* Transcript at 39:13-19; Exhibit 2.) Defendant's counsel Edward Brill stated in his email to Plaintiffs' counsel attaching the proposed schedule "We have prepared the attached proposed pre-trial schedule for your review and consideration, based on the May trial date. Let me know when you will be available to discuss this." (Exhibit 2.) At no time did Defendant indicate an unwillingness to negotiate the deadlines prior to trial. Defendant was just making an effort to get the ball rolling, fully understanding that the deadlines prior to trial would be subject to negotiation. Had Plaintiffs' counsel ever expressed an interest in negotiating a schedule based on the Court's May 3 trial date, they would know that Defendant was amenable to compromise. Instead of respecting the Court's ruling and attempting to negotiate a mutually agreeable schedule, Plaintiffs proposed a schedule that delays the trial until July. It is shocking that the Plaintiffs have the audacity to claim that Defendant is being

unreasonable about the schedule when Plaintiffs are insisting on a schedule that completely disregards the May 3 trial date set by the Court.

## II. Defendant Is Not Being Insensitive to the Needs of Its Students

Plaintiffs argue that Defendant is trying to force the student plaintiffs "to choose between taking (or studying for) final exams and enforcing their civil rights." (Plaintiffs' Motion for Miscellaneous Relief, hereinafter "Pl. Mot." at 4.) This is absolutely untrue. Plaintiffs' claim that the Defendant "refused" to agree to postpone the trial to accommodate the students is another misrepresentation. (*Id*.) Although Defendant had initially suggested that the trial be moved to April as a result of the conflict with exams, on Friday, November 6, Defendant's counsel, Edward Brill, sent Plaintiffs' counsel, Jonathan Orleans, an email indicating that "In light of the fact that the May 3 trial date falls during finals week, we would be willing to agree to move the trial to **either the week before or the following week** in order to accommodate the student plaintiffs, providing that the court is able to schedule the trial during one of those weeks." (Emphasis added.) (Exhibit 3.) Plaintiffs' claim that the Defendant is trying to gain some tactical advantage from the students' exam schedule is simply absurd.[1] It was the Court that originally suggested that the student plaintiffs could testify before the May 3 trial date if there was a conflict with exams. (Transcript at 37:4-7.)

## III. Plaintiffs' Purported Justifications for Delaying the Trial

### A. Plaintiffs' Proposed Expert Testimony Is Inadmissible

The crux of Plaintiffs' argument for a delayed trial is that their experts require more time to analyze the facts. As discussed below, Defendant wholly disagrees with this claim, but even if

[1] Plaintiffs' suggestion that Defendant's counsel somehow misrepresented the date of final exams is itself a misrepresentation. (Pl. Mot. at 4.) Defendant's counsel indicated at the conference that they believed that exams were later than that last year and that they would check. (Transcript at 36:13-37:3.) Further Plaintiffs claim that the Court relied upon the Defendants' supposed representation about exams is also false. (Pl. Mot. at 2.)

it were true, the purported needs of Plaintiffs' experts should not be a determining factor in the trial schedule. Plaintiffs' sole purpose in offering expert testimony is to have individuals with purported expertise in Title IX as it applies to athletics testify as to whether Defendant is complying with the law. Such testimony is not admissible.[2] Plaintiffs indicate that their cheer expert will review the OCR factors and sports definition guidance, the factual information regarding how Defendant operates its competitive cheer team this year, and "render opinions whether QU can legitimately claim to run its cheer program as a sport." (Pl. Mot. at 7.) Similarly, Plaintiffs intend to offer expert testimony as to whether it is lawful under Title IX for Defendant to count cross country, indoor track, and outdoor track athletes separately for proportionality purposes. They further indicate that they will offer expert testimony as to whether female athletes at Quinnipiac get "genuine varsity athletic participation opportunities." (Pl. Mot. at 6.) Determining whether an athletic participation opportunity is genuine is not like determining whether a painting or gem is genuine. The only way to determine whether the opportunity provided is genuine is to assess whether it meets the standard under Title IX. Applying the facts to the law is the purview of the trier of fact, not an expert. This is a particular concern in light of Plaintiffs' unwillingness to agree to a bench trial.[3] (Pl. Mot. at 15.)

Furthermore, the factual issues in this case are not of a complicated or scientific nature that would require an expert to translate them into "layman's terms." In sum, expert testimony is not needed or appropriate in this case.

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[2] Defendant does not purport to provide a thorough briefing of this issue here but is prepared to do so, should the Court deem it necessary or useful. The issue was raised in connection with plaintiff's use of expert testimony at the preliminary injunction hearing; at that time the Court stated that it would consider the testimony to the extent admissible.

[3] Defendant opposes Plaintiffs' request for a jury trial and reserves its right to object in the future.

B. Expert Testimony Does Not Necessitate a Delay

Even if Plaintiffs are permitted to present the expert testimony they intend to, there is no reason the experts cannot be prepared for a trial in early May. Plaintiffs argue that the trial should be delayed because the spring seasons will not be completed before the trial date. Plaintiffs further imply that the Court's October 22 order was based on the Defendant's misrepresentation that the spring sports season would be complete by the May 3 trial date. (Pl. Mot. at 2.) This is completely false. The dates of the championships of the spring sports were before the Court at the October 22 conference. (Transcript at 24:1-5.) Indeed, it was Plaintiffs' counsel that listed the dates at the conference. (*Id*.) Plaintiffs are not presenting new information. They are simply rearguing the same points that they argued at the conference unsuccessfully, hoping that the outcome will be different and attempting to delay these proceedings further. As the Court has already ruled, there is no reason why Plaintiffs will not be able to analyze the veracity of the roster information based upon the participation information available through the middle of April. Most of regular season play will be completed by that point. It makes no sense to think that coaches would improperly add or drop players in the last few weeks of the season to manipulate roster numbers. Moreover, the experts can always supplement their reports prior to trial based upon new information.

Plaintiffs' further claim that their expert on competitive cheer will need to evaluate the teams against whom Quinnipiac competes is spurious. It cannot be the case that a team cannot be considered varsity if they compete against teams that are not also varsity. If that were true, then a school could never elevate a sport that is not already played at the varsity level. In any event, the competitive cheer season will be completed by April 9, 2009, which will allow sufficient time for analysis of the competitive cheer program.

C. Defendant Will Comply with Its Discovery Obligations in a Timely Manner

Contrary to Plaintiffs' claims, they have no reason, "good" or otherwise, to believe that Defendant will not comply with its discovery obligations. Defendant provided all documents to which the parties agreed and which the Court ordered be produced. Plaintiffs' reference to the fact that the Defendant has not yet provided any participation reports is disingenuous. (Pl. Mot. at 13.) Defense counsel Brill had communicated with Plaintiffs' counsel Orleans regarding developing a mechanism for production of the participation information. The two agreed that they would discuss how the information would be communicated.

Plaintiffs' claim that the Defendant "seems to believe that to satisfy its disclosure obligations in this case it need only turn over its self-reported roster counts for each sport…" is yet another baseless misrepresentation. (Pl. Mot. at 5.) The parties have not had any discussions about what documents will be produced with respect to the roster counts in connection with the merits trial. Moreover, Plaintiffs have not served any document requests since the preliminary injunction was granted, and there was no understanding between the parties that the discovery requests served in connection with the preliminary injunction hearing were ongoing. For these same reasons, Plaintiffs' attempt to imply that Defendant's failure to produce the roster numbers for the 2009-10 first dates of competition is evidence of Defendant's unwillingness to comply with its discovery obligations is completely disingenuous. (Pl. Mot. at 5, fn. 3).

D. Plaintiffs' Pleading and Disclosure Deadlines Should Not Be Predicated on Discovery from Defendant

Plaintiffs' claim that they cannot serve an amended complaint until they get some discovery to confirm the accuracy of their potential claims.[4] (Pl. Mot. at 10-11.) In essence,

[4] Plaintiffs continue to contend that the current complaint includes participation claims of women who cannot compete because there is no athletic opportunity available. That cannot be the case because all of

they are arguing that they should be granted additional time for discovery to go on a fishing expedition to see if they can catch any new claims or new plaintiffs. That is not the purpose of discovery, and it is certainly not a valid reason to delay the schedule. Furthermore, there is no reason why Plaintiffs need until December 7 to file an amended complaint. They have been indicating their intent to file an amended complaint since the beginning of this litigation, more than six months ago.[5]

Plaintiffs further claim that their damages analysis will depend upon Defendant's responding to their requests for discovery and Defendant's answer to the Amended Complaint. It is not clear what discovery Plaintiffs would need from Defendant to provide a damages analysis, what impact the answer could have, or, for that matter, what damages there could be at all, given that the preliminary injunction has maintained the status quo.

## IV. Defendant Is Entitled to Adjudication of Plaintiffs' Claims on the Merits in Advance of the 2010-11 Academic Year.

Quinnipiac is entitled to a determination of whether the volleyball program can be eliminated as soon as possible and well in advance of the new academic year. Not only is it in the best interests of the University to be able to plan for the upcoming year, but it is in the best interests of the volleyball players and their coach, particularly to the extent that the students plan to transfer to another school to play, should the University prevail at trial.

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the student plaintiffs are volleyball players and thus have had athletic opportunities available to them. They simply have no standing to assert such a claim.

[5] Plaintiffs propose that Defendant answer the amended complaint by January 4. Although Defendant does not object to a thirty day period for response, it is, at the very least, discourteous to expect Defendant to prepare its answer over the University's holiday recess, which runs from December 25 – Jan. 1, particularly in light of Plaintiffs' several month delay in filing an amended complaint.

## CONCLUSION

Plaintiffs have not presented any new or legitimate justification for delaying the trial until July, and thus, their request should be denied. The Court has already set a trial date and that date should not be moved, except to the extent necessary to accommodate the exam schedule of the student plaintiffs. Defendant is prepared to be flexible with respect to any discovery schedule that contemplates a trial in early May. Defendant is further amenable to compressing the schedule for discovery with respect to the spring sports to the extent reasonable. The proposed schedule was aimed at providing ample time for expert disclosure, but Defendant does not claim that its proposed dates are the only appropriate ones.

Dated: November 17, 2009

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CERTIFICATE OF SERVICE

I hereby certify that on November 17, 2009, a copy of the foregoing Opposition to Plaintiffs' Motion for Miscellaneous Relief 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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