

**UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA**

Shannon Miller,
Jen Banford, and
Annette Wiles,

Case No. 15-cv-3740 (RHK/LIB)

Plaintiffs,

vs.

**MEMORANDUM OF LAW IN
SUPPORT OF PLAINTIFFS' MOTION
TO COMPEL DISCOVERY**

The Board of Regents of the
University of Minnesota,

Defendant.

Plaintiffs Shannon Miller, Jen Banford and Annette Wiles (“Plaintiffs”), by and through their undersigned attorneys of record, hereby submit this memorandum of law in support of their motion to compel the production of documents and answers to interrogatories from Defendant The Board of Regents of the University of Minnesota (“Defendant”).

Specifically, Plaintiffs request an order containing the following relief: (1) Requiring Defendant to produce all relevant and non-privileged documents responsive to Plaintiffs’ Requests for Production Nos. 5-7, 9, 10, and 19-20; (2) Requiring Defendant to produce all relevant and non-privileged information responsive to Plaintiffs’ Interrogatory No. 4; (3) Requiring Defendant to confirm, for all discovery requests, that a complete set of relevant and non-responsive documents and information has been produced in this matter; (4) Requiring Defendant to produce a privilege log; and (5) awarding Plaintiffs their reasonable costs and attorneys’ fees associated with bringing this motion.

Plaintiffs' motion is made and based upon this memorandum of law, the Declaration of Andrew T. James and its exhibits, all papers and pleadings on file herein, and any oral argument at the time of hearing.

I. FACTS SUPPORTING PLAINTIFFS' MOTION.

A. FACTUAL BASIS FOR PLAINTIFFS' CLAIMS.

Plaintiffs are former employees of the University of Minnesota-Duluth ("UMD"), where they served as athletics coaches. [Compl., dated Sept. 28, 2015, ECF No. 1 ("Compl."), at ¶¶ 2-4.] Shannon Miller was UMD's first-ever varsity women's ice hockey head coach. [*Id.* ¶ 10.] Over her 16 seasons as head coach, Miller established herself as one of the most accomplished women's ice hockey coaches of all-time, winning five NCAA Division I national championships and eleven Frozen Four tournament wins during her tenure at the university. [*Id.* ¶¶ 10, 12-17.]

Jen Banford was UMD's head women's softball coach—a position she held for 10 seasons—and also served as the part-time director of operations for UMD's women's ice hockey program. [*Id.* ¶¶ 55-56.] Banford's UMD softball teams accumulated an overall record of 332-169, four NCAA division II Central Region berths, one Northern Sun Intercollegiate Conference ("NSIC") regular season title, and Banford was named NSIC Coach of the Year in 2013. [*Id.* ¶ 58.]

Annette Wiles was UMD's head women's basketball coach. [*Id.* ¶ 92.] Over seven seasons in that role, Wiles compiled a 109-86 record, guiding her team into the postseason for her final five seasons as UMD's head coach. [*Id.* ¶ 96.]

All three Plaintiffs are women, each is openly gay, Miller and Wiles were 51-years-old and 46-years-old at the time of their non-renewal and constructive discharge, respectively, and Miller and Banford are Canadian. [*Id.* ¶¶ 10, 55, 92.]

Over the course of their respective employments at UMD, each Plaintiff experienced severe and ongoing discrimination by UMD, including, but not limited to, by its Athletic Director, Josh Berlo, and its Chancellor, Lendley C. Black. [*See generally id.* ¶¶ 132-196.] This discrimination was on the basis of Plaintiffs' sexual orientations, genders, ages, and/or national origins. [*Id.*] All three Plaintiffs were outspoken proponents of gender and sexual orientation equality at UMD, and regularly reported discrimination and Title IX violations to UMD. [*See, e.g.,* ¶¶ 36, 40, 42-43, 45-46, 48, 50, 61, 76, 79, 120-123.]

On December 9, 2014, Miller was informed for the first time, and without being provided the opportunity to take a pay cut, that her coaching contract—and the contracts of her entire coaching staff, consisting of three women, each of whom was a Canadian citizen and identified as gay, lesbian, bisexual, or transgender (“GLBT”)—would not be renewed, effective June 30, 2015. [*Id.* ¶¶ 20-21, 24.] Two days after UMD announced it would not renew Miller's coaching contract, it informed Banford that her contract to serve as UMD's director of women's hockey operations would also not be renewed. [*Id.* ¶ 59.] At that same time, Banford was informed that her coaching contract relative to the women's softball team would also not be renewed, and Athletic Director Berlo concluded by thanking Banford for her services and wishing her well in her endeavors. [*Id.*] On

June 1, 2015, Wiles was forced to resign from her employment at UMD as a result of the hostile and discriminatory environment created by the University. [*Id.* ¶ 92.]

B. PROCEDURAL POSTURE OF LAWSUIT.

On September 28, 2015, Plaintiffs filed their Complaint against Defendant, which is the governing body for UMD and is therefore liable for its conduct at issue in this lawsuit. [*Id.* ¶¶ 8-9.]

Plaintiffs have asserted eight claims against Defendant: (1) discrimination under the Minnesota Human Rights Act, Minn. Stat. §§ 363A.01, *et seq.* (“MHRA”); (2) reprisal under the MHRA; (3) discrimination under Title VII of the Civil Rights Acts of 1964 and 1991, 42 U.S.C. § 2000e, *et seq.* (“Title VII”); (4) creation of a hostile work environment under the MHRA and Title VII; (5) retaliation and discrimination under Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681, *et seq.* (“Title IX”); (6) violation of Minnesota’s Equal Pay for Equal Work law, Minn. Stat. § 181.66, *et seq.*; (7) violation of the Equal Pay Act, 29 U.S.C. § 206(d)(1); and (8) violation of Minnesota’s whistleblower act, Minn. Stat. § 181.932.

C. FACTUAL BASIS FOR DISCOVERY DISPUTE.

1. PLAINTIFFS’ DISCOVERY REQUESTS AND DEFENDANT’S RESPONSES.

On March 16, 2016, Plaintiffs served Defendant with their first set of Requests for Production of Documents and first set of Interrogatories. (Attached to the Declaration of Andrew T. James, dated November 3, 2016 (“James Decl.”) as Exs. 1 and 2, respectively.)

On April 20, 2016, Defendant served Plaintiffs with its responses and answers to those discovery requests. (Attached to James Decl. as Exs. 3 and 4, respectively.)

Defendant has produced documents in several rounds in this matter. Defendant's initial production of documents occurred on May 13, 2016, when it produced documents numbered UM_000000001-000002849. (Letter, dated May 13, 2016, attached to James Decl. as Ex. 12.) On July 15, 2016, Defendant produced additional documents numbered UM_000002850-000004585. (Letter, dated July 15, 2016, attached to James Decl. as Ex. 13.)¹

2. PLAINTIFFS ATTEMPT NUMEROUS TIMES TO MEET AND CONFER REGARDING DISCOVERY DEFICIENCIES.

On July 21, 2016, Plaintiffs sent a letter to Defendant's counsel detailing numerous deficiencies with respect to Defendant's document production and its answers to interrogatories. (Attached to James Decl. as Ex. 5.) Counsel for all parties participated in a meet and confer telephone conference on July 27, 2016, which lasted approximately four hours. (Decl. of Andrew T. James Concerning Meet and Confer, dated Nov. 3, 2016 ("Meet and Confer Stmt."), ¶ 5.) During that conference, counsel discussed deficiencies claimed by Plaintiffs and Defendant in a good faith attempt to resolve the parties' disputes. (*Id.*)

After that meet and confer call, on August 8, 2016, Plaintiffs' counsel sent Defendant's counsel a letter detailing the parties' discussions during the July 27 meet and confer call. (Attached to James Decl. as Ex. 6.) On August 12, 2016, Defendant's

¹ Although this letter states "May 13, 2016" at the top, it was received by Plaintiffs' counsel on July 15, 2016.

counsel responded in writing with additional clarifications regarding that meet and confer call. (Attached to James Decl. as Ex. 7.) On that same date, Defendant also produced another set of documents, numbered UM_000004586-5884. (Letter, dated Aug. 12, 2016, attached to James Decl. as Ex. 14.) Defendant produced its fourth set of documents on September 12, 2016, containing documents numbered UM_000005885-6513. (Letter, dated Sept. 12, 2016, attached to James Decl. as Ex. 15.)

On September 27, 2016, Defendant served its Supplemental Answers to Plaintiffs' First Set of Interrogatories, which modified Defendant's response to Interrogatory No. 4. (Attached to James Decl. as Ex. 8, at pp. 6-7.) On October 7, 2016, Defendant produced its fifth set of documents, numbered UM_000006514-8396. (Letter, dated Oct. 7, 2016, attached to James Decl. as Ex. 16.)

Despite Plaintiffs' good faith attempt to resolve the parties' discovery disputes without need for a motion, Defendant did not produce the agreed-upon documents and information. As a result, on October 13, 2016, Plaintiffs' counsel sent another letter detailing the remaining deficiencies in Defendant's document production and interrogatory answers. (Attached to James Decl. as Ex. 9.) Due to the limited timeline for Plaintiffs' expert witness reports and depositions, Plaintiffs' counsel asked that all documents be produced and that Defendant confirm that it has produced all documents or that no documents exist, along with production of a corresponding privilege log, no later than October 20, 2016. (*Id.* p. 9.) Counsel for all parties participated in a second meet and confer telephone conference on October 17, 2016, and again discussed deficiencies

claimed by both Plaintiffs and Defendant seeking to resolve the parties' disputes. (Meet and Confer Stmt. ¶ 9.)

On October 20, 2016, Defendant produced to Plaintiffs approximately an additional 4,500 pages of documents, bates nos. UM_000008397-12707.² (See letter from Defendant to Plaintiffs, dated October 20, 2016, attached to James Decl. as Ex. 10.) The next day, Defendant produced to Plaintiffs another five pages of documents, numbered UM_000012708-12713. (Letter, dated Oct. 21, 2016, attached to James Decl. as Ex. 17.) However, several deficiencies remained with respect to Defendant's document production and interrogatory responses.

On October 27, 2016, Plaintiffs' counsel emailed Defendant's counsel requesting confirmation that all responsive documents have been produced, requesting an indication of any document requests for which production remains incomplete or outstanding, and requesting production of a privilege log. (Attached to James Decl. as Ex. 11.) Defendant's counsel responded on October 28, 2016, stating that Defendant would be making another document production on October 31 or November 1, that it continues to investigate several requests for production, but that its production would be complete for most requests by November 1. (*Id.* p. 1.)

² As of the date of this memorandum, Defendant has produced approximately 13,008 pages of documents in response to Plaintiffs' discovery requests. These documents are not organized by document request and are in varying forms and file types. Accordingly, Plaintiffs have asked that if Defendant's response to any deficiency is that the requested documents have been produced, they should identify the responsive documents by bates number. (James Decl., Ex. 9, at p. 9.)

On October 31, 2016, Defendant produced an additional set of documents, numbered UM_000012714-13373. (Letter, dated Oct. 31, 2016, attached to James Decl. as Ex. 18.)

II. LEGAL ARGUMENT.

A. STANDARD OF REVIEW.

The Federal Rules of Civil Procedure provide that “[p]arties may obtain discovery regarding any nonprivileged matter that is relevant to any party’s claim or defense.” Fed. R. Civ. P. 26(b)(1). A matter is relevant if “(a) it has any tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence in determining the action.” Fed. R. Evid. 401. Significantly, “[r]elevant evidence need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence.” Fed. R. Civ. P. 26(b)(1).

District courts enjoy extremely broad discretion in controlling discovery. *Crawford-El v. Britton*, 523 U.S. 574, 598, 118 S.Ct. 1584 (1998); *In re Missouri Dep’t of Nat. Res.*, 105 F.3d 434, 435 (8th Cir. 1997) (citing *Bunting v. Sea Ray, Inc.*, 99 F.3d 887, 890 (8th Cir. 1996)). The scope of discovery has been “construed broadly to encompass any matter that bears on, or that reasonably could lead to other matter that could bear on, any issue that is or may be in the case . . . discovery is not limited to issues raised by the pleadings, discovery itself is designed to help define and clarify the issues.” *Oppenheimer Fund Inc. v. Sanders*, 437 U.S. 340, 351, 98 S. Ct. 2380, 2389, 57 L. Ed. 2d 253, 265 (1978) (internal citation omitted). It is not a ground for objection that the information sought would or would not be admissible at trial, as long as it is reasonably

calculated to lead to the discovery of admissible evidence. Fed. R. Civ. P. 26(b)(1); *Oppenheimer*, 437 U.S. at 351, 98 S. Ct. at 2389.

B. DEFENDANT’S DISCOVERY DEFICIENCIES.

1. DEPARTMENT LINE ITEM BUDGETS.

In Plaintiffs’ Request for Production No. 5, they seek production of line item budgets for the Athletic Department for the University of Minnesota-Duluth from the year 2010-2011 through the present. Specifically, Plaintiffs’ Request for Production No. 5 states, and Defendant answered, as follows:

DOCUMENT REQUEST NO. 5: Please produce line item budgets for each year from 2010-2011 to the present for the UMD Athletics Department including, but not limited to, final drafts and revisions.

RESPONSE NO. 5: The University will produce any non-privileged responsive documents.

(James Decl., Ex. 3 at p. 5.)

In Request No. 5, Plaintiffs seek production of Defendant’s year-end report, as well as any responsive line item budgets for the Athletic Department. Neither has been fully produced.

Defendant has produced responsive documents, including, but not limited to, a spreadsheet containing a complete departmental breakdown of expenses, revenue, and a budgetary breakdown on a per-sport basis. (*See, e.g.*, UM_000010099.)³ Although a

³ In order to more quickly produce documents in this matter, Defendant’s counsel admits it over-designated documents as “Confidential” under this Court’s January 26, 2016 Protective Order, ECF No. 27. (*See* James Decl., Ex. 10.) (Stating most of the documents in bates range UM_000008397-000012707 are marked confidential in order to hasten production, and the designation will be removed following a more detailed review in the

similar spreadsheet has been produced for 2014-2016, Plaintiffs are entitled to production of that spreadsheet for the years 2010-2013, and on an ongoing basis.

Defendant has also attached some monthly line item budgets for all sports. (*See, e.g.,* UM_000006629.) (January 2014.) Although monthly line item budgets were produced for all sports for the years 2014-2016, Defendant has not yet produced the requested line item budgets for 2010-2013. Those budgets must be produced.

Finally, Defendant has not produced line item budgets for the athletic department's marketing, development, and discretionary funds. The department spreadsheets (*See, e.g.,* UM_000009001) do not provide this level of information. Plaintiffs therefore request production of line item marketing budgets, line item development budgets, and line item discretionary funds budgets for the UMD Athletic Director for every year from 2010 to the present.

2. NCAA AND EADA SUBMISSIONS.

In Plaintiffs' Request for Production No. 6, they request a set of documents that includes all documents filed with any governmental or regulatory entity, including documents submitted to the NCAA and submitted to the United States Department of Education pursuant to the Equity in Athletics Disclosure Act, 20 U.S.C. § 1092 ("EADA").

future.) Accordingly, because Plaintiffs are unable to attach copies of many documents referenced in this motion without doing so under seal, Plaintiffs will instead provide bates numbers for Defendant's reference, and will provide copies of the referenced documents to the Court upon request at the hearing.

Specifically, Plaintiffs' Request for Production No. 6 states, and Defendant answered, as follows:

DOCUMENT REQUEST NO. 6: Please produce all Documents filed with any governmental or regulatory entity, or maintained by UMD, relating to Title IX and UMD's obligations thereunder with respect to UMD's athletics department from 2010 to the present, including, but not limited to, any attachments, any Documents providing support for the information contained therein, and any drafts and revisions of the same, and specifically including any such Documents relating to the Equity in Athletics Disclosure Act.

RESPONSE NO. 6: The University objects to Document Request No. 6 as overly broad, unduly burdensome, irrelevant, and vague and ambiguous to the extent it seeks production of "all Documents . . . maintained by UMD, relating to Title IX and UMD's obligations thereunder," insofar as many of the Athletics Department's activities are geared toward compliance with Title IX. Subject to and without waiving these objections, the University will produce non-privileged responsive documents.

(James Decl., Ex. 3 at p. 5.)

Plaintiffs have not received a full production relating to two categories of documents: (1) documents submitted to the NCAA; and (2) documents submitted to the EADA. With respect to documents submitted to the NCAA, Plaintiffs request a full production of four documents:

- Sport Sponsorship and Demographics forms: Defendant has produced this form for the years 2012-2013 through 2015-2016. (*See, e.g.,* UM_000005059-5077, 5116-5134.) Defendant must also produce this form for the years 2010-2011 and 2011-2012.
- NCAA Annual Financial Report: Defendant has produced this report for the years 2011-2014. (*See, e.g.,* UM_000012309-12425 (2011-2013),

10261-10277 (2014).) Defendant must also produce this report for the years 2010 and 2015. Defendant has produced an excel spreadsheet that Plaintiffs believe contains information used to prepare the 2014 report. (UM_000010260.) Plaintiffs are entitled to production of this document and information for the years 2010-2013 and 2015.

- NCAA Division I Institutional Self-Studies. To the extent that UMD has participated in any NCAA Division I self-studies, it is obligated to produce all documentation submitted relative to each self-study. This information has not yet been produced.
- NCAA Division II Institutional Self-Studies. To the extent that UMD has participated in any NCAA Division II self-studies, it is obligated to produce all documentation submitted relative to each self-study. On information and belief, Division II self-study reports are performed every five years, and therefore documentation should exist for the 2011-2012 academic year and the 2015-2016 academic year. This information has not yet been produced.

Second, although Defendant has produced documents that appear to be submitted to the U.S. Department of Education annually from 2010-2015 (*see, e.g.,* UM_000005193-5208 (2015)), it is not clear whether Defendant has produced all documentation that was provided to the D.O.E. under the EADA from 2010-2015, and Defendant has not produced the underlying documentation referenced to create that submission. Defendant must either produce the full set of documents or confirm that all

responsive documents have been produced.

3. COACHING CONTRACTS FOR HEAD AND ASSISTANT SPORTS COACHES.

In Plaintiffs' Request for Production No. 7, they seek production of coaching contracts for certain UMD athletics coaches from the year 2010-2011 through the present. Specifically, Plaintiffs' Request for Production No. 7 states, and Defendant answered, as follows:

DOCUMENT REQUEST NO. 7: Please produce all Documents reflecting the salaries, including the title, percent of full time equivalent (FTE) and salary of all coaches and assistant coaches in the men's and women's interscholastic baseball, ice hockey, softball, baseball, and football programs in the UMD Athletics Department, including for each year from 2010 to the present, including, but not limited to, any contracts for each such coach or assistant coach.

RESPONSE NO. 7: The University objects to Document Request No. 7 as overly broad and unduly burdensome to the extent it seeks production of "all Documents" reflecting the sought-after information. Subject to and without waiving these objections, the University will produce documents sufficient to show that salary, title, and percent of full-time equivalent for each head coach and assistant coach of UMD's intercollegiate athletics programs for men's basketball, women's basketball, football, men's hockey, women's hockey, baseball, and softball, including their contracts, from the 2010-2011 academic year to the present.

(James Decl., Ex. 3 at pp. 5-6.)

Despite agreeing to produce these coaching contracts, Defendant has failed to produce contracts for several coaches, and has only partially produced contracts for others.

a. CONTRACTS NOT PRODUCED.

Plaintiffs have not received any coaching contracts for the following individuals,

each of whom is a head coach or assistant coach identified in Document Request No. 7:

- Matt Bowen, head coach of UMD men's basketball team (hired before the 2012-2013 season);
- Greg Bower, assistant coach of UMD football team (joined UMD in January 2013);
- Maura Crowell, head coach of UMD women's hockey team (hired in 2015);
- Katherine Crudo, assistant coach of UMD softball team (hired before the 2012-2013 season);
- Trey Dill, assistant coach of UMD football team (hired before the 2010-2011 season);
- Josh Foreman, assistant coach of UMD baseball team (hired before the 2010-2011 season);
- Chris Garner, equipment manager for UMD men's hockey team (hired before the 2007-2008 season);
- Kaitlyn Hanson, assistant coach for UMD softball team (hiring date unknown);
- Garth Heikkinen, graduate assistant coach for UMD football team (joined as coach in 2013);
- Susan Hoppe, athletic trainer for UMD men's hockey team and former athletic trainer for UMD women's basketball, soccer, and softball teams (hired by UMD in 1981);
- Ashley Johnson, assistant coach for UMD softball team (joined as coach in 2014);
- Stan Karich, assistant coach for UMD softball team (hired before 2010-2011 season);
- Christian Koelling, director of hockey operations for UMD men's hockey team (took over that role in 2008);

- Dan Larson, assistant coach for UMD football team (hired in January 2013);
- Peter Lue, assistant coach for UMD football team (hired in 2003);
- Jeff Nicholas, assistant coach for UMD men's basketball team (hired in 2006);
- Blake Palmer, strength and conditioning coach for UMD men's hockey team (hired in 2007);
- Mandy Pearson, head coach for UMD women's basketball team (hired in 2015);
- Jacqueline Phillips, athletic trainer for UMD women's hockey team (hiring date unknown);
- Bob Rients, head coach for UMD men's baseball team (hired in 2005);
- John Steger, assistant coach for UMD football team (hired in 1997);
- Bryce Tesdahl, graduate assistant coach for UMD men's basketball team (joined team in 2013-2014 season);
- Tyler Johnson, graduate assistant coach for UMD football team (joined team in 2012 or 2013);
- Julianne Vasichek, strength and conditioning coach for UMD women's hockey team (hiring date unknown);
- Jen Walter, head coach for UMD softball team (hired in 2015); and
- Joanna Warmington, head coach for UMD women's cross country team (hired before 2009-2010 season).

These individuals are plainly within the scope of Plaintiffs' Document Request No. 7, and their coaching contracts contain relevant and discoverable information in this lawsuit. Defendant must therefore produce their coaching contracts.

b. CONTRACTS INCOMPLETELY PRODUCED.

There are other UMD athletic coaches for whom Defendant has produced certain of their contracts, but not others. Plaintiffs have requested all responsive coaching contracts since 2010. Defendant's remaining deficiencies in this category are as follows:

- Jess Abrahamas, assistant coach for UMD women's basketball team (need contract for 2012-2013 season);
- Gary Holquist, head coach for UMD men's basketball team (need contracts from 2010-2012);
- Derek Plante, assistant coach for UMD men's hockey team (need contracts from 2011 and 2013);
- Scott Sandelin, head coach for UMD men's hockey team (need contract from 2010-2011); and
- Curt Wiese, head coach for UMD football team (need contracts from 2012-2015).

Plaintiffs are entitled to production of all coaching contracts for these individuals, which Defendant has agreed to provide.

4. DOCUMENTS REFLECTING MERIT INCREASES FOR COACHES.

In Plaintiffs' Request for Production No. 9, they seek production of documentation of merit pay increases for UMD athletics coaches from the year 2010-2011 through the present. Specifically, Plaintiffs' Request for Production No. 9 states, and Defendant answered, as follows:

DOCUMENT REQUEST NO. 9: Please produce all Documents referring or relating to merit increases for all staff in the men's and women's interscholastic basketball, ice hockey, softball, baseball, and football programs in the UMD Athletics Department for each year from 2010-2011 to the present.

RESPONSE NO. 9: The University objects to Document Request No. 9 as overly broad, unduly burdensome, vague, and ambiguous to the extent it seeks “all Documents referring or relating to” merit increases. Subject to and without waiving these objections, Defendants will produce non-privileged documents sufficient to show merit increases for each head coach and assistant coach of UMD’s intercollegiate athletics programs for men’s basketball, women’s basketball, football, men’s hockey, women’s hockey, baseball, and softball, from the academic year 2010-2011 to the present.

(James Decl, Ex. 3 at p. 7.) Defendant has produced a document showing certain performance bonuses and retirement supplements provided to coaches Scott Sandelin (men’s hockey), Shannon Miller (women’s hockey), Derek Plante (men’s hockey), Jason Herter (men’s hockey), Brett Larson (men’s hockey), and Joakim Flygh (women’s hockey). Defendant has not produced this information for the other coaches under Document Request No. 9. It also has not produced the underlying documentation of these merit pay increases, nor documentation of merit pay increases reflected as a percentage of the coaches’ annual salaries.

Defendant has also produced merit pay entry forms from FY 2017 (UM_000009205, 9207, 9209, and 9212), but not that documentation for 2010-2016, and it has not produced the underlying documentation of those merit increases. This information is discoverable and should have been produced.

5. DOCUMENTS REFLECTING DONATIONS TO UMD ATHLETICS.

In Plaintiffs’ Request for Production No. 10, they seek production of any documentation surrounding donations made to UMD athletics from 2010-2011 through the present, including any conditions placed on those donations. Specifically, Plaintiffs’ Request for Production No. 10 states, and Defendant answered, as follows:

DOCUMENT REQUEST NO. 10: Please produce all Documents relating to or referring to all donations to any UMD athletic team, including the name of the donor, the date of each individual donation, the amount of each individual donation, any condition(s) placed upon such donation by the donor, and all Documents showing the distribution or use of each such donation, including, but not limited to, which UMD athletics team received the donation, the portion of the donation received by each team, and all Correspondence relating to any such donation, from 2010 to the present.

RESPONSE NO. 10: The University objects to Document Request No. 10 as overly broad, unduly burdensome, vague, and ambiguous to the extent it seeks “all Documents referring or relating to” donations. Subject to and without waiving these objections, Defendants will produce non-privileged documents sufficient to show each donation to UMD’s intercollegiate athletics programs from 2010-2011 academic year to the present, including the name of the donor (if available), the date and amount of the donation, any condition placed on the donation, and the distribution of each donation.

(James Decl., Ex. 3 at pp. 7-8.)

Defendant has produced a spreadsheet containing a list of certain individual donations, donation information for certain of the donors, and the UMD athletics fund associated with the donation. (*See* UM_000010115.) It has also produced a chart for fiscal year 2010 showing various general levels of donations, providing identifying information for some of the donors, stating whether the donation is a gift or a pledge, and the “purpose” of the gift. (UM_000012708.)

UMD has not produced documentation showing any conditions placed on the donations. Moreover, even the document produced by Defendant does not appear to be complete—for example, it does not list any donations for the “Fall Fling,” an annual fundraising event at UMD during that time period. Plaintiffs are entitled to full documentation of any and all donations made during the responsive time period.

This information is discoverable and is an integral component of Plaintiffs’ claims.

Plaintiffs expect the documentation will show UMD's misuse of donation funds in a discriminatory manner and conditions being placed on donation money in a manner harmful to UMD's women's athletics teams. This documentation is also important for Plaintiffs, and their experts, to assess the budget for UMD's athletics department and assess the credibility of Defendant's claim that finances prevented it from extending Shannon Miller's coaching contract.

6. STUDENT SURVEYS.

In Plaintiffs' Request for Production No. 19, they seek production of student surveys that were performed from 2010-2011 through the present. Specifically, Plaintiffs' Request for Production No. 19 states, and Defendant answered, as follows:

DOCUMENT REQUEST NO. 19: Please produce all Documents constituting, referring to, or relating to any survey or interview, including without limitation, any student survey or senior exit interview, conducted by Defendant concerning any plaintiff from 2010 to the present.

RESPONSE NO. 19: The University objects to Document Request No. 19 as overly broad, vague, and ambiguous as to "interview." Subject to and without waiving these objections, the University will produce non-privileged responsive documents regarding student surveys and senior exit interviews from the 2010-2011 academic year to the present concerning any plaintiff.

(*Id.* pp. 12-13.)

Defendant has produced some evidence of student surveys, but not the full set of those documents. Although Defendant produced summaries of survey interviews, it has not produced a complete set of exit interviews for women's ice hockey and softball. In particular, Defendant has produced a spreadsheet for Wiles containing responses to the exit survey questionnaire (*see* UM_000000853-868) and selected responses to the same

(*see, e.g.*, UM_000000869-870), but not all responsive documents concerning the women's basketball team.

Furthermore, for sports other than women's basketball, Defendant appears to have produced survey responses in a different format. (*See* UM_000011127-11143.) If multiple formats of responsive documents exist, Plaintiffs are entitled to production of all those documents, regardless of the formatting.

Plaintiffs have requested and are entitled to the complete set of interview responses, including the individual responses from students and all breakdowns of those responses. Plaintiffs are further entitled to production of any spreadsheet showing survey responses made by women's ice hockey or softball teams. Finally, Plaintiffs are entitled to complete documentation of any exit interviews that may have been performed relating to their respective departures from UMD.

7. DECEMBER 5, 2014 STAFF MEETING DOCUMENT.

Plaintiffs' Request for Production No. 20 states, and Defendant answered, as follows:

DOCUMENT REQUEST NO. 20: Please produce all Documents constituting, referring to, or relating to the power point presentation created by or presented by Josh Berlo at the December 9, 2014 UMD Athletics Department staff meeting regarding department finances and fundraising.

RESPONSE NO. 20: The University will produce responsive documents. (James Decl., Ex. 3 at p. 13.) Although UMD produced a document in response to this request (UM_000010916-10934), that document appears to be one that was provided at a town hall meeting on December 5, 2014—not the responsive staff meeting. Defendant must either confirm this was the document presented at the athletic department staff meeting or produce that document that was presented at that meeting.

8. DETAILED INFORMATION REGARDING FRINGE BENEFITS.

Plaintiffs have alleged in their Complaint that Defendant discriminated against them on the basis of their sex in the benefits, terms, and conditions of their employment. (Compl. ¶ 178.) This discrimination includes, but is not limited to, fringe benefits that are provided by Defendant to its head and assistant athletics coaches. Plaintiffs' Interrogatory No. 4 requests all information relating to the fringe benefits provided to those coaches.

In response to Interrogatory No. 4, Defendant provided information with respect to the general fringe benefits provided to coaches, and basic information concerning vehicle stipends provided to coaches.⁴

With respect to each Plaintiff, Defendant produced a chart depicting their salary and fringe benefits from the years 2010-2015. (UM_000005880.) This chart very clearly shows the amount of fringe benefits provided differs even amongst the Plaintiffs. It is thus likely that the amount of fringe benefits provided to other head and assistant coaches will also differ from Plaintiffs.

Plaintiffs are entitled to know the cost to Defendant of each fringe benefit provided to its coaches—male and female. Plaintiffs are also entitled to know if the list of fringe benefits provided by Defendant in its answer and supplemental answer to Interrogatory 4 is complete, and whether any other fringe benefits were provided to

⁴ Defendant's answer to Interrogatory No. 4 is lengthy, and therefore will not be quoted in full. However, Defendant's Supplemental Answers to Plaintiff's First Set of Interrogatories are attached to the declaration of Plaintiffs' counsel. (*See* James Decl., Ex. 8, at pp. 4-7.)

coaches. Because the information provided in response to Interrogatory No. 4 is incomplete, Defendant must supplement its answer to provide the missing information. Plaintiffs therefore request the same information contained in UM_000005880 for all responsive coaches.

9. COMPLETE DISCOVERY RESPONSES.

In response to Plaintiffs' request for confirmation that all responsive documents and information have been produced, Defendant's counsel has provided only a partial, conditional response.

First, Defendant states that it continues to investigate the existence of additional responsive budget documents, and to locate additional information documents regarding donations to UMD's intercollegiate athletics programs and the distribution of those donations. (James Decl., Ex. 11 at p. 1.) These documents are crucial to permit Plaintiffs' experts to create their reports in a timely manner, and also to permit Plaintiffs' counsel to fully and completely depose witnesses concerning the discrimination in Defendant's operation of its athletics department. Plaintiffs' First Set of Requests for Production were served on Defendant on March 16, 2016—over 7 months ago. (James Decl., Ex. 1 at p. 16.) Defendant had more than sufficient time to locate and produce all responsive documents concerning its athletics budgets and donations. Defendant must be ordered to produce all responsive documents immediately.

Second, with respect to the remaining discovery requests, Defendant states that “the University has conducted a reasonable search and, to the best of [its] knowledge, its production is complete or will be complete by Monday or Tuesday [October 31 or

November 1].” (*Id.*) This response leaves open the possibility that further responsive documents have not been produced. To the extent this is the case, production of those documents is required. Plaintiffs are preparing to depose several members of UMD’s athletic department concerning Defendant’s interrogatory answers and responses to requests for production. Additionally, Plaintiffs’ experts have indicated they need a full set of documents and discovery responses to timely draft their expert reports. Rather than re-take depositions due to delayed production of documents or information that have been requested, Plaintiffs simply ask for Defendant to confirm it has produced all responsive documents for all requests for production. Plaintiffs also request production of a privilege log, which has not been produced. Once this confirmation and the privilege log are received, Plaintiffs can proceed to take depositions on a complete record.

C. PLAINTIFFS ARE ENTITLED TO AN AWARD OF THEIR REASONABLE EXPENSES INCURRED IN BRINGING THIS MOTION.

Federal Rule of Civil Procedure 37(a)(5)(A) provides that if a motion to compel is granted, or if discovery is provided after the filing of a motion to compel, the court “*must*, after giving an opportunity to be heard, require the party...whose conduct necessitated the motion, the party or attorney advising that conduct, or both to pay the movant’s reasonable expenses incurred in making the motion, including attorney’s fees.” *See Ackerman v. PNC Bank*, Civil No. 12-cv-0042 (SRN/JSM), 2013 U.S. Dist. LEXIS 85847, at *9-10 (D. Minn. June 18, 2013) (affirming magistrate judge’s award of plaintiff’s fees and costs incurred in bringing motion to compel). Because Plaintiffs made a good faith effort to obtain the above-described documents and information

without court action, and because Defendant's nondisclosure is not substantially justified, an award of Plaintiffs' reasonable fees and costs incurred in bringing this motion is appropriate.

III. CONCLUSION.

For these reasons, Plaintiffs are entitled to production of the above-described documents and information. Plaintiffs therefore respectfully request that this Court grant their motion and award their reasonable fees and costs incurred in bringing this motion.

[SIGNATURE PAGE FOLLOWS.]

Respectfully submitted,

Dated: November 3, 2016

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**UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA**

Shannon Miller,
Jen Banford, and
Annette Wiles,

Case No. 15-cv-3740 (RHK/LIB)

Plaintiffs,

**CERTIFICATE OF WORD COUNT
COMPLIANCE PURSUANT TO
L.R. 7.1(d)**

vs.

The Board of Regents of the
University of Minnesota,

Defendant.

I, Andrew T. James, hereby certify that Plaintiffs' Memorandum of Law in Support of Plaintiffs' Motion to Compel Discovery is compliant with Local Rule 7.1(d) and with the type size limitation of L.R. 7.1(f).

I further certify that, in preparation of the aforementioned Memorandum of Law, I used Microsoft® Word 2010, and that this word processing program has been applied specifically to include all text, including headings, footnotes and quotations in the following word count.

I further certify that the above-referenced Memorandum of Law contains 5752 words.

[SIGNATURE PAGE FOLLOWS.]

Dated: November 3, 2016

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