

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY

ERIC H. HOLDER, JR.,	:	
ATTORNEY GENERAL OF THE	:	
UNITED STATES OF AMERICA,	:	CIVIL ACTION
	:	
Plaintiff,	:	
	:	
v.	:	
	:	
DAVID HAMILTON,	:	No. 3:10CV-759-C
	:	
Defendant.	:	

MOTION IN LIMINE TO PRECLUDE WITNESS TESTIMONY

Eric H. Holder, Jr., Attorney General of the United States, by the undersigned attorneys, hereby respectfully moves the Court for an Order precluding the testimony of Patricia A. Schutt at any trial or hearing in this matter or, in the alternative, directing Defendant to pay reasonable expenses, including attorney’s fees, incurred by the Attorney General in connection with her deposition.

In a Supplemental Rule 26(a) Disclosure filed on September 28, 2012, Defendant disclosed Ms. Schutt as a potential witness. ECF No. 56. This disclosure, however, came almost four months after the May 31, 2012 discovery deadline in this case, ECF No. 42, and after a motion for summary judgment has already been ruled on. ECF No. 55. At this point, then, the disclosure is untimely, and it would prejudice the Attorney General if Ms. Schutt was permitted to testify.

Under Federal Rule of Civil Procedure 37(c)(1), “[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.” Rule 37 “is designed to provide a strong inducement for disclosure of Rule 26(a) material,” and sanctioning is mandatory absent the showing of substantial justification or harmlessness. *Ames v. Van Dyne*, No. 95-3376, 1996 WL 662899, at *4 (6th Cir. Nov. 13, 1996) (citation and internal quotation marks omitted); *see Sexton v. Uniroyal Chem. Co.*, 62 F. App’x 615, 616 (6th Cir. 2003); *Vance v. United States*, No. 98-5488, 1999 WL 455435, at *4 (6th Cir. June 25, 1999) (noting that Rule 37 “clearly contemplates stricter adherence to discovery requirements, and harsher sanctions for breaches of this rule, and the required sanction in the ordinary case is mandatory preclusion”). In lieu of or in addition to preclusion, Rule 37 also allows a court, upon motion and after giving parties an opportunity to be heard, to “order payment of the reasonable expenses, including attorney’s fees, caused by the failure. . . .” Fed. R. Civ. Pro. 37(c)(1)(A).

Here, where this case was filed in December 2010 and discovery began nearly a year ago, after this Court issued its Scheduling Order in October 2011, Defendant’s failure to disclose this potential witness earlier cannot be substantially justified. Even after the allotted fourteen-day window following the Rule 26(f) conference closed, defense counsel had ample time during discovery to investigate and ascertain the identities of any potential witnesses. *See* Fed. R. Civ. Pro. 26(a)(1)(E) (“A party is not excused from making its disclosures because it has not fully investigated the case. . . .”).

Nor is Defendant’s failure harmless, as allowing Ms. Schutt to testify would require the Attorney General to prepare for her testimony at this late stage and incur additional costs. *See, e.g., Bank One, N.A. v. Echo Acceptance Corp.*, No. 04-CV-318, 2008 WL 1766891, at *4 (S.D.

Ohio April 11, 2008) (precluding testimony of witnesses whose identities were disclosed late and finding “violation of the Court’s discovery schedule . . . neither harmless nor justified”).

Should the Court allow Ms. Schutt to testify, the Attorney General would seek to depose her as soon as possible, despite the fact that discovery has closed. Therefore, if this Court foregoes an Order precluding Ms. Schutt’s testimony, the Attorney General seeks an Order directing Defendant to pay reasonable expenses, including travel and attorney’s fees, incurred by the Attorney General in connection with an in-person deposition. Fed. R. Civ. Pro. 37(c)(1)(A);¹ *see also Sunnycalb v. CSX Transp., Inc.*, No. 1:10-cv-192-HJW, 2012 WL 3619267, at *1 (S.D. Ohio May 25, 2012) (ordering defendant to pay plaintiff’s travel and related deposition expenses incurred as a result of defendant’s late disclosure of a witness).

For the foregoing reasons, the Attorney General respectfully requests that the Court preclude the testimony of Patricia A. Schutt in this matter or, alternatively, order Defendant to pay the Attorney General’s reasonable expenses associated with her deposition.

Dated: October 24, 2012

¹ Defendant has stated that he has no objection to Plaintiff deposing Ms. Schutt, but will not agree to pay the expenses associated with that deposition.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on October 24, 2012, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF, which will provide notice of such filing to all registered parties.

s/Aaron Fleisher
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**[PROPOSED] ORDER GRANTING PLAINTIFF’S MOTION *IN LIMINE* TO
PRECLUDE WITNESS TESTIMONY**

The Attorney General of the United States of America has moved for an Order precluding the testimony of Patricia A. Schutt at any trial or hearing in this matter.

The Court, having concluded that oral argument is unnecessary in resolving the pending motion, hereby ORDERS that Patricia A. Schutt is precluded from testifying at any trial or hearing in this matter.

BY THE COURT:

JUDGE, UNITED STATES DISTRICT COURT