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DISTRICT COURT, CITY AND COUNTY OF DENVER, COLORADO 1437 Bannock St., Room 256 Denver, CO 80202	
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▲
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DEFENDANTS' REPLY IN SUPPORT OF THEIR APPLICATION FOR ORDER TO RETAIN CONFIDENTIALITY

The State is attempting to strip the entirety of the trial record—including effectively "all trial exhibits and testimony" (Application Ex. B)—of any protection from public disclosure. The request is plainly driven by an improper political agenda, notwithstanding the State's attempt to

come up with less unseemly motives. In addition, the State's own response to Defendants' Application shows that it understands its sweeping request is improper: it concedes that the confidentiality of a substantial portion of the record, including personal identifying information and students' records, were not and *cannot* be waived. Response at 8. Yet it never attempts to square the breadth of its request with this concession, or suggest how the Court may grant the request without breaching confidentiality that even the State acknowledges must be honored.

The Court and Court personnel likewise recognize that the trial record contains materials that must remain subject to protection. Indeed, a collection of nonparties have recently sought to intervene in an effort to gain access to the trial record after approaching the Court Clerk, who, recognizing the sensitivity of the requested materials, declined to provide them. *See* February 23, 2021 Non-Party Intervenors Combined Motion. This confirms that the Court and the Court Clerk interpret the Protective Order exactly as Defendants described in their Application, protecting even materials that were submitted into evidence at trial.

The Court should therefore grant Defendants' Application and order that the trial record retain the protected status.

I. THE DESIGNATED MATERIALS CONTAIN CONFIDENTIAL INFORMATION THAT MUST BE PROTECTED.

Defendants' Application noted the broad range of information in the trial record that requires ongoing protection. This includes, in particular, student-specific information such as enrollment forms, transcripts, financial aid information, medical records, and other information identifying students by name, as well as discussion of particular students to whom the Court referred to in its Findings of Fact and Conclusions of Law only by their initials in order to protect their identity from disclosure. *See* Application at 4–6. That such information should not be

disclosed to the public is self-evident. In fact, far from contesting this point, the State agrees: anything the parties did or could have done at trial, the State concedes, "should not constitute a waiver of confidentiality as to personal identifying information and students' records." Response at 8. Such information is protected under FERPA and other laws requiring maintenance of confidentiality, and the State agrees that "parties and the Court must comply with privacy laws and maintain and share such information accordingly." *Id.* Yet in spite of this concession, the State does nothing to tailor the broad scope of its request. By the State's own admission, the records it seeks to make available to the public include documents that must continue to be shielded from disclosure. That means its request is improper.

Other sensitive materials, such as Defendants' proprietary and financial information—none of which the State claims to have been improperly designated as confidential in the first place, even in its Response—were treated no differently than other documents for which the State acknowledges confidentiality was not waived. Being treated no differently, they are no less deserving of ongoing protection. And though the State claims Defendants "fail to substantially articulate reasons" why they would be harmed by the disclosure of these documents (Response at 8), the need to maintain protection over company financial and employee records, quite frankly, requires no explanation.[1] Moreover, providing an explanation for why hundreds of individual documents require protection is not practical. The same sensitive content that justified the

[1] The State's suggestion that there is no need to protect this information now that CollegeAmerica is closed is also inconsistent with the State's recent contention that ongoing injunctive relief is proper. If shutting down operations means there is no need to continue to protect proprietary information about those operations, there would be even less need for injunctions restraining any aspect of those operations. Ultimately, the materials should be protected irrespective of the need for injunctive relief; if these materials were stripped of their current protection, the value that came from the confidentiality of these materials could be irretrievably lost.

designation in the first place requires their continued protection under the Protective Order.

Indeed, as noted in Defendants' Application, the Court's Protective Order specifically contemplates that materials submitted into evidence do not lose their protection by virtue of such submission. Am. Protective Order ¶¶ 14–15. The State's response to this point does little more than deny the unavoidable consequence of this language; it contends, in effect, that the Protective Order cannot possibly mean what it unambiguously says. Hence, the State attempts to distinguish the cases Defendants cited in their Application by denying that the Protective Order at issue in this case affords ongoing protection to documents submitted into evidence, as the protective orders at issue in those cases did. Response at 9. The plain language of the Amended Protective Order itself shows otherwise. It plainly continues the protection of designated materials even after they are submitted into evidence.

The Court's own conduct confirms this understanding of the Protective Order's meaning. The Court's Findings of Fact and Conclusions of Law include discussion of a specific CollegeAmerica student who was frequently referenced by his full name at trial; in fact, the State called him as a witness, and he personally appeared and testified at trial. Neither side took any extra measures to give additional protection, above and beyond what the Protective Order already provides, to this student's identity, or to records disclosing other information about him. Under the State's argument, the individual's identity should now be considered a matter of public record, as would be numerous documents submitted into evidence that identify him by name. Yet in its Findings of Fact and Conclusions of Law, the Court referred to this individual exclusively with initials—never by name. The Court plainly does not accept the premise of the State's argument. Neither, for that matter, does the State.

The Court Clerk likewise recognizes, and follows, the clear instructions of the Protective Order. After Defendants filed their application, a collection of nonparties moved to intervene to ask the Court to provide relief that essentially mirrors the State's position here, asking to release the entire trial record other than information about individual students. *See* February 23, 2021 Non-Party Intervenors Motion at 3 n.3. Their argument is much the same as the State's; they contend that this information is now a matter of public record because of its presentation at trial. Yet the nonparties acknowledge that the Court Clerk continues to treat all materials in the trial record as protected, necessitating their motion. *See id.* The Court and Court Clerk thus recognize that these materials remain subject to protection and treat them as such.

The State also mischaracterizes Defendants' position by suggesting "Defendants contend the entire trial record is confidential." Response at 2. Many of the exhibits are not designated as confidential, as Exhibit F from the Application makes plain. But the State presses the converse position: it asks for the entirety of the trial record to be released to the public, effectively arguing that *none* of the trial record is confidential. That is even more obviously untrue; even the State acknowledges as much. Contrary to the State's reasoning, this is not an all-or-nothing proposition: the parties would need to review the documents at issue to individually determine what must remain protected, and what need not remain protected. Had the State made a good-faith effort to identify the specific protected materials it wished to see released, Defendants could explain the rationale for why any one of them should retain their protection, and their Application might not have been necessary. Instead, the State took the lazy shortcut of challenging wholesale the entire trial record—something it assured Defendants it would not do when the parties negotiated the Protective Order. *See* Application Ex. G. But in levying this

sweeping challenge, the State overreached, as it admits.

The State's efforts to strip the entirety of the trial record of protection would expose materials the parties and the Court must keep confidential. This is precisely what the Protective Order requires—a fact the Court Clerk acknowledges by continuing to give these materials protected status. The Court should reject the State's efforts to pierce these protections.

II. The State's Proffered Reason for the Request to Release the Entire Trial Record to the Public is a Baseless Pretext for its Improper Motives.

The State claims it makes its sweeping request in order to provide the trial record to the U.S. Department of Education, which it suggests might need the record to consider application of the Borrower Defense Rule. Response at 10–13. This claim is doubly flawed: it plainly is *not* the genuine reason for the request, and would not serve the feigned purpose in any event.

In the affidavit of Mark Bailey, which the State provided with its Response, Mr. Bailey claims that his office received "multiple inquiries" about the trial and the trial record from a range of sources, including the U.S. Department of Education, the Consumer Financial Protection Bureau, the U.S. House of Representatives, as well as from the author Larry Kirsch. Bailey Aff. ¶¶ 2–3. Yet as he acknowledges, it was only the latter request—not any of the others—that spurred the State into action here. *Id.* ¶ 4 (noting email to inform Defendants of "the request," referring to the request from Mr. Kirsch). When the State notified Defendants of the request from Mr. Kirsch, Defendants asked the State to identify the specific materials the State wished to disclose to him. App. Ex. B (C. Steese 11/18/20 email). This prompted the State's demand that the entirety of the trial record be released to the public. *Id.* (L. Webster 12/8/20 email). Only weeks later, after Defendants responded to this improper request and during subsequent meet-and-confer sessions, did the State raise the new argument that its objection was

somehow based on the "Borrower Defense" rule. App. Exs. C, D. The State can hardly pretend that it had in mind all along a rule it only thought to mention as an afterthought, after Defendants showed the baselessness of the State's initial request and motive. The record makes plain that the State's reliance on this rule is merely a thinly contrived excuse.

It should come as little surprise, then, that this newly invented purpose does not hold up under scrutiny. As Defendants already showed (*see* Application at 9–10), most of the processes and provisions created by the Borrower Defense rule apply to borrowers whose loans were first disbursed on or after July 1, 2017—well after any of the conduct at issue during the trial (which itself took place in 2017). *See* 34 C.F.R. § 685.222. The State nevertheless suggests that "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." Response at 11 n.6. Yet the State does not even attempt to show how that could be true—because it plainly is not. Nothing in the trial record, all of which concerned conduct in the distant past even at the date of trial, would be of any use to students who took out loans after July 1, 2017—the only group of students able to make use of the rule's more extensive provisions and procedures.

The State also suggests Defendants have asserted "that the Department has no authority to adjudicate a group application brought by the State on behalf of CollegeAmerica borrowers." Response at 12. That simply misstates Defendants' Application. As Defendants noted, mass adjudication under these rules can be initiated by the Secretary of Education—but not the State:

> 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).

Application at 9 (italics in original; bold emphases added). The Borrower Defense rule thus neither requires nor contemplates any function by the State on behalf of students who took out loans in this period. There is no function for the State to perform, and no legitimate interest of the Attorney General's office to be served by its attempt to strip the trial record of protection.

What the State does not show, moreover, is that the Department of Education, in furthering whatever purposes or aims it may have, would need anything more than this Court's decision, or even that the Secretary has an interest in pursuing such mass adjudication. What the State offers instead is sheer speculation that "[t]he 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." Response at 11. Why this is "likely," and what more the Department would require, the State does not bother to explain. Nor does the State address an even more salient point: why, if the Department had any need for any of these materials, it could not seek them out on its own. The Department of Education has every ability to seek out any portion of the trial record it may believe it requires; yet to date, it has not done so. This calls into question not only the State's unsupported suggestion that the Department of Education may require more than it is already able to access, but also the State's motives for trying to make publicly available materials the Department apparently has not even tried to obtain.

The same is true for Mr. Kirsch, CollegeAmerica students on whose behalf the State claims to act, or anyone else who seeks to review protected materials in the trial record. If any of them wished to access any portion of the trial record, they, too, can take action on their own to request them, and the Court can evaluate the extent to which such requests are appropriate. Not that anything beyond documents already available to them is actually necessary. Mr. Kirsch, for

example, has apparently already obtained everything he believes he needs. *See* Bailey Aff. ¶ 7. And the State once again offers no support for its assertion that the trial record is necessary or even useful to any students who might wish to make an application based on the Borrower Defense rule. The State simply fails to suggest any reason why the sweeping action it asks the Court to take is necessary or appropriate.

In particular, the Court should give no credence to the State's suggestion that any CollegeAmerica student has suffered any harm the Court has not already redressed, or that its request would facilitate additional effort to redress that harm. The State had every opportunity to prove any such harm at trial, where it had four weeks to show what evidence its "extraordinary investigative powers" had uncovered after years of searching—and it could not do so. Findings of Fact and Conclusions of Law, ¶¶ 774. The State's attempt to once again cast itself in the role of the paternalistic guardian is not merely unconvincing—it is offensive. Colorado citizens are not helpless wards in desperate need of protection that only the State can provide, especially not from a harm the State could not prove exists. If any students who took out loans during any period of time believe any perceived harm remains unaddressed, those students are at liberty to raise whatever argument they wish on their own. To date, CollegeAmerica has heard nothing from any student as a result of the Order.

III. CONCLUSION

The State's request to expose to the public the entirety of the trial record would expose materials that must remain confidential, and the State admits as much. The State makes this overreaching request not for any litigation or other legitimate purpose of the Attorney General's office, but to facilitate efforts by others who share their political agenda to do harm to

CollegeAmerica and related parties by any means possible. There are proper procedures already in place for anyone who wishes to access these sensitive materials to request them—and for the State to initiate a good-faith discussion of specific materials that should or should not remain subject to protection. These procedures should be followed.

Defendants therefore respectfully request that their Application be granted, and that the Court enter an order instructing that the Litigation Materials Defendants have designated are entitled to retain their confidential status and protection.

Dated: February 24, 2021.

Respectfully submitted,

s/ Charles W. Steese

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CERTIFICATE OF SERVICE

I hereby certify that on this 24th day of February 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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