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 TO INTERVENE

INTRODUCTION

The Project on Predatory Student Lending of the Legal Services Center of Harvard Law School moves to intervene pursuant to Federal Rule of Civil Procedure 24(b) for the limited purpose of seeking clarification or modification of the umbrella protective order in this case.[1] In this lawsuit, which has now settled, the federal government, along with several states, alleged that Education Management Corporation ("EDMC")—a large for-profit education company—violated federal law, which prohibits for-profit colleges from compensating their recruiters based on the number of students they enroll, and then lied to the government about it in order to receive federal funding.

The Project on Predatory Student Lending, which represents low-income student loan borrowers who have been harmed by the predatory practices of for-profit schools, filed state and federal freedom of information requests seeking documents, produced in discovery in this case,

[1] The Project's Motion for Clarification or Modification of Protective Order is being filed in conjunction with this motion.

that are likely to shed light on EDMC's recruitment practices.[2] The federal government denied the Project's FOIA request, in part because of an umbrella protective order entered at the beginning of discovery in this case. But that protective order made clear it provided only *provisional* protection for documents marked confidential by a party and produced in discovery. It explicitly stated that it did *not* constitute a finding of the court that there was, in fact, good cause to keep any document secret—and any party who sought to prevent documents from being released under state or federal freedom of information laws was required to move for a protective order and demonstrate good cause for doing so. No party has done so here. And yet, the federal government is still relying on the umbrella protective order to withhold documents.

The Project, therefore, moves to intervene in this case for the limited purpose of seeking an order from this Court clarifying that the umbrella protective order does not prohibit the disclosure of documents pursuant to state or federal freedom of information laws and requiring that any party that seeks to prevent such disclosure must move for a protective order within ten days.

As explained below, the Project has a strong interest in the documents produced in discovery in this case, which but for the government's reading of the protective order, would likely be available under FOIA: It represents former EDMC students who are seeking loan forgiveness from the federal government, and these documents may help them support their claims. In addition, the Project is dedicated to informing the public about for-profit education and advocating for policies that will protect low-income students. These documents will aid them in this work.

[2] The intervening states and applicable public records statutes are California, Cal. Gov't Code § 6250 *et seq.*; Florida, Fla. Stat. § 119.01 *et seq.*; Illinois, 5 Ill. Comp. Stat. 140/1 *et seq.*; Indiana, Ind. Code § 5-14-3-1 *et seq.*; and Minnesota, Minn. Stat. § 13.01 *et seq.*

The Third Circuit has held that a third party has standing to challenge a protective order where the order "presents an obstacle to the [third party's] attempt to obtain access" to requested records. *Pansy v. Borough of Stroudsburg*, 23 F.3d 772, 777 (3d Cir. 1994). That is plainly the case here. The Project meets the requirements for permissive intervention under Rule 24(b) and should be permitted to intervene for the limited purpose of seeking to remove that obstacle.

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 were 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.[3] *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."[4] *See* Report & 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

[3] The intervening 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.

[4] 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 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.

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 in the litigation—seeking these documents. *See* Exs. A-F to Brief in Support of Project on Predatory Student Lending's Motion for Clarification or Modification of Protective Order ("Movant's Brief"). 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 to Movant's Brief). 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 to Movant's Brief. 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.

INTEREST OF MOVANT

The Project on Predatory Student Lending has a strong interest in intervening in this case to ensure that it is able to obtain documents produced in discovery that—absent an order from this Court to the contrary—would be available through state or federal freedom of information statutes.

The Project represents low-income student loan borrowers who have been subject to predatory lending by for-profit education companies, including EDMC. Ex. A. Project attorneys advise, support, and litigate on behalf of borrowers who are struggling to repay their student loans and who did not receive the education they were promised.

In addition, the Project is devoted to advocating for policy that will ensure the integrity of the federal student loan program, the accountability of for-profit schools, and the protection of low-income student loan recipients. Ex. A. Attorneys from the Project have provided extensive testimony on federal and state higher education regulations. *See, e.g.*, Project on Predatory Student Lending, *Comments on PLUS Loan Program Proposed Regulations* (Sept. 8, 2014), https://www.regulations.gov/document?D=ED-2014-OPE-0082-0210. They have also served as negotiators for the four most recent recent Department of Education Negotiated Rulemakings on the integrity and improvement of the federal student loan program. *See, e.g.*, U.S. Dep't of Education, *Student Assistance General Provisions, Federal Family Education Loan Program, and William D. Ford Federal Direct Loan Program*, https://www.regulations.gov/document?D=ED-2014-OPE-0161-0002 (listing Toby Merrill as negotiator "representing legal assistance organizations that represent students").

The Project regularly informs the public—and other advocates—of information regarding for-profit schools and the government's oversight of for-profit education. *See, e.g.*, Project on Predatory Student Lending, http://www.legalservicescenter.org/get-legal-help/predatory-lending-and-consumer-protection-unit/project-on-predatory-student-lending/ (making testimony on government oversight available to the public by publishing it on the Project's website).

The Project's attorneys frequently rely on documents obtained from government agencies through public records requests to inform and support their advocacy. Ex. A.

Many of the documents produced in discovery in this case are particularly relevant to the Project's work. As explained above, the court records in this case suggest that, in discovery, EDMC produced information related to its recruitment and regulatory compliance practices. *See supra* page 6. This information could include complaints the school received about its recruitment practices, allegations (or possibly evidence) of misrepresentations or misconduct by its recruiters, and documents from regulatory audits and investigations. *See id.* Because the federal government, as well as several states, were party to this litigation, these documents should now be in their possession—and (absent statutory exemption) available through state and federal freedom of information requests.

These documents are likely to aid the Project in its representation of former EDMC students—low-income borrowers who are now seeking loan forgiveness from the federal government. Under the Department of Education's borrower defense rule, borrowers may seek cancellation of their federal student loans on the grounds that their school 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] But because this case settled without an admission of wrongdoing, former EDMC students seeking loan forgiveness often have little but their own personal experiences to corroborate their claims of misconduct. The documents produced in this case may help demonstrate that EDMC's

[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).

recruitment practices violated state law—and therefore help these students prove their loan forgiveness claims.[6]

Hundreds, maybe thousands, of former EDMC students are now bringing loan forgiveness claims.[7] The Project represents a subset of these borrowers: those who incurred unsustainable amounts of student loan debt to finance attendance at the EDMC-owned New England Institute of Art ("NEIA").[8] Ex. A. But many former students seeking loan forgiveness are doing so without the assistance of counsel. *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. Disclosure of these documents would not only aid the Project in representing its clients; it would help all former EDMC students bringing loan forgiveness claims.

In addition, these documents will aid the Project in its efforts to inform the public about the practices of for-profit education companies and the government's oversight of for-profit schools, as well as inform the Project's advocacy for policies that will protect low-income

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[6] The use of incentive compensation schemes can violate state consumer protection laws, independent of the federal incentive compensation ban, and thus provide students with an avenue for relief. *See, e.g.*, 940 Mass. Code Regs. § 31.06(10) (deeming a school's reference to recruiters as "counselors" or "advisors," when "such person is evaluated or compensated in any part based on student recruitment[,]" to be "an unfair or deceptive act or practice" in violation of Massachusetts's consumer protection statute). Additionally, the Department of Education's new regulation setting forth the circumstances in which a student may be relieved from federal student loans because of school misconduct incorporates high pressure sales tactics as a factor. *See* 81 Fed. Reg. 75,926, 76,083 (listing a school's "unreasonably pressuring the borrower" as a factor "supporting the reasonableness of a borrower's reliance on a misrepresentation"). The use of such tactics is an unsurprising consequence of incentive compensation recruiting systems.

[7] As of November 18, 2015, the Department of Education had received 931 borrower defense claims from EDMC-owned Art Institute schools. 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.

[8] On information and belief, NEIA is a wholly-owned subsidiary of The Art Institutes International II LLC, which in turn is a wholly-owned subsidiary of EDMC. *See* Educ. Mgmt. Corp., Annual Report (Form 10-K) 30 (Sept. 28, 2001).

borrowers in the future. Congress enacted the incentive compensation ban, forbidding schools from compensating recruiters based on the number of students they enroll, to counteract the "pressure to recruit as many students as possible [that] starts at the top of the for-profit education business model" and permeates it throughout, leading recruiters to employ aggressive and misleading recruiting tactics such as creating a false sense of urgency to enroll and exploiting the vulnerabilities of prospective students. HELP Report at 16, 49-50; *see* S. Rep. No. 102-58, at 8 (1991). The documents in this case are likely to demonstrate the consequences of violating that ban.

They are also likely to aid the public in overseeing the Department of Education's efforts to enforce the ban. The federal government characterized the settlement of this case as an example of the government's "deep commitment to protecting precious public resources." 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 (quoting U.S. Attorney General Loretta E. Lynch). The Department of Justice, the government stated, was "standing up for those who are vulnerable" by protecting students against EDMC's "recruitment mill," which, it stated, violated federal law and students' trust "at taxpayer expense." *Id.* (quoting Lynch). Students who attended EDMC schools, and the public at large, have the right to know what evidence DOJ marshaled to demonstrate that EDMC "profit[ed] illegally off of students and taxpayers." *Id.* (quoting then-Secretary of Education Arne Duncan). The public has a right to know the extent and duration of EDMC's practices, to evaluate the settlement based on those practices, and to use the information available about this case to consider what, if any, steps may be taken to prevent

future abuse by EDMC or other for-profit schools.

The Project's FOIA request asserts this right on behalf of students and the public at large, in furtherance of what the Third Circuit has recognized are "the enduring beliefs underlying freedom of information laws: that an informed public is desirable, that access to information prevents governmental abuse and helps secure freedom, and that, ultimately, government must answer to its citizens." *Pansy*, 23 F.3d at 792.

Thus, the Project's interest in seeking an order clarifying that the umbrella protective order in this case does not prevent disclosure of the documents it seeks is to aid the students it represents, and other low-income student borrowers, in seeking loan forgiveness; to support its public education and advocacy; and to ensure that the public's right to know about the government's regulation of for-profit schools is not abrogated without good cause.

ARGUMENT

INTERVENTION IS WARRANTED BECAUSE THE PROJECT ON PREDATORY STUDENT LENDING MEETS FEDERAL RULE OF CIVIL PROCEDURE 24(B)'S REQUIREMENTS FOR PERMISSIVE INTERVENTION.

The Third Circuit has made clear that third parties may permissively intervene in cases to challenge protective orders. *Pansy*, 23 F.3d at 778. That is precisely what the Project on Predatory Student Lending seeks to do here.

Federal Rule of Civil Procedure 24(b), which governs permissive intervention, provides that intervention is permissible when (1) the intervention is timely; (2) the intervenor shares a question of law or fact in common with the main action; and (3) the intervention will not unduly delay or prejudice the adjudication of the parties' rights."[9] Fed. R. Civ. P. 24(b). The Project

[9] The Third Circuit has recognized that, "although permissive intervention ordinarily requires independent jurisdictional grounds, . . . in cases where intervenors seek to modify an order of the

meets all three requirements, and therefore should be permitted to intervene.

I. THE PROJECT ON PREDATORY STUDENT LENDING'S MOTION TO INTERVENE IS TIMELY.

The timeliness inquiry for permissive intervention is substantially relaxed when the sole purpose of the intervention is to challenge—or in this case clarify—a protective order. The Third Circuit—in accordance with a "growing consensus among the courts of appeals"—has made clear that a motion to intervene for the limited purpose of modifying a protective order may be granted "even after the underlying dispute between the parties has long been settled." *Pansy*, 23 F.3d at 779-80 (quoting *Leucadia, Inc. v. Applied Extrusion Techs., Inc.*, 998 F.2d 157, 161 n.5 (3d Cir. 1993)). Indeed, "[n]umerous courts have allowed third parties to intervene in cases directly analogous to this one, many involving delays measured in years." *Public Citizen v. Liggett Group, Inc.*, 858 F.2d 775, 785 (1st Cir. 1988) (citing cases); *see Pansy*, 23 F.3d at 780 (citing cases).

As the Third Circuit has recognized, "the public and third parties may often have no way of knowing at the time a confidentiality order is granted what relevance the . . . case has to their interests." *Pansy*, 23 F.3d at 780. Because of these informational asymmetries, "to preclude third parties from challenging a confidentiality order once a case has been settled would often make it impossible for third parties to have their day in court to contest the scope or need for confidentiality." *Id.*

Here, there was no way the Project could have known in 2013, when the umbrella protective order was first entered, that years later the government would settle with EDMC, the Project would represent students seeking loan forgiveness, and the government would attempt to

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court, the court has jurisdiction based on the fact that it already has the power to modify the protective order and no independent jurisdictional basis is needed." *Pansy*, 23 F.3d at 778 n.3.

rely on the umbrella order to deny its FOIA request.

The facts of this case parallel those in *Pansy*, where a newspaper, one of the proposed intervenors, sent the defendant borough a request for information "just over four months" after the settlement of the underlying action. 23 F.3d at 780 n.8. The borough responded approximately one month later, refusing to provide the requested records on the basis of a confidentiality order entered in the underlying action, at which time the newspaper "realize[d] that court action would be necessary" to challenge the order. *Id.* After approximately another month, the newspaper, together with other newspapers, simultaneously filed a state court petition challenging the borough's refusal to produce the documents pursuant to the Pennsylvania Right to Know Act and a motion to intervene in the underlying action, seeking to reconsider, vacate, or modify the confidentiality order. *Id.* at 776. The Third Circuit held that the newspapers' motion to intervene was timely. *Id.* at 780 n.8.

Here, the Project submitted its FOIA request to DOJ on June 20, 2016, about six months after this case was dismissed, *see* Order of Dismissal, Doc. 447. The Project did not receive a final response to its FOIA request from DOJ until September 6, 2016, when DOJ issued a full denial of the request, citing the Protective Order as grounds for the denial.[10] Like the newspaper in *Pansy*, the Project "realize[d] that court action would be necessary" to seek relief from the Protective Order, and now moves to intervene. 23 F.3d at 780 n.8. Because a motion to intervene for the limited purpose of modifying or vacating a protective order is appropriate "even

[10] On July 8, 2016, July 21, 2016, and August 5, 2016, representatives of the Attorneys General of Illinois, Minnesota, and Indiana, respectively, informed the Project that they had no responsive records. Although the Project received an acknowledgment of its request from a representative of the Florida Attorney General on June 30, 2016, to date the Project has received no further responses from the Florida Attorney General's Office. Likewise, the Project has received no response from the California Attorney General's Office.

after the underlying dispute between the parties has long been settled," the Project's motion is timely. *Id.* at 780 (quoting *Leucadia*, 998 F.2d at 161 n.5).

II. THE PROJECT ON PREDATORY STUDENT LENDING'S MOTION TO INTERVENE SHARES A QUESTION OF LAW OR FACT IN COMMON WITH THE MAIN ACTION.

The Project also unquestionably meets Rule 24(b)'s requirement that its Motion to Intervene for the limited purpose of seeking relief from the Protective Order "share[] with the main action a common question of law or fact." Fed. R. Civ. P. 24(b)(1). *Pansy* again controls: There, the Third Circuit recognized that intervention for the sole purpose of challenging a protective order satisfies Rule 24(b)'s "common question of law or fact" requirement. 23 F.3d at 778. In so ruling, the Third Circuit joined "a forming consensus in the federal courts . . . that the procedural device for permissive intervention is appropriately used to enable a litigant who was not an original party to an action to challenge protective or confidentiality orders entered in that action." *Id.* (listing cases); *see also E.E.O.C. v. Nat'l Children's Ctr., Inc.*, 146 F.3d 1042, 1045 (D.C. Cir. 1998) ("[D]espite the lack of a clear fit with the literal terms of Rule 24(b), *every circuit court that has considered the question has come to the conclusion that nonparties may permissively intervene for the purpose of challenging confidentiality orders*." (emphasis added)). This consensus has arisen from courts' recognition of "the need for 'an effective mechanism for third-party claims of access to information generated through judicial proceedings.'" *Nat'l Children's Ctr.*, 146 F.3d at 1045 (quoting *Public Citizen*, 858 F.2d at 783); *see also San Jose Mercury News, Inc. v. U.S. Dist. Court*, 187 F.3d 1096, 1103 (9th Cir. 1999) (finding that district court erroneously denied newspaper's motion "to intervene in order to press the public's right of access to discovery materials").

Because the Third Circuit has expressly held that an intervenor's challenge to a protective order meets Rule 24(b)'s "common question of law or fact" requirement, *Pansy*, 23 F.3d at 778, the Project's Motion to Intervene satisfies this requirement.

III. THE PROJECT ON PREDATORY STUDENT LENDING'S INTERVENTION WILL NOT UNDULY DELAY OR PREJUDICE THE ADJUDICATION OF THE PARTIES' RIGHTS.

Finally, because the Project moves to intervene for the limited purpose of seeking relief from the Protective Order, it satisfies the third Rule 24(b) factor because its intervention will not "unduly delay or prejudice the adjudication of the original parties' rights." Fed. R. Civ. P. 24(b)(3). This case is settled. There will be no further adjudication of the parties' rights.

Pansy is determinative yet again: Considering the third factor, the Third Circuit adopted the First Circuit's reasoning in *Public Citizen*, concluding that the possibility of prejudicing the original parties "is minimized" where an intervenor seeks "to litigate only the issue of the protective order, and not to reopen the merits" of the underlying action. *Pansy*, 23 F.3d at 779-80 (quoting *Public Citizen*, 858 F.2d at 786). Allowing an intervenor to seek relief from a protective order "will not disrupt the resolution of the underlying merits"—the concern behind this factor—because such a motion "pertains to a particularly discrete and ancillary issue, as demonstrated by the fact that the merits of the case have already been concluded and are no longer subject to review." *Id*. As in *Pansy*, the Project's motion to intervene pertains only to the Protective Order, "an ancillary issue" apart from the merits of this case. *Id.* at 779. Because the Project does not seek to litigate or otherwise "reopen the merits" of the underlying dispute, the potential for prejudice to the existing parties is minimal. *Id.* at 780.

CONCLUSION

The records requested by the Project are critically important not only to taxpayers at

large, but also to student loan borrowers who have been harmed by EDMC's unfair and deceptive practices and who now seek relief. Because the Project's Motion to Intervene meets all of Rule 24(b)'s requirements for permissive intervention, the Project respectfully requests that the Court enter the proposed Order permitting the Project's intervention for the limited purpose of seeking relief from the Protective Order.

Respectfully submitted,

PROJECT ON PREDATORY STUDENT LENDING

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