DISTRICT COURT, DENVER CITY AND COUNTY, COLORADO 1437 Bannock Street Denver, Colorado 80202	DATE FILED: February 17, 2021 5:02 PM FILING ID: 6F28EF4AEB55A CASE NUMBER: 2014CV34530
STATE OF COLORADO, ex rel. PHILIP J. WEISER, ATTORNEY GENERAL, AND MARTHA FULFORD, ADMINISTRATOR, UNIFORM CONSUMER CREDIT CODE, Plaintiffs, v. CENTER FOR EXCELLENCE IN HIGHER EDUCATION, INC., a not-for-profit company, *et al*, Defendants.	▲ **COURT USE ONLY** ▲
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RESPONSE TO DEFENDANTS' APPLICATION FOR ORDER TO RETAIN CONFIDENTIALITY

Plaintiffs, the State of Colorado, upon relation of Philip J. Weiser, Attorney General for the State of Colorado, and Martha Fulford, Administrator of the Uniform Consumer Credit Code (the "State" or "Plaintiffs"), respectfully submit this response to *Defendants' Application for Order to Retain Confidentiality*.

INTRODUCTION

Despite a four-week public trial during which the parties openly discussed and entered into evidence 408 exhibits and examined more than 40 live witnesses in an open courtroom, Defendants contend the entire trial record is confidential. Defendants' current position is inconsistent with their earlier positions, the law, and the terms of the Amended Protective Order ("Protective Order"). The Protective Order requires the designating party to take certain steps – which Defendants did not take – to preserve the confidentiality of designated information used in public filings and hearings. Defendants' position is also at odds with this Court's well supported view, and Defendants' own expressed position at the time of the trial that the trial is a matter of public record. Defendants restated this position less than two years ago during a hearing involving interpretation of the Protective Order.

Most importantly, Defendants' position harms CollegeAmerica students who could benefit from access to the trial record in seeking forgiveness of their federal student loans. The State wishes to submit the trial record to the U.S. Department of Education ("Department") for its determination whether CollegeAmerica students are entitled to such forgiveness of their federal student loans pursuant to the Borrower Defense Rule. *See* 20 U.S.C. § 1087e(h); 34 CFR §685.206(c). This Court's Final Judgment, alone, may not be enough to form the basis for a Borrower Defense application for the vast majority of students who attended CollegeAmerica during the timeframe in the State's Complaint. The Department may require the evidentiary record supporting the Court's Final Judgment in order for a student's Borrower Defense application to qualify. 34 CFR §685.206(c)(1).

Accordingly, the State respectfully requests the Court to DENY Defendants' motion, and allow the Clerk of the Court and the parties to share the trial record, consistent with state and federal privacy laws.

BACKGROUND

In 2017, the parties tried this matter over four weeks, during which the courtroom remained open, except 22 minutes during Mr. Barney's testimony which was sealed, (*See, Exhibit* H.1, *pp. 150 - 167, attached to the State's Proposed Findings and Conclusions)* after Defendants followed the proper procedure for doing so. The parties discussed hundreds of exhibits in open court and then uploaded all but thirteen of the 409 exhibits without being suppressed or sealed.[1] At critical points in time, Defendants did not take any steps to maintain the confidentiality of the information they had so designated. For example, the State's expert Rohit Chopra testified about CEHE's financials and discussed Exhibit 750, which displayed the company's revenue, profit and expenses – information designated "confidential" by Defendants during discovery and which Defendants still contend is confidential. *See Application at 5; See, Exhibit D at 43:16 – 83:3, attached to the State's Proposed Findings and Conclusions, and Trial Exhibit 750.* Mr. Chopra testified about Exhibit 750 for nearly 45 minutes. At no point in time during or

[1] The State's review of the trial record identified 13 instances where the electronic docket indicates the exhibits, or portions thereof, are filed "sealed." In some cases, a "sealed" exhibit provides further detail, *e.g.* Ex. 911 states "Sealed, Report Card." Some of these sealed exhibits are marked "Confidential" (Exs. 0534, 0560, 0563, 0911, 2181 (including parts, 3, 8, 11), 2899, 3224, portion of Ex. 3513) and the rest are not marked "Confidential" (0578, 3209, 3513). One "Confidential" exhibit is filed "suppressed" (Ex. 543). The State, in following the Protective Order, filed Exs. A-S to the State's Proposed Findings of Fact and Conclusions of Law "suppressed."

after the trial did Defendants seek to suppress or seal the "confidential" information to which Mr. Chopra testified.[2]

While defendants now seek to keep the record sealed, they have on different occasions acknowledged that the trial is a matter of public record[3]:

- "… once a designated document is admitted into evidence as a matter of public record, the restrictions on ***use*** may be lifted" (*Defendants' Response to Motion to Reconsider May 15, 2019 Oral Order, at 6*);
- the trial record is public and should be treated differently than the "confidential" information that was not presented during trial (*Transcript of July 2, 2019 Motion to Reconsider Hearing, at 22:18-23:14,* ***Exhibit 1***);
- a member of the public can access the record by requesting it from the clerk of the court (*Application at 10*).

[2] Members of the public were present in the courtroom the day Mr. Chopra testified. *See, e.g.* a news piece discussing his testimony, at https://www.huffpost.com/entry/with-collegeamerica-trial-underway-someone-just-posted_b_59e948b7e4b032f98fa30c9c. At least one local news outlet covered the trial, see https://denver.cbslocal.com/2017/10/17/college-america-trial-misleading-ads/.

[3] At the same time that Defendants argue that the trial record should be shielded from public scrutiny they are castigating the Court on the process in public for the unfairness of the very proceedings that they seek to shield from public view. For example, Mr. Juhlin has made post-judgment statements to the press that this Court "didn't examine the evidence," and failed to do its job "to evaluate the witnesses" and "evaluate the evidence" and simply cut and paste the State's proposed findings. *See Jimmy Sengenberger Show – January 9, 2021*, at 8:15 - 8:35; 10:06 – 10:29, https://omny.fm/shows/jimmy-sengenberger-show/jimmy-sengenberger-show-january-9-2020-hr-3; See also, "Mark Hillman: Colorado deserves more accountability from our courts," published Feb. 9, 2021, at https://www.denverpost.com/2021/02/09/mark-hillman-coloradans-deserve-more-accountability-from-our-courts/; Mr. Juhlin also criticizes the confidentiality of the Judicial Ethics Commission's review of the Court's "delay" in filing its Final Judgment, calling the process "a black box." *Sengenberger* at 8:35. Despite these attacks, It is Defendants who are the ones holding public information hostage, preventing the public from assessing the trial record, all the while decrying the system's injustices against them in a vacuum shielding the system from the light of day.

- *But see:* the trial record is confidential and subject to the Protective Order (*See Affidavit of Mark T. Bailey, at paras. 4-6*) and the trial was closed to the public (*Application at 8*).

Since the trial, the State has received inquiries regarding the trial record, but is unable to share the public information. *See Bailey Affidavit, paras. 2-7.* Pursuant to paragraph 6 of the Protective Order, the State notified Defendants in writing on December 8, 2020, that it objected to Defendants' continuing "confidential" designation that Defendants may make of the exhibits and testimony that were publicly admitted during trial. *See Bailey Affidavit, Attachment 1*; *See, Amended Protective Order, attached hereto as* ***Exhibit 2***. The State attached to its email the portion of the electronic docket that lists all of the trial exhibits including testimony. Defendants responded within 28 days on January 4, 2021, rejecting the State's objection as "baseless and improper." *See Jan. 4, 2021 Letter from C. Steese to L. Webster, attached hereto as* ***Exhibit 3.***[4] The parties conferred over the phone at which time the State disabused Defendants of the notion that it wanted to use the trial record for "political" purposes. The State explained its intention to share the public record with the Department of Education with the hope of obtaining debt relief for CollegeAmerica students under the Borrower Defense Rule. On January 11, 2021, defense counsel followed up and stated that it was standing by its

[4] Contrary to Defendants' argument in the Jan. 4 letter and their Application, the State may challenge a designation "at any time" under the Protective Order (para. 6), and further contemplates challenges to a large number of documents (more than 100 documents may be challenged at one time). *See Protective Order, at para. 6.* Defendants admonished the state in 2019 that the proper way to address disagreements about the status of documents is to challenge their designation per paragraph 6 of the Protective Order. *See, Transcript of Hearing on Motion for Reconsideration, at 22:25-23:5,* ***Exhibit 1***.

position. "The documents and transcripts should be maintained as confidential." *See, January 11, 2021 email from C. Steese to L. Webster, attached hereto as* ***Exhibit 4.*** Defense counsel confirmed that they did not take steps to broadly redact all personal identifying information or to file "confidential" materials under seal or suppressed, relying instead on the "protected" status assigned to exhibits by the clerk's office. *See Bailey Affidavit, paras. 8-9 and Attachment 2.*

ARGUMENT

I. Defendants failed to take the requisite steps outlined in the Protective Order to preserve confidentiality designations in the trial record.

The Protective Order explicitly states in paragraph 13: "Where practical, the parties shall redact in public filings with the court portions of litigation materials that contain confidential information. If individual redaction would be impractical, the parties may file confidential litigation material suppressed from public view, unless otherwise ordered by the court." *Exhibit 2, para. 13.* Simply put, Defendants needed to do more than simply designate information as "confidential" in order to preserve its confidentiality during the public trial. While paragraph 15 of the Protective Order contemplates that the trial record may contain confidential material, it neither explicitly nor impliedly states that the materials will retain protections even if a party places them into the public domain during trial and does not take further steps to assure exclusion. *See Id. at para. 15.* Indeed, paragraph 11 explicitly states that "[p]ublic information may not be designated as

CONFIDENTIAL Litigation Materials." *Id. at para. 11.* And while paragraph 14 provides that "litigation material marked, labeled or otherwise designated confidential pursuant to this Protective Order may be offered into evidence at hearings" and "to prepare for trial" and "shall be subject to the terms of this order and to any further order regarding confidentiality… " (*see Id. at para. 14),* a party must still follow the requirements of paragraph 13 of the Protective Order and take affirmative steps to preserve confidentiality. *Id. at para. 13.*

Defendants' inaction during and after trial to ensure the record was properly redacted or filed suppressed, had the effect of waiving the confidentiality of the information Defendants previously designated. It is a "well-established principle of American jurisprudence that the release of information in open trial is a publication of that information and, if no effort is made to limit its disclosure, operates a waiver of any rights a party had to restrict its further use." *Nat'l Polymer Prod., Inc. v. Borg-Warner Corp.*, 641 F.2d 418, 421 (6th Cir. 1981); *See Rambus, Inc. v. Infineon Technologies AG*, 2005 WL 1081337, *3 (E.D. Va. 2005) ("[T]he previous public use effectively stripped the documents of any protection under the protection order."); *Littlejohn v. Bic Corp.*, 851 F.2d 673, 680 (3d Cir. 1988) (holding that "[defendant's] failure to object to the admission into evidence of the [confidential] documents, absent a sealing of the record, constituted a waiver of whatever confidentiality interests might have been preserved under the PO"); *Glaxo Inc. v. Novopharm Ltd.*, 931 F. Supp. 1280, 1301 (E.D.N.C. 1996) (finding that admission of documents containing trade secrets without sealing the documents rendered them matters of

public record and "nullifie[d] any confidentiality interests in those exhibits and the information they contain.").

While Defendants argue that they would be harmed by the disclosure of information produced at trial, they fail to substantially articulate reasons for that harm. *See, Gillard v. Boulder Valley Sch. Dist. RE–2,* 196 F.R.D. 382, 386 (D. Colo. 2000) ("the party seeking the protection shoulders the burden of proof in justifying retaining the confidentiality designation"). For example, what competitive disadvantage would Defendants face today by disclosure of business strategies or financial information from over 3 years ago, especially given the fact Defendants closed CollegeAmerica? The proprietary nature of information fades with the passage of time and the only relevance applicable today is to shine a light on Defendants' unlawful conduct for the benefit of the public, particularly students, and policy makers.

By contrast, Defendant's inaction to protect supposedly confidential information at trial should not constitute a waiver of confidentiality as to personal identifying information and students' records. Defendants may waive their own confidentiality interests, but not those of third parties. Protective Order notwithstanding, the parties and the Court must comply with privacy laws and maintain and share such information accordingly. *See Directive Concerning Access to Court Records*, Section 4.60(a), Supreme Court of Colorado, Amended Oct. 18, 2016 (https://www.courts.state.co.us/Courts/Supreme_Court/Directives/05-01_Amended%202016%20Oct18%20Web.pdf).

The cases cited by Defendants are distinguishable and involve (1) a protective order that, unlike the Protective Order here, did not require parties to take steps, such as redacting and filing under seal, in order to preserve such designations (*Jochims v. Isuzu Motors, Ltd.*, 151 F.R.D. 338, 341 (S.D. Iowa 1993); *Livingston v. Isuzu Motors*, Ltd., 910 F. Supp. 1473, 1480 (D. Mont. 1995)); (2) a situation, unlike here, where the confidential documents never became part of the public record (*Livingston*, 910 F. Supp. at 1480 (D. Mont. 1995); and (3) a protective order that, unlike the Protective Order here, explicitly states confidential information used in any court filing or proceeding, including trial, shall not lose its confidential status (*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)).

II. The Court has previously articulated the well-supported legal standard that the trial record is a matter of public record and members of the public are permitted access.

In 2019, the Court held two hearings in connection with Defendants' motion to sanction the State for sharing "confidential" trial documents. During the two hearings on this topic, the Court stated that the trial record in this case is a matter of public record and therefore a member of the public is permitted to view trial documents that were not filed suppressed (*see, Transcript of May 15, 2019 hearing, at 44:15-19,* ***Exhibit 5****; Transcript of July 2, 2019 Motion to Reconsider Hearing, at 11:2-11,* ***Exhibit 1***). The Court also stated that the State can talk about and display trial evidence that is a matter of public record (*see, Transcript of May 15,*

2019 hearing, at 57:4-12, ***Exhibit 5*****).** Case law supports the proposition that civil judicial proceedings are a matter of public record unless steps are taken to restrict the public and there is a sound basis for such restrictions. *See Mann v. Boatright*, 477 F.3d 1140, 1149 (10th Cir.2007)(the right of access to judicial records can only be rebutted if "countervailing interests heavily outweigh the public interest in access"); *United States v. McVeigh*, 119 F.3d 806, 811 (10th Cir. 1997). The policies and directives of the Courts set similar parameters. *See, e.g.,* Chief Justice Directive Concerning Access to Court Records, October 18, 2016, https://www.courts.state.co.us/Courts/Supreme_Court/Directives/05-01_Amended%202016%20Oct18%20Web.pdf (The first three reasons for the policy are to provide access that: "(1) maximizes accessibility to court records; (2) supports the role of the judiciary; [and] (3) promotes governmental accountability."

III. The State articulates a sound basis under the Borrower Defense Rule to provide the trial record to the U.S. Department of Education.

Defendants' belief that the State is using the Borrower Defense Rule as a pretext for political activities stems from a misapprehension of the Rule and its purpose.[5] *Application at 9*. Because of the early timeframe in which most CollegeAmerica

[5] Contrary to Defendants' assertions, the Borrower Defense Rule existed well before the Obama Administration. In response to numerous federal investigations and reports documenting the abusive and fraudulent conduct of for-profit schools, Congress in 1993 directed the Secretary of Education to "specify in regulations which acts or omissions of an institution of higher education a borrower may assert as a defense to repayment of a [federal student] loan." 20 U.S.C. § 1087e(h). In so doing, Congress applied a broadly applicable and well-established principle of consumer protection law. When a business treats a consumer in an unfair or deceptive manner, or otherwise violates applicable law, a consumer may assert that conduct as a defense to repaying a loan that financed the purchase of the goods or services that business provided.

students took out federal loans, the public trial record is critical to proving Defendants' violation of state law – the predicate for receiving relief under the Borrower Defense Rule. See 34 CFR §685.206(c)(1). Without access to the public trial record, students who were financially harmed by CollegeAmerica face the grim prospect of continuing to owe money on educational services that were deceptively sold to them. Given CollegeAmerica students' historically high default rates on their federal loans, the financial harm – unless abated – will continue to waterfall into other aspects of students' lives. *See, Final Judgment, paras. 593; 698; 699.*

By way of background, Title IV of the Higher Education Act of 1965, 20 U.S.C. § 1070, *et. seq*, ("HEA") provides the statutory authorization for federal student loans. *Id*. §§ 1070-1099. The HEA, Department regulations, and students' loan contracts allow students to cancel their federal student loans on the basis of their school's misconduct—*i.e.* a borrower defense. The HEA directs that "the Secretary shall specify in regulations which acts or omissions of an institution of higher education a borrower may assert as a defense to repayment of a loan made under this part[.]" 20 U.S.C. § 1087e(h).

The Department likely requires more than this Court's Final Judgment in order to determine applications from students who took out federal loans prior to July 1, 2017.[6] For federal Direct loans disbursed on or before June 30, 2017, an accepted

[6] In 2016, the Department promulgated new Borrower Defense regulations, which provide that for loans disbursed between July 1, 2017 and June 30, 2020, there are three available federal defenses to repayment: (1) judgments against the school (34 CFR §685.222(b)), (2) breach of contract by the school (34 CFR §685.222(c)), and (3) substantial misrepresentation by the school (34 CFR §685.222(d)). CollegeAmerica students who took out federal loans or consolidated existing loans between 2017 and 2020 may be able to rely on the Court's Final Judgment in seeking relief.

borrower defense is "any act or omission of the school attended by the student that relates to the making of the loan for enrollment at the school or the provision of educational services for which the loan was provided that would give rise to a cause of action against the school under applicable State law." 34 CFR §685.206(c)(1). CollegeAmerica students would likely have to show through documented evidence – such as the public trial record – that CollegeAmerica engaged in conduct giving rise to a cause of action under state law. *See* 34 CFR §685.206(c)(1).

Whether the State provides the trial record to the Department *vis a vis* a group application or simply provides the record to the Department for consideration of individual CollegeAmerica applications, the fact remains the trial record is critical to these borrowers. *Id.* In any event, Defendants' assertion that the Department has no authority to adjudicate a group application brought by the State on behalf of CollegeAmerica borrowers prior to 2017 is incorrect. A recent federal district court held that a group discharge process does in fact exist for students who took out loans prior to July 1, 2017. *See Vara v. DeVos*, Civil No. 19-12175-LTS, 2020 WL 3489679, at *26 (D. Mass. June 25, 2020),[7] *attached here as* ***Exhibit 6***. In rejecting the Department's claim that there is no group process to address the Massachusetts Attorney General's application on behalf of Corinthian students, the Court stated:

> The Court rejects defendants' claim that a group discharge process did not exist and thus could not be requested by the AGO. In fact, this claim is contradicted by overwhelming record evidence, which demonstrates that the agency repeatedly exercised its discretion to initiate group discharge processes upon receipt of group applications. *See, e.g.,* Doc. No. 33-11 (granting a request for group discharge submitted by the AGO); *Calvillo Manriquez v. Devos*, Civil Case

[7] The Department of Education is appealing this decision to the U.S. Court of Appeals for the First Circuit. Briefing is not complete. Case number 20-1832.

No. 3:17-cv-07210-SK, Doc. No. 35-8 at 89 (considering and granting a borrower defense application submitted on behalf of 58 borrowers).

Id. *See also Williams v. DeVos*, Civil No. 16-11949-LTS, 2018 WL 5281741, at *12 (D. Mass. Oct. 24, 2018) ("In short, the Court finds that Attorney General Healey's DTR submission was sufficient to require the Secretary to determine the validity of the plaintiffs' borrower defense."), *attached hereto as* ***Exhibit 7.***

CONCLUSION

Defendants' current position that the trial record continues to enjoy protections directly contradicts the terms of the Protective Order and the policy requirements for openness. Defendants did not take the necessary steps to preserve the record from public disclosure and to the extent Defendants believe certain "confidential" records should retain protections, they have failed to meet their burden of establishing the reasons for doing so. Instead of engaging in any type of meaningful analysis, Defendants blanketly argue that the entire trial record remains protected.

Meanwhile, students who decided to enroll in CollegeAmerica based on widespread misrepresentations about graduate outcomes, the availability of certain training, and the affordability of the EduPlan loan will continue to suffer financial harm as long as Defendants hold the public trial record hostage. The record, on which the Court based its 160-page findings and conclusions that Defendants violated state consumer protection laws, might be students' only path to relief.

For the foregoing reasons, the State respectfully requests the Court to DENY Defendants' motion and allow the Clerk of the Court and the parties to share the trial record, consistent with state and federal privacy laws and policies.

Respectfully submitted this 17th day of February 2021.

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CERTIFICATE OF SERVICE

I hereby certify that on this 17th day of February 2021 true and correct copy of the foregoing **RESPONSE TO DEFENDANTS' APPLICATION FOR ORDER TO RETAIN CONFIDENTIALITY** was filed and served via Colorado Electronic Filing System upon the following:

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