DISTRICT COURT, CITY AND COUNTY OF DENVER, COLORADO 1437 Bannock St. Denver, CO 80202	DATE FILED: January 27, 2021 2:19 PM FILING ID: D330D62F25D81 CASE NUMBER: 2014CV34530
PLAINTIFFS: STATE OF COLORADO, EX. REL. PHILIP J. WEISER, ATTORNEY GENERAL, and MARTHA FULFORD, ADMINISTRATOR, UNIFORM CONSUMER CREDIT CODE, v. **DEFENDANTS:** CENTER FOR EXCELLENCE IN HIGHER EDUCATION, INC., a not-for-profit company; *et al.,*	▲COURT USE ONLY▲ District Court Case No. 2014CV34530 Div. 275

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DEFENDANTS' APPLICATION FOR ORDER TO RETAIN CONFIDENTIALITY

Defendants Center for Excellence in Higher Education, Inc. ("CEHE"); CollegeAmerica Denver, Inc. and CollegeAmerica Arizona, Inc., divisions thereof, d/b/a CollegeAmerica;

Stevens-Henager College, Inc., a division thereof, d/b/a Stevens-Henager College (collectively "CollegeAmerica" or "CA"); CollegeAmerica Services, Inc., a division thereof, d/b/a the Carl Barney Living Trust, Carl Barney as Chairman of CEHE and Trustee of the Carl Barney Living Trust, and Eric Juhlin (collectively "Defendants"), through counsel and pursuant to paragraph six of the Court's January 4, 2016 Amended Protective Order, apply to the Court for an Order maintaining the confidential status and protection of confidential documents and materials presented at trial.

I. BACKGROUND INFORMATION

In November 2020, counsel for the State reached out to defense counsel to inform Defendants that the State had received a request for certain materials from the 2017 trial. *See* Declaration of Charles W. Steese ("Dec.") ¶ 5; Dec. Ex. A [M. Bailey 11/17/2020 4:15 p.m. email]. The State later informed Defendants that the request had come from an "author named Larry Kirsch", who has authored *Financial Justice: The People's Campaign to Stop Lender Abuse* and *Meltdown: The Financial Crisis, Consumer Protection, and the Road Forward*, which has a forward authored by Senator Elizabeth Warren. *See id.* This author has a clear progressive platform designed to paint industries like private career colleges in a negative light.

After receiving this request, Defendants asked the State to identify the specific materials the State wished to disclose to the author. Dec. ¶ 6; Dec. Ex. B [C. Steese 11/18/20 email]. The State countered by formally notifying Defendants that it considered "all trial exhibits and testimony"—literally the entirety of the proceedings and all materials submitted in connection with them—to be public records, and that any confidential materials therefore "should not be

subject to any continuing confidentiality designation by Defendants." Dec. ¶ 6; *id.* Ex. B [L. Webster 12/8/2020 email]. In other words, the State implied that it wanted to provide the entire trial record to an author with a progressive agenda similar to theirs—i.e., they want to use the trial to advance their cause on a national level, just as Defendants have argued since the dawn of this proceeding.

Defendants responded on January 4, 2021, explaining that the State's attempt to strip the entirety of the trial record of any protection was contrary to the Court's Protective Order and inappropriate, as the record included not only confidential commercial information but also personal identifying information and student information. *See* Dec. ¶ 7; Dec. Ex. C [1/4/21 C. Steese letter]. The parties met shortly thereafter to confer on the State's objection. *See* Dec. ¶ 8.

During their meet-and-confer, the State raised a new argument, claiming that its objection was actually somehow based on the "borrower defense" rule. *See id.* ¶ 9. As discussed in detail below, the State's new basis for its objection makes no sense, and Defendants informed the State as much. *See* Dec. ¶ 9; Dec. Ex. D [C. Steese 1/11/21 email]. Refusing to yield, the State informed Defendants on January 14, 2021 that it "deem[ed] the conferral period at an end," triggering the requirement in the Court's January 6, 2016 Protective Order for Defendants, as the designating party, to apply to the Court for an order maintaining the protection of confidential materials. *See* Dec. ¶ 9; *id.* Dec. Ex. D [L. Webster 1/14/21 email]; Jan. 4, 2016 Amended Protective Order ¶ 6. The State later agreed to extend the time for Defendants to submit this application to January 27, 2021. *See* Dec. ¶ 10; Dec. Ex. E [L. Webster 1/18/21].

II. ARGUMENT

The Court entered its Amended Protective Order on January 4, 2016. In this Order, the

Court instructed that any person producing materials "may in good faith . . . designate as CONFIDENTIAL such Litigation Materials containing trade secret or other confidential research, development, or commercial information, personal identifying information . . . and student information. . . ." Am. Protective Order ¶ 1. These confidential Litigation Materials also include "all information derived from designated materials and all copies, summaries, abstracts, excerpts, indices and descriptions of such material that reveal CONFIDENTIAL information." *Id.* To the extent one party disagrees with another's confidentiality designation, the Protective Order permits the disputing party to provide a written notice of objection, also to be made "in good faith, to a designation of Litigation Materials as Confidential." *Id.* ¶ 6. The Order then instructs the parties to follow a dispute resolution process after which, if the dispute is not resolved, the designating party is to "apply to the Court for an order that the Litigation Materials at issue are entitled to CONFIDENTIAL status and protection under this Order." *Id.*

Here, the State has lodged a wholesale objection to the entirety of the trial record, claiming anything submitted into evidence magically morphed to public information freely available to all. This claim is indefensible. The materials were properly designated in the first place because of their sensitive contents—a point the State does not contest—and did not lose that protection simply because they were discussed at trial. Defendants discussed these issues with the State as required by the Protective Order but were unable convince the State to abandon its objection. Defendants therefore apply to the Court to maintain the materials' protected status.

A. The Designated Materials Contain Confidential Information that Must be Protected.

Even a cursory review of the trial record confirms that it contains materials that should remain under protection. Collectively, the parties submitted 391 exhibits into evidence at trial, of

which 186 exhibits—nearly half—were designated as confidential. *See* Dec. ¶ 11; Dec. Ex. F. The exhibits in question include detailed company financial records, such as operating reports for the Colorado CollegeAmerica campuses and summaries of their audited financial records (*see*, *e.g.*, Exs. 2370, 750); employee records, some of which discuss compensation of individual CollegeAmerica employees and disciplinary actions (*see*, *e.g.*, Ex. 863 (letters regarding bonuses to be paid to employees); Exs. 904, 947 (personnel change notices discussing changes to salary); Ex. 949 (employee performance improvement plan)); and records for individual students that attended CollegeAmerica, including students for whom the Court has already ordered Defendants to refund their tuition and forgive their loans. Among these student-specific documents are enrollment forms (*see*, *e.g.*, Exs. 840, 849, 851, 3077, 3078); transcripts (*see*, *e.g.*, Ex. 534, 911); earnings history (*see*, *e.g.*, Ex. 470); loan applications (*see*, *e.g.*, Ex. 2880, 3221); financial aid worksheets (*see, e.g.*, Ex. 3223); graduate employment information (*see*, *e.g.*, Ex. 3225); doctors' notes excusing students' absences due to illness (*see*, *e.g.*, Ex. 543); and other documents listing individual student names (*see*, *e.g.*, Ex. 414).

Some of these exhibits are redacted in part, but the redactions are sparse, leaving broad swaths of sensitive information—like student names, salary information, etc.—that should remain subject to protection. Indeed, the disclosure of the entirety of the exhibits submitted at trial would reveal information the Court deliberately intended to shield from disclosure. In its Findings of Fact and Conclusions of Law, for example, the Court discussed a specific student whom it referred to only by the initials "A.G." *See* Findings of Fact and Conclusions of Law ¶ 133. Some of the exhibits the State now asks the Court to strip of protection includes A.G.'s full name. *See*, *e.g.*, Exs. 905, 906, 2889, 2890, 2894. Were the Court to sustain the State's

objection, that information, which the Court plainly intended be protected, would also be exposed to the public.

The sensitive financial information and student information contained throughout these documents were properly designated in the first instance, and the State has never suggested otherwise. Neither the propriety of these designations, nor the need to maintain protection over that sensitive information, changed as a result of them being submitted into evidence. They warranted protection in the first place; they still warrant protection.[1]

B. The Designated Materials, Even if Admitted into Evidence, Remain Subject to the Protection of the Protective Order.

It is hard to conceive how the State could have a true need for public release of all this sensitive information. Yet even after Defendants repeatedly asked the State to identify the particular materials the State believes should not be protected, it has not done so. Nor does the State suggest that any particular document, or any set of them, does not contain confidential information, or should not have been designated as confidential in the first place. Instead, the State presses the sweeping and indiscriminate claim that "all trial exhibits and testimony," with only limited exceptions, "are public records and should not be subject to any continuing confidentiality designation" simply because they were "admitted during the trial." Dec. Ex. B.

The Court's Amended Protective Order specifically rejects this claim. As the Order

[1] Defendants provide these as just a few examples of the State's overreaching. Given the wholesale challenge to 186 exhibits, it is not possible to discuss each document individually. Defendants could explain the rationale for each of the 186 exhibits. Challenging a huge number of documents at one time was a central point of contention when the parties were negotiating the protective order. *See*, *e.g.*, Dec. ¶ 12; Dec. Ex. G [L. Webster 9/2/15 email and emails part of the same thread] (see discussion on then-paragraph 7). Indeed, Defendants raised the specific concern that the structure of the agreement as then constituted "would allow one party to challenge the designations of a large group of documents without justification," with the State assuring that it did not "intend to challenge a large group of documents 'without justification.'" *Id.* Those assurances, unfortunately, have proven empty.

instructs, designated materials "***may be offered into evidence*** at hearings on motions and may be used to prepare for and conduct discovery, to prepare for trial and to support or oppose any motion in this action, ***but shall be subject to the terms of this Order and to any further order regarding confidentiality that this Court may enter***." Am. Protective Order ¶ 14 (emphasis added). The Protective Order further provides that materials designated as confidential must be returned after final disposition of this matter, though allowing as an exception to this rule that Counsel may retain "***the trial record (including exhibits)*** even if such material contains Confidential Litigation Material, so long as such material is clearly marked to reflect that it may contain such information." *Id*. ¶ 15 (emphasis added). This shows that the Protective Order preserves the protection it bestows upon designated materials even if they were submitted into evidence as exhibits at trial.

This is consistent with well-established standards both in and beyond Colorado. *See, e.g.*, *Int'l Bhd. of Teamsters, Airline Div. v. Frontier Airlines, Inc.*, No. 11-CV-02007-MSK-KLM, 2012 WL 1429524, at *3 (D. Colo. Apr. 24, 2012) ("In the event Confidential Information is used in any court filing or proceeding in this action, including but not limited to its use at trial, it shall not lose its confidential status as between the Parties through such use."); *Jochims v. Isuzu Motors, Ltd.*, 151 F.R.D. 338, 341 (S.D. Iowa 1993) (noting that even though the trial record had not been sealed, confidential materials submitted as trial exhibits retained protection where "the original protective order expressly provided . . . that the order covered designated confidential data introduced at trial").

Livingston v. Isuzu Motors, Ltd., 910 F. Supp. 1473, 1480 (D. Mont. 1995) is particularly instructive. There, the plaintiffs moved to release exhibits that had been used during a public trial

after the fact. The court denied the motion, and in so doing made several key observations:

> [1] All of the documents were produced pursuant to protective order which contemplated use of such documents at trial without loss of their confidentiality. [2] Plaintiffs did not timely dispute whether any of the produced documents were truly confidential and as such subject to the protective order. [3] This court notes that during the trial these documents were regarded by all parties as confidential, sensitive information, and by implication agreed that the untoward release of them had the potential to harm defendants. [4] Finally, the confidential documents are not now part of the public record; the continued treatment of the documents as confidential will not impose a burden upon any party to this action.
>
> For these reasons, the Protective Order previously entered by the court remains in effect and shall continue to remain in effect.

910 F. Supp. at 1480.

The same is true here. First, each exhibit the State challenges was produced pursuant to the Court's protective orders, which expressly contemplated that those exhibits could be submitted into evidence, including at trial, without thereby losing their confidentiality. Second, the State never disputed the initial designation of these materials, and its current objections, raised over three years after the conclusion of the trial, can hardly be considered timely. Third, up until now, the parties have treated all these materials consistent with their confidentiality designation, including at trial, where the parties, witnesses, counsel, and court personnel were the only people in the courtroom, such that it was for all intents and purposes a closed trial. Fourth, the materials continue to be treated as protected by the court clerk, so it will impose no burden on any party to this action to continue treating them as confidential.

The suggestion that the designated materials lost the protected status they had before their admission contradicts the clear directives of the Protective Order. The Court should therefore reject the State's argument.

C. The State's Effort to Revoke Protection of these Confidential Materials is Improper.

In the parties' meet-and-confers, the State maintained its attempt to indiscriminately strip all confidential exhibits of protection on the pretense that the trial record should be revealed to the public in its entirety due to the borrower defense rule. This claim does not withstand even slight scrutiny. It is plainly a pretext for the State's real objective: to smear the reputation of private career colleges like CollegeAmerica, and facilitate others' efforts to do the same.

The borrower defense to repayment rule refers to regulations the Department of Education promulgated during the Obama Administration (and later revised under the Trump Administration). As first issued, the regulations created a process for borrowers to petition for federal student loan discharge if they believed they had been defrauded under state law. But most of these processes and provisions apply to borrowers whose loans were first disbursed on or after July 1, 2017—years after any of the conduct placed at issue during the trial of CollegeAmerica. *See* 34 C.F.R. § 685.222. For loans disbursed prior to July 1, 2017, the regulations allow borrowers to raise an *individual defense* to repayment arising from any state law claim the borrower may have against the school based on an act or omission of the school. *See* 34 C.F.R. § 685.206(c)(1). These defenses must be asserted, and considered, on an individual basis; mass adjudication of multiple students' asserted defenses can be initiated only by the Secretary of Education. *See* 34 C.F.R. § 685.222(f)–(h). There is no indication that the Secretary would need anything more than this Court's decision, or even if it has an interest in pursuing such an action. What is plain is the State cannot bring a claim on behalf of any students discussed in the case.

If the State's argument is that the outcome of the case somehow establishes some part of an individual student's claim, the confidential materials are unhelpful; the Court's findings and

conclusions are already publicly available. And to the extent the trial record included discussion of individual students that believed they had been aggrieved by any action of Defendants, the Court addressed those individuals already, and where the Court thought appropriate, ordered Defendants to provide restitution to repay their tuition and forgive their loans (which Defendants have done notwithstanding their pending appeal). How any of the confidential materials presented at trial would assist individual students raising independent claims based on any purported act or omission of CollegeAmerica is a mystery—one the State has not even tried to explain.

Assuming the State's contention is sincere gives it far more credit than it deserves. The State's reliance on the borrower defense rule is a half-baked excuse the State concocted after realizing it would need to offer a legitimate reason to destroy the protection over these confidential materials—and that it had none to give. Its real reason for attempting to publicize this confidential material is much less innocent. Defendants understand the State has been approached by an author compiling materials for a project critical of private career schools like CollegeAmerica. There are already established processes for this person, or any other person that wishes to review the protected records of the Court, to seek access to them: they may go to the Court Clerk and request to see a protected exhibit, whereupon the Clerk would allow them to view it after first reviewing it and redacting any confidential information. The State intends to fast-track this process for these non-parties, not to serve any litigation or other legitimate purpose of the Attorney General's office, but to facilitate efforts by others to press their shared political agenda against private career colleges. Its purpose is, in short, to advance its improper political motives and to do harm to CollegeAmerica and CEHE by any means possible, legal or

otherwise.

The State's actual purpose, while consistent with the cavalier attitude it has shown in the past towards the protected information (for which it has already been sanctioned), is nevertheless inconsistent with the standards the Court pronounced in the Amended Protective Order. The State remains under the obligation to shield these sensitive and confidential materials from public disclosure, and may challenge that protection only where it has a good-faith basis for doing so. The State's objection to the entirety of the trial record is ultimately a lazy shortcut, meant to make Defendants do the State's work for it. If the State believes that any specific documents, or sets of documents, no longer merit protection, let it identify those documents so the parties can engage in genuine, good-faith discussions of whether they should remain subject to protection. The Protective Order requires no less.

III. CONCLUSION

Defendants take seriously their obligation to protect not only their own confidential information but also the private information of its students. Defendants therefore respectfully apply to the Court for an order that the Litigation Materials they have designated are entitled to retain their confidential status and protection under the Court's January 6, 2016 Amended Protective Order.

Dated: January 27, 2021.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 27th day of January 2021, the foregoing was filed electronically on all persons registered to receive case filings through Colorado Court E-Filing.

s/Vanessa Sanchez
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