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DISTRICT COURT, CITY AND COUNTY OF DENVER, COLORADO 1437 Bannock St. 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▲
Attorneys for Defendants: Charles W. Steese, #26924 IJay Palansky, #53431 William M. Ojile, Jr., #26531 Douglas N. Marsh, #45964 Armstrong Teasdale LLP 4643 South Ulster, Suite 800 Denver, CO 80237 Phone: 720-200-0676 csteese@armstrongteasdale.com ipalansky@armstrongteasdale.com bojile@armstrongteasdale.com dmarsh@armstrongteasddale.com Larry S. Pozner, #2792 LS POZNER PLLC 1444 Blake Street Denver, CO 80202 303-888-7063 pozneroncross@gmail.com	District Court Case No. 2014CV34530 Div. 275

DEFENDANTS' RESPONSE TO NOTICE OF RECEIPT OF REQUEST FOR CASE INFORMATION

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"), respectfully respond to the State's "Notice of Receipt of Request for Case Information." Though styled as a "Notice," the pleading openly advocates for the Court to take a specific course of action, and so requires response to show how the State continues to misconstrue the Amended Protective Order and why its proposed course of action should be rejected.

I. BACKGROUND INFORMATION

After years where this case laid dormant, and several months after the Court issued its final decision in August 2020, the past few weeks have seen an onslaught of coordinated efforts to gain public access to confidential materials in the trial record.

The earliest of these coordinated efforts are described in Defendants' January 27, 2021 Application for Order to Retain Confidentiality. That Application noted how the State, though ostensibly reacting solely to an author's request for specific portions of the trial record, took the breathtakingly broad position that effectively the entire trial record should be stripped of its current protected status and made available to the public. Even while briefing on this Application was still underway, non-party intervenors filed a motion taking the exact same position as the State. This, too, is likely no coincidence. It is clear the State is working with others who share its political objective in a continued effort to do harm to Defendants by any means possible.

One of these intervenors, notably, identifies itself as "Veterans Education Success, a non-profit organization dedicated to uncovering abuses against Veterans." Non-Party Intervenors Combined Motion at 1. It is, in short, a lobbying group—one that, like the State and the Intervenors, has targeted for-profit and career colleges and advocates for federal and state agencies to take action against them. *See id.* at 11–12.

The State's Notice suggests that those lobbying efforts have gotten at least a little traction. On March 15, 2021, counsel for the State shared with Defendants what it attached to its Notice as Exhibit A—a one-page letter the State received from the Department of Veterans Affairs seeking the State's "evidentiary file." The letter itself gives no indication of what the unusual term "evidentiary file" means—it could conceivably include evidence the State introduced, other exhibits, notes on the State's internal investigations, the State's direct and cross-examination outlines, transcripts, or some combination of these individual components (or maybe something else altogether). The letter also says nothing at all as to whether confidential information was within the scope of the request. Yet the State was able to divine from this vague request that the Veterans Benefits Administration ("VBA") sought "information that Defendants have designated confidential," and informed Defendants that it intended to "provide the public trial transcript and exhibits to VBA in fourteen days." *See* Exhibit B to Notice (M. Bailey 3/15/2021 email to C. Steese).

That the State somehow arrived at this interpretation strongly suggests that the State is leveraging the letter to suit is own position (and that of the Intervenors), that the State's interpretation is informed by other undisclosed communications with the VBA, or both. Indeed, when counsel for Defendants requested that the State provide all written communications

between the State and other non-parties seeking access to any portion of the trial record (*see* the State's Exhibit B), the State responded with an email acknowledging other communications with the VBA, and claimed the VBA, in those unwritten communications, "informed [the State] that they are seeking information that Defendants have designated confidential." Dec. ¶ 5, Ex. A (M. Bailey 3/22/2021 email to C. Steese). The State curiously elected not to attach this email to the Notice, even though it responds to the email the State submitted as Exhibit B and was sent to Defendants the same day it filed the Notice. Nor has the State stated whether it has had other communications with other non-parties seeking access to the trial record. These omissions seem to make plain that the State is coordinating with others who share its political agenda in an effort to do harm to Defendants by any means possible, and to get what mileage it can out of the Court's decision before it faces the chances of a reversal on appeal.

The State's professed belief that it is permitted under the Amended Protective Order to share the trial record with the VBA (Notice at 3) is incorrect. As Defendants stated in their Application and their Response to the Intervenors' Motion, the trial record contains materials that all parties agree should remain under protection—and other materials that should remain protected notwithstanding the State's contrary contentions. Meaningful efforts to sort what materials the parties believe can and cannot be disclosed, and to resolve disagreement on that point, must be undertaken before any disclosure of materials currently designated as confidential, making the State's repeated requests for wholesale disclosure of the record inappropriate. In any event, it is a practical certainty that nothing in the trial record will be of any service to any objective of the VBA—though if it believes otherwise, is entirely capable of approaching the Court itself to say so. The State therefore should not be permitted to breach the Amended

Protective Order yet again by improperly disclosing confidential materials.

II. ARGUMENT

A. The Amended Protective Order Does Not Permit the State to Disregard its Requirements Absent a Legal Requirement to Disclose the Materials.

In its communications with Defendants and in the Notice, the State cited to Section 7 of the Amended Protected Order, suggesting that it governs the VBA's request for the "evidentiary file." That section states as follows, with emphases added:

> If any person or entity (excluding Qualified Persons identified in paragraph 3) ***subpoenas or otherwise requests*** any CONFIDENTIAL Litigation Materials that a party has obtained under the terms of this Protective Order, such party shall promptly provide written notice to counsel for the party or other person who produced the CONFIDENTIAL Litigation Materials and counsel for the other parties to this action of the pendency of such ***subpoenas or orders*** as soon as reasonably possible, and, in any event, before the date of production under the ***subpoena or order***. If written notice cannot be provided at least fourteen (14) days before the time for production or other disclosure, the party receiving the ***subpoena or order*** shall promptly, in addition to the written notice, give notice by telephone to counsel for the party or person who produced the CONFIDENTIAL Litigation Materials. The party making the production or disclosure may do so once notice is given. In no event shall production or disclosure be made before notice is given except to comply with the terms of the ***subpoena, order, or request or otherwise with a legal requirement***. The purpose of this paragraph is to provide the party or person who produced the CONFIDENTIAL Litigation Materials the opportunity to intervene at its own expense to object to the production of CONFIDENTIAL Litigation Materials.

The language of this Section makes clear that it contemplates something more than an informal request by letter for something as unspecific as an "evidentiary file" before a recipient of confidential information is entitled to make wholesale disclosures of that information. It requires, in short, something "with a legal requirement"—such as a "subpoena," an "order," or a "request" such as a request for production under Rule 34—which imposes upon the recipient a legal obligation to disclose the requested materials. A simple informal request, such as the VBA's one-page letter, is not what this Section has in mind.

The contrary argument would be inconsistent with the obvious purpose of Section 7, and of the Amended Protective Order itself. The Amended Protective Order makes clear that the parties are under serious obligations to maintain sensitive materials in strict confidence. When served with subpoenas, orders, or other legal requirements to produce those materials, this duty to keep materials in confidence could come into conflict with competing duties to disclose, unless there are provisions to resolve that potential conflict. That is what Section 7 does: it allows a party to comply with its obligations under the Amended Protective Order without violating the "legal requirement" imposed by the subpoena, order, or other request. That is why Section 7 does not apply to a request that does not impose a "legal requirement" to produce. If the parties can abide by their obligations under the Amended Protective Order without implicating other, potentially competing "legal requirements," they must.

In its Notice, the State suggests that Defendants previously took the "opposite" position regarding an earlier request for materials from the Consumer Financial Protection Bureau. *See* Notice at 3 n.1. This suggestion is simply false. By the time the State notified Defendants of the "request" from the CFPB, it had already disclosed confidential materials to the CFPB. Everyone—Defendants, the State, and the Court as well—recognized that these improper disclosures violated the Amended Protective Order, and the State was sanctioned for this violation. At the time Defendants filed the Motion for Sanctions (as cited in the Notice), the only information the State had given Defendants as to why it made these improper disclosures was that "a governmental agency," which it later clarified to be the CFPB, had "requested information" from the State. *See* Exhibit C to April 29, 2019 Motion for Sanctions at 1, 3 (L. Webster emails of April 15 and 16, 2019). Unlike here, where the State actually sent the VBA's

letter to Defendants, nothing more about the "request" from the CFPB was mentioned—and in particular, the State offered nothing to indicate that it was not a "request" that imposed any kind of legal obligation to respond, as Section 7 contemplates. Only later, including during the hearing on the Motion, did the State acknowledge the "request" was nothing more than series of phone conversations with the CFPB. But ultimately, whether the "request" was of the kind Section 7 contemplates was immaterial. If it was, then the State had an obligation to notify Defendants before responding to the request; if it was not, the State had neither the obligation nor the right to provide responsive materials anyway. Either way, the disclosure was improper, and no one has even tried to argue otherwise. Nothing about the Motion for Sanctions supports the notion that the State can disregard its obligations under the Amended Protective Order upon receiving a "request" for documents with which it has no legal obligation to comply.

The State seems to think Section 7 gives it a license to disregard obligations with which it no longer wishes to comply, or that might make more difficult its political aims. Under the State's interpretation, it can evade the Amended Protected Order's requirements by simply finding a willing partner, encouraging them to make an informal "request," molding the contours of that "request" to suit its own whims, and turning over the materials unless Defendants undertake the time and expense to seek a court order to reinforce the protections the State hopes to disregard. Contrary to the plain purpose of Section 7—to enable compliance with a party's legal obligations—the State is doing everything it can to shirk them, as it has already done multiple times. This needs to stop.

B. The State's Intent to Provide Materials to the VBA Makes No Accommodations for Confidential Materials.

The State claims to believe it would be appropriate to provide the trial record to the VBA.

See Notice at 2–3. This is unlike its previous request, or the Motion of the Intervenors, in at least one material respect. In the prior instances, both the State and Intervenors recognized that there is a significant amount of material, including student-specific information, that remains subject to protection. But now, the State indicates that it intends to simply turn over the entire trial record—confidential materials and all. To refuse to make any accommodation for content even the State acknowledges remains subject to protection under the Amended Protective Order is unjustifiable.

Nothing has changed from the first two times Defendants have briefed this subject. The trial record consists of private information everyone agrees cannot be shared, public information everyone agrees can be shared, and other information where there is disagreement on the propriety of ongoing protection. Sorting out which is which is going to require extensive effort and cooperation. But rather than work together with Defendants to do this heavy lifting, the State is trying once again to take shortcuts, and make Defendants do its work for it. This cannot occur; before this request (or any of the recent requests to disclose the trial record) can be considered, the parties—including the State—have work to do.

C. Nothing in the Trial Record is Relevant to any of the VBA's Functions.

It is no answer to the confidentiality issue that the State would be providing the confidential student-specific information to a government agency—whether the CFPB, as before, or the VBA now. The simple fact is that the VBA has no need for any of the information in the trial record, much less the materials all parties are obligated to maintain as confidential.

For one, almost none of the student information the State previously agreed must remain protected has to do with veterans. Of all the witnesses who testified over the four weeks of trial,

exactly one was a CollegeAmerica student and a veteran—and she was a witness for Defendants, offering testimony that was overwhelmingly supportive for Defendants and testifying that CollegeAmerica absolutely gave her the tools she needed to succeed in life. *See* Nov. 6, 2017 Transcript at 83:15–19.

For another, nothing in the trial record has anything to do with any current or ongoing conduct, which is the exclusive concern of the VBA. In its letter to the State, the VBA noted that veterans may not be enrolled in courses offered by an institution which "utilizes" deceptive advertising practices. *See* Ex. A to Notice (citing 38 U.S.C. § 3696). The letter's use of the present tense, just as is used in the statute (*see* 38 U.S.C. § 3696(a)), is critical: it shows that the VBA is focused on current advertising practices, not advertising practices long abandoned. Further confirming the VBA's exclusively prospective outlook, 38 U.S.C. § 3696(b) requires institutions offering courses approved for the enrollment of veterans to maintain a complete record of advertisement materials utilized "during the preceding 12-month period." Thus, the VBA's concern is current and ongoing conduct, not conduct long since discontinued—which is all it would find in the trial record. Even as of the date of the trial, the specific advertising practices the State challenged were almost entirely in the distant past. More than three additional years have lapsed since then. The VBA will find nothing in the trial record relating to ongoing practices that any Defendant currently "utilizes," or utilized in the previous 12 months.[1]

It is not just difficult to imagine how the trial record would be relevant to a VBA

[1] Section 3696(c) also authorizes the VBA to coordinate with the Federal Trade Commission, and to utilize its services and facilities, to carry out its investigations. The Court took great pains to point out that federal law and procedure, and witnesses' knowledge and experience arising from working with the Federal Trade Commission, would not factor into the decision. *See*, *e.g.*, Findings of Fact and Conclusions of law at 7, ¶ 49.

investigation—it is almost impossible.

D. Any Entity that Wishes to have Access to the Trial Record must Follow the Established Procedures for Seeking that Access.

But suppose the VBA disagrees, and believes it really needs the trial record. If so, the next step is obvious: it can seek those materials itself, filing its own motion with the Court to explain exactly what it wants and why it needs it, rather than using the State as a go-between.

That makes this the third time the State and its political allies have tried to breach the protection over the confidential trial materials not to serve their own purposes, but to provide those materials to others—none of whom have approached the Court on their own. In doing so, the State continues to disregard the established processes in place for anyone that wishes to obtain access to these materials. These processes do not present disproportionate burdens or prevent meaningful access to materials other parties have the ability to obtain already. Indeed, Intervenors have indicated that all they had to do to get access to the trial transcript was pay the court reporter. But as of yet, no entity that has a direct interest in these materials—not any government entity, and not any aggrieved student—seems to think the trial record is important enough to approach the Court and ask for it themselves. It is telling that these other entities' interest in the record is so fleeting that they are not willing to bother with the hassle of sorting out protected materials—or paying the court reporter's fees.

The State is determined to facilitate efforts by those who might share its political agenda. These efforts serve no legitimate interests of the Attorney General's office and disregard its continuing obligations under the Amended Protective Order. If these other entities wish to have access to the trial record, let them take the necessary steps to obtain those materials on their own.

III. CONCLUSION

Despite its past violations of the Amended Protective Order, for which it has already been sanctioned, it appears the State still does not take the requirements of the Amended Protective Order seriously. Its continued efforts to evade the Amended Protective Order's requirements and share confidential materials from the trial record do not comply with the Court's clear instructions or its obligations to maintain that information in confidence. Defendants therefore respectfully request that the Court instruct the State to abide by the Amended Protective Order and prohibit the State from making additional disclosures of confidential materials from the trial record.

Dated: April 7, 2021.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 7th day of April, 2021, the foregoing was filed electronically and served on all persons registered to receive case filings through CCES.

s/Vanessa Sanchez
Vanessa Sanchez, Paralegal