**IN THE UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF MINNESOTA**

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| Shannon Miller, Jen Banford, and Annette Wiles,<br><br>Plaintiffs,<br><br>v.<br><br>The Board of Regents of the University of Minnesota,<br><br>Defendant. | Case No. 15-cv-03740 (RHK/LIB)<br><br>**DEFENDANT'S MEMORANDUM OF LAW IN SUPPORT OF MOTION TO COMPEL DISCOVERY** |

## INTRODUCTION

In this case, three former intercollegiate athletics coaches at the University of Minnesota, Duluth ("UMD") sued the Board of Regents of the University of Minnesota ("the University") for alleged discrimination on the basis of gender, sexual orientation, national origin (Canadian), and/or age; reprisal for reporting alleged discrimination; and violations of the Equal Pay for Equal Work Law or the Equal Pay Act. Plaintiff Shannon Miller seeks damages in the amount of $8 million; Plaintiffs Jen Banford and Annette Wiles seek to recover $5 million each. (ECF No. 20 at 4 (Pls.' Statement of the Case).) Plaintiffs' alleged damages include past and future lost income. (ECF No. 1 (Compl. ¶¶ 144, 153, 163, 174).)

Despite the amount in dispute and the nature of the damages sought, Miller and Banford refuse to produce documents relating to the business they formed in

Palm Springs after leaving the University. And despite putting their respective incomes directly at issue, Plaintiffs refuse to produce their income-tax returns.

Moreover, each Plaintiff refuses to submit to an interview by the University's vocational rehabilitation expert, despite the expert being a suitably licensed and certified examiner, and despite Plaintiffs' experts' anticipated testimony that that the University's actions have rendered them unemployable as collegiate coaches.

The University denies all of Plaintiffs' claims. It makes this motion to compel to prevent Plaintiffs' attempts to hide extraordinarily relevant documents and information that may well assist the University in defending against Plaintiffs' baseless claims. Specifically, the University respectfully asks the Court to issue an order compelling (1) the production of the financial records of Miller's and Banford's business; (2) the production of Plaintiffs' tax returns; and (3) vocational examinations of Plaintiffs by the University's expert.

## ARGUMENT

## I. PLAINTIFFS SHOULD BE REQUIRED TO PRODUCE ADDITIONAL RESPONSIVE DOCUMENTS RELEVANT TO LIABILITY AND DAMAGES.

### A. Governing Law

The scope of discovery is governed by Rule 26(b)(1) of the Federal Rules of Civil Procedure:

> Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case, considering the importance of the issues at

> stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit. Information within this scope of discovery need not be admissible in evidence to be discoverable.

Fed. R. Civ. P. 26(b)(1); *Orduno v. Pietrzak*, No. 14-1393 (ADM/JSM), 2016 WL 5853723, at *2–3 (D. Minn. Oct. 5, 2016) (applying Rule 26(b(1) factors and affirming magistrate judge's order granting motion to compel).

Courts construe Rule 26 broadly to encompass "any matter that bears on, or that reasonably could lead to other matter[s] that could bear on, any issue that is or may be in the case." *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 351 (1978); *see also Hofer v. Mack Trucks, Inc.*, 981 F.2d 377, 380 (8th Cir. 1992) (Rule 26 "is liberal in scope and interpretation, extending to those matters which are relevant and reasonably calculated to lead to the discovery of admissible evidence"). The threshold requirement of discoverability is met "if the information sought is 'relevant to the subject matter involved in the pending action.'" *Archer Daniels Midland Co. v. Aon Risk Servs., Inc. of Minn.*, 187 F.R.D. 578, 589 (D. Minn. 1999) (quoting *Shelton v. Am. Motors*, 805 F.2d 1323, 1326 (8th Cir. 1986)). The standard of relevance in the context of discovery is broader than in the context of admissibility. *Hofer*, 981 F.2d at 380.

Fed. R. Civ. P. 37(a) provides that a party may move for an order compelling discovery where, as here, a party fails to produce documents within the scope of discovery.

**B. The Court should compel production of documents relating to Plaintiffs' income and their businesses (Document Request No. 5).**

The University's Document Request No. 5 seeks documents relating to Plaintiffs' income and the profitability of Miller's and Banford's new business venture, which are highly relevant to assessing their damages claims. Request No. 5 reads:

> Produce all documents that constitute, explain, describe, or in any other way relate to or pertain to your income and your household income, from any source whatsoever, for the years 2011 to the present, including but not limited to a copy of your *federal and state tax returns, W-2 forms, schedules and related forms*, copies of any unemployment insurance, disability insurance, and/or social security disability payments made to you, and *copies of the financial statements (monthly, quarterly and annual balance sheets, profit and loss statements, income statements, etc.) and tax returns and Schedule K-1s of any business owned in whole or in part by you*.

(Aff. of Jeanette M. Bazis ("Bazis Aff.") Exs. A–C at 5 (emphasis added).) Plaintiffs objected to this document request, stating they would produce only Plaintiffs' W-2 forms, 1099 forms, and unspecified documents reflecting their income from 2011 to present:

> Plaintiff objects to this request on the grounds that it requests documents not relevant to any claim or defense in this matter, is overbroad, is not likely to lead to the discovery of admissible

> evidence, seeks documents that are beyond the scope of permissible discovery, and seeks to invade plaintiff's right to privacy. Subject to and without waiving the foregoing objections, plaintiff will produce responsive W-2 forms, 1099 forms, and documents reflecting plaintiff's income for the years 2011 to present.

(*Id.*) Following extensive meet-and-confer efforts, Plaintiffs agreed to produce, in addition to W-2 and 1099 forms, any documents reflecting Plaintiffs' unemployment insurance, disability insurance, and any social security disability payments. (Bazis Aff. Ex. H at 1–2; Ex. I ¶ 2; Ex. J at 4 ¶ 2.)[1]

Plaintiffs refuse, however, to supply documents critical to evaluating and testing their damages claims—namely, documents relating to the pedal-pub business that Miller and Banford formed after leaving the University, and the tax returns for all three Plaintiffs.

### 1. The Court should order Plaintiffs to produce Sunny Cycle financial records.

It is undisputed that Miller and Banford are co-owners of a limited liability company called Sunny Cycle, LLC. *See* Sunny Cycle, Who We Are, http://sunnycycleps.com/who-we-are/. Sunny Cycle is a pedal-pub business that Miller and Banford operate in Palm Springs, California. Yet while they claim lost income, Miller and Banford refuse to provide any documents relating to Sunny

[1] To date, it appears that the only documents to have been produced along these lines are Wiles's W-2s from the University (for 2011, 2012, 2014, and 2015) and a Form 1099 (for 2014). No other income-related documents have been produced; the University takes Plaintiffs at their word that additional documents are forthcoming.

Cycle, citing their privacy rights. The University seeks an order compelling production of Sunny Cycle's monthly, quarterly, and annual financial statements (profit-and-loss statements, income statements, and balance sheets), Schedule K-1's, business tax returns, business plans, pro formas, budgets, projections, loan-application documents, and documents evidencing the income and benefits that Miller and Banford have received or are entitled to receive from Sunny Cycle.

In their interrogatory responses, Miller and Banford deny receiving any income from Sunny Cycle, other than Internet, phone, and car payments. Miller states:

> Miller has not received any income from Sunny Cycle to date; she has received $54.50 a month for Internet for the last eight months. She has also received $224.57 a month for her car payments for the last eight months.

(Bazis Aff. Ex. D at 4–5.) Similarly, Banford states:

> Banford has not received any income from Sunny Cycle to date, she has received $54.50 for Internet for the last eight months totally, $436 to date for her Internet and phone. She has also received $224.57 per month for eight months for payment towards her car, a total of $1796.60.

(Bazis Aff. Ex. E at 4–5.)

According to Plaintiffs, these interrogatory responses should suffice. But the University is entitled to thorough discovery on damages, particularly given Miller's and Banford's collective damages claims of $13 million. The University is entitled to discover, for instance, whether Miller and Banford are refraining from distributing

profits from Sunny Cycle to themselves and stockpiling cash, or distributing monies to a third party for safekeeping, in order to bolster their claims for lost income. Accordingly, Miller and Banford should be ordered to produce Sunny Cycle's monthly, quarterly, and annual financial statements from inception to present, business tax returns, and K-1's or other similar tax documents issued to Miller and Banford, so that the University—and the fact-finder—can see for themselves. *See Shay v. Lifting Gear Hire, Corp.*, No. 12 C 1687, 2012 WL 6680313, at *3–4 (E.D. Ill. Dec. 21, 2012) (concluding, in action against former employer for age discrimination and retaliation, that information concerning plaintiff's start-up business was discoverable because it may be relevant to defendant's defense of failure to mitigate damages, and ordering plaintiff to produce documents); *Fields v. Gen. Motors Corp.*, No. 94 C 4066, 1996 WL 14040, at *5–6 (N.D. Ill. Jan. 14, 1996) (concluding that defendant was allowed inquire into the financial status of plaintiffs' past and present owned or operated motor-vehicle dealerships because those areas "may relate to matters of mitigation," and ordering production of "all financial documents" relating to those dealerships—including audited annual financial statements, income statements, statements of cost of goods sold, selling, general and administrative expenses, balance sheets, statements of cash flows, and statements of stockholders' equity or statements of owner's equity); *Harper v. Applied Power, Inc.*, No. 79-2612-M, 1980 WL 308, at *2–3 (W.D. Tenn. Aug. 28,

1980) (concluding, in age-discrimination and breach-of-contract action against former employer, that plaintiff was required to produce documents regarding a business owned by plaintiff and his family, where plaintiff went to work after his allegedly discriminatory termination, including state and federal business tax returns and financial statements for the company); *Ziolkowski v. Han–Tek, Inc.*, 126 A.D.3d 1431, 1432 (N.Y. App. Div. 2015) (holding, in an action related to injuries plaintiff sustained in a work-related accident, that documents relating to plaintiffs' residential real-estate business were "relevant to plaintiff's claim for lost wages, as well as [defendant]'s affirmative defense of failure to mitigate damages" and reversing order quashing subpoena for those documents (citations omitted)).

Also relevant and responsive would be any documents that show whether and how much the business is paying for vehicles driven by Plaintiffs, gasoline, mileage, rent or mortgage payments, cell phones, or other expenses that benefit Plaintiffs personally. Indeed, Plaintiffs state in their interrogatory responses that the business is paying their Internet, telephone, and car payments; the University is entitled to documentary proof of those payments and to test whether Plaintiffs are deriving any additional benefits from the business.

The University also is entitled to any business plans, pro formas, budgets, and projections submitted to financing sources, as well as any loan-application

documents. Plaintiffs' own real-time estimates of the projected earnings of their business certainly are relevant to their claims for loss of future earnings.

In short, there are many avenues by which a business owner can take advantage of corporate structure; all documents reflecting such benefits flowing to Plaintiffs from the business—or which may be purposefully withheld from distribution to Plaintiffs—are discoverable.

Plaintiffs have stated they are withholding the Sunny Cycle documents based on a right to privacy. (Bazis Aff. Exs. A–C at 5; Ex. G at 1.) This objection is baseless. First, these are business documents, not personal documents. Second, the Protective Order allows for Plaintiffs to designate the tax returns as Confidential and protect them from disclosure to the public. Plaintiffs commenced this suit and claim damages in the form of lost income; they have therefore forfeited the right to object to production of their business's financial information.

For all of these reasons, the Sunny Cycle documents sought are highly relevant to Miller and Banford's damages claim, and proportional to the needs of this case, where Miller and Banford are seeking $13 million in damages. Miller and Banford have ready access to relevant documents, and there is no cost or burden to them associated with securing and producing the documents. Accordingly, Rule 26 strongly favors disclosure.

**2. The Court should also require Plaintiffs to produce their tax returns and additional income-related documents.**

Again, to defend against Plaintiffs' damages claims, the University seeks information about Plaintiffs' respective incomes—specifically, all documents reflecting the income and fringe benefits Plaintiffs have received since their departure from the University. In addition to the W-2 forms, 1099 forms, and documents showing unemployment insurance, disability insurance, and any social security disability payments, Plaintiffs should be required to produce their federal and state tax returns and schedules. They decline to do so. (Bazis Aff. Exs. A–C at 5; Ex. H at 2; Ex. I ¶ 2; Ex. J at 4 ¶ 2.)

Each Plaintiff has made an issue of her income by claiming loss of income due to the University's alleged conduct. Plaintiffs must produce their tax returns, which are relevant to the extent of Plaintiffs' alleged financial injuries and their mitigation thereof. *See Gaillard v Jim's Water Serv., Inc.*, 535 F.3d 771, 778–79 (8th Cir. 2008) (holding that, where plaintiff presented evidence to suggest he suffered a loss of income, he opened the door for defendants to produce evidence to contradict those claims, and concluding that plaintiff's tax records were "highly relevant" to the defense of the case because "past income as established by tax returns is highly relevant to a loss of income claim," the returns were relevant to the credibility of plaintiff's testimony regarding loss of income and the extent and severity of his injuries, and the returns were relevant to the credibility of plaintiff's

economic expert); *Fields*, 1996 WL 14040, at *4 (concluding that where a party makes an issue of his income by claiming loss due to injury, he opens his tax returns up to scrutiny by his opponent, that it would be "somewhat inequitable for plaintiffs, who filed this action claiming financial damages, to later fail to provide the very financial information necessary to suitably demonstrate either the extent of their financial injury or mitigation of that injury," and granting defendant's motion to compel production of income-tax returns).

Moreover, Plaintiffs may well derive income from sources and circumstances in which they would not receive a W-2 (issued to employees) or a Form 1099 (issued to independent contractors, etc.). For instance, they may report cash income to taxing authorities, income from rental properties, or—as in the case of Miller and Banford—income as business owners. It is therefore critical that Plaintiffs' tax returns be produced.

The stakes in this multi-million-dollar case are high, so this request is proportional to the needs of the case. Plaintiffs have ready access to responsive documents, and there is no cost or burden to them of securing and producing the documents. Accordingly, Rule 26 strongly favors production.

## II. THE COURT SHOULD REQUIRE EACH PLAINTIFF TO SUBMIT TO AN INTERVIEW WITH THE UNIVERSITY'S VOCATIONAL REHABILITATION EXPERT.

The University seeks an order requiring each Plaintiff to submit to an interview, approximately two hours in length, with its vocational rehabilitation expert, Jan Lowe, M.S., C.R.C. No recording devices will be used, and the University is not requesting that Plaintiffs submit to any testing by Ms. Lowe.

Federal Rule of Civil Procedure 35(a) provides:

> The court . . . may order a party whose mental or physical condition—including blood group—is in controversy to submit to a physical or mental examination by a suitably licensed or certified examiner. . . . The order may be made only on motion for good cause . . . .

The Court should compel each Plaintiff to submit to an interview with Ms. Lowe because Ms. Lowe is a suitably licensed and certified examiner, because Plaintiffs' vocational, mental, and physical conditions are in controversy, and because good cause exists. *See Schlagenhauf v. Holder*, 379 U.S. 104, 118–19 (1964) (stating that Rule 35(a) requires demonstration of "in controversy" and "good cause," which requirements are "necessarily related").

Ms. Lowe has a master's degree in Vocational Rehabilitation Counseling, is a diplomate of the American Board of Vocational Experts, and is a certified rehabilitation counselor. (Aff. of Jan Lowe ("Lowe Aff.") ¶ 2 & Ex. A.) She has all of the required credentials of a "suitably licensed or certified examiner." *See Jefferys v. LRP Publ'ns, Inc.*, 184 F.R.D. 262, 263 (E.D. Pa. 1999); *see also Fischer v. Coastal*

*Towing Inc.*, 168 F.R.D. 199, 201 (E.D. Tex. 1996) (concluding that a "suitably licensed or certified examiner" under Rule 35 includes a vocational-rehabilitation expert).

Moreover, a vocational examination involves examination of a plaintiff's mental and physical condition within the meaning of Rule 35. "A vocational examination 'is within the spirit and letter of the rule as currently written.'" *Kephart v. ABB, Inc.*, No. 2:12-668, 2014 WL 1452020, at *8 (W.D. Pa. Apr. 14, 2014) (quoting *Jefferys*, 184 F.R.D. at 263). Namely, a vocational examination typically consists of a private interview where the examiner gathers information on the individual's background and vocational qualifications. Such an interview addresses both the physical and mental circumstances of the individual, including the individual's self-perception and self-description, abilities, interests, appearance, and demeanor. Lowe Aff. ¶ 5; *see also, e.g.*, *Scheriff v. C. B. Fleet Co.*, No. 07-C-873, 2008 WL 2434184, at *1 (E.D. Wis. June 16, 2008).

Good cause requires an order directing Plaintiffs to submit to vocational examinations because the University should have the opportunity to evaluate Plaintiffs' vocational capacities, opportunities, and limitations in order to rebut their intended testimony that they cannot return to the collegiate workforce due to the University's actions. Each Plaintiff here alleges future loss of earnings as a result of the University's alleged actions. (ECF No. 1 (Compl. ¶¶ 144, 153, 163, 174).)

In fact, Plaintiffs intend to submit testimony by two experts opining that the University's actions have rendered them unemployable in positions equivalent to those they held at the University. Plaintiffs have disclosed that both Richard A. Lapchick, B.A., M.A., Ph.D., and Donna Lopiano, B.S., M.A., Ph.D., "will testify regarding the relatively small college coaching community and how Plaintiffs' employment and treatment at the University will make it difficult for each to be hired as a collegiate coach, or otherwise the [*sic*] college sports industry, in the future." (Bazis Aff. Ex. F at 2–3.)

By asserting damages claims for $8 million (Miller), $5 million (Banford), and $5 million (Wiles), Plaintiffs have squarely placed their earning capacity and the scope and extent of their future employability at issue. Good cause therefore exists for the evaluation by Ms. Lowe. *See Scheriff*, 2008 WL 2434184, at 3 ("Plaintiff has placed his earning capacity in issue, and a Rule 35 examination is appropriate."); *see also Ornelas v. Southern Tire Mart, LLC*, 292 F.R.D. 388, 393 (S.D. Tex. March 28, 2013) ("[E]xaminations by vocational rehabilitation experts are repeatedly found to be warranted where the scope and extent of the plaintiff's future employability are at issue."); *Monroe v. Cooper/T. Smith Stevedoring Co.*, No. 06–933–B–M2, 2008 WL 687196, at *3 (M.D. La. Mar. 10, 2008) (granting motion to compel vocational rehabilitation evaluation where plaintiffs "placed Mr. Monroe's physical/mental condition and residual employability in controversy" by,

among other things, "alleging damages for loss of earnings and/or earning capacity and disability"); *Fenger v. Lehman*, No. 19HA-CV-11-3466, 2013 WL 4792881, at *1 (Dakota Cnty. Dist. Ct. May 31, 2013) (permitting defendants' qualified vocation rehabilitation expert to interview or otherwise examine plaintiff where plaintiff made a claim for lost wages and decreased earning capacity); *Bidwell v. Camacho*, No. C6-02-8303, 2003 WL 25557905 (Ramsey Cnty. Dist. Ct. Aug. 26, 2003) (concluding that defendant had established good cause for an interview with a vocational specialist because plaintiff placed his vocational condition—employability—in issue).

It would be unfair to prevent Ms. Lowe from conducting examinations that will assist her in testifying about Plaintiffs' employability and the nature of the positions for which they would be employable. In short, the University is entitled to respond to the expert reports and anticipated testimony of Drs. Lapchick and Lopiano to remain on equal footing with Plaintiffs. *See Duncan v. Upjohn*, 155 F.R.D. 23, 25 (D. Conn. 1994) ("One purpose in granting a request for a[n] . . . examination pursuant to Rule 35 is to 'preserve the equal footing of the parties . . . .'" (quoting *Tomlin v. Holeck*, 150 F.R.D. 628, 633 (D. Minn. 1993))); *cf. Wills v. Red Lake Mun. Liquor Store*, 350 N.W.2d 452, 455 (Minn. App. 1984) ("Whether plaintiff will be able to obtain gainful employment requires evaluation by experts along with comprehensive testing. ***All parties should have an***

***opportunity to fully explore and understand his employment potential***." (emphasis added)). And it is both best practice and common practice for a vocational rehabilitation expert to conduct evaluative interviews such as the one requested by this motion. (*See* Lowe Aff. ¶ 7.)

A deposition is not an effective substitute for the requested vocational rehabilitation interview, as Plaintiffs have posited. Expert testimony as to whether Plaintiffs will be able to find gainful equivalent employment is best garnered by questioning and evaluation by an expert—not by a lay attorney. (Lowe Aff. ¶ 8.) Courts have found that a defendant should not be compelled to limit its case to mere cross-examination (in contrast to an expert's own examination), as expert testimony can be essential to afford a defendant adequate opportunity to challenge the plaintiff's claim. *See Ornelas*, 292 F.R.D. at 392 ("The promulgators of Rule 35 deemed that the opportunity to cross-examine was an insufficient test of truth and as a result, independent examinations were prescribed." (quotation omitted)). And here there is no intention to record or otherwise transcribe the interview. The University should have an opportunity to fully explore and understand Plaintiffs' employment potential and their employment market and opportunities.

As for Wiles, although she has agreed to submit to an independent medical examination, courts have recognized that where a plaintiff places his employment abilities in controversy, medical examinations or medical records may not be

sufficient, and that a defendant might be prejudiced if not permitted to conduct a vocational examination of the plaintiff. *See Kephart*, 2014 WL 1452020, at *9 (citing *Douris v. Cnty. of Bucks*, No. 99–cv–3357, 2000 WL 1358481, at * 3 (E.D. Pa. Sept. 21, 2000) (requiring plaintiff to submit to a medical examination and a separate vocational examination). Likewise, courts have noted that reports prepared by a plaintiff's experts, a defendant's deposition of a plaintiff, and a plaintiff's answers to interrogatories do not preclude the defendant from conducting a vocational examination of the plaintiff, as long as the defendant can show good cause. *Id.* (citing *Carotenuto v. Emerson Elec. Co.*, No. 89–cv–6298, 1991 WL 111258, at * 1 (E.D. Pa. June 19, 1991)). These courts have also explained that a vocational examination is not a "repeat" medical examination, but is a separate examination that provides information about a plaintiff's vocational capabilities. Therefore, the sought-after vocational examination is neither unreasonably cumulative nor duplicative.

Accordingly, good cause exists for the proposed vocational examinations, and the University should have the opportunity to evaluate Plaintiffs' vocational capacities, opportunities, and limitations to determine whether they can return to the collegiate workforce.

## CONCLUSION

For the reasons stated above, the University respectfully requests that the Court grant its motion to compel discovery.

Dated: November 3, 2016

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I, Katherine M. Swenson, certify that that Defendant's Memorandum of Law in Support of Motion to Compel Discovery complies with the limits in LR 7.1(f) and with the type-size limit of LR 7.1(h).

I further certify that, in preparation of this memorandum, 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, but excluding the caption and signature block as provided under LR 7.1(f)(2).

I further certify that the above-referenced memorandum contains 3,904 words.

Dated: November 3, 2016

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