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DISTRICT COURT, CITY AND COUNTY OF DENVER, COLORADO 1437 Bannock Street, Room 256 Denver, CO 80202	
Plaintiffs: STATE OF COLORADO, ex rel. CYNTHIA H. COFFMAN, ATTORNEY GENERAL, *ET AL.*, **Defendants:** CENTER FOR EXCELLENCE IN HIGHER EDUCATION, INC., *ET AL*.	▲ COURT USE ONLY▲
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NON-PARTY INTERVENORS COMBINED MOTION (1) TO UNSUPPRESS AND UN-PROTECT RECORDS FROM THE PUBLIC TRIAL AND CITED IN THE COURT'S RULING, AND (2) TO INTERVENE FOR THAT LIMITED PURPOSE

Non-Party Intervenors, through their undersigned counsel, hereby submit this Combined Motion (1) To Unsuppress and Unprotect Records from the Public Trial and Cited in the Court's Ruling, and (2) To Intervene for that Limited Purpose, and in support state as follows:

Pursuant to Chief Justice Directive 05-01, Intervenors Debbi Potts, the original whistle-blower in this case; David Halperin, a lawyer whose articles in Republic Report, a news website, have reported extensively on Defendants and this case; Veterans Education Success, a non-profit organization dedicated to uncovering abuses against veterans like those at issue in this case; The Century Foundation, a non-profit think tank that has developed specific public policy proposals relating to Defendants and that has followed these proceedings closely; and Nannette Wride and Katie Brooks, qui tam relators in a related proceeding against the same Defendants, whose counsel personally observed the trial proceedings and trial exhibits in this matter, move the Court to un-suppress and/or unprotect two sets of Court files: (1) exhibits and testimony from the public portions of the trial, and (2) all evidence cited in this Court's ultimate ruling on the merits.

Certificate of Conferral: Pursuant to C.R.C.P. 121 § 1-15(8), Non-Party Intervenors counsel conferred with Defense counsel regarding this motion. On February 19, 2021, counsel for the moving parties conferred with Defendants' counsel, Doug Marsh, by telephone. Counsel also provided him with an email that same day, which summarized the anticipated motion, as Mr. Mash requested. On February 22, 2021 counsel for the moving parties reached out to Mr. Marsh again by email to ask about his clients' response, Mr. Marsh indicated that he was unable to provide a response due to his inability to communicate with unidentified members of Defendants' "legal team." He did not commit to providing a response by any date or explain why he could not otherwise consult with the others. As of the filing of this motion, no response has yet to be given. In

any event, in light of Defendants' own pending motion--which seeks relief contrary to this Motion--Intervenors have meaningfully conferred with Defendants prior to filing this Motion and while counsel for the moving parties has reached out both my phone and in multiple emails, Defendants have not responded to officially state their position, though counsel for the moving parties believes that Defendants object to the relief sought in this motion.

INTRODUCTION

"A trial is a public event. What transpires in the court room is public property," and there "is no special perquisite of the judiciary which enables it, as distinguished from other institutions of democratic government, to suppress, edit, or censor events which transpire in proceedings before it." *Craig v. Harney*, 331 U.S. 367, 374, 67 S. Ct. 1249, 1254, 91 L. Ed. 1546 (1947). Yet despite the parties in this matter presenting hundreds of exhibits publicly in open court in the course of the four-week trial in this matter, and despite the Court citing these exhibits, along with trial and deposition testimony, in its extensive ruling, which found that Defendants committed thousands of violations of consumer protection laws, all of this evidence remains completely off-limits to the public, to journalists who have extensively covered this action, to former students and their advocates who could use the information to seek a discharge of their loans, to institutions that help shape public policy on these issues, and to parties pursuing claims with overlapping facts in federal court.

During the four-week trial, the parties presented the testimony of dozens of witnesses who testified about hundreds of exhibits in open court in front of the public. The exhibits were displayed on projector screens large enough for the public in the gallery to easily view. The public, including the undersigned and his colleague, were permitted to observe the proceedings, hear the testimony,

and observe the exhibits. The information now belongs to the public, but the public cannot access it because it has been suppressed or protected in its *entirety* under this Court's filing procedures.

Likewise, following the trial, this Court issued a 160-page Findings of Fact, Conclusions of Law, and Judgment on August 21, 2020 (the "Ruling"), in which this Court extensively cited specific portions of the trial transcript, particular exhibits, and other record materials, including deposition excerpts. In that Ruling, the Court found Defendants liable for the violation of numerous consumer protection laws, penalizing Defendants at the "statutory cap" for each of six different violations, among other things. Ruling ¶¶ 733–68. The Court also made numerous findings and conclusions regarding the widespread nature of Defendants' violations of these laws and the harm they caused to the wider public. *Id.* This information, too, belongs to the public, as evidence of Defendants' extensive civil liability under consumer protection laws enforced by the Attorney General. But it also remains under a blanket order of suppression and protection.

Intervenors are a diverse group of parties seeking access to the records and testimony that either were (1) already disclosed publicly during the course of the trial of this matter ("Trial Materials"), and (2) any *other* evidence cited by the Court in its Ruling ("Ruling Materials"). Intervenors seek access to the testimony, exhibits, and other evidence establishing Defendants' culpability for millions of dollars in civil penalties, as determined by this Court.[1]

Intervenors include the individual who originally blew the whistle to the Colorado Attorney General; a news organization that has covered this matter extensively; non-profit organizations

[1] Intervenors do not seek access to any private student information. If a record contains private information pertaining to an identifiable student, Intervenors request the Court consider whether redaction of the private student information is practicable, consistent with the presumption of access discussed below. If not, Intervenors ask that such record remain sealed—Intervenors have no desire to revictimize these students.

whose work is focused on the issues raised in the Ruling and who desire to use the evidence cited in the Ruling and presented at trial to advocate on behalf of student clients and to develop specific public policy proposals relating to Defendants; and two individuals who are currently plaintiffs and relators in a case pending under the federal False Claims Act, in which the government has intervened, involving similar factual issues. Each of these parties has a unique, protectible interest in reviewing the Trial and Ruling Materials.

BACKGROUND

Intervenor Debbi Potts was the original whistleblower in this case.

In 2012, shortly after resigning as the highest-ranking manager of one of Defendants' branch campuses, Intervenor Debbi Potts made one of the most consequential decisions of her life—she informed the Colorado Attorney General (and Wyoming Attorney General, for that matter) about the numerous unethical and illegal business practices she had witnessed at Defendants' campuses. (Exhibit 1, Declaration of Debbi Potts, ¶ 2.)

Ms. Potts' courage was the spark that resulted in this lawsuit, at least according to the testimony of an investigator for the Colorado Attorney General's office, who testified on Ms. Potts' behalf during a jury trial in Larimer County Court in May 2019. (*Id.* ¶¶ 11–12.) That trial was the culmination of Defendants' years' long retaliatory lawsuit against Ms. Potts, and it resulted in a verdict for Defendants—for an entire dollar. (*Id.* ¶¶ 2–11.) The award was literally the least the jury could have awarded Defendants for finding that Ms. Potts said true—but negative—things about Defendants during the Colorado Attorney General's investigation. (*Id.*)

Years before the trial, Defendants used *this litigation* to advance their retaliatory lawsuit against Ms. Potts. When Defendants sought Ms. Potts' deposition in this case—after seeking and

being prevented from obtaining her deposition in the Larimer County action—she asked this Court to enter a narrow protective order limiting Defendants' use of such deposition testimony "solely for purposes of this lawsuit."[2] (*Id.* ¶¶ 5–8; Exhibit 2, Declaration of Brandon Mark, ¶¶ 2–4.) But this Court refused Ms. Potts' request for even that minimal protection, allowing Defendants to use that deposition without limitation, including publicly, had they chosen. (Ex. 1, Potts Decl. ¶ 9; Ex. 2, Mark Decl. ¶¶ 2–4.)

Ms. Potts has nevertheless persevered. She has been interviewed by several journalists about her plight as a whistleblower, about the victims of the practices the Court found in the Ruling, about her participation in the original investigation, and other topics. (Ex. 1, Potts Decl. ¶ 13.) Ms. Potts wants access to the Trial and Ruling Materials, in part, to obtain peace of mind about her role as a whistleblower in this case—something that completely upended her life. (*Id.* ¶ 15.) It strikes Ms. Potts as particularly unfair that Defendants would be permitted to shield the considerable evidence of their widespread violations of the law from public view when—as a private citizen—she asked this Court for similar protection, and the Court refused. (*Id.* ¶ 14.)

Given what Ms. Potts has endured for daring to speak on behalf of the citizens of Colorado, she has an obvious interest in the proceedings before this Court.

The Colorado Attorney General brought suit against Defendants under numerous consumer protection laws intended to protect the public at large.

A few years after learning of Ms. Potts' and others' information, the Colorado Attorney General filed this suit in 2014, alleging that Defendants had and continued to violate numerous

[2] Because this Court has apparently decided to classify every attachment to any brief as "protected"—regardless of whether the filing party sought that designation—Ms. Potts' attorney cannot access his *own declaration* in this case, which he filed in support of her request for a protective order.

consumer protection laws, particularly the Colorado Consumer Protection Act and the Colorado Uniform Consumer Credit Code, on a broad scale. Compl. ¶ 1. The Colorado Attorney General noted at the time that "[t]hrough the unlawful practices of their business, Defendants have deceived, misled, and financially injured consumers in Colorado." *Id.* ¶ 29. The Attorney General alleged that the suit was "necessary to safeguard citizens from Defendants' unlawful business activities." *Id.* Likewise, the Attorney General's prayer for relief sought an injunction, alleging it was "necessary to prevent Defendants' continued or future deceptive trade practices and unconscionable transactions" against the public. *Id.* at 33.

The Court's Ruling cites extensively to the trial record and other evidence in support of its conclusion that Defendants committed widespread violations of Colorado's consumer protection laws that injured the public.

In its Ruling, the Court cited numerous exhibits comprising trial and deposition transcripts, marked trial exhibits, and certain other materials in support of its findings and conclusions that Defendants violated numerous aspects of the Colorado Consumer Protection Act and the Colorado Uniform Consumer Credit Code. The Court's 160-page Ruling is a broad indictment of Defendants' practices, finding that Defendants repeatedly violated the laws in various ways.

The Court noted that the Colorado Consumer Protection Act "'deters and punishes businesses which commit deceptive trade practices in their dealings with the public." Ruling at 102 (quoting *Rhino Linings USA, Inc. v. Rocky Mountain Rhino Linings, Inc*., 62 P.3d 142, 146 (Colo. 2003)). The Court further noted that the Act was upheld as constitutional because the inherent police power allows the legislature to punish commercial practices that "may prove injurious, offensive, or dangerous to the public." Ruling at 102 (quoting *Hall v. Walter*, 969 P.2d 224, 230 (Colo. 1998)).

Although the Court ultimately ruled that the Colorado Attorney General did not have to establish, as a legal matter, that Defendants' practices had a significant impact on the public, the Court did in fact determine that was the case. For example, the Court found that the statutory cap for civil penalties was warranted for each of six different violations. Ruling ¶ 733. As one example, the Court found that two of the advertising pieces containing misleading information were mailed to approximately 14,000 households in Colorado. *Id.* ¶¶ 737, 764. The Court likewise found that Defendants also engaged in certain other violations every day for several years, involving thousands of separate violations. *Id.* ¶¶ 744, 749, 754, 759.

Journalists and public policy advocates, like Intervenor David Halperin, have covered these proceedings extensively and have urged further reforms in the wake of this Court's Ruling. Mr. Halperin's work would specifically benefit from access to the Trial and Ruling Materials.

Intervenor David Halperin is a former member of the White House staff, holding the title Special Assistant to the President for National Security Affairs, and a former counsel to the U.S. Senate Select Committee on Intelligence, and he currently engages in advocacy and consulting work, including on higher education issues, and he advises and represents law clients. He is also the editor and main contributor to a website called Republic Report, at https://www.republicreport.org/, where many of his articles are investigative pieces about the career and for-profit college sector. (Exhibit 3, Declaration of David Halperin, ¶ 1.)

Mr. Halperin's higher education work is and has been funded entirely by non-profit charitable foundations and organizations concerned about the quality and affordability of higher education and the success of post-secondary students. His higher education research, advocacy, and reporting have helped prompt federal and state law enforcement investigations and actions, agency actions, congressional investigations, legislative proposals and actions, and media reports, as well

as internal changes within educational institutions and related businesses. Additionally, Mr. Halperin's work on higher education has been regularly cited by legislators, media outlets, and academics. (*Id.* ¶¶ 2–3.)

Mr. Halperin has testified and spoken on career and for-profit college issues before the House Oversight Committee, a Federal Trade Commission workshop, and other government agencies, as well as numerous industry and academic conferences and events. He is regularly quoted on higher education issues in national, local, and trade media. (*Id.* ¶ 5.)

Mr. Halperin has reported extensively on Defendants' activities. He has published on Republic Report numerous articles about Defendant CEHE; its schools Independence University, College-America, and Stevens-Henager College; Defendants Carl Barney and Eric Juhlin; its recruiting practices, advertising, instruction, and business transactions; the conversion of its schools from for-profit to non-profit status; and various lawsuits and investigations, and administrative and accreditor actions, against it and its schools. (*Id.* ¶¶ 6–8 (citing articles).)

Furthermore, Mr. Halperin published the first account of this Court's Ruling, just hours after the decision was issued, and was likely the first to report, in September 2019, that Defendant CEHE was under investigation by the federal Consumer Financial Protection Bureau. (*Id.* ¶ 7 (citing articles).)

Additionally, Mr. Halperin helped prepare, and was one of the signers of, an October 14, 2020, letter to U.S. Secretary of Education Betsy DeVos, calling on her to follow federal law and terminate Department of Education aid to Defendants' schools based on the Court's Ruling and imploring the Secretary to provide debt relief for former students, to seek to recover such losses from Defendants, and to further investigate Defendants' schools. (*Id.* ¶ 9 (citing letter).)

Based on his experience as an advocate and lawyer, and on his expertise with career education, Mr. Halperin is of the opinion that access to the court record in this case is important for aggrieved former students seeking debt relief; for current and prospective students who deserve a better understanding of the institution and its schools; for regulators, accreditors, and legislators charged with overseeing Defendants and higher education, including for the U.S. Department of Education in considering our petition to take action against Defendants; and for lawyers, advocates, researchers, and others. (*Id.* ¶ 10.) Indeed, the limited records previously made public in this lawsuit already demonstrate the value of these materials in understanding Defendants and career institutions, government oversight, and law enforcement efforts in this area. (*Id.* ¶ 11.)

Among other specific items, the public should have access to the deposition and trial testimony of Diane Auer Jones, who served as a paid expert witness for Defendants. Ms. Jones, a former executive at another large company in the industry, Career Education Corporation (now called Perdoceo), subsequently served as the top higher education official in the U.S. Department of Education under President Donald Trump and Secretary of Education Betsy DeVos, although she served in an acting capacity and was never nominated by the President for Senate confirmation. Ms. Jones' tenure at the Department was controversial, as she oversaw a radical shift in policy and oversight that reversed efforts by the previous administration to hold accountable predatory colleges—and she was accused by prominent members of Congress of making multiple false statements about career college matters. Mr. Halperin has previously posted online a written statement from Ms. Jones filed in this case. It Mr. Halperin's opinion that public access to all of Ms. Jones's testimony in this case would contribute greatly to public understanding of the views and conduct

of one of the most influential federal higher education officials so far in this century. (*Id.* ¶ 12 (citing articles and prior posts).)

Finally, Mr. Halperin also serves as of counsel to the California-based non-profit organization Public.Resource.Org, a group committed to public access to government legal materials and other information, including court records. As he notes, where a lawsuit was brought by a state attorney general against institutions that have been receiving close to 90 percent of their revenue from taxpayers via the U.S. Department of Education, and other revenue from the Department of Defense and Department of Veterans Affairs, the litigation is undeniably the public's business, and the public should have access to the record. (*Id.* ¶ 13.)

Intervenor Veterans Education Success uses evidence of consumer protection violations, such as the evidence cited in the Ruling, to seek loan forgiveness and other relief for its clients.

Intervenor Veterans Education Success provides a variety of services to veterans relating to higher education issues. For example, Veterans Education Success provides free legal services, advice, and college and career counseling for the GI Bill; non-partisan research on issues of concern to student veterans, including student outcomes and federal oversight; non-partisan assistance to policymakers to improve higher education quality and veterans' success and to protect the integrity of the GI Bill; and assistance to federal and state law enforcement, building cases to stop college consumer fraud. (Exhibit 4, Declaration of Carrie Wofford, ¶ 2.)

Proprietary colleges are inadvertently incentivized by a loophole in the Higher Education Act to view service members and veterans "as nothing more than dollar signs in uniform, and to use aggressive marketing to draw them in" because the loophole permits the schools to use GI Bill and other military student aid to offset the cap the schools otherwise face on federal funds. Hollister

K. Petraeus, For-Profit Colleges, Vulnerable GIs, N.Y. Times, Sept. 21, 2011, http://www.nytimes.com/2011/09/22/opinion/for-profit-colleges-vulnerablegis.html. (*Id.* ¶¶ 3–4.)

Veterans therefore have a particular interest in ensuring that the education and job opportunities promised by schools—and paid for with their hard-earned education benefits—comply with the law. Robust enforcement at all levels, including by state enforcement entities, is necessary to hold accountable those institutions that are defrauding students and government. (*Id.* ¶ 5.)

Veterans Education Success has heard from thousands of veterans and service members who were defrauded or deceived by predatory college recruiters who misled them on key facts about the colleges, from the colleges' tuition, accreditation, transferability of credits, graduation rates, and job prospects for graduates, to the quality of education and materials and how much of the tuition their GI Bill would cover. The examples identified in this Court's ruling are consistent with the stories Veterans Education Success has heard about other institutions. (*Id.* ¶ 6.)

Veterans Education Success has provided free legal assistance to more than 5,000 veterans and servicemembers, including in loan forgiveness proceedings, and it believes the materials for which public access is sought will be important to assisting students, including veterans, who have been harmed by Defendants to obtain loan forgiveness. The "borrower defense to repayment" loan forgiveness program at the U.S. Department of Education requires students to present evidence about the fraud they encountered and the school's intent. The materials sought here will be critical in this. (*Id.* ¶ 7.)

Additionally, the evidence detailing the scope, severity, and duration of Defendants' legal violations will provide critical information to federal and state enforcement agencies; federal and state regulators that oversee colleges; policymakers—including Congress—who are engaged in

oversight of such regulators; and to non-governmental policy experts and advocates who urge better government oversight. This information will provide important insight to law enforcement, regulators, policymakers, and advocates about the failures that resulted in the problems identified in the Court's ruling and how to prevent them from happening again in the future. (*Id.* ¶ 8.)

Intervenor The Century Foundation is a think tank that provides public policy recommendations on higher education issues, including issues specifically related to Defendants, and its work would benefit from access to the Trial and Ruling Materials.

Intervenor The Century Foundation is a non-profit think tank that publishes research, commentary, and public policy recommendations on higher education issues, including reducing abuses by predatory for-profit colleges and improving protections and relief options for students who have been harmed by such institutions. (Exhibit 5, Declaration of Yan Cao, ¶ 1.) Several staff members of The Century Foundation have written extensively on topics relating to the trial in this matter, including loan relief for defrauded students, federal aid eligibility for deceptive colleges, and colleges that pursue insider-guided conversions from for-profit to tax-exempt status. (*Id.* ¶ 2 (citing examples).)

The Century Foundation's work has prompted accreditor action, congressional inquiries, proposals for improved oversight of predatory colleges, and direct modification by colleges of practices that are likely to mislead students. Moreover, its expertise has been sought and cited by enforcement agencies, college regulators, policymakers, media outlets, and parties seeking loan relief on behalf of students. (*Id.* ¶ 3.)

In direct reaction to this Court's Ruling, The Century Foundation joined with other experts and advocates in calling upon the U.S. Department of Education to provide relief for Defendants' students and protect taxpayers by obtaining increased financial surety from Defendant CEHE and

its principals. (*Id.* ¶ 4 (citing examples).) The Department must promptly obtain surety in the form of a Letter of Credit (LOC) in order to cover costs from Defendant-related closures and loan relief. The Trial and Ruling Materials may provide The Century Foundation with information to necessary determine the general size of the LOC that is needed to appropriately protect taxpayers from being left on the hook for covering Defendants' losses and expenses. Delay in obtaining a LOC could shift millions in costs to taxpayers if Defendants seeks bankruptcy protection. (*Id.*)

Furthermore, The Century Foundation believes, based on its experience representing students in loan relief actions, that the evidentiary record from this case is key to ensuring that students who have been harmed by Defendants are not subject to debt collection, wage garnishment or offset of federal payments. (*Id.* ¶¶ 5–6.) Additionally, the evidence detailing the scope, severity, and duration of Defendants' wrongdoing would allow advocates and state regulators to assess and protect against the risk of a precipitous closure that could greatly harm the nearly 10,000 students still enrolled in Defendants' Independence University if appropriate precautions are not swiftly pursued. (*Id.* ¶ 7.)

Finally, the Ruling suggests that Trial and Ruling Materials may be important to understanding the Department of Education's policies and practices, a topic on which The Century Foundation has submitted a request under the Freedom of Information Act (FOIA). (*Id.* ¶ 8.) On August 28, 2020, The Century Foundation's Yan Cao submitted a FOIA request to the Department of Education for records relating a senior Department official's (i.e., Ms. Jones') testimony, referenced in the Ruling, "that use of national averages, specifically the BLS wage data, was the 'safe zone' prior to the DOE's promulgation of the Gainful Employment regulations in 2014." Ruling at 106. The FOIA response stated that the Department had "no responsive documents" on this

important question relating to the Department's policies on misleading representations, raising serious questions about the veracity of this testimony from Ms. Jones. (*Id*.)

Intervenors Katie Brooks and Nannette Wride have a current lawsuit against Defendants on behalf of the federal government and seek the Trial and Ruling Materials to support those claims.

Likewise, Intervenors Katie Brooks and Nannette Wride are relators under the federal False Claims Act, 31 U.S.C. § 3729–30, which are private whistleblowers that bring fraud claims on behalf of the U.S. government. Ms. Brooks and Ms. Wride have an existing case against Defendants in Utah federal court in which the U.S. government has intervened in support. Counsel for Ms. Brooks and Ms. Wride—who also represented Ms. Potts during relevant periods in the past, including before this Court—attended large portions of the public trial in this matter, heard all the testimony, and personally observed all the trial exhibits displayed during their attendance. Counsel was excluded from the courtroom at Defendants' request exactly once, for approximately fifteen minutes, during testimony about a single exhibit involving some type of confidential settlement agreement. (Ex. 2, Mark Decl. ¶¶ 1, 5–7.)

The Court's Ruling made numerous factual findings relevant to the claims in that False Claims Act suit, which, in its current form, addresses the payment of bonuses to admissions consultants. The Ruling found that admissions consultants were expected to "enroll and start between 60% and 70% of the prospective students" and meeting different enrollment benchmarks "would lead to a bonus." Ruling ¶ 139. The Court also found that "[t]here was pressure within admissions to keep students enrolled . . . because there were bonuses" available to the admissions consultants for doing so. Ruling ¶ 468. These issues—and many others addressed in the Trial and Ruling

Materials—are squarely relevant to Ms. Brooks and Ms. Wride's ongoing lawsuit concerning alleged fraud committed by Defendants against the federal government. (Ex. 2, Mark Decl. ¶¶ 8–9.)

Furthermore, Ms. Brooks and Ms. Wride's counsel first identified Cristi Brougham as a witness in their case and, recognizing she had information important to this case, put her in contact with the Colorado Attorney General's office. Her testimony was instrumental to this Court's Ruling; the Court cited Ms. Brougham's testimony numerous times in its Ruling. *See, e.g.*, Ruling ¶¶ 60, 67, 81, 83, 85, 93, 105, 112–13. Her testimony in this case, among other evidence and testimony from other witnesses, is also directly relevant to the issues in Ms. Brooks and Ms. Wride's own pending case brought on behalf of the federal government under the False Claims Act. Ms. Brooks and Ms. Wride have an interest in these issues as well, which all relate to their own suit bringing claims in the federal government's name. (Ex. 2, Mark Decl. ¶¶ 8–9.)

Furthermore, Ms. Brooks and Ms. Wride's counsel has already obtained portions of the trial transcript, pursuant to this Court's procedures and its directions for doing so. About four months after the trial, Ms. Brooks and Ms. Wride's counsel inquired of this Court about obtaining copies of portions of the trial transcript. Following this Court's directions, counsel contacted the court reporter to obtain a copy. At no time did the Court's staff or the court reporter suggest that a copy of the transcript was not available to any member of the public willing to pay for a separate transcription. After paying hefty fees for a separate transcription of one particular day,[3] Ms. Brooks and Ms. Wride's counsel were allowed a copy. Defendants are fully aware that Ms. Brooks and

[3] To obtain a full transcription of the trial would have cost in excess of $12,000. Ms. Brooks and Ms. Wride's counsel was told that they had to pay for a separate transcription because a public version was not yet available. Nonetheless, the only limitation on access to the entire trial transcript was payment of the court reporter's transcription fees.

Ms. Wride's counsel have this transcript because portions of that transcript have been directly quoted in public filings in the federal False Claims Act suit. *See* Fourth Amended Complaint, 2:15-cv-00119 (District of Utah), ECF #427, ¶¶ 93–94, 186, 190, 192–93, 309. (Ex. 2, Mark Decl. ¶¶ 10-12.)

ARGUMENT

I. INTERVENORS HAVE A RIGHT TO INTERVENE IN THESE PROCEEDINGS.

A. Intervenors should be permitted to intervene for the limited purpose of seeking access to Court records.

Intervenors seek permission to intervene in this matter for a limited and narrow purpose—to ask the Court to make records from the public trial and cited in its Ruling available to the public for review and inspection. Colorado Rule of Civil Procedure 24 permits intervention for this limited purpose because Intervenors have a recognized collateral interest in this Court's decision to maintain suppressed and protected status over the Trial and Ruling Materials.

As the Colorado Court of Appeals has noted, "the common manner by which nonlitigants seek modification of a protective order [to obtain access to litigation materials] is to move for intervention under Rule 24(b)," and "there is a considerable body of law affirming the propriety of such limited intervention." *Mauro by & through Mauro v. State Farm Mut. Auto. Ins. Co.*, 2013 COA 117, ¶ 15, 410 P.3d 495, 498 (citing 8A Charles Alan Wright et al., Federal Practice and Procedure § 2044.1 (3d ed.2007).); *United Nuclear Corp. v. Cranford Ins. Co.*, 905 F.2d 1424, 1427 (10th Cir. 1990) ("The courts have widely recognized that the correct procedure for a non-party to challenge a protective order is through intervention for that purpose.").

B. Colorado's rules governing the classification of Court records provide Intervenors with an implied right to intervene for the purpose of challenging the Court's designations of records as non-public.

Additionally, Chief Justice Directive 05-01 (the "Directive"), which addresses the procedure for classifying different types of Court records for protection, specifically provides rights to third parties seeking to challenge the designation of Court records as off limits to the public. In this case, it appears that the records that Intervenors seek have been variously classified as either suppressed or protected.

Section 3.08 of the Directive, which addresses "Suppressed" court records, provides that "[a]ny member of the public seeking access to a suppressed court record must" do so by "obtain[ing] a court order." Obviously, the only way for a member of the public to obtain such an order would be to first intervene in the suit in question for that purpose. Section 3.08 presupposes that the public may intervene for the purpose of obtaining such an order.

Similarly, Section 3.09 defines "Protected" court records as a "record that is accessible to the public … after redaction" by the Court according to any state or federal requirements. Like, Section 3.08, Section 3.09 recognizes explicit rights belonging to the public at large to access Court records classified as "Protected." Section 3.09 expressly directs that the public be allowed access to such records once the Court redacts any necessary information from them. If a Court fails to adhere the directives of Section 3.09—and fails to make those records available to the public—Section 3.09 implicitly confers a right on the public to seek that relief.

Accordingly, because both Sections 3.08 and 3.09 of the Directive confer a right on the public to seek access to Court records classified as either "Suppressed" or "Protected," Intervenors should be permitted to intervene in this action for that limited purpose.

II. THE TRIAL AND RULING MATERIALS ARE PRESUMPTIVELY OPEN TO PUBLIC INSPECTION, PARTICULARLY IN A CASE OF PUBLIC IMPORTANCE.

"The courts of this country recognize a general right to inspect and copy public records and documents, including judicial records and documents." *Nixon v. Warner Commc'ns, Inc.*, 435 U.S. 589, 597, 98 S. Ct. 1306, 1312, 55 L. Ed. 2d 570 (1978). Indeed, the Colorado Supreme Court long ago endorsed this right, holding that in a case of "public interest," "to refuse permission to examine the pleadings and other papers on file would be an abuse of discretion." *Times-Call Pub. Co. v. Wingfield*, 159 Colo. 172, 178, 410 P.2d 511, 514 (1966); *see also Anderson v. Home Ins. Co.*, 924 P.2d 1123, 1127 (Colo. App. 1996) ("In view of the fact that court files are public records . . . , it is unreasonable, as a matter of law, for the parties to litigation to expect or to assume that all of the court files will remain private.").

Because court files are presumptively public, the "burden [is] upon the party seeking to limit access to a court file to overcome this presumption in favor of public accessibility by demonstrating that the harm to the privacy of a person in interest outweighs the public interest in the openness of court files." *Id.* at 1126; *United States v. Pickard*, 733 F.3d 1297, 1302 (10th Cir. 2013) ("Consistent with this presumption that judicial records should be open to the public, the party seeking to keep records sealed bears the burden of justifying that secrecy, even where, as here, the district court already previously determined that those documents should be sealed."). Because Intervenors do not seek records containing the private information of any student, *see* note 1, *supra*, the only privacy interests that could possibly be implicated by this request are those purportedly belonging to Defendants.

However, Defendants have irrevocably waived any purported confidentiality interest in the Trial and Ruling Materials by failing to undertake any effort to keep them confidential during the trial and related proceedings. And even if Defendants could somehow establish that these documents and testimony retain confidential protections notwithstanding the public's prior exposure to them, Defendants have no protectible interest in keeping the evidence of their wrongdoing out of the public's view.

A. Defendants forever and irrevocably waived any claim of confidentiality over the exhibits and testimony when they failed to object to their use during the public trial.

Confidentiality is not a theoretical construct or a legal fiction—once testimony or an exhibit has "been disclosed to the public during trial," they "no longer are appropriately deemed confidential," and a defendant will be found to have "waived the confidentiality . . . by not objecting to their public disclosure at trial." *Hunton v. Am. Zurich Ins. Co*., No. CV-16-00539-PHX-DLR, 2018 WL 6329392, at *4 (D. Ariz. Dec. 4, 2018) (collecting cases). Indeed, even where a protective order or confidentiality agreement exists, a party must still "take reasonable steps to protect the confidentiality of these exhibits at the time they [a]re used in open court." *Id.*

This is a well-established legal principle recognized by courts throughout the country. *See, e.g.*, *Littlejohn v. BIC Corp.*, 851 F.2d 673, 680 (3d Cir.1988) ("It is well established that the release of information in open court is a publication of that information and, if no effort is made to limit its disclosure, operates as a waiver of any rights a party had to restrict its future use" and that a defendant's "failure to object to the admission into evidence of the documents . . . constitute[s] a waiver of whatever confidentiality interests might have been preserved under the [protective order]."); *accord Nat'l Polymer Products, Inc. v. Borg–Warner Corp.*, 641 F.2d 418, 421 (6th

Cir. 1981); *Gambale v. Deutsche Bank AG*, 377 F.3d 133, 144 & n. 11 (2nd Cir. 2004); *Phillips v. C.R. Bard, Inc*., No. 3:12-CV-00344-RCJ, 2015 WL 3485039, at *2 (D. Nev. June 1, 2015) ("Even if the test [for asserting confidentiality] could be satisfied, Plaintiff correctly notes that Defendants have waived the issue because Defendants made no motion to seal the exhibits or testimony at the public trial.").

In their recent motion to the Court, Defendants cited *Livingston v. Isuzu Motors, Ltd*., 910 F. Supp. 1473, 1480 (D. Mont. 1995), for the supposed proposition that even where exhibits are displayed during trial, they may not necessarily enter the public record. However, the *Livingston* court's rationale—which another court in that circuit has recently criticized as "squarely at odds with the more recent cases . . . and th[e] strong presumption in favor of public access to judicial records"[4]—turned largely on the idiosyncrasy that "although they were used at trial, [the] exhibits did not enter the public record as it existed" because they "were returned to the party who produced them" given that the "sheer volume of exhibits made a storage problem for the Clerk of Court." 910 F. Supp. at 1480. Whatever its merit, that is not the case here—this Court has physical custody over all the Trial and Ruling Materials.[5]

[4] *In re Bard IVC Filters Prod. Liab. Litig*., No. CV-16-00474-PHX-DGC, 2018 WL 3725729, at *2 (D. Ariz. June 25, 2018), *on reconsideration in part*, No. CV-16-00474-PHX-DGC, 2018 WL 3721373 (D. Ariz. Aug. 3, 2018).

[5] Defendants also cited the related case of *Jochims v. Isuzu Motors, Ltd*., 151 F.R.D. 338, 342 (S.D. Iowa 1993), upon which *Livingston* relied. However, even in *Jochims*, the court recognized that the defendant could not prevent the public's access to the vast majority of the trial record and ordered that only the narrow parts of the record that actually implicated the defendant's trade secrets remain sealed. *Jochims* did not account for the public's First Amendment rights because the court there found that members of the public did not actually attend the trial. 151 F.R.D. at 341 n.6. That is not the case here.

The Trial and Ruling Materials to which Intervenors seek access were discussed, displayed, and generally disclosed in open court during the four-week trial in this matter. Not only did the general public view and observe the testimony and exhibits, counsel to Intervenors Brooks, Wride, and Potts personally attended the proceedings and took copious, detailed notes about the testimony and exhibits. The information contained in the exhibits and conveyed in the testimony has now all been exposed to the public. Just as a bell cannot be un-rung, the exhibits and testimony presented during the public trial have forever lost their confidential status. Defendants desire to now bury the evidence of their misdeeds is not a basis for clawing back testimony and exhibits openly presented during a public trial.

B. Even if Defendants had not waived their confidentiality claims, the Trial and Ruling Materials should be made public.

Even if Defendants had not waived their confidentiality claims, the fact that the Trial and Ruling Materials are the basis of this Court's findings and conclusions that Defendants engaged in systematic violations of consumer protection laws tips the scales heavily in favor of public access. *See Anderson*, 924 P.2d at 1128 ("If the charge [of malpractice against a healthcare professional] is proven accurate, the public should have access to that information."); *Times-Call Pub. Co*., 159 Colo. at 178, 410 P.2d at 514 ("[T]o refuse permission to examine the pleadings and other papers on file" in a case of "public interest" would "be an abuse of discretion.").

Even if Defendants could offer more than vague claims that the materials sought may contain "personal, private, and confidential matters," which "is generally insufficient to constitute a privacy interest warranting the sealing of that entire file," this Court's reliance on those materials to impose civil penalties negates any remaining privacy interest in those records. *Anderson*, 924 P.2d at 1127. As the Colorado Supreme Court has ruled in an analogous circumstance, "evidence

of crime necessarily loses its entirely private character when" it is obtained "for use in" a "prosecution on behalf of the public." *Harris v. Denver Post Corp*., 123 P.3d 1166, 1170 (Colo. 2005). The principle applies with equal force to evidence of violations of consumer protection laws resulting in millions of dollars in civil penalties, which were obtained by the Attorney General's office on behalf of the public.

Indeed, the mere fact that this lawsuit involves an enforcement action brought by the Colorado Attorney General and implicates thousands of the state's residents ought to be sufficient to establish that the case involves issues of public interest and importance that justify opening the records to that very public. *Anderson*, 924 P.2d at 1128 (noting that "because [the defendant] is a licensed health care professional, a charge that he has engaged in unprofessional conduct implicates the public interest and involves more than a private dispute between individuals"). Because Defendants cannot establish a protectible interest in the Trial and Ruling Materials that Intervenors seek—that is, they have no legitimate interest in maintaining the confidentiality of the evidence of their wrongdoing—the Court should order those materials made public, subject only to the privacy interests of current or former students.

III. INTERVENORS HAVE AN ADDITIONAL FIRST AMENDMENT RIGHT TO ACCESS THE INFORMATION THAT WAS DISCLOSED DURING THE PUBLIC TRIAL WITHOUT RESTRICTION.

The "First Amendment and the common law provide different levels of protection" to judicial records. *Stone v. Univ. of Maryland Med. Sys. Corp*., 855 F.2d 178, 180 (4th Cir. 1988). While the common law presumes access to judicial records, *Nixon*, 35 U.S. at 597, "[w]here the First Amendment guarantees access, . . . [it] may be denied only on the basis of a compelling governmental interest, and only if the denial is narrowly tailored to serve that interest," *Stone*, 855

F.2d at 180. "The burden to overcome a First Amendment right of access rests on the party seeking to restrict access, and that party must present specific reasons in support of its position." *Virginia Dep't of State Police v. Washington Post*, 386 F.3d 567, 575 (4th Cir. 2004).

Here, "when the documents currently at issue were offered into evidence . . . at trial, they became, simply by virtue of that event, subject to the public right of access guaranteed by the First Amendment." *Level 3 Commc'ns, LLC v. Limelight Networks*, Inc., 611 F. Supp. 2d 572, 589 (E.D. Va. 2009). As in the *Level 3* case, "[t]he First Amendment public right of access to these exhibits sprang into existence upon their being offered into evidence . . . at trial," and, Defendants' failure to take action at that time constituted a "waive[r of] any future right to assert any competing interest to be weighed by the Court and, thus, any objection to the public availability of the exhibits in the Court's files." *Id.* at 588.

Counsel for Ms. Brooks, Ms. Wride, and Ms. Potts attended the public trial, heard the testimony of the witnesses, and observed the exhibits offered by the parties and shown on the projector screen. In other words, they were privy to the Trial Materials from the public gallery. Therefore, under the First Amendment, Ms. Brooks, Ms. Wride, and Ms. Potts all acquired a future right of access to the Trial Materials, and Defendants' waived their right to oppose the further and future access to those records.

As noted, unlike the common law rights of access to court records, which may be overcome by a showing that Defendants' privacy interests outweigh the public's interest in access, the First Amendment rights now belonging to Ms. Brooks, Ms. Wride, and Ms. Potts may only be denied by a compelling government interest. And even then, any restriction on those access rights must be narrowly tailored to accomplish that government purpose.

Certainly, Defendants cannot articulate a legitimate *government* (rather than private) purpose for restricting Ms. Brooks', Ms. Wride's, and Ms. Potts' access to evidence of Defendants' massive civil liability, and it does not appear that the relevant government entity—the State of Colorado—opposes Intervenors' request for access to the Trial Materials. Because Intervenors have a First Amendment right of access to the Trial Materials and Defendants have waived their rights to oppose such access, the Court should order that Intervenors may access the Trial Materials.

CONCLUSION

For the reasons stated above, the Court should enter an order making all Trial and Ruling Materials, except those containing unredacted private student information, available to the public as quickly as reasonably practicable.

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In accordance with C.R.C.P. 121 §1-26(7) a copy of this document with original signatures is being maintained by the filing party and will be made available for inspection by other parties or the court upon request.

CERTIFICATE OF SERVICE

I hereby certify that the **COMBINED MOTION (1) TO UNSUPPRESS AND UNPROTECT RECORDS FROM THE PUBLIC TRIAL AND CITED IN THE COURT'S RULING, AND (2) TO INTERVENE FOR THAT LIMITED PURPOSE** was filed with the Court electronically and served via CCE on February 23, 2021, on the following:

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