IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA, *et al.*,	)	
Plaintiffs,	)	Civil Action No. 2:07-cv-00461-TFM
v.	)	Hon. Terrence F. McVerry
EDUCATION MANAGEMENT LLC, *et al.*,	)	Electronically Filed Document
Defendants.	)	

BRIEF IN SUPPORT OF PROJECT ON PREDATORY STUDENT LENDING'S MOTION FOR CLARIFICATION OR MODIFICATION OF PROTECTIVE ORDER

INTRODUCTION

The law is clear: A party that wants to bar disclosure of documents produced in discovery must demonstrate "good cause" for doing so. Fed. R. Civ. P. 26(c). This rule is particularly important here, where the public has a strong interest in—and, under state and federal open records laws, a right to—the documents produced in discovery. In this lawsuit, the United States—along with several states—alleged that Education Management Corporation ("EDMC"), one of the largest for-profit education companies in the country, violated federal law and then lied to the government about it to receive federal funding. Presumably based, at least in part, on evidence contained in the documents produced in discovery, the government settled its claims against the corporation for nearly one hundred million dollars.

Months ago, the Project on Predatory Student Lending—which represents low-income student borrowers harmed by the predatory practices of for-profit schools—sought some of these documents under the federal Freedom of Information Act (as well as several state open records acts). Among other things, the Project sought any complaints about EDMC's recruiting process

or alleged misrepresentations to potential students; documents regarding student retention and job placement; and materials regarding investigations of the corporation's compliance with federal regulations. There has never been any finding that there is good cause to keep these documents—or any documents produced in discovery in this case—secret.

Nevertheless, the Department of Justice denied the Project's FOIA request. In denying the request, the government cited an umbrella protective order, issued by this Court at the beginning of discovery. That order allowed the parties themselves to mark documents produced in discovery confidential. But it made clear that the parties' designation is provisional. It explicitly states that this Court has *not* determined that there is good cause for keeping the documents secret. If anyone challenges a confidentiality designation—or, as here, seeks documents through an open records request—the order requires that any party wishing to prevent their release must move for a protective order—and demonstrate good cause for doing so. No party has done so here.

The Project, therefore, requests that this Court issue an order clarifying that because no party has demonstrated good cause to withhold the documents the Project seeks, the umbrella protective order does not require that they be withheld. Furthermore, this Court should order any party that seeks to bar the disclosure of those documents to move for a protective order within ten days.

FACTUAL BACKGROUND

A. The Underlying Litigation

This case is a False Claims Act suit, in which the United States government—along with several states—alleged that EDMC violated federal law and then lied to the government about it in order to receive billions of dollars in federal funding.

EDMC's primary source of revenue is government student loans. *See, e.g.*, Senate Comm. on Health, Educ., Labor & Pensions, *For Profit Higher Education: The Failure to Safeguard the Federal Investment and Ensure Student Success* ("HELP Report") 453, A9-5 (2012). The company recruits students to attend one of its for-profit colleges, the students apply for state and federal loans, that loan money goes to EDMC for tuition, and the students are on the hook to repay the government. This business model depends on student enrollment—the more students enroll at EDMC, the more loan money they bring in, and the more revenue EDMC earns. *See id.* at 462.

According to the government's complaint in this case, EDMC, therefore, established an illegal compensation system for its admissions officers—the more students they recruited, the more they were paid. Joint Complaint in Intervention by the United States of America, and the States of California, Florida, Illinois, and Indiana, Doc. 128 ¶¶ 36-168, 271. The complaint alleges that the corporation "created a 'boiler room' style sales culture," the "relentless and exclusive focus" of which was "the number of new students" each recruiter could enroll. *Id.* ¶¶ 88-89. EDMC taught its recruiters a "tactic called 'finding the pain,'" which meant "locating a prospective student's vulnerabilities and exploiting those vulnerabilities to persuade the student to enroll in an EDMC program, even after the student has expressed a desire not to enroll." *Id.* ¶ 108. The corporation "regularly instruct[ed]" recruiters "to enroll applicants regardless of their qualifications, including applicants who are unable to write coherently, applicants who appear to . . . be under the influence of drugs, and applicants for" online education "who do not own computers." *Id.* ¶ 106.

Recruiters' compensation was based on the number of students they could enroll. *Id.* ¶ 88. And those who recruited the most students were rewarded with bonuses, extra time off,

vacations, and gifts. *Id.* ¶¶ 140-47. Those who didn't meet their quotas were threatened with termination. *Id.* ¶¶ 148-50.

Federal law has prohibited this kind of compensation system since 1992, forbidding schools from providing "any commission, bonus, or other incentive payment based directly or indirectly on success in securing enrollments or financial aid to any persons or entities engaged in any student recruiting or admission activities or in making decisions regarding the award of student financial assistance." 20 U.S.C. § 1094(a)(20). To receive federal funding, EDMC was required to—and did—certify compliance with this incentive compensation ban. Doc. 128 ¶¶ 271-72. The government's claim in this case was that EDMC's certifications that it had complied with the incentive compensation ban was false, and therefore each loan an EDMC student received, which went to funding the school, was a "false or fraudulent claim" in violation of the False Claims Act.[1] *See id.*

Following discovery, the parties settled the case for nearly one hundred million dollars. *See* U.S. Dep't of Justice, Office of Pub. Affairs, *For-Profit College Company to Pay $95.5 Million to Settle Claims of Illegal Recruiting, Consumer Fraud and Other Violations* (Nov. 16, 2015), https://www.justice.gov/opa/pr/profit-college-company-pay-955-million-settle-claims-illegal-recruiting-consumer-fraud-and ("DOJ Settlement Press Release").

B. The Protective Order and the Project on Predatory Student Lending's Open Records Requests

At the outset of discovery, the Court entered an "umbrella" protective order, which permitted any party to mark information it produced in discovery "confidential."[2] *See* Report &

[1] The states brought analogous state law claims. *See* Doc. 128 ¶¶ 288-95, 300-419, 429-35; Complaint in Intervention by the State of Minnesota, Doc. 141 ¶¶ 38-41.

[2] The Court also entered a separate protective order governing personally identifiable information from education records subject to the Family Educational Rights and Privacy Act. Doc. 255. That order is not relevant here. Information subject to the Act was required to be

Recommendation #1 of the Special Master, Doc. 251; Mem. Order, Doc. 256; Doc. 257. The order made clear that the court had not actually determined that there was good cause to keep any particular document confidential. Indeed, it explicitly stated that "[n]othing in [its] provisions . . . shall be construed in any way" as a judicial "finding that information designated" by a party as confidential was actually confidential. Doc. 257 ¶ 3. Therefore, the order provided that if a third party requested information that had been marked "confidential," that information could be revealed, unless the party who had designated the information confidential moved for a protective order to prevent its release within ten days. *Id.* ¶ 7.

In the course of discovery, the Court ordered EDMC to produce documents shedding light on its recruitment and regulatory compliance practices, such as complaints received about its recruiting process, including instances of alleged misrepresentations or misconduct by recruiters; templates for written communications between recruiters and prospective students; scripts used by admissions employees during campus tours; documents regarding what admissions employees may or may not say to prospective students; materials regarding regulatory audits and investigations; and admissions employee emails. *See* Report & Recommendation #2 of the Special Master, Doc. 258; Mem. Op. and Order of Court, Doc. 291; Report & Recommendation #4 of the Special Master, Doc. 314; Order Adopting Special Master Report and Recommendation #4, Doc. 319. As parties to the litigation, the federal government and the intervening states are now likely to have these documents in their possession.

In June 2016, the Project on Predatory Student Lending sent a FOIA request to the U.S. Department of Justice—as well as state public records requests to the states that had intervened

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destroyed 60 days after the case closed (which was December 8, 2015). *Id.* ¶ 5. In any case, to the extent that the government still possesses such information, the Project agrees that it need not be disclosed under FOIA and should be redacted from any documents produced in response to the Project's request.

in the litigation—seeking these documents. *See* Exs. A-F. As discussed in greater detail in the motion to intervene, the Project requested these records to further its policy advocacy on behalf of low-income student loan borrowers and to assist students in asserting claims for debt relief based on EDMC's aggressive and misleading recruitment.

Pursuant to the umbrella protective order that had been entered at the beginning of discovery, the Department of Justice notified EDMC of the Project's FOIA request. Letter from Christy C. Wiegand, Assistant U.S. Attorney, U.S. Dep't of Justice, U.S. Attorney's Office, W.D. Pa., to Amanda Savage (July 12, 2016) (Ex. G). DOJ, writing on behalf of the United States and intervening states, stated that unless EDMC moved for a further protective order, "we will respond to [the Project's] requests as required pursuant to federal and state statutes and regulations." *Id.* On July 22, 2016, EDMC filed an unopposed motion, which the Court granted, requesting an additional 60 days—until September 20, 2016—to evaluate the Project's public records requests and determine whether to move for a further protective order. *See* Unopposed Motion for Extension of Time to File Protective Order, Doc. 448; Order, Doc. 449.

On September 6, 2016, before EDMC's time had run out—and despite the fact that EDMC had not, in fact, moved for a further protective order—DOJ denied the Project's FOIA request. Ex. H. In denying the request, DOJ relied in part on the umbrella protective order—the same order that made clear that it was not to be relied upon in denying public records requests, because it did not constitute a determination of good cause for secrecy. *Id.* The Project has appealed the denial.

On September 15, 2016—*after* DOJ had already denied the Project's FOIA request—EDMC filed an unopposed motion to amend the umbrella protective order to require a designating party to move for a further protective order within ten days of receipt of "notice from

another party of an intent to produce Confidential Material in response to a third-party request." Unopposed Motion to Amend Protective Order (Doc. 257), Doc. 452 ¶ 3. The Court granted the motion the next day. First Amended Protective Order Governing Confidential Material, Doc. 453. As a non-party, the Project did not have an opportunity to be heard on the motion.

ARGUMENT

I. THE UMBRELLA PROTECTIVE ORDER DOES NOT—AND CANNOT—SHIELD THE DOCUMENTS FROM DISCLOSURE.

It is well-established that a party seeking a protective order, requiring that documents produced in discovery be kept confidential, must demonstrate—for "each and every document sought to be covered"—"good cause" for secrecy. *Cipollone v. Liggett Grp., Inc.*, 785 F.2d 1108, 1122 (3d Cir. 1986); *see* Fed. R. Civ. P. 26(c). The Third Circuit permits district courts to enter umbrella protective orders, like the one issued in this case, which allow the parties themselves to mark documents confidential. *Cipollone*, 785 F.2d at 1122. A party's designation of a document as confidential, however, does not satisfy its burden to demonstrate to the court that there is good cause for keeping that document secret. *Id.* An umbrella protective order, therefore, can only protect documents "*initially*." *Id.* (emphasis added).

Once another party—or, as here, a third party intervenor—challenges the confidentiality of the documents, the party seeking to keep them confidential must demonstrate good cause for doing so. *See Cipollone*, 785 F.2d at 1122 ("[T]he burden of justifying the confidentiality of each and every document sought to be covered by a protective order remains on the party seeking the protective order; any other conclusion would turn Rule 26(c) on its head."); *Leucadia, Inc. v. Applied Extrusion Techs., Inc.*, 998 F.2d 157, 166 (3d Cir. 1993) ("Although our decision in *Cipollone* concerned the challenge by a party to the confidentiality designation made by its opponent, our reasoning applies with equal force when a non-party moves to

intervene in a pending or settled lawsuit for the limited purpose of modifying a protective order . . . .").

Here, the Project on Predatory Student Lending has sought, through FOIA, the documents produced in the case—and challenges EDMC's designation of those documents as confidential. The umbrella protective order, therefore, cannot suffice to prevent the documents from being disclosed. Indeed, in requesting the umbrella protective order in the first place, the parties themselves agreed that it did not relieve a party seeking confidentiality of the burden of demonstrating good cause to the court. *See* The United States' Objections to the Special Master's March 14, 2013 Report and Recommendation No. 1 Concerning Entry of a Protective Order Governing Confidential Material, Exhibit 6 (Special Master's January 17, 2013 Preliminary Findings), Doc. 252-8.

This Court, therefore, should make clear that the umbrella protective order does not prevent the documents' disclosure. If EDMC wishes to keep the documents the Project seeks secret, it must demonstrate good cause.

II. TO SHOW GOOD CAUSE, EDMC WOULD HAVE TO DEMONSTRATE WITH SPECIFICITY A CLEARLY DEFINED AND SERIOUS INJURY SUFFICIENT TO OUTWEIGH THE PUBLIC INTEREST IN DISCLOSURE.

A. Good Cause Requires a Clearly Defined and Serious Injury.

The "good cause" burden is substantial. A party seeking to prevent disclosure of discovery documents must show "that disclosure will work a clearly defined and serious injury to the party seeking closure." *Pansy v. Borough of Stroudsburg*, 23 F.3d 772, 786 (3d. Cir. 1994) (quoting *Publicker Indus., Inc. v. Cohen,* 733 F.2d 1059, 1071 (3d Cir.1984)). Any asserted "injury must be shown with specificity." *Id.* "'Broad allegations of harm, unsubstantiated by specific examples or articulated reasoning,' do not support a good cause showing." *Id.* (quoting *Cipollone*, 785 F.2d at 1121).

Thus, for example, the Third Circuit has made clear that a company may not keep documents secret simply by asserting that disclosure would embarrass the company or harm its reputation. *Cipollone*, 785 F.2d at 1121. Indeed, because "embarrassment is usually thought of as a nonmonetizable harm to individuals, it may be especially difficult for a business enterprise, whose primary measure of well-being is presumably monetizable, to argue for a protective order on this ground." *Id.* To seek a protective order on the ground that the information the Project seeks would damage EDMC's reputation, therefore, the company would have to demonstrate with "specificity that the embarrassment resulting from dissemination of the information would cause a significant harm to its competitive and financial position," *id.*—harm beyond that which has already been caused by the numerous lawsuits against it and its multimillion dollar settlement with the government (and the resulting press coverage). This would seem to be an unlikely proposition.

B. There is a Strong Public Interest in Disclosure of the Documents the Project Seeks.

Even if EDMC could demonstrate with specificity that disclosure of the documents would cause a "clearly defined and serious injury," that still would not be sufficient for a protective order. In determining whether to issue a protective order, courts must balance the interest in confidentiality with any competing interests in disclosure. *Pansy*, 23 F.3d at 787-91. Here, the interests in disclosure are particularly strong.

Indeed, this case involves several factors the Third Circuit has held weigh in favor of disclosure: (1) It "involves issues important to the public"; (2) the information the Project seeks would "likely be accessible" under state and federal freedom of information laws; and (3) given that these documents may aid the hundreds of former EDMC students in their claims for relief

from their student loans, disclosure "would promote fairness and efficiency." *Pansy*, 23 F.3d at 787-88, 791.

1. First, the Third Circuit has repeatedly held that the presence of "issues or parties of a public nature" and "matters of legitimate public concern . . . weigh[s] against entering or maintaining an order of confidentiality." *Pansy*, 23 F.3d at 788; *accord Shingara v. Skiles*, 420 F.3d 301, 307 (3d Cir. 2005); *Glenmede Trust Co. v. Thompson*, 56 F.3d 476, 484 (3d Cir. 1995) ("The public interest in *Pansy* was 'particularly legitimate' given that one of the parties to the action was a public entity."). This case involves issues of critical importance to the public. EDMC recruited well over 150,000 students and received billions of dollars in federal student loans. *See* HELP Report at 451; *id.* at 453, A9-5 (2012) (stating that in 2010 alone, EDMC received almost $1.79 billion from Title IV federal financial aid). The documents in this case are likely to shed light on EDMC's practices—practices that, again, affected tens of thousands of people; on the Department of Education's management of the taxpayer-funded trillion dollar federal student loan program; and on the ability (or, perhaps, lack thereof) of for-profit education companies such as EDMC to evade requirements for receiving federal student aid funding. Moreover, if the documents in this case demonstrate that EDMC violated state law, students struggling to pay off their student loans will be able to seek forgiveness from the Department of Education. *See* 34 C.F.R. 685.206(c).

Indeed, the federal government has already recognized the importance of the issues in this case to the public. *See* U.S. Dep't of Justice, Office of Pub. Affairs, *U.S. Files Complaint Against Education Management Corp. Alleging False Claims Act Violations* (Aug. 8, 2011), https://www.justice.gov/opa/pr/us-files-complaint-against-education-management-corp-alleging-false-claims-act-violations; DOJ Settlement Press Release; Doc. 252-6 (DOJ brief explaining

that terms of protective order here must be given "a circumscribed meaning" because "there is a particularly strong 'public interest' in accessing the materials generated in the proceedings").

2. Second, the Third Circuit requires courts to consider the powerful public interest in access to information under freedom of information laws. Lamenting that "confidentiality orders can frustrate, if not render useless, federal and state freedom of information laws," the Third Circuit has held that

> where a government entity is a party to litigation, no protective, sealing or other confidentiality order shall be entered without consideration of its effect on disclosure of government records to the public under state and federal freedom of information laws. An order binding governmental entities shall be narrowly drawn to avoid interference with the rights of the public to obtain disclosure of government records . . . .

Pansy, 23 F.3d at 791 (quoting Janice Toran, *Secrecy Orders and Government Litigants: "A Northwest Passage Around the Freedom of Information Act"?*, 27 Ga. L. Rev. 121, 182 (1992)) (internal brackets omitted).

Absent a protective order from this Court prohibiting the government from disclosing all of the documents, the Project is highly likely to succeed in its efforts to gain at least some of the documents via FOIA. In addition to the umbrella protective order, DOJ cited three categories of FOIA exemptions that might apply to the documents the Project requested—exemptions for the protection of personal privacy, for confidential business information, and for information protected by the Family Educational Rights and Privacy Act (personally identifiable information from education records). Ex. H.[3] These exemptions are likely to justify the *redaction* of *some*

[3] Beyond a conclusory statement that these exemptions apply, the government provided no further explanation for its decision. Its response, therefore, makes it impossible for the Project to discern the basis of the government's objections or to what information they apply. It is therefore wholly insufficient to meet the government's burden of demonstrating that the exemptions it cites apply to the requested records. *Davin v. U.S. Dep't of Justice*, 60 F.3d 1043, 1049, 1051-52 (3d Cir. 1995).

information. For example, if there are any documents containing personally identifiable information of EDMC students, such information can, of course, be redacted.

But it is virtually impossible that *all* of the information likely to be contained in the documents—information such as complaints EDMC received about its recruiting process and information regarding alleged misrepresentations or misconduct by recruiters—is either private personal information or confidential business information. *Cf. Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1011 n.15 (1984) ("emphasiz[ing]" that information that a company's product is harmful does not constitute a trade secret). And FOIA prohibits the government from withholding a document in its entirety simply because part of the document is exempt. *See* 5 U.S.C. § 552(b). Instead, the government is required to release "[a]ny reasonably segregable portion of a record . . . to any person requesting such record after deletion of" any exempt portions. *Id.*; *see Davin v. U.S. Dep't of Justice*, 60 F.3d 1043, 1052 (3d Cir. 1995).

Because at least some of the information requested by the Project is highly likely to be accessible under FOIA, "a strong presumption exists" against confidentiality. *Pansy*, 23 F.3d at 791 ("[W]here it is likely that information is accessible under a relevant freedom of information law, a strong presumption exists against granting or maintaining an order of confidentiality whose scope would prevent disclosure of the information pursuant to the relevant freedom of information law."). [4]

In addition, DOJ also failed to comply with FOIA's requirement that "[i]n denying a request for records, in whole or in part, an agency shall make a reasonable effort to estimate the volume of any requested matter the provision of which is denied, and shall provide any such estimate to the person making the request, ..." 5 U.S.C. § 552(a)(6)(F). DOJ's denial contains no such estimate.

[4] The materials are also likely to be available under state open records laws. Although Illinois, Minnesota, and Indiana have stated that they have no records responsive to the Project's state public records requests, the Project's requested records are likely to be accessible under the public records statutes of California and Florida. The requested records fall within both statutes'

3. Finally, the third factor that weighs against confidentiality in this case is that disclosure of the documents will aid former EDMC students, who have filed claims with the federal government seeking to discharge their student loans. Under the Department of Education's borrower defense rule, borrowers may seek cancellation of their federal student loans on the grounds that their schools violated state law. *See* 34 C.F.R. 685.206(c) ("In any proceeding to collect on a Direct Loan, the borrower may assert as a defense against repayment, any act or omission of the school attended by the student that would give rise to a cause of action against the school under applicable State law.").[5] At least 931 former EDMC students have filed borrower defense claims. U.S. Dep't of Educ., *Second Report of the Special Master for Borrower Defense to the Under Secretary* (Dec. 3, 2015), https://www2.ed.gov/documents/press-releases/report-special-master-borrower-defense-2.pdf. The discovery documents in this case could help these claimants—many of whom are low-income students who do not have the

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definitions of "public records," as they are documents "containing information relating to the conduct of the public's business prepared, owned, used, or retained by a[] state or local agency," Cal. Gov't Code § 6252(e), and they were "made or received . . . in connection with the transaction of official business by an[] agency," Fla. Stat. § 119.011(12); *see also City of Los Angeles v. Superior Court*, 41 Cal. App. 4th 1083 (Cal. Ct. App. 1996) (holding that deposition transcripts from litigation to which a city was a party are not exempt from the California Public Records Act); *Hill v. Prudential Ins. Co. of Am.*, 701 So. 2d 1218, 1220 (Fla. Dist. Ct. App. 1997) (ordering the public release of documents in possession of the Florida Attorney General when the state decided to settle consumer protection claims against an insurance company, reasoning that "public policy favors that the public be aware of the documents which were available to the state at the time of the settlement in order that the public may judge the propriety of the decision to settle the litigation"). In addition, the Project intends to supplement its FOIA requests to DOJ and the intervening states to include requests for information that they generated in investigating EDMC's incentive compensation system or obtained from EDMC during their investigations, and subsequently produced in the course of this litigation.

[5] Although the Department of Education has adopted a new federal standard for borrower defenses, this will apply only to loans first disbursed on or after July 1, 2017; the current defense to repayment standard will continue to govern defenses to repayment of loans disbursed prior to that date. *See* Student Assistance General Provisions, Federal Perkins Loan Program, Federal Family Education Loan Program, William D. Ford Federal Direct Loan Program, and Teacher Education Assistance for College and Higher Education Grant Program, 81 Fed. Reg. 75,926 (Nov. 1, 2016) (to be codified at 34 C.F.R. pts. 30, 668, 674, 682, 685, 686).

assistance of counsel—support their claims that EDMC acted improperly. *See, e.g.*, Nat'l Consumer Law Ctr., *Ensuring Educational Integrity: 10 Steps to Improve State Oversight of For-Profit Schools* (2014) 24, http://www.nclc.org/images/pdf/pr-reports/for-profit-report.

The Third Circuit has observed that "the sharing of information among litigants . . . promote[s] fairness and efficiency." *Pansy*, 23 F.3d at 787. Therefore, it has made clear that "[f]ederal courts should not provide a shield to potential claims by entering broad protective orders that prevent public disclosure of relevant information." *Glenmede*, 56 F.3d at 485. The hundreds—perhaps thousands—of students who have filed borrower defense claims should not be required to reinvent the wheel. The documents they need to support their claims have already been gathered—and their disclosure is in the public interest and required by open records laws anyway. Fairness and efficiency, therefore, counsel against secrecy in this case.

III. EDMC SHOULD NOT BE PERMITTED TO FURTHER DELAY THE DISCLOSURE OF THESE DOCUMENTS.

The umbrella protective order entered at the beginning of discovery in this case—after extensive briefing and negotiation by the parties—made clear that it was *not* sufficient to prevent the government from disclosing information under FOIA. Doc. 257 ¶ 7. To the contrary, the order required that any party that wished to prevent the disclosure of documents to third parties under FOIA was required to move for a protective order within ten days of being notified of a FOIA request. *Id.* As explained by the Department of Justice, "this approach . . . enable[d] [EDMC] to make an effort to protect their confidential material, but [did] not inhibit a third party's judicially enforceable right [created by FOIA] to access certain information held by the government." Doc. 251, at 4 (fourth brackets in original & internal quotation marks omitted).

Nevertheless, when the Project on Predatory Student Lending filed its FOIA request, EDMC did not move for a protective order within ten days. Instead, it repeatedly sought to

delay. First, it sought—and was granted—a 60 day extension within which to seek such a protective order.[6] And then, when that extension was close to expiring, EDMC again sought to avoid its obligation to demonstrate good cause. Instead, it moved to modify the umbrella protective order, adding new language that states that a party need not move for a protective order when it is notified of a FOIA request, but instead may wait until the government has identified the confidential material it intends to produce—without identifying any method or time limit for that identification process. Doc. 452.[7] Presumably because the government did not oppose the motion—and the Project on Predatory Student Lending, as a non-party, was not given an opportunity to be heard—the Court signed the proposed order the day after it was requested.

But this Court should not permit EDMC to stall any longer. The Third Circuit has clearly held that an umbrella protective order is only sufficient unless and until somebody challenges it. *See Cipollone*, 785 F.2d at 1122; *Leucadia*, 998 F.2d at 166; *Pansy*, 23 F.3d at 787 n.17. The Project on Predatory Student Lending has now challenged the secrecy of the discovery documents in this case. Under Third Circuit precedent, therefore, the Court may no longer bar the disclosure of those documents unless EDMC demonstrates good cause for secrecy. To the extent that the umbrella protective order—with the recent modification requested by EDMC—arguably applies even where a party or intervenor has challenged it, it is impermissible under Third Circuit law, and this Court should amend it.

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[6] Oddly, shortly before that extension was set to expire, and without EDMC moving for a further protective order as required by the umbrella protective order, the government denied the Project's FOIA request, in part on the basis of the umbrella protective order.

[7] In its motion, EDMC did not mention that it had argued for similar language before the special master who initially drafted the umbrella protective order, and its argument had been rejected because it might delay the government's ability to provide a prompt response to FOIA requests. Doc. 251, at 7.

Furthermore, as explained above, it is highly likely that much of the information sought by the Project will, in fact, be available under FOIA (as well as state open records laws). But the government cited the umbrella protective order in denying the Project's request. The Project should not be forced to wait until it has finished litigating the other, ancillary, FOIA exceptions—exceptions that almost certainly do not apply to all, or even most, of the information the Project seeks—just to begin litigating what appears to be the primary source of the government's withholding here, EDMC's assertion that the documents are confidential. Students are seeking loan forgiveness from the government now. They may not have months or years to wait to receive documents that could support their claims.

As the Third Circuit cautioned in *Pansy*, "[i]t is precisely because courts have the power to trump freedom of information laws that they should exercise this power judiciously and sparingly." 23 F.3d at 791 n.29. Given the Third Circuit's "strong presumption" against "maintaining an order of confidentiality whose scope would prevent disclosure of . . . information pursuant to" FOIA, *id.* at 791, this Court should not only clarify that the umbrella protective order does not bar the government from releasing documents. It should also issue an order providing that if EDMC wants to seek a protective order shielding any of the documents, it must move for one within ten days.

CONCLUSION

For the foregoing reasons, the Project requests that this Court issue an order clarifying that the umbrella protective order does not bar the government from releasing documents produced in this case. And it should require that if EDMC believes there is good cause for keeping any of the documents secret, it should move for a protective order within ten days.

Respectfully submitted,

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