DC Superior Court
Judge-In-Chambers
Washington, DC 20001

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IN THE SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
Civil Division

DISTRICT OF COLUMBIA a municipal corporation 441 4th Street, N.W. Washington, D.C. 20001, **PETITIONER,** v. **NAVIENT SOLUTIONS, L.L.C.** 2001 Edmund Halley Drive Reston, VA 20191 **RESPONDENT.**	Case No.: 2019 CA 5086 Judge:

ORDER

Upon consideration of the District of Columbia Office of the Attorney General's Petition for Enforcement of its May 2, 2017 subpoena to Navient Solutions, L.L.C., any opposition thereto, and the record herein, it is hereby, this 5th day of August, 2019,

ORDERED, that the Petition is **GRANTED**; and it is further,

ORDERED, that Respondent Navient Solutions, L.L.C. shall furnish all non-privileged documents and recordings responsive to the District's May 2, 2017 subpoena on or before November 5th, 2019, notwithstanding the Privacy Act objections; and it is further

ORDERED, that all production in this matter is made pursuant to the order of a court of competent jurisdiction.

Jh Bagley
Superior Court Judge

For service via CaseFileExpress:

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IN THE SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
Civil Division

DISTRICT OF COLUMBIA a municipal corporation 441 4th Street, N.W. Washington, D.C. 20001, **PETITIONER,** v. **NAVIENT SOLUTIONS, L.L.C.** 2001 Edmund Halley Drive Reston, VA 20191, **RESPONDENT.**	Case No.: Judge: 19-0005086

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Superior Court of the
District of Columbia
Washington, D.C.

PETITION FOR ENFORCEMENT OF THE ATTORNEY GENERAL'S INVESTIGATIVE SUBPOENA TO NAVIENT SOLUTIONS, L.L.C.

1. Petitioner District of Columbia, by and through the Office of the Attorney General for the District of Columbia ("OAG"), pursuant to D.C. Code § 1-301.88d, respectfully petitions this Court for an order to enforce an investigative subpoena (See Exhibit A), served on Respondent Navient Solutions, L.L.C. ("Respondent").[1] Respondent is a student loan servicer. The subpoena requires the Respondent to produce documents relevant to the Attorney General's investigation into whether Respondent is violating the District's Consumer Protection Procedures Act ("CPPA"), D.C. Code §§ 28-3901, *et al.*

2. OAG commenced its investigation after becoming aware of potential violations of law concerning Navient's servicing of student loans, in part through notice of lawsuits filed against the Respondent by the Consumer Financial Protection Bureau, the state of Washington,

[1] The District served the subpoena on Navient Solutions, Inc. However, in responding to the District's subpoena, Respondent's counsel explained in a letter dated July 21, 2017, that on December 14, 2016, Navient Solutions, Inc. filed a Certificate of Conversion with the Delaware Secretary of State changing its status to a limited liability company.

and the state of Illinois.[2] These, as well as other documents reviewed by OAG, raised concerns about Respondent's servicing of student loans in the District of Columbia, including that it may be: (1) steering borrowers into forbearance rather than less costly options for the borrower, (2) failing to inform borrowers of all of their options for repayment when the borrower is facing financial difficulty, (3) failing to sufficiently disclose annual renewal deadlines for long-term repayment plans, and (4) misrepresenting one of the requirements for borrowers to release cosigners from private student loans.

3. D.C. Code § 1-301.88d(a) provides that the Attorney General "shall have the authority to issue subpoenas for the production of documents and materials or for the attendance and testimony of witnesses under oath, or both, related to an investigation into unfair, deceptive, unconscionable, or fraudulent trade practices by or between a merchant or consumer, as defined in § 28-3901." See also D.C. Code § 28-3910 (provides OAG authority to investigate whether to seek relief under the CPPA). Consistent with that authority, on May 2, 2017, OAG served a subpoena on Respondent requiring it to provide information concerning the scope of its potentially unlawful practices, including specific information about the dates that individual consumers had loans in forbearance, deferment, or were placed in an income-driven repayment plan.

4. At the beginning of the investigation, Respondent requested that OAG take two steps in order to allay Respondent's concerns about OAG protecting the confidentiality of the information sought.

5. First, Respondent requested that OAG write a letter following a template that it provided, requesting borrower-specific information, in order to obtain the approval of the

[2] Since that time, the states of Pennsylvania and California have also filed suit against Respondent.

Department of Education ("DOE") for the release of the information. OAG sent Respondent the requested letter on June 8, 2017.

6. Second, Respondent requested that OAG execute a ten-page Confidentiality Agreement, agreeing to keep certain information received by OAG as confidential. OAG executed the requested agreement on June 8, 2017.

7. Respondent apparently obtained the approval of DOE, and produced data and information in response to OAG's subpoena on both July 21, 2017 and September 11, 2017.

8. The information that Respondent provided to OAG included personally identifying information about individual student borrowers.

9. On November 2, 2017, Respondent's counsel informed OAG in a phone call that DOE had revoked Respondent's permission to provide borrower data to OAG.

10. Approximately two weeks later, on November 17, 2017, Respondent informed OAG via email that DOE had once again provided it with permission to provide borrower data to OAG.

11. Respondent provided additional data to OAG on November 17, 2017.

12. On May 8, 2018, in response to OAG's request for updated data, Respondent's counsel wrote in an email that Respondent was "awaiting permission from DOE to release this data."

13. Then, about one week later, on May 17, 2018, Respondent's counsel wrote that OAG should make requests for federal data directly to DOE based upon restrictions contained within the Privacy Act of 1974, as amended ("Privacy Act").

14. On September 5, 2018, OAG wrote to Respondent's counsel noting that in a recent decision (Exhibit E) in the case of *CFPB v. Navient*, in the Middle District of Pennsylvania, the judge had found that Navient should produce documents previously withheld

from the CFPB on the same Privacy Act arguments that Respondent was invoking to resist OAG's subpoena.

15. Respondent did not respond to OAG's September 5, 2018 letter.

16. On December 5, 2018, OAG wrote to DOE stating that without conceding that Navient is not already under obligation to produce student loan borrower data directly to OAG, OAG requests that DOE reinstate its permission to Navient to produce documents requested under its subpoena. In light of the language in the Senate appropriations committee report of September 28, 2018 (Pub. L. 115-245), OAG asked for a response within ten days.[3]

17. DOE did not respond to OAG's December 5th letter.

18. On January 16, 2019, after OAG engaged in further discussions with Navient's counsel, Navient produced additional data pursuant to the subpoena.

19. On July 9, 2019, OAG sent Navient a narrowed request for the call recordings sought in its subpoena.

20. On July 26, 2019, Navient's counsel represented to OAG that under the Privacy Act Navient could not produce the call recordings without either an order from a Court or individual permission from each borrower whose call recordings OAG seeks.

21. D.C. Code § 1-301.88d provides that "[i]n the case of refusal to obey a subpoena issued under this section, the Attorney General may petition the Superior Court of the District of Columbia for an order requiring compliance. Any failure to obey the order of the court may be treated by the court as contempt."

[3] Since the tenth day from the date of the letter fell on a Saturday, December 15th, OAG expected a response by the following Monday, December 17th.

22. This Court has subject matter jurisdiction over this matter pursuant to D.C. Code §§ 1-301.88d and 28-3909(a). This Court has personal jurisdiction over Respondent pursuant to D.C. Code §§ 13-423(a)(1) and (a)(3).

23. The standard for determining the validity of an investigative subpoena, like the one at issue here, is whether the inquiry is authorized by statute, the information sought is relevant to the inquiry, and the demand is not too indefinite or overbroad. *See United States v. Morton Salt Co.*, 338 U.S. 632, 652 (1950); *Oklahoma Press Publishing Co. v. Walling*, 327 U.S. 186, 208-09 (1946); *Endicott v. Perkins*, 317 U.S. 501, 509 (1943); *Washington Home Remodelers, Inc. v. State of Maryland*, 45 A.2d 208 (2012).

24. OAG's subpoena here was issued pursuant to statutory authority granted to OAG to compel the production of records. The information sought by OAG is relevant to the Agency's concerns that Respondent is harming consumers in its servicing of student loans.

25. To avoid further delay into OAG's investigation of Respondent's potentially illegal loan servicing activities, OAG respectfully requests that this Court issue an order compelling Respondent to produce the remainder of the documents responsive to OAG's subpoena.

26. Courts have ordered Navient's production of call recordings over Navient's Privacy Act objections in at least the following matters: *State of California v. Navient Corp. et al.*, Order dated May 8, 2019 (Exhibit B); *Commonwealth of Pennsylvania v. Navient Corp., et al.*, Opinion and Order dated October 16, 2018 (Exhibit C); *State of Washington v. Navient Corp. et al.*, Order dated September 21, 2018 (Exhibit D); *C.F.P.B. v. Navient Corp.*, Opinion and Order dated August 10, 2018 (Exhibit E).

Respectfully submitted,

KARL A. RACINE
Attorney General for the District of Columbia

JIMMY R. ROCK
Acting Deputy Attorney General
Public Advocacy Division

BENJAMIN WISEMAN (#1005442)
Director, Office of Consumer Protection

WENDY J. WEINBERG (# 445460)
Senior Assistant Attorney General
Office of Consumer Protection
Office of the Attorney General
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Washington, D.C. 20001
(202) 724-1342
Wendy.Weinberg@dc.gov

Dated: August 2, 2019

Attorneys for the District of Columbia

IN THE SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
Civil Division

DISTRICT OF COLUMBIA a municipal corporation 441 4th Street, N.W. Washington, D.C. 20001, **PETITIONER,** v. **NAVIENT SOLUTIONS, L.L.C.** 2001 Edmund Halley Drive Reston, VA 20191 **RESPONDENT.**	Case No.: Judge:

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PETITION FOR ENFORCEMENT OF THE ATTORNEY GENERAL'S INVESTIGATIVE SUBPOENA TO NAVIENT SOLUTIONS, L.L.C.

This is a miscellaneous action filed by the Petitioner District of Columbia to obtain judicial enforcement of a subpoena issued by the District's Office of the Attorney General's ("OAG") pursuant to D.C. Code § 1-301.88d. The Consumer Protection Procedures Act ("CPPA") grants OAG authority to prosecute any person who it has reason to believe is using or intends to use any method, act, or practice that violates the CPPA or other consumer protection laws. D.C. Code §§ 28-3901, *et al.* OAG also has statutory authority to conduct "investigation[s] to determine whether to seek relief under [the CPPA]," D.C. Code § 28-3910, and may issue subpoenas for the production of records in connection with those investigations. *See* D.C. Code § 1-301.88d(a).

Respondent is in the business of servicing student loans. It takes and processes loan payments from borrowers, and, according to its website, https://about.navient.com/products-and-services, it helps borrowers "successfully repay their education loans and build their credit" and

"stay on a path to successful repayment." OAG initiated an investigation into Respondent's loan servicing practices after reviewing documents, including lawsuits filed against Respondent,[4] that raised concerns that Respondent is: (1) steering borrowers into forbearance rather than less costly options for the borrower, 2) failing to inform borrowers of all of their options for repayment when the borrower is facing financial difficulty, 3) failing to sufficiently disclose annual renewal deadlines for long-term repayment plans, and 4) misrepresenting one of the requirements for borrowers to release cosigners from private student loans. Such conduct, if proven to be true, violates the CPPA.

On May 2, 2017, OAG issued a subpoena to Respondent requiring it to produce documents concerning its servicing of student loans held by District consumers. Respondent initially responded to OAG's subpoena, producing documents on July 21, 2017, September 11, 2017, and November 17, 2017. Respondent continued to reply to the District's questions about the data that it produced until July 26, 2019, when Respondent asserted that it could not produce subpoenaed call recordings due to restrictions in the Privacy Act.

To avoid unnecessarily delaying an investigation into whether Respondent has used or is currently using unfair or deceptive practices in its servicing of student loans in the District of Columbia, the District has petitioned this Court to issue an order compelling Respondent to produce all documents responsive to OAG's subpoena.

ARGUMENT

The Office of Attorney General, as the chief law enforcement officer for the District, is responsible for investigating potential violations of the District's consumer protection laws,

[4] *CFPB v. Navient Corp.*, United States District Court for the Middle District of Pennsylvania, Case 3:17-cv-00101-RDM; *People of the State of Illinois v. Navient Corporation, et. al*, Circuit Court of Cook County, Illinois, County Department, Chancery Division, 2017CH00761; *State of Washington v. Navient Corporation, et al.*, State of Washington, King County Superior Court, No. 17-2-01115-1 SEA.

including the CPPA. OAG has broad investigative subpoena power to compel the production of records, books, papers, contracts, and other documents. *See* D.C. Code §§ 1-301.88d and 28-3910.

It is well-settled law that a government agency subpoena should be enforced if a three-prong test is met. That test requires that: (a) the investigation and the issuance of the subpoena are within the authority of the agency; (b) the demands sought are not too indefinite and are reasonably related to the inquiry; and (c) the demands are not unduly burdensome or unreasonably broad. *United States v. Morton Salt Co.*, 338 U.S. 632, 652 (1950); *Oklahoma Press Publishing Co. v. Walling*, 327 U.S. 186, 208-09 (1946); *Endicott v. Perkins*, 317 U.S. 501, 509 (1943); *Washington Home Remodelers, Inc. v. State of Maryland*, 45 A.2d 208 (2012).

This is not a rigorous standard; courts have said that the "agency's own appraisal of relevancy must be accepted so long as it is not 'obviously wrong[.]'" *F.T.C. v. Invention Submission Corp.*, 965 F.2d 1086, 1089 (C.A.D.C. 1992) (quoting *FTC v. Texaco, Inc.*, 555 F.2d 862, 872, 873 n. 23 (D.C. Cir.) (*en banc*) (quoting *United States v. Morton Salt Co.*, 338 U.S. 632, 652, (1950)), *cert. denied*, 431 U.S. 974, (1977)). Courts should only refuse to enforce a subpoena if the agency's appraisal is "plainly incompetent or irrelevant to any lawful purpose of the [agency]." *See FTC v. Carter*, 636 F.2d 781, 787-88 (D.C. Cir. 1980) (quoting *Texaco*, 555 F.2d at 877 n. 32).

OAG's subpoena easily meets this test because it is well within its authority, the requests contained therein only seek information reasonably related to the OAG's inquiry and are stated in definite terms, and the subpoena's demands are not unduly burdensome or unreasonably broad. Indeed, Respondent has not objected to OAG's subpoena on any of these grounds. Accordingly, this Court should enforce the subpoena. The only stated reason that Respondent has

provided for its cessation of compliance is the Privacy Act of 1974, as amended ("the Privacy Act"). Respondent's invocation of the Privacy Act is wrong, as described below.

The Privacy Act is Not a Bar to Respondent's Production

Respondent claims that the Privacy Act prevents it from further responding to the District's subpoena. Notwithstanding the Privacy Act, Respondent produced data to the District, including personally identifying information about borrowers, for one year before raising this objection.

In an August 2018 decision, the United States District Court for the Middle District of Pennsylvania specifically rejected Respondent's same Privacy Act objections and ordered the company to produce subpoenaed records. (See Exhibit E). The court noted that "as an initial matter, there is no dispute that the borrower documents at issue are in the possession of Defendants." (p. 4). It continued its analysis by citing Fed R. Civ. P. 34(a)(1),[5] under which discovery requests can be made for documents in "the responding party's possession, custody or control" unless those documents are privileged. The court wrote that: "Despite the Privacy Act's general prohibition on disclosure of records, the Court agrees with the rulings of numerous courts that have found that the Privacy Act does not create a qualified discovery privilege . . . ." (pp. 5-6.) (citing *Laxalt v. McClatchy*, 809 F.2d 885, 888 (D.C. Cir. 1987); *See also Buchanan v. United States*, 165 A.3d 297, 311 (D.C. 2017). "Therefore, a party can invoke discovery of materials protected by the Privacy Act through the normal discovery process and according to the usual discovery standards, and the test of discoverability is the relevance standard of FRCP

[5] Similarly, D.C. Super. Ct. R. Civ. P. 34 provides: (a) In General. A party may serve on any other party a request within the scope of Rule 26(b):
(1) to produce and permit the requesting party or its representative to inspect, copy, test, or sample the following items in the responding party's possession, custody, or control:
(A) any designated documents or electronically stored information--including writings, drawings, graphs, charts, photographs, sound recordings, images, and other data or data compilations--stored in any medium from which information can be obtained either directly or, if necessary, after translation by the responding party into a reasonably usable form;

26(b)(1)." (See Exhibit E, pp. 5-6.) (See also Orders overruling Navient's Privacy Act objections in Exhibits B, C and D annexed hereto.) In short, Respondent's Privacy Act objections are no bar to regular civil discovery, and therefore must be produced in response to OAG's investigative subpoena.

Respondent has not raised any other relevance or burden objections to OAG's subpoena. Its sole objection therefore appears to be under the Privacy Act. This objection is not well-founded, particularly here, where Respondent produced data for one year before raising this concern.

OAG routinely obtains confidential information from companies and individuals in the course of its investigations, and has established procedures to protect confidential information. Additionally, OAG provided further assurances to Respondent here through the Confidentiality Agreement that it signed in June 2017, and its letter of June 8, 2017. Indeed, OAG has protected the confidentiality of the information that it has already obtained from Respondent for over a year. Respondent's invocation of the Privacy Act does not justify its failure to comply with the District's subpoena.

CONCLUSION

For each of the reasons set forth above, OAG requests that this Court enter the attached proposed Order requiring the Respondent to complete its production of documents under OAG's subpoena.

Respectfully submitted,

KARL A. RACINE
Attorney General for the District of Columbia

JIMMY R. ROCK
Acting Deputy Attorney General
Public Advocacy Division

BENJAMIN WISEMAN (#1005442)
Director, Office of Consumer Protection

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Dated: August 2, 2019

IN THE SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
Civil Division

DISTRICT OF COLUMBIA a municipal corporation 441 4th Street, N.W. Washington, D.C. 20001, **PETITIONER,** v. **NAVIENT SOLUTIONS, L.L.C.** 2001 Edmund Halley Drive Reston, VA 20191 **RESPONDENT.**	Case No.: Judge:

ORDER

Upon consideration of the District of Columbia Office of the Attorney General's Petition for Enforcement of its May 2, 2017 subpoena to Navient Solutions, L.L.C., any opposition thereto, and the record herein, it is hereby, this _____ day of _____, 2019,

ORDERED, that the Petition is **GRANTED**; and it is further,

ORDERED, that Respondent Navient Solutions, L.L.C. shall furnish all non-privileged documents and recordings responsive to the District's May 2, 2017 subpoena on or before _____, 2019, notwithstanding the Privacy Act objections; and it is further

ORDERED, that all production in this matter is made pursuant to the order of a court of competent jurisdiction.

_____
Superior Court Judge

For service via CaseFileExpress:

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EXHIBIT A

GOVERNMENT OF THE DISTRICT OF COLUMBIA
OFFICE OF THE ATTORNEY GENERAL



Karl A. Racine
Attorney General

Office of Consumer Protection

SUBPOENA

In the Matter of
Navient Solutions, Inc.

DEMAND FOR PRODUCTION OF DOCUMENTS

To: Navient Solutions, Inc.
2001 Edmund Halley Drive
Reston, VA 20191

Serve On: Corporation Service Company
1090 Vermont Ave NW
Washington, DC 20005

****

The Office of the Attorney General for the District of Columbia is investigating whether Navient Solutions, Inc. ("Navient"), or any of its affiliates, may have violated one or more of the provisions of the District of Columbia Consumer Protection Procedures Act, D.C. Code § 28-3901, *et seq.*, in connection with its servicing of student loans and its debt collection practices.

Pursuant to D.C. Code § 28-3910, and by the authority vested in the Attorney General for the District of Columbia, you are hereby required to produce the documents and information requested below, on or before June 7, 2017, to the attention of:

Office of the Attorney General for the District of Columbia
Attn: Kenneth Barrington, Investigator
441 Fourth Street NW, Suite 600-S
Washington, DC 20001

Questions regarding this subpoena should be directed to Assistant Attorney General Wendy Weinberg at 202-724-1342, wendy.weinberg@dc.gov.

I. DEFINITIONS

1. **"And"** and **"or"** are terms of inclusion and not of exclusion and shall be construed either disjunctively or conjunctively, as necessary, to bring within the scope of this subpoena any document or information that might otherwise be construed to be outside its scope.

2. **"Consumer"** shall include the definition contained in D.C. Code § 28-3901(a)(2) and for purposes of this subpoena shall refer to any resident of the District of Columbia who had a student loan serviced by Navient, or for whom Navient engaged in collection activities on their student loan.

3. **"Document(s)"** means written, recorded and graphic material of every kind, including all Electronically Stored Information. The term "document(s)" includes electronic correspondence, drafts of documents, and copies of documents that are not identical duplicates of the originals. Document(s) includes the labels or metadata associated with each original or copy.

4. **"Electronically Stored Information,"** or **"ESI,"** means the complete original and any non-identical copy (whether different from the original because of notations, different metadata, or otherwise) of any electronically created or stored information, including but not limited to e-mail, instant messaging, videoconferencing, SMS, MMS, or other text messaging, and other electronic correspondence (whether active, archived, unsent, or in a sent or deleted-items folder), word-processing files, spreadsheets, databases, unorganized data, document metadata, presentation files, and sound recordings, regardless of how or where the information is stored, including if it is on a mobile device.

5. **"Identify" or "identifying,"** when used in connection with a consumer, means the provision of the consumer's name, physical address, email address and phone number.

6. **"You"** and **"your"** means Navient Solutions Inc., any parent entities, affiliated entities, predecessor entities, including but not limited to Pioneer Credit Recovery, Inc., and all of its past and present officers and employees, whether assigned to its principal offices or any of its fields or other locations, including all of its divisions, subsidiaries (whether or not incorporated) and affiliated enterprises and all of its headquarters, regional, zone and other offices and its employees, and all agents, contractors, consultants, attorneys and law firms and other persons engaged directly or indirectly (*e.g.*, employee of a consultant) by or under the control of Navient (including all business units and persons previously referred to).

II. INSTRUCTIONS

1. **Documents No Longer in Possession of Respondent/Destroyed Documents:** If any responsive document was, but no longer is, in your possession, custody or control, produce a description of each such document. The description shall include the

following:

(a) the name of each author, sender, creator, and initiator of such document;
(b) the name of each recipient, addressee, or party for whom such document was intended;
(c) the date the document was created;
(d) the date(s) the document was in use;
(e) a detailed description of the content of the document;
(f) the reason it is no longer in your possession, custody or control; and
(g) the document's current location.

If the document is no longer in existence, in addition to providing the information indicated above, state on whose instructions the document was destroyed or otherwise disposed of, and the date and manner of the disposal.

2. **Format and Organization of Responses**: If your response to the subpoena, in total, will exceed 1,000 pages, documents shall be produced in the following searchable electronic format that can be loaded into a document review program: single-page Tagged Image Format files (.tiff), an index file containing relevant metadata, and all file, record, instructions, codes, or other information necessary to retrieve or interpret the data. If your response, in total, will be less than 1,000 pages, documents may be produced as individual, searchable PDF files.

If any portion of your production consists of ESI and cannot be produced in the above-format, those documents should be produced in their native format. You should take reasonable steps to maintain any responsive ESI in its original native format. For responsive information contained in databases, produce the database in its native format as well as converted into in Excel spreadsheet format (.xls), or if not possible, a comma-separated text file (.csv) format.

Regardless of the format of production, all documents must be marked with a unique, consecutive control number (*i.e.* Bates stamp). Responsive documents shall also be accompanied by an index that identifies: (i) the name of the custodian of the document; (ii) the full Bates-range for that document; (iii) the request or requests to which the document responds; and (iv) the format of the original document (such as hardcopy, email, electronic document, etc.).

You must submit each separate production on a CD, DVD, USB thumb drive or hard drive, using the media requiring the least number of deliverables. Each production should be accompanied by a cover letter setting out the Bates-range for the production, a list of each piece of media included in the production, and an updated document index required by the prior paragraph.

If you have any questions about these instructions, or would like to discuss alternative formats for any portions of your production, please contact the Assistant Attorney General identified on the first page of this subpoena.

3. **Privileged Documents**: If any responsive document is withheld under any claim of privilege, provide a detailed privilege log that contains at least the following information for each document that you have withheld:

   (a) the name of each author, writer, sender, creator, or initiator of such document;
   (b) the name of each recipient, addressee, or party for whom such document was intended;
   (c) the date of such document, or an estimate thereof if no date appears on the document;
   (d) the general subject matter of the document; and
   (e) the claimed grounds for withholding the document, including – but not limited to – the nature of any claimed privilege and grounds in support.

4. **Duty to Supplement**: All document requests are continuing in nature so as to require the supplementary production if you obtain further responsive documents or information. You are also required to amend your responses to the requests contained within this subpoena if you discover that the previous response was incorrect or incomplete.

5. **Relevant Time Period**: Unless otherwise noted, the relevant time period for which documents are requested is from April 1, 2007 to the present. In each instance in which a document is produced in response to a request, the current edition should be produced together with all earlier editions, or predecessor documents during the relevant time period, even though the title of earlier documents may differ from current versions.

6. **Duty to Preserve Documents**: All documents and/or other data which relate to the subject matter or requests of this subpoena must be preserved. Any destruction involving such documents must cease, even if it is your normal or routine course of business to delete or destroy such documents or data and even if you believe such documents or data are privileged or otherwise need not be produced.

7. **Certification**: The person to whom the Subpoena is directed or, if it is directed to an entity, any person having knowledge of the facts and circumstances relating to the production, must certify that the response to this Subpoena is true and complete, and that all documents produced were records of regularly conducted business activity. This certification must be made on the form declaration included with this Subpoena.

8. **Notice of Rights**: Any person to whom a subpoena has been issued under the Consumer Protection Procedures Act, D.C. Code § 28-3901, *et seq.* may exercise the privileges enjoyed by all witnesses, including moving to quash or modify the subpoena in the Superior Court of the District of Columbia on grounds including: (1) the Attorney General failed to follow or satisfy the procedures set forth in this section for the issuance of a subpoena; or (2) any grounds that exist under statute or common law for quashing or modifying a subpoena. In the case of refusal to obey a subpoena issued under this section, the Attorney General may petition the Superior Court of the District of Columbia for an order requiring

compliance. Any failure to obey the order of the court may be treated by the court as contempt.

III. DOCUMENTS AND INFORMATION REQUESTED

1. Documents sufficient to show the names, titles, inclusive dates of employment, addresses, and phone numbers of your current and former officers, employees and contractors responsible for setting your policies and practices in connection with:

    a) placing and servicing loans in forbearance;
    b) placing and servicing loans for consumers in income-driven repayment plans;
    c) servicing loans for consumers who are totally or permanently disabled;
    d) releasing cosigners from loans; and
    e) communicating with consumers who have been in default on their loans, about how curing the default will impact negative information in their credit reports.

2. Documents sufficient to list or describe the responsibilities of your current and former owners, officers, members, directors and employees responsible for setting your policies and practices in connection with:

    a) placing and servicing loans in forbearance;
    b) placing and servicing loans for consumers in income-driven repayment plans;
    c) servicing loans for consumers who are totally or permanently disabled;
    d) releasing cosigners from loans; and
    e) communicating with consumers who have been in default on their loans, about how curing the default will impact negative information in their credit reports.

3. All training manuals, guidelines, scripts and policy documents that set forth your policies, practices and procedures concerning:

    a) placing and servicing loans in forbearance;
    b) placing and servicing loans for consumers in income-driven repayment plans;
    c) servicing loans for consumers who are totally or permanently disabled;
    d) releasing cosigners from loans;
    e) communicating with consumers who have been in default on their loans, about how curing the default will impact negative information in their credit reports; and
    f) communicating with consumers about collection fees assessed by the Department of Education when a federal student loan enters default status.

4. Documents sufficient to identify:

    a) consumers with loans in forbearance:
        i. the type(s) of loan(s) you serviced for that consumer;
        ii. the beginning and ending dates of all forbearances that you provided to the consumer for each loan;

iii. the reason for the forbearance;
iv. the date(s), if any, that the consumer commenced repayment on the loan(s); and
v. the amount of interest you added to the principal balance of the loan(s), that accumulated during each period of forbearance.

b) consumers in an income-driven repayment plan:
i. the type of loan(s) you serviced for that consumer;
ii. the type of income-driven repayment plan;
iii. the beginning and ending dates that the consumer was in the plan; and
iv. the reason for the termination of the plan.

c) consumers who are totally or permanently disabled:
i. the type(s) of loan(s) you serviced for that consumer;
ii. the date (if any) that you reported to a credit reporting agency that the loan was discharged; and
iii. the code (and explanation of each code) used to report any such non-defaulted, discharged loans to a credit reporting agency.

d) consumers for whom you denied their application for release of a cosigner:
i. the type(s) of loan(s) you serviced for that consumer;
ii. the monthly payments made by the consumers for the 48 months prior to their application for release of a cosigner;
iii. the monthly amounts due by the consumers for the 48 months prior to their application; and
iv. the reason you denied the consumer's application for the release of a cosigner.

e) consumers who defaulted in their payments on a loan, had two trade lines related to the loan in default, and had only one of those two trade lines removed from their credit report after the loan was no longer in default status.
i. The dates that the trade line was removed;
ii. The dates of all communications between you and the consumer during the fourteen months preceding the removal of the trade line, and the form of that communication (e.g – email, mail, phone).

To the extent the requested information is available as either an electronic database or list itemizing the aforementioned information, produce such data in lieu of producing actual documents.

5. All call recordings between you and the consumers:

a) identified in 4(a) above, for the two months before the consumer was placed in forbearance, and the four months after the end of the forbearance;

b) identified in 4(b) above, for the two months prior to the date that you entered the consumer into the plan, as well as the three months prior to the termination of the plan;

c) identified in 4(c) above, for the four months prior to the date that the loan was discharged;

d) identified in 4(d) above, for the two months prior to the date that the cosigner signed the loan, and the two months after you denied the consumer's application for the release of the cosigner; and

e) identified in 4(e) above, for the six months subsequent to the first month of non-payment by the consumer, and for the four months after the date that the trade line was removed.

6. Exemplars of all notices provided to consumers in income driven repayment plans related to annual renewal requirements, and:

   a) documents sufficient to identify the method of delivery of the notices;
      i. for email notices, identify the subject line of each notice;
   b) documents sufficient to identify the time period during which you utilized each exemplar form of the notice; and
   c) documents sufficient to identify when you utilized each exemplar form of the notice in relation to the renewal deadline for the plan.

7. Documents sufficient to identify:

   a) the person or persons who provided information or documents for the responses to this subpoena;
   b) those persons' addresses, phone numbers, inclusive dates of employment with you, job titles, and job responsibilities; and
   c) the requests for which that person provided information.

   In lieu of providing actual documents, you may provide a list containing the requested information.

8. All complaints received by you from any consumer in connection with your servicing or collection of student loans.

9. All of your responses to any consumer complaints concerning your servicing or collection of student loans.

10. Documents sufficient to identify any investigation of you by law enforcement regarding your servicing or collection of student loans.

11. Documents sufficient to identify any lawsuits or private causes of action filed against you concerning your servicing or collection of student loans.

Date: 5/02/17.

KARL A. RACINE
Attorney General for the District of Columbia

Issued: Natalie O Ludaway

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FILED
San Francisco County Superior Court
MAY 08 2019
CLERK OF THE COURT
BY: Deputy Clerk

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN FRANCISCO

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff,

v.

NAVIENT CORPORATION; NAVIENT SOLUTIONS, LLC; PIONEER CREDIT RECOVERY, INC.; AND GENERAL REVENUE CORPORATION,

Defendants.

CGC-18-567732

~~[PROPOSED]~~ ORDER GRANTING THE PEOPLE'S MOTION TO COMPEL PRODUCTION RE: DEFENDANTS' PRIVACY ACT OBJECTIONS TO RFP NOS. 15-19 TO NAVIENT SOLUTIONS AND RFP NOS. 9-10 TO PIONEER

~~[PROPOSED]~~ ORDER

The Court, having reviewed the moving and opposing papers on the People's Motion to Compel Production Regarding Defendants' Privacy Act Objections to RFP Nos. 15-19 to Navient Solutions and RFP Nos. 9-10 to Pioneer, and having heard and considered oral argument of counsel on the matter, the Court GRANTS the Motion to Compel.

IT IS HEREBY ORDERED that:

1. Defendants' Privacy Act objections to the People's Requests for Production of Documents Nos. 15-19 to Navient Solutions and Nos. 9-10 to Pioneer Credit Recovery, Inc. are overruled;

2. Defendants are ordered to produce documents and information responsive to the People's Request for Production of Documents Nos. 15-19 served on Navient Solutions, LLC, and Nos. 9-10 served on Pioneer Credit Recovery, Inc., notwithstanding the Privacy Act objections; and

3. All discovery production in this matter is made pursuant to the order of a court of competent jurisdiction. See 5 U.S.C. §552a(b)(11).

IT IS SO ORDERED.

Dated: May 8, 2019

The Honorable Mary E. Wiss
JUDGE OF THE SUPERIOR COURT

EXHIBIT C

THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA, Plaintiff, v. NAVIENT CORPORATION, et al., Defendants.	:	3:17-CV-1814 (JUDGE MARIANI)

MEMORANDUM OPINION

I. INTRODUCTION

Through this lawsuit, the Commonwealth of Pennsylvania (the "Commonwealth") seeks to hold Navient Corporation and Navient Solutions, LLC, (collectively, "Navient") liable for conduct that has allegedly harmed student loan borrowers in Pennsylvania, as well as student loan borrowers nationwide. Specifically, the Commonwealth contends that Navient has committed a variety of unfair, deceptive, and abusive practices in connection with the origination and servicing of student loans in violation of the Consumer Financial Protection Act ("CFPA"), 12 U.S.C. § 5536, and the Pennsylvania Unfair Trade Practices and Consumer Protection Law ("CPL"), 73 P.S. § 201-1, *et seq.* (Doc. 1). Presently before the Court is a dispute that has arisen during the course of discovery.

Per the procedure of the Court, the Commonwealth, rather than filing a motion, filed a letter with the Court on August 17, 2018 identifying the dispute. (Doc. 35). In particular,

the Commonwealth stated that Navient was refusing to produce certain student loan borrower records "on the basis of purported Privacy Act concerns." (*Id.* at 1). The Commonwealth recounted that it had requested the records directly from Navient in April 2018, but that Navient subsequently informed the Commonwealth that the Department of Education ("ED") denied permission for Navient to release the records to the Commonwealth. (*Id.* at 2). The Commonwealth stated that it then went directly to ED to obtain the records, but ED refused to release the records, and requested that the Commonwealth submit "another request that addressed new concerns of the Department—concerns that ED did not mention in its initial May 4 letter [to Navient refusing to allow Navient to release the records]." (*Id.*) The Commonwealth further contended that Navient's resort to the Privacy Act as a basis to refuse production of the records was denied by the Court in a related case involving the Consumer Financial Protection Bureau ("CFPB") pursuing similar claims against Navient ("CFPB-Navient matter"). (*Id.* at 2); *see CFPB v. Navient Corp.*, Case No. 3:17-cv-101, 2018 WL 3824367 (Aug. 10, 2018). The Commonwealth's letter closed with a request that "the Court issue an order requiring Navient to produce all documents it is refusing to produce on the basis of purported Privacy Act concerns." (Doc. 35 at 2).

In an August 20, 2018 letter, Navient responded to the Commonwealth's letter. (Doc. 36). Navient contended that "[w]hile we recognize that this Court recently ordered the production of [the borrower] data to the Consumer Financial Protection Bureau . . . for the

reasons set forth below, it would be both premature and inappropriate to order the production of the vast amount of data here." (*Id.* at 1). Navient's "reasons" in its letter included: (1) the borrower records, while in the physical possession of Navient, are legally owned by ED, and Navient is prohibited from releasing them to the Commonwealth pursuant to its contract with ED, the Privacy Act, and other federal regulations, (*id.* at 2-4); and (2) the procedural posture of the matter, that is, Navient's motion to dismiss remains pending, which Navient submits means that "this Court's resolution of the pending motion may limit—or even preclude—the need for much of the discovery sought by the Commonwealth," (*id.* at 5). Navient also argued that the Court:

> would benefit from inviting ED to submit a formal statement of the government's position to the Court. *See* 28 U.S.C. § 517. ED's legal ownership, custody, and control of the underlying data gives the United States a clear, direct, and obvious interest in this subject matter, and before this Court takes any action that might compromise the government's interests, ED should be provided an opportunity to evaluate potential objections to the production of its data as well as the burden of providing the required notice to borrowers whose information would be subject to disclosure.

(Doc. 36 at 4-5). Navient ended its letter with a request that the Court deny the Commonwealth's request for the borrower data and instruct the Commonwealth to go directly to ED and request the borrower data in compliance with ED's regulations (also known as "*Touhy*" regulations, 34 C.F.R. §§ 8.1-8.5). (Doc. 36 at 6). In the alternative, Navient requested that the Court invite ED to submit a formal statement of interest regarding the issue, wait to decide the issue until receiving such a formal

statement, and stay all discovery relating to the borrower records until after Navient's motion to dismiss is decided by the Court. (*Id.*)

The parties appeared telephonically before the Court on October 10, 2018. For the reasons that follow, the Court will order that Defendants produce student loan borrower records previously withheld on the basis of the Privacy Act, 5 U.S.C. § 552a; that the parties confer about potential burden, scope, and relevancy issues related to the production of the records; and in the event they are not able to resolve these issues, seek Court guidance and ruling.

II. ANALYSIS

The question presented in this discovery dispute is essentially identical to the question previously decided by the Court in the CFPB-Navient matter: can Navient entirely withhold production of student loan borrower records that are in the physical possession of Navient because they may be "legally" owned by ED? In presenting its position, Navient mainly attempts to retread its previous Privacy Act-related arguments made in the related CFPB-Navient matter. However, during its October 10, 2018 telephonic appearance before the Court, Navient insisted that other federal statutes and regulations also bear upon the dispute, including, but not limited to the Federal Information Security Management Act of 2002 ("FISMA"), Pub. L. No. 107-347, 116 Stat. 2946 (2002); Pub. L. No. 107-296, 116 Stat. 2259 (2002). *See also* Federal Information Security Modernization Act of 2014, Pub. L. No. 113-283, 128 Stat. 3073 (2014).

A. "Legal" Ownership, the Privacy Act, and Related Federal Statutes and Regulations

Navient's first argument is that the disputed borrower records are in the legal control of ED, and that Navient's contract with ED, as well as federal laws and regulations, including the Privacy Act, prohibit the release of the records without ED's blessing. Navient attempts to frame this argument as something that the Court did not previously consider in its earlier ruling in the CFPB-Navient matter: "[t]he *CFPB* Order did not consider the impact of either (A) Navient's contract with ED or (B) ED's regulations on the question of who possesses, controls, or has custody of the records." (Doc. 36 at 4). However, the Court did previously consider and reject Navient's position, and the slight variations to Navient's argument presented in this matter do not change the Court's conclusion that Navient is required to produce the borrower records.

First, and most importantly, there is no dispute that the borrower records at issue are in the physical possession of Navient, even if they are in the "legal" possession of ED.[1] The Court reaffirmed its understanding of this fact at the October 10 telephone conference. Under Fed. R. Civ. P. 34(a)(1), requests can be made for production of documents, electronically stored information, and things in "the responding party's possession, custody, or control." Numerous courts, in this Circuit and beyond, have ruled that physical

[1] The Court makes this determination based on the representations of the parties in this matter, and Navient's counsel in the CFPB-Navient matter. However, the Court notes that neither the Commonwealth nor Navient have identified with specificity exactly what student loan borrower records are at issue in this dispute. For example, neither has placed of record or quoted from the Commonwealth's Request for Production of Documents or Navient's response. In the event that future Court involvement is needed to resolve issues surrounding the production of these records, the Court urges the parties to provide detailed specificity on the nature of the records.

possession of documents is enough for the purposes of Rule 34(a)(1). *See, e.g., In re Sunrise Sec. Litig.*, 109 B.R. 658, 661 (E.D. Pa. 1990) ("Under [Rule 34(a)], legal ownership of a document is not determinative. Possession or control over the documents is sufficient to permit a request for production."); *Devon Robotics v. DeViedma*, No. 09-cv-3552, 2010 WL 3985877, at *2 (E.D. Pa. Oct. 8, 2010); *In re Bankers Trust Co.*, 61 F.3d 465, 469-71 (6th Cir. 1995). The Court asked Navient's counsel at the October 10 telephone conference if he had any legal authority to cite to the contrary in support of its argument that "legal" possession is necessary under Rule 34, and he did not.

Navient's protest that its particular circumstances should somehow excuse compliance with the requirements of Rule 34 is unconvincing. The Court has already addressed some of Navient's excuses to fail to produce the borrower records, including the Privacy Act, which mandates certain protections for and prohibitions on disclosure of federal records. As the Court indicated in its ruling in the CFPB-Navient matter:

> Despite the Privacy Act's general prohibition on disclosure of records, the Court agrees with the rulings of numerous courts that have found that the Privacy Act does not create a qualified discovery privilege. *See, e.g., Laxalt v. McClatchy*, 809 F.2d 885, 888 (D.C. Cir. 1987) ("The Privacy Act, however, does not create a qualified discovery privilege as that concept is generally understood, and we find no basis in the statute or its legislative history for inferring one."). "Therefore, a party can invoke discovery of materials protected by the Privacy Act through the normal discovery process and according to the usual discovery standards, and the test of discoverability is the relevance standard of FRCP 26(b)(1)." *Forrest v. U.S.*, No. CIV.A. 95-3889, 1996 WL 171539, at *2 (E.D. Pa. Apr. 11, 1996) (citing *Laxalt*, 809 F.2d at 889). Indeed, the Privacy Act's inclusion of an exception for release of records pursuant to court order, 5 U.S.C. § 552a(b)(11), "make[s] it completely clear that the [Privacy] Act cannot be used to block the normal

> course of court proceedings, including court-ordered discovery." *Adelman v. Brady*, CIV.A. No. 89-4714, 1990 WL 39147, at *2 (E.D. Pa. Mar. 28, 1990). Thus, Defendants cannot rely on the Privacy Act to resist Plaintiff's document requests for borrower documents, made in the course of discovery.

Navient, 2018 WL 3824367, at *3 (full citations added). Indeed, both the Privacy Act and ED's internal regulations implementing the Privacy Act contain exemptions to the prohibition on disclosure in the context of court ordered discovery. *See* 5 U.S.C. § 552a(b)(11) (records can be released "pursuant to the order of a court of competent jurisdiction); 34 C.F.R. § 5b.9(b)(11) (same).

The *In re Bankers Trust* case, 61 F.3d 465 (6th Cir. 1995), while not binding on this Court, is particularly instructive on the issue of ED's internal Privacy Act regulations and why the regulations do not prevent production of the borrower records. In that matter, the Sixth Circuit ruled that the Federal Reserve did not have "the power to promulgate regulations in direct contravention of the Federal Rules of Civil Procedure," when its internal regulations, which stated that certain records physically possessed by banks remained the legal property of the Federal Reserve, prohibited disclosure by the banks in litigation discovery. *In re Bankers Trust*, 61 F.3d at 470. "To allow a federal regulation issued by an agency to effectively override the application of the Federal Rules of Civil Procedure, and in essence, divest a court of jurisdiction over discovery, the enabling statute must be more specific than a general grant of authority as found here." *Id.* In making this ruling, the Sixth Circuit referred to, among other enabling statutes, 5 U.S.C. § 301, which is also one of the enabling statutes for ED's Privacy Act regulations and is a "general housekeeping statute"

that "does not provide 'substantive rules' regarding disclosure of government information." *In re Bankers Trust*, 61 F.3d at 470; *see also* 5 U.S.C. § 301 (also noting "[t]his section does not authorize withholding information from the public or limiting the availability of records to the public"). Similarly, Navient's reference in its August 20 letter to a federal regulation stating that records and data created for government use in the hands of federal contractors are federal records and are subject to the Privacy Act, 36 C.F.R. § 1222.32(b), also misses the point. (Doc. 36 at 4). The Privacy Act does not bar disclosure of the borrower records.

Navient raises new arguments regarding its contract with ED and another federal statute, FISMA, and its associated regulations, but these too are unavailing. Navient argues that "ED's contract with Navient expressly and unambiguously bars Navient from asserting or exercising any control over the data and records at issue . . . ." (Doc. 36 at 2). This statement ignores the admissions by Navient in the teleconference held in this matter on October 10, 2018 that Navient is in physical possession of the data sought by the Commonwealth. For instance, these admissions from Navient include: "[I]n its role of a contractor to ED, Navient happens to have built the server that contains that data and maintains it on ED's behalf." (Doc. 43 at 9:15-17). And the admissions further include the following, when Navient referenced the CFPB-Navient matter:

> I think, when this issue was in front of [the Court] before the CFPB, there was no dispute in front of [the Court], and Navient did not dispute that, as a factual matter, right, it physically possesses this data. As I've said before, and I'm not walking that back now, as I said before, the data resides on a server that Navient built on a Navient property.

(Doc. 43 at 13:14-19). While the Court is sympathetic to Navient's desire to not violate its contract with ED or act against the apparent directives of ED with respect to production of the borrower records, Navient's contract with ED is not a privilege that prevents Navient from producing the borrower records, and Navient cites no legal authority in support of such a proposition. Moreover, provisions in Navient's contract with ED, a portion of which was attached to Navient's August 20, 2018 letter, cast serious doubt on Navient's argument that compliance with the Commonwealth's request for documents would breach its contract with ED. The contract states that "[s]ervicers will be required to meet all statutory and legislative requirements," and "[t]he servicer shall comply with all of the following standard items related to record management," followed by citations to various federal laws, including the Privacy Act. (Doc. 36-1 at A3, A15). As previously noted, the Federal Rules of Civil Procedure require disclosure of documents as part of discovery, Fed. R. Civ. P. 34, and the Privacy Act also indicates that federal records may be disclosed in discovery, 5 U.S.C. § 552a(b)(11). Thus, on one reading of these contractual provisions, Navient, complying with federal law by properly disclosing the records, would be complying with its contract.

FISMA, which Navient only referenced at the October 10 telephone conference, also does not provide Navient with an avenue to resist production of the borrower records. At the October 10 telephone conference, Navient contended that the information security requirements imposed by FISMA on federal record information systems, like those managed by Navient, mean that there are special considerations regarding a release of

federal records outside of the federal government. FISMA and its additions in the Federal Information Security Modernization Act of 2014 mandate that: "the Director of the Office of Management and Budget shall, on the basis of proposed standards developed by the National Institute of Standards and Technology . . . and in consultation with the Secretary of Homeland Security, promulgate information security standards pertaining to Federal information systems." 40 U.S.C. § 11331(b)(1)(A). However, Navient pointed to nothing in FISMA or its associated regulations that would trump the requirements of Rule 34 or provide a privilege for a federal contractor to refuse to produce records properly requested by a state agency in the course of discovery. In fact, FISMA explicitly recognizes that its mandated information security standards do not affect the authority of "the head of any agency, with respect to the authorized use or disclosure of information, including with regard to the protection of personal privacy under section 552a of title 5 [the Privacy Act]." 44 U.S.C. § 3558. Thus, by its plain language, FISMA countenances that information protected by mandated information security standards may be released in accordance with the Privacy Act, which, as previously noted, provides for a release of protected records in court-ordered discovery. *See* 5 U.S.C. § 552a(b)(11); *cf. Long v. Immigration & Customs Enf't*, 149 F. Supp. 3d 39, 54 (D.D.C. 2015) (citing 44 U.S.C. § 3558, stating that it "does not alter agencies' obligations under [the Freedom of Information Act]," and denying government agency reliance on § 3558 as a reason to refuse disclosure of information under the Freedom of Information Act).

Navient's final appeal that is connected to its various statutory and regulatory-related arguments is that requiring production of the borrower records from Navient, a federal contractor, "would have serious consequences not only in this case, but in scores of other matters: [because] [i]t effectively would prevent federal agencies from controlling access to their data whenever the federal government engages an outside contractor to provide services . . . ." (Doc. 36 at 4). However, that is a risk that any party, federal agency or otherwise, takes when it outsources the possession and management of its records to another. Navient does not point to any legal authority to suggest to the contrary. Accordingly, the Court rejects Navient's arguments put forth in support of its refusal to produce the borrower records.

B. The Pending Motion to Dismiss

Navient's second argument relates to the current procedural posture of this case. Here, unlike the CFPB-Navient matter, there is a pending motion to dismiss the action, based, in part, on preemption and preclusion grounds. (Doc. 16). Navient contends that "[w]here a party's whole lawsuit may be dismissed, its need to access even the most relevant data is entirely speculative, . . ., and even if that need were compelling (which it is not), there would be no prejudice in waiting until the Court resolves the pending motion to dismiss." (Doc. 36 at 6). The Commonwealth argues that the motion to dismiss "is not a principled distinction" between this case and the CFPB-Navient matter, and that there has

been no stay on discovery in this case, and none requested by Navient until now. (Doc. 35 at 2).

The Court will not withhold its ruling on this discovery dispute, nor will it stay discovery of the borrower records entirely, merely because there is a motion to dismiss pending. There is nothing in the Federal Rules of Civil Procedure that mandates that discovery should not proceed before a motion to dismiss is decided. To the contrary, the timing set forth for discovery-related tasks in the Federal Rules, including for the parties' discovery planning conference under Fed. R. Civ. P. 26(f) and the court's issuance of a scheduling order under Fed. R. Civ. P. 16(b), indicates that it is expected that the parties in litigation will expeditiously begin discovery soon after a case is filed. "A stay of discovery is not appropriate solely because a motion to dismiss is pending." *Babalola v. Donegal Mut. Ins. Co.*, No. 1:08-CV-621, 2008 WL 5278393, at *1 (E.D. Pa. Dec. 18, 2008) (citing *19th Street Baptist Church v. St. Peters Episcopal Church*, 190 F.R.D. 345, 349 (E.D. Pa. 2000)). The Court notes that it is within its discretion to stay discovery based on a balancing of the "relative benefit and harm that would ensue to each party from the grant or denial of a stay." *19th Street Baptist Church*, 190 F.R.D. at 349. However, Navient has not presented sufficient evidence to persuade the Court that a stay is now necessary, particularly when Navient is only raising this request months after discovery began and its motion to dismiss was filed, and when Navient has already been ordered by the Court to produce what appear to be very similar or identical borrower records in the CFPB-Navient matter.

C. Formal Statement of Interest from ED

Finally, Navient urges the Court to invite ED to submit a formal statement of interest regarding the discovery dispute, citing 28 U.S.C. § 517. That statute provides that:

> The Solicitor General, or any officer of the Department of Justice, may be sent by the Attorney General to any State or district in the United States to attend to the interests of the United States in a suit pending in a court of the United States, or in a court of a State, or to attend to any other interest of the United States.

Id. Neither this statute, nor Rule 24 of the Federal Rules of Civil Procedure, which addresses the intervention of interested parties, mandates that the Court must *sua sponte* invite ED to participate in this dispute. *See, e.g.*, Fed. R. Civ. P. 24(a)(2) (the Court "may" allow intervention by a government officer or agency "[o]n timely motion"). Nor does this dispute appear to present a situation where "the constitutionality of any Act of Congress affecting the public interest is drawn in question, [where] the [C]court should certify such fact to the Attorney General." 28 U.S.C. § 2405(a). ED is free on its own accord to move the Court to intervene in this case. However, the Court will not further delay this case in the interim.[2]

[2] The Court will also deny Navient's request that the Commonwealth go directly to ED to obtain the borrower records. As extensively noted above, it has been established that Navient physically possesses the records. Navient's reference to ED's *Touhy* regulations and its argument that the Commonwealth should be required to follow them does not bear on this dispute. By their plain language, such regulations, which govern the procedures ED employees should follow when responding to an external request for information, only apply when seeking information directly from ED, which is not the case here. *See* 34 C.F.R. § 8.1(a) ("this part establishes the procedures to be followed when *the Department or any employee of the Department* receives a demand for . . .) (emphasis added).

III. Conclusion

For the reasons outlined above, the Court will order Navient to produce the disputed borrower records.[3] The parties are also ordered to meet and confer to resolve potential burden, scope, and relevancy issues related to the production of the records, which the Court has previously and repeatedly noted have not as of yet been ripe for Court consideration.[4] In the event the parties are not able to resolve these issues, they should so inform the Court and in doing so, precisely delineate the disputes that they are unable to resolve. A separate Order follows.

Robert D. Mariani
United States District Judge

[3] Similar to the Order in the CFPB-Navient matter, (Doc. 104), and to satisfy concerns regarding the Privacy Act, the Order will state that "all discovery production in this matter is made pursuant to the order of a court of competent jurisdiction."

[4] Navient's appeal to the Court to consider the necessity of the Commonwealth to obtain the borrower records and balance it against the potential harms of disclosure is for future adjudication, if warranted. (*See* Doc. 36 at 5-6 (Navient discussing such a calculation in Privacy Act cases)). The Court here is only concerned with addressing Navient's blanket refusal to produce any of the disputed borrower records.

THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA,

Plaintiff,

v.

NAVIENT CORPORATION, et al.,

Defendants.

3:17-CV-1814
(JUDGE MARIANI)

ORDER

AND NOW, THIS 16th DAY OF OCTOBER, 2018, upon consideration of the discovery disputes discussed at the October 10, 2018 telephone conference, **IT IS HEREBY ORDERED THAT:**

1. Plaintiff's request for borrower documents in the possession, custody, or control of Defendants that relate to Defendants' administration of Department of Education federal student loan programs, (Doc. 35 at 1), is **GRANTED.** Defendants are **ORDERED** to produce all such documents to Plaintiff. It is also **ORDERED** that all discovery production in this matter is made pursuant to the order of a court of competent jurisdiction. *See* 5 U.S.C. § 552a(b)(11).
2. The parties are directed to timely meet and confer to discuss and resolve potential burden, scope, and relevancy issues related to the production of the borrower documents. In the event the parties are not able to resolve these issues, they are

directed to jointly inform the Court and each submit a letter not to exceed three pages setting forth their respective position on the dispute.

Robert D. Mariani
United States District Judge

EXHIBIT D

The Honorable Veronica Alicea-Galván
Noted for Consideration: September 21, 2018
With Oral Argument

STATE OF WASHINGTON
KING COUNTY SUPERIOR COURT

STATE OF WASHINGTON, Plaintiff, v. NAVIENT CORPORATION; NAVIENT SOLUTIONS, INC.; PIONEER CREDIT RECOVERY, INC.; and GENERAL REVENUE CORPORATION, Defendants.	NO. 17-2-01115-1 SEA ~~(PROPOSED)~~ ORDER GRANTING STATE OF WASHINGTON'S MOTION FOR AN ORDER COMPELLING PRODUCTION OF DOCUMENTS **(Clerk's Action Required)**

THIS MATTER, having come before the Court on Plaintiff's Motion for an Order Compelling Production of Documents, and the Court having reviewed the foregoing Motion, responses, if any, and considered the following material:

1. Motion for an Order Compelling Production of Documents;
2. The Declaration of Benjamin J. Roesch and the exhibits thereto;
3. The Declaration of Trisha L. McArdle and the exhibits thereto;
4. Defendants' Opposition to Plaintiff's Motion for an Order Compelling Production of Documents;
5. Declaration of Angelo J. Calfo in Support of Defendants' Opposition to Plaintiff's Motion for an Order Compelling Production of Documents and the exhibits thereto;

ATTORNEY GENERAL OF WASHINGTON
Consumer Protection Division
800 Fifth Avenue, Suite 2000
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6. Reply in Support of State of Washington's Motion for an Order Compelling Production of Documents; and

7. The papers and pleadings on file in this case.

The Court hereby ORDERS that the Motion for an Order Compelling Production of Documents is GRANTED. Navient Solutions, LLC is directed to produce all documents responsive to Request for Production 55 and 73 within 30 days of this Order. Furthermore, in order to eliminate the need for further motions practice on this issue, the Court Holds and all discovery in this matter is made pursuant to an order of a court of competent jurisdiction.

DATED this 21 day of September, 2018.

HONORABLE VERONICA ALICEA-GALVÁN
King County Superior Court

Presented by:

ROBERT W. FERGUSON
Attorney General

/s/ Benjamin J. Roesch
BENJAMIN J. ROESCH, WSBA # 39960
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DECLARATION OF SERVICE BY FILE & SERVEXPRESS

Case Name: **PEOPLE OF THE STATE OF CALIFORNIA VS. NAVIENT CORPORATION ET AL**

No.: **CGC-18-567732**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter.

On April 9, 2019, by electronic transmission via File & ServeXpress, I served the documents described as

EXHIBITS A-F TO DECLARATION OF JOANNA HULL IN SUPPORT OF THE PEOPLE'S MOTION TO COMPEL PRODUCTION RE: DEFENDANTS' PRIVACY ACT OBJECTIONS TO RFP NOS. 15-19 TO NAVIENT SOLUTIONS AND RFP NOS. 9-10 TO PIONEER

on the following interested parties in this action who are registered for e-filing:

Austin L. Klar
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I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on April 9, 2019, at San Francisco, California.

B. Sobalvarro
Declarant

Signature

EXHIBIT E

THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

CONSUMER FINANCIAL PROTECTION BUREAU,	
Plaintiff,	
v.	3:17-CV-101 (JUDGE MARIANI)
NAVIENT CORPORATION, et al.,	
Defendants.	

MEMORANDUM OPINION

I. INTRODUCTION

Through this lawsuit, the Consumer Financial Protection Bureau ("Plaintiff") seeks to prove that Navient Corporation, Navient Solutions, Inc., and Pioneer Credit Recovery, Inc., (collectively "Defendants"), committed various violations of the Consumer Financial Protection Act, 12 U.S.C. §§ 5531, 5536, the Fair Debt Collection Practices Act, 15 U.S.C. § 1692e, and Regulation V of the Fair Credit Reporting Act, 12 C.F.R. §1022.42. (Doc. 1). Presently before the Court are several new disputes that have arisen during the course of discovery.

The path of discovery has not been smooth in this case. The parties have previously submitted numerous discovery-related disputes to the Court, (*see* Docs. 68, 70, 72, 73, 74, 79, 83, 84), and have appeared before the Court on multiple occasions, both telephonically, (Doc. 69), and in-person, (Doc. 80), to present their respective positions.

However, additional discovery disputes came to the Court's attention on July 11, 2018.[1] Per the procedure of the Court, Plaintiff, instead of filing a motion, filed a brief letter with the Court identifying the disputes. (Doc. 95). The Court ordered that "[d]efendants shall submit to the Court a concise response to Plaintiff's letter." (Doc. 96). Defendants responded in a July 13, 2018 letter, and requested "an in-person conference" to discuss the dispute. (Doc. 97). The Court issued a scheduling order setting a telephone conference for the parties on August 8, 2018. (Doc. 98).

Several days before the conference, on August 5, 2018, Plaintiff filed an additional letter with the Court identifying additional discovery disputes and providing more argument regarding certain issues raised in its July 11 letter. (Doc. 99). The morning of the scheduled telephone conference, on August 8, 2018, Defendants responded to Plaintiff's additional discovery disputes in a letter filed with the Court. (Doc. 100).

The parties appeared telephonically before the Court on August 8, 2018. For the reasons that follow, the Court will order that: 1) Defendants produce student loan borrower documents previously withheld on the basis of the Privacy Act, 5 U.S.C. § 552a; 2) Defendants produce contact information of former employees contained within their records; and 3) the fact discovery deadline be extended four months, and all subsequent litigation deadlines correspondingly extended in accordance with previous order of the Court.

[1] Though the disputes were initially raised by Plaintiff and responded to by counsel for Defendant Navient Solutions, Inc., prudence suggests that the Court make clear that its Order will have application to all Defendants insofar as the discovery issues addressed would have application to them. Therefore, references in this opinion and the accompanying Order are to all Defendants.

II. ANALYSIS

In its July 11 and August 5 letters, Plaintiff collectively raises three discovery disputes that require the Court's resolution. The Court will address each in turn.

A. Student Loan Borrower Documents

The first and most complex dispute involves Plaintiff's requests for certain student loan borrower documents, (Doc. 95 at 1), that Defendants' have thus far refused to provide because they assert that the documents belong to the Department of Education and the Privacy Act, 5 U.S.C. § 552a, prohibits their release. (Doc. 97 at 1-2; *see also* Doc. 100 at 1). Plaintiff asserts that it is entitled to receive the borrower documents, which it claims are "essential to identifying the universe of harmed consumers and quantifying damages."[2] (Doc. 95 at 1). Plaintiff argues that the Privacy Act "is not a bar to the information sought," because the Privacy Act allows for disclosure of covered records "pursuant to an order of a court of competent jurisdiction, 5 U.S.C. § 552a(b)(11)"; that "[t]he protective order in this case . . . satisfies this exception"; and that the Privacy Act is "not a vehicle to resist discovery of relevant information."[3] (Doc. 95 at 1-2).

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[2] Plaintiff did not specifically identify the documents that are at issue in its July 11 letter or at the August 8 telephone conference. Instead, Plaintiff's letter referenced a February 2018 set of requests for production, (Doc. 95 at 1), and included some of these requests in the form of a copy of Defendants' "Objections and Responses to Plaintiff's Second Set of Requests for Production," (Doc. 95-1 at A4-28). Regardless, as addressed below and in the Court's separate order, and without deciding burden or scope issues that are not before the Court, the Court will require Defendants to produce all disputed borrower documents.

[3] Plaintiffs have stated that they attempted to obtain permission from the Department of Education to obtain the borrower documents from Defendants pursuant to the Privacy Act's exceptions on the prohibitions on disclosure, but that the Department "was not prepared to grant permission." (Doc. 95 at 1).

Defendants respond that they maintain the borrower documents on behalf of the Department of Education, which owns the documents, and that Defendants are required to follow the directives of the Department of Education with respect to disclosure of the documents. (Doc. 97 at 1-2.) Defendants state that the Department of Education requires third-parties, including Plaintiff, to obtain permission to get the documents in order to comply with the Privacy Act, which otherwise prohibits their release. (*Id.* at 2.) Defendants claim that the borrower document discovery dispute is really between Plaintiff and the Department of Education and not Plaintiff and Defendants, and should be resolved by them. (*Id.*)

The Court agrees with Plaintiff that Defendants cannot assert that the records may ultimately belong to the Department of Education or use the Privacy Act to shield the requested borrower documents from production. As an initial matter, there is no dispute that the borrower documents at issue are in the possession of Defendants, even if, as Defendants assert, they are owned by the Department of Education. (Doc. 97 at 1 (letter to the Court from Defendants' counsel stating "The records exist on Navient's systems, but they are the property of the federal government and subject to ED's control.")). Under Fed. R. Civ. P. 34(a)(1), requests can be made for production of documents, electronically stored information, and things in "the responding party's possession, custody, or control." The inquiry thus shifts to available privileges that Defendants' can assert to justify its refusal to produce the documents. See Fed. R. Civ. P. 26(b)(1) (scope of discovery includes "any *nonprivileged* matter that is relevant to any party's claim or defense" (emphasis added)).

The Privacy Act, 5 U.S.C. § 552a, does not provide such a discovery privilege. *Laxalt v. McClatchy*, 809 F.2d 885, 888-89 (D.C. Cir. 1987); *Weahkee v. Norton*, 621 F.2d 1080, 1082 (10th Cir. 1980); *Johnson v. Folino*, 528 F. Supp. 2d 548, 552 (E.D. Pa. 2007); *Forrest v. U.S.*, No. CIV. A. 95-3889, 1996 WL 171539, at *2 (E.D. Pa. Apr. 11, 1996); *Adelman v. Brady*, CIV. A. No. 89-4714, 1990 WL 39147, at *2 (E.D. Pa. Mar. 28, 1990). The Privacy Act generally prohibits government agencies from disclosing "records," which are:

> any item, collection, or grouping of information about an individual that is maintained by an agency, including, but not limited to, his education, financial transactions, medical history, and criminal or employment history and that contains his name, or the identifying number, symbol, or other identifying particular assigned to the individual, such as a finger or voice print or a photograph

5 U.S.C. § 552a(4); *see also* 5 U.S.C. § 552a(b) ("No agency shall disclose any record . . . ."). The Privacy Act also requires government agencies to apply the protections mandated by the Privacy Act to record systems operated by government contractors.[4] 5 U.S.C. § 552a(m)(1). The parties do not appear to dispute that the borrower documents at issue in the discovery dispute are "records" as defined in the Privacy Act.

Despite the Privacy Act's general prohibition on disclosure of records, the Court agrees with the rulings of numerous courts that have found that the Privacy

[4] Although unnecessary to determine in ruling on this discovery dispute, the Court notes that the Second Circuit has previously ruled that one of the Defendants in this case, Pioneer Credit Recovery, Inc., is not a government agency. *See Burch v. Pioneer Credit Recovery, Inc.*, 551 F.3d 122, 125 (2d Cir. 2008).

Act does not create a qualified discovery privilege. *See, e.g., Laxalt*, 809 F.2d at 888 ("The Privacy Act, however, does not create a qualified discovery privilege as that concept is generally understood, and we find no basis in the statute or its legislative history for inferring one."). "Therefore, a party can invoke discovery of materials protected by the Privacy Act through the normal discovery process and according to the usual discovery standards, and the test of discoverability is the relevance standard of FRCP 26(b)(1)." *Forrest*, 1996 WL 171539, at *2 (citing *Laxalt*, 809 F.2d at 889). Indeed, the Privacy Act's inclusion of an exception for release of records pursuant to court order, 5 U.S.C. § 552a(b)(11), "make[s] it completely clear that the [Privacy] Act cannot be used to block the normal course of court proceedings, including court-ordered discovery." *Adelman*, 1990 WL 39147, at *2. Thus, Defendants cannot rely on the Privacy Act to resist Plaintiff's document requests for borrower documents, made in the course of discovery.[5] Without deciding burden or scope issues not squarely before the Court, the Court will order that Defendants must produce the disputed borrower documents.[6]

[5] The Court appreciates concerns regarding the potentially sensitive nature of personal information in the disputed borrower records, and expects the parties to comply with the provisions of the Stipulated Confidentiality Agreement and Protective Order, (Doc. 66-1), to safeguard the information.

[6] To avoid future disputes that discovery production in this matter is somehow barred by the Privacy Act, the Court's separate order explicitly states that all discovery production in this matter is made pursuant to the order of a court of competent jurisdiction.

B. Former Employee Contact Information

The second discovery dispute involves Defendants' refusal to respond to Plaintiff's interrogatory seeking the identification of certain classes of current and former employees, including providing the employees "present or last known address, telephone number, and e-mail address." (Docs. 99 at 3-4, 99-1 at A12, A16-17, A27). Defendants produced lists that did not contain addresses, telephone numbers, or e-mail addresses of former employees. (Docs. 99 at 4, 99-1 at A129-30, 100 at 2). Defendants assert that they had previously told Plaintiff what information would be included in the spreadsheet they were providing, and that the spreadsheet would not contain contact information, with no contemporaneous objection by Plaintiff. (Doc. 100 at 2). Defendants also assert that producing the lists was burdensome, (*id.*), and raised a relevance objection at the August 8 telephone conference.

The Court finds it difficult to believe that Defendants, large and sophisticated corporate entities, would not retain in their records at least some contact information of former employees. The Court also finds that a list of former employees with mere "name[s], title[s], division[s], hire date[s], termination date[s], and the reasons for the termination[s]," (*id.*), with no associated contact information, is insufficient to respond to Plaintiff's otherwise reasonable discovery request. Accordingly, the Court will order that Defendants shall be required to produce last-known contact information, including present or last-known

address, telephone number, and e-mail address, that is contained in Defendants' records for the list of former employees at issue in the dispute.

C. Extension of Fact Discovery and Subsequent Deadlines

The final discovery dispute concerns Plaintiff's request to extend fact discovery. (Docs. 95 at 2, 97 at 2-3). Plaintiff asserts that Defendants have dragged their feet on responding to discovery requests, Defendants have not yet fully responded to many discovery requests, and the complexity of Defendants' systems and data means that substantial additional time will be needed to review and analyze the data once Plaintiff obtains access. (Doc. 95 at 2). Plaintiffs request an extension of the fact discovery deadline to "five months from when Defendants complete their responses to the Bureau's written discovery requests." (*Id.*).

Defendants respond that Plaintiff's request is "an invitation to virtually endless discovery," that Defendants have been engaged in "strenuous efforts to conclude discovery in the face of sweeping [Plaintiff] demands for internal emails and other documents of attenuated relevance," and that any delays in completing discovery are essentially Plaintiff's fault. (Doc. 97 at 2-3). At the August 8 telephone conference, Defendants' counsel also noted the immense burden Plaintiff's expansive discovery requests has placed on Defendants, and that Defendants were ready to "cry uncle."

While the Court agrees with Defendants' understandable desire to bring discovery to a close and move the litigation forward, it also agrees with Plaintiff that more time is needed

to complete fact discovery. As these most recent discovery disputes have illustrated, there is substantial production to be completed to ensure that the parties have a sufficient evidentiary foundation for pre-trial dispositive motions and beyond. However, the Court will not grant Plaintiff's ill-defined request for a potentially lengthy extension, and will order that fact discovery close four months from the current deadline of August 9, 2018. All subsequent deadlines will also be extended in accordance with the Court's previously granted extension of fact discovery. (Doc. 82). Given the already substantial length of discovery in this case, the Court advises the parties that it will not be predisposed to grant further discovery extensions.[7]

III. Conclusion

For the reasons outlined above, the Court will order Defendants to produce the disputed borrower documents, order Defendants to produce former employee contact information, and extend the fact discovery deadline and all subsequent deadlines. A separate Order follows.

Robert D. Mariani
United States District Judge

[7] The Court notes that at the August 8 telephone conference in response to a question from the Court, Plaintiff's counsel stated that it had not issued any requests for production of documents since February 2018 and that no further requests for production of documents would be forthcoming. The Court also reminds the parties that its May 3, 2018 Order prohibits the parties from serving any additional interrogatories or requests for production of documents beyond those which have already been served. (Doc. 89, ¶ 7).

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

CONSUMER FINANCIAL PROTECTION BUREAU,

Plaintiff,

v.

NAVIENT CORPORATION, et al.,

Defendants.

3:17-CV-101
(JUDGE MARIANI)

ORDER

AND NOW, THIS 10th **DAY OF AUGUST, 2018,** upon consideration of the discovery disputes discussed at the August 8, 2018 telephone conference, **IT IS HEREBY ORDERED THAT:**

1. Plaintiff's request for borrower documents in the possession, custody, or control of Defendants that relate to Defendants' administration of Department of Education federal student loan programs, (Doc. 95 at 1), is **GRANTED**. Defendants are **ORDERED** to produce all such documents to Plaintiff. It is also **ORDERED** that all discovery production in this matter is made pursuant to the order of a court of competent jurisdiction. *See* 5 U.S.C. § 552a(b)(11).
2. Plaintiff's request for the contact information of Defendants' former employees, including present or last-known address, telephone number, and e-mail address,

(Doc. 99 at 4), is **GRANTED**. Defendants are **ORDERED** to produce such contact information to the extent Defendants possess such information in their records.

3. Plaintiff's request to extend fact discovery, (Doc. 95 at 2), is **GRANTED AS MODIFIED**. Fact discovery shall close on **December 7, 2018**. Subsequent litigation deadlines shall be modified consistent with the Court's April 6, 2018 Order extending discovery deadlines, (Doc. 82):

   a. All potentially dispositive motions shall be filed no later than **May 6, 2019**. If filing a motion for summary judgment, counsel shall provide the Court with a courtesy copy of that motion, supporting brief, and all accompanying exhibits. Counsel for the non-moving party shall also provide a courtesy copy of the brief in opposition to the motion for summary judgment and all accompanying exhibits.

   b. Reports from Plaintiff's experts shall be due by **January 7, 2019**.

   c. Reports from Defendants' experts shall be due by **February 5, 2019**.

   d. Supplementations shall be due by **March 7, 2019**.

   e. All expert discovery shall be commenced in time to be completed by **April 8, 2019**.

Robert D. Mariani
United States District Judge