DATE FILED: March 23, 2021 9:00 PM
FILING ID: 2E7D8CAD6B315
CASE NUMBER: 2014CV34530

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 ▲ Case No.: 2014cv34530 Div.: 275 Ctrm:
Zachary S. Westerfield 600 17th St. Suite 2800 South Tower Denver, CO 80202 Phone Number: (303) 748-3444 FAX Number: (303) 260-6401 E-mail: zach@westerfieldlaw.com Atty. Reg. #: 38690 Brandon J. Mark (pro hac vice admission sought) 201 S. Main St., Suite 1800 Salt Lake City, UT 84111 Phone Number: (801) 532-1234 E-mail: bmark@parsonsbehle.com Utah Bar #10439 *Attorneys for Non-Party Intervenors*	

INTERVENORS' COMBINED REPLY IN SUPPORT OF MOTIONS (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

Non-Party Intervenors, through their undersigned counsel, hereby submit this Combined Reply in Support of their Motions (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:

INTRODUCTION

In an effort to stall,[1] Defendants try to turn a relatively straightforward and simple issue—what few documents from the trial record should be excluded from public disclosure because they contain information about a particular student (that can't be redacted)—into an intractable maze of difficult choices. While Intervenors understand that it may take Court personnel, working with the parties, some time to address a few difficult exhibits, they are confident the Court will be able to work through those issues, operating under the presumption of public access, and reach the right result in each case.

And just because the evidence of Defendants' misdeeds is voluminous does not justify, as Defendants suggest, negating the fundamental presumption of public access recognized by the Colorado Supreme Court by placing a burden on that public to provide what Defendants consider to be a legitimate reason for reviewing those exhibits. That's exactly the opposite of a presumption of public disclosure, and it is contrary to Colorado and federal law. As requested in Intervenor's Motion, the Court should grant public access to the Trial and Ruling Materials.

[1] Defendants failed to serve Intervenors with their Response to the Motion, electronically or otherwise. Intervenors only became aware of the filing of the Response by checking the docket on CCE. Additionally, because the Court's filing system does not permit any non-parties to access "protected" documents, which all the exhibits to Defendant's responsive affidavit are designated, Intervenors do not have access to those records to prepare this Reply.

ARGUMENT

I. INTERVENORS SOUGHT TO MEANINGFULLY CONFER WITH DEFENDANTS' COUNSEL BUT DEFENDANTS COULD NOT BOTHER TO RESPOND TO THE REQUEST.[2]

Defendants' Response spills much ink decrying Intervenors' supposed failure to confer with Defendants prior to filing the motion, but it is Defendants who refused to participate in the conferral process in good faith. Intervenors' counsel reached Defendants' counsel by telephone on a Friday afternoon and explained that they intended to file a motion that was, in effect, the opposite of the motion Defendants had filed only a few weeks earlier.[3] When Intervenors reached out for confirmation that Defendants intended to oppose the Motion on Monday afternoon, Defendants' counsel said they had not even bothered to confer among themselves and would "reach back" when they were ready. (D. Marsh Email, 2/22/2021.) Defendants' counsels' failure to discuss Intervenors' request *at all* for two full business days (four days total), even through email, demonstrates Defendants did not engage in the conferral process in good faith.

Furthermore, had they intended to confer in good faith, one would expect Defendants could have identified at least a handful of exhibits and several days of trial testimony that could

[2] Absent from Defendants' Response to Intervenors' Motion is any argument regarding Intervenors' separate request to intervene in these proceedings for the purpose of seeking public access to the Trial and Ruling Materials. Accordingly, the Court should grant Intervenors standing in this lawsuit to seek public access to the Trial and Ruling Materials, as requested.

[3] Defendants ignore the broader context in which Intervenors filed their Motion. At the time, Defendants had recently filed their own motion to maintain the seal of the very same materials that Intervenors seek access to in their Motion. Contrary to Defendants' representations, Defendants' counsel did not ask Intervenors to catalog the exhibits and testimony they sought. Instead, he asked for a written description of what Intervenors sought, and Intervenors provided Defendants with the same description of Trial and Ruling Materials as they used in their Motion—which is as specific as Intervenors can be under the circumstances. Just because some of their counsel sat through portions of the trial does not mean they have access to the exhibit lists and other materials that would allow Intervenors to identify the materials more specifically.

be made public immediately—the "documents and information [Defendants] would agree should *not* be protected." (Response 4.) But Defendants still haven't identified a single exhibit or piece of testimony they'd freely admit is public—they appear ready to contest *every* exhibit and *every* line of testimony.[4]

Finally, Defendants' naked hostility to certain Intervenors[5] establishes precisely why Defendants cannot be allowed to control the process of accessing Court records through a never-ending conferral process. It is evident that Defendants believe that certain Intervenors could never, under any circumstance, hope to qualify as having a legitimate interest in the Trial and Ruling Materials under Defendants' view of the world. (Response 13–16.) Given Defendants stated belief that certain Intervenors seek to gain access to the Trial and Ruling Materials for nefarious purposes, it is evident Defendants are incapable of conferring in good faith and free of biases.

II. DEFENDANTS' EFFORTS TO UNDERMINE THE PRESUMPTION OF PUBLIC ACCESS ARE CONTRARY TO BINDING PRECEDENT.

On the question of public access to court records, Defendants' Response fails to contest

[4] Defendants point to Exhibit F to their own motion to maintain most Trial and Ruling Materials as sealed as a disclosure of exhibits that Defendants believe should be unprotected or unsuppressed. Of course, Defendants neglect to inform the Court *that Exbibit F is itself "protected" and therefore inaccessible to the public*, including to Intervenors. Defendants never provided Intervenors with a copy of Exhibit F or otherwise disclosed its substance to them. Moreover, based on Defendants' description of Exbibit F in their own motion, it is evident that exhibit is a woefully underinclusive list and is far less than what Intervenors seek through the Motion. Exhibit F, it would appear, does nothing to narrow the issues before the Court.

[5] Defendants' desperation leads them to outright deceit, falsely claiming that "counsel for the Intervenors, Brandon Mark, previously received confidential information from the State (requiring the parties to take effort to claw back that impermissible disclosure)." (Response 5 n.1.) That never happened—Defendants are fabricating transgressions. It appears Intervenors are not the only ones that have been falsely accused of violating various standards by Defendants—Intervenors recognize that Defendants have leveled similar accusations against the Court and Plaintiff's counsel during the course of these proceedings.

that under binding precedent—including *Times-Call Pub. Co. v. Wingfield*, 159 Colo. 172, 410 P.2d 511 (1966), and *Anderson v. Home Ins. Co*., 924 P.2d 1123 (Colo. Ct. App. 1996)—the public has a presumptive right of access to all records in the Court's files about this case. Indeed, Defendants' Response fails to address the *Times-Call Publishing* or *Anderson* cases whatsoever—or cite to any *other* Colorado precedent or source of law on the relevant subjects. Moreover, Defendants' legal authority agrees that "[j]udges have a responsibility to avoid secrecy in court proceedings because 'secret court proceedings are anathema to a free society.'" *Turner Ins. Agency, Inc. v. Farmland Partners Inc*., No. 18-CV-02104, 2020 WL 6870564, at *1 (D. Colo. Feb. 7, 2020) (quoting *M.M. v. Zavaras*, 939 F. Supp. 799, 801 (D. Colo. 1996).)

Nor do Defendants squarely contest that 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." *Anderson*, 924 P.2d at 1126. Indeed, Defendants concede that there is a "presumption of public access" that they must "overcome." (Response 8.)

But instead of providing the facts and law to justify their request to designate large portions of the record as off limits to the public, Defendants instead try to shift that burden to Intervenors and flip the presumption, arguing that Intervenors must "offer a more narrowly tailored request, specifying the particular materials from the trial record they believe they need." (Response 7.) That's not how it works—the burden is on Defendants to identify the specific exhibits and portions of the transcript that should be exempt from the public access *and* provide the legal and factual basis justifying that request. It is *not* Intervenors' burden to do that.

Defendants have come nowhere near satisfying their burden of establishing that documents and testimony about "company financial records" or "employee records discussing compensation and disciplinary actions"—the only two categories Defendants identify in even general terms (Response 9)—should receive protection from public disclosure. These are exactly the kinds of records that *Anderson* said were not generally subject to protection. *See* 924 P.2d at 1127 (noting that courts have rejected motions to seal parties' financial affidavits). Instead, "a heightened expectation of privacy or confidentiality in court records has been found to exist only in those limited instances in which an accusation of sexual assault has been made, or in which trade secrets, potentially defamatory material, or threats to national security may be implicated." *Id*. Defendants do not suggest that anything substantially similar exists here.

A. Defendants waived the protections of the Protective Order, which would not cover the Ruling Materials in any event.

The only substantive argument that Defendants advance in response to the Motion is that the Protective Order entered in this case trumps the public presumption of access and Intervenors' First Amendment rights. Defendants, however, *fail to address any* of the numerous cases cited in the Motion*, which involved protective orders that contained substantially similar provisions*, and in which the courts found that notwithstanding the protective orders, the parties had waived any protections by failing to undertake any effort to maintain confidentiality at the time the evidence was offered during a public trial. *See, e.g.*, *Hunton v. Am. Zurich Ins. Co.*, No. CV-16-00539, 2018 WL 6329392, at *4 (D. Ariz. Dec. 4, 2018) (collecting cases).

Defendants specifically point to the language in the Protective Order permitting previously designated materials to be "offered into evidence" subject to the terms of the Protective Order. (Response 10.) But as a case cited in *Hunton* notes, there is a vast difference between an exhibit

that is "merely admitted into evidence" and one that is also "published or discussed in open court." *In re Bard IVC Filters Prod. Liab. Litig.*, No. CV-16-00474, 2018 WL 3721373, at *2 (D. Ariz. Aug. 3, 2018). Once an exhibit is discussed or testimony elicited in open court, whatever protections a protective order may have once provided are waived unless the party asserting the protections takes steps *at that time* to limit their public disclosure. *Littlejohn v. Bic Corp.*, 851 F.2d 673, 680 (3d Cir. 1988).

In *Littlejohn*, the protective order provided that "the documents were to be kept confidential 'absent further court order'"—a much broader protection than the relevant language of the Protective Order here. 851 F.2d at 680 n.17. The court held that notwithstanding the absolute language of the protective order, the defendant's "failure to object to the admission into evidence of the documents, absent a sealing of the record, constituted a waiver of whatever confidentiality interests might have been preserved under the" protective order. *Id*. at 680; *see also In re Google Inc. Gmail Litig.*, No. 13-MD-02430, 2014 WL 10537440, at *6 (N.D. Cal. Aug. 6, 2014) ("[W]here, as here, the parties did not request closure of the courtroom . . . and the disclosures were not inadvertent, the Court will not permit an ex post facto redaction of statements made in open court[.]"); *Rambus, Inc. v. Infineon Techs. AG*, No. Civ.A. 3:00CV524, 2005 WL 1081337, *3 (E.D. Va. May 6, 2005) ("[T]he previous public use effectively stripped the documents of any protection under the protection order.").[6]

[6] Defendants cannot honestly claim surprise by this. As noted in the Motion, the one time that Defendants desired to maintain confidentiality over a specific exhibit during the trial, they asked the Court to clear the public gallery of the courtroom while the exhibit was discussed. They implicitly understood that unless they took additional steps to prevent the public from hearing about the exhibit, any confidentiality protections could not be expected to continue, yet now they suggest that they thought the Protective Order was itself sufficient. The claim doesn't square.

Further, with respect to the exhibits cited in the Court's Ruling as evidence of Defendants' violations of Colorado consumer protection laws, Defendants never come to terms with Colorado precedent holding that "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). Insofar as the Court has cited exhibits or testimony in support of its findings, they have become public property, even if they also contain certain previously protectible information of Defendants. Again, absent some particularized showing that the exhibits or some testimony will actually result in cognizable harm to Defendants or a third party—separate and apart from any reputational harm they may suffer from its disclosure—public access must be presumed. Defendants have failed to make any such showing, instead relying entirely on the inapplicable provisions of the Protective Order.

B. Intervenors need not demonstrate a "special interest" in the materials to obtain access.

Even though Colorado precedent is clear that "[t]here is no requirement that the party seeking access [to court records] must demonstrate a special interest in the records requested," *Anderson v. Home Ins. Co*., 924 P.2d 1123, 1126 (Colo. Ct. App. 1996) (citing *Denver Publishing Co. v. Dreyfus*, 184 Colo. 288, 520 P.2d 104 (1974)), Defendants devote an entire section of their Response to suggesting that because certain Intervenors have what Defendants believe are "dubious" interests, the Court should deny the Motion. Leaving aside the fact that considering Intervenors' purported viewpoints towards Defendants in evaluating whether to allow Intervenors the requested records would violate their First Amendment rights (*see* Section II.C, *infra*), Defendants fail to articulate why the Court is allowed to pass judgment on whether Intervenors have a sufficient interest when the law presumes the public has an inherently sufficient interest.

Moreover, while Defendants nitpick a few Intervenors with inaccurate and misleading criticisms,[7] they fail to meaningfully address the interests of the Century Foundation and Veterans Education Success, writing them off as "non-profit institutions that lobby for the interests of students and veterans that were purportedly aggrieved by Defendants' actions." (Response 14.) It is unclear why non-profits that advocate for the victims of the very practices this Court found and documented in its Ruling are illegitimate representatives of the public here.

C. Denying Intervenors access to the Trial and Ruling Materials because of their prior protected expression—particularly their protected viewpoints—would be a violation of their constitutional rights.

More fundamentally, however, if this Court were to *even consider* the viewpoints of Intervenors in deciding whether to allow them to review exhibits and other materials, the Court would violate the United States Constitution. "The Supreme Court has said in a variety of contexts that the government may not deny a benefit to a person because he exercises a constitutional right," and has applied that doctrine "when the condition acts [to] limit a government-provided benefit . . . to those who refrain from or engage in certain expression or association." *Planned Parenthood Ass'n of Utah v. Herbert*, 828 F.3d 1245, 1258 (10th Cir. 2016) (cleaned up). Limiting Intervenors' access to the Trial and Ruling Materials as Defendants suggest, because of what Intervenors have said—including the viewpoints they have expressed, would amount to a consti-

[7] For example, as Defendants are aware, the Tenth Circuit did not rule that Defendants did not commit retaliation against Ms. Potts, it held only that 31 U.S.C. § 3730(h) does not protect against post-employment retaliation, as she alleged. And Ms. Potts was not found liable for disclosing confidential information—that is false. Defendants never even accused her of disclosing confidential information. Instead, she was found liable for saying true, but negative, things about Defendants while trying to recruit additional witnesses for the Colorado Attorney General's investigation. And the jury thought so little of Defendant's half-decade campaign of retaliation that it awarded Defendants ***an entire dollar*** for the "harm" Ms. Potts purportedly caused Defendants from revealing this "damaging" true information about Defendants.

tutional deprivation. Intervenors expect the Court will not take this information into account, consistent with the Court's careful consideration of all issues it has so far decided.

III. DEFENDANTS FAIL TO ADDRESS INTERVENORS' FIRST AMENDMENT RIGHTS OF ACCESS TO THE TRIAL MATERIALS.

Defendants' sole response to Intervenors' assertion of separate First Amendment rights to access the Trial Materials, which is contained in a footnote, contends that one of the many cases that Intervenors cited on the subject in the Motion noted "several courts have also recognized that, in limited circumstances, certain . . . private interests might also implicate higher values sufficient to override (or, in an alternative mode of analysis, to except the proceeding or materials at issue from) the First Amendment presumption of public access." *Level 3 Commc'ns, LLC v. Limelight Networks, Inc*., 611 F. Supp. 2d 572, 580 (E.D. Va. 2009).

But Defendants misstate that ruling—suggesting that a party's mere interests under a protective order or its vague privacy interests in financial records are sufficient countervailing private interests. Not so. Surveying the legal landscape, the *Level 3 Communications* court noted that such private interests are in the nature of "a criminal defendant's Sixth Amendment right to a fair trial" or a non-party victim's personal privacy interests. *Id*. While courts have noted that in a "case [that] involves private commercial conduct," a party's trade secrets may sometimes qualify as a countervailing private interest, "[i]f the material still under seal ha[s] some substantial relation to an important governmental or political question, an entirely different question would be presented." *In re Iowa Freedom of Info. Council*, 724 F.2d 658, 664 (8th Cir. 1983).

Furthermore, the precedent Defendants reference also notes that "[r]egardless of whether the source of the asserted countervailing interest is governmental or non-governmental, '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.'" *Level 3 Commc'ns*, 611 F. Supp. 2d at 583 (quoting *Virginia Dep't of State Police v. Washington Post*, 386 F.3d 567, 575 (4th Cir. 2004)). And "even when a court finds a private party to have carried its burden in this connection, the court must fashion relief that is narrowly tailored to serve the overriding interest presented." *Level 3 Commc'ns*, 611 F. Supp. 2d at 583 (citing cases). Defendants have neither provided specific reasons supporting their position nor suggested a narrowly tailored order that protects their purported private interests and no more.

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.

Respectfully submitted on the 23rd day of March 2021.

/s/ Zachary S. Westerfield
Zachary S. Westerfield
Atty. Reg. #: 38690
600 17th St. Suite 2800 South Tower
Denver, CO 80202
(303) 832-1122

And

Brandon J. Mark (pro hac vice sought)
201 S. Main St., Suite 1800
Salt Lake City, UT 84111
Phone Number: (801) 532-1234
E-mail: bmark@parsonsbehle.com
Utah Bar #10439

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 **INTERVENORS' COMBINED REPLY IN SUPPORT OF MOTIONS (1) TO UNSUP-PRESS 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 March 23, 2021 on the following:

Charles W. Steese, Atty. Reg. # 26924
IJay Palansky (pro hac vice)
Henry M. Baskerville, Atty. Reg. # 49431
Armstrong Teasdale LLP
4643 South Ulster Street, Suite 800
Denver, Colorado 80237
Phone Number: 720-200-0676
Fax Number: 720-200-0679
E-mail: csteese@armstrongteasdale.com
ipalansky@armstrongteasdale.com
hbaskerville@armstrongteasdale.com
Attorneys for Defendants

Jay B. Simonson
First Assistant Attorney General
Consumer Protection Section
Olivia D. Webster
Senior Assistant Attorney General
Mark T. Bailey
Sarah P. Jackson
Assistant Attorneys General
Consumer Fraud Unit
1300 Broadway, 7th Floor
Denver, CO 80203

Attorneys for Plaintiffs

/s/ Zachary S. Westerfield