No. 22A-__

IN THE

Supreme Court of the United States

EVERGLADES COLLEGE, INC.; LINCOLN EDUCATIONAL SERVICES CORPORATION; AND AMERICAN NATIONAL UNIVERSITY,

Applicants,

v.

MIGUEL CARDONA, ET AL.; THERESA SWEET, ET AL.,

Respondents.

To the Honorable Elena Kagan, Associate Justice of the United States Supreme Court and Circuit Justice for the Ninth Circuit

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Appendix to Application to Stay the Judgment Entered by the United States District Court for Northern District of California

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JESSE PANUCCIO
Counsel of Record
JASON HILBORN
BOIES SCHILLER & FLEXNER LLP
401 E. Las Olas Blvd., Ste. 1200
Fort Lauderdale, FL 33301
(954) 356-0011
jpanuccio@bsfllp.com

Counsel for Everglades College, Inc.

JOHN S. MORAN
Counsel of Record
MCGUIREWOODS LLP
888 16th St. N.W., Suite 500
Black Lives Matter Plaza
Washington, D.C. 20006
(202) 828-2817
jmoran@mcguirewoods.com

Counsel for American National University

LUCAS C. TOWNSEND
Counsel of Record
JESSICA L. WAGNER
JEFFREY LIU
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500
ltownsend@gibsondunn.com

JAMES L. ZELENAY, JR.
GIBSON, DUNN & CRUTCHER LLP
333 South Grand Avenue
Los Angeles, CA 90071
(213) 229-7449

Counsel for Lincoln Educational Services Corporation

Additional Counsel Listed On Inside Cover

PIPER A. WALDRON
MCGUIREWOODS LLP
1800 Century Park East, 8th Floor
Los Angeles, CA 90067
(310) 315-8250

Counsel for American National University

KATHERINE WORDEN
GIBSON, DUNN & CRUTCHER LLP
555 Mission Street
San Francisco, CA 94105
(415) 393-8229

Counsel for Lincoln Educational Services Corporation

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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

MAR 29 2023

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

THERESA SWEET; et al., Plaintiffs-Appellees, EVERGLADES COLLEGE, INC., Intervenor-Appellant, v. MIGUEL A. CARDONA, Secretary of the United States Department of Education; U.S. DEPARTMENT OF EDUCATION, Defendants-Appellees, LINCOLN EDUCATIONAL SERVICES CORPORATION; et al., Intervenors.	No. 23-15049 D.C. No. 3:19-cv-03674-WHA Northern District of California, San Francisco ORDER

THERESA SWEET; et al., Plaintiffs-Appellees, v. LINCOLN EDUCATIONAL SERVICES CORPORATION, Intervenor-Appellant,	No. 23-15050 D.C. No. 3:19-cv-03674-WHA

LCC/MOATT

v.

MIGUEL A. CARDONA, Secretary of the United States Department of Education; U.S. DEPARTMENT OF EDUCATION,

Defendants-Appellees,

EVERGLADES COLLEGE, INC.; et al.,

Intervenors.

THERESA SWEET; et al.,

Plaintiffs-Appellees,

v.

AMERICAN NATIONAL UNIVERSITY,

Intervenor-Appellant,

v.

MIGUEL A. CARDONA, Secretary of the United States Department of Education; U.S. DEPARTMENT OF EDUCATION,

Defendants-Appellees,

EVERGLADES COLLEGE, INC.; et al.,

No. 23-15051

D.C. No. 3:19-cv-03674-WHA

Intervenors.

Before: TASHIMA, S.R. THOMAS, and KOH, Circuit Judges.

Appellants' joint motion to exceed the page limits for their joint motion for a stay pending appeal (Docket Entry No. 12) is granted.

Appellants' joint motion for a stay pending appeal (Docket Entry No. 13) is denied. *See Nken v. Holder*, 556 U.S. 418, 433-34 (2009) (stating standard). Appellants fail to demonstrate a sufficient probability of irreparable harm to warrant a stay of the challenged settlement pending these appeals.

Plaintiffs-appellees' cross-motion to dismiss these appeals for lack of jurisdiction (Docket Entry No. 15) is denied without prejudice to renewing the arguments in the answering brief. *See Nat'l Indus. v. Republic Nat'l Life Ins. Co.*, 677 F.2d 1258, 1262 (9th Cir. 1982) (noting that merits panel may consider appellate jurisdiction despite earlier denial of motion to dismiss).

The consolidated opening brief is due May 3, 2023. The consolidated answering briefs are due June 2, 2023. The optional consolidated reply brief is due within 21 days after service of the last-served answering brief.

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

THERESA SWEET, et al.,

Plaintiffs,

v.

MIGUEL CARDONA, et al.,

Defendants.

No. C 19-03674 WHA

ORDER RE MOTION TO STAY JUDGMENT PENDING APPEAL

INTRODUCTION

On November 16, 2022, a settlement between the United States Secretary of Education and a class of student-loan borrowers received final approval. The entry of final judgment started a 60-day clock to appeal. Of roughly half a million class members, none appealed the final approval order. But on day 58, three intervenor schools did. They now move this district court for a stay pending appeal. Specifically, they move to stay the entire judgment or, in the alternative, the judgment as to them.

Recall this settlement is independent from the more far-reaching loan forgiveness initiative under review by the Supreme Court. And notwithstanding the broad relief that this settlement provides, the instant motion turns on a narrow question: have these three intervenor schools shown that they are likely to succeed on the merits of their appeals and suffer irreparable harm absent a stay? This order concludes that they have not.

For the following reasons, the motion to stay judgment pending appeal is **DENIED**. To the extent stated below, this order temporarily stays judgment with respect to discharges and discharge requests for loans associated with the three intervenor schools to allow the three intervenor schools to present a stay motion to our court of appeals.

STATEMENT

The final approval order described the factual background and procedural history at length. *See Sweet v. Cardona*, 2022 WL 16966513, at *1–4 (N.D. Cal. Nov. 16, 2022). Here, they will be sketched in broader strokes and supplemented with the latest developments.

1. FROM "FLOOD OF CLAIMS" TO FINAL APPROVAL.

In 1994, the Secretary of Education established the first "borrower defense" program for federal student loans, allowing a borrower to "assert as a defense against repayment[] any act or omission of the school attended by the student that would give rise to a cause of action against the school under applicable State law." 59 Fed. Reg. 61,664, 61,696 (Dec. 1, 1994); *see also* 60 Fed. Reg. 37,768 (July 21, 1995).

Twenty years passed in which the borrower-defense regulations largely lay dormant (AR 590). But after the collapse of one of the nation's largest for-profit college chains in 2015, the Department of Education faced a "flood of borrower defense claims." 81 Fed. Reg. 39,330, 39,330 (June 16, 2016). The agency updated its regulations to expedite application processing and created a "Borrower Defense Unit" to address the backlog. 81 Fed. Reg. 75,926 (Nov. 1, 2016); (AR 341). Yet thousands more applications poured in, including from borrowers who attended other schools, and the backlog persisted (AR 339–41).

In 2017, a new Secretary paused claim adjudications to review the borrower-defense procedures and then stopped conducting claim adjudications entirely (AR 502–03). For eighteen months, well into this suit, she issued zero decisions (AR 350). As of June 2019, borrowers had filed 272,721 total applications, 210,168 of which remained pending (AR 399–400). Named plaintiffs filed this action to require the Secretary to carry out her statutory duty to adjudicate borrower-defense applications.

After the certification of a Rule 23(b)(2) class and the filing of cross-motions for summary judgment, plaintiffs (a class of borrowers) and defendants (the Secretary and the Department) ostensibly reached a settlement and moved for preliminary approval. That settlement received preliminary approval in May 2020 but failed to receive final approval four months later once it became known that there was, in fact, no meeting of the minds; unbeknownst to the class and the undersigned, the Secretary had adopted a practice of sending form-denial notices to borrowers. Following a trip to our court of appeals to clarify permissible discovery and the filing of new cross-motions for summary judgment, plaintiffs and defendants reached the instant settlement and again moved for preliminary approval. This settlement received preliminary approval in August 2022 and final approval that November (Dkt. No. 246-1).

In brief, the settlement agreement sorts class members into three groups. For group one (approximately 200,000 borrowers), it provides for "full," "automatic" relief, *i.e.*, discharge of federal loans, cash refunds of amounts paid to the Department, and credit repair. This relief goes to class members who attended one of the 151 schools listed in Exhibit C to the agreement. As explained in the joint motion for final approval, "certain indicia of misconduct by the listed schools, including the high volume of Class Members with applications related to the listed schools, led the Department to conclude that these Class Members were entitled to summary settlement relief without any further time-consuming individualized review process" (Dkt. No. 323 at 11).

Meanwhile, for groups two and three, the agreement provides for streamlined borrower-defense application adjudication. Specifically, for group two (approximately 64,000 borrowers), it provides for decisions within specified periods of time correlated to how long the applications have been pending, with certain presumptions in favor of the borrower. And for group three (those who submitted applications after the execution of the settlement but before final approval, approximately 206,000 borrowers), it provides for decisions within three years of final approval without such presumptions. If the Secretary does not render decisions

on applications for borrowers in groups two and three within the periods of time set out in the agreement, those borrowers receive full, automatic relief like borrowers in group one.

At the preliminary approval stage, four schools moved to intervene to oppose the settlement: American National University (ANU), the Chicago School of Professional Psychology (CSPP), Everglades College, Inc. (Everglades), and Lincoln Educational Services Corporation (Lincoln). These schools took issue with their inclusion on Exhibit C, which they labeled a "scarlet letter." An order found the schools could not intervene as of right but could permissively intervene to object to the settlement. When plaintiffs and defendants moved for final approval, each intervenor school filed an opposition, which the final approval order discussed in detail. The settlement received final approval on November 16, 2022, and the entry of final judgment that day started a 60-day clock to appeal the final approval order.[1]

2. THE LATEST DEVELOPMENTS.

Fifty-eight days later, on January 13, 2023, three of the four intervenor schools noticed appeals and jointly moved this district court to stay judgment pending the resolution of their appeals.[2] In their motion, ANU, Everglades, and Lincoln explained that they filed "[i]n an abundance of caution," convinced the settlement agreement "itself is best read to delay the Effective Date during an appeal or until the final judgment is not subject to any further review" (Br. 1–2) (internal quotation and citation omitted). Movants requested a stay of the entire judgment or, in the alternative, a stay of the judgment only as to movants, recognizing they "represent only a miniscule fraction of the claims included in the class" and "do not wish to prevent a legitimate settlement of this case or prevent granting of meritorious [borrower-defense] applications" (Br. 25). All parties were subsequently notified that the impact of the

[1] Because the United States is a party to this litigation, the original deadline to file a notice of appeal was sixty days after the entry of final judgment. Fed. R. App. P. 4(a)(1)(B). Sixty days after November 16, 2022, was January 15, 2023. That day, however, fell on a Sunday, and the following Monday was Martin Luther King Day. Thus, had the three intervenor schools not extended the deadline by noticing appeals, the original deadline would have been January 17, 2023. Fed. R. App. P. 4(a)(3).

[2] CSPP neither noticed an appeal nor joined the motion to stay.

stay motion and its pendency on the settlement would be discussed at a status conference set for January 26, 2023.

At the status conference, fireworks erupted. After explaining that plaintiffs and defendants disputed movants' reading of the Effective Date — which they believed was actually two days away, on January 28, 2023 — counsel revealed that the Department planned to undertake "immediate actions" the following business day, on January 30, 2023 (Tr. 5). These immediate actions included "sending lists to servicers so that those servicers could start performing discharges, and that would include about 99-percent of borrowers in Exhibit C," with the expectation that some servicers would discharge loans "within that week" (Tr. 6, 9). The Department also planned to email "borrowers, including substantially all Exhibit C borrowers, letting them know about settlement relief," email "borrowers notifying them that the denials had been rescinded and their cases had been reopened," "update its own internal tracking system to reflect . . . [that those borrowers'] status had been changed," and "begin the adjudication process for reopening cases" (Tr. 5–6). According to the defendants, "the Department really need[ed] all the time that[] [was] allowed under the settlement to fully satisfy its obligations" (Tr. 6). Movants asked, "at the very least[,] that the Court implement an administrative stay through its decision on the underlying stay motion" (Tr. 15).

Seeking to balance fairness to plaintiffs and defendants in maintaining the settlement's momentum with fairness to movants in allowing them an opportunity to be heard, the undersigned proposed delaying loan discharges and discharge requests for borrowers who attended movants' schools until the stay motion could be heard and ruled upon. But counsel for defendants explained that the Department could not, at that time, separate out discharge requests for borrowers who attended movants' schools.[3] In light of this disclosure, the undersigned ordered that no discharge requests be sent and no loans be discharged until a hearing took place and an order on the stay motion issued. That hearing occurred on February 15, 2023. This order follows full briefing and oral argument.

[3] Defendants have since filed declarations describing changes made to facilitate separating out these requests (Dkt. Nos. 363, 376).

Before proceeding, it is important to reiterate that this order does not involve President Biden's plan to forgive student debt under review by the Supreme Court. *See Biden v. Nebraska*, No. 22-506; *Dep't of Educ. v. Brown*, No. 22-535. Rather, it involves approval of a discrete settlement involving a group of borrowers who filed borrower-defense applications. And this discrete settlement is based on a separate policy, enacted under a separate legal authority, designed to serve different purposes under different circumstances. *See Sweet*, 2022 WL 16966513, at *4–7.

ANALYSIS

It is well-established that a "stay is not a matter of right" but "an exercise of judicial discretion." *Virginian Ry. Co. v. United States*, 272 U.S. 658, 672 (1926). "The party requesting a stay bears the burden of showing that the circumstances justify an exercise of that discretion," and the "propriety" of the stay "is dependent upon the circumstances of the particular case." *Nken v. Holder*, 556 U.S. 418, 433–34 (2009); *Virginian Ry. Co.*, 272 U.S. at 672–73.

In ruling on a motion to stay pending appeal, a district court considers four factors: "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *Nken*, 556 U.S. at 426 (citation omitted). Under our court of appeals' "sliding scale" approach, a stronger showing of one factor may offset a weaker showing of another. *Leiva-Perez v. Holder*, 640 F.3d 962, 964 (9th Cir. 2011). But the Supreme Court has made clear that the "most critical" factors are the first two; once they are satisfied, the third and fourth factors are considered. *Nken*, 556 U.S. at 434–35.

1. EFFECTIVE DATE OF THE SETTLEMENT: JANUARY 28, 2023.

Prior to considering the stay factors, however, this order must address a threshold question raised by the motion: whether the settlement is now in effect. Movants maintain that the settlement "provides for a self-executing stay pending appeal" (Reply Br. 2). Accordingly, "[i]f the Court recognizes that the Settlement cannot take effect until appeals are resolved, the

Court need not consider equitable stay relief" (*ibid.*). The implication seems to be that if there is no settlement in effect, there is no reason to stay judgment. Movants base their arguments on interrelated provisions in the settlement agreement: Sections II.K and XIII.A.

A. SECTION II.K.

Section II.K defines Effective Date based on two potential events:

> the date upon which, if this Agreement has not been voided under Section XIII, the Final Judgment approving this Agreement, entered by the Court in the form attached hereto as Exhibit B, becomes non-appealable, or, in the event of an appeal by a Class Member based upon a timely filed objection to this Agreement, upon the date of final resolution of said appeal.

(Dkt. No. 246-1 § II.K). Movants assert that the first potential event, final judgment "becom[ing] non-appealable," has not occurred because final judgment "*has been appealed*" (Reply Br. 2 (emphasis in original); *see* Br. 22). Meanwhile, acknowledging that the second potential event, "the date of final resolution of said appeal," anticipates "appeal by a Class Member," movants declare that this language is best read to cover their appeals as well because it was "written prior to intervention" (Br. 20). Walking this back a bit, they add that even if this language does not cover their appeals, it establishes that the settling parties agreed delaying the Effective Date would be necessary to prevent harm upon reversal (*ibid.*).

For their part, the settling parties reiterate that the Effective Date is January 28, 2023, pursuant to Section II.K. Both read final judgment "becom[ing] non-appealable" as "the expiration of the time to appeal the District Court's final judgment" (Plaintiffs' Opp. 18; *see also* Defendants' Opp. 8). As explained by plaintiffs, because movants timely noticed appeals on January 13, 2023, this extended the deadline for others to notice appeals fourteen days from that date under Federal Rule of Appellate Procedure 4(a)(3). Thus, final judgment "bec[ame] non-appealable" the following day, January 28, 2023, and Section II.K's first potential event defined the Effective Date (Plaintiffs' Opp. 18 n.9).

Both settling parties vehemently contest movants' suggestion that the second potential event is applicable when no class member appealed the settlement. According to defendants, "[n]othing in the settlement agreement contemplates delaying the [E]ffective [D]ate based on

an appeal by a non-class member . . . [a]nd for good reason, as this litigation concerns the rights of borrowers and the harm that attends delay in resolving their borrower defense claims" (Defendants' Opp. 8). According to plaintiffs, "[t]he Settlement is not ambiguous; there is no need to turn to canons of construction to see that it intends for the Effective Date to be delayed only by a class member's appeal" (Plaintiffs' Opp. 18).

This order finds that the plain language of the settlement agreement supports the interpretation of its signatories. Movants conflate "the date upon which . . . Final Judgment approving this Agreement . . . becomes non-appealable" (§ II.K) and the date of "a non-appealable judgment" (Reply Br. 2). This is a paradigmatic distinction with a difference. Once movants noticed appeals on January 13, 2023, they extended the deadline for other parties to notice appeals fourteen days from that date, through January 27, 2023. Fed. R. App. P. 4(a)(3). Thus, final judgment "bec[ame] non-appealable" the next day, January 28, 2023. That is the Effective Date — a steady point of reference in a turbulent world.

True, Section II.K demonstrates the settling parties had agreed that delaying the Effective Date would be necessary to prevent harm upon reversal. As plaintiffs and defendants attest, however, this provision was drafted (and approved) with an eye to the harm that would befall *class members* eager to move on with their lives and without the threat of collection. For that reason, the settlement agreement allows for delaying the Effective Date "in the event of an appeal by a Class Member based upon a timely filed objection to this Agreement."

This order will not read in "intervenor" or "school" where the settlement agreement clearly says "Class Member." Not only would this contravene the stated intent of the signatories — and brazenly violate some of the more widely accepted canons of construction — but it would unduly equate the (accepted) rights and harms of class members and (contested) rights and harms of movants that are implicated by the settlement. Movants are parties to this litigation, but they were not parties to this settlement agreement, which was carefully negotiated after years of heated litigation between the class of borrowers and the Secretary. The Court allowed movants to permissively intervene to oppose the agreement, but it will not entertain their attempts to re-write it.

B. SECTION XIII.A.

Movants also invoke Section XIII.A, which provides: "This Agreement shall be void if it is not approved as written by a final Court order not subject to any further review" (Dkt. No. 246-1 § XIII.A). According to movants, this provision "powerfully confirms that the Effective Date is delayed until all appeals are resolved" (Reply Br. 2). Defendants do not address this provision specifically, but plaintiffs counter that "[t]he plain, logical reading of the interaction between Section II.K and Section XIII.A is that the Settlement would not become effective if it were not finally approved" in a final approval order (Plaintiffs' Opp. 18 n.8). Meanwhile, movants' "counter-textual interpretation would create the absurd result of rendering the Settlement Agreement void from the moment it was approved" (*ibid.*).

This order agrees with plaintiffs. In the motion to stay, movants reason that "the Settlement is *void* altogether unless approved by a final order that is 'not subject to any further review'" (Br. 22) (emphasis in original). By extension, movants suggest that the agreement is now void under Section XIII.A because their appeals reflect "it is not approved as written by a final Court order not subject to any further review." Consequently, the Effective Date cannot be "the date upon which, if this Agreement has not been voided under Section XIII, the Final Judgment approving this Agreement . . . becomes non-appealable" under Section II.K because the agreement *has* "been voided under Section XIII." But if this agreement is now void, there can be no "self-executing stay pending appeal" because there can be no Effective Date to delay. Indeed, there can be no approved settlement to appeal. As counsel for Lincoln acknowledged at the status conference, "the agreement provides that if the agreement is void, the consequence of that is the parties resume litigating . . . as they were before the settlement agreement" (Tr. 13; *see* Dkt. No. 246-1 § XIV.A).

The undersigned is not convinced that plaintiffs and defendants negotiated a settlement that could conceivably lock them into settlement negotiation forever, sending them back to the drawing board with each noticed appeal irrespective of its merit. Movants do not appear convinced either, as they equivocate in their reading of the term "void." At the status conference, for example, counsel for Lincoln explained, "[w]e can't know whether the

agreement is void until the judgment is not subject to any further review" (Tr. 11). Yet if *this* is the case, and Section XIII.A delays the Effective Date indefinitely until all appeals are resolved, it short circuits Section II.K. That provision's two potential events for defining Effective Date would then only be evaluated "if this Agreement has not been voided under Section XIII," at which point the second potential event would always be superfluous. In the event of an unsuccessful class member appeal, "the date of final resolution of said appeal" and "the date upon which . . . the Final Judgment approving this Agreement . . . bec[ame] non-appealable" would invariably be identical. The settlement agreement cannot be read to create such redundancy.

In sum, this order concludes that the Effective Date of the settlement agreement is January 28, 2023. As such, the settlement is now in effect. The actions anticipated by the settlement that have yet to take effect — effecting loan discharges and sending discharge requests — are actions administratively stayed awaiting this order. Because there is no "self-executing stay pending appeal," this order turns to whether movants have carried their burden of showing that the circumstances warrant a stay of judgment based on the stay factors.

2. INADEQUATE SHOWING OF IRREPARABLE INJURY TO MOVANTS.

Whether movants will be irreparably injured absent a stay will be considered first. "[S]imply showing some possibility of irreparable injury fails to satisfy [this] factor." *Nken*, 556 U.S. at 434. "An applicant for a stay pending appeal must show that a stay is necessary to avoid likely irreparable injury to the applicant while the appeal is pending." *Al Otro Lado v. Wolf*, 952 F.3d 999, 1007 (9th Cir. 2020) (citing *Nken*, 556 U.S. at 434). Thus, "[t]he minimum threshold showing for a stay pending appeal requires that irreparable injury is likely to occur during the period before the appeal is likely to be decided." *Ibid.* (citing *Leiva-Perez*, 640 F.3d at 968). Accounting for all evidence on this record — even the new and tardy evidence plaintiffs sought to strike from movants' reply and attached declarations — movants do not make the minimum threshold showing here.

Their irreparable injury arguments fall into two categories: purported regulatory harm and purported reputational harm. (Conspicuously absent is purported financial harm: recall,

the settlement does not require any school to make any payment.) These categories will be taken up in turn.

A. PURPORTED REGULATORY HARM.

Starting with purported regulatory harm, movants argue that their rights enshrined in the Department's borrower-defense regulations stand to be violated in effecting the settlement. According to movants, the settlement "will eliminate an essential step of the administrative process" because "[t]here will no longer be [borrower-defense] proceedings at the Department in which the schools can participate to defend their reputations" and they "will also be denied a reasoned decision on each [borrower-defense] claim" (Br. 18–19). Thus, the "schools will immediately be denied *their* right to an agency process defined by duly promulgated regulations" (Br. 19) (emphasis in original). But as plaintiffs and defendants explain, movants seriously overstate their rights under the borrower-defense regulations, which are not even implicated.

The final approval order summarized the regulations that govern a school's participation in the borrower-defense administrative process. *See Sweet*, 2022 WL 16966513, at *9; *see also* 87 Fed. Reg. 65,904 (Nov. 1, 2022) (new regulations effective July 2023). Briefly here, while carrying out fact-finding in review of a borrower-defense application, the Department gives a school notice and an opportunity to file a responsive statement. 34 C.F.R. §§ 685.222(a)(1), (a)(2), (e)(3)(i); 685.206(c)(2), (e)(8)–(12). The school is not required to respond, and only a borrower is entitled to a reasoned decision (upon *denial* of a borrower-defense application). *Id.* § 685.222(e)(4)(ii). Upon approval of a borrower-defense application, if the Department elects to initiate a proceeding against a school for recoupment of an amount discharged, it gives this school a statement of facts and law, as well as an opportunity to respond, request a hearing, and litigate the merits *de novo*. *Id.* §§ 685.308(a)(3); 668.87(a)–(b).

As defendants point out, however, "[t]he settlement does not call for the Department to adjudicate the borrower defense applications of the group of class members to which Exhibit C applies, nor does the provision of full settlement relief to those class members constitute

borrower defense decisions" (Defendants' Opp. 7). In other words, the settlement does not call for the Department to adjudicate the borrower-defense applications of class members who attended movants' schools, nor does the provision of full settlement relief to these class members constitute decisions on their borrower-defense applications. Accordingly, the relief provided to class members who attended movants' schools does not trigger the borrower-defense regulations. Movants therefore cannot be deprived of any rights under the borrower-defense regulations through effecting the settlement.

Plaintiffs stress that "the Department has repeatedly stated that it will not seek to recoup any of the amounts discharged pursuant to the settlement" (Plaintiffs' Opp. 6) (emphasis omitted). The reader should keep in mind, however, that the Department *cannot* recoup amounts discharged pursuant to the settlement from movants. This is because the settlement does not call for the adjudication of borrower-defense applications of class members who attended movants' schools (as explained above). Thus, "[t]he school's actions that gave rise to a successful claim for which the Secretary discharged a loan, in whole or in part, pursuant to § 685.206, § 685.214, § 685.216, or § 685.222" (the borrower-defense regulations) cannot be the predicate for the Department to initiate proceedings against movants for recoupment. 34 C.F.R. § 685.308(a)(3). Under the settlement, the loans of class members who attended movants' schools are discharged pursuant to a separate authority. *See Sweet*, 2022 WL 16966513, at *4–7.

Recoupment of amounts discharged pursuant to the settlement from movants is also foreclosed by the Miller Declaration. As explained in the final approval order, the Department has "represented in the sworn declaration of Benjamin Miller that it does not consider inclusion on Exhibit C a finding of misconduct and that inclusion does not constitute evidence that could or would be considered in an action by the Department against a school. The Court relied upon, and the Court expects the government to stand behind, the statements made in the Miller Declaration." *Id.* at *10 (citing Dkt. No. 288-1). Because there can be no recoupment from movants pursuant to the settlement, there can be no deprivation of movants' rights in recoupment proceedings pursuant to the settlement.

To summarize, movants' rights under the borrower-defense regulations are simply not implicated by the settlement and the relief it provides to class members who attended movants' schools. Thus, movants do not suffer any regulatory harm — let alone irreparable regulatory harm — in the absence of a stay.

B. PURPORTED REPUTATIONAL HARM.

Next, this order turns to purported reputational harm. In some instances, movants contend that they "are experiencing irreparable harm by being branded with the Exhibit C scarlet letter, and that harm will intensify after the Settlement's Effective Date" (Br. 18). In others, they claim that they "will suffer irreparable harm to their reputations, goodwill, and standing with regulators if the Settlement takes effect" (*id*. at 20). According to movants, "all schools on Exhibit C will immediately suffer the stigma of having all [borrower-defense] claims against them summarily granted — without any administrative process, judicial fact-finding, or reasoned decision on the merits" (*id*. at 19). They aver that "this unproven stigma will carry the imprimatur of both the Department and the final judgment of a federal court that deemed the Department's finding fair and reasonable," and "[i]t will be impossible to fully reverse that stigma after class members receive their promised relief" (*ibid*.). Plaintiffs and defendants respond, *inter alia*, that movants fail to offer satisfactory evidence of any reputational injury likely to befall movants as a result of the settlement that a stay would allow movants to avoid (Plaintiffs' Opp. 6–8; Defendants' Opp. 9–10). This proves to be the silver dagger to the "scarlet letter."

At the outset, to the extent that movants argue they "*are* experiencing irreparable harm by being branded with the Exhibit C scarlet letter" (back in June 2022), they cut off their noses to spite their faces (Br. 18) (emphasis added). Recall, "[a]n applicant for a stay pending appeal must show that a stay is necessary to avoid likely irreparable injury to the applicant while the appeal is pending." *Al Otro Lado*, 952 F.3d at 1007 (citing *Nken*, 556 U.S. at 434). If the reputational injury experienced by movants is already irreparable, it is unclear why a stay would be necessary to avoid irreparable injury pending appeal. As movants recognize, the harm inquiry requires consideration of "the significance of the change from the status quo

which would arise in the absence of a stay" (Br. 18 (quoting *John Doe Co. v. CFPB*, 235 F. Supp. 3d 194, 206 (D.D.C. 2017) (Judge Rudolph Contreras)). According to movants' theory of harm here, however, in the absence of a stay, there would be no change from the status quo. Exhibit C would continue to "brand" them, either indefinitely or until our court of appeals reverses or vacates judgment. Put simply, issuing a stay would have no effect.

But to the extent that movants argue they "*will* suffer irreparable harm to their reputations, good will, and standing with regulators if the Settlement takes effect," their showing is weak (Br. 20) (emphasis added). Movants were on notice they would have to make this showing here. In their stay motion, they cite the correct legal standard and entitle a section "Intervenors Will Suffer Irreparable Harm Absent a Stay" (*id*. at 2, 18–22). What's more, the final approval order expressly cautioned that "intervenors' speculative assertions of harm fail to render the settlement unfair, especially in light of the significant benefits to both the class and the Department in settling this litigation." *Sweet*, 2022 WL 16966513, at *10. Two months after that order issued — and more than seven months after the settlement and Exhibit C were made public — movants' assertions of reputational harm remain markedly speculative, "grounded in platitudes rather than evidence." *Herb Reed Enters., LLC v. Fla. Ent. Mgmt., Inc.*, 736 F.3d 1239, 1250 (9th Cir. 2013).

(i) Evidence Presented with the Motion.

In support of the reputational harm arguments made in their stay motion, movants cite a report from a students' rights advocacy group, the National Student Legal Defense Network, that has purportedly "leveraged Lincoln's mere inclusion on Exhibit C to pressure and criticize the Department for recently renewing its Program Participation Agreement [(PPA)] with Lincoln College of Technology," an agreement that is necessary for receipt of Title IV funding (Br. 21 (citing Townsend Decl. Exh. 1)). The report is attached to the motion in an attorney declaration, along with an article from the publication *Higher Ed Dive* describing this report (Townsend Decl. Exh. 2). Neither the report nor the article supports a showing of irreparable reputational harm to movants that a stay would counteract.

The National Student Legal Defense Network report explains that "[i]n recent months, the Department has affirmatively granted new PPAs to numerous for-profit colleges with a history of law enforcement activity and consumer fraud abuses," and "[t]his includes schools that the Department itself has determined to have 'strong indicia' of having engaged in 'substantial misconduct' that had either been 'credibly alleged' or 'proven'" (Townsend Decl. Exh. 1 at 2). As defendants observe, movants make no effort to explain why, in light of this "history of law enforcement activity and consumer fraud abuses," any reputational harm experienced by Lincoln that is reflected in or compounded by the report is attributable to Exhibit C (Defendants' Opp. 9 n.3). In fact, the heading for the section in the report discussing Lincoln is titled, "The Department Awarded a New Contract to Lincoln Tech After *Massachusetts Attorney General* Maura Healey Issued a Civil Investigatory Demand and while the *MA AG Borrower Defense Claim* on Behalf of Lincoln Tech Students Remains Pending at [the Department]" (Townsend Decl. Exh. 1 at 2) (emphasis added).

This section recounts a series of enforcement activities involving Lincoln:

> In July 2015, the Massachusetts Attorney General ("MA AG") entered a consent judgment with Lincoln Tech and Lincoln Educational Services (collectively "Lincoln") to resolve allegations that the school violated state consumer protection law regarding its enrollment, disclosure, admissions, and educational practices. Lincoln agreed to pay $850,000 and forgive $165,000 in student debt to resolve an investigation into the disclosure and reporting of job placement data for a single program of study at two Lincoln Tech campuses in Massachusetts. In January 2016, the MA AG sent a letter to the Department of Education seeking a discharge of debt for affected students.
>
> In the meantime, Lincoln has been the subject of numerous law enforcement inquiries. In September 2021, the Department's Inspector General determined that Lincoln failed to follow federal requirements associated with COVID-19 emergency relief programs. In December 2021, the school received a letter from the Consumer Financial Protection Bureau ("CFPB") stating that the CFPB was requesting information and assessing conduct regarding the school's "extensions of credit" to its students. That same month, the Department cited Lincoln for "untimely refunds," demanding that Lincoln provide a financial surety to the Department. On June 7, 2022, the MA AG issued a new civil investigative demand to investigate consumer misconduct "in connection with their policies regarding fee refunds and associated disclosures to students and prospective students." Lincoln reports to be "cooperating" with the MA AG investigation.

(*id*. at 2–3) (footnotes omitted). It is only after a survey of "numerous law enforcement inquiries" that the report matter-of-factly states: "Meanwhile, as noted above, in 2022, the Department included Lincoln on its list of schools with a 'strong indicia' of having engaged in 'substantial misconduct' that had either been 'credibly alleged' or 'proven'" (*id*. at 3). The relationship between alleged stigma and approved settlement is thereby strained. Perhaps this report could support a showing of stigma afflicting Lincoln, but it does not support a showing of stigma *likely deriving from Exhibit C* or a showing of stigma *that a stay would likely offset*. Lincoln seems to make a scapegoat of the settlement here.

The article from *Higher Ed Dive* also discusses law enforcement inquiries (*see* Townsend Decl. Exh. 2 at 1 ("The U.S. Department of Education is allowing several for-profit colleges to continue accessing federal financial aid even though they're facing scrutiny from state attorneys general and their accreditors, according to a new report from the National Student Legal Defense Network."")). And it offers an even-handed summary of Exhibit C, going so far as to observe that "some institutions on the list have objected to the idea that the settlement proves wrongdoing on their behalf" and "[a] federal judge who approved the settlement wrote that the list of 151 colleges does not brand them with 'an impermissible scarlet letter'" (*id*. at 2). Lincoln even provided a statement for the article: "We believe the report strongly mischaracterizes the issues and does not properly reflect the respective outcomes" (*id*. at 3). Again, in light of the "scrutiny from state attorneys general and their accreditors," the asserted connection between stigma and settlement is too attenuated. Using this article, movants have not shown that Exhibit C will cause them any reputational injury. Indeed, the very issuance of a PPA to Lincoln and other schools listed on Exhibit C powerfully signals that the Department sees no stigma arising from Exhibit C.

Based on the evidence presented with their motion, movants have not shown that a stay would avoid any reputational injury to them, let alone irreparable reputational injury.[4]

[4] Elsewhere, movants cite a public statement by plaintiffs' counsel, about schools that "cheated" students, as a direct consequence of Exhibit C that caused movants harm (Br. 21 (citing Dkt. No. 325-4 at 5)). Counsel's statement did not mention Exhibit C or any school on Exhibit C, so the statement cannot be read that way.

(ii) Evidence Presented with the Reply.

Tellingly, movants raise new evidence in their reply, drawing from new declarations (Reply Br. 9–13). They cite Lincoln executive Francis Giglio's declaration for the illustrative example that "six months after Exhibit C was released, Lincoln was denied an opportunity to speak with a class at Centennial High School in Nevada specifically because 'Lincoln Tech is on the U.S. Department of Ed's list of predatory schools'" (Reply Br. 11 (citing Giglio Decl. ¶ 4)). For his part, Mr. Giglio cites and attaches a post on the Federal Trade Commission's website that he alleges "expressly equates inclusion on Exhibit C with deceptive practices," and he describes harm to Lincoln flowing from disclosure of this litigation as a material risk in securities filings with the Securities Exchange Commission (Giglio Decl. ¶¶ 6, 9). Meanwhile, movants rely on Everglades executive Joseph Berardinelli's declaration for its proposition that "[s]ome lenders have expressed concern and begun inquiring about the Settlement as part of their due diligence, which has (1) required [Everglades] to dedicate resources to addressing those questions and concerns, (2) delayed and/or increased the cost of financing, and (3) caused in some instances, potential lenders not to provide financing" (Berardinelli Decl. ¶ 13; *see* Reply Br. 11). Plaintiffs formally object to these excerpts and request they be struck from the record because they allegedly involve untimely evidence that should have been presented with the motion to stay (Dkt. No. 361).[5]

Generally, a district court declines to consider information and arguments presented for the first time in a reply. Although it has discretion to consider new evidence presented in a reply, it generally exercises this discretion when "the new evidence appears to be a reasonable

[5] Plaintiffs also request leave to file a sur-reply in response to Mr. Giglio and Mr. Berardinelli's claims that their respective institutions were unable to locate records relating to three class members who filed declarations in support of plaintiffs' opposition and claimed to attend these institutions (Dkt. No. 366 (citing Giglio Decl. ¶ 8; Berardinelli Decl. ¶ 9)). Plaintiffs seek to attach supplemental declarations from these class members that explain why the claims in the Giglio and Berardinelli Declarations were inaccurate and/or incomplete: two class members who attended Keiser University (owned by Everglades) changed their names after marriage, and one class member attended a school that was later acquired by Lincoln (the New England Institute of Technology). Recognizing that movants do not object to this sur-reply or the supplemental class member declarations, this order **GRANTS** plaintiffs' motion but **DENIES** the request in the sur-reply to strike the associated language from the Giglio and Berardinelli Declarations.

response to the opposition" or upon "giving the non-movant the opportunity to respond." *Hodges v. Hertz Corp.*, 351 F. Supp. 3d 1227, 1249 (N.D. Cal. 2018) (Judge Donna M. Ryu); *Harris v. City of Kent*, 2022 WL 1310080, at *5 (W.D. Wash. Mar. 11, 2022) (Judge Theresa L. Fricke) (citing *Provenz v. Miller*, 102 F.3d 1478, 1487 (9th Cir. 1996)).

This order agrees with plaintiffs that it was unfair to lard the record on reply and thus deprive the settling parties of the opportunity to address the new material in their oppositions. The incident with the high school teacher that Mr. Giglio describes reportedly took place on January 9, 2023 (Giglio Decl. ¶¶ 4–5). The FTC post he cites is dated September 16, 2022 (*id.* ¶ 6). And the securities filings he references are from August 8, 2022, and November 7, 2022, respectively (*id.* ¶ 9). Movants could have appended all of the evidence in the Giglio Declaration to their stay motion filed on January 13, 2023. Meanwhile, although Mr. Berardinelli does not date his assertions, he also does not in any way indicate that the harms he describes took place between January 13, 2023, when movants filed their stay motion, and February 3, 2023, when movants filed their reply.

Ordinarily, judges would not allow movants to introduce this evidence, and the relevant passages from the reply and attached declarations would be struck. Here, however, these passages will be considered. Plaintiffs' objections are **OVERRULED**. Even so, on this new and late evidence, movants have failed to show that they are likely to experience irreparable reputational harm that a stay would counteract.

First, with respect to the incident involving the high school teacher, it should be noted at the outset that any alleged reputational harm associated with this incident (and other potential incidents of this sort) is reparable through correction. Lincoln could provide essentially the same statement it provided to *Higher Ed Dive*: "We believe [this characterization] strongly mischaracterizes the issues . . . " (Townsend Decl. Exh. 2 at 3). What is more problematic, however, is that movants have not shown that the alleged reputational harm associated with this incident could be avoided with a stay in place. There is no indication that a *stay of judgment* would divest this teacher of the false impression that "Lincoln Tech is on the U.S.

Department of Ed's list of predatory schools." Recall, a stay would not remove Lincoln or other movants from Exhibit C. Only our court of appeals' merits ruling could do that.

Second, with respect to the FTC post, movants are not candid. This order reproduces the language that Mr. Giglio discusses in full:

> Some of the names on the list of schools included in the *Sweet* settlement may look familiar — and they should. The FTC has also sued the University of Phoenix, DeVry, and the operators of American InterContinental University and Colorado Technical University for their allegedly deceptive practices. Students who took out loans to attend those schools got more than $300 million in payments and debt cancellation through these FTC actions. If you got a check from one of these settlements: You're still eligible to get your federal loans forgiven through the borrower defense program, so file your application.

(Giglio Decl. ¶ 6). This post does not impugn the non-movant schools listed on Exhibit C on account of their inclusion on Exhibit C such that it could cause reputational harm to movants. Exhibit C is invoked in a neutral, accurate fashion here, solely to inform borrowers that they may still be entitled to debt relief even if they have already received money from an FTC settlement. Yes, the post mentions "scammers," but that does not refer to schools listed on Exhibit C but rather con artists who will try to rip-off borrowers by "helping" them get their borrower-defense claims approved.

Third, with respect to Lincoln's securities filings with the SEC, this order finds that plaintiffs captured the deficiency in their objection:

> Mr. Giglio claims that disclosing the existence of the Settlement in this case in Lincoln's securities filings has "caused concrete and material consequences for the company, its financial reporting, and its shareholder relations." Giglio Decl. ¶ 9. Yet a brief perusal of Lincoln's listing on the NASDAQ exchange shows that Lincoln's stock was higher as of the date of the Reply Brief ($6.58) than it was on the date Exhibit C was made public ($6.00). *See* https://finance.yahoo.com/chart/LINC. Indeed, the stock equaled its 2022 high point ($7.71) on August 2, 2022, after Exhibit C had been public for over a month, and hit its 2022 low ($4.69) on October 14, 2022, which was not anywhere near the disclosure dates cited in the Declaration. *See id*.

(Dkt. No. 365 at 2 n.1). No harm, no foul.

Fourth, with respect to Mr. Berardinelli's assertions, they are simply too speculative. How is the undersigned (or Mr. Berardinelli, for that matter,) to know whether the "delayed and/or increased . . . cost of financing" or decisions "in some instances . . . not to provide financing" came about on account of "inquir[ies] about the Settlement"? (Berardinelli Decl. ¶ 13). The undersigned will not connect the dots and delineate reputational harm for movants. "[C]onclusory factual assertions and speculative arguments that are unsupported in the record" will not suffice. *Doe #1 v. Trump*, 957 F.3d 1050, 1059–60 (9th Cir. 2020).

This order recognizes movants may be correct that, if our court of appeals reverses or vacates judgment, class members may have new claims of reliance and assertions of hardship (Br. 20). This could result in harm — even irreparable harm — but not irreparable harm to movants. The key question for this order is whether movants can show that *movants* will be irreparably injured absent a stay. The showing here is too weak. At bottom, movants fail to show that a stay is necessary to avoid likely irreparable injury to movants while their appeals are pending.[6]

3. INADEQUATE SHOWING OF LIKELIHOOD OF SUCCESS ON THE MERITS.

"An applicant for a stay pending appeal must make 'a strong showing that he is likely to succeed on the merits.' Where, as here, the showing of irreparable harm is weak at best, the [applicant] must make a commensurately strong showing of a likelihood of success on the merits to prevail under the sliding scale approach." *Al Otro Lado*, 952 F.3d at 1010 (quoting *Nken*, 556 U.S. at 434). In brief, movants have not made a commensurately strong showing of a likelihood of success on the merits.

[6] Two days ago, one week after the hearing, movants sought leave to file yet another piece of evidence in support of its showing of harm: a letter from plaintiffs' counsel and other organizations submitted to an entity that is considering affiliating with a non-movant school listed on Exhibit C, the University of Phoenix (Dkt. No. 381). According to movants, "[t]his letter is another example of how Plaintiffs and others are using Exhibit C to harm schools on that list, how the harm manifests itself over time, and why effectuation of the settlement during appeal will cause irreparable harm to Intervenors" (Mot. 1–2). The Court has already generously considered tardy evidence. The motion to consider even more tardy evidence is **DENIED**.

The bulk of the stay motion is dedicated to the same merits arguments that movants made at the final approval stage (Br. 2–18). The final approval order attended to every legal argument that movants have repeated in their stay motion, often verbatim, and the Court stands by its analysis. At any rate, this order need not revisit these arguments because what tips the scales for this factor is a different issue — and a threshold one.

Noticeably absent from movants' stay motion is any discussion of Article III standing. Such discussion is also noticeably absent from movants' reply, despite plaintiffs raising Article III standing in their opposition (Plaintiffs' Opp. 19–23; *cf*. Defendants' Opp. 9). An intervenor who appeals a judgment when neither original party has appealed must demonstrate independent Article III standing to maintain that appeal. *See Wittman v. Personhuballah*, 578 U.S. 539, 543–44 (2016) (holding that intervenors lack standing and dismissing appeal for lack of jurisdiction). The Supreme Court has explained:

> A party has standing only if he shows that he has suffered an "injury in fact," that the injury is "fairly traceable" to the conduct being challenged, and that the injury will likely be "redressed" by a favorable decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–561. . . (1992) (internal quotation marks and ellipsis omitted). The need to satisfy these three requirements persists throughout the life of the lawsuit. *Arizonans for Official English* [*v. Arizona*], 520 U.S. [43,] 67 [(1997)] . . . .
>
> An "intervenor cannot step into the shoes of the original party" (here, the Commonwealth) "unless the intervenor independently 'fulfills the requirements of Article III.'" *Id*., at 65 . . . (quoting *Diamond v. Charles*, 476 U.S. 54, 68 . . . (1986)).

Ibid.

As alluded to in the final approval order and this order's discussion of harm, movants have not identified an injury in fact, a "legally protected interest" they have that the settlement affects in a sufficiently "concrete and particularized" way. *Lujan*, 504 U.S. at 560; *see also TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2212 (2021). This district court is at a loss to identify an injury to movants arising from this settlement agreement (that they were not a party to) resolving this litigation (that did not involve them). As discussed above and at even greater length in the final approval order, "the schools have lost no procedural rights, nor has their status been altered. No liberty or property interest has been disturbed." *Sweet*, 2022 WL

16966513, at *10. And it is well-recognized that case law "does not establish the proposition that reputation alone, apart from some more tangible interest such as employment, is either 'liberty' or 'property' by itself sufficient to invoke the procedural protection of the Due Process Clause." *Paul v. Davis*, 424 U.S. 693, 701 (1976); *see also Sweet*, 2022 WL 16966513, at *10. As plaintiffs observe, even if there were evidence of reputational harm on this record, movants fail to establish a "plus factor," "the denial of a more tangible interest" in connection with alleged stigmatization (Plaintiffs' Opp. 21 (quoting *Hart v. Parks*, 450 F.3d 1059, 1069 (9th Cir. 2006) (internal quotation and citation omitted)).

In light of this, movants' showing on this stay factor is unsatisfactory. "Whether [movants have] failed to show any irreparable harm during the pendency of the appeal or [have] made only a minimal showing, [they have] not carried [their] burden to establish a sufficient likelihood of success on the merits." *Al Otro Lado*, 952 F.3d at 1010.

4. BALANCE OF THE EQUITIES AND THE PUBLIC INTEREST WEIGH AGAINST A STAY.

"Because the [movants] ha[ve] not satisfied the first two factors, we need not dwell on the final two factors — harm to the opposing party and the public interest." *Id.* at 1014 (internal quotations and citations omitted). But this order would be remiss not to mention that both heavily weigh against a stay. Seeing as "[t]hese factors merge when the Government is [an] opposing party," they are addressed together here. *Nken*, 556 U.S. at 435.

With respect to the third factor — whether issuance of the stay will substantially injure the other parties interested in the proceeding — movants emphasize that a stay would not cause irreparable harm to plaintiffs because their loans are in forbearance and because movants could potentially receive loan cancellation from President Biden's debt relief initiative (Reply Br. 13). They also aver that a stay would *benefit* defendants because they would not have to expend resources effecting the settlement when it could later be reversed (Br. 22–23).

Whereas movants' claims of harm experienced by movants are acutely overstated, their claims of harm experienced by plaintiffs and defendants are acutely understated. In short, that loans are currently in forbearance is of little consolation to plaintiffs when the sword of

Damocles hangs over their heads. There is ample evidence on this record of abiding and evolving harm to plaintiffs who are awaiting decisions on their borrower-defense applications that forbearance or hope for other debt relief cannot allay. These include reputational harms, not to mention financial, physical, and emotional ones (*see* Plaintiffs' Opp. Exh. A (declarations of 144 borrowers in opposition to stay motion)). Meanwhile, this order credits defendants' assertion that defendants do not, in fact, benefit from a stay that frustrates their strong interest in resolving this litigation and eliminating their backlog of borrower-defense applications — especially when defendants have already devoted substantial resources to resolving this matter (Defendants' Opp. 11). On this record, it is evident that a stay would substantially injure plaintiffs and defendants.[7]

With respect to the fourth factor — where the public interest lies — movants argue: (1) a stay would protect the Ninth Circuit's jurisdiction; (2) a stay would promote the orderly administration of justice, with the Supreme Court presently reviewing President Biden's debt forgiveness program; and (3) the public has no legitimate interest in constricting appellate review (Br. 23–25). But the public interest favors the significant benefits to roughly half a million class members and the Department in settling this litigation here.

Movants state that "[a] stay would preserve the status quo while the appeal plays out" (Br. 23). As defendants emphasize, however, movants fail to earnestly reckon with the fact "that the status quo before settlement — a massive, ever-expanding backlog of unresolved borrower-defense claims — was the impetus of this lawsuit" (Defendants' Opp. 11). There is

[7] Movants also call attention to the fact that the Supreme Court recognized the propriety of maintaining a stay pending appeal of President Biden's debt forgiveness initiative in a parallel context, and that plaintiffs' claims of harm are undermined by the fact that they "chose not to advance" this litigation for seventeen months while they unsuccessfully appealed a discovery issue (Br. 22 n.12, 23). This order (again) cautions that President Biden's initiative is separate and apart from this settlement, so drawing parallels about the harm arising from stays in these actions is perilous. And this order considers it unfair to suggest that plaintiffs "chose not to advance" this litigation while appealing a discovery issue and that this thereby calls into question the harm they would suffer upon grant of a stay. Indeed, this argument is particularly feeble given that movants waited until the tail end of the appeal window to notice appeals of the final approval order despite the alleged irreparable harm they discuss in their stay motion. Movants' other arguments, including those involving the Effective Date and the students who allegedly did not attend movants' schools, are addressed elsewhere in this order and the final approval order.

no public interest in the preservation of this stubborn and burgeoning backlog. The settlement breaks a logjam that has vexed several Secretaries and allows the Department to redirect resources to other initiatives. And it gives plaintiffs, who have languished in borrower-defense application limbo, their long-awaited relief. Note the relief provided by this settlement (financial and otherwise) will allow plaintiffs to breathe easier, sleep easier, repair their credit scores, take new jobs, enroll in new educational programs, finish their degrees, get married, start families, provide for their children, finance houses and vehicles, and save for retirement (Plaintiffs' Opp. Exh. A). It will allow them not only to move on, but also to move up, elevating others in the process. The public interest favors this settlement.

Resolution of a lawsuit concerning monumental delay should not be delayed any longer by three intervenor schools who were not parties to the settlement agreement and who were not involved in the long, hard-fought litigation that preceded it. For the foregoing reasons, the joint motion to stay the entire judgment pending appeal is **DENIED**. For the same reasons, the alternative request to stay judgment pending appeal only as to movants is **DENIED** as well.

5. TEMPORARY STAY.

Nevertheless, this order **GRANTS** a temporary, same-day stay of judgment with respect to discharges and discharge requests for loans associated with movants to allow them to present a stay motion to our court of appeals. *See* Fed. R. App. P. 8(a)(2). The judgment with respect to discharges and discharge requests for loans associated with movants is hereby stayed for **SEVEN DAYS** pursuant to Ninth Circuit Rule 27-2. If movants file a motion to stay in our court of appeals within seven days of the entry of this order, the temporary stay will continue until our court of appeals rules on the stay motion. If movants fail to so file, however, then the temporary stay shall expire seven days after the entry of this order. Movants shall please notify the Court if they seek a stay in our court of appeals.

CONCLUSION

For the reasons stated herein, the motion to stay judgment pending appeal is **DENIED**. This order temporarily stays judgment with respect to discharges and discharge requests for

loans associated with movants for **SEVEN DAYS** to allow them to present a stay motion to our court of appeals.

IT IS SO ORDERED.

Dated: February 24, 2023.

WILLIAM ALSUP
UNITED STATES DISTRICT JUDGE

United States District Court
Northern District of California

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

THERESA SWEET, et al.,

Plaintiffs,

v.

MIGUEL CARDONA, et al.,

Defendants.

No. C 19-03674 WHA

ORDER GRANTING FINAL SETTLEMENT APPROVAL

INTRODUCTION

The United States Secretary of Education has reached a settlement with a class of student-loan borrowers whose complaint alleges that, for years, the Department of Education unlawfully delayed processing, or perfunctorily denied, hundreds of thousands of "borrower-defense" applications — requests by students to discharge their loans in light of alleged wrongful acts and omissions of the schools they attended. The settlement leaps over the borrowers' request to require administrative proceedings and provides for the automatic discharge of billions of dollars of student loans and streamlined claim processing. This settlement is separate and apart from President Biden's broader program to forgive $430 billion in student debt. The key question now at final approval concerns whether the Secretary has the authority to enter into such a settlement.

STATEMENT

Title IV of the Higher Education Act directs the Secretary of Education "to assist in making available the benefits of postsecondary education to eligible students" through financial-assistance programs. The Student Loan Reform Act of 1993 directed the Secretary to promulgate legislative regulations for agency consideration of discharges of loans due to the wrongful acts or omissions of the schools attended by the borrowers. 20 U.S.C. §§ 1070, 1087e(h); Pub. L. No. 103-66 (1993).

The Secretary established the first "borrower defense" program for certain federal loans in 1994, which allowed a borrower to "assert as a defense against repayment of his or her loan any act or omission of the school attended by the student that would give rise to a cause of action against the school under applicable State law." 59 Fed. Reg. 61,664, 61,696 (Dec. 1, 1994); *see also* 60 Fed. Reg. 37,768 (July 21, 1995). These rules went largely unused for the next twenty years (AR 590).

That all changed in May 2015 with the collapse of Corinthian Colleges, Inc., a for-profit college with more than 100 campuses and over 70,000 students. The Department faced a "flood of borrower defense claims submitted by Corinthian students." Secretary John B. King, Jr. quickly moved to update the regulations for handling these applications to expedite processing. 81 Fed. Reg. 39,330, 39,330, 39,335 (June 16, 2016); 81 Fed. Reg. 75,926 (Nov. 1, 2016) (final regulation).[1]

The Secretary recruited an interim "Special Master" Joseph Smith to assess the influx of claims, and eventually created a "Borrower Defense Unit" ("BDU") to address the backlog. In total, by the end of the Obama Administration, the Secretary had approved 31,773 applications for discharge and found 245 ineligible, for a 99.2% grant rate (a rate that includes both Corinthian students and claimants who attended other schools). Borrowers, however, had

[1] Our action does not directly address issues related to Corinthian, which proceeded in a separate action filed in our district, *Calvillo Manriquez v. DeVos*, No. C 17-07210 (N.D. Cal. filed Dec. 20, 2017) (Judge Sallie Kim).

submitted many thousands more which remained unexamined (AR 339–40, 347, 369, 384–85, 392–94, 502–03).

After the 2016 election and a change in administrations, new Secretary Elisabeth DeVos paused claim adjudications in order to review the overall procedure. She did, however, honor 16,164 borrower-defense applications approved but not yet finalized before the change in administrations, albeit with "extreme displeasure" (Dkt. No. 66-3, Ex. 7). Including all prior decisions, by June 2018 the Department had granted in total 47,942 applications and denied or closed 11,940, for an 80% grant rate for borrower defense-claims. (The grant rate under Secretary DeVos alone was 58%.) By that point, borrowers had submitted, in total, 165,880 applications, leaving 105,998 still to be decided (AR 401). The flood of applications continued.

Then, all adjudication stopped. For *eighteen* months, well into this suit, the Secretary issued zero decisions. As of June 2019, borrowers had filed (from day one) 272,721 applications and 210,168 of them remained pending (AR 350, 397–404, 587–88).

Named plaintiffs accordingly brought this suit to require the Secretary to adjudicate these applications. They argued the Secretary's delay constituted unlawful stonewalling. The complaint spelled out the relief sought: "[Named plaintiffs] do not ask this Court to adjudicate their borrower defenses. Nor do they ask this Court to dictate how the Department should prioritize their pending borrower defenses. Their request is simple: they seek an order compelling the Department to start granting or denying their borrower defenses and vacating the Department's policy of withholding resolution" (Compl. ¶¶ 1, 10).

A Rule 23(b)(2) class was eventually certified as follows:

> All people who borrowed a Direct Loan or FFEL loan to pay for a program of higher education, who have asserted a borrower defense to repayment to the U.S. Department of Education, whose borrower defense has not been granted or denied on the merits, and who is not a class member in *Calvillo Manriquez v. DeVos*, No. 17-7106 (N.D. Cal.) [the latter action concerning Corinthian Colleges specifically]

(Dkt. No. 46 at 14). Afterwards, an administrative record was lodged and cross-motions for summary judgment were filed. At that point, the number of pending applications was around 225,000 (AR 591).

Before an order issued on summary judgment, the parties ostensibly reached a settlement (an earlier one than the settlement now under consideration). A May 2020 order preliminarily approved that proposal as it appeared to impose an eighteen-month deadline for the Secretary to decide claims and a twenty-one-month deadline to effect relief for claims filed by April 7, 2020. That settlement also set reporting requirements and established hefty penalties should the Secretary fail to uphold her end of the bargain (Dkt. No. 103). The parties notified the class and solicited comments for a fairness hearing scheduled for October 2020.

However, unbeknownst to class counsel or the Court, the Secretary had already adopted a practice of sending alarmingly curt form-denial notices, in violation (as class counsel put it) of both the spirit of the proposed settlement and the Administrative Procedure Act. Upon inquiry from the Court, the Secretary acknowledged that, since December 2019 (when decisions on borrower-defense applications had resumed), the Department used four templates to deny 118,300 of 131,800 applications reviewed (for an 89.8% denial rate). This was so out of keeping with the supposed settlement that the Court found there had been no meeting of the minds. An October 2020 order denied the class settlement and restarted discovery. The Secretary thereafter agreed to abstain from those types of form denials until further order (Dkt. Nos. 116, 146, 150).

Plaintiffs filed a supplemental complaint that alleged the Secretary had not actually restarted adjudication of borrower-defense claims. Rather, plaintiffs argued she had violated the law and the settlement by sending boilerplate denials without review. Plaintiffs asserted the Secretary's "presumption of denial" policy constituted further violations of the Administrative Procedure Act and the Due Process Clause of the Fifth Amendment.

After a trip to our court of appeals regarding the extent of permissible discovery (*In re Dep't of Education*, 25 F.4th 692 (9th Cir. 2022)), an order herein set a new summary judgment schedule with a hearing planned for July 28, 2022. During the pendency of the

summary judgment briefing schedule, and after another change in administrations, the parties reached the instant settlement and filed their second motion for preliminary approval.

Separate from our litigation, President Biden announced a different plan to cancel up to $10,000 of student debt for low- to middle-income borrowers. The reader should keep in mind that this order does not consider President Biden's initiative but considers only a discrete settlement for a specific group of borrowers who have filed borrower-defense applications.

In brief, the settlement under consideration here sorts class members into three groups.

For group one, approximately 200,000 borrowers or 75% of the class as defined by the settlement, the agreement provides for "full," "automatic" relief, *i.e.*, discharge of the borrower's federal loans, cash refunds of amounts paid to the Department, and credit repair. This "up-front" relief would go to class members who attended one of the 151 schools listed in Exhibit C to the settlement (151 of the 6,000 colleges operating in the United States). The relief provided for this group will result in the discharge of approximately six billion dollars of debt in the aggregate.

For group two, the remaining 25% of the class as defined by the settlement (approximately 64,000 borrowers), the agreement provides for final written decisions on their borrower-defense applications within specified periods of time, correlated to how long they have been waiting for a decision. The Department will make those decisions according to a streamlined process that provides certain presumptions in favor of the borrower. Should the Department not issue a decision within a specified time, the borrower will receive full, automatic relief like the borrowers in group one. The Secretary estimates the relief provided for this group will result in the discharge of a further $1.5 billion in cumulative student debt.

For group three, those who submitted a borrower-defense application after execution of the settlement on June 22, 2022, and before final approval (approximately 179,000 borrowers), *i.e.*, "post-class applicants" as defined by the settlement, the agreement provides a streamlined process for their borrower-defense applications. If the Secretary does not render a decision within three years of final approval, then the borrower would receive full, automatic relief like

the borrowers in group one. The settlement also has reporting requirements and some appeal procedures (Dkt. No. 246-1).

Four schools filed motions to intervene to oppose the settlement: American National University (ANU), The Chicago School of Professional Psychology, Everglades College, Inc., and Lincoln Educational Services Corporation. The schools take issue with their inclusion on Exhibit C, which they label a scarlet letter. Argument on their motions to intervene were heard during the hearing on preliminary approval.

Preliminary approval was granted. After no further interested parties moved to intervene, an order found that the schools could not intervene as of right but could permissively intervene to object to the settlement (Dkt. Nos. 307, 322). This order follows full briefing and oral argument.

ANALYSIS

1. THE SECRETARY HAS AUTHORITY TO ENTER INTO THE SETTLEMENT.

Let's consider the central issue. The settlement provides extensive relief for the class: complete and automatic discharge of all loans for 75% of the settlement class — about six billion dollars in loan forgiveness; streamlined adjudication with a presumption towards discharge for the rest of the settlement class; and a presumption of discharge and borrower-friendly procedures for "post-class applicants," as defined by the settlement. This bonanza raises the question whether the Secretary has authority to provide such relief.

It is important to observe (again) that this settlement is separate and apart from the significantly more expansive loan-forgiveness plan recently announced by President Biden. That plan will (potentially) affect 40 million borrowers and cancel approximately $430 billion in student debt. *See* The Congressional Budget Office, Re: Costs of Suspending Student Loan Payments and Cancelling Debt (Sept. 26, 2022); The White House, Assessing Debt Relief's Fiscal and Cash-Flow Effects (Aug. 26, 2022). The instant settlement is anchored in separate authority. Even if the broader loan-forgiveness plan recently announced by President Biden

lacks authority (and this order does not so hold), this lesser litigation settlement lies within the authority of the government.

"[T]he Attorney General has plenary discretion under 28 U.S.C. §§ 516 and 519 to settle litigation to which the federal government is a party." *United States v. Carpenter*, 526 F.3d 1237, 1241 (9th Cir. 2008). The compromise and settlement authority has long been considered an inherent facet of the Attorney General's charge to supervise litigation for the United States. *See Confiscation Cases*, 7 Wall. 454, 19 L. Ed. 196 (1869); *Power of the Attorney General in Matters of Compromise*, 38 U.S. Op. Atty. Gen. 124 (1934). And, Section 5 of Executive Order No. 6166 (June 10, 1933), transferred to the Department of Justice the powers "to prosecute, or to defend, or to compromise, or to appeal, or to abandon prosecution or defense" of actions involving the United States. *See also* 28 U.S.C. § 510; *see generally Authority of the United States to Enter Settlements Limiting the Future Exercise of Executive Branch Discretion*, 23 U.S. Op. Off. Legal Counsel 126, 135 (1999).

Of course, the Department of Justice, though it has plenary settlement authority, cannot agree to something that the Secretary of Education cannot do in the first place. For example, the Department of Justice could not settle a lawsuit against the Federal Communications Commission by giving a plaintiff the privilege of putting a new pharmaceutical drug on the market. The FCC lacks that authority (which is possessed by the Food and Drug Administration). "The Attorney General's authority to settle litigation for its government clients stops at the walls of illegality." *Carpenter*, 526 F.3d at 1242 (quoting *Exec. Bus. Media, Inc. v. Dep't of Defense*, 3 F.3d 759, 762 (4th Cir. 1993)); *see also Heckler v. Chaney*, 470 U.S. 821, 834 (1985).

The Secretary primarily relies upon two provisions of the Higher Education Act to effectuate the instant settlement, 20 U.S.C. Sections 1082(a)(6) and 1087e(a)(1). *See also* 20 U.S.C. §§ 3441, 3471. Section 1082(a)(6) of Title 20 of the United States Code recites, in relevant part, "In the performance of, and with respect to, the functions, powers, and duties, vested in him by this part, the Secretary may . . . enforce, pay, compromise, waive, or release any right, title, claim, lien, or demand, however acquired, including any equity or any right of

redemption." This provision has been in effect since 1965 and passage of the original iteration of the Higher Education Act. Upon a plain reading, it bestows the Secretary with broad discretion over handling — and discharging — student loans. *See Nat'l Ass'n of Mfrs. v. Dep't of Defense*, 138 S. Ct. 617, 631 (2018); *United States v. Lillard*, 935 F.3d 827, 833–34 (9th Cir. 2019). The legislative history supports this reading. *See* H.R. Rep. No. 89-621, at 49 (1965); *see also* Robert A. Katzmann, Judging Statutes 29, 51–52 (2014).

The reader will note that the provision specifies "this part." Section 1082 is housed under Part B of the Student Assistance subchapter, which outlines the Federal Family Education Loan (FFEL) Program. The Federal Direct Loan Program is under a different part, Part D. Section 1087e(a)(1) of Part D, says in relevant part: "Unless otherwise specified in this part, loans made to borrowers under this part shall have the same terms, conditions, and benefits, and be available in the same amounts, as loans made to borrowers, and first disbursed on June 30, 2010, under sections 1078, 1078-2, 1078-3, and 1078-8 of this title." Since the Department first proposed borrower-defense regulations in 1994, it has construed Section 1087e to confirm that the Secretary's general discretion to discharge loans made pursuant to the FFEL Program applied with equal force to the Direct Loan program, ensuring parity. *See* 59 Fed. Reg. 42,646, 42,649 (Aug. 18, 1994); 81 Fed. Reg. 39,330, 39,368, 39,379 (June 16, 2016).

"[C]ourts generally will defer to an agency's construction of the statute it is charged with implementing." *Chaney*, 470 U.S. at 832. The legislative history supports this conclusion, in part due to the fact that the Direct Loan Program was intended to eventually replace the FFEL Program. H.R. Rep. 102-447, at 156 (1992); H.R. Doc. No. 103-82 at 3, 357 (1993); H.R. Doc. No. 103-49, at 92 (1993). Another district court has also recently found that Section 1082(a)(6) covers both FFEL loans and Direct Loans. This order finds unpersuasive the dicta from a different district court that reached the opposite conclusion as it considered different issues and because Section 1082 is the only congressional authorization in the Higher Education Act for the Secretary to sue and be sued regarding student aid, *e.g.*, Direct Loans, FFEL loans, or otherwise. *Compare Weingarten v. DeVos*, 468 F. Supp. 3d 322, 328 (D.D.C.

2020) (Judge Dabney L. Friedrich), *with Pa. Higher Educ. Assistance Agency v. Perez*, 416 F. Supp. 3d 75, 96–97 (D. Conn. 2019) (Judge Michael P. Shea). This order finds the Secretary's interpretation of Section 1087e(a)(1) the most reasonable interpretation of the provision and concludes that Section 1082(a)(6) applies to both FFEL loans and Direct Loans.

The school-intervenors argue, however, that the Secretary's interpretation of the Higher Education Act hides "elephants in mouseholes," which sets this action apart as a "major questions case." *See West Virginia v. EPA*, 142 S. Ct. 2587 (2022). As the Supreme Court recently explained,

> Extraordinary grants of regulatory authority are rarely accomplished through modest words, vague terms, or subtle devices. Nor does Congress typically use oblique or elliptical language to empower an agency to make a radical or fundamental change to a statutory scheme. Agencies have only those powers given to them by Congress, and enabling legislation is generally not an open book to which the agency may add pages and change the plot line. We presume that Congress intends to make major policy decisions itself, not leave those decisions to agencies.

Id. at 2609 (cleaned up).

In *West Virginia*, EPA had "issued a new rule concluding that the 'best system of emission reduction' for existing coal-fired power plants included a requirement that such facilities reduce their own production of electricity, or subsidize increased generation by natural gas, wind, or solar sources." "The White House stated that the Clean Power Plan would 'drive a[n] . . . aggressive transformation in the domestic energy industry.'" In other words, the rule "restructure[ed] the Nation's overall mix of electricity generation." *Id.* at 2599, 2604, 2607.

Our settlement, in contrast, will not fundamentally transform a domestic industry, nor will it have any national ripple effect. The relief will remain limited to class members in a litigated case. Yes, this settlement will discharge over six billion dollars in loans, but *West Virginia* made clear that determining whether a case contains a major question is not merely an exercise in checking the bottom line. The representative decisions cited in *West Virginia* considered "unusual" and "unheralded" applications of agency authority. *Id.* at 2608–09. There is nothing unusual about the Secretary exercising his discretion to discharge student-loan

debt, and the *scale* of relief here is inherently limited to the metes and bounds of this federal class-action litigation. *Cf. Chaney*, 470 U.S. at 833 n.4.[2]

Justice Frankfurter, as quoted with approval in *West Virginia*, reasoned that "just as established practice may shed light on the extent of power conveyed by general statutory language, so the want of assertion of power by those who presumably would be alert to exercise it, is equally significant in determining whether such power was actually conferred." 142 S. Ct. at 2610. The Secretary has exercised the authority utilized in our settlement many times, even in the past few years, even across administrations:

School	Date Announced	Est. Number of Borrowers	Est. Amount Discharged
Dream Center Education Holdings (Art Inst. of Colo.; Ill Inst. of Art)	2019	7,400	$175 M
Weingarten v. Cardona, No. C 19-02056 DLF, Dkt. No. 49 (D.D.C.)	2021	7	$0.283 M
Minnesota School of Business / Globe University	2021–22	1,191	$26 M
Marinello Schools of Beauty	2022	28,000	$238 M
Corinthian Colleges, Inc. (Everest; Heald College; WyoTech)	2022	560,000	$5.8 B
ITT Technical Institute	2022	208,000	$3.9 B
Westwood College	2022	79,000	$1.5 B

These discharges addressed both Direct Loans and loans pursuant to the FFEL program. The Secretary also stressed that the Department has discharged many student loans pursuant to Section 1082(a)(6) on an individual basis (Dkt. No. 337).

Our settlement will discharge less than three percent of the outstanding federal student loan portfolio (*see* Dkt. Nos. 325-2; 331 at 16). Intervenors assert the Department's press releases regarding the above discharges did not specifically cite Section 1082(a)(6). This is

[2] Everglades tears down a strawman when it argues that interpreting Section 1082(a)(6) to support the settlement leaves the Secretary with exclusive authority to eliminate a $1.6 trillion industry and discharge every student loan in America (Everglades Opp. 23). The Secretary has asserted no such broad authority. His actions remain rooted in, and limited to, this litigation. Recall, *West Virginia* based its analysis on EPA's own projections of the effects of the "Clean Power Plan" it had promulgated. 142 S. Ct. at 2603–04. Common sense dictates we consider the actual agency action — the settlement — not a hypothetical.

specious. Statements to the general public regarding an agency action need not provide the legal minutiae regarding the authority underlying the action. The Secretary has provided those details in a filing herein (Dkt. No. 337).

Here's the practical litigation problem the Secretary faces and seeks to settle. The borrower-defense program set up by Congress has devolved into an impossible quagmire. This has been true across all administrations, as detailed above. As of now, approximately 443,000 borrowers have pending borrower-defense applications. That is a staggering number. If, hypothetically, the Department's Borrower Defense Unit had all 33 of its claim adjudicators working 40 hours a week, 52 weeks a year (no holidays or vacation), with each claim adjudicator processing two claims per day, it would take the Department *more than twenty-five years* to get through the backlog.

Had each and every class member sued the Department individually, the Department could have settled those individual actions one by one, and it could have done so using precisely the same criteria set forth for Exhibit C — namely, indicia of misconduct and the volume of claims associated with a given school. Indeed, it could have done so without even revealing its internal criteria used to settle claims. If it can do that, then this order holds that it can resolve them all in a class settlement using the same criteria and that such a settlement falls within the plenary authority of the Secretary and the Attorney General. "For convenience, therefore, and to prevent a failure of justice, a court of equity permits a portion of the parties in interest to represent the entire body, and the decree binds all of them the same as if all were before the court." *Smith v. Swormstedt*, 57 U.S. 288, 303 (1853). This order holds that this group approach is the only feasible way for the agency to give practical relief to class members. Conducting individualized reviews is no longer practicable.

Yes, the agency has explained its criteria and placed 151 schools on a list (151 of the 6,000 colleges operating in the United States). This was done to explain why some class members will get full relief whereas others will get less relief. This does not change the fact that the Department could have used the very same criteria to settle each application one at a

time and therefore can now do the same thing on a class basis. The approach taken here is group-wise and within the plenary settlement authority of the Secretary and Attorney General.

This order rejects intervenors remaining arguments.

First, intervenors dispute the Secretary's authority under Section 1082(a)(6) based upon a rescinded, January 2021 memorandum composed by the Department's Office of General Counsel, which the Department later substantively and procedurally disavowed. *See* Dep't of Educ., Office of the General Counsel, Memorandum re: Student Loan Principal Balance Cancellation, Compromise, Discharge, and Forgiveness Authority (Jan. 12, 2021); 87 Fed. Reg. 52,943 (Aug. 30, 2022). The memo stated: "[W]e believe 20 U.S.C. § 1082(a)(6) is best construed as a limited authorization for the Secretary to provide cancellation, compromise, discharge, or forgiveness only on a case-by-case basis and then only under those circumstances specified by Congress." The memo has been rescinded and this order disagrees with it for the reasons stated above.

Second, at the hearing intervenors highlighted two other provisions they deemed statutory bars to relief. The anti-injunction provision in 20 U.S.C. Section 1082(a)(2) is inapplicable because the government is requesting and consenting to this settlement. Plaintiffs have also maintained a viable theory throughout this litigation that the Secretary acted *ultra vires*, and that consequently the anti-injunction provision does not apply. And, Section 1082(b) only places a cap on the size of settlements where the Attorney General is not involved. The government confirmed at the hearing the settlement is properly authorized.

Third, intervenors say that the settlement must incorporate the Department's standard borrower-defense regulations, citing the *Accardi* doctrine (*e.g.*, Everglades Opp. 20). This order disagrees. Those regulations constitute a procedure promulgated by the Department to perform ordinary reviews of borrower-defense applications, as enabled by 20 U.S.C. Section 1087e(h). Within the specific context of settling this class-action litigation, in contrast, the Secretary relies upon different, independent sources of statutory authorization — Sections 1082(a)(6) and 1087e(a)(1). The Secretary has plenary discretion to settle litigation within the confines of the law; this order cannot dictate the basis by which the Secretary effectuates the

settlement, particularly in light of the fact that the Secretary has multiple sources of statutory authority on which to premise action on student loans. *See Carpenter*, 526 F.3d at 1241; *United States v. Hercules, Inc.*, 961 F.2d 796, 798 (8th Cir. 1992). Imposing such a mandate would limit the Secretary's broad discretion in settlement — "the court's role should be more restrained." *Citizens for a Better Env't v. Gorsuch*, 718 F.2d 1117, 1126–27 (D.C. Cir. 1983).

Fourth, intervenors similarly argue that the Secretary cannot "circumvent" notice-and-comment rulemaking under the guise of settlement, citing *Conservation Northwest v. Sherman*, 715 F.3d 1181 (9th Cir. 2013). But in that opinion our court of appeals held "that a district court abuses its discretion when it enters a consent decree that *permanently and substantially* amends an agency rule that would have otherwise been subject to statutory rulemaking procedures." *Id.* at 1187 (emphasis added). The Secretary has not altered the borrower-defense procedures at all. Those regulations remain in place. In fact, the Department recently amended them. *See* 87 Fed. Reg. 65,904 (Nov. 1, 2022). Rather, for the specific group of borrowers contemplated by the class certification order and this settlement, the Secretary has crafted a process for resolving the enormous backlog of claims, and he has done so pursuant to specific congressional authorization. *See Turtle Island Restoration Network v. Dep't of Commerce*, 672 F.3d 1160, 1167 (9th Cir. 2012).

Fifth, intervenors assert "the parties cannot achieve by settlement what the [p]laintiffs could not have achieved by litigating the case to judgment" as a further reason that the borrower-defense regulations must be followed (*see* Lincoln Opp. 17). The Supreme Court has made clear, however, that "a federal court is not necessarily barred from entering a consent decree merely because the decree provides broader relief than the court could have awarded after a trial." *Local No. 93, Int'l Ass'n of Firefighters v. City of Cleveland*, 478 U.S. 501, 525 (1986). This statement applies with equal force to settlements. *See id.* at 519; *Conservation Nw.*, 715 F.3d at 1185–86.

In sum, the Secretary has not exceeded his statutory authority or failed to follow the agency's regulations by entering into the settlement. Intervenors' constitutional arguments

concern their inclusion on Exhibit C, which this order considers next in conjunction with their broader reputational harm contentions.

2. EXHIBIT C DOES NOT INVALIDATE THE SETTLEMENT.

The settlement grants full and automatic relief to all class members that attended the schools listed on Exhibit C. Intervenors argue Exhibit C constitutes an impermissible scarlet letter. This order finds the list does not carry the necessary legal significance to justify denying final approval of the settlement.

The settlement agreement recites that the Secretary "will effectuate Full Settlement Relief for each and every Class Member whose Relevant Loan Debt is associated with the schools, programs, and School Groups listed in Exhibit C." Intervenors point to a statement made in the class and Secretary's joint motion for preliminary approval:

> The Department has determined that attendance at one of these schools justifies presumptive relief, for purposes of this settlement, based on strong indicia regarding substantial misconduct by listed schools, whether credibly alleged or in some instances proven, and the high rate of class members with applications related to the listed schools

(Dkt. No. 246 at 3). The joint motion for final approval further discussed automatic loan discharge for students who attended a school on Exhibit C:

> Such automatic relief is warranted in the context of the overarching settlement structure, as certain indicia of misconduct by the listed schools, including the high volume of Class Members with applications related to the listed schools, led the Department to conclude that these Class Members were entitled to summary settlement relief without any further time-consuming individualized review process

(Br. 11). Intervenors concentrate their fire on these statements and their inclusion on Exhibit C.

These explanations do not impose any liability whatsoever on intervenors, for the schools cannot be held liable for any remedial measures absent proceedings initiated specifically against them. To understand why this is so, it is necessary to summarize the relevant regulations. When a borrower-defense application criticizes a school, the Department gives the school notice and the opportunity to file a responsive statement, although the school is not

required to do so. *Regardless of whether the school files such a statement (or not), the grant of a borrower-defense application has no binding effect on the school*. If the Department approves a borrower-defense application, then that can be the predicate for the department *initiating* a proceeding against the school for recoupment. But even in such an instance, the school still retains all due process rights, is not bound by the success of the student's application, and is free to litigate *ab initio* the merits of its performance. The Department may also pursue other remedial actions against a school unrelated to a successful borrower-defense application but, again, in those instances the school still has all of its due process protections. *See* 34 C.F.R. § 685.308; 34 C.F.R. Pt. 668, Subpt. G.[3] Nothing in this settlement will cause any school to lose a dime.

Moreover, the settlement does not constitute a successful or approved borrower-defense claim, a position maintained by both the class and Secretary (*see* Dkt. No. 300). Therefore, no recoupment action could be initiated in any event as a result of the settlement.

In *Paul v. Davis*, 424 U.S. 693, 701 (1976), the Supreme Court, in consideration of an "active shoplifters" flyer distributed by police that listed the plaintiff therein, held that "[w]hile we have in a number of our prior cases pointed out the frequently drastic effect of the 'stigma' which may result from defamation by the government in a variety of contexts, this line of cases does not establish the proposition that reputation alone, apart from some more tangible interests such as employment, is either 'liberty' or 'property' by itself sufficient to invoke the procedural protection of the Due Process Clause." *See also Fikre v. FBI*, 35 F.4th 762, 776 (9th Cir. 2022).

[3] For clarity, this order lays out the order of operations regarding a school's participation in borrower-defense claims. For loans issued prior to July 1, 2017, a Department official notifies the school and considers any response or submission from the school. *See* 34 C.F.R. § 685.222(a)(1); *id.* § 685.206(c)(2); *id.* § 685.222(e)(3)(i). For loans issued on or after July 1, 2017 but before July 1, 2020, a Department official will follow that same procedure of notifying the school and considering any response or submission from the school. *Id.* § 685.222(a)(2), (e)(3)(i). For loans issued on or after July 1, 2020, the Department provides the school a copy of the borrower's claim and other evidence, after which the school may respond and the borrower may reply (copies of which will also be provided to the school). *Id.* § 685.206(e)(8)–(12). A new set of regulations will go into effect July 1, 2023. *See* 87 Fed. Reg. 65,904 (Nov. 1, 2022).

As explained, the schools have lost no procedural rights, nor has their status been altered. No liberty or property interest has been disturbed. Any hypothetical, future remedial action would proceed according to established regulations, which would provide the schools with full due process. *Cf. Endy v. Cnty. of Los Angeles*, 975 F.3d 757, 764–65 (9th Cir. 2020). The Department has also represented in the sworn declaration of Benjamin Miller that it does not consider inclusion on Exhibit C a finding of misconduct and that inclusion does not constitute evidence that could or would be considered in an action by the Department against a school. The Court relied upon, and the Court expects the government to stand behind, the statements made in the Miller Declaration (Dkt. No. 288-1).

Furthermore, because the class and Secretary's briefing advocating for approval of the settlement had no legally binding effect on the intervenors, no actionable reputational harm exists on that basis either. *See Joshi v. Nat'l Transp. Safety Bd.*, 791 F.3d 8, 11–12 (D.C. Cir. 2015); *see also Przywieczerski v. Blinken*, 2021 WL 2385822, at *4 (D.N.J. June 10, 2021) (Judge Kevin McNulty) (citing cases). The issues herein differ from those in *Foretich v. United States*, 351 F.3d 1198, 1212–13 (D.C. Cir. 2003), which considered a fully enacted law that embodied a congressional determination of misconduct. Here, there is no binding or official determination of misconduct against the schools. To repeat, since the settlement does not utilize the borrower-defense procedure, the Secretary cannot initiate a recoupment action against any of the schools listed on Exhibit C premised upon a successful borrower-defense application.

Finally, intervenors contend their inclusion on Exhibit C means the settlement is not fair to them. They argue the "court must 'reach a reasoned judgment that . . . the settlement, taken as a whole, is fair, reasonable and adequate *to all concerned*'" (Lincoln Opp. 9, quoting *Officers for Just. v. Civ. Serv. Comm'n of City & Cnty. of S.F.*, 688 F.2d 615, 625 (9th Cir. 1982), emphasis in brief). In light of the foregoing, and taking stock of the settlement as a whole, this order finds that intervenors' speculative assertions of harm fail to render the settlement unfair, especially in light of the significant benefits to both the class and Department in settling this litigation.

To repeat, had borrowers brought individual actions, each could have been compromised using whatever criteria the Attorney General and Secretary felt wise in the circumstances, including the criteria behind Exhibit C. That the claims are aggregated and now settled on a class basis using the same criteria does not matter.

3. THE CASE IS NOT MOOT AND PLAINTIFFS STILL HAVE STANDING.

The school-intervenors further argue the district court does not have jurisdiction to entertain the settlement because plaintiffs lack standing and the action is now moot. Both arguments fail.

First, to establish Article III standing, plaintiffs must show they have suffered an injury in fact that is concrete, particularized, and actual or imminent, that the injury was likely caused by the defendants, and that the injury would likely be redressed by judicial relief. Plaintiffs must demonstrate standing to the degree required by each stage of the litigation, including at the class-action settlement stage. *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2203, 2208 (2021); *Campbell v. Facebook, Inc.*, 951 F.3d 1106, 1116 (9th Cir. 2020).

This order finds all class members, including our named plaintiffs, have properly asserted a real and concrete injury arising from the Secretary's alleged unlawful handling of their borrower-defense claims. The injury is two-fold. The Secretary's improper delay and suspension of processing claims for debt relief has directly led to a specific economic injury to each class member. Unlawful delay of debt relief results in clear monetary harm. Moreover, as detailed in the supplemental complaint, the Secretary's "presumption of denial" policy and form denials have resulted in another layer of injury to class members. These issues would likely be redressed by judicial action. To this, the intervenors make the following arguments.

Everglades and ANU argue plaintiffs cannot demonstrate standing for the remedies provided by the settlement (Everglades Opp. 8; ANU Opp. 24). The standing analysis, however, considers plaintiffs' stake in the case and whether they can demonstrate standing "for each claim that they press and for each form of relief that they seek (for example, injunctive relief and damages)." *See TransUnion*, 141 S. Ct. at 2203, 2208. Plaintiffs have properly

demonstrated such a stake in this action and for the judicial relief they seek. And again, a settlement agreement can provide broader relief than a court could have awarded after a trial. *See Firefighters*, 478 U.S. at 519, 525; *Conservation Nw.*, 715 F.3d at 1185–86. ANU's assertion that the settlement's rescinding of form denials impermissibly puts borrowers that lack standing back into the class misses the mark for an additional reason: it wholly ignores the supplemental complaint and the allegations that the Secretary never lawfully adjudicated those claims in the first place. ANU's contention that this constitutes a "second bite at the apple" ignores the problem they never got a bite in the first place.

The Chicago School and ANU further argue the class as defined is overbroad and inherently includes individuals who lack standing. Their theory is incorrect. Per the class definition, any class member that has their claims properly adjudicated will drop out of the class. All current class members, therefore, have a concrete injury stemming from the Secretary's alleged improper delay and presumption of denial policy. The intervenors' reference to other settlements and discharges apart from this litigation is similarly inapposite. This settlement provides no opportunity for any "unjust enrichment" as it simply discharges a borrower's affirmative obligation to repay their student loans. The agreement provides that a borrower's relief cannot exceed the student loan debt associated with their borrower-defense application (Settlement Agreement II.W, Dkt. No. 246-1). On our record, there is no proof of any double recovery and specifically no proof of any litigation against a school that resulted in money going to a student specifically for loans. So, it is speculation by intervenors, and speculation only, that some will get duplicative recovery.

Second, litigation that becomes moot during the proceedings "is no longer a 'Case' or 'Controversy' for purposes of Article III, and is outside the jurisdiction of the federal courts." *United States v. Sanchez-Gomez*, 138 S. Ct. 1532, 1537 (2018) (quotations removed). Dismissal based on mootness, however, "is justified only if it is absolutely clear that the litigant no longer has any need of the judicial protection that it sought." *Pizzuto v. Tewalt*, 997 F.3d 893, 903 (9th Cir. 2021) (cleaned up).

That is not the case here. Intervenors argue the Secretary has already "approved tens of thousands of borrower defense applications" (Everglades Opp. 7, quoting Dkt. No. 249 at 1). But what of the hundreds of thousands of applications that remain? It is not enough for merely some absent class members to have dropped out of the class because they have had their claims adjudicated. Unquestionably, five of our seven named plaintiffs' borrower-defense applications remain pending and their loans outstanding. The Chicago School says that two class representatives who attended Corinthian (but are not part of the *Calvillo Manriquez* class action) will have their loans discharged by the Secretary in a separate agency action (Chicago Opp. 13). This does not render our action moot, nor otherwise impact the validity of the class. *See also Rosebrock v. Mathis*, 745 F.3d 963, 971 (9th Cir. 2014).

True, the Secretary argued that this action was moot in his most recent cross-motion for summary judgment, briefing of which was interrupted by the joint filing of the motion for preliminary approval (Dkt. No. 249). Like all litigants, however, the Secretary can aggressively advocate for his position while simultaneously negotiating a settlement that will end the litigation without the risk of trial. "Settlement is to be encouraged." *Turtle Island*, 672 F.3d at 1167. Because the Secretary has not resolved all of the pending borrower-defense applications, nor addressed the issues stemming from the presumption of denial policy used during the pendency of this action, this litigation is not moot.

Finally, Everglades, ANU, and Lincoln all argue that class members lack standing or that this action is moot in light of President Biden's recently announced initiative for student loan relief, which *could* provide up to $10,000 of debt relief for low and middle-income federal student-loan borrowers. *See* The White House, Fact Sheet: President Biden Announces Student Loan Relief for Borrowers Who Need It Most (Aug. 24, 2022). The instant settlement, however, is anchored in separate authority and is completely independent from the Biden plan, which has already been declared unlawful by one district court, so relief thereunder is in some doubt. *See Brown v. Dep't of Education*, 2022 WL 16858525, No. C 22-0908, Dkt. No. 37 (N.D. Tex. Nov. 10, 2022) (Judge Mark T. Pittman); *see also, e.g.*, *Nebraska v. Biden,* No. 22-3179 (8th Cir. Nov. 14, 2022). This order need not and does not opine on the authority of the

President to cancel student loans (one way or the other), but this order does hold that the instant settlement, involving a narrower class and narrower relief, falls within the government's authority.

In sum, this order finds that plaintiffs have adequately demonstrated standing at this stage of the proceedings and that this action is not moot.

4. THE SETTLEMENT IS STILL VIABLE AND FAIR, REASONABLE, AND ADEQUATE.

A settlement purporting to bind absent class members must be fair, reasonable, and adequate. *See* FRCP 23(e). This settlement is not only fair, reasonable, and adequate but a grand slam home run for class members. They originally sued just to get a decision one way or another on their applications. Now, they are getting total forgiveness in most cases. For the remainder of the class, it is at least a home run. This is a very good deal for the class.

Intervenors initially question whether a viable Rule 23(b)(2) class still exists for which settlement relief can be approved, challenging commonality, typicality, adequacy, the relief provided by the settlement, and the validity of the "post-class applicant" group.

Considering commonality, "Rule 23(b)(2) applies only when a single injunction or declaratory judgment would provide relief to each member of the class." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 360 (2011). The class certification order, to this end, found "the Department's alleged policy of inaction applies to the proposed class as a whole." The order made clear that "whether a borrower defense claim has been pending for three years or three months, all claims were subject to the same alleged policy of inaction" (Dkt. No. 46 at 12, 13). As the litigation progressed, and the Secretary's practice of issuing form denials came to light, plaintiffs sought additional relief consistent with Rule 23(b)(2) to hold the Secretary accountable for further alleged *ultra vires* actions (*e.g.*, Dkt. No. 245 at 33). All class members remain subject to the same delay and allegedly unlawful policies. A single judicial remedy directed at the Secretary's activities could provide class-wide relief in a single stroke. Commonality remains.

Everglades argues that differences in class member's individual circumstances defeat typicality, but it provides no support for that argument. Typicality — like all the Rule 23 requirements — "limit[s] the class claims to those fairly encompassed by the named plaintiff's claims." *Dukes*, 564 U.S. at 349 (quotation omitted). Plaintiffs' claims focus on the Department's policy of inaction, form denials, and presumption of denial. Typicality is still satisfied.

Next, Lincoln says that the settlement "effectively" provides damages, which therefore destroys the viability of the class (Lincoln Opp. 15). *Dukes* explained that Rule 23(b)(2) "does not authorize class certification when each class member would be entitled to an individualized award of monetary damages." 564 U.S. at 360–61. The settlement relief here fits squarely within Rule 23(b)(2) as it in effect provides injunctive relief voiding the borrower's obligation to repay their student loans. In some cases a class member will receive refunds, but refunds are restitution and fall within the relief available in an injunction/declaratory relief action. Discharge of an obligation to repay a debt does not constitute monetary damages.

Intervenors similarly argue that the settlement is inadequate and unfair because some class members will receive automatic debt relief while others will have their borrower-defense applications reviewed. This mirrors the fairness inquiry recited by Rule 23(e)(2)(D), which requires the settlement to treat class members equitably relative to one another, not for each class member to receive identical relief. The class and Secretary have provided a logical and reasoned explanation regarding how the volume of applications and certain indicia of misconduct asserted against each school warrant tailoring settlement relief to certain subgroups. This order finds such differentiation equitable. Rule 23(b)(2) does not affect this conclusion because it remains true that a single injunction or declaratory judgment after a trial could provide relief and, as explained, a settlement can provide broader relief than a court could have awarded after a trial. *See Firefighters*, 478 U.S. at 519, 525; *Conservation Nw.*, 715 F.3d at 1185–86.

The last issue intervenors raise regarding the general viability of the settlement concerns the "post-class applicant" group, which is composed of individuals that filed a borrower-

defense application in between execution of the settlement on June 22, 2022, and final approval. The named plaintiffs and Department state that this group does not fall "within the class definition and thus [is] not formally part of the Rule 23 analysis" (Mot. Final Approval 12 n.3). Contrary to these points, the class certification order set no cut-off date for membership, so the class definition as recited in that order clearly encompasses all of these borrowers. Nevertheless, to ensure the overall fairness of the settlement, this group will receive relief under the agreement, namely their applications will be decided with streamlined procedures within three years on pain of automatic discharge of the loans. This lesser relief is justified on the ground that this group has not been waiting as long for a decision as groups one and two.

With no issues regarding the viability of the class, this order turns to the eight *Churchill* factors our court of appeals has enumerated for review in the final fairness assessment to determine whether the settlement is fair, reasonable, and adequate: (1) the strength of the plaintiff's case; (2) the suit's risk, expense, complexity, and the likely duration of further litigation; (3) the risk of maintaining class-action status throughout the trial; (4) the amount offered in settlement; (5) the extent of discovery and the stage of the proceedings; (6) the experience and views of counsel; (7) the presence of a governmental participant; and (8) the reaction of class members of the proposed settlement. Rule 23(e)(2) also requires the district court to consider an overlapping set of factors. *See Kim v. Allison*, 8 F.4th 1170, 1178–79 (9th Cir. 2021) (quoting *In re Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d 935, 946 (9th Cir. 2011)); *Churchill Vill., LLC. v. Gen. Elec.*, 361 F.3d 566 (9th Cir. 2004).

Many of these factors have been addressed in the foregoing analysis. This order finds the second, fifth, sixth, and seventh *Churchill* factors all clearly and strongly favor settlement. A brief review of the docket (and this order) will reveal to the reader the complexity of the issues this action considers. Continuing on with this litigation through summary judgment and (possibly) trial would require still more expense and delay in an action directly addressing undue delay and agency inaction. *Indeed, we have already attempted a settlement once and the proposed timeline for that entire process has come and gone*. Discovery has already taken

place, so the parties have had an adequate opportunity to evaluate the strengths and weaknesses of their respective positions. Counsel for both sides, which includes the government, have advocated for the advantages of this settlement.

Next, the first and third factors also favor settlement. Plaintiffs have strong arguments that the Secretary's actions were unlawful, but as the opening salvos in the latest round of summary judgment reveal, the ordinary risks of litigating on a class-wide basis persist. Moreover, as plaintiffs acknowledge, questions remain about the remedies they could seek and be granted after a trial.

The relief offered (the fourth factor) clearly favors settlement. This order pauses to again emphasize that automatic loan discharges and a streamlined process for adjudicating the remaining borrower-defense applications as provided for in the settlement will likely prove a transformative opportunity for many class members. These class members decided to take on considerable debt to attend schools that they now allege misled them on the value of such a significant financial decision. The relief also furthers the Secretary's interest in resolving the backlog of claims. Notice was sufficient, the discharge process ranks as adequate, attorney's fees have been left to the Court's discretion, and the method for processing relief is also fair.

The reaction of the class (the eighth and final *Churchill* factor) also supports the settlement. The class has actively participated in the settlement approval process, sending both class counsel and the Court over 1,500 letters and emails.

Most of these letters express complete support for the agreement. One class member wrote that, "Like so many thousands of college students I was misled by my graduate school and given a financial death sentence in student loan debt. I have spent my adult life following the path of my heart and helping hundreds of patients, yet I can barely help myself." Another voiced support but "ask[ed] the Court to ensure that [the] final terms of the settlement protect individual applicants from arbitrary treatment by the Department." As this order demonstrates, the settlement includes appropriate protections.

Fewer than 175 borrowers objected or requested changes to the settlement. Primarily, these borrowers requested: additional schools be added to Exhibit C; delay of the cut-off date

for class membership (as defined by the settlement); automatic debt relief for "post-class applicants"; faster timelines for debt relief; and relief for those borrowers who refinanced their loans into private loans. None of these concerns constitute meaningful objections to the settlement as a whole. Rather, these borrowers request further relief and do not call into question the overall fairness of the settlement. One "objector" expressed concern about never receiving notice of this class action (she did not file her borrower-defense application until after the announcement of the instant settlement). She hence objected to being considered a "post-class applicant." As discussed, this objector's issues speak to the importance of the streamlined procedures for the "post-class applicant" designation in ensuring the overall fairness of the settlement. Finally, private borrowers are not part of our class.[4]

In sum, the *Churchill* factors favor settlement. We turn to the remaining two factors listed in Rule 23(e)(2).

First, named plaintiffs and class counsel have adequately represented the class. Everglades, the Chicago School, and one objector argued that, because class counsel was (until recently) affiliated with Harvard Law School, a conflict of interest existed. The objector noted, and intervenors echoed, that his program, the American Repertory Theater/Moscow Art Theater Institute for Advanced Theater Training at Harvard ("ART") was not on Exhibit C. This order is not persuaded. Any speculative conflict of interest is now resolved (class counsel have separated from Harvard) and neither the objecting class member nor the intervenors provide any meaningful basis to call into question counsel's representation or ART's exclusion from Exhibit C. The settlement provides substantial relief to class members, which supports the conclusion named plaintiffs and class counsel have adequately represented the class.

Second, the proposal was negotiated at arm's length. Everglades and the Chicago School object that the settlement is collusive. Taking a step back, the purpose of any such objection is to protect absent class members from settlements that disproportionately reward named

[4] ANU makes a brief argument that the settlement is unfair to the class because it imposes tax risks that the Secretary and named plaintiffs failed to address. But every class member has voluntarily filed a borrower-defense application to have their loan discharged. Any ensuing tax consequences accordingly do not rank as unfair.

plaintiffs and their counsel at the expense of the class as a whole. Intervenors do not raise this problem at all. They argue instead that the settlement provides so much to the class it could not have been negotiated at arm's length. This just underscores all the more that the settlement is and will be in the best interest of the class. That the settlement was conducted in "secret" goes nowhere. It's a common practice.

In short, the *Churchill* and Rule 23 factors favor final approval of the settlement.

CONCLUSION

For the foregoing reasons, all objections are **OVERRULED**. Final approval of the settlement is **GRANTED**. This action is hereby **DISMISSED WITH PREJUDICE**, except in that the Court shall retain jurisdiction over this action as set forth in the settlement agreement. Once the defendants have effectuated all appropriate relief, plaintiffs and defendants shall file a notice with the Court. A joint status report regarding the class and Department's progress in carrying out the settlement is due **JANUARY 26, 2023**.

IT IS SO ORDERED.

Dated: November 16, 2022.

WILLIAM ALSUP
UNITED STATES DISTRICT JUDGE

United States District Court
Northern District of California

United States District Court
Northern District of California

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

THERESA SWEET, et al.,

Plaintiffs,

v.

MIGUEL CARDONA, et al.,

Defendants.

No. C 19-03674 WHA

FINAL JUDGMENT

For the reasons stated in the accompanying order granting final approval of the class settlement, the Court directs that judgment of dismissal of the class's claims against the Secretary of Education and the United States Department of Education shall be final and appealable in accordance with Federal Rule of Civil Procedure 54. The Court should retain jurisdiction to monitor and oversee implementation of the settlement as set forth in the settlement agreement.

IT IS SO ORDERED.

Dated: November 16, 2022.

WILLIAM ALSUP
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

THERESA SWEET, CHENELLE ARCHIBALD, DANIEL DEEGAN, SAMUEL HOOD, TRESA APODACA, ALICIA DAVIS, and JESSICA JACOBSON, individually and on behalf of all others similarly situated,

Plaintiffs,

v.

ELISABETH DEVOS, in her official capacity as Secretary of the United States Department of Education, and THE UNITED STATES DEPARTMENT OF EDUCATION,

Defendants.
/

No. C 19-03674 WHA

ORDER GRANTING MOTION FOR CLASS CERTIFICATION

INTRODUCTION

In this putative class action arising under the Higher Education Act and the APA, plaintiffs move for class certification. For the reasons stated below, the motion is **GRANTED**.

STATEMENT

Many for-profit colleges have left numerous students saddled with debt. Certain of these schools used fraudulent tactics to enroll students, such as inflating job placement numbers. Members of the instant putative class — including plaintiffs Theresa Sweet, Chenelle Archibald, Daniel Deegan, Samuel Hood, Tresa Apodaca, Alicia Davis, and Jessica Jacobson — sought to cancel their federal student loans with defendant United States Department of

Education under the "borrower defense" rule, which allows defrauded students to apply for loan forgiveness based on their school's misconduct.

Plaintiffs allege that since June 2018, the Department has arbitrarily and capriciously stonewalled (and continues to stonewall) the relief process with its "blanket refusal" to process their borrower claims. In June 2019, they brought the instant putative class action, seeking to compel the Department to at least begin deciding applications again. Plaintiffs fired the opening salvo soon thereafter with the instant motion for class certification. Most of the underlying facts were developed on briefing for the instant motion and are briefly summarized herein.

1. BORROWER DEFENSE REGULATORY SCHEME.

Title IV of the Higher Education Act of 1965, 20 U.S.C. § 1070 *et seq*., authorizes the Secretary of Education "to assist in making available the benefits of postsecondary education to eligible students" through financial-assistance programs. *See id*. §§ 1070(a), 1071(a)(1). These loan programs include the William D. Ford Federal Direct Loan Program ("Direct Loan Program"), which allows students attending "participating institutions of higher education" to secure direct loans from the federal government, and the Federal Family Education Loan ("FFEL") Program, which allows the Department to reinsure guaranteed loans made to students by financial institutions. *Id.* §§ 1078, 1087a.

The Act allows the Department to cancel a student federal loan repayment based on a school's misconduct. In implementing the Direct Loan Program, the Secretary "shall specify in regulations which acts or omissions of an institution of higher education a borrower may assert as a defense to repayment of a loan under this part." 20 U.S.C. § 1087e(h). The FFEL Program, which has been ineffective since 2010, had already provided for borrower defense claims (Dkt. No. 20-13 at 4).

In January 1994, the Secretary promulgated regulations setting forth the first variation of the "borrower defense" rule for direct loans — later amended in December 1994 and effective 1995 — which allowed a borrower to "assert as a defense against repayment of his or her loan 'any act or omission of the school attended by the [borrower] that would give rise to a cause of

action against the school under applicable State law.' " 60 Fed. Reg. 37,768, 37,770 (July 21, 1995) (quoting 34 C.F.R. § 685.206(c) (1995)). This standard still applies to all loans "first disbursed prior to July 1, 2017." 34 C.F.R. § 685.206 (2018).

In May 2015, Corinthian Colleges, Inc. ("Corinthian") — "a publicly traded company [that] operat[ed] numerous postsecondary schools that enrolled over 70,000 students at more than 100 campuses nationwide" — collapsed. 81 Fed. Reg. 39,330, 39,335 (June 16, 2016). In the wake of Corinthian's bankruptcy filing and the Department's finding "that the college had misrepresented its job placement rates," Corinthian students submitted a "flood of borrower defense claims." *Id*. at 39,330, 39,335.

In response to the heightened demand, the Department began creating a streamlined process and infrastructure for adjudicating the borrower defense claims. In June 2015, the Department appointed a special master "to create and oversee a process to provide debt relief for these Corinthian borrowers" and created a "Borrower Defense Unit" to handle those claims (Dkt. No. 20-15 at 7). 81 Fed. Reg. at 39,335. In November 2016, it promulgated new borrower defense regulations — scheduled to take effect on July 1, 2017 — to codify the process for adjudication and to set a new standard for borrower defense claims. *See* 34 C.F.R. §§ 685.206, 685.222 (2018). The regulations required a borrower to submit an application with evidence supporting his or her claim and allowed the Secretary to designate an official to resolve the claim. *Id*. § 685.222(e).

In 2017, the Department created a Borrower Defense Review Panel to examine the Department's borrower defense process and make recommendations on how to address pending claims going forward. That panel "decided to honor approximately 16,000 borrower defense claim approvals made, but not effectuated, prior to January 20, 2017" (Compl. ¶¶ 164–65; Dkt. No. 20-15 at 33).

Shortly before the 2016 regulations' effective date (July 1, 2017), the Department stayed the regulations under Section 705 of the APA, which delay another federal court found arbitrary and capricious in September 2018. *Bauer v. DeVos*, 325 F. Supp. 3d 74, 110 (D.D.C. 2018) (Judge Randolph Moss). In May 2018, yet another federal court in this district preliminarily

enjoined the Department's use of its new "partial relief methodology," which methodology provided for, in some cases, less than full discharges depending on the level of harm suffered by borrowers at particular Corinthian programs (Dkt. No. 38 at 5). *Calvillo Manriquez v. Devos*, 345 F. Supp. 3d 1077 (N.D. Cal. 2018) (Magistrate Judge Sallie Kim). The appeal of this preliminary injunction is currently pending before our court of appeals.[1]

2. THE INSTANT ACTION.

Borrowers continue to seek to cancel their student loans. Yet the Department has not decided a borrower defense claim since June 2018. Plaintiffs are former students of for-profit schools who have asserted borrower defense claims as early as 2015. They allege that the Department's inaction continues to cause putative class members ongoing harm (Compl. ¶¶ 181, 187, 205–35).

For example, plaintiff Theresa Sweet graduated from the Brooks Institute of Photography ("Brooks"), a for-profit school offering programs in the visual arts, in 2006. Brooks represented to her that "80–90% of graduates got employed immediately after graduating"; "promised that they would help [her] get a job from 'faculty networking' or from the job placement assistance office"; and "promised that Brooks credits would transfer to other colleges and universities." Sweet borrowed about $46,107 in FFEL loans (and over $140,000 in private loans). Investigations eventually revealed that Brooks had violated state law, such as misrepresenting students' post-graduation income. Brooks shut down in August 2016. Sweet now works in a hospital as a certified nurse's assistant. She has never held a job that used her Brooks education. She could not transfer her credits from Brooks to other colleges or universities. Sweet asserted her borrower defense to the Department in the fall of 2016. The Department has yet to act on her application. Meanwhile, the interest on her loans continues to grow, with her federal loans now at $65,000. The debt has affected her credit, which in turn has affected her career prospects, and other aspects of her life (*id*. ¶¶ 237–39, 244–54; Dkt. No. 20-2 ¶¶ 5–6).

[1] The Department has subsequently finalized new borrower defense regulations, which "rescind[] in large part the 2016 regulations and establish[] new standards governing" borrower defense claims for loans first disbursed on or after July 1, 2020 (Dkt. No. 38 at 3 n.1).

In June 2019, plaintiffs filed the instant putative class action, alleging that the Department "refuses to grant or deny" any of the over 158,000 pending borrower defense applications as a matter of policy. They assert a single claim under Section 706(1) of the APA under the theory that the Department's inaction constituted unlawfully withheld and unreasonably delayed agency action. They seek injunctive relief compelling the Department to begin deciding borrower defense claims again. That is, they seek to "escape this limbo" and simply want a decision — whether an approval or denial — on their applications (Compl. ¶¶ 187, 377–89; Dkt. No. 20 at 2).[2]

Plaintiffs now move to represent other borrower defense claimants and certify the following class pursuant to Federal Rules of Civil Procedure 23(a) and 23(b)(2):

> All people who borrowed a Direct Loan or FFEL loan to pay for a program of higher education, who have asserted a borrower defense to repayment to the U.S. Department of Education, whose borrower defense has not been granted or denied on the merits, and who is not a class member in *Calvillo Manriquez v. DeVos*, No. 17-7106 (N.D. Cal.).

In the alternative, plaintiffs seek an order holding the instant motion in abeyance until further discovery (Dkt. No. 20 at 1).

Defendants oppose, arguing that plaintiffs failed to show that their claim can be resolved with a common answer, that plaintiffs' claim is typical, or that the proposed class is amenable to a single injunctive relief (Dkt. No. 38 at 1–2). This order follows full briefing and oral argument.

ANALYSIS

Class certification is appropriate when a plaintiff can show that all of the prerequisites of Rule 23(a) and one of the requirements of Rule 23(b) has been met. *Abdullah v. U.S. Sec. Assocs., Inc.*, 731 F.3d 952, 956–57 (9th Cir. 2013). Rule 23(a) considers whether "(1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of

[2] A prior order granted defendants' unopposed motion to dismiss Claim 2 (Dkt. No. 41). Plaintiffs correspondingly dropped their request to certify a subclass of students originally raised under Section 706(2) (Dkt. No. 42 at 2 n.2).

the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class." Rule 23(b)(2) provides that "[a] class action may be maintained if Rule 23(a) is satisfied and if . . . the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole."

1. RULE 23(A).

A. Numerosity.

The proposed class — which encompasses over 158,000 members — satisfies the numerosity requirement (Dkt. No. 20-20 at 19).

B. Adequacy.

A proposed class representative is adequate if they "will fairly and adequately protect the interests of the class." Rule 23(a)(4). Our court of appeals has explained that a representative meets this standard if they (1) have no conflicts of interest with other class members, and (2) will prosecute the action vigorously on behalf of the class. *Staton v. Boeing Co.*, 327 F.3d 938, 957 (9th Cir. 2003).

Nothing in the record suggests that plaintiffs' interests deviate from the interests of other class members — plaintiffs and other class members seek to recover from the same alleged injury in the same manner based on the alleged policy and practices of the Department. Nor does it suggest any risk that plaintiffs (or their counsel) would fail to prosecute the action vigorously on behalf of the class. Accordingly, this order finds that plaintiffs are adequate representatives for the proposed class.

C. Commonality & Typicality.

Commonality is satisfied if "there are questions of law or fact common to the class." Rule 23(a)(2). "A common contention need not be one that will be answered, on the merits, in favor of the class. It only must be of such a nature that it is capable of classwide *resolution*." *Alcantar v. Hobart Serv.*, 800 F.3d 1047, 1053 (9th Cir. 2015) (citations omitted).

Typicality is satisfied if "the claims or defenses of the representative parties are typical of the claims or defenses of the class." Rule 23(a)(3). "The test of typicality is whether other

members have the same or similar injury, whether the action is based on conduct which is not unique to the named plaintiffs, and whether other class members have been injured by the same course of conduct." *Wolin v. Jaguar Land Rover N. Am., LLC*, 617 F.3d 1168, 1175 (9th Cir. 2010) (citation omitted). "Under the rule's permissive standards, representative claims are 'typical' if they are reasonably co-extensive with those of absent class members; they need not be substantially identical." *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1020 (9th Cir. 1998).

"The commonality and typicality requirements of Rule 23(a) tend to merge. Both serve as guideposts for determining whether under the particular circumstances maintenance of a class action is economical and whether the named plaintiff's claim and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected in their absence." *Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 158 n.13 (1982).

The parties largely do not dispute that plaintiffs have alleged common questions — namely, "whether the Department has a mandatory duty to decide borrower defenses and whether its blanket refusal to do so is *per se* unlawful under the Administrative Procedure Act" (Dkt. Nos. 20 at 2; 38 at 9). Defendants, however, contend that the common questions do not have common answers because (1) plaintiffs have not shown that the Department is operating under a uniform policy regarding the pending borrower defense claims, and (2) the pending claims are "factually diverse" and thus require "an individualized analysis . . . to determine if the Department has unreasonably delayed action with respect to any particular claim" (Dkt. No. 38 at 9). They further assert that plaintiffs similarly failed to show typicality. This order disagrees.

First, defendants improperly argue the merits at the class certification stage. They fault plaintiffs for "identify[ing] no such policy [of inaction], written or otherwise, relying instead on inferences drawn from the Department's delay in adjudicating claims and from various publicly available materials relating to the Department's processing of borrower defense claims" (*id*. at 10). They complain that plaintiffs do not allege any facts regarding some explicit order from on high within the Department (*ibid*.).

Defendants further take issue with plaintiffs' other proffered "evidence," such as plaintiffs' mischaracterization of a Department official's statement that borrower defense adjudication is in a "holding pattern" (*id*. at 12). They paint plaintiffs' evidentiary showing as amounting to "cobbled-together excerpts of statements and reports from which [p]laintiffs cherry-pick information" (*id*. at 10). Defendants further point to other evidence they believe suggest a lack of a uniform policy, such as the Department's statements that it is "working tirelessly to reduce the number of pending claims" and is "reviewing other options" for new a methodology after another court in this district preliminarily enjoined its use of a "partial relief methodology" (Dkt. Nos. 20-19 at 58; 38 at 12).

But here is a fact no one disputes: the Department has decided zero applications since June 2018 (Dkt. No. 20-20 at 20; Compl. ¶ 181). As represented during oral argument, over 210,000 borrower defense claims now remain pending and the Department has failed to grant or deny a single application since June 2018. This is especially striking considering that between July 2016 and January 20, 2017, the Department had decided approximately 27,996 borrower defenses applications (Compl. ¶ 135). Even if this gaping contrast might possibly be explained in part by the preliminary injunction in *Manriquez*, it nonetheless evidences the uniform policy of inaction alleged here where the proposed class explicitly excludes Corinthian borrowers who are members of the *Manriquez* class. According to plaintiffs, the Department "has a legal duty to reach a final decision on each borrower defense assertion" and it is undisputed that — despite the swelling backlog — "it has refused to satisfy that duty for well over a year" (*id*. ¶¶ 52–76; Dkt. No. 42 at 3).

Further, the Department allegedly "has sharply curtailed its borrower defense infrastructure" since January 2017 (*id*. ¶ 149). And, the activities defendants cite to that actually relate to the Department's adjudication of borrower defense claims largely pre-date June 2018, when the Department went radio silent (*see* Dkt. No. 38 at 11–13). Nor do defendants offer any timeline for final agency action or explain any *recent* concrete steps taken

by the Department (other than mere statements by Department officials) toward resolving the backlog. This order finds plaintiffs' evidentiary showing is sufficient at this stage of litigation.

Defendants rely on *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011), and *DL v. D.C.*, 713 F.3d 120 (D.C. Cir. 2013), for the proposition that plaintiffs failed to offer sufficient evidence that the Department operated under a general policy of inaction and thus failed to show commonality. Their reliance is misplaced. Both *Wal-Mart* and *DL* held that a class broadly defined only by the contention that the putative class members "have all suffered a violation of the same provision of law" insufficiently showed commonality. *Id*. at 350; *DL*, 713 F.3d at 126. The Supreme Court in *Wal-Mart*, which involved a nationwide Title VII class claim, noted that "[s]ignificant proof" that the defendant "operated under a general policy of discrimination" would have satisfied commonality. *See Wal-Mart*, 564 U.S. at 353 (quoting *Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 159 n.15 (1982)) (alteration in original). It found that proof of such a policy, however, was "entirely absent" where the defendant gave its local supervisors discretion over policy matters and the plaintiffs could not identify "a common mode of exercising discretion that pervade[d] the entire company" other than their expert's inadequate testimony that the defendant had a " 'strong corporate culture,' that ma[de] it 'vulnerable' to 'gender bias.' " *Id*. at 353–56. Similarly in *DL*, the United States Court of Appeals for the District of Columbia Circuit held that there was no commonality where the plaintiffs in a putative IDEA class action merely alleged systemic IDEA violations based on multiple, disparate compliance failures stemming from different causes. *DL*, 713 F.3d at 128.

Here, in contrast, plaintiffs do not submit only a threadbare allegation of harm. Rather, they have identified a single uniform policy — namely, the Department's alleged "blanket refusal" to adjudicate borrower defenses — which "bridges all their claims" (*see* Dkt. No. 20 at 19). *DL*, 713 F.3d at 127. And, this alleged uniform policy is supported by the undisputed fact that the Department has failed to adjudicate a single borrower defense claim in over a year.

Nor is *Northwest Immigrant Rights Project v. United States Citizenship and Immigration Services*, 325 F.R.D. 671 (Judge James Robart) (W.D. Wash. 2016) — which defendants cite for the proposition that "anecdotal evidence" is insufficient to show

commonality for a Section 706(1) claim — persuasive. The issue there related to different circumstances that affected the tolling or resetting of the adjudication timetable at issue for each putative class members' claim. The district court found that the plaintiffs failed to submit sufficient evidence as to the frequency with which the tolling circumstances occurred to support commonality and only offered "anecdotal evidence." *Id*. at 695. In contrast, no such tolling issue exists here. And, plaintiffs rely on a uniform policy, which their submitted declarations evidence.

Instead, defendants appear to fault plaintiffs for failing to fully prove their claim at this early stage. This order, however, will not require such an evidentiary showing, as a ruling on the merits at this stage is improper. While class certification analysis "may 'entail some overlap with the merits of the plaintiff's underlying claim," it does not grant "license to engage in free-ranging merits inquiries at the certification stage." *Amgen Inc. v. Conn. Ret. Plans & Tr. Funds*, 568 U.S. 455, 465–66 (2013). "Merits questions may be considered to the extent — but only to the extent — that they are relevant to determining whether" plaintiffs have satisfied the requirements for class certification. *Ibid*. In other words, though plaintiffs must show a common method of proof, they need not actually prove their case at this stage. Here, plaintiffs' evidentiary showing points to more than an amorphous, undefined systemic conduct. This is sufficient at this stage.

Second, defendants misconstrue plaintiffs' claim. They argue that the putative class members' borrower defense claims were "both factually and procedurally diverse, and thus not amenable to class-wide resolution" (Dkt. No. 38 at 14). Specifically, they argue that plaintiffs' claim — that the Department had a mandatory legal duty to decide borrower defense claims and that its failure to do so *per se* constituted unlawful withholding or unreasonable delay under the APA — cannot be determined on a class-wide basis because "[t]here is no per se rule as to how long is too long to wait for agency action" (Dkt. No. 38 at 13 (quoting *In re Pesticide Action Network N. Am.*, 532 F. App'x 649, 651 (9th Cir. 2013)). Rather, according to defendants, a Section 706(1) violation must be assessed by the *TRAC* factors, the "six-factor test articulated in

Telecommunications Research and Action Center v. F.C.C., 750 F.2d 70 (D.C. Cir. 1984)." *Id.* at 650. Those six factors include:

> (1) the time agencies take to make decisions must be governed by a "rule of reason"; (2) where Congress has provided a timetable or other indication of the speed with which it expects the agency to proceed in the enabling statute, that statutory scheme may supply content for this rule of reason; (3) delays that might be reasonable in the sphere of economic regulation are less tolerable when human health and welfare are at stake; (4) the court should consider the effect of expediting delayed action on agency activities of a higher or competing priority; (5) the court should also take into account the nature and extent of the interests prejudiced by the delay; and (6) the court need not "find any impropriety lurking behind agency lassitude in order to hold that agency action is unreasonably delayed."

Indep. Min. Co. v. Babbitt, 105 F.3d 502, 507 n.7 (9th Cir. 1997) (quoting *TRAC*, 750 F.2d at 80) (alterations omitted). Defendants contend that the differences in "filing dates, factual allegations, adjudication processes, and applicable legal standards among the pending borrower defense claims" that must be considered under *TRAC* in determining unreasonable delay prevent commonality (Dkt. No. 38 at 17).

But these factual differences are irrelevant where plaintiffs define their harm by a single policy. *Parsons v. Ryan*, 754 F.3d 657 (9th Cir. 2014), is instructive. There, the inmate plaintiffs asserted Eighth Amendment violations by the defendants. In upholding class certification, our court of appeals rejected the defendants' argument that the plaintiffs' claims amounted to "an aggregation of many claims of individual mistreatment," which purportedly "impede[d] the generation of common answers." *Id.* at 675–76. The appellate court reasoned that the complaint "d[id] not allege that the care provided on any particular occasion to any particular inmate (or group of inmates) was insufficient." *Id.* at 676. Rather, plaintiffs pointed to "policies and practices of statewide and systemic application" that "expose[d] all inmates in [the defendants'] custody to a substantial risk of serious harm." *Ibid.* That is,

> What all members of the putative class . . . ha[d] in common [was] their alleged exposure, as a result of specified statewide [] policies and practices that govern[ed] the overall conditions of health care services and confinement, to a substantial risk of serious future harm to which the defendants [we]re allegedly deliberately indifferent. As the district court recognized, although a presently existing risk may ultimately result in different future harm for different inmates — ranging from no harm at all to death — every inmate suffer[ed] exactly the same constitutional injury when he [was] exposed to a

> single statewide [] policy or practice that create[ed] a substantial risk of serious harm.

Id. at 678. Thus the key question, which could have been "determined in one stroke," centered on "whether the specified statewide policies and practices to which they [we]re all subjected by [the defendants] expose[d] them to a substantial risk of harm." *Ibid*. "[E]ither each of the policies and practices" — which were "the 'glue' that h[eld] together the putative class" — was "unlawful as to every inmate or it [was] not." *Ibid*.

So too here. Plaintiffs' point is that, whether a borrower defense claim has been pending for three years or three months, all claims were subject to the same alleged policy of inaction. In other words, it is the Department's (alleged) systemic abdication of its obligation to process borrower defense claims — not the length of delay itself — that plaintiffs challenge as a *per se* APA violation. Nor are plaintiffs seeking a specific ruling for each application, which would indeed require an individualized inquiry. Rather, they simply seek to restart the decision-making process to ultimately obtain *a* decision. At bottom, plaintiffs challenge the policy of inaction — to which each class member was subjected — not the outcome of each application. As in *Parsons*, "[t]hat inquiry does not require us to determine the effect of th[at] polic[y] . . . upon any individual class member . . . or to undertake any other kind of individualized determination." *Ibid*. Thus even if *TRAC* applies, the analysis of those six factors — *i.e.*, the "rule of reason" applicable here (where the hold on processing claims is allegedly indefinite), the existence (or nonexistence) of a congressionally-provided timetable, the effect on human welfare and the putative class members' interests, and the Department's competing priorities (or lack thereof) — would still be driven by the alleged policy of inaction. Defendants have not sufficiently shown otherwise. Accordingly, plaintiffs satisfy the commonality and typicality requirements.

2. RULE 23(b)(2) & RULE 65(d).

Rule 23(b)(2) allows class treatment only when a single injunction or declaratory judgment would provide relief to each member of the class. *Wal-Mart*, 564 U.S. at 360. "The key to the (b)(2) class is the indivisible nature of the injunctive or declaratory remedy warranted

— the notion that the conduct is such that it can be enjoined or declared unlawful only as to all of the class members or as to none of them." *Ibid*. (internal quotation marks omitted).

Defendants argue that the proposed class is not amenable to a uniform remedy primarily for the same reasons they asserted in opposing the commonality prong — namely, that plaintiffs failed to show the existence of a systemic policy of inaction (*see* Dkt. No. 38 at 18–20). Again, this order disagrees for the reasons discussed above. Rule 23(b)(2)'s requirements are satisfied where "class members complain of a pattern or practice that is generally applicable to the class as a whole." *Rodriguez v. Hayes*, 591 F.3d 1105, 1125 (9th Cir. 2010) (quoting *Walters v. Reno*, 145 F.3d 1032, 1047 (9th Cir. 1998)). Such is the case here, where the Department's alleged policy of inaction applies to the proposed class as a whole. This common harm inflicted by an alleged common policy is curable by a single injunction.

Nor must plaintiffs "specify the precise injunctive relief they will ultimately seek at the class certification stage." *B.K. by next friend Tinsley v. Snyder*, 922 F.3d 957, 972 (9th Cir. 2019). Rule 23(b)(2) "ordinarily will be satisfied when plaintiffs have described the general contours of an injunction that would provide relief to the whole class, that is more specific than a bare injunction to follow the law, and that can be given greater substance and specificity at an appropriate stage in the litigation through fact-finding, negotiations, and expert testimony." *Parsons*, 754 F.3d at 689 n.35. Here, under these circumstances, the requested relief of a single order compelling defendants to restart the processing of borrower defense claims outlines the "general contours" of the requested injunction at this stage. A more specific remedy, such as a plan setting forth a timeline for resolving the backlog of applications, can be fashioned later in this litigation. Defendants ultimately have not sufficiently shown otherwise that "crafting uniform injunctive relief will be impossible." *B.K.*, 922 F.3d at 973 ("It [] does not matter whether crafting appropriate injunctive relief will be difficult or not. Those merits questions . . . do not preclude certification as a matter of law unless . . . crafting uniform injunctive relief will be impossible."). Rules 23(b)(2) and 65(d) are satisfied.

CONCLUSION

For the foregoing reasons, plaintiffs' motion for class certification is **GRANTED**. The following class is **CERTIFIED**:

> All people who borrowed a Direct Loan or FFEL loan to pay for a program of higher education, who have asserted a borrower defense to repayment to the U.S. Department of Education, whose borrower defense has not been granted or denied on the merits, and who is not a class member in *Calvillo Manriquez v. DeVos*, No. 17-7106 (N.D. Cal.).

This class definition shall apply for all purposes, including settlement. Plaintiffs Theresa Sweet, Chenelle Archibald, Daniel Deegan, Samuel Hood, Tresa Apodaca, Alicia Davis, and Jessica Jacobson are hereby **APPOINTED** as class representatives. Plaintiffs' counsel from the Harvard Legal Service Center's Project on Predatory Student Lending and the Housing and Economic Rights Advocates, are hereby **APPOINTED** as class counsel. By **NOVEMBER 6 AT NOON**, the parties shall jointly submit a proposal for class notification with a plan to distribute notice, including by first-class mail.

IT IS SO ORDERED.

Dated: October 30, 2019.

WILLIAM ALSUP
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

THERESA SWEET, *et al.*,

Plaintiffs,

v.

MIGUEL CARDONA, in his official capacity as Secretary of Education, and the UNITED STATES DEPARTMENT OF EDUCATION

Defendants.

No. 3:19-cv-03674-WHA

SETTLEMENT AGREEMENT

I. INTRODUCTION

WHEREAS, in this class action the Plaintiffs assert that the U.S. Department of Education ("Department") has (i) unreasonably delayed and unlawfully withheld decisions on pending "borrower defense" claims, *i.e.*, claims for relief from certain federal student loan obligations based on institutional misconduct; (ii) issued unlawful notices denying certain borrower defense claims; and (iii) adopted unlawful policies governing the process of evaluating borrower defense claims;

WHEREAS, Defendants, the Department and its Secretary, Miguel Cardona, in his official capacity, deny any wrongdoing and deny that Plaintiffs are entitled to the relief they have sought in this Action;

WHEREAS, Defendants and Plaintiffs (referred to herein collectively, where appropriate, as "the Parties") now mutually desire to avoid the delay, uncertainty, inconvenience and expense of protracted litigation, and have determined to settle this Action, including all claims that Plaintiffs, the certified Class (as defined below), and the members of that Class have brought in this case;

NOW, THEREFORE, in reliance upon the representations, mutual promises, covenants, releases, and obligations set forth in this Settlement Agreement, and for good and valuable consideration, the Parties hereby stipulate and agree to compromise, settle, and resolve this case on the following terms and conditions.

II. DEFINITIONS

Unless otherwise noted, the following definitions apply in this Settlement Agreement, and for purposes of this Settlement Agreement alone.

A. **Action** means the litigation styled *Sweet, et al. v. Cardona, et al.*, No. 3:19-cv-3674-WHA (N.D. Cal.).

B. **Agreement** means this Settlement Agreement, including any attached exhibits.

C. **Borrower defense application** means a request by a Direct Loan or Federal Family Education Loan Program borrower for relief from his or her repayment obligations with respect to those loans based on the alleged misconduct of the borrower's

school. A borrower's application can include multiple claims of alleged misconduct on behalf of his or her school.

D. **Borrower defense claim** means an allegation made for relief from a borrower's repayment obligations in a borrower defense application.

E. **Class** or **Class Members** are the members of the class that has been certified by this Court and refers to individuals who meet the criteria set forth in Section II below. When used in this Agreement, the terms Class and Class Members refer, individually and collectively, to the Plaintiffs, the Class, and each Member of the Class.

F. **Class Counsel** or **Plaintiffs' Counsel** refers to Plaintiffs' attorneys of record in this Action.

G. **Class Notice** means the document attached hereto as Exhibit A, which shall be distributed pursuant to subsection X.B, below.

H. **Court** means the U.S. District Court for the Northern District of California.

I. **Department** refers to the U.S. Department of Education.

J. **Direct Loan** means and refers to a loan made pursuant to the William D. Ford Federal Direct Loan Program, 20 U.S.C. § 1087a *et seq*.

K. **Effective Date** means the date upon which, if this Agreement has not been voided under Section XIII, the Final Judgment approving this Agreement, entered by the Court in the form attached hereto as Exhibit B, becomes non-appealable, or, in the event of an appeal by a Class Member based upon a timely filed objection to this Agreement, upon the date of final resolution of said appeal. When this Agreement refers to the date on which the Agreement became "Effective," such date is the Effective Date.

L. **Execution Date** means the date upon which all Parties to this Agreement, and/or their counsel of record, have signed the Agreement.

M. **Fairness Hearing** means a hearing held by the Court at which time the Court will determine whether this Agreement should be approved under Federal Rule of Civil Procedure 23(e).

N. **Final Approval Date** refers to the date on which the Court enters Final Judgment approving this Agreement in the form attached hereto as Exhibit B.

O. **Final Decision** refers to a decision by the Department either approving or denying settlement relief to a borrower under the terms of this Agreement.

P. **FFEL** means and refers to a loan made pursuant to the Federal Family Education Loan Program, 20 U.S.C. §§ 1071-1087-4.

Q. **Form Denial Notice** refers to a notice sent by the Department to a Class Member, in substantially the form of one of the documents submitted by Defendants to the Court in this Action at ECF Nos. 116-1, 116-2, 116-3, and 116-4.

R. **FSA** is the Department's Federal Student Aid office.

S. **Full Settlement Relief** means (i) discharge of all of a Class Member's Relevant Loan Debt, (ii) a refund of all amounts the Class Member previously paid to the Department toward any Relevant Loan Debt (including, but not limited to, Relevant Loan Debt that was fully paid off at the time that borrower defense relief is granted), and (iii) deletion of the credit tradeline associated with the Relevant Loan Debt.

T. **Involuntary Collection Activity** means any attempt by the Department or its agents to collect payments toward the Relevant Loan Debt (in whole or in part), as defined below, through involuntary means from a borrower in default, including but not limited to certifying the borrower's debts for collection through the Treasury Offset Program and/or administrative wage garnishment. Any activity by the Department or its agents that reduces the borrower's Relevant Loan Debt without any action by the borrower or which eliminates a default on the loan without action by the borrower is not an Involuntary Collection Activity.

U. **Plaintiffs**, for purposes of Section V, includes Post-Class Applicants as the term is defined in Section IV.D.

V. **Preliminary Approval Date** refers to the date on which the Court enters a preliminary approval order, as set forth in subsection X.A.

W. **Relevant Loan Debt** refers to Direct Loans or FFEL loans associated with the school that is the subject of the Class Member's borrower defense application. That debt includes the original principal of the affected federal student loan plus any and all interest and fees that accrued or were incurred on that loan.

X. **School Group** refers to the name of a multi-institution organization based on ownership data and/or multi-campus institution as defined in FSA's Postsecondary Education Participants System ("PEPS"), to the extent that data is included in the borrower defense review platform.

Y. **Written Notice** is provided when the Department sends an email to the relevant individual's email address or, where the Department does not have such an email address available or becomes aware that email is undeliverable to the email address on file, the Department sends a copy of the relevant communication to the individual's last known mailing address.

III. CLASS

A. Pursuant to Federal Rule of Civil Procedure 23(b)(2), the Court has certified a plaintiff class consisting of all people who borrowed a Direct Loan or FFEL loan to pay for a program of higher education, who have asserted a borrower defense to repayment to the Department, whose borrower defense has not been granted or denied on the merits, and who is not a class member in *Calvillo Manriquez v. DeVos*, No. 3:17-cv-7210 (N.D. Cal.). *See* ECF No. 46 (Oct. 30, 2019). In this Agreement, individuals who meet this class definition as of the date of class closure are referred to as "the Class" or "Class Members."

B. For the purposes of this Agreement, the Parties agree that the Class includes individuals who are members of the Plaintiffs' proposed "§ 555(e) Subclass," which the Parties agree includes all members of the class certified in this case on October 30, 2019 (ECF No. 46) whose borrower defense applications were denied

between the date of class certification and the Execution Date. *See* Pls.' Suppl. Compl., ECF No. 198 ¶ 430 (May 4, 2021).

C. As of the Effective Date, all Class Members are bound by the terms of this Agreement.

D. The Class is closed as of the Execution Date.

IV. DEFENDANTS' CONSIDERATION

In consideration for the promises of Plaintiffs set forth in this Agreement, Defendants agree as follows:

A. Relief for applications meeting certain school criteria.

1. No later than one year after the Effective Date, Defendants will effectuate Full Settlement Relief for each and every Class Member whose Relevant Loan Debt is associated with the schools, programs, and School Groups listed in Exhibit C hereto. If any such Class Member receiving relief under this Paragraph IV.A previously received a Form Denial Notice, the provision of Full Settlement Relief will be deemed to rescind that Form Denial Notice.

2. Class Members shall be eligible for this form of relief regardless of whether the Class Member is a member of the § 555(e) Subclass.

3. Defendants shall provide Written Notice of this relief to each qualifying Class Member no later than 90 calendar days after the Effective Date. The notice shall specify that the Class Member will receive Full Settlement Relief, as defined in this Agreement, and need not take any additional action to receive this relief. The notice shall also specify that the Class Member's Relevant Loan Debt will remain in forbearance or stopped collection status pending the effectuation of relief. If the notice is sent by email and it bounces back, Defendants will have an additional 90 calendar days to send the notice by first class mail to the last known mailing address.

4. The Parties acknowledge that some Class Members may be eligible for discharges of their loans, outside of this Agreement, based on the misconduct of schools they attended, and that nothing in this Agreement shall prevent the Department from effectuating such relief outside this Agreement. The Department agrees, however, that any such Class Members who are deemed eligible for such relief outside this Agreement shall receive Full Settlement Relief pursuant to this Agreement.

5. If the Department's borrower defense or loan data includes conflicting evidence which raises a substantial question as to whether a Class Member's Relevant Loan Debt is associated with a program, school, or School Group listed in Exhibit C, the question will be resolved in favor of the Class Member (*i.e.*, in favor of granting relief).

B. Rescission of Form Denial Notices.

1. For Class Members who do not receive relief pursuant to Paragraph IV.A, above, but previously received a Form Denial Notice, Defendants, no later than 120 calendar days after the Effective Date, will provide Written Notice to those Class Members that their denials have been rescinded and that their borrower defense applications are again under consideration.

2. For purposes of Paragraph IV.C.3, the Department will deem the applications of Class Members who previously received a Form Denial Notice to have been pending since the original date of submission.

C. Process and timeline for issuing decisions on remaining Class applications.

1. Defendants will apply the following procedures to their review of borrower defense applications submitted by Class Members who did not receive relief pursuant to Paragraph IV.A:

i. Defendants will review the borrower defense application and any attachments included by the Class Member to determine whether the application states a claim that, if presumed to be true, would assert

a valid basis for borrower defense relief under the standards in the borrower defense regulations published by the Department on November 1, 2016 (81 *Fed. Reg.* 75,926). If it does, Defendants will provide that Class Member Full Settlement Relief.

ii. If a Class Member's borrower defense application reviewed under this Paragraph IV.C alleges a misrepresentation or omission that, if presumed to be true, would assert a valid basis for borrower defense relief, Defendants will presume that the Class Member reasonably relied on that misrepresentation or omission regardless of whether the Class Member alleges such reliance in his or her application.

iii. No borrower defense application reviewed under this Paragraph IV.C will be denied on the basis of insufficient evidence.

iv. Defendants will not apply any statute of limitations to borrower defense applications reviewed under this Paragraph IV.C.

2. Defendants will issue any Class Member whose borrower defense application is reviewed under this Paragraph IV.C a "settlement relief decision," a "revise and resubmit notice," or a "denial notice," as defined below.

i. A "settlement relief decision" notifies a Class Member that his or her borrower defense application has been approved under the terms of this Settlement Agreement and that the Class Member will receive Full Settlement Relief.

ii. A "revise and resubmit notice" notifies a Class Member that his or her borrower defense application is deficient, provides instructions on how to revise and resubmit his or her application, and advises the Class Member that he or she may do so within 6 months of the date of the notice. The notice will state that if the Class Member does not submit a revised application within 6 months, the notice itself will

serve as Defendants' final decision of denial and that the Class Member has the right to seek review of such decision in federal district court.

iii. A "denial decision" will only be issued to Class Members whose applications are denied after having resubmitted their application following receipt of a "revise and resubmit notice," as defined in the preceding subparagraph. A denial decision will explain the reasons the application was denied and apprise the recipient of his or her right to seek review of the decision in federal district court.

3. Defendants will issue decisions to Class Members whose applications are reviewed under this Paragraph IV.C according to the timelines set forth below. For purposes of this subparagraph, a "decision" refers to either a "settlement relief decision" or a "revise and resubmit notice," as defined in Paragraph IV.C.2.

i. For any application submitted between January 1, 2015 and December 31, 2017, Defendants will issue a decision no later than 6 months after the Effective Date.

ii. For any application submitted between January 1, 2018 and December 31, 2018, Defendants will issue a decision no later than 12 months after the Effective Date.

iii. For any application submitted between January 1, 2019 and December 31, 2019, Defendants will issue a decision no later than 18 months after the Effective Date.

iv. For any application submitted between January 1, 2020 and December 31, 2020, Defendants will issue a decision no later than 24 months after the Effective Date.

v. For any application submitted between January 1, 2021 and the Execution Date, Defendants will issue a decision no later than 30 months after the Effective Date.

vi. If a Class Member has submitted more than one borrower defense application, the earliest submitted application will control for purposes of the timelines set forth above.

4. Defendants will issue a final decision to any Class Member who resubmits his or her application after receiving a "revise and resubmit notice" no later than 6 months after Defendants receive the Class Member's resubmission. For purposes of this subparagraph IV.C.4, a "final decision" refers to either a "settlement relief decision" or a "denial decision" as defined in Paragraph IV.C.2.

5. Class Members shall be eligible for the relief set forth in this Paragraph IV.C regardless of whether the Class Member is a member of the § 555(e) Subclass.

6. The decisions required by this Paragraph IV.C shall be sent by Written Notice, as defined in this Agreement.

7. The Relevant Loan Debt for each Class Member eligible under this section will remain in forbearance or stopped collection status either until he or she receives Full Settlement Relief or until the Department's decision denying the Class Member's claim becomes final pursuant to either Paragraph IV.C.2.ii or Paragraph IV.C.2.iii, as applicable. For this period of forbearance or stopped collection status, the Department will remove any interest that accrues on the Relevant Loan Debt.

8. If a Class Member has not received a timely decision required under Paragraphs IV.C.3 and IV.C.4, as applicable, that Class Member shall receive Full Settlement Relief. Defendants shall provide the affected Class

Member with notice that the Class Member will receive this relief within 60 calendar days following the expiration of the applicable deadline.

9. Defendants will effectuate relief for any Class Member entitled to settlement relief pursuant to Paragraphs IV.C.3, IV.C.4, or IV.C.8, as applicable, no later than one year after the date that Defendants provide that Class Member Written Notice of the settlement relief decision.

D. Relief for Certain Post-Class Applicants.

1. If an individual submits a borrower defense application after the Execution Date (*i.e.*, the date the class closes), but before the Final Approval Date, such individual is a Post-Class Applicant. Defendants will issue a final decision on the merits of a Post-Class Applicant's application no later than 36 months after the Effective Date. In making these decisions, the Department will apply the standards in the borrower defense regulations published by the Department on November 1, 2016 (81 *Fed. Reg.* 75,926).

2. If a Post-Class Applicant has not received a timely decision as required under Paragraph IV.D.1, that applicant shall receive Full Settlement Relief. Defendants shall provide the affected Post-Class Applicant with notice that the applicant will receive this relief within 60 calendar days following the expiration of the applicable deadline.

3. Defendants will effectuate relief for any Post-Class Applicant entitled to settlement relief pursuant to Paragraphs IV.D.1 and IV.D.2 no later than one year after the date that Defendants provide that applicant Written Notice of the settlement relief decision.

E. Class Member informational webpage. The Department will establish a webpage on its studentaid.gov website providing general information about this Agreement and links to copies of the Agreement and related Court documents. The webpage will be available to the public within 30 calendar days after the Preliminary Approval Date and will be updated no later than 30 calendar days after the Effective

Date to include information about how Class Members can contact the Department if the Class Member has questions regarding their borrower defense application.

F. Effectuating relief.

1. Defendants have effectuated relief for purposes of Paragraphs IV.A, IV.C, and IV.D when they and their loan servicers have taken all steps necessary to discharge the Relevant Loan Debt of the Class Member (or Paragraph IV.D. Post-Class Applicant), including but not limited to (1) discharging any interest that accrued while the borrower defense application was pending; (2) determining if the Class Member (or Paragraph IV.D Post-Class Applicant) is entitled to any refund, and if so, issuing refund check(s) for payment of that refund; (3) if the Class Member's (or Paragraph IV.D Post-Class Applicant's) Relevant Loan Debt was previously in default, removing such debt from default status; and (4) requesting the deletion of the relevant tradeline.

2. Class Members (or Paragraph IV.D Post-Class Applicants) who receive relief under Paragraphs IV.A, IV.C, or IV.D shall not be required to take steps to consolidate any Relevant Loan Debt into a Direct Loan to receive the relief to which they are entitled pursuant to those Paragraphs. Defendants shall take all necessary steps to ensure that other loan holders effectuate the required relief.

G. Reporting Requirement.

1. Within 30 calendar days after the Effective Date, Defendants will provide Plaintiffs with, as of the Final Approval Date, (i) the total number of Class Members, (ii) the total number of Class Members the Department has determined are eligible for Full Settlement Relief pursuant to Paragraph IV.A; (iii) the total number of Class Members who must receive decisions pursuant to Paragraph IV.C; and (iv) the total number of Class Members and Post-Class Applicants who must receive decisions by each deadline set

forth in Paragraph IV.C.3(i) through (v) and Paragraph IV.D, respectively, and a schedule of the dates certain by which such decisions must be received pursuant to these paragraphs.

2. Defendants will submit quarterly reports to Plaintiffs documenting their progress toward fulfilling their obligations under Paragraphs IV.A, IV.C, and IV.D of this Agreement. Defendants will submit these reports to Plaintiffs' Counsel via electronic mail and will post those reports publicly on their Federal Student Aid website.

3. The first quarterly report shall be submitted 120 calendar days after the Effective Date, unless that day falls on a weekend or Federal holiday, in which case the report shall be submitted on the next business day. The quarterly reports shall be submitted every 90 calendar days thereafter, subject to the same exceptions where the 90th day falls on a weekend or Federal holiday.

4. The quarterly reports described herein shall contain the information listed below. The first report will reflect progress Defendants have made since the Effective Date and later reports will reflect the progress Defendants made from the last date reported in the prior report to the end of each reporting period. The first reporting period will start on the Effective Date. Each subsequent reporting period will start on the last date for which progress was reported in any previous report. Each reporting period shall exclude a period not exceeding 30 calendar days immediately preceding the submission of a report, during which Defendants pull, confirm, and validate the data provided in each report.

   i. The total number of Class Members with pending borrower defense applications (which number shall include members of the § 555(e) Subclass);

ii. The total number of settlement relief decisions, revise and resubmit notices, and denial decisions, as defined in Paragraph IV.C.2, that Defendants have issued to Class Members pursuant to Paragraph IV.C;

iii. The number of Class Members who received settlement relief decisions; the number of Class Members who received "revise and resubmit notices"; and the number of Class Members who received final denial decisions during the reporting period; and

iv. The total number of Class Members for whom Defendants have effectuated relief pursuant to Paragraph IV.A, including the number of Class Members for whom Defendants effectuated relief during the reporting period.

v. For any quarterly report covering the time period during which a deadline established in Paragraphs IV.C.3(i) through (v) and Paragraph IV.D falls, the total number of Class Members for whom the Department did not provide a decision.

5. All of the data required in this section is subject to privacy restrictions and will be suppressed where the total number of Class Members for any data point is less than 10.

6. Defendants shall notify Plaintiffs' Counsel within 30 calendar days of the date as of which they have resolved all Class Members' borrower defense applications, notified all Class Members of their final decisions (where applicable), and effectuated all appropriate relief to Class Members, at which point Defendants' reporting obligations will cease. Until Defendants provide such notice, Defendants shall continue providing quarterly reports as required by this Paragraph IV.G.

H. Other Assurances. In accordance with applicable statutory and regulatory requirements, and additional governing policies and procedures specific to

Defendants' consideration of borrower defense claims, Defendants represent and confirm that the following policies will apply to all Class Members throughout the time covered by the Agreement:

1. Defendants do not take action to collect outstanding student loan debts through involuntary collection activity against individuals with pending borrower defense applications, as required by the Department's borrower defense regulations. However, this Agreement does not preclude a Class Member from proactively and voluntarily paying his or her student loans.

2. Defendants provide an interest credit for any interest that accrues on the relevant federal student loan accounts of borrowers between the time that the borrower submits his or her borrower defense application and the time the Department issues a final decision on the application and notifies the borrower of that decision.

V. ENFORCEMENT

A. Notwithstanding all other provisions outside Section V of this Agreement, the Court shall retain jurisdiction only to review claims set forth in this Section V, and only in the manner explicitly provided in Section V. In connection with each such claim, the Court shall retain jurisdiction only to order the relief explicitly specified for each particular claim and only where Defendants have not provided that relief pursuant to the procedures specified in this Section. The Court shall lack jurisdiction to imply any claims, or authority to issue any other relief, under this Agreement.

B. The only claims permissible to enforce this Agreement are as follows:

1. Failure to Provide Relief to Class Members Who Did Not Receive a Decision by the Decision Due Date. Plaintiffs may bring a claim alleging that Defendants have materially breached the Agreement if Defendants have (i) failed to issue to a Class Member or Post-Class Applicant by the due date established in Paragraph IV.C.3, IV.C.4, or IV.D.2, as applicable,

a decision, as defined by Paragraph IV.C.2; and (ii) subsequently failed, within 30 calendar days following the expiration of the applicable deadline, to provide that Class Member with notice that they will receive Full Settlement Relief, as required by Paragraph IV.C.8 or IV.D.2, as applicable.

i. Should Plaintiffs prevail on this claim, the only relief available from the Court shall be an order requiring Defendants to promptly provide Full Settlement Relief to each affected Class Member on a timetable set by the Court. Defendants shall also be liable for Plaintiffs' reasonable attorneys' fees and costs incurred in bringing the claim.

ii. In the event of such a Court order, Defendants will report to Plaintiffs' Counsel and the Court on its progress of issuing relief, as provided herein, to affected Class Members.

2. Failure to Issue Relief by Relief Due Date. Plaintiffs may bring a claim alleging that Defendants have materially breached Paragraph IV.A.1, IV.C.9, IV.D.1, and/or IV.D.3 of the Agreement by failing to effectuate relief within the prescribed time periods for any individual who is entitled to receive relief pursuant those Paragraphs.

i. Should Plaintiffs prevail on this claim, the only relief available from the Court shall be an order requiring Defendants to promptly provide Full Settlement Relief to each affected individual on a schedule set by the Court. Defendants shall also be liable for Plaintiffs' reasonable attorneys' fees and costs incurred in bringing the claim.

ii. In the event of such a Court order, Defendants will report to Plaintiffs' Counsel and the Court on its progress of issuing relief, as provided herein, to affected Class Members.

3. Failure to Submit Timely Quarterly Reports. Plaintiffs may bring a claim alleging that Defendants have materially breached Paragraph IV.G of the Agreement by failing to submit a timely and complete quarterly report to

Plaintiffs' Counsel via electronic mail within 90 calendar days after the deadline for the report according to the timelines specified therein. Should Plaintiffs prevail on this claim, the only relief available from the Court shall be an order requiring Defendants to submit their reports on a monthly basis from the point of the order forward. Defendants shall also be liable for Plaintiffs' reasonable attorneys' fees and costs incurred in bringing the claim.

4. Involuntary Collections of Class Members' Student Loan Debt. Plaintiffs may bring a claim alleging that Defendants have materially breached Paragraph IV.H.1 of the Agreement by collecting on a Relevant Loan after the Effective Date through involuntary collection activity against a Class Member or Post-Class Applicant while his or her application was or is pending or while the Class Member or Post-Class Applicant was or is awaiting the effectuation of relief.

   i. Should Plaintiffs prevail on this claim, the only relief available from the Court shall be an order requiring the Department to refund the payment(s) collected. If Defendants do not have a valid address for the affected borrowers to send the refunds, Defendants will take reasonable steps to engage in skip tracing to find a valid address.

   ii. Defendants shall be liable for a material breach under this Paragraph V.B.4 if involuntary collection activity occurs because they, their agents, or their contractors took action to collect a debt through an involuntary collection activity. Defendants shall not be liable based on events outside of Defendants' control, including but not limited to a situation where a third party, such as an employer, undertakes debt collection activities, such as wage garnishment, inconsistent with Defendants' instructions that collection activity cease.

C. All claims listed above are subject to the complete defense of impracticability or impossibility of performance, as set forth below in Paragraph V.D.5 and Paragraph XII, as well as the defense that the breach claimed by Plaintiffs is not material.

D. The exclusive procedure for bringing a claim to enforce the terms and conditions of this Agreement shall be as follows:

1. Prior to asserting any claim pursuant to Paragraph V.B, above, Plaintiffs' Counsel shall submit written notice alleging a material breach of this Agreement to counsel for Defendants. Such notice shall be submitted by electronic mail, and shall specify what alleged breach has occurred; describe the facts and circumstances supporting the claim; and state that Plaintiffs intend to seek an order from the Court pursuant to Paragraph V.B. Plaintiffs shall not inform the Court of their allegation(s) at that time.

2. Within 2 business days of receipt of the notice from Plaintiffs' Counsel, Defendants will acknowledge receipt of Plaintiffs' notice.

3. Defendants shall have a period of 14 calendar days after receipt of such notice from Plaintiffs' Counsel to inform Plaintiffs' Counsel in writing of its determination on whether a material breach has occurred, including relevant information that informed Defendants' determination.

i. If Defendants agree that a material breach has occurred, Defendants will disclose any action they propose to take to resolve the alleged material breach in the written notice to Plaintiffs as described by this Paragraph V.D.3. The Parties will meet and confer to determine whether those actions are sufficient within 5 business days of Plaintiffs' receipt of Defendants' notice.

a. Upon Defendants' request, Plaintiffs shall provide to Defendants any information and materials available to Plaintiffs that support the violation alleged in the notice.

b. Defendants will have 21 calendar days following the Parties' meet and confer to take the action(s) specified in their written notice and/or any further action(s) agreed upon in writing by the Parties.

c. If the Parties agree about the existence of a material breach, but cannot reach consensus on the appropriate action to resolve that breach within 21 calendar days following the Parties' meet and confer, either Party may file a motion for enforcement of the Agreement.

ii. If Defendants do not agree that a material breach has occurred, the Parties will meet and confer to determine if a consensus can be reached within 5 business days after Plaintiffs' receipt of Defendants' notice as described in this Paragraph V.D.3. If a consensus cannot be reached within 21 business days following the Parties' meet and confer, Plaintiffs may file a motion for enforcement of the Agreement.

4. Absent the prior, written agreement of the Parties, any motion for enforcement of the Agreement must be brought within two (2) years after the Parties notify the Court that Defendants have resolved all Class Members' borrower defense applications, notified all Class Members of their final decisions (where applicable), and effectuated all appropriate relief to Class Members, as specified in Paragraph XI, below. Otherwise, any claim of material breach not brought within two (2) years of such date shall be forever waived by Plaintiffs.

5. If Defendants are reasonably prevented from or delayed in fully performing any of the obligations set forth in Paragraph IV, above, due to extraordinary circumstances beyond Defendants' control, Defendants will notify Plaintiffs' Counsel within 14 calendar days of Defendants' determination

that they will not be able to fully perform their obligations. Within that notification, Defendants will describe the facts providing their basis for believing extraordinary circumstances beyond Defendants' control prevent Defendants from fully performing their obligations. Within 14 calendar days of that notice, the Parties will meet and confer as to whether the circumstances are beyond the Defendants' control and to what extent they affect Defendants' ability to issue final decisions or effectuate relief. If the Parties agree an extension is warranted, the Parties will negotiate the length of an appropriate extension, and the deadlines set forth for Defendants' performance in Paragraph IV may be altered accordingly. If the Parties cannot agree as to whether extraordinary circumstances exist or what the appropriate length of an extension is, Plaintiffs may raise a claim of material breach of Paragraph IV with the Court prior to the expiration of the timelines provided in that Paragraph. Defendants shall be permitted to oppose the filing of such a claim upon the grounds of extraordinary circumstances, and the Court will at that point have jurisdiction to determine whether Defendants are entitled to any extension of the deadlines set forth in Paragraph IV on the basis of extraordinary circumstances. The extension set forth in this Paragraph V.D.5 shall be for a minimum of seven (7) calendar days beyond the deadlines for performance set forth in Paragraph IV without requiring any action by any Party other than Defendants, and may be longer than that period pursuant to written agreement among the Parties.

E. The Court relinquishes jurisdiction over all claims, causes of actions, motions, suits, allegations, and other requests for relief in this Action that are not expressly stated in this Paragraph V.

F. The Court shall have no jurisdiction to supervise, monitor, or issue orders in this Action, except to the extent that Plaintiffs invoke the Court's jurisdiction pursuant to the procedures set forth in this Paragraph V.

VI. ATTORNEYS' FEES

A. To resolve Plaintiffs' claim for attorneys' fees, costs, and expenses, Plaintiffs will submit a petition for fees under the Equal Access to Justice Act, 28 U.S.C. § 2412(d), to the Court.

B. Defendants agree that Plaintiffs are the prevailing party in this action for purposes of a fee petition under the Equal Access to Justice Act.

C. Nothing in this Section shall affect the Parties' ability to attempt to reach a compromise regarding Plaintiffs' claim for attorneys' fees, costs, and expenses.

VII. WAIVER AND RELEASE

Plaintiffs, the Class Members, and their heirs, administrators, representatives, attorneys, successors, and assigns, and each of them hereby forever waive, release, and forever discharge Defendants, and all of their officers, employees, and agents, from, and are hereby forever barred and precluded from prosecuting, any and all claims, causes of action, motions, and requests for any injunctive, declaratory, and/or monetary relief, including but not limited to damages, tax payments, debt relief, costs, attorney's fees, expenses, and/or interest, whether presently known or unknown, contingent or liquidated, alleged in this Action against Defendants through and including the Effective Date, including but not limited to the right to appeal any and all claims Plaintiffs asserted in this Action. This Agreement is not intended to release any claim based on an act or omission or other conduct occurring after the Effective Date, including but not limited to claims by Class Members based on the substance or content of their borrower defense decisions. The Parties do not intend to waive or narrow any res judicata defense Defendants could assert against a future claim brought by any Plaintiff.

VIII. NO ADMISSION OF LIABILITY

A. Nothing in this Settlement Agreement shall constitute or be construed to constitute an admission of any wrongdoing or liability by Defendants, an admission by

Defendants of the truth of any allegation or the validity of any claim asserted in this Action, a concession or admission by Defendants of any fault or omission of any act or failure to act, or an admission by Defendants that the consideration provided to Plaintiffs under Paragraph IV, above, represents relief that could be recovered by Plaintiffs in this Action.

B. Plaintiffs may not offer, proffer, or refer to any of the terms of this Agreement as evidence in any civil, criminal, or administrative proceedings other than proceedings that may be necessary to enforce the Agreement as set forth in Paragraph V, above, or to obtain approval from the Court as set forth in Paragraph X, below.

IX. PLAINTIFFS' COVENANTS NOT TO SUE

A. Plaintiffs hereby covenant not to commence any action, claim, suit, or administrative proceeding against Defendants related to the non-performance, failed performance, or otherwise unsatisfactory performance in fulfilling their duties and responsibilities under this Agreement; provided, however, that Plaintiffs may initiate an action against Defendants pursuant to the continuing jurisdiction of the Court to compel Defendants' performance of their obligations under this Agreement, but only as expressly articulated in this Agreement in Paragraph V, above.

B. Plaintiffs hereby covenant not to commence against Defendants any action, claim, suit, or administrative proceeding on account of any claim or cause of action that has been released or discharged by this Agreement.

X. PROCEDURES GOVERNING APPROVAL OF THIS AGREEMENT

A. Within 14 calendar days of the Execution Date, the Parties shall jointly submit this Agreement and its exhibits to the Court, and shall apply for entry of an Order in which the Court:

1. Grants preliminary approval to this Agreement as being fair, reasonable, and adequate to Plaintiffs;

2. Approves the form of the Class Notice attached hereto as Exhibit A;

3. Directs the Parties to provide Class Notice as set forth in Paragraph X.B below, and grants approval of such plan as reasonable under Federal Rule of Civil Procedure 23(e)(1);

4. Schedules a Fairness Hearing to determine whether this Agreement should be approved as fair, reasonable, and adequate, and whether an order approving the settlement should be entered pursuant to Federal Rule of Civil Procedure 23(e);

5. Provides that any person who wishes to object to the terms of this Agreement, or to the entry of an Order approving this Agreement, must file a written Notice of Objection with the Court specifying the objections and the basis for such objections as provided in the Class Notice, with copies served on all Parties' counsel;

6. Provides that between the Execution Date and the Fairness Hearing, the Defendants shall direct all inquiries from Class Members and Post-Class Applicants regarding the Agreement to Plaintiffs' Counsel;

7. Provides that in order to have an objection considered and heard at the Fairness Hearing, such written Notice of Objection must be filed with the Court and served on counsel by the date specified in the Class Notice;

8. Provides that the Parties shall each be entitled, but not required, to respond, in writing, to any Objections up to 14 calendar days prior to the Fairness Hearing; and

9. Provides that the Fairness Hearing may, from time to time and without further notice to the Class, be continued or adjourned by order of the Court.

B. After the Court enters an Order containing all of the items set forth in Paragraph X.A, above, the Parties shall promptly distribute the Class Notice as follows:

1. Defendants shall email all Class Members who provided their e-mail addresses to the Department on their borrower defense applications, or,

where Defendants do not have such an e-mail address available or become aware that email is undeliverable to the email address on file, Defendants shall send a copy of the notice to the Class Member's last known mailing address by first class mail.

2. Class Counsel will update the Class Member website's "Frequently Asked Questions" page regarding the lawsuit. A link to the Class Members' website will be included in the Class Notice and will be included on the Department's website.

3. Plaintiffs will also circulate the Class Notice to legal aid and advocacy organizations across the country providing borrower defense assistance.

C. No later than 3 business days before the Fairness Hearing, the Parties shall each file with the Court a declaration confirming compliance with the Notice procedures approved by the Court.

D. At the Fairness Hearing, the Parties shall jointly request the Court's final approval of this Agreement, pursuant to Federal Rule of Civil Procedure 23(e). The Parties agree to take all actions necessary to obtain approval of this Agreement.

E. If, after the Fairness Hearing, the Court approves this Agreement as fair, adequate, and reasonable, the Parties consent to entry of Final Judgment in a form substantively identical to the Final Judgment attached hereto as Exhibit B.

F. Within 120 days after the Effective Date, Defendants shall send Written Notice to all Post-Class Applicants informing them of their status as Post-Class Applicants and the provisions of the Agreement that apply to them.

XI. DISMISSAL AND JURISDICTION OF THE COURT TO ENFORCE THIS AGREEMENT

The Parties hereby stipulate and agree to entry of Final Judgment in a form substantively identical to the Final Judgment attached hereto as Exhibit B. As provided in that exhibit, Plaintiffs' claims in this Action are dismissed with prejudice, except that the Court shall retain limited jurisdiction for the sole purpose of enforcing the terms of this Agreement as expressly set forth in Paragraph V of this Agreement. Once Defendants have resolved all Class Members' and Post-

Class Applicants' borrower defense applications, notified all Class Members and Post-Class Applicants of their final decisions (where applicable), and effectuated all appropriate relief to Class Members and Post-Class Applicants, the Parties will file a notice with the Court. Upon the date of that notice, the Court's jurisdiction over this Action shall completely terminate.

The Parties agree that any order of the Court granting approval of this Agreement does not render the terms and conditions of this Agreement subject to the contempt powers of the Court.

XII. IMPOSSIBILITY OF PERFORMANCE

In addition to the excuses to performance listed in Paragraph V.D.5, above, if Congress renders Defendants' performance under this Agreement impossible, in whole or in part, then Defendants shall forever be relieved of all obligations that would, as a result of such Congressional action, be impossible to perform. Defendants shall not be required to take any action, or attempt to take any action, which would circumvent or violate, or have the effect of circumventing or violating, the law.

XIII. CONDITIONS THAT RENDER THIS AGREEMENT VOID OR VOIDABLE

A. This Agreement shall be void if it is not approved as written by a final Court order not subject to any further review.

B. This Agreement shall be voidable by Plaintiffs and/or Defendants if the Court does not enter a Final Judgment, or other Final Approval Order, that is substantively identical to the one attached hereto as Exhibit B. Any Party's decision to void the Agreement under this provision is effective only if that Party provides notice of its decision, in writing, to the counsel of record for all other Parties within 30 calendar days of the date on which the Court entered Final Judgment.

C. This Agreement shall be voidable by Plaintiffs if a condition of impossibility occurs, as described in Paragraph XII. Plaintiffs' decision to void the Agreement under this provision is effective only if Plaintiffs' Counsel provides notice of their decision, in writing, to the counsel of record for Defendants.

XIV. EFFECT OF AGREEMENT IF VOIDED

A. Should this Agreement become void as set forth in Section XIII above, none of the Parties will object to reinstatement of this Action in the same posture and form as it was pending immediately before the Execution Date.

B. All negotiations in connection herewith, and all statements made by the Parties at or submitted to the Court as part of the Fairness Hearing process, shall be without prejudice to the Parties to this Agreement and shall not be deemed or construed to be an admission by a Party of any fact, matter, or proposition, nor admissible for any purpose in the Action other than with respect to the settlement of same.

C. The Parties shall retain all defenses, arguments, and motions as to all claims that have been or might later be asserted in this Action, and nothing in this Agreement shall be raised or construed by any Party to defeat or limit any claims, defenses, arguments, or motions asserted by either Party.

XV. MODIFICATION OF THIS AGREEMENT

A. Before the Preliminary Approval Date, this Agreement, including the attached exhibits, may be modified only upon the written agreement of the Parties.

B. After the Preliminary Approval Date—including the time after which Final Judgment has been entered—this Agreement, including the attached exhibits, may be modified only with the written agreement of all the Parties and with the approval of the Court, upon such notice to the Class, if any, as the Court may require.

XVI. RULES OF CONSTRUCTION

A. The Parties acknowledge that this Agreement constitutes a negotiated compromise. The Parties agree that any rule of construction under which any terms or latent ambiguities are construed against the drafter of a legal document shall not apply to this Agreement.

B. This Agreement shall be construed in a manner to ensure its consistency with federal law. Nothing contained in this Agreement shall impose upon Defendants any duty, obligation, or requirement, the performance of which would be

inconsistent with federal statutes, rules, or regulations in effect at the time of such performance.

C. The headings in this Agreement are for the convenience of the Parties only and shall not limit, expand, modify, or aid in the interpretation or construction of this Agreement.

XVII. INTEGRATION

This Agreement and its exhibits constitute the entire agreement of the Parties, and no prior statement, representation, agreement, or understanding, oral or written, that is not contained herein, will have any force or effect.

XVIII. EXECUTION

This Agreement may be executed in counterparts. Facsimiles and Adobe PDF versions of signatures shall constitute acceptable, binding signatures for purposes of this Agreement.

For the Defendants:

R. Charlie Merritt

BRIAN D. NETTER
Deputy Assistant Attorney General
STEPHANIE HINDS
United States Attorney
MARCIA BERMAN
Assistant Branch Director
R. CHARLIE MERRITT
Trial Attorney
U.S. Department of Justice
Civil Division, Federal Programs Branch
1100 L Street, N.W.
Washington, DC 20005
Telephone: (202) 616-8098
E-mail: robert.c.merritt@usdoj.gov

For the Plaintiffs:

EILEEN M. CONNOR (SBN 248856)
econnor@law.harvard.edu
REBECCA C. ELLIS (*pro hac vice*)
rellis@law.harvard.edu
LEGAL SERVICES CENTER OF
HARVARD LAW SCHOOL
122 Boylston Street
Jamaica Plain, MA 02130
Tel.: (617) 390-3003
Fax: (617) 522-0715

JOSEPH JARAMILLO (SBN 178566)
jjaramillo@heraca.org
HOUSING & ECONOMIC RIGHTS
ADVOCATES
3950 Broadway, Suite 200
Oakland, California 94611
Tel.: (510) 271-8443
Fax: (510) 868-4521

Exhibit A

DRAFT

Internal Name: BD Sweet v. Cardona – General Notification
Internal Number: 01
Subject if sent electronically: Notice of Proposed Class Action Settlement - Important borrower defense information for you

[DATE]

Borrower Defense Application #: [Case Number]

Dear [Primary Contact Name]:

Your rights may be affected, please read carefully.

You filed a borrower defense application asking the U.S. Department of Education ("Department") to cancel some or all of your federal student loan debt because you allege the school you (or your child) attended engaged in unlawful conduct. We write to inform you that there is a proposed settlement in a class action lawsuit that could affect your claim and to explain how your legal rights may be affected by that lawsuit.

As a borrower defense applicant, you may have been previously informed of a class action lawsuit called *Sweet v. DeVos*, which challenged the Department's delay in issuing final decisions on borrower defense applications, including yours. You may also have been informed in 2020 that the parties had proposed a settlement of the lawsuit, subject to the court's approval. The court did not approve that proposed settlement, so the lawsuit continued. You can find more information about that here: https://predatorystudentlending.org/news/press-releases/in-new-ruling-judge-denies-borrower-defense-settlement-over-department-of-educations-perfunctory-alarmingly-curt-denials-press-release/. The lawsuit now also challenges the Department's denial of certain borrower defense applications.

We now write to inform you that there is a new proposed settlement of the lawsuit. The settlement will not become final until it is approved by the court as fair, adequate, and reasonable. This Notice describes how your legal rights may be affected by this settlement.

What is the case about?

A lawsuit was filed in a federal court in California by seven borrower defense applicants who represent, with certain exceptions, all borrowers with pending borrower defense applications. The lawsuit challenges the way the Department has been dealing with borrower defense applications over the past few years, including the Department's delays in issuing final decisions and the Department's denial of certain applications starting in December 2019. The case is now called *Sweet v. Cardona*, No. 3:19-cv-3674 (N.D. Cal.).

Now, both parties are proposing to settle this lawsuit. This proposed settlement is a compromise of disputed claims, and Defendants continue to deny that they have acted unlawfully.

What are the terms of the proposed settlement for borrowers who applied for borrower defense relief *on or before June 22, 2022*?

In the proposed settlement, the Department agrees to resolve the borrower defense applications of people who have borrower defense applications pending as of June 22, 2022 on the following terms:

- If your borrower defense application related to federal student loans borrowed to pay for attendance at a school on the list attached to this letter, you will receive a discharge of federal loans associated with that school and a refund of any amounts paid to the Department on those federal loans, and the credit tradeline for those loans will be deleted from your credit report. Within 90 days of the date that the court's approval of the settlement agreement becomes final, the Department will notify you that you will receive this relief. You will receive the relief within one year of the final effective date of the settlement agreement. Until this relief is provided, the Department will not take action to collect your debt.

- If your loans are not associated with a school on the list attached to this letter, you will receive a decision on your application according to the following schedule:

    - If you submitted your application between January 1, 2015 and December 31, 2017, the Department will issue a decision no later than 6 months after the court's approval of the settlement agreement becomes final.

    - If you submitted your application between January 1, 2018 and December 31, 2018, the Department will issue a decision no later than 12 months after the court's approval of the settlement agreement becomes final.

    - If you submitted your application between January 1, 2019 and December 31, 2019, the Department will issue a decision no later than 18 months after the court's approval of the settlement agreement becomes final.

    - If you submitted your application between January 1, 2020 and December 31, 2020, the Department will issue a decision no later than 24 months after the court's approval of the settlement agreement becomes final.

    - If you submitted your application between January 1, 2021 and June 22, 2022, the Department will issue a decision no later than 30 months after the court's approval of the settlement agreement becomes final.

- If you do not receive a decision within the timeline outlined above, you will receive a discharge of federal loans associated with your borrower defense applications and a refund of any amounts paid to the Department on those federal loans, and the credit tradeline for those loans will be deleted from your credit report.

- The Department will decide your application in a streamlined review process that will determine whether the application states a claim that, if presumed to be true, would assert a valid basis for

borrower defense; will not require further supporting evidence; will not require proof of reliance; and will not apply any statute of limitations to your application.

- If your application is approved under the procedures above, you will receive a discharge of federal loans associated with your borrower defense application and a refund of any amounts paid to the Department on those federal loans, and the credit tradeline for those loans will be deleted from your credit report.

- The Department will not deny your application without first providing instructions on what is required for a successful application and giving you the opportunity to resubmit your application.

    - If you choose to resubmit your application, you must do so within 6 months after receiving those instructions. The instructions will explain that if you do not resubmit within the 6-month period, your application will be considered denied.

    - If you choose to resubmit your application within the 6-month time period after receiving the instructions, the Department will issue you a final decision no later than 6 months after receiving your resubmitted application.

- If you received a notice from the Department in December 2019 or later informing you that your borrower defense application was denied, that denial has been voided and the Department is reviewing your application pursuant to the terms described above.

What are the terms of the proposed settlement for borrowers who applied for borrower defense relief *after June 22, 2022 but before final approval of the settlement*?

- If you submitted your application after June 22, 2022, but before the court approves the settlement agreement, the Department will issue a decision on your application no later than 36 months after the court's approval of the settlement agreement becomes final. If the Department does not issue a decision within that time period, you will receive a discharge of federal loans associated with your borrower defense application and a refund of any amounts paid to the Department on those federal loans, and the credit tradeline for those loans will be deleted from your credit report.

Does the Department have any reporting obligations?

- The Department will provide your lawyers with information about its progress making borrower defense decisions every three months, including how many decisions the Department has made and how many borrowers have received a loan discharge.

What if my loan is in default?

- If you are in default, the Department will not take action to collect your debt, such as by garnishing your wages (that is, taking part of your paycheck) or taking portions of your tax refund, while your application is pending or while you are waiting to receive any relief you are owed under the settlement.

What happens next?

The court will need to approve the proposed settlement before it becomes final. The court will hold a public hearing, called a fairness hearing, to decide if the proposed settlement is fair. The hearing will be held on _____, 2022, beginning at _____, at the following address:

United States District Court
Northern District of California
450 Golden Gate Avenue, Courtroom 12, 19th Floor
San Francisco, California 94102

Information about the hearing, including the process for participation and virtual attendance (if any), will be posted at https://predatorystudentlending.org/cases/sweet-v-devos/.

What should I do in response to this Notice?

IF YOU AGREE with the proposed settlement, you do not have to do anything. You have the right to attend the fairness hearing, at the time and place above, but **you are not required to do so.**

IF YOU DISAGREE WITH OR HAVE COMMENTS on the proposed settlement, you can write to the court or ask to speak at the hearing. You must do this by writing to the Clerk of the Court, at the following mailing address:

Clerk of the Court
United States District Court
Northern District of California
450 Golden Gate Avenue
San Francisco, California 94102

You can also submit comments by email to the Clerk of Court at [email address]. Your written comments or request to speak at the fairness hearing must be postmarked or date-stamped by ____, 2022. The Clerk will provide copies of the written comments to the lawyers who brought the lawsuit.

Where can I get more information?

There is more information about the *Sweet* lawsuit on Class Counsel's website at https://predatorystudentlending.org/cases/sweet-v-devos/. Check this site periodically for updated information about the lawsuit.

A copy of the proposed settlement is available online at https://predatorystudentlending.org/cases/sweet-v-devos/documents/.

If you have questions about this lawsuit or about the proposed settlement, please visit this Frequently Asked Questions page, https://predatorystudentlending.org/sweet-v-devos-class-members/, which also has contact information for the lawyers who brought the lawsuit.

Sincerely,

U.S. Department of Education

Federal Student Aid

Exhibit B

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

THERESA SWEET, *et al.*, Plaintiffs, v. MIGUEL CARDONA, in his official capacity as Secretary of Education, and the UNITED STATES DEPARTMENT OF EDUCATION Defendants.	No. 3:19-cv-03674-WHA **ORDER APPROVING SETTLEMENT AGREEMENT AND ENTERING FINAL JUDGMENT** Hon. William Alsup

Following this Court's Order preliminarily approving the proposed Settlement Agreement ("Agreement"), Plaintiffs and Defendants ("the Parties") disseminated a Notice of Proposed Settlement and Fairness Hearing to the Plaintiff Class. After consideration of the written submissions of the Parties, the Agreement between the Parties, any objections to the Agreement, all filings in support of the Agreement, and the presentations at the hearing held by the Court to consider the fairness of the Agreement, the Court hereby Orders, Finds, Adjudges, and Decrees that:

1. The Agreement between the Parties is finally approved as fair, reasonable, and adequate. The Court hereby incorporates the terms of the Agreement, executed by the Parties on June 22, 2022, into this Judgment Order.

2. Except as provided in paragraph 3 of this Order, this action is hereby dismissed with prejudice.

3. The Court shall retain jurisdiction over this action solely to enforce the terms of the Agreement, but only such jurisdiction as expressly set forth in Section V of the Agreement.

4. Once Defendants have decided all Class Members' borrower defense claims, notified all Class Members of their final decisions (where applicable), and effectuated all

appropriate relief to Class Members, the Parties will file a notice with the Court. Upon the date of that notice, the Court's jurisdiction over this action shall completely terminate.

IT IS SO ORDERED.

Dated:

_____
The Honorable William Alsup
United States District Judge

Exhibit C

School Owner(s)	School/Brand Name
Alta Colleges, Inc. (Westwood)	Westwood College
American Commercial Colleges, Inc.	American Commercial College
American National University	American National University
Ana Maria Piña Houde and Marc Houde	Anamarc College
Anthem Education Group; International Education Corporation	Anthem College
	Anthem Institute
Apollo Group	University of Phoenix
	Western International University
ATI Enterprises	ATI Career Training Center
	ATI College
	ATI College of Health
	ATI Technical Training Center
B&H Education, Inc.	Marinello School of Beauty
Berkeley College (NY)	Berkeley College
Bridgepoint Education	Ashford University
	University of the Rockies
Capella Education Company; Strategic Education, Inc.	Capella University
Career Education Corporation	American InterContinental University
	Briarcliffe College
	Brooks College
	Brooks Institute
	Collins College
	Colorado Technical University
	Gibbs College
	Harrington College of Design
	International Academy of Design and Technology
	Katharine Gibbs School
	Le Cordon Bleu
	Le Cordon Bleu College of Culinary Arts
	Le Cordon Bleu Institute of Culinary Arts
	Lehigh Valley College
	McIntosh College
	Missouri College of Cosmetology North
	Pittsburgh Career Institute
	Sanford-Brown College
	Sanford-Brown Institute
	Brown College
	Brown Institute
	Washington Business School
	Allentown Business School
	Western School of Health and Business Careers
	Ultrasound Diagnostic Schools
	School of Computer Technology

School Owner(s)	School/Brand Name
	Al Collins Graphic Design School
	Orlando Culinary Academy
	Southern California School of Culinary Arts
	California Culinary Academy
	California School of Culinary Arts
	Pennsylvania Culinary Institute
	Cooking and Hospitality Institute of Chicago
	Scottsdale Culinary Institute
	Texas Culinary Academy
	Kitchen Academy
	Western Culinary Institute
Center for Employment Training	Center for Employment Training
Center for Excellence in Higher Education (CEHE)	California College San Diego
	CollegeAmerica
	Independence University
	Stevens-Henager
Computer Systems Institute	
Court Reporting Institute, Inc.	Court Reporting Institute
Cynthia Becher	La' James College of Hairstyling
	La' James International College
David Pyle	American Career College
	American Career Institute
Delta Career Education Corporation	McCann School of Business & Technology
	Miami-Jacobs Career College
	Miller Motte Business College
	Miller-Motte College
	Miller-Motte Technical College
	Tucson College
DeVry	American University of the Caribbean
	Carrington College
	Chamberlain University
	DeVry College of Technology
	Devry Institute of Technology
	DeVry University
	Keller Graduate School of Management
	Ross University School of Veterinary Medicine
	Ross University School of Medicine
EDMC/Dream Center	Argosy University
	The Art Institute
	Brown Mackie College
	Illinois Institute of Art (The)
	Miami International University of Art & Design
	New England Institute of Art (The)
	South University
	Western State University College of Law
	All-State Career School

School Owner(s)	School/Brand Name
Education Affiliates (JLL Partners)	Fortis College
	Fortis Institute
Edudyne Systems Inc.	Career Point College
Empire Education Group	Empire Beauty School
Everglades College, Inc.	Everglades University
	Keiser University
FastTrain	FastTrain
Globe Education Network	Globe University
	Minnesota School of Business
Graham Holdings Company (Kaplan)	Bauder College
	Kaplan Career Institute
	Kaplan College
	Mount Washington College
	Purdue University Global
Grand Canyon Education, Inc.	Grand Canyon University
Infilaw Holding, LLC	Arizona Summit Law School
	Charlotte School of Law
	Florida Coastal School of Law
International Education Corporation	Florida Career College
	United Education Institute
ITT Educational Services Inc.	ITT Technical Institute
JTC Education, Inc.	Gwinnett College
	Medtech College
	Radians College
Laureate Education, Inc.	Walden University
Leeds Equity Partners V, L.P.	Florida Technical College
	National University College
	NUC University
Liberty Partners	Concorde Career College
	Concorde Career Institute
Lincoln Educational Services Corporation	International Technical Institute
	Lincoln College of Technology
	Lincoln Technical Institute
Mark A. Gabis Trust	Daymar College
Mission Group Kansas, Inc.	Wright Business School
	Wright Career College
Premier Education Group L.P.	American College for Medical Careers
	Branford Hall Career Institute
	Hallmark Institute of Photography
	Hallmark University
	Harris School of Business
	Institute for Health Education (The)
	Micropower Career Institute
	Suburban Technical School
	Salter College
	Beckfield College

School Owner(s)	School/Brand Name
Quad Partners LLC	Blue Cliff College
	Dorsey College
Remington University, Inc.; Remington College BCL, Inc.	Remington College
Southern Technical Holdings, LLC	Southern Technical College
Star Career Academy	Star Career Academy
Sullivan and Cogliano Training Center, Inc.	Sullivan and Cogliano Training Centers
TCS Education System	Chicago School of Professional Psychology
Vatterott Educational Centers, Inc.	Court Reporting Institute of St Louis
	Vatterott College
Wilfred American Education Corp.	Robert Fiance Beauty Schools
	Robert Fiance Hair Design Institute
	Robert Fiance Institute of Florida
	Wilfred Academy
	Wilfred Academy of Beauty Culture
	Wilfred Academy of Hair & Beauty Culture
Willis Stein & Partners (ECA)	Brightwood Career Institute
	Brightwood College
	New England College of Business and Finance
	Virginia College

GIBSON, DUNN & CRUTCHER LLP
LUCAS TOWNSEND (*pro hac* application forthcoming)
1050 Connecticut Ave., N.W.
Washington, D.C. 20036
ltownsend@gibsondunn.com
Telephone: 202.887.3731
Facsimile: 202.530.4254

GIBSON, DUNN & CRUTCHER LLP
JAMES L. ZELENAY, JR., SBN 237339
333 South Grand Avenue
Los Angeles, CA 90071
jzelenay@gibsondunn.com
Telephone: 213.229.7449
Facsimile: 213.229.6449

Attorneys for Proposed Intervenor
Lincoln Educational Services Corporation

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

THERESA SWEET, ALICIA DAVIS, TRESA APODACA, CHENELLE ARCHIBALD, DANIEL DEEGAN, SAMUEL HOOD, and JESSICA JACOBSON on behalf of themselves and all others similarly situated,

Plaintiffs,

v.

MIGUEL CARDONA, in his official capacity as Secretary of the United States Department of Education, and

THE UNITED STATES DEPARTMENT OF EDUCATION,

Defendants.

Case No. 19-cv-03674-WHA

Judge: Hon. William H. Alsup
Courtroom: 12

DECLARATION OF FRANCIS GIGLIO IN SUPPORT OF MOTION TO INTERVENE

HEARING DATE: August 18, 2022, 8:00 AM

(Class Action)
(Administrative Procedure Act Case)

I, Francis Giglio, have personal knowledge of the facts stated herein and hereby declare, under penalty of perjury pursuant to 28 U.S.C. § 1746, that the following is true and correct:

1. I am the Senior Vice President of Compliance and Regulatory Services at Lincoln Educational Services Corporation ("Lincoln"). I am over the age of 18 and suffer from no impairments that would prevent me from giving a declaration.

2. Lincoln provides diversified career-oriented post-secondary education to recent high school graduates and working adults. Lincoln currently operates schools on 22 campuses in 14 states, offering programs in skilled trades, automotive technology, healthcare services, hospitality services, and information technology. Those schools include the Lincoln Technical Institute, Lincoln College of Technology, and Euphoria Institute of Beauty Arts and Sciences. Lincoln's schools are nationally accredited and participate in federal financial aid programs administered by the U.S. Department of Education (the "Department") and applicable state education agencies and accrediting commissions.

3. Incorporated in New Jersey in 2003, Lincoln is the successor-in-interest to schools including Lincoln Technical Institute, Inc., which opened its first campus in the aftermath of World War II in Newark, New Jersey. Lincoln Technical Institute was founded in 1946 "on the principle of keeping our nation positioned as the world's leading economy by providing invaluable training programs to help returning veterans rejoin the workforce." A Message From Scott M. Shaw, Chief Executive Officer and President, https://www.lincolntech.edu/about/letter-from-ceo. Since its founding, Lincoln Technical Institute alone has seen more than a quarter of a million graduates pass through its programs. *Id.*

4. Lincoln's mission is to provide its students with high-quality career-oriented training in its vocational programs, thereby serving students, local employers and their communities. By combining substantial distance training with traditional classroom-based training led by experienced instructors, Lincoln believes it offers its students a strong opportunity to develop practical job skills. Those job skills enable Lincoln's students to compete for employment opportunities and to pursue salary and career advancement.

5. In my role as Senior Vice President of Compliance and Regulatory Services, I am responsible for ensuring Lincoln's compliance with all accreditation standards and state regulations. I approve all responses to accreditation findings and review all applications to state, accrediting, or federal agencies. Since April 2021, I have served as Lincoln's liaison with the Department in responding to the Department's correspondence concerning borrower defense claims against Lincoln.

6. Before April 2021, Lincoln was not aware that any borrower defense applications had been made against it. On April 29, 2021, however, the Department notified Lincoln of "borrower

defense applications that make allegations regarding your school and that will require a fact-finding process pursuant to" departmental regulations. The Department's letter also made a number of general requests for information to facilitate the Department's fact-finding.

7. In all, the Department transmitted approximately 307 borrower defense applications to Lincoln in two tranches in May and July 2021. Many of the applications presented stale claims from students who attended Lincoln's schools well over a decade ago, including as early as 1992.

8. The number of students submitting borrower defense applications represents a miniscule fraction of Lincoln's student body over that time. Compared to the approximately 307 borrower defense applications that the Department transmitted to Lincoln, over 340,000 students enrolled at Lincoln's schools between 2005 and 2021.

9. When the Department transmitted these borrower defense applications to Lincoln, Lincoln had only 30 days to respond to the claims. However, Lincoln timely and comprehensively responded to each of the 307 applications. Lincoln also fully and timely complied with the Department's general requests for information by September 2021.

10. As Lincoln explained in its responses to the borrower defense claims, Lincoln's policies and practices refute any allegations of wrongdoing.

11. Lincoln understands the importance of employment rates for students selecting institutions and takes extensive measures to ensure that all published rates are accurate. Lincoln calculates its employment rates according to state and accreditor standards. To help ensure the accuracy of its reporting, Lincoln also employs a qualified third party to verify its placements.

12. Since at least June 2011, Lincoln has had in place a Code of Compliance, Ethics and Admission Policy—which Lincoln disclosed to the Department—that imposes high ethical standards on Lincoln's admissions officers. Specifically, the Policy states that admissions officers should never "imply or guarantee that the school will find employment for the student" or "make explicit or implicit promises of employment or exaggerated statements regarding employment or salary prospects to prospective students." The Policy also warns that admissions officers should "never imply that our credits may transfer to another college or institution and, in fact . . . affirm it is the receiving institution's determination on whether or not to accept our credits." Lincoln's admissions

team reviews the Policy during training, and admissions officers found to be in violation of the Policy risk discipline and termination. In reviewing its own personnel, Lincoln has found that its admissions officers observe the Policy.

13. To the best of my knowledge, the Department has never adjudicated the borrower defense applications against Lincoln or made any findings of wrongdoing in accordance with the Department's regulations. Lincoln is aware of no findings or even credible allegations of wrongdoing against it.

14. Lincoln first learned of a proposed settlement between the plaintiff class and the Department in this case when the parties filed their Notice of Motion and Joint Motion for Preliminary Approval of Settlement and Direct Notice to Class in this Court on June 22, 2022. For the first time, Lincoln became aware that the Department had agreed to include Lincoln on a list of schools that had purportedly engaged in "substantial misconduct," Dkt. 246, at 3; Ex. C, and that the Department had promised full student loan forgiveness for each proposed class member associated with a listed school. Dkt. 246-1, at 6.

15. As currently drafted, the proposed settlement will severely harm Lincoln's interests. Lincoln's unfounded inclusion on a list of purported wrongdoers is inflicting, and will continue to inflict, substantial reputational harms on Lincoln and its schools. As recent media coverage shows, including Lincoln in such a list will erroneously associate Lincoln with allegedly *proven* wrongdoers.*

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* *See, e.g.*, Adam S. Minsky, *264,000 Borrowers Will Get $6 Billion In Student Loan Forgiveness In 'Landmark' Settlement Agreement With Biden Administration*, Forbes (June 23, 2022), https://www.forbes.com/sites/adamminsky/2022/06/23/student-loan-forgiveness-another-264000-borrowers-will-get-debt-cancelled-in-landmark-settlement-agreement-with-biden-administration/?sh=fb62b4c5dfc8 (associating the listed schools in the proposed settlement with a prior scandal involving a "notorious" institution facing "widespread allegations of misconduct"); Addy Bink, *Attended One of These Schools? You May be Eligible for Student Loan Forgiveness*, Nexstar Media Wire (July 10, 2022), https://fox8.com/news/nexstar-media-wire/attended-one-of-these-schools-you-may-be-eligible-for-student-loan-forgiveness (recounting history of programs that "lacked certifications and accreditation" and engaged in "pervasive and widespread misconduct").

16. The consequences of these reputational harms also ultimately fall on Lincoln's students. In securing employment, Lincoln's students and alumni depend not only on the training they receive at Lincoln, but on Lincoln's leading reputation as a provider of technical skills.

17. As currently drafted, the proposed settlement also exposes Lincoln to additional regulatory risk from state regulators and accreditation boards. State governments could improperly attempt to leverage the settlement to bring de-licensing proceedings or consumer protection actions against Lincoln's schools. The proposed settlement also could spur state governments and accreditation boards to open new investigations into Lincoln's recruiting and educational practices, without any finding of wrongdoing under the Department's regulations.

18. Private plaintiffs also could use the proposed settlement as a springboard for actions seeking damages under state law causes of action, including actions for education malpractice or fraud and misrepresentation. While any such actions would be unfounded, the litigation risk is a substantial burden for Lincoln.

19. At minimum, the proposed settlement likely will lead to increased numbers of unmeritorious borrower-defense applications, to which Lincoln will be forced to respond. In just the week after the proposed settlement was filed, the Department reportedly "received more than 60,000 new borrower defense applications," while the Department received only about 100,000 such claims in all of 2021. Michael Stratford, *Inside the Deal That Could Revamp Loan Forgiveness For Defrauded Borrowers*, Politico (July 5, 2022), https://www.politico.com/newsletters/weekly-education/2022/07/05/inside-the-deal-that-could-revamp-loan-forgiveness-for-defrauded-borrowers-00043893.

20. By being subjected to the various harms identified above, Lincoln would be significantly injured if the proposed settlement is approved without a prior opportunity for Lincoln to provide substantive input.

I declare, under the penalty of perjury under the laws of the United States that these facts are true and correct and that this Declaration is executed this 13th day of July, 2022 at Westfield, New Jersey.

EXECUTED: July 13, 2022

Westfield, New Jersey

Francis Giglio

CERTIFICATE OF SERVICE

I hereby certify that on July 13, 2022, the foregoing document entitled **DECLARATION OF FRANCIS GIGLIO IN SUPPORT OF MOTION TO INTERVENE** was filed electronically with the Clerk of the Court for the United States District Court, Northern District of California using the ECF system. Upon completion the ECF system will automatically generate a "Notice of Electronic Filing" as service through ECF to registered e-mail addresses of parties of record in the case.

/s/ Piper A. Waldron
Piper A. Waldron

GIBSON, DUNN & CRUTCHER LLP
LUCAS TOWNSEND (*pro hac vice*)
1050 Connecticut Ave., N.W.
Washington, D.C. 20036
ltownsend@gibsondunn.com
Telephone: 202.887.3731
Facsimile: 202.530.4254

GIBSON, DUNN & CRUTCHER LLP
JAMES L. ZELENAY, JR., SBN 237339
333 South Grand Avenue
Los Angeles, CA 90071
jzelenay@gibsondunn.com
Telephone: 213.229.7449
Facsimile: 213.229.6449

Attorneys for Intervenor
Lincoln Educational Services Corporation

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

THERESA SWEET, ALICIA DAVIS, TRESA APODACA, CHENELLE ARCHIBALD, DANIEL DEEGAN, SAMUEL HOOD, and JESSICA JACOBSON on behalf of themselves and all others similarly situated,

Plaintiffs,

v.

MIGUEL CARDONA, in his official capacity as Secretary of the United States Department of Education, and

THE UNITED STATES DEPARTMENT OF EDUCATION,

Defendants,

and

CHICAGO SCHOOL OF PROFESSIONAL PSYCHOLOGY; EVERGLADES COLLEGE, INC.; AMERICAN NATIONAL UNIVERSITY; and LINCOLN EDUCATIONAL SERVICES CORPORATION,

Intervenors.

Case No. 19-cv-03674-WHA

Judge: Hon. William H. Alsup
Courtroom: 12

SUPPLEMENTAL DECLARATION OF FRANCIS GIGLIO IN SUPPORT OF INTERVENOR LINCOLN EDUCATIONAL SERVICES CORPORATION'S RESPONSE TO JOINT MOTION FOR FINAL APPROVAL OF SETTLEMENT

Hearing Date: November 3, 2022
Hearing Time: 11:00 am

(Class Action)
(Administrative Procedure Act Case)

I, Francis Giglio, have personal knowledge of the facts stated herein and hereby declare, under penalty of perjury pursuant to 28 U.S.C. § 1746, that the following is true and correct:

1. I am the Senior Vice President of Compliance and Regulatory Services at Lincoln Educational Services Corporation ("Lincoln"). I am over the age of 18 and suffer from no impairments that would prevent me from giving a declaration. This supplemental declaration details additional developments that have occurred since I submitted my first declaration in this case on July 13, 2022.

2. On August 8, 2022, Lincoln received a letter from the Department of Education ("Department") regarding a single borrower defense application submitted on behalf of approximately 350 students who were enrolled in Lincoln Technical Institute's criminal justice program at two of its Massachusetts campuses between 2010 and 2013. The Department's letter provided a list of the students in question and a generalized description of grounds for borrower defenses on behalf of all approximately 350 students. Based on the Department's letter, it appears that the application is premised on many of the same allegations by the Massachusetts Attorney General that were settled in 2015 without any findings of liability. The Department's letter, which did not state who submitted the application or when it was submitted, asked Lincoln to submit any response within 60 calendar days.

3. On August 11, 2022, I emailed the Department to request further details of the individual students' claims to assist in responding to their application. The Department has not responded or provided any additional information in response to my request.

4. On October 5, 2022, Lincoln timely responded to the Department's letter to the best of its ability, given that the Department did not provide Lincoln with a copy of the borrower defense application or any supporting documentation or evidence. Among other grounds, Lincoln noted that the borrower defense application appeared to be untimely, facially insufficient, and unmeritorious.

5. Furthermore, according to Lincoln's records, at least 40 of the approximately 350 students included in the borrower defense application had not received any Title IV federal student loans and therefore are ineligible for borrower defense relief. This further calls into question the basis for the application.

6. After I submitted my first declaration in this case, the Biden Administration announced a plan (the "Biden plan") to forgive up to $20,000 in student loan debt to Federal Pell Grant recipients

and up to $10,000 in debt relief to non-Pell Grant recipients for borrowers with an individual income of less than $125,000 or joint household income of less than $250,000. *See The Biden-Harris Administration's Student Debt Relief Plan Explained*, Federal Student Aid, bit.ly/3rrrBgF. The Biden plan apparently would apply to members of the class in this case. The Biden plan thus provides an important point of comparison and raises questions about whether, and to what extent, class members and post-class borrower defense applicants will benefit from the proposed settlement.

7. Lincoln primarily offers short-term programs of study that do not require students to finance multi-year degree programs. The typical length of a program of study at Lincoln is one to two years. According to data publicly available on the Department's College Scorecard, the median total debt after graduation for Lincoln students is approximately $11,000.

8. For the Lincoln students whose borrower defense applications were transmitted to Lincoln in 2021, the average amount of Title IV federal student loans issued to students and their parents was approximately $13,000, and the median amount of Title IV federal student loans issued to those students and their parents was approximately $10,000. These figures reflect initial Title IV federal student loan balances and do not reflect any accrued interest or current loan balances.

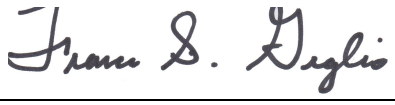
9. For the Lincoln students whose borrower defense applications were transmitted to Lincoln in August 2022, the average and median amount of Title IV federal student loans issued to students and their parents was approximately $7,500. These figures reflect initial Title IV federal student loan balances and do not reflect any accrued interest or current loan balances.

10. Comparing Lincoln's specific data to the Biden plan shows that approximately 81% of Lincoln students who received Federal Pell Grants and submitted borrower defense applications had an initial Title IV federal student loan balance below the $20,000 cancellation limit of the Biden plan. Approximately 54% of Lincoln students who did not receive Pell Grants had an initial Title IV federal student loan balance below the corresponding $10,000 cancellation limit. These data suggest that many borrower defense applicants may receive substantial, if not complete, relief under the Biden plan independent of monetary relief available under the proposed settlement in this case.

I declare, under the penalty of perjury under the laws of the United States that these facts are true and correct and that this Declaration is executed this 6th day of October, 2022 at Westfield, New Jersey.

EXECUTED: October 6, 2022

Westfield, New Jersey



Francis Giglio

Lucas Townsend (*pro hac vice*)
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Ave., N.W.
Washington, D.C. 20036
Telephone: (202) 887-3731
ltownsend@gibsondunn.com

James L. Zelenay, Jr. (SBN 237339)
GIBSON, DUNN & CRUTCHER LLP
333 South Grand Avenue
Los Angeles, CA 90071
Telephone: (213) 229-7449
jzelenay@gibsondunn.com

Attorneys for Intervenor Lincoln Educational Services Corporation

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

THERESA SWEET, et al.,

Plaintiffs,

v.

MIGUEL CARDONA, in his official capacity as Secretary of Education, and the UNITED STATES DEPARTMENT OF EDUCATION,

Defendants.

Case No. 3:19-cv-03674-WHA

DECLARATION OF FRANCIS GIGLIO IN SUPPORT OF INTERVENORS' JOINT MOTION FOR STAY PENDING APPEAL

Date: February 15, 2023
Time: 1:30 p.m.
Room: 12, 19th Floor
Judge: Honorable William Alsup

(Class Action)

(Administrative Procedure Act Case)

I, Francis Giglio, have personal knowledge of the facts stated herein and hereby declare, under penalty of perjury pursuant to 28 U.S.C. § 1746, that the following is true and correct:

1. I am the Senior Vice President of Compliance and Regulatory Services at Lincoln Educational Services Corporation ("Lincoln"). I am over the age of 18 and suffer from no impairments that would prevent me from giving a declaration. I submitted declarations in this case on July 13, 2022 and October 6, 2022. This declaration details additional harms that have resulted from the settlement and final judgment in this case on November 17, 2022.

2. I understand that the plaintiffs have argued that Lincoln has suffered no harm from the settlement of this case, and will suffer no harm if the judgment is carried into effect while appeals are pending. However, plaintiffs' arguments fail to acknowledge the real harms that an institution of higher education, such as Lincoln, suffers when its primary federal regulator disparages the institution in the way that the Department of Education has done in the final judgment here.

3. Lincoln Technical Institute was founded in 1946 to provide vocational and skills training to America's post-war workforce. In the more than 76 years since its founding, Lincoln has grown to become one of the leading providers of diversified career-oriented post-secondary education to recent high school graduates and working adults. Lincoln has worked to build longstanding relationships in the communities it serves, including relationships with state and local governments, secondary educational institutions, and employers in the market for skilled trades. Lincoln regularly participates in community events, sends representatives to participate in career counseling events at secondary schools, and sponsors job fairs, among many other programmatic activities.

4. Lincoln's programmatic activities have been harmed and will continue to be harmed as a direct result of the judgment in this case. As one example, a Lincoln representative was recently denied an opportunity to speak with students in a government class at Centennial High School in Las Vegas, Nevada, because of Lincoln's inclusion on Exhibit C. The Lincoln representative had presented to students at this high school in October 2021 and September 2022.

In January 2023, the representative contacted a teacher at the same high school to schedule a presentation to high school seniors regarding career paths in the skilled trades. On January 9, 2023, following entry of the final judgment in this case, the teacher at the high school emailed Lincoln with the following message: "It is my understanding that Lincoln Tech is on the U.S. Department of Ed's list of predatory schools. I no longer feel comfortable taking class time to have your people talk to my students." (I am withholding the names of the sender and recipient to protect their privacy.) As a result, the Lincoln representative did not speak to the government class at Centennial High School, and both Lincoln and the students lost an invaluable opportunity to connect regarding career opportunities.

5. The January 9, 2023 email exchange described above draws a direct connection between Lincoln's inclusion on Exhibit C (described as "the U.S. Department of Ed's list of predatory schools" in the email) and programmatic harm to Lincoln (i.e., "I no longer feel comfortable taking class time to have your people talk to my students.").

6. I understand that the Department of Education has stated in this case that Lincoln's inclusion on Exhibit C does not itself represent a finding of wrongdoing. Even if that is true, however, the January 9, 2023 email described above shows how the dissemination of misinformation about the judgment in this case—by the federal government, the plaintiffs, and others—has created the perception that the federal government has found all Exhibit C schools to be "predatory schools." For example, the Federal Trade Commission—an agency of the United States Government—has publicized on its webpage "the list of schools included in the Sweet settlement" and has urged borrowers to "get your federal loans forgiven through the borrower defense program" and "file your application."[1] The Federal Trade Commission's webpage expressly equates inclusion on Exhibit C with deceptive practices:

> Some of the names on the list of schools included in the Sweet settlement may look familiar — and they should. The FTC has also sued the University of Phoenix, DeVry,

[1] https://consumer.ftc.gov/consumer-alerts/2022/09/got-student-loans-spot-scams-related-sweet-lawsuit. A copy of the Federal Trade Commission's webpage is attached to this Declaration for the Court's convenience.

> and the operators of American InterContinental University and Colorado Technical University for their allegedly deceptive practices. Students who took out loans to attend those schools got more than $300 million in payments and debt cancellation through these FTC actions. If you got a check from one of these settlements: You're still eligible to get your federal loans forgiven through the borrower defense program, so file your application.

Id. The plaintiffs in this case, by their very name (Project on Predatory Student Lending), further convey that schools on Exhibit C—even those such as Lincoln that have never been found to have committed wrongdoing—are "predatory." Therefore, the parties' own actions have exacerbated the harm to Lincoln from inclusion on Exhibit C.

7. I understand that plaintiffs have argued that the intervenors have not provided evidence of actual harm since the Department announced its Exhibit C. The evidence described above, as well as other evidence filed in this case, shows that Lincoln is experiencing real harm from the settlement and judgment. Moreover, plaintiffs are mistaken in expecting that all such harm will materialize immediately following entry of judgment. The harm from being deemed a wrongdoer by a regulator manifests itself over time, often in subtle and sometimes unpredictable ways, such as community partners who quietly discontinue their relationships with schools, prospective students who look elsewhere for their post-secondary education, employers who distance themselves from a school's graduates, and regulators who subject schools to heightened scrutiny. The harm is real even if it manifests itself over time.

8. I understand that Plaintiffs in this case have filed a declaration from an individual, Mr. Keith Lapsker, to support their argument that members of the class will be irreparably harmed by a stay during the appeals. In his declaration, Mr. Lapsker states: "I attended Lincoln Tech and submitted a borrower defense application on or before June 22, 2022." However, Mr. Lapsker did not attend Lincoln Tech, or any institution of higher education owned or operated by Lincoln Educational Services Corporation at the time of his attendance. Rather, Mr. Lapsker must have attended a school not affiliated with Lincoln at the time. If the Court has questions, Lincoln can

provide the Court with additional information under seal, consistent with federal confidentiality law, upon order of the Court.

9. As I detailed in my prior declaration, the settlement and judgment in this case also directly and concretely harm Lincoln through its financial reporting to regulators and investors. Lincoln is a public company whose stock trades on The NASDAQ Stock Market. Like all public companies, Lincoln must report material risks in its filings with the Securities and Exchange Commission. Since the proposed judgment was announced on June 22, 2022, Lincoln has described this litigation in Lincoln's August 8, 2022 Form 10-Q filing and November 7, 2022 Form 10-Q filing, and has identified the results of this litigation as a potential risk factor for the company. This record further shows how Lincoln's inclusion on Exhibit, incorporated into the final judgment in this case, has caused concrete and material consequences for the company, its financial reporting, and its shareholder relations.

I declare, under the penalty of perjury under the laws of the United States that these facts are true and correct and that this Declaration is executed this 3rd day of February, 2023 at Parsippany, New Jersey.

EXECUTED: February 3, 2023

Parsippany, New Jersey

Francis Giglio

FEDERAL TRADE COMMISSION
CONSUMER ADVICE

Consumer Alert

Got student loans? Spot scams related to the Sweet lawsuit

By: Terri Miller, Consumer Education Specialist | September 16, 2022

If you have student loans, you probably already know about the US Department of Education's (ED's) borrower defense loan forgiveness program. But did you know about a lawsuit and proposed settlement in the case of ***Sweet v. Cardona*** that could mean thousands more people with borrower defense claims will be able to get their eligible federal loans forgiven? Read on to learn more and see how to avoid scammers looking to cash in.

The details are still coming together, but here's what to know right now:

- **If your borrower defense application was pending as of June 22, 2022,** there's nothing else you need to do. Students who attended certain schools will have their loans discharged, along with other benefits. Otherwise, decisions will be made on a rolling basis depending on when you submitted your application. Check ED's website for more details.
- **If you haven't applied for borrower defense (but think you should) – do it now.** There are benefits to getting your borrower defense application in before the final approval of the settlement (which hasn't been announced yet — but should be soon). Check out what types of claims may qualify for borrower defense.

Some of the names on the list of schools included in the *Sweet* settlement may look familiar — and they should. The FTC has also sued the University of Phoenix, DeVry, and the operators of American InterContinental University and Colorado Technical University for their allegedly deceptive practices. Students who took out loans to attend those schools got more than $300 million in payments and debt cancellation through these FTC actions. If you got a check from one of these settlements: **You're still eligible to get your federal loans forgiven** through the borrower defense program, so file your application.

This settlement is not a scam. It's real. And it's free to apply. Remember:

- **Don't pay anybody for anything related to your borrower defense claim**. Nobody can move you up in line, give you special access, or guarantee a successful application. Not for free, and certainly not for money. And only scammers will ask. And if you spot a scam, tell the FTC: ReportFraud.ftc.gov.

Search Terms: student, loan, scam

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Charlotte Bohannon September 16, 2022

I get calls about student loans nearly every day. I am 76 years old, never had a student loan & never signed with anyone else to get one. I have told them numerous times I don't have a student loan. They say they will take my name off; but they call right back the next day. I am sure it is a scam.

Jesse Panuccio (*pro hac vice*)
Jason Hilborn (*pro hac vice*)
BOIES SCHILLER FLEXNER LLP
401 E. Las Olas Blvd., Ste. 1200
Fort Lauderdale, FL 33301
Telephone: (954) 356-0011
jpanuccio@bsfllp.com
jhilborn@bsfllp.com

John J. Kucera (SBN 274184)
BOIES SCHILLER FLEXNER LLP
725 S. Figueroa St., 31st Fl.
Los Angeles, CA 90017
Telephone: (213) 629-9040
jkucera@bsfllp.com

Counsel for Intervenor Everglades College, Inc.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

THERESA SWEET, et al.,

Plaintiffs,

v.

MIGUEL CARDONA, in his official capacity as Secretary of Education, and the UNITED STATES DEPARTMENT OF EDUCATION,

Defendants.

Case No. 3:19-cv-03674-WHA

DECLARATION OF JOSEPH C. BERARDINELLI IN SUPPORT OF INTERVENOR'S MOTION FOR STAY PENDING APPEAL

I, Joseph C. Berardinelli, hereby declare as follows:

1. I am over the age of eighteen and competent to testify to the matters herein.

2. I have been an employee of Everglades College, Inc. ("ECI") (or its component institutions) for 18 years. I am the Senior Vice Chancellor, Chief Financial Officer, and Treasurer for ECI. In this role, among other responsibilities, I am responsible for all financial aspects of the university including, but not limited to, maintaining the institutions' treasury and obtaining financing for the acquistion of real and personal property.

3. I have knowledge of the facts stated herein and, if called upon as a witness, I could and would testify competently thereto.

4. This declaration is submitted in support of Everglades College, Inc.'s Reply in Support of Motion For Stay Pending Appeal.

5. Everglades College, Inc. ("ECI") is a Florida nonprofit corporation that runs an independent university system for undergraduate and graduate programs. ECI focuses on providing education to those who want to return to school to enhance or change their careers. ECI accomplishes this goal through two nonprofit educational institutions: Everglades University and Keiser University. These institutions collectively enroll around 20,000 students on 27 campuses, in three countries, and online.

6. To my knowledge, and based on a reasonable investigation of ECI's business records, the Department of Education has not informed ECI, Everglades University, or Keiser University that any of its students or former students have filed borrower-defense applications.

7. I am aware that on January 27, 2023, Plaintiffs filed with the Court the declarations of Marlo Duffy and Tiffany Winder, and that these individuals assert they "attended Keiser" and "submitted a borrower defense application on or before June 22, 2022." Doc. 361-1 at 64, 158.

8. Despite the notice requirements in the borrower-defense regulations, the Department of Education ("Department") has never notified Keiser University that Marlo Duffy or Tiffany Winder filed borrower-defense applications related to the university. The Duffy and Winder declarations do not contain any specific allegations of wrongdoing by Keiser University,

and the Department has never afforded Keiser University the opportunity to answer any specific allegations made by Marlo Duffy or Tiffany Winder.

9. Our staff has performed a search of our database of students and former students and has been unable to locate a record of attendance at Keiser for any person named "Marlo Duffy" or "Tiffany Winder." To the best of my knowledge, and based on a search of institutional records, prior to the filing of the recent Duffy and Winder declarations, neither the Department of Education nor Plaintiffs' counsel ever provided ECI with any complaints from, or information about, Marlo Duffy and Tiffany Winder. It thus goes without saying that ECI has not been afforded the opportunity to address any specific allegations of wrongdoing made by Marlo Duffy or Tiffany Winder.

10. The declaration from Tiffany Winder states that Winder has been damaged by "[t]he scam," but fails to explain the alleged scam or how it damaged her. She alleges that the Chancellor of Keiser University is a "ruthless person who continues with greed and immorally acts out of selfishness." But Winder provides no facts to support these allegations. Unfortunately, these are examples of the baseless attacks that the Settlement in this case encourages—attacks that ultimately harm the school's reputation.

11. The declaration from Marlo Duffy states that Duffy was a student at Keiser College (now Keiser University) over twenty years ago and complains of being divorced and saddled with debt but makes no allegation of misconduct by Keiser College.

12. Another example of such reputational harm comes from Plaintiffs' counsel, who has used the settlement to claim in the media, as a matter of established fact, that persons receiving relief under the settlement were "cheated by their schools." Doc. 325-4.

13. ECI's inclusion on Exhibit C is causing financial and programmatic consequences and harm for the institution. Some lenders have expressed concern and begun inquiring about the Settlement as part of their due diligence, which has (1) required ECI to dedicate resources to addressing those questions and concerns, (2) delayed and/or increased the cost of financing, and (3) caused, in some instances, potential lenders not to provide financing.

14. ECI is supportive of full and fair adjudication of any and all borrower-defense claims. But ECI has not been provided an opportunity to answer (or even know) the allegations leveled against it. Yet ECI's federal regulator, with the impramatur of the Final Judgment of a federal court, has determined ECI engaged in misconduct. I understand that Plaintiffs argue the Intervenor schools have not provided evidence of harm caused by this process. However, the evidence described above, as well as other evidence filed in this case, shows that ECI is already experiencing actual harm from the Settlement and Final Judgment. Moreover, Plaintiffs' argument ignores how harm unfolds once an institution's federal regulator has deemed it a wrongdoer. This harm unfolds over time, sometimes in unforeseen ways, such as community partners ending relationships without explanation, prospecive students who are turned off before applying, prospective faculty who take other opportunities, and other regulators making unfounded assumptions.

I declare under penalty of perjury that the foregoing is true and correct.

Dated: February 3, 2023

s/ Joseph C. Berardinelli

Joseph C. Berardinelli