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

United States of America et al., **Plaintiffs** **v.** **Education Management LLC, et al.,** **Defendants**	**Case No. 2:07-cv-00461** **Judge Terrence McVerry** ***Electronically Filed***

REPORT & RECOMMENDATION # 4 OF THE SPECIAL MASTER
[Plaintiffs' and Defendants' Submissions Regarding Ongoing Discovery Disputes]
(November 24, 2013)

Before the Special Master are Plaintiffs'[1] and Defendants' submissions regarding the progress of discovery in this case. In particular, the parties disagree on the progress of rolling discovery and the prioritization of the production of certain discovery materials; the timing of early depositions; the use of search terms, date ranges, and computer-assisted review in the collection of electronically stored information ("ESI"); the number of structured databases to which such electronic searches should be applied; the time frame for completion of privilege logs; and Defendants' redaction of social security numbers from the documents in their productions.

At the request of the Special Master, the parties submitted to the Special Master statements of their positions on the various issues. In addition, the parties provided the Special

[1] As used here, Plaintiffs refers to the United States, the State Plaintiffs and the Relators.

Master with a not-insignificant number of letters and emails that were exchanged between the parties. On November 18, 2013 the Special Master held oral argument on the matters at issue.[2]

I. Background

The Court referred this case to the Special Master for the purpose of overseeing discovery and discovery disputes. (*See* Order of Appointment, ECF No. 225). In January 2013, the Court accepted the parties' Joint Motion for the Entry of a Case Management Order and signed Case Management Order No. 1. ("CMO No. 1"; ECF No. 237). That original CMO provided that document production would conclude by July 2, 2013, with depositions beginning in August 2013.

In May 2013, the Special Master issued reports and recommendations addressing Plaintiffs' Motion to Compel Discovery [*United States v. Education Management LLC*, 2013 WL 3854453 (W.D. Pa. May 14, 2013) (hereinafter "R&R No. 2"); ECF No. 258] and Defendants' Motion to Compel Discovery [*United States v. Education Management LLC*, 2013 WL 3854458 (W.D. Pa. May 14, 2013) (hereinafter "R&R No. 3"); ECF No. 259], which addressed various scope-defining issues pertinent to this litigation.

In particular, with regard to Plaintiffs' Motion to Compel, the Special Master recommended that the Court require Defendants to produce expansive discovery, including requiring Defendants to respond to various requests for production from Plaintiffs which were issued in an attempt to show that Defendants did not implement "as written" their plan to compensate assistant directors of admission ("ADA's") and instead compensated ADA's based solely on enrollments. (R&R No. 2, 2013 WL 3854453 at *7-*8).

[2] An additional issue foreshadowed by events leading up to the issuance of this Report and Recommendation is the conduct of the required meet and confer sessions. The Special Master has been presented with very different perspectives on the utility and effectiveness of these sessions. While "meet and confer" requirements and format are not considered in this Report and Recommendation, there may be a need to re-visit them in the near future.

With regard to Defendants' Motion to Compel, the Special Master recommended, *inter alia*, that the Court require Plaintiffs to respond to various requests for production seeking information regarding the government's prior knowledge of Defendants' alleged violations; regarding the government's prior enforcement of the Incentive Compensation Ban ("ICB") and regarding the Government Accounting Office's ("GAO's") audit of the Department of Education's ("DOE's") enforcement of the ICB. (R&R No. 3, 2013 WL 3854458 at *6-9, *11-14, *17-18).

In July, the Court issued a Memorandum Opinion and Order accepting the Special Master's findings. [*United States v. Education Management LLC,* 2013 WL 3863963 (W.D. Pa. July 23, 2013); ECF No. 291]. In so ruling, the Court expressly noted that "[t]he scope of discovery into these allegations must necessarily be expansive," and urged the parties to cooperate in order to efficiently manage the "Herculean task" of discovery (*Id. at *3*).

Recognizing that the dates required by CMO No. 1 were no longer feasible because the motion to compel process had delayed the parties from completing document production by the date required under CMO No. 1, and because the Court's Memorandum Opinion clarified the scope of discovery, the parties negotiated a revised Case Management Order ("CMO No. 2") with the assistance of the Special Master. As part of that process, the Special Master reviewed written submissions from the parties, heard oral argument and then issued written preliminary findings. Based on those findings and without requesting a Report and Recommendation, the parties reached agreement on the terms of CMO No. 2 and submitted a Joint Motion for the Entry of a Revised Case Management Order, which the Court signed in September 2013. (ECF No. 298).

Under the terms of CMO No. 2, the parties are required to produce documents in response to Rule 34 requests for production of documents on a rolling basis starting no later than October 15, 2013, and must finish their production by April 30, 2014. (CMO No. 2 ¶¶ 8-11). Excluding depositions of records' custodians or ESI-related depositions, CMO No. 2 permits the parties to take up to 70 hours of Rule 30 deposition testimony prior to the April 30 deadline for document production, with the provision that any fact witness deposed in this time period cannot be re-deposed absent compelling need. (CMO No. 2 ¶¶ 22-23).

Following the October 15 deadline for the commencement of rolling productions, it has become clear that the Court's urging of cooperation is being tested. Each party has raised with the Special Master certain deficiencies that each perceives in the other's productions. A major focus of the parties' disagreements and problems seems to be the use of early depositions. It is this subject that seems to be a continuous theme, particularly to Plaintiffs.

The subject of early depositions was raised prior to the issuance of CMO No. 2. Early depositions were one of the subjects discussed at the August 20 meeting of the parties and the Special Master, at which time the Special Master expressed a view favoring a limited use of early depositions. Plaintiffs were unable to agree to or reject such limited use at that time, and requested additional time to discuss the Special Master's suggestion with several State Plaintiffs who were unable to attend the hearing in person. In a submission to the Special Master on August 23, the Plaintiffs represented that

> Under the circumstances, Plaintiffs believe that Defendants' original proposal of 70 hours of early depositions per side is a reasonable compromise that permits the parties to begin taking depositions at an early stage, but prevents either party from overwhelming the other with the need to prepare for numerous depositions at a time when the demands of this case mandate that the parties should be focused on producing documents and answering written discovery.

On August 29, 2013, after receipt of briefing and having conducted oral argument, the Special Master issued Preliminary Findings adopting the 70-hour limit and including the following preliminary finding:

> ii. Limitation on hours
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> 1. The Special Master recommends that the parties adopt the 70-hour limitation for early depositions recommended by Plaintiffs. The Special Master finds persuasive Defendants' argument that taking some deposition testimony before the close of document exchange will enable them to target their ongoing discovery and to make the overall process more efficient.
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> 2. In making this recommendation, the Special Master seeks to accommodate Plaintiffs' concern that being forced to focus on depositions this early in the process make impact their ability to focus on document discovery and privilege matters.

Following issuance of these Preliminary Findings, the parties met and agreed on a joint submission of what is now CMO No. 2, which includes provisions that permit the parties to take up to 70 hours of fact depositions as "early depositions." (CMO No. 2 at ¶ 23). It should be noted that no party requested a Report and Recommendation on this or any other subject related to what became CMO No. 2.

The Special Master continues to believe that early depositions provide a useful vehicle for targeting and streamlining discovery and Plaintiffs have not presented any compelling reason to revisit this finding. Nevertheless, it seems that at least part of the parties' disagreements centers on the timing of the early depositions and the impact such depositions will have on document discovery and privilege matters.[3]

[3] A related issue discussed at oral argument was that of resources in the context of early depositions, document production and creation of privilege logs. The United States and the plaintiff States all elected to intervene in this case as Plaintiffs. With that election comes certain responsibilities to the Court and to the Defendants in terms of efficiently and expeditiously positioning this case for resolution of the allegations set forth in the Joint Complaint in Intervention. As the Court noted, this is a case where there is "an amount in controversy of billions of dollars" and "the government and EDMC both possess significant resources and the issues are of surpassing importance." (*U.S. v. EDMC*, 2013 WL 3863963 at *3). Having made the decisions to intervene, it is not unreasonable to expect all

After consideration of the numerous written submissions and oral arguments directed to a variety of discovery issues, the Special Master determines that it is necessary to issue this Report and Recommendation and, regrettably, again engage the Court in the implementation of the goals and expectations noted in the Court's July 23 Order.

II. Discussion

"As a general rule, 'matters of docket control and conduct of discovery' are within the sound discretion of the District Court." [*In re Rega*, 362 Fed. Appx. 246, 247 (3d Cir. 2010) (quoting *In re Fine Paper Antitrust Litig.*, 685 F. 2d 810, 817 (3d Cir. 1982))].The Court in this case has recognized that, in light of the size of this case and the amount in controversy, it is essential for

> counsel to work closely and cooperatively throughout the discovery process to refine and streamline the specific searches and document productions, and to minimize and/or eliminate areas in which the burden outweighs the benefit. All parties have agreed that discovery will proceed on a 'rolling basis' and the Court instructs the parties to use the knowledge gained in the initial phases to make the ongoing progress more effective.

(*United States v. Education Management LLC,* 2013 WL 3863963 at *3). In so stating, the Court urged the parties to work cooperatively throughout the discovery process, and in particular during the beginning of that process, in order to maximize the efficiency and effectiveness of the discovery period. With this directive in mind, the Special Master will assess each of the issues raised in the parties' submissions.

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parties to devote the necessary resources to the current discovery phase of the case. Understanding that each party has certain "lead" counsel, it is anticipated that personnel as needed will be assigned and duties delegated so that discovery may proceed simultaneously on multiple levels. When a schedule is set for discovery, absent some extraordinary events (*e.g.*, the October shutdown of the Federal Government for several weeks), personnel and staffing issues cannot dictate that discovery be conducted in a manner contrary to that ordered by the Court, at least in the absence of a subsequent order of the Court.

A. Progress of rolling discovery and the prioritization of the production of certain discovery material

In their submission and at oral argument, Defendants submitted data showing that, by November 22, they will have provided Plaintiffs 6.6 million pages of material – an amount much greater than the 65,000 pages produced to date by all Plaintiffs and the Relators. (*See* Def. 11/15/13 Sub. at 2). According to Defendants' correspondence with Plaintiffs and representations at oral argument, much of the material that Plaintiffs have produced consists of publicly available documents – matters that are of little relevance to Defendants. (*See also id*. at 3; 10/16/13 Ltr. from L. Ellsworth to C. Wiegand at 2). Both at oral argument on November 18 and in prior correspondence, Defendants asserted that Plaintiffs' reluctance to put forth a "meaningful rolling production" is a tactical decision aimed at limiting Defendants' ability to take the early depositions permitted under CMO NO. 2. (Argument; *see also* 10/16/13 Ellsworth Ltr. at 2).

Defendants ask the Special Master to "formulate a protocol" to ensure that Plaintiffs are appropriately advancing their discovery obligations. (Def. 11/15 Sub. at 3). Defendants further ask the Special Master to recommend that the Court compel Plaintiffs to prioritize the collection of several categories of material, including

- Materials related to the 2002 Hansen Memorandum and related DOE memoranda;
- Materials provided to the GAO during its 2010 investigation of the DOE's enforcement of the ICB;
- Certain regulatory materials regarding the Safe Harbor associated with the ICB; and
- Materials relating to alleged damages

(*Id*. at 5). According to Defendants, during a November 7 meet and confer Plaintiffs agreed to prioritize the production of this material, but only on the condition that Defendants agree to prioritize four categories of documents selected by Plaintiffs. (*Id*.)

In their 11/15 Submission Defendants stated that they have:

> already … produced or [have] slated for production documents in material volumes from two of the four requested categories and that EDMC would consider the feasibility of advancing production from the other two categories. EDMC now anticipates making reasonable good faith efforts to advance production from all four categories, consistent with its written discovery responses and objections.[4]

(Def. 11/15 Sub. At In their written submission, Plaintiffs represent that, "where schedules allow," they intend to prioritize the production of the Defendants' categories, with at least part of this material being produced to the United States no later than December 31, 2013. (Pl. 11/15 Sub. at 5-6).

At oral argument, Plaintiffs responded to Defendants' allegations that they (Plaintiffs) are intentionally delaying production. Plaintiffs contend that the number of documents produced is a "red herring" because Defendants' total document production is likely to be much larger than that put forth by the combined Plaintiffs, and note that their initial production consisted of documents which Defendants had specifically requested. They argued that Defendants' decision to take early depositions has prevented Plaintiffs from prioritizing document discovery. According to Plaintiffs, they currently are engaged in a laborious "forensic collection" of documents from hundreds of custodians located at ten different regional offices, and need to focus on preparing witnesses for the depositions, several of which are scheduled in December. Plaintiffs assert that these tasks limit their ability to focus on document collection at this time.

The Special Master has no reason to disagree with Plaintiffs' contention that the nature of the claims and defenses in this case may well result in Defendants producing many more pages

[4] In a footnote, Defendants further commented that, "[c]onsistent with its objections and discovery responses, EDMC has already produced documents and communications pertaining to admissions-related employees and is finalizing another production of such material. EDMC has also produced—and is preparing for production—documents pertaining to a second category the government identified, materials concerning EDMC's Compensation Review Task Force. The other two categories that the government identified are (i) EDMC's communications with investors on the ICB and the Plan; and (ii) materials regarding the process for PPA review and signature." [Def. 11/15 Sub. at 5 n.4].

of documents than Plaintiffs. Any disparity in the number of pages produced to date by Defendants, as opposed to Plaintiffs, is not dispositive of the issues presented.

Several aspects of Plaintiffs' discovery efforts, however, do raise serious questions. First, aside from Plaintiffs' characterization as to the actual number of pages produced to date, Plaintiffs do not dispute the fact that their initial productions contained very little nonpublic information. It is therefore difficult not to conclude, at this juncture, that there is most likely at least some merit to Defendants' assertion that Plaintiffs' productions to date have contained little material useful to Defendants.

The volume and nature of Plaintiffs' productions to date raise dual concerns: ensuring that document production enhances the direction and efficiency of discovery and ensuring that early depositions provide a useful adjunct to more targeted and efficient discovery. Also, the Special Master is concerned about avoiding a situation where document production (and accompanying privilege disputes) are "back-loaded" into later productions thereby subverting the purpose of rolling discovery.[5]

Second, throughout oral argument Plaintiffs repeatedly explained that their document production is moving slowly because of the need to collect documents from hundreds of custodians across the country. To be sure, as represented, this "forensic collection" appears to be a laborious, time-intensive process. Nonetheless, Plaintiffs have failed to explain why the slow progress of this collection has prevented them from producing other materials that they presumably already have (and have had for some time) in their possession, such as material from

[5] During status calls, at oral argument and in an October 22 letter to Defendants (Mr. Bresch and Ms. Ellsworth)(p. 3), Plaintiffs continuously have represented they will complete rolling production by the end of the rolling production period – April 30, 2014. While the Special Master has no reason at this point to question Plaintiffs' representation, the representation does little to allay concerns about avoiding back-loading and undermining the purpose and intent of early depositions.

the investigation the United States and States undertook before deciding to intervene in this case or material provided by Plaintiff-Relators to the United States during that investigative stage.

Finally, the Special Master is concerned by Plaintiffs' representation that they will only endeavor to prioritize the particular categories delineated by Defendants "where schedules allow" and by Defendants' representations that Plaintiffs will agree to Defendants' prioritization requests only if Defendants agree to prioritize four categories of documents as requested by Plaintiffs. (Pl. 11/15 Sub. at 5; Def. 11/15 Sub. at 5). The Special Master does not doubt that Plaintiffs will devote substantial time and resources to responding to Defendants' production requests, but is concerned that the schedule limitations asserted by Plaintiffs may prevent them from putting forth sufficiently meaningful discovery in this initial stage of the discovery process.[6]

As the Court made clear, the claims and defenses at issue in this case are of such breadth that discovery will "undoubtedly present a Herculean task." (*Education Management*, 2013 WL 3863963 at *3). If this Herculean task is to be completed in a reasonable time frame – a time frame suggested by the parties and accepted by the Court, it is essential that the parties engage in meaningful rolling document discovery throughout the few months set aside for this purpose. Having viewed the initiation of the rolling production and the problems that seem to be associated with this process on the front end, the Special Master is persuaded that prioritizing the production of certain materials will advance the goal of "streamlining" envisioned by the Court, particularly because many of the materials listed in Defendants' prioritization requests are directly related to requests for production as to which the Court has compelled production. (*See id.*)

[6] See n. 3, *supra.*

For these reasons, the Special Master recommends that the Court require that, by December 31, 2013, Plaintiffs (including the State Plaintiffs and Relators) produce all relevant, responsive material that was in their possession as of November 18, 2013.[7] In making this recommendation, the Special Master expects that Plaintiffs' December production will include, *inter alia*, all material gathered by the United States during its pre-intervention investigation; all material produced by Plaintiff-Relators to the United States during that investigation; and the Hansen memorandum and related whitepapers and safe harbor regulatory materials. The United States also should prioritize the collection of documents related to the GAO investigation of the DOE and the DOE's establishment and rescinding of the safe harbor provision.

Likewise, the Court should require Defendants to produce, not later than December 31, 2013, all material currently available to them regarding the four categories of documents as to which Plaintiffs have sought prioritization: (1) admissions employee emails; (2) investor communications related to the ICB; (3) materials relied upon with regard to the Program Participation Agreements and Defendants' compliance therewith; and (4) materials related to Defendants' Compensation Review Task Force. (Pl. 11/15/13 Sub. at 15).

Because there is a direct relationship between document production and the taking (and utility) of early depositions, the proposed production date impacts early depositions. At oral argument, Plaintiffs contended that the need to prepare for the early depositions is affecting their ability to complete document discovery in a timely manner. Their assessment could be interpreted as minimizing the fact that, because jointly presented CMO No. 2 specifically

[7] This recommendation assumes that Plaintiffs will withhold some documents based on assertions of privilege or work product protection. Depending on the quantity of documents withheld on these grounds and the ultimate determination of privilege and work product claims, the volume of documents affected could be significant and impact this initial phase of discovery.

provides for the taking of such depositions, early depositions now *are actually a part of the discovery process*.

Mindful of the limited resources available to both parties and noting that some substantive document production must be made in order to maximize the usefulness of the early deposition time, the Special Master recommends that the date for commencement of early depositions be moved from December 3, 2013 to January 6, 2013 and the date for completion of fact discovery be moved from September 12, 2014 to October 10, 2014. (CMO No. 2 ¶¶ I.4&5 & V.22, 24(a), 25(a).This recommendation is made with the specific intent that the parties will use the remainder of November and the whole of December to focus on generating extensive document productions that include the categories of documents identified by each party as being of particular importance. (*See* Def. 11/15 Sub. at 5).

B. The use of search terms and computer-assisted review in the collection of electronically stored information ("ESI")

The parties have agreed on or are in the process of agreeing on the particular search terms that Defendants will apply to their "going forward" ESI searches, but are unable to agree on the sources to which Defendants should apply these searches.[8] Defendants intend to apply these search terms to all electronic discovery sources. (Def. 11/15 Sub. at 3-4).

Plaintiffs object to Defendants' proposal to the extent that the terms would apply to "all sources, regardless of volume, content, or nature of source." (Pl. 11/15 Sub. at 8). In particular, Plaintiffs argue that search terms are unnecessary if a custodian only has three or four responsive documents, and that because, for example, "most, if not all, … admissions employees' electronic and physical files will be relevant and responsive" under the Court's July Order and R&R 2,

[8] Defendants represented that they have accepted virtually of the terms requested by Plaintiffs. (Def. 11/15 Sub. at 4).

Defendants should produce those files in whole automatically without the need for search term assessment. (*Id*.)

Search terms are useful tools for narrowing document collection review, particularly in a case of this size in which over 6 million pages of documents have already been produced. While Plaintiffs raise potentially valid criticisms of the use of such terms, the Special Master is unwilling to recommend that Defendants' use of terms be limited at this time, particularly in the absence of some concrete examples of issues of concern to Plaintiffs.

First, Defendants have not actually used search terms to produce the vast majority of material already provided to Plaintiffs. (*See* Def. 11/15 Sub. at 4). Second, Plaintiffs have had significant input into the actual terms to be employed. (*See id.*) Carefully crafted terms should result in the production of all of the documents responsive to Plaintiffs' requests. Indeed, based on the representations made, the Special Master expects that the specific terms recommended by Plaintiffs (*see id.* at Exh. 3) are likely to return, for example, all admissions employee files. At any rate, Plaintiffs have not identified any way in which the extensive list of search terms have to date proven insufficient nor have they suggested that Defendants' productions to date have excluded documents that Plaintiffs would have expected to be included. Should future productions prove differently, Plaintiffs are free to ask the Special Master to revisit this point.

C. Defendants' use of computer assisted review

Plaintiffs also object to Defendants' use of computer-assisted review ("CAR") to sequence their review of materials. According to Plaintiffs, using this tool means that "even though a document may be a 'hit' according to Defendants' search terms and date range, Defendants anticipate that they will decide to ignore it." (Pl. 11/15 Sub. at 11). Plaintiffs complain that Defendants "have refused to provide Plaintiffs with any information at all on the

manner in which CAR is prioritizing the sequence of Defendants' review." (Pl. 11/15 Sub. at 11; *see also,* Def. 11/15 Sub. Exh. 5 at 3).

In an October 30, 2013 letter to Plaintiffs, Defendants represented that they are

> Using 'computer assisted review' to prioritize documents for its attorneys to review. Specifically, after providing training to the computer, the computer orders the review by placing documents most likely to be responsive first. Attorneys then review the documents based on this prioritization. All documents are reviewed by an attorney prior to production.
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> There may come a point when, based on this prioritization, EDMC can establish that the remaining documents are likely to be nonresponsive and that the review should end. Should EDMC reach this point, EDMC will notify the Government and will meet and confer with respect to ending the review.

(Def. 11/15 Sub. Exh. 4 at 3).

CAR, also known as "predictive coding," relies on "sophisticated algorithms to enable the computer to determine relevance, based on interaction with (i.e., training by) a human reviewer." (Andrew Peck, *Search, Forward: Will manual document review and keyword searches be replaced by computer-assisted coding?*, Law Technology News, Oct. 2011, at 2).[9] CAR search programs may offer a simple "yes/no" regarding relevance, or may offer a scaled relevance score. (*Id*.) If the program offers a score, the human reviewers may elect to review any documents with a stated degree of relevance. (*Id*.)

Predictive coding appears to offer a reasonable means by which Defendants may enhance the efficiency of their discovery efforts. At least one case has considered CAR and approved of its use. [*See Moore v. Publicis Groupe*, 287 F.R.D. 182 (S.D.N.Y. 2012)].[10] In that case,

[9] In *Moore v. Publicis Groupe*, 287 F.R.D. 182, 183-184 (S.D.N.Y. 2012) M.J. Peck quoted his article to the effect that CAR goes by different names, including predictive coding – "[b]y computer-assisted coding, I mean tools (different vendors use different names) . . . ."

[10] Plaintiffs note the decision in *Moore v. Publicis Groupe SA*, 2012 U.S. Dist. LEXIS 58742 (S.D.N.Y April 25, 2012) (adopting the Magistrate Judge's findings with respect to CAR).

however, the parties worked together to determine the custodians to which the CAR would be applied and the protocol which would be used by the CAR program. (*Id*. at 185-87).

While Defendants have not detailed the precise method by which their chosen CAR vendor will assess their document collections, Defendants are clear that they are using CAR only to "prioritize documents for review." (*See* Def. 11/15 Sub. Exh. 5 at 3).

In light of Defendants' representations to Plaintiffs regarding the intended use of CAR noted in the October 30 letter above (as a prioritization tool, not an exclusionary one), the Special Master does not see any reason to limit Defendants' use of the CAR tools for such prioritization, provided that no documents actually are excluded from review because of the CAR system. Indeed, the use of CAR at this time in this case appears to be an effective method of streamlining the vast quantity of documents to be reviewed in this case.

If Defendants intended to review only documents that meet a particular standard of relevance as determined by the CAR system, and discount documents below that standard, the Special Master might offer a different recommendation. Granting one party the authority to unilaterally determine the method through which CAR may be employed with the effect of excluding certain documents would run counter to the purposes of and need for cooperative discovery.

D. Date parameters for production efforts

Defendants represent that they intend to limit their searches to documents produced from January 1, 2002 to December 31, 2011. (Def. 11/15/13 Sub. at 4). Defendants used Plaintiffs' own discovery requests to choose the January 1 date. The ending date is, according to Defendants, eight months after the last admissions performance plan review referenced in the complaint. (*Id*.)

Plaintiffs assert that they "are entitled to documentary evidence that Defendants' decade-long violation of the Incentive Compensation Ban continued into at least 2012." (Pl. 11/15/13 Sub. at 10). Plaintiffs note that the Joint Complaint in Intervention ("JCII"; ECF No. 128) repeatedly alleges that Defendants committed violations from various dates "to the present," (*see, e.g.*, JC II at ¶ 271), which would have been August 8, 2011, the date that the complaint was filed.

It is not inconceivable that materials generated in 2012 may have discussed activities from the prior years and therefore may provide the type of "circumstantial evidence" that the Court has recognized that Plaintiffs are entitled to collect. (*Education Management*, 2013 WL 3863963 at *3). Moreover, Defendants have not shown that expanding their search dates would impose any type of undue burden on them. For these reasons, the Special Master recommends that the Court order Defendants to extend the date ranges of their search through December 31, 2012.

E. The number of structured databases to which such electronic searches should be applied

The parties agree on the format of productions from structured database, but are unable to agree on the databases that must be searched. According to Plaintiffs, "Defendants have identified only three structured databases, among more than 100 Defendants, that contain information responsive to Plaintiffs' discovery requests." (Pl. 11/15 Sub. at 13). Plaintiffs suggest that the databases identified by Defendants are missing certain information that Plaintiffs would expect to be in those databases. (Pl. 11/15 Sub. at 14).

Defendants have indicated that the three databases at issue include one database containing employee information and two containing student information. (Def. 11/15 Sub. Exh. 5 at 4). According to Defendants, these databases represent the only structured databases that

they have confirmed to have relevant information at this time. (Def. 11/15 Sub. at 4). Defendants continue to assess their other databases to see whether they might contain additional information. (*Id*.) In addition, Defendants have noted that the deposition of EDMC's Rule 30(b)(6) designee is scheduled to take place in the near future, at which time Plaintiffs may ask specific questions regarding the databases.

While the Special Master appreciates Defendants' representation that they are continuing to reassess their databases, this representation, without more, is too open-ended to enable Plaintiffs to engage in the type of organization and planning required in this case. The Special Master therefore recommends that the Court order Defendants to reassess their available databases and inform Plaintiffs of the results no later than December 31, 2013, in order to indicate with the greatest degree of certainty possible whether additional databases contain responsive information.

F. Time frame for completion of privilege logs

The Case Management Order for Issues Related to Privilege Claims ("Privilege CMO"), which the parties jointly submitted to the Court, contains specific instruction regarding the timing of privilege logs:

> Documents that are responsive to requests for production and that have been withheld on a claim of privilege and/or work product protection must be included on a privilege log. Each side shall serve its privilege log(s) on the first of every month following the first rolling production. Each privilege log will include all documents withheld on a claim of privilege and/or work product protection during the preceding production period, so that, for example, privilege logs served on June 1, 2013 will include documents withheld during the April 1, 2013 to April 30,2013 production period. All privilege logs must be served on the other side within thirty (30) days of the close of document production under then then-operative case management order.

[Privilege CMO at ¶ I (1)].

Defendants assert that Plaintiffs have indicated that they (Plaintiffs) have "thousands" of privileged documents in their possession and that have not been logged because they do not relate to the material which Plaintiffs have produced. (Def. 11/15 Sub. at 6-7). Plaintiffs indicate that they "are not withholding documents that have otherwise been reviewed, determined to be privileged, but remain unproduced and unlogged." (Pl. 11/15 Sub. at 20).

The language of the Privilege CMO makes clear that a privilege log need only include "documents withheld on a claim of privilege and/or work product protection during the preceding production period." [Privilege CMO at ¶ I (1)]. The Special Master reads this paragraph to mean that if, for example, Plaintiffs had produced as part of their October production information relating to the GAO investigation of DOE, Plaintiffs would then be required to serve by December 1 a privilege log addressing all documents relating to the investigation withheld from production based upon a claim of privilege or work product protection.

Given the limited amount of material Plaintiffs elected to forward in their earlier productions, it is not surprising that there were no associated privileged materials to log. Assuming that the Court adopts the Special Master's recommendation that Plaintiffs issue a much more meaningful production by December 31, 2013, it is likely that the February 1, 2013 privilege log likely will be quite extensive.

The Special Master notes that, but for the Government's decision to not make a substantive production in October, much of the information that will be contained in the February 1 privilege log would have been provided to Defendants no later than December 1, 2013, prior to the start of early depositions. Plaintiffs made a tactical decision regarding the

conduct of their document production and that decision is having significant impact on the discovery timeline.

Because of the current status of discovery and the events noted above, if the Court accepts the Special Master's recommendation for the December 31 production, the Special Master requests that the Court, pursuant to ¶ V.2 of the Privilege CMO, authorize the Special Master to modify the Privilege CMO concerning the number of challenges that a party may make under ¶ III.2 of the Privilege CMO as to documents produced on or before December 31 and the timing for such challenges under ¶ III.3-6.

In order to determine the number of and timing for challenges, the Special Master further requests that the Court order:

1. that within 3 business days of production of a privilege log prior to December 31, 2013 the parties meet and confer on the number of challenges anticipated and the timing for briefing of the challenges. If no agreement is reached the parties are to provide written submissions of their respective positions to the Special Master 5 business days after production;
2. the parties to meet and confer by January 7, 2014 on the number of challenges anticipated and the timing for briefing of the challenges;
3. any party anticipating challenges to the invocations of privilege and/or work product protection submit a letter to the Special Master by January 10, 2014 with a proposed timeline for briefing on the challenges. Any response is to be filed by January 14, 2014.

The key factor to be considered in modification of the timelines will be the number of documents to which privilege and/or work product protection has been asserted.[11] Such flexibility is requested to permit the Special Master to attempt to make the most effective use of the now-limited time left for early depositions.

G. Defendants' redaction of social security numbers from the documents in their productions Plaintiffs

Defendants have redacted student social security numbers from the productions they have submitted to date. (Pl. 11/15 Sub. at 19). Plaintiffs aver that they need these numbers in order to "link particular students with specific loan and grant information that will be relevant to both liability and damages in this case." (*Id*.) Defendants state that the numbers "implicate[ ] significant privacy and security concerns for thousands of private, third-party individuals" and asserts that it does not believe such disclosures are necessary at this time. (Def. 11/15 Sub. at 4).

There are two orders in place which specifically address the protection of personally identifying information such as social security numbers and which specifically provide for the protected disclosure of this material. (*See* FERPA Proective Order, ECF No. 254; Protective Order Governing Confidential Material, ECF No. 257). Plaintiffs have put forward a reasonable justification as to why this material is essential to their damage calculations: social security numbers provide the link between monies disbursed to each student and repayments of each student's loans.

Defendants have submitted a separate motion regarding the production of discovery regarding those calculations. Based on Plaintiffs' representation, it appears that providing the social security numbers is likely to accelerate discovery regarding such damage calculations. The

[11] Should any party voluntarily elect to make production prior to December 31, it will be expected that privilege challenges could similarly be advanced consistent with the authority requested by the Special Master after consultation with the parties.

Special Master therefore recommends that the Court order Defendants to provide Plaintiffs with copies of unredacted social security numbers for all discovery already produced, and to refrain from making such redactions in the future.

III. Conclusion[12]

The Special Master recommends that the Court institute various deadlines for discovery production by the parties in this case. In particular, the Special Master recommends that:

- The Court order Plaintiffs to produce, by December 31, 2013, all relevant, responsive material that was in their possession as of November 18, 2013 including, but not limited to, all material gathered by the United States during its pre-intervention investigation; all material produced by Plaintiff-Relators to the United States during that investigation; and the Hansen memorandum and related whitepapers and safe harbor regulatory materials;
- The Court order Defendants to produce, by December 31, 2013, all material currently available to them regarding: (1) admissions employee emails; (2) investor communications related to the ICB; (3) materials relied upon with regard to the Program Participation Agreements and Defendants' compliance therewith; and (4) materials related to Defendants' Compensation Review Task Force;
- That Defendants extend the date parameters for document searches to the period of January 1, 2002 through December 31, 2012;
- That Defendants reassess the applicable number of structured databases to which such electronic searches should be applied and report the results to Plaintiffs no later than December 31, 2013; and

[12] Given the time constraints involved, the Court may wish to consider modification of the times for objecting to this Report and Recommendation otherwise provided by F.R. Civ. P. 53(f)(2).

- That Defendants provide Plaintiffs with unredacted social security numbers relating to all discovery already produced, and that Defendants refrain from redacting this information in the future.
- That the Special Master shall have the authority to modify the Case Management Order for Issues Related to Privilege Claims [ECF No. 296] concerning the number of challenges that a party may make under ¶ III.2 of that Order as to documents produced on or before December 31 and the timing for such challenges under ¶ III.3-6 of the Order.
- That the parties be ordered to meet and confer by January 7, 2014, or sooner in the case of privilege logs produced prior to December 31 (as set forth in the proposed Order accompanying this Report and Recommendation), on the number of challenges anticipated and the timing for briefing of the challenges;
- That any party anticipating challenges to the invocations of privilege and/or work product protection submit a letter to the Special Master by January 10, 2014 with a proposed timeline for briefing on the challenges, with any response to be filed by January 14, 2014.
- That the references to completion of fact discovery in CMO No.2 be changed from September 12 to October 10, 2014. [CMO No. 2 ¶¶ I.4&5 & V.22, 24(a), 25(a)].

/s/ Hon. Richard A. Levie (Ret.)
Hon. Richard A. Levie (Ret.)
Special Master

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

United States of America et al., **Plaintiffs** **v.** **Education Management LLC, et al.,** **Defendants**	**Case No. 2:07-cv-00461** **Judge Terrence McVerry** ***Electronically Filed***

Order Adopting Special Master Report and Recommendation #4

Upon consideration of Special Master Report and Recommendation #4 on Plaintiffs' and Defendants' Submissions Regarding Ongoing Discovery Matters, it is this _____ day of December, 2013, hereby:

Ordered that Plaintiffs' and Defendants' objections to Report and Recommendation #4 are overruled; and it is

Further Ordered that Plaintiffs shall produce, by December 31, 2013, all relevant, responsive material that was in their possession as of November 18, 2013; and it is

Further Ordered that Defendants shall produce, by December 31, 2013, all material currently available to them regarding: (1) admissions employee emails; (2) investor communications related to the ICB; (3) materials relied upon with regard to the Program Participation Agreements and Defendants' compliance therewith; and (4) materials related to Defendants' Compensation Review Task Force; and it is

Further Ordered that Defendants shall extend the date parameters for their document searches to January 1, 2002 through December 31, 2012; and it is

Further Ordered that Defendants shall reassess the applicable number of structured databases to which such electronic searches should be applied and report the results to Plaintiffs no later than December 31, 2013; and it is

Further Ordered that Defendants provide Plaintiffs with unredacted social security numbers relating to all discovery already produced, and that Defendants shall refrain from redacting this information in the future; and it is

Further Ordered that the Special Master shall have the authority to modify the Case Management Order for Issues Related to Privilege Claims [ECF No. 296] concerning the number of challenges that a party may make under ¶ III.2 of that Order as to documents produced on or before December 31 and the timing for such challenges under ¶ III.3-6 of the Order; and it is

Further Ordered that, within 3 business days of production of a privilege log prior to December 31, 2013, the parties meet and confer on the number of challenges anticipated and the timing for briefing of the challenges. If no agreement is reached the parties are to provide written submissions of their respective positions to the Special Master 5 business days after production; and it is

Further Ordered that the parties to meet and confer by January 7, 2014 on the number of challenges anticipated and the timing for briefing of the challenges; and it is

Further Ordered that any party anticipating challenges to the invocations of privilege and/or work product protection shall submit a letter to the Special Master by January 10, 2014 with a proposed timeline for briefing on the challenges, with any response to be filed by January 14, 2014; and it is

Further Ordered that the date for completion of fact discovery in CMO No. 2 ¶¶ I.4&5 & V.22, 24(a), 25(a) will be changed from September 12, 2014 to October 10, 2014.

_____
Terrence F. McVerry
United States District Judge