

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF NEW YORK

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GARY METZGAR, RICHARD MUELLER,  
KEVIN REAGAN, RONALD REAGAN,  
SHERWOOD NOBLE, and  
DANIEL O'CALLAGHAN,

Plaintiffs,

v.

U.A. PLUMBERS AND STEAMFITTERS LOCAL  
NO. 22 PENSION FUND,  
BOARD OF TRUSTEES OF U.A. PLUMBERS AND  
STEAMFITTERS LOCAL NO. 22 PENSION FUND, and  
DEBRA KOROPOLINSKI, in her capacity as Plan  
Administrator, for the U.A. Plumbers and Steamfitters  
Local 22 Pension Fund,

Defendants.

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**DECISION  
and  
ORDER**

**13-CV-85V(F)**

APPEARANCES:

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Attorney for Plaintiffs  
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BLITMAN & KING  
Attorneys for Defendants  
JULES L. SMITH, of Counsel  
The Powers Building  
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By papers filed December 21, 2016 (Dkt. 58), Defendants moved to compel Plaintiffs' required disclosures pursuant to Fed.R.Civ.P. 26(a)(1) ("Rule 26(a)(1)"), including Fed.R.Civ.P. 26(a)(1)(A)(iii) ("Rule 26(a)(1)(A)(iii)"), to enlarge the period for Defendants' responses to Plaintiffs' First Set of Interrogatories and Requests to Produce, and for expenses incurred in bringing Defendants' motion pursuant to Fed.R.Civ.P. 37(a)(5)(A) ("Rule 37(a)(5)(A)") ("Defendants' motion"). Plaintiffs

conceded Plaintiffs have failed to timely provide Plaintiffs' required Rule 26(a)(1) disclosures, requesting Plaintiffs be permitted to serve such disclosures by January 26, 2017, Dkt. 60 ¶¶ 2, 8, and do not oppose Defendants' request to provide Defendants' additional time to serve Defendants' responses to Plaintiffs' discovery requests. Dkt. 60 ¶ 7. Accordingly, the court finds the oral argument scheduled for January 18, 2017 to be unnecessary and that Defendants' motion is essentially unopposed. However, as to Defendants' request for expenses, contrary to Plaintiffs' assertion, required disclosures may not be avoided because the opposing party may be possessed of the information subject to such required disclosures. See *Kingsway Financial Services, Inc. v. Pricewaterhouse-Coopers LLP*, 2008 WL 4452134, at \*5 (S.D.N.Y. Oct. 2, 2008) (citing cases). The court also finds Plaintiffs' counsel's multiple health problems which have adversely impacted her practice, see Dkt. 60 ¶¶ 3-5, warrant the conclusion that while Plaintiffs' failure to provide Plaintiffs' required Rule 26(a)(1)(A)(iii) disclosures was not substantially justified, nevertheless, an award of Defendants' expenses would under the circumstances presented be unjust. See Rule 27(a)(5)(A)(iii); *Scott-Iverson v. Independent Health Association, Inc.*, 2016 WL 1458239, at \* 2 (W.D.N.Y. Apr. 14, 2016) ("An award of expenses is unjust under Rule 37(d)(3) where the circumstances of a party's refusal show an inability to comply by factors outside the party's control such as a disability preventing a request for judicial relief, or a physical inability to appear for a deposition such as travel restrictions related to incarceration or a deponent's serious illness." (citing *Restis v. American Coalition Against Nuclear Iran, Inc.*, 2014 WL 1870368, at \* 4 (S.D.N.Y. Apr. 25, 2014) (deponent's travel restrictions, if documented, could have excused appearance at deposition))).

## CONCLUSION

Based on the foregoing, Defendants' motion (Dkt. 58) is GRANTED in part and DENIED in part. Plaintiffs shall serve Plaintiffs' Rule 26(a)(1) disclosures in accordance with Rule 26(a)(1)(A), including without limitation Rule 26(a)(1)(A)(iii), not later than January 26, 2017. Defendants' response to Plaintiffs' First Set of Interrogatories and Request to Produce may be served not later than 30 days following service of Plaintiffs' disclosures in accordance with this Decision and Order. Oral argument on Defendants' motion presently scheduled for January 18, 2017 at 2:00 p.m. is CANCELLED.

SO ORDERED.

*/s/ Leslie G. Foschio*

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LESLIE G. FOSCHIO  
UNITED STATES MAGISTRATE JUDGE

Dated: January 17, 2017  
Buffalo, New York