

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

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| Shannon Miller, Jen Banford, and Annette Wiles, |) | File No. 15-CV-3740 |
| |) | (RHK/LIB) |
| Plaintiffs, |) | |
| |) | |
| vs. |) | Duluth, Minnesota |
| |) | November 17, 2016 |
| The Board of Regents of the University of Minnesota, |) | DIGITAL RECORDING |
| |) | |
| Defendant. |) | |
| |) | |

BEFORE THE HONORABLE LEO I. BRISBOIS
UNITED STATES DISTRICT COURT MAGISTRATE JUDGE

(MOTIONS HEARING)

APPEARANCES

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1 about an hour and 15 minutes to wrap things up. I have
2 another matter which is actually going to be postponed
3 because of that. So we've given you a little extra time,
4 but I can't give you too much more.

5 Who is going to argue on behalf of the plaintiffs
6 for -- well, obviously you are. You are here alone. Come
7 on up to the podium, please.

8 MR. BRIMMER: All right. Thank you, Judge. And I
9 think that the Court's time probably won't be an issue.
10 We've had a discussion and I think most everything in
11 plaintiffs' motion has been resolved. I think there's one
12 issue between us that's still in dispute.

13 THE COURT: You've got to let me ask the question
14 first.

15 MR. BRIMMER: Oh, sorry, Judge. I jumped the gun.
16 (Laughter)

17 THE COURT: Well, that was good. That, in fact,
18 was going to be my first question, that based on the
19 defendant's memorandum, it seemed like there was -- and the
20 history behind the meet and confers -- that a good deal of
21 what was at issue both in the interrogatory in terms of
22 background documents and the document requests themselves
23 had either been produced over time or a commitment had been
24 made to produce them as a result of this motion. So that's
25 my question, you know, what -- first of all, tell me exactly

1 what's left.

2 MR. BRIMMER: Okay.

3 THE COURT: And then I have a question about the
4 rest.

5 MR. BRIMMER: All right.

6 THE COURT: So what remains in dispute?

7 MR. BRIMMER: The only issue that remains in
8 dispute is information relating to the fringe benefits paid
9 to coaches.

10 THE COURT: And that's Document Request No. what?
11 Or is it -- yeah, it's a document request.

12 MR. BRIMMER: It's a document request.

13 THE COURT: Yeah.

14 MR. BRIMMER: May I grab my book --

15 THE COURT: Sure.

16 MR. BRIMMER: -- please, Judge?

17 Thank you.

18 (Pause)

19 MR. BRIMMER: This is actually the interrogatory,
20 Judge. This is Interrogatory No. 4.

21 THE COURT: All right.

22 MR. BRIMMER: And I believe the defendants --

23 THE COURT: I guess the reason I confused or
24 conflated the two is that, in answering earlier, some
25 document or evidence in the form of tables and things like

1 that was produced.

2 MR. BRIMMER: I believe the document was produced
3 and I think it's number 5880. And in lieu of answering the
4 interrogatory, they provided basically a business record,
5 which was a table that showed the three plaintiffs' fringe
6 benefits.

7 THE COURT: So some aspect of Interrogatory No. 4
8 remains in dispute. Everything else, though, has been
9 resolved --

10 MR. BRIMMER: Yes.

11 THE COURT: -- to the plaintiffs' satisfaction,
12 correct?

13 MR. BRIMMER: Yes, Your Honor.

14 THE COURT: And so my only question, then, is and
15 it's actually more to -- whoever is going to respond to this
16 for the defense, come up here.

17 We'll get into the substance of the dispute
18 regarding Interrogatory 4 in a minute, but as to everything
19 else, one of the recurring themes through the record that
20 was submitted is, you know, here's some documents, here's
21 some documents, and then there was never a definitive
22 production or termination.

23 As part of these meet and confers that resolved
24 everything except Interrogatory 4, do we now have a
25 definitive date for compliance?

1 MR. PRAMAS: For any, I'll call it, missing pieces
2 of the production, we believe within the next two weeks we
3 can complete it. There's not that much left and I indicated
4 to counsel when we were meeting before this hearing in the
5 hallway that I thought two weeks was a reasonable period of
6 time to put together or find the missing pieces and produce
7 it.

8 THE COURT: All right. In light of the holiday
9 next week, I'm going to order that everything that's the
10 result of the meet and confer which takes everything off
11 this motion, all those missing pieces, 21 days from today,
12 that's your drop-dead date. Sooner is fine --

13 MR. PRAMAS: Sure.

14 THE COURT: -- but anything -- that extra seven
15 days in light of the holidays should eliminate any sort of,
16 sorry, we didn't anticipate the delay kind of response. How
17 does that work?

18 MR. PRAMAS: Perfect.

19 THE COURT: Mr. Brimmer?

20 MR. BRIMMER: Great, Judge. Thank you.

21 THE COURT: Okay. Now you can have a seat again.

22 Mr. Brimmer, what is your -- what are the specific
23 arguments and what are the specific deficiencies regarding
24 Interrogatory No. 4?

25 MR. BRIMMER: The only remaining deficiency,

1 Judge, is that the university has not produced information
2 detailing the amount and value of the fringe benefits paid
3 to coaches other than the plaintiffs. In response to
4 Interrogatory No. 4, a document was produced which was --

5 THE COURT: So you're looking for specifically
6 what each other coach elected or received during the 2010 to
7 2015 time frame?

8 MR. BRIMMER: Yes, Your Honor. And really what we
9 would like is the same document they produced for the
10 plaintiffs, just for the other coaches.

11 THE COURT: Anything else?

12 MR. BRIMMER: That's it, Judge. We think that
13 they're relevant because it relates to the compensation.
14 Compensation in any case where you're comparing the amount
15 that was paid to males and females or whatever it may be, it
16 involves two components, which is salary and fringe
17 benefits, and we would just like to know what the value of
18 the fringe benefits paid to the other coaches are.

19 THE COURT: All right. Thank you.

20 MR. BRIMMER: Thank you, Judge.

21 THE COURT: Mr. Pramas.

22 MR. PRAMAS: Thank you. May it please the Court,
23 Counsel.

24 The university's objection to producing what we
25 produced for the plaintiffs for the other head coaches is

1 two parts. The first is that it isn't relevant and the
2 information would not be helpful for any analysis of the
3 discrimination claims. And the second part is undue burden.
4 Let me start with the first objection that's relevance.

5 I understand and we did produce for the
6 plaintiffs, with considerable time and effort, a detailed
7 listing of the university's costs to provide all the various
8 fringe benefits to each of the plaintiffs and I understand
9 they need that for wage loss calculations.

10 But finding out what other coaches -- what the
11 university's contribution was to other coaches doesn't help
12 resolve any issue that's in dispute in this case and that's
13 because all coaches at UMD and actually all coaches
14 university-wide are in the job classification of
15 professional and administrative employees, referred in short
16 as P&A employees.

17 All P&A employees system-wide have the same menu
18 of benefits they choose from and the amount the university
19 contributes toward fringe benefits will vary based on a
20 variety of factors.

21 Let's say, for instance, the men's basketball
22 coach and let's focus on medical for a second. Does the
23 men's basketball coach choose sort of a standard medical
24 plan? Is it just himself that he seeks coverage for or does
25 he seek coverage for a spouse? Are there any dependents he

1 seeks coverage for? On that the university's contribution
2 toward the medical plan will vary. Instead does the coach
3 choose a higher deductible, higher out-of-pocket cost plan
4 where the cost to the university is lower? What's the
5 coach's age? Because that affects what the university
6 contributes. Does the coach contribute to a health savings
7 account, to a flexible savings account? Has the coach
8 earned enough wellness points that there's a reduction in
9 the premium? And that's just the analysis for the medical.

10 So for each head coach, based on the head coach's
11 unique demographic features, whether the coach has
12 dependents or a spouse that's going to be covered by the
13 plan, the amounts the university contributes to each coach
14 will vary.

15 It's not the case that a coach of a men's team
16 gets some special plan that isn't available to a coach of a
17 women's team. All the coaches choose from the same plan.
18 So asking the university to go through what would take a
19 considerable amount of time and effort to show what the
20 university contributed toward each coach isn't proof of
21 anything regarding discrimination. It's just going to vary
22 based on unique things.

23 The other thing that varies, things like life
24 insurance or long-term disability, the amount of the
25 benefit, the amount of life insurance you get in the event

1 of a death, the amount of long-term disability benefit you
2 get if you're disabled is a percentage of the salary.

3 So the amount the university would contribute to
4 each coach is based on salary and is going to vary because
5 of that. For instance, the women's hockey coach makes over
6 200,000 a year. The women's softball coach makes roughly
7 20, 25 percent of that.

8 So having a chart for all the other coaches, not
9 the plaintiffs, you'll see that it varies by amount, but it
10 doesn't establish anything that's relevant or in dispute.

11 What we have produced is all the plans that shows
12 what the university contributes if you select Plan A, B, C,
13 et cetera, for medical so the plaintiffs can see. And all
14 the policies have been produced showing for people in a P&A
15 job classification what menu of benefits they can choose
16 from.

17 Asking us to go through the considerable effort of
18 trying to calculate what it was for each head coach over a
19 five- to six-year period doesn't establish anything as far
20 as discrimination because the calculated amount for fringe
21 benefits is going to vary by individual based on the
22 individual's unique circumstances.

23 It's not a record that we can just hit a button
24 and print out. It requires people to go back -- multiple
25 people to go back and over the course of many days try to

1 recreate what the fringe benefit was that was offered to
2 each coach over time in each of the sports. So it's very
3 burdensome.

4 And what we get out of it isn't something that
5 contributes to determining whether there was some sort of
6 discrimination because, in fact, and we produced the
7 documents that show it, as I said, each coach chooses from
8 the same menu of benefits.

9 If a coach gets something unique that another
10 coach didn't, that's identified within the contract or the
11 appointment letter or the reappointment letter for a coach,
12 which have been produced already.

13 So if the plaintiffs' theory is that a coach of a
14 men's team was getting something not offered to a coach of a
15 women's team, they can determine that by looking at the
16 contract. They don't need to put the university through the
17 time and expense of trying to create a chart that doesn't
18 help answer the question is the men's coach getting
19 something that a coach of a women's team isn't getting.

20 So there's a much more direct, less burdensome way
21 for the plaintiff to test their theory that somehow coaches
22 of men's teams get something that a coach of a women's team
23 doesn't. So that's why we objected to going through that
24 exercise for calculating fringe benefits paid to all the
25 other coaches.

1 THE COURT: Your relevance argument strikes me as
2 a little bit more of a weight issue. I mean, for Rule 26
3 relevance, especially since December 1st of 2015, you know,
4 it's not a question of admissibility, it's not a question of
5 whether it's going to lead to other things. It's if it's
6 relevant to a claim or defense, then it's discoverable. And
7 here one of the claims is disparate treatment and so you
8 need the comparables to pursue that.

9 So that seems to me, at least for purposes of
10 Rule 26, to be relevant for discovery purposes regardless of
11 what you think of the weight of what it's going to show.
12 That's the party's subjective analysis. That's not the
13 analysis that the court puts on it.

14 However -- and this is probably more a question
15 for Mr. Brimmer, right?

16 MR. BRIMMER: Yes, sir.

17 THE COURT: The new rules also do put a
18 re-emphasis, because it was always there, on the
19 proportionality, if you will.

20 If you don't have anything else, I have a question
21 for Mr. Brimmer.

22 MR. PRAMAS: Sure.

23 MR. BRIMMER: Yes, Your Honor.

24 THE COURT: So when you ask for all coaches, I
25 mean, you know, then in light of the fact that all coaches

1 have the same menu of benefits and they make their
2 individualized election and you have the contracts for
3 anything that's outside of that menu to add in to see
4 whether somebody got something else, in that context asking
5 for all coaches when balanced proportionally against what
6 you're going to gain, even though I obviously probably
7 tipped my hand that I think it's relevant, as drafted there
8 may be a proportionality argument here that I should
9 consider.

10 So I noticed in other discovery requests and in
11 other discovery requests meet and confers that are
12 referenced in the letter -- in the record, sorry, that when
13 it came to this sort of community of coaches at the
14 university, there was a narrowing to all sports to major
15 sports for the participants, but I use the term "major
16 sport" based on size, you know. It's hockey, basketball,
17 football, baseball, soccer, you know.

18 So isn't there a possibility that you can -- your
19 prime comparators here, you know, could be narrowed a little
20 bit? I mean, clearly you've got a hockey coach, hockey
21 operations director who is also the softball coach, and
22 you've got the basketball coach. So those coaches on the
23 men's side would seem pertinent and other programs, you
24 know, of similar season and size. But, you know, it seems
25 like there could be some fine-tuning of this a little bit.

1 You know, if every coach had a unique fringe
2 benefit package that was part of negotiations, then the
3 proportionality shifts the other way. In this case the
4 uniqueness is found in the appointment letters and the
5 contracts. Most everybody, your clients, as others, choose
6 from the same list of fringe benefits and so it's an
7 individual choice. So the proportionalities are slightly
8 different.

9 So I guess that's more of a suggestion than a
10 question. My intention is to take the matter under
11 advisement. And in light of the Court's comments, maybe the
12 parties can have an additional discussion and inform the
13 Court as to whether that might be resolved in the interim as
14 well --

15 MR. BRIMMER: Absolutely.

16 THE COURT: -- consistent with the Court's
17 observations.

18 MR. BRIMMER: Absolutely, Judge. The only
19 response, if I may, briefly?

20 THE COURT: Oh, yeah. No, I'm not cutting you
21 off. I'm just -- you see where I'm going and why my -- and
22 it's not a question out of the blue. It's based on your own
23 modifications of other interrogatories throughout the course
24 of this case. So there seems to be a way -- at least a way
25 to reignite or reinstitute some discussions while I have the

1 matter under advisement that might mutually resolve these.

2 MR. BRIMMER: Absolutely. And we will do that,
3 Judge, to be sure.

4 THE COURT: So go ahead. Anything you want to
5 say?

6 MR. BRIMMER: I agree with you about certainly the
7 parity programs, I'll call them that, the hockey, baseball,
8 basketball, and other major larger sports.

9 But my concern is that this is a Title IX case
10 and in Title IX cases part of the analysis is an
11 institution-wide analysis about whether the university is
12 complying with federal law as it relates to women's
13 athletics.

14 So my response would be the university has
15 admitted during oral argument today that there are special
16 benefits that are given to some people. You know, there may
17 be --

18 THE COURT: The Title IX allegations, though, are
19 retaliation and individualized discrimination against your
20 clients and then whistleblower, which is another retaliation
21 type claim. So your Title IX claims are individualized, not
22 systemic.

23 MR. BRIMMER: But the analysis under Title IX, the
24 context in which those claims are brought is an
25 understanding of the institution as a whole and its policies

1 and its procedures.

2 THE COURT: But as I understand your complaint,
3 though, your claims of unlawful retaliation and
4 discrimination and the whistleblower issues all relate to
5 the individualized conduct directed to your clients.

6 MR. BRIMMER: That's true, yes, Your Honor.

7 THE COURT: So it's not a Title IX case of the
8 kind where there's 50 percent less opportunities for women
9 athletes than for male athletes.

10 So, again, I understand what you're saying, but I
11 still think it fits within the concerns of my observations
12 and might be adequately addressed. The parties -- I am not
13 mandating you to compromise your position, but I think you
14 can see why I think there's reasons for further discussion.

15 MR. BRIMMER: The only other argument I would
16 make, Judge, is that there is also Title VII and Minnesota
17 Human Rights Act claims and under the mostly federal case
18 law that deals with those issues, and I guess the state
19 equivalents, plaintiffs have a right to compare themselves
20 to all similarly situated. And our argument would be that
21 all the coaches at the university are similarly situated.
22 Sure, there will be differences between them.

23 THE COURT: And, again, that's the proportionality
24 concern. But each case is different, you know, based on the
25 circumstances. If the fringe benefits were unique to every

1 single coach, then the comparator -- the proportionality of
2 that comparator of that relevant evidence changes when -- as
3 opposed to all the coaches at the initial point select from
4 the same menu of fringe benefits and make individualized
5 decisions.

6 So where there are differences for discovery
7 purposes it might be relevant, but the proportional burden
8 of that might be outweighed because those differences in
9 many cases may be individualized decisions of the coach, not
10 the university.

11 And so while I understand you want to test those
12 and look at some of these things, that's where the
13 proportionality analysis and the additional meet and confer
14 might narrow this down to a point that's mutually agreeable.
15 Otherwise I'll take the matter under advisement and I will
16 make a decision.

17 MR. BRIMMER: Absolutely, Judge, and we'll advise
18 you of any developments after we have a chance to meet and
19 confer on it.

20 And I have nothing further on this motion.

21 THE COURT: Mr. Pramas, any reaction to my
22 observations?

23 MR. PRAMAS: I have nothing further. I'm happy to
24 answer any questions, but I have nothing further myself.

25 THE COURT: All right. Docket No. 36,

1 Interrogatory No. 4 as addressed and clarified here is
2 submitted and under advisement. The other aspects of Docket
3 No. 36 have been resolved by the representation of parties,
4 and performance pursuant to those meet and confer agreements
5 shall be completed no later than 21 days from today.

6 MR. BRIMMER: Thank you, Your Honor.

7 THE COURT: If the parties with regard to
8 Interrogatory No. 4 find a mutual resolution in the next two
9 weeks, submit a joint letter to the Court advising us that
10 Interrogatory No. 5 -- No. 4 has been resolved. Otherwise
11 we will issue our order as soon as our current workload
12 permits.

13 Anything else with regard to Docket No. 36?

14 MR. BRIMMER: Nothing, Your Honor.

15 MR. PRAMAS: No, Your Honor.

16 THE COURT: All right. Docket No. 42, defendant's
17 motion to compel. Ms. Bazis.

18 MS. BAZIS: Good morning, Your Honor.

19 THE COURT: Is it Baiz-is or Bay-zees?

20 MS. BAZIS: Long "a," Baiz-is.

21 THE COURT: Bazis, okay.

22 MS. BAZIS: I'm pleased to let the judge know that
23 as a result of meet and confer again this morning, two of
24 the three issues raised by the university's motion have been
25 resolved.

1 THE COURT: Okay. What remains?

2 MS. BAZIS: What remains are the Sunny Cycle
3 financial records and the vocational rehabilitative
4 interview by Ms. Lowe. So plaintiffs have agreed to produce
5 their tax returns and related schedules.

6 THE COURT: All three plaintiffs?

7 MS. BAZIS: Yes.

8 THE COURT: Okay.

9 MS. BAZIS: I'm sure Mr. Brimmer will confirm that
10 on the record.

11 THE COURT: All right. Go ahead.

12 MS. BAZIS: Okay. So the first issue I'll address
13 is Document Request No. 5, which is Sunny Cycles' financial
14 records.

15 After Ms. Miller, after her -- she was not given a
16 new contract and after Ms. Banford resigned from the
17 university, they moved to Palm Springs and started a
18 business called Sunny Cycle, which is a limited liability
19 corporation. They're the sole owners and the sole operators
20 of Sunny Cycle and they formed that business in, according
21 to public records, in the fall of 2015.

22 THE COURT: So it's a proprietorship?

23 MS. BAZIS: Well, it's a limited liability
24 corporation. There are two shareholders, so.

25 THE COURT: Okay.

1 MS. BAZIS: Yeah. So everything passes through
2 the owners, all the income passes through the owners, the
3 two owners.

4 So the plaintiffs have declined to produce any
5 financial records or other records whatsoever related to
6 Sunny Cycle. Even though they are not self-employed by
7 Sunny Cycle, I think the case law makes clear that their
8 income is relevant to their damages claim. It's also
9 relevant to our mitigation of damages defense.

10 What they're willing to do, according to their
11 opposition brief, are two things. They're willing to answer
12 questions at their deposition and they're willing to respond
13 to interrogatories.

14 So their interrogatories -- we did ask about this
15 issue in an interrogatory and what they both indicated was
16 that they've received a total of about \$2,200 each for
17 Internet, for phone, and for car payments. However, they
18 say that Banford has not received any income from Sunny
19 Cycle to date. So I don't know how they characterize these
20 payments on their behalf, but --

21 THE COURT: Well, if they're going to produce
22 their individual tax returns for the relevant period,
23 including the creation of and operation of Sunny Cycle,
24 don't they have a federal obligation, perjury consequences
25 to report their sources of income on those returns and

1 wouldn't that indicate what income they derived as the
2 shareholders of Sunny Cycle?

3 MS. BAZIS: Well, they have the option as the
4 owners of the business to keep the cash, to keep profits in
5 the company and not distribute them to themselves. So they
6 could have a million dollars, and this is doubtful, of
7 course, but hypothetically they could have a million dollars
8 or half a million dollars in revenues, not offset by
9 expenses, that they are keeping in their LLC.

10 THE COURT: So wouldn't --

11 MS. BAZIS: And they have a right to distribute it
12 to themselves --

13 THE COURT: At some point.

14 MS. BAZIS: -- at some point, but they choose not
15 to to bolster their damages claims here.

16 THE COURT: But that need could be met, couldn't
17 it, with a limited production from Sunny Cycle rather than
18 all documents?

19 MS. BAZIS: Well, that's what we've asked for,
20 Your Honor.

21 THE COURT: Okay. It wasn't -- it's not evident
22 in the materials that that request has been narrowed.

23 MS. BAZIS: So we've asked for monthly, quarterly,
24 and annual financial statements, which would be just a
25 profit and loss statement, balance sheet, and income

1 statement. Those are routine documents that are kept in the
2 ordinary course of business.

3 They haven't said that there's any burden with
4 respect to producing those. All they've said is we have
5 privacy rights and this violates our privacy rights. And by
6 claiming \$13 million in damages, Your Honor, and by suing
7 the university to recover those damages, they have waived
8 the right to privacy. And of course there's a protective
9 order in place. They can mark those documents as
10 confidential and shield those from public view.

11 So, you know, they keep saying we've asked for all
12 their business documents. It's just not the case. So we've
13 asked for --

14 THE COURT: Well, you did. You did --

15 MS. BAZIS: In my meet and confer letter it says
16 we're not asking for all documents. We're only asking for
17 X, Y, and Z.

18 THE COURT: So now it's just -- it's limited to
19 the financial statements?

20 MS. BAZIS: So there's two pieces. There's the
21 financial statements that are kept in the ordinary course.
22 And then, according to public records, there's a secured
23 party, US Bank, from whom they got financing. So to the
24 extent that they may have submitted to the bank already and
25 have on hand business projections and business plans that

1 show their anticipated future income, we believe we're
2 entitled to those as well.

3 Because they're claiming lost future income, so we
4 think we're entitled to see what they have estimated their
5 profits are going to be going forward. We think they're
6 highly relevant to their damages claims as well, again, to
7 our mitigation of damages claims.

8 So the only documents they've said that they would
9 give us are W-2s and 1099s. So a W-2 is something that an
10 employer gives to an employee. It doesn't apply to business
11 owners.

12 THE COURT: A W-2 and 1099s issued by Sunny Cycle?

13 MS. BAZIS: Yes, but as owners --

14 THE COURT: No, no.

15 MS. BAZIS: Yeah. Well, it's not -- no, I don't
16 think they've limited --

17 THE COURT: Because you're getting --

18 MS. BAZIS: -- it to that.

19 THE COURT: Because you're getting their
20 individual tax returns, so that includes information on --

21 MS. BAZIS: And they have already agreed to --

22 THE COURT: -- any W-2s or 1099s received by them.

23 MS. BAZIS: Right. So to the extent -- Ms. Wiles
24 has a job now with Topeka high schools and she gets --

25 THE COURT: Well, she's not involved in Sunny

1 Cycle.

2 MS. BAZIS: Right, right, right. She's the only
3 one with an outside job now. They have said, yes, we will
4 give you her W-2s, which will show her income received from
5 the school district.

6 Ms. Banford had a job at the College of the Desert
7 for a while and they've agreed to provide her W-2s as well.
8 But that doesn't deal with the Sunny Cycle issue because
9 they are owners, not employees, so they won't get W-2s.
10 They are not employees of Sunny Cycle. They're the owners.
11 And K-1s [sic] are something that's issued to an independent
12 contractor.

13 What an owner gets, Your Honor, is a K-1. So the
14 limited liability corporation would issue a K-1 to them,
15 which would show their income, but, again, that doesn't get
16 to the issue of -- their personal tax returns don't get to
17 the issue of what money is sitting in that business that
18 they have a right to distribute to themselves and have
19 chosen not to.

20 THE COURT: So your interest is in any retained
21 earnings and then any documents that were representations
22 made to the security holder in order --

23 MS. BAZIS: Well, yeah.

24 THE COURT: -- in order to secure financing --

25 MS. BAZIS: Any business plans, projections, those

1 sorts of documents, right.

2 But on the first point, it's not just retained
3 earnings. It's also what are their expenses. We know that
4 the business is paying some of their own personal expenses.
5 If there are any other personal expenses that are being paid
6 by Sunny Cycle, we're entitled to see that too. This is
7 not -- again, there's no privacy right to these documents --

8 THE COURT: Well, but if --

9 MS. BAZIS: -- in this context.

10 THE COURT: If the expenses are paid, then they
11 show up as income on the tax returns.

12 MS. BAZIS: Well, they say in their interrogatory
13 responses that that's not income.

14 THE COURT: It's going to -- well, then they might
15 have issues with the IRS, but --

16 MS. BAZIS: This is why we think we're entitled to
17 their financials. These aren't sophisticated business
18 people. We're entitled to see what money is coming in and
19 what money is going out, in particular where are these
20 earnings going and are they still in there. These are just
21 regular, everyday business documents.

22 THE COURT: Yeah, but income and expenses and in
23 this case expenses, even if they're expensed out and claimed
24 as some sort of business expense, it's for some -- you know,
25 Internet, phone, other expenses, those will be reflected on

1 the financial statements that you've asked for, right?

2 MS. BAZIS: Well, I thought that's what we were
3 talking about, are the financial statements.

4 THE COURT: You said -- okay. Well, you've gone
5 off into three -- two or three different other categories of
6 documents.

7 MS. BAZIS: Well, no. The income statement would
8 show revenues and expenses. That's a profit and loss
9 statement.

10 THE COURT: All right. So --

11 MS. BAZIS: The income statement and the balance
12 sheets.

13 THE COURT: So you are looking at the balance
14 sheets, yeah. Okay.

15 MS. BAZIS: Right.

16 THE COURT: The financial documents.

17 MS. BAZIS: So we are not asking for anything
18 beyond that, just --

19 THE COURT: Other than the loan application
20 materials?

21 MS. BAZIS: Right, right. Any business plans,
22 business projections, that sort of thing.

23 THE COURT: Well, limited to the US Bank loan.

24 MS. BAZIS: It's the only loan that I'm aware of
25 just, again, by looking at public records. This wasn't

1 revealed by the plaintiffs. This is just something that
2 was -- that is in public records on Lexis, so.

3 And being limited to interrogatories, as they
4 suggest, to find out what the revenues of the business are
5 and the expenses, that doesn't help us, Your Honor, because
6 we get one shot at them in January for their depositions.

7 We're looking at a trial, you know, quite a ways
8 out from there and under Rule 26 they have to supplement
9 their document productions. So we will get before trial
10 their updated financial statements and our expert will be
11 able to use those to talk about the damages issue and we can
12 use those to talk about mitigation issues, so.

13 And to rely on their recollections and their
14 memories about business documents during a deposition where,
15 unlike a corporate rep depo, they don't have the obligation
16 to prepare, that just really leaves us at a disadvantage.
17 And, again, when we're talking about \$13 million, we think
18 the proportionality is in our favor on this, Your Honor.

19 THE COURT: Do you want to talk about the
20 vocational expert?

21 MS. BAZIS: Sure. So the university seeks an
22 order requiring that plaintiffs submit to a two-hour
23 interview with our vocational rehabilitation expert, Jan
24 Lowe.

25 THE COURT: Two hours each?

1 MS. BAZIS: Two hours each. They're both
2 appearing in January in Minneapolis for their depositions.
3 They have asked for back-to-back consecutive day
4 depositions, so presumably they'll be coming together and
5 leaving together.

6 So while one is in deposition, one could spend two
7 hours with Ms. Lowe. We could even do that in our offices.
8 And then the next day the other can, while the other one is
9 in the deposition, submit to a two-hour interview. We're
10 not talking about tests being administered or anything like
11 that.

12 And, again, we think proportionality clearly
13 weighs in our favor given the total of \$18 million in
14 damages that they're claiming.

15 So this is under Rule 35(a), which says that the
16 court may order a party whose mental or physical condition
17 is in controversy to submit to a physical or mental
18 examination by a suitably licensed or certified examiner on
19 good cause.

20 So the plaintiffs don't contest that Ms. Lowe is a
21 suitably licensed and certified examiner. So what's in play
22 here is the in controversy and good cause requirements. And
23 the U.S. Supreme Court tells us, as we say in the brief,
24 that those two are interrelated.

25 So courts have held and routinely hold that a

1 vocational examination involves the examination of the
2 plaintiff's mental and physical condition within the meaning
3 of Rule 35 and we've cited those cases in our brief too,
4 Kephart, for instance.

5 And Ms. Lowe submitted an affidavit herself that
6 talks about that an interview addresses both the physical
7 and mental circumstances of the individual, including their
8 self-perception, their self-description, their abilities,
9 their interests, their appearance, and their demeanor and
10 that all of those things are important to her expert
11 assessment of their earning capacity and to matching what
12 jobs are available in the market to what they would be
13 suited for.

14 They each claim future lost earnings. Both of
15 them indicated that -- I'm sorry. They indicated that both
16 of their experts, Ms. Lopiano and Dr. Lapchick, will be
17 testifying about how plaintiffs' employment and treatment at
18 the university will make it difficult for each to be hired
19 as a collegiate coach. They don't explain exactly what that
20 expert testimony will look like.

21 But, again, her -- Ms. Lowe's testimony won't be
22 limited to just the collegiate -- intercollegiate athletic
23 jobs. Ms. Miller has been a public speaker and she lists
24 that on her resumés and her cover letters. She claims that
25 she is engaged in the purchase and sale of property around

1 the globe, in her words, in addition to being a five-time
2 national champion hockey coach.

3 So Ms. Lowe will be looking at and having a
4 discussion with the plaintiffs about, again, their skills,
5 interests, making her expert assessment. I'm not an expert,
6 far from it. Mr. Pramas isn't an expert. So while she
7 could assist us and guide us in what we might ask during a
8 deposition, that is a very poor substitute for the two-hour
9 interview that Ms. Lowe would do and we don't think we
10 should be limited to that.

11 The plaintiffs talk about the Stanislawski vs.
12 Upper River case and indicate that that's controlling. That
13 was a 1991 decision by Magistrate Judge Noel. It's not
14 controlling here, of course, because every magistrate judge
15 gets to look at the individual facts of their case and then
16 exercise their discretion about discovery issues.

17 But more important, this was a pre-1991 amendment
18 case and before the 1991 amendments examinations were
19 limited to a physical examination by a physician or a mental
20 examination by a physician or a psychologist.

21 And Magistrate Noel said the fact that this
22 rehabilitation vocational expert happens to be a
23 psychologist has nothing to do with the examination that
24 they're doing and that was one of the reasons that he
25 declined in that case to allow it.

1 But secondly, he didn't have before him an
2 affidavit like the one we have from Ms. Lowe that indicates
3 the nature of her examination -- or I should say interview
4 and the fact that it's best practices in the industry, the
5 fact that it's routine in the industry, and the fact that
6 she feels like that's necessary and important to her
7 assessment of these individual plaintiffs.

8 So we believe that on balance there's very little
9 burden to the plaintiffs. We're not asking them to make a
10 special trip. They will be here. It's limited to two hours
11 and no testing. And that proportionally with their damages
12 claims, that it's warranted in this case.

13 THE COURT: Mr. Brimmer.

14 MR. BRIMMER: Thank you, Your Honor.

15 MS. BAZIS: Oh, Your Honor, I apologize. I
16 neglected to mention one of the pieces of the Sunny Side
17 [sic] financial records that we're also seeking that weren't
18 a part of their agreement is their tax returns. I'm not
19 sure exactly --

20 THE COURT: Their corporate tax returns?

21 MS. BAZIS: Their corporate tax returns, right.
22 So I limited it to two buckets, but there is that third
23 bucket and that just came to mind. I think part of my mind
24 was thinking that that might have been resolved too, but I
25 did clarify that with Mr. Brimmer and he indicated that was

1 not part of their agreement.

2 THE COURT: Well, if Sunny Side -- not Sunny Side.
3 If Sunny Cycle provided the corporate tax returns, then
4 would that eliminate the need for the financial statements
5 because it would show retained earnings?

6 MS. BAZIS: I don't know that it would, Your
7 Honor. I think our expert indicated that he needs the tax
8 returns, would like the tax returns, and I need to rely on
9 him. Lord knows I pay someone to do my taxes, so I'm not --
10 and I certainly have nothing to do with my law firm's taxes.
11 I don't know that a corporate tax return indicates retained
12 earnings. I just don't know that. I have to -- so my
13 expert, I'd like to defer to him on that.

14 THE COURT: Mr. Brimmer.

15 MR. BRIMMER: Thank you, Judge.

16 THE COURT: Take the Sunny Cycle issues first and
17 then we'll talk about the VRE.

18 MR. BRIMMER: All right. With regard to Sunny
19 Cycle, I think a lot of the issues you raised about the
20 scope of these requests are valid and it's telling that
21 they're trying to get an intrusive look into the way this
22 business is operated. This business is not a party to this
23 lawsuit.

24 THE COURT: Well, I don't know that any of my
25 questions implied that it was intrusive. To the extent that

1 you draw those conclusions, they're incorrect.

2 MR. BRIMMER: I apologize. My point is that
3 they're asking for quite a bit. They're asking for
4 information about business *pro formas*. They're asking for
5 information about loans. They're asking for a wide swath of
6 information when really what they want to know is about
7 income and is about mitigation of damages. That's what it
8 gets tied back to.

9 THE COURT: Well, they have a point, though, about
10 retained earnings, don't they?

11 MR. BRIMMER: I mean, this business is -- they own
12 one pedal pub, I think that's all there is, and I know that
13 there's a loan for it.

14 But our position is that this nonparty should not
15 be required to produce all of its business, tax, and
16 financial records. I don't honestly know exactly what
17 records they keep, so I don't know if this would require, to
18 comply with their request, require them to create new
19 documents. I'm not sure about that. But I do know that the
20 defendants have been provided with, as Your Honor noted --

21 THE COURT: Well, both your clients, Ms. Banford
22 and Ms. Miller, are the only people with -- who have an
23 ownership interest in Sunny Cycle, right?

24 MR. BRIMMER: True.

25 THE COURT: So while an LLC has a distinct legal

1 fiction and identity, all the assets of the business belong
2 to your clients, there's no one else involved, right?

3 MR. BRIMMER: Yes, Your Honor.

4 THE COURT: So there is no third party in the
5 human sense who's being asked to disclose information?

6 MR. BRIMMER: That's true. But my clients and the
7 LLC has the right to run its business in the manner that it
8 sees the most fit and we do know that the owners, my
9 clients, have derived no income other than covering certain
10 expenses.

11 THE COURT: But the reason the discovery request
12 is proffered as being relevant is you've made -- your
13 clients have made future loss of earnings claims and so the
14 defense to that claim would be actual earnings that meet or
15 exceed prior earnings from a different source or a failure
16 to pursue those earnings, which is a failure to mitigate.
17 Those are two distinct ways to defend against such a claim.

18 The concern here is that there's a business which
19 is exclusively owned by two of the plaintiffs and one of the
20 ways that businesses can operate is to retain earnings for
21 disbursement at a later date to the owners. So, you know,
22 that would seem to be relevant to a defense of the loss of
23 earning claims of your clients.

24 So the question then is -- again, the reason I
25 asked and went through the colloquy that there is no other

1 person other than your clients who have an ownership
2 interest in that business, the answer may be there's \$5 of
3 retained earnings, but at this point we don't know, do we?

4 MR. BRIMMER: I don't, Your Honor.

5 THE COURT: Yeah, but -- okay. Go ahead.

6 MR. BRIMMER: For the reasons stated in the brief,
7 we oppose producing it. But if the Court is inclined to
8 require a production, we would ask that it be limited in
9 some reasonable way to compute financial statements or tax
10 returns, the things that Your Honor raised. We believe that
11 would be a reasonable scope should it be ordered.

12 THE COURT: Anything else with regard to the Sunny
13 Cycle financials?

14 MR. BRIMMER: Nothing, Your Honor.

15 THE COURT: Okay. What about the vocational
16 rehabilitation expert?

17 MR. BRIMMER: Yes, Your Honor. We do have --
18 obviously we oppose our clients being sat down by an expert
19 and having a two-hour unrecorded, unrepresented interview
20 with an expert. And the reason, in the Stanislawski case
21 and in Rule 35 in general, this is not the right type of
22 case for a vocational rehabilitation expert.

23 In my experience, vocation rehab experts are
24 always involved in personal injury cases where if there's a
25 traumatic brain injury or there's an injury to a shoulder

1 and somebody is alleging I can't work anymore because of
2 what happened to me, my physical condition is deteriorated,
3 you know, I have a brain injury and I can't perform the
4 tasks necessary.

5 In a personal injury case I can understand the
6 relevance of it, but there's no allegation here by any of
7 the plaintiffs that they are physically or mentally unable
8 to perform the job of coaching. I think the university
9 would have agreed when they still employed them that they
10 had those capabilities, and there is no argument from
11 plaintiffs that they've suffered some physical or mental
12 impairment that's preventing them from being able to work as
13 college coaches.

14 Rule 35, which is referenced in the Stanislowski
15 case, it does provide an important limitation on
16 examinations and that is when a party whose mental or
17 physical condition is in controversy. Ms. Miller and
18 Ms. Banford have not placed their physical or mental
19 condition in controversy.

20 THE COURT: They make a claim for emotional
21 distress, don't they?

22 MR. BRIMMER: Ms. Miller does, but it's garden
23 variety, so no exploration of records. There's no medical
24 to back it up or anything like that.

25 THE COURT: So there's been no counseling, no

1 treatment or anything like that as a result?

2 MR. BRIMMER: Correct. And the defendants aren't
3 even seeking an IME of Ms. Miller or Ms. Banford.
4 Ms. Banford is not making that similar claim.

5 Ms. Wiles has placed her physical and emotional
6 condition into controversy and her allegation is that as a
7 result of the discriminatory experiences she had at the
8 university, she did manifest physical symptoms of her
9 distress. And in response to that we have produced medical
10 records, we've produced psych records. There's going to be
11 a psych expert. We've agreed to submit her to an IME and
12 there's also going to be the deposition in the case. But --

13 THE COURT: But she's not claiming -- if I
14 understand correctly, she's not claiming that those physical
15 manifestations prevent her employment?

16 MR. BRIMMER: Yes, Your Honor, that's correct.
17 There's no argument she can't do the job and, in fact,
18 she's -- it's in the high school context, not the college
19 context, but she's got a new job as an AD.

20 THE COURT: Well, my father is a former junior
21 high school teacher and I think he'd tell you that that was
22 probably a tougher job than working in college.

23 MR. BRIMMER: You've got to deal with parents.
24 That's probably not as fun.

25 THE COURT: Well, seventh and eighth graders can

1 be a handful.

2 (Laughter)

3 MR. BRIMMER: That's probably right, Judge.

4 THE COURT: Let me ask you a different question.
5 You've disclosed a VRE of your own or two of them, right?

6 MR. BRIMMER: Our -- no.

7 THE COURT: What are your vocational experts; what
8 are they?

9 MR. BRIMMER: We don't have vocational experts.
10 They're not VREs, as you've said, Judge. They're --

11 THE COURT: Okay. Well, that's what I understood
12 them to be.

13 MR. BRIMMER: They're Title IX experts.

14 THE COURT: Okay. So what are they and what's the
15 topics they're going to address, just for my edification?

16 MR. BRIMMER: Sure. Dr. Lopiano and Dr. Lapchick
17 are both not medical doctors, but they're Ph.D.s and both of
18 them specialize in Title IX issues. And really what they
19 are both going to do is analyze the policies and procedures
20 and the environment that was present at UMD and they're
21 going to render their opinions about compliance with
22 Title IX, about the issues.

23 THE COURT: Are they going to address the
24 employability in the future of the three plaintiffs?

25 MR. BRIMMER: What they're going to address is a

1 fact based on their knowledge and understanding of the
2 college coaching community across the nation and they're
3 going to say that the college coaching community is
4 relatively small and that in their experience when coaches,
5 such as my clients, get fired, that number one it's
6 difficult to find employment because of the sparsity of
7 available jobs, but also because of the stigma that is
8 associated with their termination from the university and
9 also the fact that, you know, they were discriminated
10 against and there's this conflict.

11 So it's not about their physical or mental ability
12 to find a job. They're going to testify about in their
13 experience, based on the coaching community, that that's
14 what the reality of these things is.

15 THE COURT: Is the foundation for their opinions
16 going to be based on personal interviews of the three
17 plaintiffs?

18 MR. BRIMMER: No, Your Honor. They will not be
19 doing any specific interviews of the plaintiffs related to
20 their job capabilities, their skill sets. Again, nothing --
21 nobody is contesting that my clients have the skill sets and
22 the physical ability to be college coaches.

23 THE COURT: So they're going to be testifying
24 about their knowledge of the market?

25 MR. BRIMMER: I think that's accurate and

1 specifically the impact of a termination on my clients and
2 there is a stigma that's out there when people are, you
3 know, unsacrimoniously terminated, which I understand is
4 disputed, but that's what their testimony is going to be
5 about.

6 THE COURT: But, again, just to be clear, it's not
7 going to be based on -- part of the foundation for their
8 opinions is not going to be based on any sort of
9 interviewing of the plaintiffs?

10 MR. BRIMMER: I believe both experts will talk to
11 the plaintiffs about what they experienced at the university
12 about policies and about procedures, but there will not be
13 any testimony in an expert capacity based on their
14 vocational aptitude to perform the tasks.

15 They will likely talk to my clients as experts
16 because my clients are the ones who sort of experienced the
17 things that we allege in the policies and procedures, but
18 it's not -- we're not going to spring a surprise and say,
19 well, we interviewed them and because of what happened at
20 the university, they don't have the capability to be coaches
21 anymore because of mental anguish. That's not what it's
22 about. It's not in the vocational context.

23 THE COURT: Anything else?

24 MR. BRIMMER: I have nothing further, Judge.

25 THE COURT: Any brief reply? It's not necessary.

1 MS. BAZIS: Just very briefly, Your Honor. It was
2 my understanding that their experts would not be
3 interviewing the plaintiffs at all from our discussions and
4 now I understand they are, and I feel like that certainly --

5 THE COURT: Well, but they --

6 MS. BAZIS: -- puts us at a disadvantage.

7 THE COURT: The representation is that they're
8 going to be asking them about the conditions of employment,
9 not their future employability, conditions of past
10 employment, not future employability, so. And that's what
11 you want your expert to talk to them about --

12 MS. BAZIS: Right. And it's --

13 THE COURT: -- is future employability from what
14 you believe to be an emotional distress issue.

15 MS. BAZIS: No, Your Honor. That's why I wanted
16 to get back up here and make sure I clarified that. What
17 our vocational rehabilitative expert wants to do is assess
18 their -- as she wrote in her own affidavit, the individual's
19 self-perception, self-description, their abilities, their
20 interests, their appearance, demeanor to assess their
21 overall employability and not just as collegiate coaches,
22 but also in the other areas that they've identified or may
23 identify in an interview where their skills and abilities
24 might be.

25 Again, their duty to mitigate is to find suitable

1 employment. It doesn't need to be in the collegiate
2 athletic field. Being a coach lends itself to lots of
3 leadership positions. And, again, Ms. Miller at least and
4 Ms. Wiles, as well as Ms. Banford, they did public speaking
5 in the community, as I understand it, and in particular
6 Ms. Miller holds herself out to the public as being a
7 speaker on leadership.

8 So, again, they want to talk -- they want personal
9 interviews to be able to assess their overall vocational and
10 rehabilitative status. It isn't limited to physical or
11 mental or emotional setbacks that may have been caused.

12 THE COURT: All right.

13 MS. BAZIS: Thank you.

14 THE COURT: When were the plaintiffs' depositions
15 scheduled for? January?

16 MS. BAZIS: I think the 5th and the 6th. Oh, I'm
17 sorry. Ms. Wiles is on December 19th, if I'm remembering
18 correctly, and Ms. Banford and Ms. Miller are January 5th
19 and 6th or around that time, 8th, 9th.

20 MR. BRIMMER: I'm not sure, Your Honor. We will
21 have to double-check our notes.

22 MR. PRAMAS: 5th and 6th.

23 MS. BAZIS: 5th and 6th. Tim has a better memory
24 than I, clearly.

25 (Pause)

1 MR. PRAMAS: I'm sorry. It's the 4th and 5th.

2 MS. BAZIS: All right. Mr. Pramas's memory isn't
3 as good as he thought it was. He says it's the 4th and 5th,
4 but you've got the idea. They're coming up pretty quickly.

5 THE COURT: So Plaintiffs Banford and Miller are
6 on January 4th and 5th or 5th and 6th --

7 MS. BAZIS: First week of January.

8 THE COURT: -- of '17, Defendant Wiles is
9 December 19th of 2016?

10 MS. BAZIS: 5th and 6th of January and the 19th,
11 yes.

12 THE COURT: So we're back --

13 MR. PRAMAS: I checked my calendar. My apologies
14 on my sketchy memory. I looked at my calendar to confirm.

15 MS. BAZIS: Now I am looking at my calendar. See,
16 I'm too old to rely on my memory, Your Honor. December 21st
17 is Ms. Wiles.

18 THE COURT: Okay. All right. Docket No. 42 is
19 submitted under advisement and we will endeavor to get that
20 order out at the same time as Docket No. 36 consistent
21 within our current workload. Hopefully before the 21st, but
22 I can't guarantee it.

23 All right. We are adjourned. Thank you.

24 MS. BAZIS: Thank you, Your Honor.

25 MR. BRIMMER: Thank you, Your Honor.

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(Court adjourned)

* * *

I, Lori A. Simpson, certify that the foregoing is a correct transcript to the best of my ability from the digital recording in the above-entitled matter.

Certified by: s/ Lori A. Simpson

Lori A. Simpson, RMR-CRR