UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

MARIANGELICA VERA,	:	
	:	CIVIL ACTION NO.
Plaintiff,	:	3:12-CV-00382 (VAB)
	:	
v.	:	
	:	
ALSTOM POWER INC.,	:	APRIL 30, 2015
	:	
Defendant.	:	

RULING ON DEFENDANT'S MOTION IN LIMINE
TO EXCLUDE UNDISCLOSED WITNESSES FROM TESTIFYING

Defendant's Motion in Limine to Exclude Undisclosed Witnesses from Testifying (ECF No. 74) is GRANTED IN PART and DENIED IN PART.

Under Federal Rule of Civil Procedure 26(e), a party "who has responded to an interrogatory, request for production, or request for admission – must supplement or correct its disclosure or response . . . in a timely manner if the party learns that in some material respect the disclosure or response is incomplete or incorrect, and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing."

On May 18, 2012, Defendant served an interrogatory that asked Plaintiff for the "identity of all persons with knowledge or information concerning the existence and/or calculation of the damages alleged." (*See* Def.'s Mot. In Limine, Ex. A at 3-4, ECF No. 74.) When responding to this interrogatory on July 16, 2012, Plaintiff did not disclose anyone who had knowledge of the plaintiff's emotional distress damages and did not do so in writing until the filing of the Joint Trial Memorandum on March 17, 2015, when four individuals, Geraldine Fischer, Jonathan Fischer, Stefanie Neveu and June Rosenblatt, were listed as capable of testifying about the Plaintiff's emotional distress.

Defendant has moved to preclude the testimony of these four witnesses. The Court grants this motion in part and will exclude three of the witnesses from testifying. Plaintiff may choose and call one of these witnesses to testify at trial. If Defendant deposes that witness before trial, Plaintiff must pay the reasonable costs, excluding attorneys' fees, of the deposition.

Under Federal Rule of Civil Procedure 37, "[i]f a party fails to provide information or identify a witness as required by Rule 26(a) or (e), the party is not allowed to use that information or witness to supply evidence on a motion, at a hearing, or at a trial, unless the failure was substantially justified or is harmless." Fed. R. Civ. P. 37(c)(1); *see also Ritchie Risk-Linked Strategies Trading (Ireland), Ltd. v. Coventry First LLC*, 280 F.R.D. 147, 158–59 (S.D.N.Y. 2012) (court may not impose sanctions under Rule 37(c)(1) where failure to comply was substantially justified or harmless). Plaintiff failed to identify these four witnesses in her interrogatory responses in 2012 or before the close of discovery at the end of 2012. Furthermore, Plaintiff failed to provide this information until the preparation of the parties' Joint Trial Memorandum, years after the close of discovery. Significantly, the identities of these witnesses were not unknown to Plaintiff. In fact, two are her children. Fed. R. Civ. P. 26(e) advisory committee's note (duty to supplement "applies whether the corrective information is learned by the client or by the attorney.") These witnesses had "knowledge or information concerning the existence" of the emotional distress damages alleged by Plaintiff at the time Plaintiff responded to the interrogatory and thereafter.

Plaintiff has not carried her burden of proving that her non-compliance was substantially justified or harmless. *Coventry First LLC*, 280 F.R.D. at 159 (party that

fails to comply with Rule 26(a) or (e) bears burden of proving substantial justification or harmlessness). First, harmlessness means an absence of prejudice to the defendant. *Id.* This matter is scheduled to be tried imminently and permitting all of these witnesses to testify without Defendant having had discovery regarding the nature of their testimony or any opportunity to question Plaintiff regarding their anticipated testimony leaves Defendant at an unfair disadvantage. *Wei Yan Yan v. 520 Asian Rest. Corp.*, No. 13 CIV. 2417 KNF, 2014 WL 1877078, at *3 (S.D.N.Y. May 7, 2014) (where party disclosed witnesses for first time in joint pre-trial order after close of discovery, court found that prejudice would be substantial in light of facts that discovery was closed and case was ready for trial; witness was precluded from testifying).

Second, "[s]ubstantial justification may be demonstrated where there is justification to a degree that could satisfy a reasonable person that parties could differ as to whether the party was required to comply with the disclosure request, or if there exists a genuine dispute concerning compliance." *Coventry First LLC*, 280 F.R.D. at 159. Plaintiff's counsel maintains that he did not read the interrogatory to request identification of witnesses with knowledge of the facts of Plaintiff's emotional suffering. The Court finds, however, that there can be no genuine dispute that Defendant's interrogatory asked for identification of "all persons with knowledge or information concerning the existence . . . of the damages alleged" and that compliance required identifying these four witnesses because they had knowledge or information concerning the existence of Plaintiff's alleged emotional distress damages. Thus, the Court would be within the scope of its discretion to exclude all of these witnesses from testifying at trial. *See* Fed. R. Civ. P. 37(c)(1); *Pinero v. 4800 W. Flagler L.L.C.*, 430 F. App'x 866,

869 (11th Cir. 2011) (district court did not abuse discretion by excluding expert's testimony where party filed to disclose expert as fact witness or expert during discovery and failed to demonstrate that such failure was substantially justified); *see also Cargill, Inc. v. Kroeger*, No. 8:11CV81, 2012 WL 4006039, at *1 (D. Neb. Sept. 12, 2012) (precluding use of expert report at trial where defendants failed to supplement interrogatory response in timely manner and defendants' narrow reading of interrogatory did not substantially justify that failure).

The Second Circuit has set forth the following factors to consider when deciding whether to preclude a witness where a party fails to comply with a disclosure requirement: "(1) the party's explanation for the failure to comply with the [disclosure requirement]; (2) the importance of the testimony of the precluded witness[es]; (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." *Patterson v. Balsamico*, 440 F.3d 104, 117 (2d Cir. 2006).

As to the first element, as noted above, the Court is not satisfied that Plaintiff's counsel's narrow reading of the interrogatory is a substantial justification for Plaintiff's failure to disclose these witnesses. As to the second element, the Court noted during a hearing on this matter that it is not clear – nor did Plaintiff's counsel have a clear answer to this question when posed – whether the testimony of all of these witnesses would be necessary or instead would be cumulative. However, the Court recognizes the importance of having at least one witness testify as to Plaintiff's emotional distress damages. As to the third element, as noted above, Defendant would suffer prejudice in having to prepare to meet all of these witnesses' testimony at trial. As to the fourth

element, a continuance is inappropriate because the trial in this matter is scheduled to begin in two weeks. Thus, the Court finds that preclusion is appropriate under these factors.

Nevertheless, Rule 37(c)(1) gives the Court discretion to fashion an appropriate sanction instead of total preclusion. Fed.R.Civ.P. 37(c)(1)("In addition to or instead of this sanction, the court, on motion and after giving an opportunity to be heard may [excercise a range of options]"); *Lorme v. Delta Air Lines, Inc.*, 251 F. App'x 691, 692 (2d Cir. 2007) ("[E]ven absent a finding of either substantial justification or harmlessness, the court does have discretion to impose other, less drastic, sanctions.") (internal quotation marks omitted) (citation omitted). Moreover, the Court notes that preclusion is a harsh remedy that should be imposed only in limited circumstances. *Update Art, Inc. v. Modiin Pub., Ltd.*, 843 F.2d 67, 71 (2d Cir. 1988). As a result, the Court will provide some leeway, but it will come at a cost appropriate for this transgression. Because there has been no showing that the testimony of these witnesses would not be cumulative, Plaintiff may call only one of the four witnesses. *See* Fed. R. Evid. 403 (permitting exclusion of relevant evidence if its probative value is substantially outweighed by a danger of "needlessly presenting cumulative evidence"). Plaintiff, not the Court, will choose which one.

If Defendant so chooses, the Court will permit it to depose this one witness out of time. To the extent that Defendant chooses to depose this witness before trial, Plaintiff must pay the reasonable expenses, excluding attorney's fees, associated with this deposition. *See* Fed. R. Civ. P. 37(c)(1)(A) (court may order payment of the reasonable expenses caused by the failure of disclosure); *Dichiara v. Wright*, No. 06 CV

6123(KAM(LB), 2009 WL 1910972, at *3 (E.D.N.Y. June 30, 2009) (ordering plaintiff who failed to disclose witness in timely manner to pay defendant's costs in deposing that witness) *order clarified*, No. 06CV6123KAMLB, 2009 WL 2882558 (E.D.N.Y. Sept. 4, 2009); *Zubulake v. UBS Warburg LLC*, 229 F.R.D. 422, 437 (S.D.N.Y. 2004) (ordering defendant to "pay the costs of any depositions or re-depositions required by the late production.").

SO ORDERED at Bridgeport, Connecticut this thirtieth day of April, 2015

/s/ Victor A. Bolden
VICTOR A. BOLDEN
UNITED STATES DISTRICT JUDGE