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UNITED STATES DISTRICT COURT
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

NOTICE OF MOTION AND JOINT MOTION FOR FINAL APPROVAL OF SETTLEMENT

HEARING DATE: November 3, 2022

(Class Action)
(Administrative Procedure Act Case)

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Rules

Treatises

NOTICE OF MOTION

PLEASE TAKE NOTICE THAT on November 3, 2022, at 11:00 a.m., in the courtroom of the Honorable William Alsup, Courtroom 12, 19th Floor of the United States District Court for the Northern District of California, located at 450 Golden Gate Avenue, San Francisco, CA 94102, the Parties will and hereby do respectfully move the Court for an order of final approval of the proposed class action settlement that received preliminary approval from the Court on August 4, 2022. This Motion is supported by the accompanying memorandum of points and authorities, the attached declarations and exhibits, the pleadings and other papers filed in this case, oral argument, and any other matters in the record or of which this Court takes notice.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

On August 4, 2022, this Court preliminarily approved a class-wide settlement of this action pursuant to Federal Rule of Civil Procedure 23. *See* ECF No. 307. The Settlement Agreement, which the Plaintiffs and the Department of Education ("Department," and together, the "Parties") signed on June 22, 2022 (ECF No. 246-1, the "Agreement"), will provide relief to approximately 264,000 Class Members, and will deliver this relief without the delay or risk of continued litigation.

The Agreement provides for automatic relief—federal loan discharges, refunds of amounts paid to the Department, and credit repair ("Full Settlement Relief")—for approximately 75% of the Class: individuals whose borrower defense ("BD") applications relate to one (or more) of a specified list of schools for which the Department has determined there exists a sufficient threshold indication of wrongdoing to justify summary settlement relief. The remainder of the Class will have their BD applications evaluated under a streamlined review process that will deliver timely and lawful written decisions. If the Department fails to provide a written decision within the specified time period, the Class Member will automatically receive Full Settlement Relief. The Agreement further provides for the rescission of all form denial notices issued by the Department on BD applications between December 2019 and October 2020 (the "Form Denial Notices").

Individuals who received a Form Denial Notice are included in the Class and will be treated as if their applications had been continuously pending since submission.

Finally, the Agreement closes the Class for purposes of settlement as of the date the Agreement was executed. "Post-Class Applicants"—individuals who have applied or will apply for borrower defense between June 23, 2022, and the date of final approval of the Agreement (if granted)—are, however, guaranteed a decision on their BD applications within 36 months of the Effective Date of the Agreement. If the Department fails to provide a decision in that time, they too will receive Full Settlement Relief.

The Court should grant final approval of the Agreement because it is fair and reasonable, and it is in the best interests of the Class, as the Court recognized at the preliminary approval hearing. *See* Transcript of Aug. 4, 2022 Hearing ("Aug. 4 Tr.") at 40.[1] The relief provided in the Agreement is consistent with what Class Members might reasonably expect to receive through litigation, while eliminating the delay and uncertainty of further proceedings. The Parties reached this Agreement following extensive adversarial proceedings: in the course of this litigation, the Parties have engaged in, among other things, extensive discovery, two rounds of summary judgment briefing, and motion practice on a previous settlement that failed to gain final approval. The Parties negotiated the current Agreement over the course of more than a year. The Agreement will resolve the claims of the Class and provides that Plaintiffs may move for attorneys' fees under the Equal Access to Justice Act, 28 U.S.C. § 2412(d), after final approval of the Agreement. In short, the Agreement meets all the criteria of Federal Rule of Civil Procedure 23(e).

As of the September 15, 2022 deadline for comments on the Agreement, the Court received submissions from 1,583 borrowers.[2] The majority of submissions either supported or raised

[1] A copy of this transcript is appended hereto as Exhibit A.

[2] On September 22, 2022, the Court transmitted 25 additional comments to the Parties. Most of these were submitted after the deadline. These comments do not meaningfully change the calculations or analysis in this motion; to the extent any later-arriving comments require specific responses, the Parties will do so in reply.

questions about, but did not object to, the Agreement. The objections—approximately 167—raised by Class Members and Post-Class Applicants do not change the conclusion that the Agreement should be approved. Indeed, the objections generally reflect a consistent theme: the relief provided to Class Members under the Agreement should be extended to even more people. Because there are good reasons for each challenged aspect of the Agreement, the objections do not undermine the fairness of the Agreement as a whole.

Finally, the Parties address certain anticipated objections from the four schools that have intervened in this case. *See* ECF No. 322 (granting permissive intervention). The arguments that the intervenors have raised thus far do not relate to any factor relevant to the Court's consideration of this motion and do not present any barrier to final approval.

II. BACKGROUND AND PROCEDURAL HISTORY

Plaintiffs filed their class action complaint ("Complaint") on June 25, 2019. *See* Compl. ¶¶ 5, 135, 181-82, ECF No. 1. The Complaint sought declaratory and injunctive relief and alleged, *inter alia*, that the Department's failure to issue any BD decisions for over a year constituted agency action unlawfully withheld or unreasonably delayed. *Id.* ¶¶ 377-89. On October 30, 2019, the Court certified a class of "[a]ll 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*." Order, ECF No. 46 at 14.

On April 7, 2020, after the Parties had briefed and argued motions for summary judgment (and after the Department asserted that it had resumed issuing final BD decisions as of December 10, 2019, *see* ECF No. 71), the Parties executed a settlement agreement. They filed that agreement on April 10, 2020, and the Court granted preliminary approval on May 22, 2020. ECF Nos. 97, 103. Soon afterward, however, Plaintiffs' counsel became aware that increasing numbers of Class Members were receiving Form Denial Notices. The Parties disputed whether these Form Denial Notices were legally adequate and whether they violated the settlement agreement. The Court denied final approval of the settlement on October 19, 2020, finding there was "no meeting of the

minds." ECF No. 146 at 10. The Court ordered the Parties to conduct expedited discovery, and ordered Defendants to show cause why the Department should not be enjoined from issuing any further denials of Class Members' BD applications until a ruling could be had on the legality of the Form Denial Notices. *Id.* at 17. In response, Defendants agreed to cease issuing any denials until such a ruling. *See* Defs.' Response to Order to Show Cause, ECF No. 150 at 2-3.

The Parties conducted discovery between November 2020 and spring 2021. Based in significant part on materials adduced in discovery, Plaintiffs filed a Supplemental Complaint that significantly expanded the scope of the case, alleging that Defendants had adopted an unlawful "presumption of denial" policy for BD applications, in violation of Section 706(2) of the APA, and had issued thousands of unlawful Form Denial Notices pursuant to this policy, in violation of Section 555(e) of the APA. Supplemental Complaint ¶¶ 436-447, ECF No. 198. Plaintiffs further alleged that both the policy and the Form Denial Notices violated the Due Process Clause of the U.S. Constitution. *Id.* ¶¶ 448-455. In their consolidated prayer for relief, Plaintiffs requested, *inter alia*, that the Court (i) vacate the Department's alleged policy of refusing to adjudicate BD applications and its alleged "presumption of denial" policy; (ii) declare that the Form Denial Notices were invalid and vacate all such denials; (iii) compel the Department to lawfully adjudicate all pending BD applications, including by providing an adequate statement of grounds for any denials; and (iv) require the Department to hold all Class Members in forbearance or stopped collection status until their applications were granted or denied on the merits. *Id.* at 76-77. The Department filed an Answer to the Supplemental Complaint on June 23, 2021, in which it denied that the Plaintiffs were entitled to any of the foregoing (or any other) relief. *See* ECF No. 206.

New leadership took over the Department of Education beginning in January 2021, and the Parties began new settlement negotiations in May 2021. Those negotiations proceeded over a number of months. This litigation was stayed during much of that time while Defendants pursued a writ of mandamus before the Ninth Circuit Court of Appeals, challenging this Court's order allowing Plaintiffs to take a three-hour deposition of former Secretary of Education Elisabeth

DeVos. *See generally In re DeVos*, No. 3:21-mc-80075-WHA (N.D. Cal.); *In re U.S. Dep't of Educ.*, No. 21-71108 (9th Cir.).

The Ninth Circuit issued an order granting the writ of mandamus on February 4, 2022. *See In re U.S. Dep't of Educ.*, 25 F.4th 692 (9th Cir. 2022). This Court subsequently set a schedule for renewed summary judgment briefing. *See* ECF Nos. 216, 219, 240. Plaintiffs filed their motion for summary judgment on June 9, 2022, ECF No. 245, and Defendants filed their opposition and cross-motion on June 23, 2022, ECF No. 249.

Meanwhile, the Parties signed the Agreement on June 22, 2022, and filed their motion for preliminary approval the same day. *See* ECF No. 246, 246-1. The Court vacated the remainder of the summary judgment briefing schedule and set a preliminary approval hearing for July 28, 2022. ECF No. 250.

Three weeks after the Parties moved for preliminary approval, four educational institutions moved to intervene in the litigation. *See* ECF No. 254 (motion of American National University ("ANU") and Lincoln Educational Services Corporation ("Lincoln")); ECF No. 261 (motion of Everglades College, Inc. ("ECI")); ECF No. 265 (motion of Chicago School of Professional Psychology ("CSPP")). Each argued, in effect, that it had an interest in the case because it was named in Exhibit C to the Agreement as a school whose former students would receive automatic settlement relief, and this fact could potentially give rise to various legal, economic, and/or reputational harms. On July 15, 2022, the Court set a briefing schedule on the motions to intervene and scheduled a consolidated hearing on those motions and the motion for preliminary approval. ECF No. 269.

At the August 4, 2022 consolidated hearing, after arguments from the Parties and the putative intervenors, the Court granted preliminary approval from the bench. Aug. 4 Tr. at 40, 48. The Court did not rule on the motions to intervene, but noted that it was "tentatively" inclined to grant permissive intervention. *Id.* at 47:9-11. The Court further explained that it might allow the intervenors to "oppose the settlement," *id.* at 49:12, but the Court was "not saying that any . . . intervenors have a property interest that's at stake," *id.* at 52:3-4, and the Court would not entertain

any "demands for discovery" in connection with opposing final approval, *id.* at 49:8-13. Rather, the Court was "inclined to let [intervenors] in . . . to keep the system honest" by "help[ing] [the Court] see the opposing arguments." *Id.* at 52:5-8.

The Court issued a preliminary approval order following the hearing and set the following deadlines: the Department would provide notice to the Class by August 19, 2022; any further motions to intervene would be filed by August 25, 2022; all comments from Class Members would be submitted to the Court by September 15, 2022; the Parties would move for final approval by September 22, 2022; and a final approval hearing would be held on November 3, 2022. *See* ECF Nos. 307, 308, 315.

No further motions to intervene were filed by the deadline. On August 31, 2022, the Court denied the motions of ANU, Lincoln, ECI, and CSPP to intervene as of right, but allowed them permissive intervention "for the sole and express purpose of objecting to and opposing the class action settlement." ECF No. 322. Intervenors must oppose the motion for final approval by October 6, 2022, and any replies are due by October 13, 2022. ECF No. 315.

III. THE SETTLEMENT AGREEMENT MERITS FINAL APPROVAL

"A district court may approve a class-action settlement only after finding that the settlement is 'fair, reasonable, and adequate.'" *Campbell v. Facebook, Inc.*, 951 F.3d 1106, 1120–21 (9th Cir. 2020) (quoting Fed. R. Civ. P. 23(e)). The district court "must evaluate the fairness of a settlement as a whole, rather than assessing its individual components." *Lane v. Facebook*, 696 F.3d 811, 818–19 (9th Cir. 2012). Rule 23(e) requires that the Court consider whether "(A) the class representatives and class counsel have adequately represented the class; (B) the proposal was negotiated at arm's length; (C) the relief provided for the class is adequate . . . ; and (D) the proposal treats class members equitably relative to each other." Fed. R. Civ. P. 23(e)(B)(2). The Ninth Circuit has identified additional relevant factors to consider in determining fairness, including "the strength of the plaintiffs' case; the risk, expense, complexity, and likely duration of further litigation; the risk of maintaining class action status throughout the trial; the amount offered in settlement; the extent of discovery completed and the stage of the proceedings; the experience and

views of counsel; the presence of a governmental participant; and the reaction of the class members to the proposed settlement." *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1026 (9th Cir. 1998), *overruled on other grounds by Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011).

Final approval of a class action settlement is ultimately within the Court's discretion: "Whether or not there are objectors or opponents to the proposed settlement, the court must make an independent analysis of the settlement terms." Manual of Complex Litigation at 310, § 21.16 (4th ed.); *see also Hanlon*, 150 F.3d at 1026 ("We have repeatedly stated that the decision to approve or reject a settlement is committed to the sound discretion of the trial judge."); *In re Volkswagen "Clean Diesel" Mktg., Sales Pracs., & Prod. Liab. Litig.*, 895 F.3d 597, 617 (9th Cir. 2018) (affirming district court's decision overruling class member objections and granting final settlement approval).

When this Court preliminarily approved the Agreement, it analyzed the factors under Rule 23(e)(2) and concluded that the settlement was fair, reasonable, and adequate. *See* ECF No. 307; *see also* Aug. 4 Tr. at 8:16–11:3 (discussion of Rule 23 factors); *id.* at 48:3–6 ("The proposed settlement on a preliminary basis is fair, reasonable, and adequate, in my view for the class members."). All of those factors continue to weigh in favor of approval.

A. Named Plaintiffs and Their Counsel Adequately Represented the Class

As the Parties showed in their motion for preliminary approval, *see* ECF No. 246 at 13-14, the named Plaintiffs and Class Counsel have zealously prosecuted this case and adequately represented the Class. The named Plaintiffs were involved in the litigation and the settlement process, and all are in favor of the Agreement. Class Counsel have vigorously litigated this case through extensive motion practice and discovery over the course of more than three years. Additionally, Class Counsel has continuously updated its website to respond to the most common questions raised by Class Members and keep them informed about the latest developments in the case. *See Information for Sweet v. Cardona Class Members*, Project on Predatory Student Lending, https://www.ppsl.org/sweet-v-cardona-class-members; *Sweet v. Cardona Case Page*, Project on Predatory Student Lending, https://www.ppsl.org/cases/sweet-v-cardona. Class Counsel have

fielded hundreds of inquiries about the Agreement since June 22, 2022, and have taken steps to ensure that all eligible Class Members will receive the relief to which they are entitled. In particular, Class Counsel have responded directly to each individual who communicated to the Court regarding the settlement, in order to address their factual questions.

B. The Parties Negotiated at Arm's Length

As explained in the motion for preliminary approval, *see* ECF No. 246 at 14-15, the Parties conducted extensive settlement negotiations, with counsel for each party zealously representing their clients' interests. Where "an agreement is the product of serious, informed, non-collusive negotiations conducted by experienced counsel . . . those facts will weigh in favor of approval." *Cmty. Res. for Indep. Living v. Mobility Works of California, LLC*, 533 F. Supp. 3d 881, 889 (N.D. Cal. 2020) (internal quotations omitted).

Moreover, Class Counsel's fees in this case will be governed by the Equal Access to Justice Act, 28 U.S.C. § 2412(d), and will be determined after the Court's decision on final approval, *see* Agreement § VI.A-B. Thus, there is no risk of the most common form of collusion in class action cases, whereby plaintiffs' counsel may "collude with defendants . . . in return for a higher attorney's fee" or use the settlement to "pursu[e] their own self-interests." *In re Bluetooth Headset Prod. Liab. Litig.*, 654 F.3d 935, 946-47 (9th Cir. 2011). Nor is there anything collusive about the confidential nature of the parties' settlement negotiations, which is standard practice when negotiating litigation settlements. *See, e.g.*, *BB&T Co. v. Pahrump 194, LLC*, No. 2:12-cv-1462, 2015 WL 1877422, at *2 (D. Nev. Apr. 23, 2015) ("Federal courts have long held that settlement negotiations should be kept secret.").

C. The Quality of the Relief to the Class Weighs in Favor of Approval

Courts must assess whether "the relief provided for the class is adequate," Fed. R. Civ. P. 23(e)(2)(C), by comparing plaintiffs' likelihood of succeeding and obtaining relief from the court against the relief provided by the proposed settlement, *see Carson v. Am. Brands, Inc.*, 450 U.S. 79, 88, n.14 (1981). The relief in this Agreement is clearly adequate, as the Court has already noted. *See* Aug. 4 Tr. at 40.

First, the Agreement provides immediate relief to Class Members who borrowed to attend any of an extensive list of schools for which there is sufficient indicia of misconduct to justify summary settlement relief. *See* Agreement § IV.A.1 & Ex. C. This group comprises approximately 75% of the Class, or approximately 200,000 individuals. These Class Members' relevant loans will be discharged, they will receive a refund of all amounts previously paid to the Department toward those loans, and the credit tradeline associated with those loans will be deleted. Affording Full Settlement Relief on an automatic basis to this group of Class Members will afford the Department the time and resources it needs to expeditiously consider and issue decisions on the applications of the Class Members in the "decision group," as discussed *infra*.

Although, as the Court noted during the August 4 hearing, "this lawsuit originally[] was to get an injunction to require the agency to adjudicate many thousands of . . . applications that had gone unadjudicated," Aug. 4 Tr. at 40:3-6, more than three years has passed since that initial Complaint. The case now involves challenges to the Department's process of reviewing and adjudicating applications and the substance and content of its decision letters denying such applications. In their recent Motion for Summary Judgment, Plaintiffs argued that the Department lacks the ability to render valid decisions on the merits of Class Members' BD applications within any reasonable time, *see* ECF No. 245 at 8-9, and that the Court should "issue an order for Defendants to show cause why each and every class member's BD application should not be granted immediately," *id.* at 33. The Department disagreed about the propriety of such a remedy. *See, e.g.*, ECF No. 249 at 25-29 (Defendants' arguments that (i) the Higher Education Act's anti-injunction provision forecloses coercive relief against the Secretary, and (ii) the Court should remand decisions on all BD applications to the Department). The Agreement represents a reasonable compromise given the facts adduced and the arguments put forward since the original Complaint.

Second, Class Members in the "decision group" will have their BD claims resolved efficiently according to strict and fair deadlines under a streamlined process, with the oldest claims receiving decisions more promptly. *See id.* § IV.C.3. Having a set timeline for decisions would

have been a likely result if Plaintiffs had prevailed on their claim under Section 706(1) of the APA. By reaching this same result without further litigation of the complicated matters raised by this case, the Agreement will result in the delivery of these decisions to Class Members faster, without the uncertainty of litigation and the potential delay of an appeal. It also ensures that the decisions will be issued according to a negotiated timeline that the Department has determined it can meet, providing certainty that is beneficial to both the Class and the Department. In a case that has been fundamentally about avoiding delay, providing this type of expeditious relief is the superior outcome for the Class.

In addition, the Agreement provides strong procedural protections. If the Department fails to meet the deadlines set forth in the Agreement, Class Members and Post-Class Applicants receive Full Settlement Relief. *Id.* §§ IV.C.8, IV.D.2. Class members retain their right to challenge any final decision denying their application in federal district court. *See id.* §§ IV.C.2(ii)-(iii), VII. And this Court will retain jurisdiction to hear claims that Defendants have breached their obligation to provide notice by the deadlines, effectuate relief by the deadlines, submit timely quarterly reports, or refrain from involuntary collections. *Id.* § V.

D. Continued Litigation Would Entail Additional Delay, Risk, and Cost

The adequacy of settlement relief is also measured against "the costs, risks, and delay of trial and appeal." Fed. R. Civ. P. 23(e)(2)(C)(i). Where Plaintiffs would face an uncertain outcome through continued litigation, courts favor settlement. *Chun-Hoon v. McKee Foods Corp.*, 716 F. Supp. 2d 848, 851 (N.D. Cal. 2010); *In re Omnivision Techs., Inc.*, 559 F. Supp. 2d 1036, 1041 (N.D. Cal. 2008) (favoring "[s]ettlement, which offers an immediate and certain award" in light of the litigation barriers the plaintiffs anticipated). In this case, settlement will bring borrowers' state of limbo to an end; continued litigation likely would not. Although the Parties each believe they have advanced strong legal and factual arguments, they acknowledge that their positions are not without legal risk. Even if Plaintiffs succeeded on the merits at the trial court, there is considerable uncertainty about the appropriate remedy; moreover, the possibility of appeal would have the potential to further delay relief for Class Members. This Agreement removes the uncertainty and

delay of further litigation, which weighs in favor of final approval.

E. The Agreement Treats All Class Members Fairly

In assessing whether the settlement "treats class members equitably relative to each other," Fed. R. Civ. P. 23(e)(2), the Court determines whether the settlement "improperly grant[s] preferential treatment to class representatives or segments of the class," *In re Tableware Antitrust Litig.*, 484 F. Supp. 2d 1078, 1079 (N.D. Cal. 2007), and whether "the apportionment of relief among class members takes appropriate account of differences among their claims," Fed. R. Civ. P. 23(e)(2)(D), advisory committee notes (2018 amendment).

The structure of the Agreement is designed to work as a whole, taking into account differences among Class Members' circumstances, to address the significant number of pending BD applications according to a fair process and a reasonable schedule. First, all Class Members whose relevant loan debt is associated with the schools listed on Exhibit C to the Agreement will receive the same, automatic settlement relief on the same timeline (within one year after the Effective Date). Agreement § IV.A.1. 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.

By granting automatic relief to Class Members who attended a listed school, the Department frees up its resources to provide the remaining Class Members with decisions more quickly than it would otherwise be able to do. The difference in treatment between the automatic relief group and the decision group is justified because the Department has determined that it needs to undertake additional review of the decision group claims, which lack sufficient existing indicia of school misconduct to warrant automatic settlement relief. Within the decision group, Class Members are treated equitably: their applications will all be subject to the same streamlined review, and that review will be conducted on a timeline that corresponds to the delay each applicant has already experienced.

Moreover, as discussed above, the streamlined review process itself provides significant benefits that decision group members would not receive if their claims were adjudicated outside this settlement under the current applicable regulation. They will be afforded a presumption of reliance, their claims will not be denied for a lack of corroborating evidence, and their recovery will not be subject to any statute of limitations. This is significant relief, calibrated to the circumstances of these Class Members and the disputed issues in this case.[3]

F. The *Hanlon* Factors Also Weigh in Favor of Approval

The Ninth Circuit instructs that, in addition to the Rule 23 factors, a court considering final approval of a class action settlement may examine additional factors including "[1] the strength of the plaintiffs' case; [2] the risk, expense, complexity, and 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 completed 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 the class members to the proposed settlement." *Hanlon*, 150 F.3d at 1026.

As discussed above, factors 1, 2, 3, and 4 work together to weigh strongly in favor of final approval. The risk, complexity, and likely duration of further litigation is significant here.[4] The

[3] Post-Class Applicants, although not within the class definition and thus not formally part of the Rule 23 analysis, also receive fair treatment under the Agreement. Post-Class Applicants did not experience the allegedly unlawful policies and procedures that Plaintiffs describe in their original and supplemental Complaints, so it makes sense that they would not receive the same settlement benefits that Class Members do. Instead, Post-Class Applicants receive the benefit of a set timeline for decision on their BD applications—consistent with the treatment that BD applicants would receive under the Department's recent proposed rule, *see* Student Assistance General Provisions, Federal Perkins Loan Program, Federal Family Education Loan Program, and William D. Ford Federal Direct Loan Program, 87 Fed. Reg. 41,878, 41,904, 42,007-008 (July 13, 2022)—and the guarantee of settlement relief if the Department fails to adhere to that timeline. Meanwhile, Post-Class Applicants do not release any claims under the Agreement, so they have legal recourse if the Department engages in any unlawful procedures in the course of adjudicating their applications.

[4] Expense is a less significant factor for Plaintiffs because Class Counsel represents the Class *pro bono*. However, if the Parties engaged in further litigation and Plaintiffs prevailed, Class Counsel would seek reimbursement from the government for additional fees under the Equal Access to

Parties have already litigated this case for over three years, including collateral litigation to the Ninth Circuit. While Plaintiffs believe that their case is strong, each party raised numerous legal issues in their motions for summary judgment—including the Department's argument that the case is moot and that the Class should be decertified. *See* ECF No. 249 at 12. Those motions would have to be fully briefed and argued if the Agreement were not approved, and if one party did not fully prevail, the case would proceed to trial. If Plaintiffs prevailed on summary judgment or at trial, there is still uncertainty about the remedy they would ultimately be entitled to. The Department would also have the option of appealing. In a case fundamentally about delay, pursuing lengthy further litigation would not be in the best interests of the Class. This is especially so when weighed against the relief offered in settlement, which this Court has already noted is substantial. *See* Aug. 4 Tr. at 40:11-15, 48:9-11.

Factors 5, 6, and 7 likewise support final approval. Plaintiffs received discovery from the Department—an unusual step in an APA case—and, largely on the basis of that discovery, brought new claims in their Supplemental Complaint. The Parties thus entered into the Agreement with extensive knowledge about the facts underpinning the case. With that knowledge, experienced counsel for both Parties made the judgment that the Agreement was a satisfactory resolution of Plaintiffs' claims. On the Plaintiffs' side, Class Counsel has litigated multiple federal class actions against the Department relating to borrower defense,[5] and brought that experience to bear in negotiating and signing the Agreement. "The recommendations of plaintiffs' counsel should be given a presumption of reasonableness." *Dyer v. Wells Fargo Bank, N.A.*, 303 F.R.D. 326, 332 (N.D. Cal. 2014) (quoting *In re Omnivision Techs., Inc.*, 559 F. Supp. 2d at 1043). On the other side, because the Department is a governmental participant, its decision to enter into the

Justice Act. The government would also have to expend additional resources in the form of time and attention from both the Departments of Education and Justice.

[5] *See Pratt v. Cardona*, No. 1:20-cv-01501 (D.D.C.); *Calvillo Manriquez v. Cardona*, No. 3:17-cv-7210 (N.D. Cal.); *Vara v. Cardona*, No. 1:19-cv-12175 (D. Mass.).

Agreement further supports final approval. *See San Francisco NAACP v. San Francisco Unified Sch. Dist.*, 59 F. Supp. 2d 1021, 1031-32 (N.D. Cal 1999).

Finally, the reaction of Class Members (and Post-Class Applicants) also weighs in favor of approval. One thousand five hundred eighty-three (1,583) borrowers submitted comments to the Court on or before the deadline of September 15, 2022. Of those, 1,019 borrowers (about 64%) expressed support for the Agreement, and 167 (about 10%) objected or requested changes to the Agreement.[6] In addition, Class Counsel and/or the Department of Justice received communications from four borrowers that can be fairly categorized as objections to the Agreement. Copies of these communications are appended hereto as Exhibit B.

To begin, the number of objectors accounts for *less than one-tenth of 1%* of the Class (approximately 264,000 individuals). Significantly, many of these objectors are Post-Class Applicants or individuals who have not yet applied for borrower defense, rather than Class Members; if the size of the Post-Class Applicant group is taken into account—as of September 20, 2022, approximately 179,000 borrowers—then objectors account for *less than 0.04%* of the combined Class and Post-Class Applicant total. "[T]he absence of a large number of objections to a proposed class action settlement raises a strong presumption that the terms . . . are favorable to the class members." *In re Omnivision*, 559 F. Supp. 2d at 1043 (quoting *Nat'l Rural Telecomms. Coop. v. DIRECTV, Inc.*, 221 F.R.D. 523, 528-29 (C.D. Cal. 2004)) (approving settlement that received three objections out of 57,630 class members); *see also Churchill Vill., LLC v. Gen. Elec.*, 361 F.3d 566, 577 (9th Cir. 2004) (affirming approval of settlement that received 45 objections out of 90,000 class members, or about 0.05%); *Lane v. Brown*, 166 F. Supp. 3d 1180, 1191-93 (D. Or. 2016) (finding that the "vast majority of the class supports and will benefit from" settlement

[6] Of the remaining 397 borrowers, 228 asked questions about the settlement, such as whether a particular commenter was included in the class, how settlement relief might interact with other forms of loan cancellation currently available from the Department, and others. Class Counsel is developing plans to communicate with these commenters to address their questions. Another 164 borrowers did not express a view regarding the settlement, but instead shared their stories about being deceived by their institutions and/or suffering under the burden of their student loans.

where 32 out of about 2,000 class members, or around 1.6%, objected); *Sugarman v. Ducati N. Am., Inc.*, No. 5:10-cv-05246, 2012 WL 113361, at *3 (N.D. Cal. Jan. 12, 2012) (objections from 42 of 38,774 class members—more than 0.1%—is a "positive response").. One letter submitted to the Court in support of the settlement was signed by 796 Post-Class Applicants, who urged the Court to approve the Agreement because it "offers post class members an opportunity to have our cases reviewed in a manner that is complete, fair, timely, and without bias," and "ensures that the Department of Education meets strict measures, which have been proven necessary by the discovery in this case." Letter from Post-Class Applicants, ECF No. 292. These nearly 800 Post-Class Applicants alone far outnumber the borrowers who objected.

The majority of the objections to the settlement can be grouped into the following general categories:

1) Additional schools should be added to the Exhibit C list;
2) The class closure date of June 22, 2022 should be extended, so that some or all Post-Class Applicants would be included in the Class;
3) Automatic settlement relief should be extended to Post-Class Applicants who borrowed to attend schools on the Exhibit C list;
4) Class Members should receive their relief faster than the timelines set out in the Agreement; and
5) Settlement relief should be extended to borrowers who refinanced their federal student loans into private loans.

Significantly, not one of these objections actually takes issue with the substantive relief being provided to Class Members under the Agreement. To the contrary, four of the five categories of objection seek to broaden that relief to apply to additional people, and the remaining category simply asks for the relief to be delivered faster. This fact alone demonstrates the high quality of relief that the Agreement provides to Class Members, and thus points in favor of final approval. None of these objections provides a basis for finding that the Agreement is not fair, reasonable, and adequate for the Class as a whole, as discussed further below.

Category 1: Contents of Exhibit C. Eighty-seven borrowers asked to have the schools they attended added to Exhibit C. This was by far the most common objection, and was the category most likely to include Class Members (as opposed to Post-Class Applicants). Notably, however, the majority of the comments in this category were not explicitly framed as objections to the Agreement at all—that is, Class Members did not argue that approval should be denied because their schools were not on the list. Rather, they typically asked whether it was possible to expand the list, without expressing disagreement with the existing contents of the list or with any other aspect of the settlement. The Parties have categorized these comments as objections in the interests of thoroughness.

As an initial matter, "[b]ecause 'the very essence of a settlement is compromise,' the Settlement may leave some Class Members without the exact remedies they would prefer." *In re Volkswagen "Clean Diesel" Mktg., Sales Pracs., & Prod. Liab. Litig.*, MDL No. 2672, 2017 WL 2212783, at *23 (N.D. Cal. May 17, 2017) (quoting *Officers for Justice v. Civil Serv. Comm'n of City & Cnty. of San Francisco*, 688 F.2d 615, 624 (9th Cir. 1982)). As the Parties have explained, the list is a tool that will enable the Department to provide relief to the Class. It was created based on information available to the Department at the time the agreement was executed regarding demonstrated or credibly alleged misconduct, as well as a review of the comparative rate of Class Members with applications concerning the listed schools.[7] *See* ECF No. 246 at 3, 17-18.

[7] One commenter argued that the program he attended, the American Repertory Theatre/Moscow Art Theatre Institute for Advanced Theatre Training at Harvard University, should have been included on the Exhibit C list because it "appeared on the predatory lending list compiled by the Obama administration in 2017," and suggested that Class Counsel may have had a conflict of interest with respect to this program because of one Counsel's previous association with the Legal Services Center of Harvard Law School. To begin, the list to which this commenter refers was composed of programs that failed a debt-to-earnings ratio standard under the Department's then-operative "gainful employment" regulation. The gainful employment regulation did not address school misconduct, which is the relevant inquiry for borrower defense. Further, Class Counsel did not have any conflict of interest. Class Counsel never consulted with representatives of Harvard University about any aspect of settlement negotiations in this case, nor about any other aspect of the conduct of the litigation. While Class Counsel operated as a unit within Harvard Law School, its attorneys always exercised their independent legal judgment in accordance with their ethical

Additionally, just as an institution's inclusion on Exhibit C is not based on a formal finding of misconduct or wrongdoing by the Department, *see* ECF No. 288 at 7, the absence of a school from Exhibit C does not necessarily mean that that school has been "cleared" of any allegations of misconduct, or that misconduct will not be discovered or substantiated in the future. For Class Members who attended non–Exhibit C schools, the Department will assess each person's claim that their school committed misconduct under the "streamlined review" process for the decision group. This process will provide a fair opportunity for applicants to receive a reasonable decision—that is to say, applicants from non–Exhibit C schools do not need to worry that their applications will be treated as presumptively invalid. Indeed, one of the purposes of the "streamlined review" process is to address Plaintiffs' claims that the Department previously utilized an allegedly unlawful "presumption of denial" policy that imposed allegedly unlawful procedural barriers to the approval of BD applications.

Category 2: The class cut-off date. Seven Post-Class Applicants objected that the class closure date of June 22, 2022, is "unfair" or "arbitrary."[8] Some of these commenters objected that they should have received individual notice of this litigation before the public filing of the Agreement, while others proposed that the class closure date should have been set to a date after the filing.

As to the former, under Fed. R. Civ. P. 23(c)(2) and 23(e)(1), notice of a class action—whether with respect to class certification or settlement—must be provided "to the class." At all times since this Court granted class certification in October 2019, the Class has been defined as,

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obligations to their clients. Exhibit C principally lists institutions, not programs, and a program or institution's lack of inclusion on Exhibit C does not dictate the outcome of Class Member applications concerning those institutions or programs. Nor does the Agreement prevent Class Counsel from representing any Class Member in a challenge to the denial of that Class Member's application.

[8] Again, we are categorizing these comments as "objections" even if they evince overall support for the Agreement. For example, one of these Post-Class Applicants also wrote, "I applaud the efforts of Plaintiffs' counsel in this case and the proposed settlement agreement that all parties have crafted." Email from Taylor Wayne Casey, Ex. B.

inter alia, "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***." ECF No. 46 (class certification order) (emphasis added); *see also* Agreement § III.A (settlement class definition). In other words, the Class has only ever included people who had already applied for borrower defense, and thus notice regarding this case was only ever due to those people. The Parties did not have an obligation under Rule 23 to provide individualized notice to *potential future* class members (*i.e.*, people who had not yet applied for borrower defense).[9] On a more general scale, during the pendency of this litigation, Class Counsel did routinely undertake significant independent efforts to further awareness of the borrower defense process and reach borrowers whose circumstances warranted asserting a defense to repayment of their loans. For example, Class Counsel maintains a "Borrower Defense FAQ" webpage that has received over 35,000 views, and recorded videos about the borrower defense process and the *Sweet* litigation that have received thousands of views on social media.

With respect to the date of June 22, 2022, the Agreement closes the Class as of its execution date, *see* Agreement § III.D, and the Parties publicly filed the Agreement that same day, *see* ECF No. 246. Again, as of the execution date, the Class consisted of people who had already filed for borrower defense; it was those people whose claims the Parties intended to settle.[10] People who did not submit a BD application until after the execution date could not have been affected by any of the practices that Plaintiffs alleged were unlawful. Closing the Class on the date of execution of the Agreement is a reasonable approach given the nature of the claims in this case and the Department's well-founded desire to know with certainty the size of the Class before committing to specific timelines for resolving Class Member claims. Once the proposed settlement was made

[9] In any event, it would have been impossible to identify who among the nation's approximately 43 million federal student loan borrowers might have wanted to apply for borrower defense at some point in the future.

[10] Indeed, it is unclear whether Class Counsel would have had authority to settle the claims of any individuals who were not yet members of the Class. *See, e.g.*, Fed. R. Civ. P. 23(g)(4) ("Class counsel must fairly and adequately represent the interests ***of the class***." (emphasis added)).

public, there was a significant increase in the number of BD applications. If the Department were required to treat those additional applicants as Class Members, it would not be able to meet the deadlines carefully negotiated and included in the Agreement.

Category 3: Date limitation on Exhibit C. Fifteen Post-Class Applicants objected that the automatic relief due to Class Members whose BD applications relate to a school on Exhibit C to the Agreement should be equally due to Post-Class Applicants who borrowed to attend one of those schools.

As the Parties explained in their motion for preliminary approval, part of the reason for providing automatic relief to this group of Class Members is to enable the Department to provide the other relief specified in the Agreement: "Clearing these claims through provision of expeditious upfront relief will significantly reduce the backlog of pending claims. This will benefit the Class as a whole because it will allow the Department to more quickly provide decisions to remaining class members than would otherwise be possible." ECF No. 246 at 18. In other words, the automatic relief provision is one aspect of the Agreement's goal of fairly and equitably clearing the large number of pending BD applications at issue in this litigation. That reasoning does not apply to Post-Class Applicants: they were not subject to the alleged policy of delay, and their applications were not among the group of already-pending applications that needs to be addressed.

The Agreement's provisions for these Post-Class Applicants are designed to ensure that they receive timely decisions on their BD applications, in line with the timelines announced in the Department's recent rulemaking proposal. They are guaranteed a decision on their applications within a set timeline, or else they will receive Full Settlement Relief. *See* Agreement § IV.D.1-2. The Agreement's reporting requirements will inform Plaintiffs about the Department's progress on these applications. *Id.* § IV.G.1-4. Finally, Post-Class Applicants do not release any rights under the Agreement, so they are free to bring a new action against the Department (including a class action) if evidence arises that their applications are not being lawfully adjudicated.

Category 4: Speed of relief. Two Class Members in the automatic relief group objected that twelve months was too long a period for the delivery of relief, while seven Class Members in

the decision group objected that the timelines for decision on their applications were likewise too long. While some Class Members may be frustrated at the timelines in the Agreement, the Department has represented that resource constraints prevent it from committing to any faster resolution. Given these practical considerations, combined with the fact that that Class Members will ultimately receive substantive relief that is highly favorable, the Parties respectfully submit that timing concerns do not undermine the overall fairness and reasonableness of the Agreement. Moreover, the Relevant Loan Debt of each Class Member will remain in forbearance or stopped collection status pending effectuation of relief or a final decision denying relief, and the Department will remove any interest that accrues on the Relevant Loan Debt during this period. Agreement §§ IV.A.3; IV.C.7.

Category 5: Private consolidation loans. Eight people wrote to the Court with concerns about the settlement failing to provide relief to individuals with private student loans, including those who originally borrowed federal student loans but then consolidated those loans with a private lender to lower their interest rates.[11] The reason that the Agreement does not contain direct relief for borrowers who currently have privately held loans is straightforward: the Department has no legal authority to discharge non-Federal loans that are held by a private entity outside of the FFEL program. (Privately held FFEL loans are different because they are still federal loans made under the provisions of the Higher Education Act ("HEA").)

Miscellaneous objections. The remaining 40 comments that the Parties have classified as objections concern a variety of issues that are not directly relevant to the Agreement or exceed the scope of what the Agreement could accomplish. Most asked the Parties to provide additional, specific relief, and none asserted that the Agreement was unfair or inadequate as presently written. A few examples include: requests for borrowers to receive damages for lost wages, additional tuition payments, and/or emotional distress (6); requests for the Department of Education to admit wrongdoing (2); requests for the Department to take further investigative or enforcement steps

[11] One of these correspondents wrote: "Overall, I am in full support of this case but would like added protections for a certain group of class members." Letter from Rae Mazzei, ECF No. 321.

against specific schools (2); and concerns about GI Bill benefits (3), the Fair Credit Reporting Act (1), and transcript withholding (1). While these comments undoubtedly describe issues of real consequence to borrowers, they are not issues that can be or need be addressed in this Agreement, when taking into consideration the claims at issue in this case.

G. Objections by Intervenors Will Not Justify Denying Approval

The Court has afforded CSPP, ECI, ANU, and Lincoln (collectively, "Intervenors") the opportunity to object to and oppose the class action settlement. *See* ECF No. 322. The Ninth Circuit "usually impose[s] the burden on the party objecting to a class action settlement." *United States v. Oregon*, 913 F.2d 576, 581 (9th Cir. 1990). Thus, "once the court is satisfied that the decree was the product of good faith, arms-length negotiations, a negotiated decree is presumptively valid and the objecting party has a heavy burden of demonstrating that the decree is unreasonable." *Id.* (internal citations and quotation marks omitted). When reviewing a proposed settlement, the court's primary concern "is the protection of those class members, including the named plaintiffs, whose rights may not have been given due regard by the negotiating parties." *Officers for Justice*, 688 F.2d at 624.

It is not entirely clear on what grounds the Intervenors will object to the settlement, and the Parties do not intend to make their arguments for them. However, their motions for intervention previewed some potential arguments, which the Parties will briefly address.

1. The Settlement Is Legally Authorized and Procedurally Appropriate

Certain of the Intervenors raised objections to the legality of the settlement, and the Court has previously inquired about the "statutory authority that allows the Department to use federal funds to forgive $6 billion in student loans without going through the borrower defense process." ECF No. 303.

It is well established that the Department has broad authority to administer the federal student loan programs and manage its portfolio of more than 43 million student loans, *see* 20 U.S.C. §§ 1082, 3441, 3471, including the explicit authority to "compromise, waive, or release" any "right, title, claim, lien, or demand" acquired in the Secretary's performance of his vested

"functions, powers, and duties" to administer federal student loans, 20 U.S.C. § 1082(a)(6). Simply put, this express grant of statutory authority enables the Secretary to compromise claims of and against the Department arising out of the federal student loan programs. As part of compromising such claims, the HEA's grant of authority also enables the Secretary to release the student loan debts owed to the Department by federal student loan borrowers on terms determined by the Secretary. Given the broad discretion conferred by the HEA, "matters concerning the Secretary's Compromise and Settlement authority are presumptively unreviewable," *Weingarten v. DeVos*, 468 F. Supp. 3d 322, 338 (D.D.C. 2020), and Defendants are not aware of any court that has invalidated or even questioned any action taken pursuant to this statutory authority.

The Secretary's reasoned judgment to resolve pending litigation and disputed claims on the terms set forth in the Parties' Settlement Agreement is a core exercise of his settlement and compromise authority. The Department has traditionally and consistently used this authority to provide full loan discharges to resolve claims asserted against the Department in litigation as well as administrative proceedings, *e.g.*, *Weingarten v. Cardona*, 19-cv-02056DLF (D.D.C.),[12] and this case illustrates why Congress afforded the Secretary broad discretion and flexibility in resolving disputes related to federal student loan repayment. As discussed elsewhere in this motion, the Class is voluminous, and the case challenges all aspects of the Department's process of adjudicating a significant number of pending BD applications. Plaintiffs have challenged the Department's timeliness in issuing decisions; alleged multiple deficiencies with the Department's adjudication process; and contested the substance of certain of the decisions that the Department has rendered. In light of these allegations, the Agreement provides a reasonable compromise of disputed claims and sets forth a structured framework for the Department to use its settlement authority to timely and comprehensively resolve all Class Members' BD applications.

[12] *Available at* https://www.aft.org/sites/default/files/media/2021/pslf_weingarten-v-cardona_executed_settlement_agreement_101221.pdf

Without the settlement's streamlined review procedures, clearing the large number of pending applications for the entire Class would require an inordinate amount of time—at a minimum, many years more than the timelines set forth in the Agreement—and Department resources, to the significant detriment of the agency's ability to carry out other priorities and statutory directives. The Agreement, on the other hand, provides for certain and efficient resolution of pending BD applications and this litigation. It also allows the Department to provide reasonably targeted relief to Class Members, in fair resolution of their myriad claims against the Department, more expeditiously than would be possible absent the Agreement. This exercise of informed agency discretion to resolve disputed claims and allocate scarce agency resources is fully consistent with the settlement and compromise authority conferred by the HEA.[13]

As a resolution of litigation against the United States, the settlement agreement must also be assessed with reference to the Attorney General's "exclusive authority and plenary power" to settle such litigation on terms that he determines further the interests of the United States. *See, e.g.*, *United States v. Hercules, Inc.*, 961 F.2d 796, 798 (8th Cir. 1992); 28 U.S.C. §§ 516-519. The Attorney General's "plenary discretion," *United States v. Carpenter*, 526 F.3d 1237, 1241-42 (9th Cir. 2008), cannot be "diminished without a clear and unambiguous directive from Congress," *Hercules*, 961 F.2d at 798. No such statutory directive is at issue here (and Intervenors have not

[13] For these reasons, the January 18, 2021 memorandum from the Department's then-Principal Deputy General Counsel that Intervenors have referenced, *see* Everglades College, Inc.'s Mot. to Intervene at 2 n.3, ECF No. 261, has no application here. That memorandum addressed only the Secretary's authority to cancel Title IV loan debt "on a blanket or mass basis." It did not address the situation presented here—a litigation settlement providing targeted relief to a specific group of plaintiffs with legal claims against the Department arising out of an asserted statutory entitlement to such relief (*i.e.*, borrower defense). *See* U.S. Dep't of Educ., Office of the General Counsel, Memorandum re: *Student Loan Principal Balance Cancellation Compromise, Discharge, and Forgiveness Authority* (Jan. 12, 2021), https://perma.cc/GNE9-ZDBK (assessing the Secretary's authority to cancel loans for all student loan borrowers based on "administrative decree"). In any event, the Department has determined that memorandum "was issued in contravention of then-effective Department processes for issuing significant guidance" and was "not properly promulgated." U.S. Dep't of Educ., Office of the General Counsel, Memorandum re: *The Secretary's Legal Authority for Debt Cancellation* at 3 n. 5 (Aug. 23, 2022), https://perma.cc/LP87-NMCS. Accordingly, it has no binding effect on the Department.

argued otherwise); rather, as discussed above, the settlement agreement authorizes the Department to use its express statutory authority to compromise and settle claims arising out of the federal student loan programs in a reasoned, orderly manner. "[T]he Attorney General's authority to control the course of the federal government's litigation is presumptively immune from judicial review." *Shoshone Bannock Tribes v. Reno*, 56 F.3d 1476, 1480 (D.C. Cir. 1995). Because that authority was exercised here to facilitate settlement obligations that fit comfortably within the Department's statutory authority, there is no basis for the Court to withhold final approval of the settlement agreement based on any objection to its legality.

2. The Agreement Will Not Cause Intervenors Reputational Harm or Financial Consequences That Could Justify Denying Final Approval

Intervenors will be unable to demonstrate that their interests justify denying final approval. First, they do not have "a significantly protectable interest" at stake that could be affected by the settlement. *See Kalbers v. U.S. Dep't of Justice*, 22 F.4th 816, 827 (9th Cir. 2021); Pltfs.' Consol. Opp. to Mots. to Intervene, ECF No. 287 at 10-16; Defs.' Consol. Opp. to Mots. to Intervene, ECF No. 288 at 15-19; Aug. 4 Tr. at 52:3-4 ("I want to be clear that I'm not saying that any of you intervenors have a property interest that's at stake.").

Second, the settlement will not "detrimentally affect" any interest they may have. *See Wilder v. Bernstein*, 645 F. Supp. 1292, 1350 (S.D.N.Y. 1986), *aff'd*, 848 F.2d 1338 (2d Cir. 1988). As Defendants explained in their opposition to the motions to intervene and at the August 4 hearing, the inclusion of a school in Exhibit C is "is the result of the parties' negotiated assessment that, for each school, there exists a sufficient threshold indication of wrongdoing to justify summary settlement relief for associated class members." ECF No. 288 at 7. While Intervenors may object to their inclusion, any reputational injury they perceive from it—which has not been established beyond speculation or bare assertion—is not a basis to block this settlement. *See id.* at 17-19; ECF No. 287 at 15-16, 22. The Parties are not aware of any instance where a class settlement has been denied approval because it allegedly caused reputational harm to a third party.

As for the risk of economic harm, the Court summed up the problem with Intervenors' argument perfectly: schools on the Exhibit C list have "already gotten the money and there's no way [the Department] can take that money back from [them] except through a recoupment action," during which "due process is totally preserved." Aug. 4 Tr. at 24:8-10. Moreover, one of the Department's Deputy Under Secretaries has given a sworn Declaration stating that the fact of an institution's inclusion on Exhibit C does not constitute evidence that can or will be considered by the Department in any proceedings against such institution. *See* Decl. of Ben Miller at ¶¶ 11, 13-14, ECF No. 288-1; *see also* ECF No. 288 at 2 (Department averring that the Exhibit C list "will not be introduced as evidence in the event any [enforcement] proceeding is initiated in the future" against a listed school, and the list "creates no independent basis for action against the schools"). The Intervenors have not shown and cannot show that the Agreement will have *any* effect on their bottom lines, let alone an effect sufficient to justify denying relief to the Class.

CONCLUSION

For the reasons set forth above, the Parties respectfully request that the Court grant final approval of the Agreement.

Dated: September 22, 2022

Respectfully submitted,

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Exhibit A

Pages 1 - 52

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

Before The Honorable William Alsup, Judge

THERESA SWEET, on behalf of themselves and all others similarly situated, et al.,	)	
Plaintiffs,	)	
VS.	)	**NO. C 19-03647-WHA**
MIGUEL CARDONA, Secretary of the United States Department of Education, et al.,	)	
Defendants.	)	

San Francisco, California
Thursday, August 4, 2022

TRANSCRIPT OF PROCEEDINGS

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Also Present: **Theresa Sweet**

Thursday - August 4, 2022 **1:01 p.m.**

P R O C E E D I N G S

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THE CLERK: All rise. Court is now in session. The Honorable William Alsup is presiding.

THE COURT: Okay. Good afternoon. Please be seated.

THE CLERK: Calling Civil Action 19-3674, Sweet, et al., versus Cardona, et al.

Counsel, please approach the microphone -- the podium and state your appearances, beginning with plaintiffs' counsel.

MS. ELLIS: Good afternoon, Your Honor. Rebecca Ellis from the Project on Predatory Student Lending for the plaintiffs. And with me is my colleague Rebecca Eisenbrey, also from the Project on Predatory Student Lending.

THE COURT: You're the ones from Harvard?

MS. ELLIS: Formerly of Harvard.

THE COURT: Formerly of Harvard. Okay.

And?

MS. ELLIS: Joseph Jaramillo from Housing Economic Rights Advocates, and our client Theresa Sweet.

THE COURT: Okay. Thank you. And for the -- for the defendants.

MR. MERRITT: Yes, Your Honor. Charlie Merritt for the Department of Justice on behalf of the defendants.

THE COURT: Okay. Welcome to you.

All right. Intervenors, or proposed intervenors.

MR. PANUCCIO: Jesse Panuccio for proposed intervenor Everglades College, Inc. With me in the back is the general counsel, our client representative, Jim Waldman.

THE COURT: Thank you.

MR. MORAN: John Moran on behalf of proposed intervenor American National University.

THE COURT: Say that name again. John?

MR. MORAN: Yes, sir. Moran, M-O-R-A-N.

THE COURT: Okay. Thank you.

MR. TOWNSEND: Good afternoon. Lucas Townsend on behalf of proposed intervenor Lincoln Educational Services Corporation. And with me is my colleague Katherine Worden.

THE COURT: Thank you.

MR. GONSALVES: Good afternoon, Your Honor. My name is Terrence Gonsalves, and I represent the Chicago School of Professional Psychology.

THE COURT: Great.

MS. RICE: Good afternoon, Your Honor. And Tania Rice also representing Chicago School of Professional Psychology.

THE COURT: Welcome. Have a seat.

All right. Let's hear from the plaintiff and then the Government concerning just the overall outline of the proposed settlement.

By the way, are there any class members here? Anybody out

there a class member? Okay.

One, two, three, four, five hands go up. Thank you for coming.

Okay. Let's hear about the settlement.

MS. ELLIS: Good afternoon, Your Honor. Rebecca Ellis for the plaintiffs.

So the settlement agreement that we filed with the Government in this case provides the class with the relief that they've been seeking, which is a lawful resolution of their borrower defense applications within a reasonable period of time.

To just briefly go over the structure of the settlement, for purposes of settlement, the class in this case is closed as of June 22nd, 2022, the date of execution of the agreement. And that essentially means that anyone who had a borrower defense application pending or who previously got a form denial notice as of that date, is included in the class. All of the form denial notices will be rescinded under the agreement and the applications treated as if they had never been denied.

So then once that's accomplished, the class is divided into two groups.

The first group, which we've called the automatic relief group, consists of about 75 percent of the class, about 200,000 people. And those are the people whose applications for borrower defense relate to one of the schools on Exhibit C to

the settlement agreement.

And I know we're going to be talking a lot about Exhibit C today, but suffice to say for this purpose that if your borrower defense application relates to a school on Exhibit C, then you'll automatically receive full settlement relief which consists of full discharge of your relevant federal student loans, refund of amounts you previously paid to the Department, and removal of that loan from your credit report.

The remaining approximately 25 percent of the class, or about 64,000 people, will then be in the decision group. These are people whose applications relate to any other school.

And people who are in the decision group will receive a decision on their borrower defense application within a time that's scaled to how long their applications have already been pending. So the people with the longest pending applications will receive a decision within six months of the effective date of the settlement; the next longest pending group within 12 months, et cetera.

And these applications -- a decision on whether the class member receives settlement relief, will be made using a set of streamlined procedures which are designed to address some of the issues that plaintiffs raised in their supplemental complaint regarding what we called the presumption of denial policy. And the streamlined procedures assure that -- that the problematic elements of the presumption of denial policy won't

apply to any of these class members.

The class members in the decision group, if they're not approved for settlement relief on the first examination, will receive a revise and resubmit notice which will tell them, essentially, what was missing from their application, and give them an additional six months to submit a revised application. And that is designed to avoid some of the pitfalls that we saw with the form denial notices.

Finally, there are some provisions in the agreement that relate to what we've called post-class applicants, which are people who apply for borrower defense after the cutoff date for the class, but before the date of final approval of this settlement, if it is approved.

And people who are post-class applicants will not get automatic relief if they apply relating to an Exhibit C school, and they won't get the streamlined procedures. They will just get regular borrower defense procedures. But what they will get is a decision within 36 months of final approval; so sort of the next time period after the end of the decision group.

And for both the decision group and the post-class applicants, if the Department fails to -- fails to actually issue a decision within the applicable time frame, then the person will automatically get settlement relief.

So that's the settlement in a nutshell. Its structure is -- it's designed to work as a whole. So by providing

up-front relief to the automatic relief group, that frees up the Department's resources, essentially, to be able to resolve the remaining decision group and post-class applications within a reasonable period of time.

And by imposing consequences, if the Department is not able to meet those deadlines, we provide some sort of disincentive for the Government to slide back into its old patterns of delay. With that being said, these timelines were set through negotiation with the understanding and expectation that the Department is committed to meeting them.

And the final thing is that class members' loans will be held in forbearance at zero interest until they receive either relief or a final decision denying their application; and that prevents the imposition of additional harm while this settlement process plays out.

So, Your Honor, as we argued in our joint motion for preliminary approval, we believe the settlement satisfies all of the Rule 23 factors. First of all, named plaintiffs and their counsel have adequately represented the class. Obviously, this case has been vigorously litigated and we have made sure that the voices of borrowers have been heard at all stages of proceedings.

Second, the parties negotiated at arm's length. This settlement is the result of over a year of extensive settlement negotiations.

And in ECI's motion to intervene, they did insinuate there was some kind of collusion between the parties. That's certainly not the case. First of all, in the context of preliminary approval, collusion usually refers to a situation where class counsel compromises claims of the class for their own financial benefit.

In this case, counsel fees are governed by the Equal Access to Justice Act. They were not any part of the negotiation of the settlement. But even aside from that, ECI puts forth no evidence of what this collusion is or could have been. The suggestion seemed to be that because the parties engaged in confidential settlement negotiations and eventually reached a settlement, that's evidence enough of collusion; and certainly it's not.

The third factor under Rule 23, the quality of relief to the class under the settlement, is comparable to or potentially better than what plaintiffs could have expected to save in litigation. And perhaps most importantly, by reaching the settlement, we eliminate further delay and uncertainty in a case that began and has been fundamentally about trying to avoid further delay.

Next, the costs --

THE COURT: Let me jump ahead a little bit.

What is your issue? How is the attorneys' fees part going to be handled?

MS. ELLIS: Your Honor --

THE COURT: Is that left completely up to me or what's the story on the attorneys' fees?

MS. ELLIS: Well, the agreement provides that the plaintiffs will be considered a prevailing party for the purposes of the Equal Access to Justice Act.

THE COURT: So you would be bringing a motion before me in due course?

MS. ELLIS: Yes, Your Honor.

THE COURT: All right.

MS. ELLIS: And we will try to -- try to address fees with the Government before we submit that motion. It's possible that we'll be able to come to an agreement about it. But, yes, it will be addressed after --

THE COURT: I got to move this quickly along. I've got other problems today.

How does -- didn't I already certify a class and define it about two years ago?

MS. ELLIS: Yes, Your Honor. There is a certified class in this case consisting of -- I don't have it in front of me, but I believe it's all individuals who borrowed, direct or FFEL loan --

THE COURT: How does that differ from the one you've defined here today?

MS. ELLIS: The definition of the class is the same.

The only difference is closing the class as of June 22nd, 2022. So the original class definition did not have any date restrictions on it.

THE COURT: All right. Now, I'm going to jump ahead a little bit.

I need to understand how -- this is before the settlement. I'm going to -- the Government can help me on this too, and the proposed intervenors maybe. But for the proposed settlement, if a borrower defense application were granted for loans that had been sold to -- by the Government to some third party, how would the third-party purchaser recover on their investment?

MS. ELLIS: Well, Your Honor, to address Section 1087i, which was mentioned in your question, the plaintiffs don't actually have any knowledge about whether or under what conditions the Department has ever used the 1087i authority. So I would say those questions would be best addressed to DOJ counsel.

THE COURT: All right. Then DOJ should come up.

Here is my concern that I want to understand: $6 billion worth of money will be forgiven, and the students don't have to pay it; but somebody is holding that paper, meaning the loans. It's either the schools or some bank or the Federal Government.

And I want to -- I need to know who is going to be out-of-pocket, and will the people who believe they're going to be paid all these loans be paid?

Now, I'm not going to -- if you dodge this, I'm not going to approve this. So I need to understand how it works and how this settlement affects that. So don't dodge it. Give me a straight answer.

MR. MERRITT: Yes, Your Honor. I would say as a general matter, the Federal Government is holding the paper, so to speak, as you just put it.

THE COURT: As a general matter? So there is no bank anywhere out there who's holding any of this paper?

MR. MERRITT: So I guess to -- I don't know about a bank.

THE COURT: How about an investor?

MR. MERRITT: I would say, as a general matter, you know, borrower defense regulations are a right that students who have certain types of loans, specifically Title IV direct loans, have and so those are held by the federal government.

So to take your question, the first question about selling loans to third-parties under 20 U.S.C. 1087i, that is a situation that has not come up. The Department has never exercised its authority to sell direct loans pursuant to that statute. I'll just --

THE COURT: Okay. I take your word for it.

If that's true -- and maybe one of the intervenors knows better, but if that's true, is there any -- third party, any bank, anybody out there other than the federal government

itself who owns this paper?

MR. MERRITT: I'd say the only potential exception is with respect to Federal Family Education Loans, FFELs, which you addressed to some extent in this litigation.

Generally, borrower defense relief is not available to loans held by private lenders. It's a specific thing to Title IV --

THE COURT: Aren't there some of those loans?

MR. MERRITT: Yes. So for that -- this is a rare type of loan pursuant to which the Department ensures -- for FFEL loans, the department ensures and subsidizes loans that are held by participating private lenders. You know, we've noted that that program was discontinued in 2010.

But, as a bottom line answer to your question, a borrower with an FFEL loan can apply for borrower defense relief, file a borrower defense application. Typically, they have to consolidate their FFEL into a direct consolidation loan in order to receive borrower defense relief. In that scenario, the Department would compensate the private FFEL loan holder for the discharged amount.

THE COURT: Is there any scenario where any private entity or public entity other than the federal government, will wind up not getting paid on the paper that it's holding under this settlement?

MR. MERRITT: I'm not aware of one, Your Honor.

Again --

THE COURT: I'm talking about the taxpayer. It's the federal taxpayers, who will bear the brunt of the $6 billion.

MR. MERRITT: Yes. Although, as has been addressed in the motions to intervene, there are procedures by which the Department can seek to hold schools liable.

THE COURT: I got that. That's a good point. We're going to come to that.

If you didn't do that, then it would be the taxpayers.

MR. MERRITT: Yes, Your Honor. The Department of Education is the holder of federal direct loans, which is the vast majority at issue here.

THE COURT: No. That's good. That simplifies things.

MR. MERRITT: If I just could clarify, Your Honor, too, under the settlement agreement, if there are discharges for FFEL loans, it would not be the same procedure that happens according to the borrower defense regulations, but the Department would provide compensation to any private holders of FFEL loans for settlement discharges.

THE COURT: Okay. Now, you answered my main question.

Let me hear from one of the intervenors, and then I'm going to give you two a chance to come back and reply.

Let me hear from one of the -- who wants to speak for the inter- -- we probably all can't speak. So who would like to speak?

Here is my question -- give me your name, please.

MR. MORAN: John Moran for American National University.

THE COURT: Thank you.

What is your objection to this settlement?

MR. MORAN: So, Your Honor, the question we've directly posed, just to be clear, is that we wanted to seek to intervene to be able to address the settlement. So we think that's a step antecedent to what our particular objections to the settlement --

THE COURT: What is your interest?

MR. MORAN: I'm not trying to play cute with you.

THE COURT: All right. What is your interest that would be possibly prejudiced by this?

I mean, newspapers, for all that matter, might have an interest. Do they get to intervene?

What is your stake in this deal?

MR. MORAN: So we think there are three particular stakes. The first two are sort of two sides of the same coin; and that is, the procedural rights that are afforded to schools under the borrower defense regulations when there is a borrower defense claim made against the schools. The schools have a concrete legal interest in enjoying the benefit of those procedures before a borrower defense application is adjudicated against them.

THE COURT: Now, why is that? What do you mean a borrower -- so you don't lose any money by it. If the borrower defense is granted, as I understand the way it works, you still get the money. You've already gotten the money. The school has already gotten the money.

So unless they bring a recoupment procedure, the U.S. government brings a recoupment against you, you don't lose any money. You've already gotten the money and spent it. So how can you say that you -- you're out-of-pocket anything?

MR. MORAN: So, Your Honor, the school has received the money.

But I would say two things:

One, the regulations themselves give the schools the right to be heard and to have their views considered in the borrower defense application. But more importantly, I think the reason that the Department's regulations provide that notice opportunity to be heard is that schools do have an interest at stake. And there are a couple of different ways that can come up.

The most direct way is that the successful application for borrower defense under the regulations is a prerequsite step for the Department to then turn around and seek recoupment against the school in question for the amount of the loan.

And it makes sense that if you had a situation where a school was genuinely responsible for misconduct that led to a

student taking out a loan for which it was later forgiven, that the Department of Education would not be necessarily on the hook to pay for that, but they would have the opportunity to turn around and then seek recoupment of that money from the school. So we have an interest in not taking a step towards the ledge of having the Department seek recoupment.

Beyond that, there are a number of different ways the schools here, and schools in general, who participate in the federal loan program are heavily regulated entities. And any time that the Department of Education were to make a determination, whether it's part of this settlement or otherwise, that they've engaged in misconduct that is the basis for forgiving loans, the concern is that could have serious consequences, not only in the subsequent recoupment action but other aspects of ongoing program participation.

Now, the Miller declaration that was submitted with the Department's opposition went some way towards addressing those concerns and provided clarity that we think was totally absent from the proposed settlement itself and from the joint motion, to say that the Department does not view these -- the granting of full settlement relief as any sort of finding of misconduct against the school that could be used in any other context other than under the terms of the settlement.

But we think that as Your Honor's own questions over the past week have shown, when you combine the Department's what we

think is a unique purported exercise of the compromise authority to compromise claims, and you combine that with a very complex set of borrower defense regulations for a heavily regulated industry, like schools who participate in the federal loan program, that there are a lot of questions and unforeseen consequences that arise.

And so we're here to ensure that whether it's this settlement or a different settlement or otherwise, that this case proceeds in a way that doesn't adversely affect the rights of schools who participate.

THE COURT: All right. Hang on. Let me -- Mr. Merritt -- no. I want to hear from Mr. Merritt.

Aren't you Mr. Merritt?

MR. MERRITT: Yes, sir.

THE COURT: Come up here, please.

Your paperwork says that none of this settlement would be deemed to be adjudication of a borrower defense application.

Am I right about that?

MR. MERRITT: That's correct, yes.

THE COURT: All right. Now is a borrower defense adjudication a prerequsite to bringing a recoupment action?

MR. MERRITT: In a recoupment action, the Department would have to prove that any amounts it seeks to recoup were justified by claims that meet the borrower defense standard.

THE COURT: Well --

MR. MERRITT: So in the recoupment proceeding --

THE COURT: That's not quite the question.

Counsel was telling me that a prerequsite for bringing a recoupment action would be a successful borrower defense application.

And therefore you get one step closer -- well, if that's true, then you would not be able to bring any recoupment actions because there would not be a successful borrower defense application as the predicate, if that's true.

So do you see what I'm getting at? That's what he said. It was, you get one step closer to the ledge, I think he said, if we go down the road of this settlement.

MR. MERRITT: So I think if a borrower defense application is denied then, of course, the Department cannot then turn around and seek recoupment. I think -- I don't know that the regulation is entirely clear as to whether in this situation the Department would be prevented from seeking recoupment for amounts discharged through settlement.

But I don't think it makes any difference in this case, because either way the Department has to prove the underlying borrower defense in the recoupment proceeding. And in that recoupment proceeding, the schools get all the rights that they would be entitled to under the first kind of borrower defense adjudication step, you know, notice and an opportunity to respond; plus a lot more, you know, a hearing, submitting

evidence, submitting expert evidence, all the things set forth in the regulations.

THE COURT: Is the recoupment brought before an ALJ? How does that work?

MR. MERRITT: It's a hearing official within the Department of Education. So it's an administrative hearing but, you know, the final result of that can be appealed to federal district court.

THE COURT: What is the reputational effect of being on Exhibit C?

MR. MERRITT: Your Honor, we don't think it's an interest that would justify standing or intervention in this case.

As we've said, mere inclusion on the Exhibit C list is not an official finding of the wrongdoing by the Department. And before any such official finding could be made, the schools would have the opportunity to defend themselves against -- the allegations, present whatever evidence they seem to be wanting to present in these proceedings, and there are specific proceedings for that.

Schools just --

THE COURT: Let me give you an example. There are 153 schools on the list; right?

Isn't that right?

MR. MERRITT: Yes.

THE COURT: 153?

MR. MERRITT: I believe so, Your Honor.

THE COURT: All right. So let's say, after the settlement, a few months after the settlement, somebody wants to borrow money to go to one of these 153 schools. Will the Department in any way say, "Oh, wait a minute, we can't grant that. They're on the list of Exhibit C"?

MR. MERRITT: No, Your Honor. That gets to one of the questions you asked.

It's a similar effect as with respect to future recoupment proceedings, future enforcement proceedings of any kind. Mere inclusion on the Exhibit C list has no independent legal effect with respect to the relationship between the Department and the schools.

So on that question, the listing of a school on Exhibit C will not have an effect on the loan eligibility of future students at those schools. You know, if the Department -- the Department would have to take formal action, in accordance with its regulations, to either restrict or terminate a school's participation in the federal student loan programs. No such action has been taken here, so so long as an Exhibit C school has a program participation agreement to participate in the federal financial aid programs and a student, you know, otherwise meets the eligibility requirements for federal student loans, the student can continue to receive loans to

attend the school.

THE COURT: I'm talking about brand-new students.

MR. MERRITT: And same for new students. I mean, again, things can change in the future, if -- if an action was taken and the schools were prevented from participating in the programs, that might -- that would be a different story that we don't need to speculate or hypothesize about here. But mere inclusion on the list does not have that concrete effect on the schools.

And the harms they have kind of hypothesized about are conclusory and speculative, and not the kind of thing they have an interest in that would be addressed by participating at this particular stage of the proceedings, of lodging objections to a settlement agreement when kind of the considerations the Court is going to undertake in deciding whether to approve that, you know, all the arguments the schools are raising don't go to those considerations.

THE COURT: Okay. Hold that thought and have a seat. Somebody else wanted to speak.

Go ahead. What's your name and who do you represent?

MR. PANUCCIO: Thank you, Your Honor. I'm Jesse Panuccio on behalf of Everglades College, Inc., one of the proposed intervenors.

I just wanted to take a couple of minutes to address some of these issues, if I could, on behalf of my client.

One, just to be clear, Rule 24 has specific requirements. They've been interpreted by the Ninth Circuit in favor of intervention. We think we've set out in our papers very clearly how we meet those.

I do want to address two issues Your Honor had brought up which is: Does the Department's answers or the declaration they filed somehow eliminate our interest in this case?

And the answer is absolutely not, and that's for several reasons. First of all, the declaration and the Department's position does nothing to effect what I call path three relief in this case, what they call the post-applicant class.

And what they're doing there is they're saying: The class you already certified doesn't matter. They're adding potentially every student loan holder in the country to the settlement agreement. They are taking away the procedures from the 2019 rule, which is in law and duly promulgated. And they will adjudicate those claims --

THE COURT: What are they taking away?

MR. PANUCCIO: They say that every person who files a borrower defense application between the date of the settlement, June 22, and the date of final approval, if you were to grant it, can apply and they will be adjudicated pursuant to the 2016 rule's procedures, not the 2019 rule, which has many more protections for accused institutions.

So they are taking away our entire set of rights that we

have to defend ourselves under the 2019 rule.

THE COURT: But it's not -- whatever you've -- here is the thing that bothers me about your position: You're the luckiest guy in the room. You've already gotten the money and you don't have to pay it back. You get the money and can go to Hawaii on a vacation, the school can give its people big time raises, and pay big-time lawyers to come in. And you've already gotten the money and there's no way they can take that money back from you except through a recoupment action. And that -- all that due process is totally preserved.

So, yes, they take -- they are jumping over the hurdle of giving you the notice to come in and give your peace before they adjudicate a borrower defense, but that's not a proceeding against you. It's a proceeding where the Government forgives the loan, but it just gives you the opportunity to put in your two cents before they go down that road. But if they delete that, you still get your day in court before you ever have to give the money back.

MR. PANUCCIO: Well, Your Honor, it's a bit like saying if you have a criminal defendant or a civil defendant, and there's a whole set of procedures that protect them all through the trial process. If we eliminate half of them, you're not injured because you still have the sentencing hearing at the end that still has due process --

THE COURT: Well, no. You still get every single one

of those rights. That's not a good analogy at all.

You get your full day in court in the recoupment. And if they don't bring a recoupment, you get all that money. You can -- you can pay your faculty members extremely large salaries and -- funded by $6 billion worth of taxpayer money.

I'm not sure where you're -- I don't see much harm to you.

MR. PANUCCIO: There is already a finding against us. And even putting aside the financial recoupment --

THE COURT: They told me it's not a finding against you. They're just settling. And if your name is on Exhibit C it doesn't mean anything against you; you still can participate in the program.

MR. PANUCCIO: Your Honor, Documentary 246 at 3, the motion seeking settlement empty approval says the Department has determined that attendance at one of these schools justifies relief based on the strong indicia of substantial misconduct by 153 schools -- without a single adjudication, to the tune of $6 billion.

Even if we put aside financial harm and just talk about reputation, if this Court were to sign off on that and say that these schools -- 153 of them -- their federal regulator, which the public is supposed to be able to trust as a neutral arbiter of facts and what's going on at these schools -- to say without trial, without process, that we believe they engaged in substantial misconduct, at the very least creates substantial

reputational harm.

And you don't have to take it from us. You can take it from the plaintiffs' counsel's own statements. As soon as the settlement was inked, plaintiffs' counsel went to the press and said: Now all of these borrowers will be granted relief because they were, quote, cheated by their schools.

So that is now what is -- it will be used and said about these schools based on the Department of Education, which has lawful regulations about how it's supposed to be an adjudicator and the process it's supposed to follow, coming to this blanket determination.

And I just want to add, Your Honor, the specific question you asked this morning. You said: By what authority would the Department do this?

One year ago, about a year and a half ago, the Department's general counsel put out a memo -- we cited in our intervention papers -- that said the Department has no -- absolutely no authority to grant blanket debt cancellation and loan forgiveness; it would violate the Major Questions Doctrine --

THE COURT: Was that the prior administration or this administration?

MR. PANUCCIO: Prior administration. And it has not been revoked or changed in any way. It is a memo that still exists. They've given no other analysis. And the analysis has

now been buttressed by the U.S. Supreme Court's decision in *West Virginia versus EPA*, which says, if you're going to take an economy-altering major financial decision, you need to have clear statutory authority.

Far from it. They are saying, We are replacing the borrower defense regulations with a completely new regime that we negotiated for a year, apparently, in secret, with your accusers and that is what you will now be governed by. It is hard to think of a precedent in history of a federal court allowing a department to replace a regulatory regime of this significance in this way.

THE COURT: All right. Okay. Thank you.

MR. PANUCCIO: Thank you, Your Honor.

THE COURT: Any other intervenor want to be heard? Or proposed intervenor?

How come so many people have got red on today? Is that a signal for something?

UNIDENTIFED SPEAKER: We're supporting our class.

MR. GONSALVES: And I've got a red pen.

THE COURT: And you've got a red pen. Okay.

Did I miss something? Is that just coincidence?

MS. SWEET: It's so we can find each other.

THE COURT: It's what?

MS. SWEET: It's so we could find each other.

THE COURT: I think that's pretty interesting.

Okay. Your turn.

MR. GONSALVES: Good afternoon, Your Honor. Terance Gonsalves on behalf of the Chicago School of Professional Psychology.

I want to touch on whether or not our rights are preserved. You know, one of the things that we raised in our papers is the declaration is a nice start, but is it binding? Will the next administration have a different look and a different feel such that we can rely on the statements in that.

Those representations made by the Department were only made because we filed our motions to intervene and raised our hands and said we have very serious concerns about the representations made in the joint motion and in the settlement itself. The procedural rights that we were talking about in the recoupment process and the prerequsite to recoupment process, you are exactly right --

THE COURT: Wait a minute. I have not made any findings. Don't say I'm exactly right. I've asked questions, but I'm not trying to -- I want to understand this, but I'm not making any findings. So don't say I'm exactly right.

MR. GONSALVES: Apologies.

You asked a question as to what the recoupment process looks like. I think the response was it was a hearing before a hearing officer at the Department of Education.

It is a mini trial. What we lose out on is not having to

go through that mini trial if we can establish with simple paperwork a simple written report that the application has no merit and should be denied and, therefore, we shouldn't have to go through a full trial, which is what is required in the recoupment process where we have these procedural rights that the Department has said that we had.

I also want to mention very quickly, the memorandum that counsel referenced that concluded -- the Office of General Counsel from the Department of Education concluded that the Department does not have the authority to cancel debt on a mass basis.

I have a copy of that memorandum here, Your Honor.

THE COURT: Let me see that memo.

MR. GONSALVES: And I have copy for counsel as well that I can share. But I think it's important that you have it.

It is hard to find, but it is there for Your Honor to review.

THE COURT: Where is the part that says no en masse?

MR. GONSALVES: If you go to the very last page, Judge, where the conclusion is. It has -- where it says that the secretary may not discharge loans en masse.

I understand -- I understand that there was a subsequent memorandum -- that one is from January of '21 -- that was in April of '21. I don't know whether it was ever finalized. The only version that I can find of the -- that April '21 version,

is fully redacted but --

THE COURT: But this one is -- what date? This is January '21?

MR. GONSALVES: That is January of '21, Your Honor, from the Office of General Counsel. And their conclusion is the secretary does not have the authority to discharge loans en mass.

THE COURT: Thank you.

MR. GONSALVES: Thank you.

THE COURT: Yes.

MR. TOWNSEND: Your Honor, Lucas Townsend for Lincoln Educational Services Corporation.

I just want to emphasize that the reputational injuries as a result of being on Schedule C are very important to my client. We're here because of a settlement in Lincoln. Seven years ago, Lincoln settled a -- an investigation in Massachusetts with -- again, with no findings, no findings of wrongdoing, no admission of wrongdoing, and yet it has these consequences that bring us here today. That's what happens from a settlement with no findings.

And we're hearing from the Government that this isn't a finding of wrongdoing. But this -- Lincoln's experience shows how there are consequences from these sorts of settlements, and from being listed as a presumptive wrongdoer by one's primary regulator.

Lincoln has been providing educational services since 1946. These are very important issues for any school, but certainly for Lincoln. And to be blacklisted, in effect, included on a Schedule C, that affects relationships with students; prospective students; past students; current students; with faculty; donors; investors; regulators; and creditors immediately. Those are immediate effects. So these are very important concerns that we have with Schedule C.

The one final point I would mention is that with respect to the hearing officer who adjudicates the recoupment proceedings, that is an employee of the Department of Education. Their employer is here today telling the Court that there is a presumption of wrongdoing. How can any school expect a fair shake in an adjudication by an employee of the Department that has deemed these schools wrongdoers?

That's -- the process going forward has significant due process and fairness concerns. And so we're very concerned about this proposed settlement and the school.

THE COURT: All right. Have I now heard from all the intervenors? I think so. Or proposed intervenors.

I've told you on the plaintiffs' side I would give you a chance to reply and I'll give you that chance now.

MS. ELLIS: Thank you, Your Honor.

THE COURT: What do you say to the reputation and what they just read out that -- I don't have the language in front

of me, but the language about why these people got on Exhibit C?

MS. ELLIS: Well, Your Honor, I would start by saying that none of the reputational harms that counsel were referring to here are actually reflected in any of their filings.

All that they've said is that they in some cases have received some questions about Exhibit C, but they've not actually offered any supported allegations of harm to their reputation, harm from --

THE COURT: I thought that was in their briefs, reputational harm.

MS. ELLIS: Well, they assert that there will be reputational harm, but they provide no examples of this reputational harm actually coming to pass.

THE COURT: Okay. But -- that, I do see that as a possible legitimate concern --

MS. ELLIS: Yes, Your Honor. But I --

THE COURT: -- to be on Exhibit C, that is -- I don't know. I'm raising that question. I'm not adjudicating it now, but -- and they hadn't had that much time to go out and work up a case either. This just came out.

MS. ELLIS: Yes, Your Honor, I do understand that.

But we would submit that even should some kind of reputational harm come to pass, that that's not a significant protectable interest for the purposes of intervention as of

right. Just the mere fact that someone else's litigation might reflect poorly on you is not a basis to intervene.

And I think the Seventh Circuit said it in the *Gryzinski* (phonetic) case that we cite in our brief, they wrote (as read):

"To hold that the prospect of an adverse finding or comment could support intervention as a party with rights to appeal, for example, even if the original parties are satisfied with the outcome, would amount to a stunning expansion of standing, and would invite prolonged and even endless litigation."

And I think that's exactly the case here.

THE COURT: What kind of case was that in the Seventh Circuit?

MS. ELLIS: That was a malpractice case. Sorry. I'm just looking at my notes here.

Yes, it was -- there was a malpractice case that was dismissed based on the Doctrine of Unclean Hands, and one of the people who was alleged to have unclean hands tried to intervene to protect his reputation.

THE COURT: Okay.

MS. ELLIS: Your Honor, if I may also address this issue of the procedural rights that the intervenors say they're entitled to under the Borrower Defense Regulations.

I would say first about that, that both Lincoln and

Chicago School of Professional Psychology did, in fact, receive notice of borrower defense applications implicating them from the Department of Education. And Lincoln submitted a response to that notice. And so I'm not exactly sure what violation of procedural rights they think has occurred.

And even as to ECI and American National University, the 2016 borrower defense regulations which set the applicable procedures for the vast majority of the class, they do say that a school will receive notice of applications involving them, they do not give the school a right to respond. If the school does respond, the Department will take it into account. But there's not a right to respond. And furthermore, there is certainly not a right to have the Department believe whatever they say when they do respond.

And just in general, the docket in this case would have given all of the proposed intervenors notice of the fact that borrower defense applications had been filed by their former students. If what the intervenors were really after is protecting their right to notice and an opportunity to respond, then they could have intervened in this case at the time they became aware that there were borrower defense applications against them; but they didn't do that.

They're not actually seeking to protect a notice right. What they're seeking to do is to block their former students from seeking relief; and that's not something they've ever had

a right to do. The borrower defense applications bifurcate the process. I'm sorry. The borrower defense regulations bifurcate the process of determining whether an application should be granted from determining whether the Department is able to recoup any discharged amounts from the school.

And borrowers are explicitly barred by the regulations from participating in the recoupment process. Likewise, part of the point of having these proceedings bifurcated was the Department's recognition, and they said this I believe in the preamble to the 2016 rule, their recognition that they did not want the schools bringing their superior economic and political power to bear against an applicant who's seeking relief; and that's exactly what the intervenors here are seeking to do.

Finally, Your Honor, to address Mr. Panuccio's point about discharge en masse, this is not a discharge en masse. It's certainly a discharge of quite a significant number and amount of loans, but it's not broad-based debt cancellation.

The idea that the post-class applicant group is some kind of cover for broad-based debt cancellation is, frankly, absurd. There are over 47 million federal student loan borrowers in the United States right now. In the entire history of the Borrower Defense Program, they've received something on the order of 500,000 applications; obviously, a tiny, tiny fraction.

And the idea that, first, tens of thousands of borrowers would apply for borrower defense in the next, say, four months

before the final approval hearing in this case, that many of them would lie under oath about having been deceived by their schools, and that the Department would then sit on those applications for three years, taking no action, which is exactly the conduct that got them into this case to begin with, it's just not realistic. It's a scare tactic.

Your Honor, finally, I'd like to address Question Number 6 that you raised in your questions this morning about the authority of the Department to -- of both the Department of Education and Justice to reach this settlement.

I have a few citations. I wouldn't necessarily represent that this is an exhaustive list, but I would point to, first, 28 U.S.C. 516 and 519, Governing the Conduct and Supervision of Litigation by the Attorney General, and regarding the Attorney General's decision to settle a case.

Justice Manual 4-3.200, Bases for Compromising or Closing Claims of the United States. Those include Subsection E, The Cost of Collecting Will Exceed Recovery; Subsection F, Compromising the Claims is Necessary to Prevent Injustice; and Subsection I, Assessment of the Litigation Risk.

As to the settlement and compromise of federal student loans, I would point the Court to 20 U.S.C. Section 1082(a)(6) which states that (as read):

"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."

The Federal Claims Collection Act 31 U.S.C. Section 3711 states that (as read):

"The head of an agency can compromise according to standards set out in the Attorney General's regulations, and this does not displace the compromise authority in an agency's organic statute."

Under the Department of Education's regulations 34 C.F.R. 30.70, regarding how the Secretary exercises discretion to compromise a debt or suspend or terminate collection of a debt, Subsection A1 states that the Secretary uses the standards of 31 C.F.R. Part 902 to determine if compromise is appropriate, and Subsection E1 states that this applies to both FFEL and direct loans.

Then following that cross-reference to 31 C.F.R. Part 902, it states under Subsection A that (as read):

"Agencies can compromise a debt if the Government cannot collect the full amount because" -- including a number of provisions, among them, "the debtor cannot pay the full amount in a reasonable time; the cost of collecting doesn't justify attempts to collect; or if there is significant doubt

concerning the Government's ability to prove its case in court."

Unless Your Honor has further questions, I can turn it over to my colleague from DOJ.

THE COURT: Does DOJ have anything more to say?

MR. MERRITT: I'll be brief, Your Honor.

THE COURT: Say it again?

MR. MERRITT: Yes, briefly.

THE COURT: Please, go ahead.

MR. MERRITT: Charlie Merritt from DOJ.

Just quickly on that same point, especially since a lot has been made of this memorandum that the intervenors raised.

First and foremost, the Department has the authority to settle and compromise claims under 20 U.S.C. 1082(a)(6).

THE COURT: You're talking about the Department of Justice?

MR. MERRITT: I'm talking about the Department of Education.

And that authority has been used in numerous times in the Department's experiences especially for cases in litigation. So I just want to take the opportunity to distinguish the situation addressed in that memo which is, I believe, a nonpublic document, you know, internal recommendations of the OGC from January 2021, referring to kind of mass or blanket cancellation.

Here we have -- it wasn't specific to borrower defense -- right? -- that's a whole separate issue. And then cases actually involved in acts of litigation of court. So the authority is going to be considered a little bit differently and also comes into line with the Department of Justice's authority to settle litigation interests of the United States.

I'll just add on the point of the, you know, reputational harm. You know, schools are really asserting an interest here in not kind of being accused of wrongdoing through the borrower defense adjudication process, including -- which they do not have, including when the Department, you know, grants a borrower defense through the normal process.

If that were the case, they would be able to -- the schools would then be able to appeal any decision the Department made approving a borrower defense claim, and granting relief to a borrower, in that proceeding between the Department and the borrower. The school would then be able to appeal that to federal district court, which just can't be right given the regulatory structure of the schools then later getting their day in court. So any reputational allegations of harm have to be considered in the context in which this exists, and the limited damage to the names of the schools.

Thank you, Your Honor.

THE COURT: Let's talk about the -- well, first let me make one ruling.

This settlement is good enough for the class. I'm now only talking about the class, and not the intervenors. The class originally, in this lawsuit originally, was to get an injunction to require the agency to adjudicate many thousands of -- many thousands of applications that had gone unadjudicated.

And I specifically asked the lawyers if it was anything more than that, and I was assured that it was only to get an order to adjudicate the cases, because the agency wasn't doing that.

Now, this settlement goes way beyond that, this settlement not only skips over the adjudication and just cancels the loan -- so from the point of view of the class members, this is a grand slam home run. And how could anybody, if you're a class member, oppose this -- because you're getting a bonanza.

Now, there may be a legal question. I'm not adjudicating this right now, but there may be a legal question whether the agency has the authority to do this. But at this stage all we're talking about is whether or not this is a good enough deal to go forward with preliminary approval, and have a class final approval hearing.

So from the point of view of the class, this is certainly a good enough deal to give preliminary approval.

So I am giving preliminary approval, and I want you to -- I've forgotten the answer to this.

Let's talk briefly to the plaintiff lawyer and the Government about the notice issue. We need to notify every single class member and give them an opportunity to be heard.

So what's our plan there?

MS. ELLIS: Yes, Your Honor.

We have prepared a draft class notice which is attached to the settlement agreement. The Department of Education will send that to every class member initially via e-mail for everyone for whom they have an e-mail on file. If they don't have an e-mail on file, or if they received a bounceback that the e-mail is no longer active, they will send it by postal mail to the class member's last address on record.

THE COURT: When will that be done? And the reason I ask is, I've heard exactly what you've told me, and then later there is a hearing where you say, "Well, Judge, we really didn't get everybody notice because so many bounced back, we then had to do the postal thing; and the Government is so slow it didn't get around to doing it in time and, therefore, there are several hundred or thousand class members who didn't get notice."

So when -- I have to ask, I have learned the hard way -- when will you get this done or the -- or the Department?

MS. ELLIS: I certainly understand your question, Your Honor. Perhaps DOJ counsel would be in a better position. I believe --

THE COURT: Give me a drop-dead date by which you promise me every class member will get the notice one way or another.

MR. MERRITT: Your Honor, I believe the order we proposed to you says that the defendants will e-mail out the first round of notices within 15 days.

THE COURT: How many?

MR. MERRITT: 15.

THE COURT: Why not -- why do you make it 15? That will fall on a Saturday. It should be a multiple of seven. So 14 days is what with it should be.

MR. MERRITT: I do think it would be Friday, if you ordered this today.

THE COURT: If I did this today, it would be a Friday. Yeah.

MR. MERRITT: Don't want to -- yeah, I understand. 14.

THE COURT: So then what? Because you're going to get a lot of bouncebacks or for all -- I don't even know you'll get a bounceback.

MR. MERRITT: I believe there's a procedure by which the Department will handle the bounceback issue. And I think we crafted this to be similar to what we did a couple of years ago when we were able to, you know, at least effectively notice the class.

I can't remember if this is specified in the agreement itself.

THE COURT: Is there a way to -- is there a website someplace where we can put this on a website?

MR. MERRITT: That is one of the notice procedures, Your Honor, that it would be on both the plaintiffs' website and the Department's website. I believe, the way the procedure is described in the settlement agreement is on page 23 of that document. It's paragraph 10B.

It says (as read):

"Defendant shall e-mail all class members who provided their e-mail addresses to the Department. And where defendants do not have such an e-mail address available or become aware that it is undeliverable" -- the bounceback situation, that "defendants will mail a copy to the last known address."

Which I believe is a change we made the last time around responding to similar concerns that Your Honor raised.

I don't have specific dates by which that would be accomplished. Here -- and it's a little bit hard to predict, you know, when the bouncebacks will happen and how that will work, but. . .

THE COURT: What's the deadline for comments by class members?

MR. MERRITT: I believe we proposed this to work backwards from a final fairness hearing, Your Honor.

Just one second.

(Pause in proceedings.)

MR. MERRITT: Okay. So I think what we proposed in the proposed order is that the objections be submitted no later than 60 days from the preliminary approval order, whenever that goes out.

THE COURT: Well, it will be verbal today.

MR. MERRITT: It would be today? Yes, Your Honor.

THE COURT: It will be a minute order. Is that okay?

MR. MERRITT: Well, I think --

THE COURT: Do I have to do it now? It will be -- I got my -- I'm in a big criminal trial right now, so I may not have time to do a written order.

MR. MERRITT: I understand that, Your Honor. I think --

THE COURT: Can't I do a verbal right now?

MS. ELLIS: Yes. That would be fine with us, Your Honor. We would start the clock today if you rule from the bench.

MR. MERRITT: Yeah. And if you want to look at the proposed order, I guess, at ECF 246-2. Our proposal at least and, of course, you know --

THE COURT: I don't have that. My law clerk didn't

give it to me. He gave me the proposed notice, but he didn't give me the proposed timetable.

Angie, tell me what three weeks from today is going to be.

THE CLERK: Your Honor, three weeks from today is August 25th.

THE COURT: What is the day that we would have the final approval hearing?

MR. MERRITT: I think we left this a little bit to your discretion, Your Honor. We had proposed that we would move for a final approval within 85 days of today, you know, of the preliminary approval order.

THE COURT: Wait a minute --

MR. MERRITT: We tried to give a little bit of flexibility.

THE COURT: Well, I've got to get it done before my law clerk leaves.

When are you leaving?

(Court and law clerk conferring.)

THE COURT: It's got to be done -- my law clerk is leaving November 18th. It will never get done unless -- and so it's got to be well before that. So let's give two weeks. It's got to be two weeks before the 18th.

So November -- the hearing is going to be November 3rd at 11:00 a.m.

Now, work backwards from that. Can you do that?

MR. MERRITT: Watching me do math --

THE COURT: I used to work in DOJ. I know you can do this, you know.

MR. MERRITT: I think.

THE COURT: There are typewriters there -- you know, you can get it done.

MR. MERRITT: So the last date before that is going to be the motion for final approval. And so, I guess I would ask the Court a little bit how much time you think you need between the filing of the motion and the date of the hearing.

THE COURT: You should do it on --

MR. MERRITT: Two to three weeks.

THE COURT: I would do it on a 42-day track. 42 days before the hearing. So that means you need to have -- all right.

Let's just go -- the notice should go out pronto. The last day to object should be 49 days before the hearing, or to make a comment, pro or con. The last day for class members to comment should be 49 days before that hearing. All right. So let's do that math and figure that out.

When is that going to be?

I think that's September 15th or so, so you got to get cracking.

MR. MERRITT: September 15th being the date by which the last objections to the settlement --

THE COURT: Objection or any kind of comment, pro or con.

MR. MERRITT: And then the motion a week after that, it looks like.

THE COURT: Would be the 22nd, I believe.

And any motion by any intervenor, if I let them in, would have to be filed by that date.

So -- no, it would be this: You have to file first. All right. Here, I'm tentatively going to let these people intervene on -- as of -- not as of right -- but as of permissive; tentatively, I haven't made my mind up on that.

And I'm also going to set a date 21 days from today for any other motions to intervene, and try to put out a notice saying 21 days. Because we're not going to have dribs and drabs of more intervenors; that would be unthinkable. So if there's anybody else going to intervene, they've got to do it 21 days from today. 22 days? Out of luck.

And I'm not saying that I'm going to grant all those, because maybe their interest would be adequately represented by these four. And then so you would file your motion. They would file their opposition 14 days later. And then you file your response and we'll have a hearing on November 3rd.

MR. MERRITT: Okay.

THE COURT: Seems like there's something else I needed to -- here's what I want you to do: I want you to prepare -- I

don't like your form of order because you're putting words in my mouth like "The Court finds that relief of more than is reasonable" -- especially in light of, "parties have" -- here's what I'm going to find verbally on the record: The proposed settlement on a preliminary basis is fair, reasonable, and adequate, in my view for the class members. It may or may not be fair or so forth to the proposed intervenors. I don't know. I'm not saying one way or the other on that.

But I believe that this is a grand slam home run for class members because not -- they don't even have to go through the litigation; they get a complete cancellation.

But I'm not going to make all these other findings. So the notice is fine.

And I want you to submit a different order to me by tomorrow that lays out the schedule that I think we have set forth for the class members, and for the intervenors to oppose it.

Now, I'm doing this on the fly. I'm in the middle of a huge trial. What am I leaving out? In other words, if the intervenors are in the picture, is there something that -- is there some other deadline date that you feel, to protect your interests, that you want vis-a-vis the intervenors?

MS. ELLIS: Just to be clear, Your Honor, would this be intervention for the limited purpose of opposing final approval of the settlement?

THE COURT: I want to make sure.

Does any intervenor think they're going to get discovery? If so, raise your hand.

MR. MORAN: Your Honor, we would take it but --

(Reporter interrupts for clarification of the record.)

THE COURT: No, I'm not going to grant that.

MR. MORAN: No, I know.

THE COURT: I'm not granting discovery, no interrogatories. Otherwise, forget it; go to the Ninth Circuit.

You can oppose it. You can oppose it on the -- you can oppose the settlement; that's okay. But not -- we're not going to come in and bollix up everything with demands for discovery.

I want to hear the rest of you say that: Is any one of you lawyers going to ask for discovery?

MR. MORAN: Your Honor, can I ask for clarification?

(Reporter interrupts for clarification of the record.)

MR. MORAN: Sorry. John Moran for American National University.

What I heard you say is that you're tentatively inclined, but you're not yet issuing a ruling --

THE COURT: That's right, I want to hear you say: We don't need discovery to do our opposition.

You're not even going to ask for it.

MR. MORAN: I agree. We will oppose -- we will

respond to the motion that is filed by the parties without seeking discovery.

But, Your Honor, I just --

THE COURT: What about these others? They're not -- they're kind of looking down at their shoes.

MR. MORAN: Your Honor, they're not --

THE COURT: They're looking at their shoelaces.

MR. MORAN: The piece that I'd like to clarify, Your Honor, is: When the Court does issue a ruling, it would be helpful to have clarity on the Court's -- whether the Court is denying intervention as of right, which it sounds like the Court is --

THE COURT: That's probably -- because I don't see --

MR. MORAN: -- in particular, as Your Honor indicated, to ensure that we are aware of what our appellate rights would be either now or in the future.

THE COURT: Well, I think you would have appellate rights to go up and oppose the settlement since you would be objecting to it. I would say, yes, you could have appellate rights; but in terms of discovery rights, no.

MR. MORAN: Understood, Your Honor.

THE COURT: And I want to find out: Any of you other intervenors going to disagree with what I just heard?

MR. GONSALVES: Terance Gonsalves on behalf of the Chicago School of Professional Psychology.

No, Judge, we will abide by your ruling and not request discovery.

MR. PANUCCIO: Jesse Panuccio for Everglades.

We will abide by the ruling, Your Honor.

THE COURT: All right. Anyone else?

MR. TOWNSEND: Lucas Townsend for Lincoln.

And we will abide by the ruling.

THE COURT: All right. Now, when you say you'll abide by the ruling, yes, of course, you have to abide by the ruling. But are you going to go up on appeal and say "He wouldn't let us have discovery"?

MR. TOWNSEND: We can oppose without discovery. We certainly would like to have information about the determination that the Department has made. We haven't seen it. We don't know who made it. These are questions that are unanswered, in our mind; but we can oppose the settlement without -- without discovery.

THE COURT: Any of you other intervenors disagree with that?

(No response.)

THE COURT: I don't hear anything. Okay.

Where was I? I'm sorry. The schedule. You're going to give me a schedule. All right.

I'm making that finding that is preliminarily approved. I want you to give me the schedule. I'm going to decide on the

intervention, and 21 days for any other intervenors to move to intervene.

I want to be clear that I'm not saying that any of you intervenors have a property interest that's at stake. The main reason I'm inclined to let you in to oppose is to keep the system honest. Because these two have reached an agreement and they both want to get it approved, so there's no one on the other side to help me see the opposing arguments; and that's sometimes pretty useful to the judge, to see the opposing arguments.

So don't go and tell the Court of Appeals that Judge Alsup found that you had a property interest that was -- I'm not. I'm not. I'm not even saying you have a reputational interest. But I'm saying it would be of use to the Court to hear what you have to say about this.

Okay. That's the most damage I can do for one day.

Thanks to all you people dressed in red for coming. And I've got to go now to my next case. So have a good day, everybody. Thank you.

THE CLERK: Court is in recess.

(Proceedings adjourned at 2:16 p.m.)

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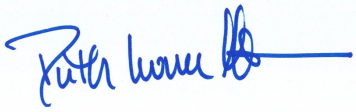
CERTIFICATE OF REPORTER

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

DATE: Saturday, August 5, 2022



Ruth Levine Ekhaus, RMR, RDR, FCRR, CSR No. 12219
Official Reporter, U.S. District Court

Exhibit B

From: tcasey@thecaseyfirm.com
To: Connor, Eileen; Ellis, Rebecca C.; jjaramillo@heraca.org
Cc: robert.c.merrit@usdoj.gov
Subject: FW: Case 3:19-cv-03674-WHA - Sweet v. Devos, et. al. - Question concerning submission by current non class members requesting parties and court consider expanding class
Date: Tuesday, July 12, 2022 2:48:27 PM
Importance: High

Good afternoon,

I attended Florida Coastal School of Law from 2007-2010 and recently learned of the proposed settlement in the above referenced case from a news story that ran late last week in Jacksonville, Florida. I was previously a lead plaintiff in Case #3:14-cv-01229 (removed to Southern District Court of Florida and transferred to Middle District Court of Florida) filed against Florida Coastal School of Law that was dismissed with prejudice in favor of Florida Coastal School of Law on September 29, 2015. Our class action did not provide any relief to myself or the other members of our proposed class. I have submitted an application for borrower defense this morning so if your proposed settlement in the above referenced case is accepted I will be a post-class member.

How can I submit a request that the court consider expanding the class in your case to include those that file a borrower defense application on, or before, July 28, 2022 (as opposed to June 22, 2022), and providing that the post-class members include those that submit a borrower defense application within sixty days after the settlement approval, i.e. on, or before, Monday September 26, 2022 if the settlement is accepted at the hearing currently scheduled for July 28, 2022?

Several individuals may not have known of your case, the requested relief, and proposed relief per the proposed settlement until after the proposed settlement was filed and publicized and it seems unfair that two identically situated individuals may get different outcomes if one filed a borrower defense application before June 22, 2022 and the other files a borrower defense application between June 22, 2022 and July 28, 2022.

I applaud the efforts of Plaintiffs' counsel in this case and the proposed settlement agreement that all parties have crafted. In my humble opinion you all have provided equitable relief far beyond the dollar amounts that may be discharged per the proposed settlement agreement and have taken a huge step toward correcting a systemic problem that has had substantial negative impacts on many individuals in pursuit of the American dream.

Respectfully,
Taylor Wayne Casey, Esquire
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Fax: (904) 354-1015
Email: tcasey@thecaseyfirm.com

The Casey Firm, PLLC

A law firm committed to its clients and building a practice based on trust.
www.thecaseyfirm.com

From: Graciela Garcia
To: Rebecca Ellis
Subject: Fwd: Settlement Agreement in Cause no 3:19-cv-03674-WHA
Date: Thursday, August 25, 2022 5:32:25 PM

Good afternoon Counsel:

I am writing as a potential Plaintiff in the above referenced matter / class action lawsuit. I believe the school that I attended, having been shut down in August 2007, with state and federal convictions against the administration of the school, **Crown College in Tacoma Washington,** for crimes against former students and fraud of the Dept. of Education, among other allegations not listed but settled through legal intervention should be included in the Settlement Agreement under the initial settlement agreement round to be decided within 90 days of the signed Settlement Agreement.

On / about January 2019, I applied for a school closure loan discharge, which was responded to by GREAT LAKES EXAMINATION UNIT on February 26, 2019, stating that my application would be reviewed and a response provided within 60 days.

On / about March 5, 2019, I received an e-mail to my personal e-mail with the attached correspondence, dated I received correspondence from / Dept of Education stating, "MANDY, we've been notified your school has closed. Your federal student loans listed below may be eligible for closed school discharge."

In addition to the Closed School Discharge, I also filed APPLICATION FOR BORROWER DEFENSE TO LOAN REPAYMENT, completed application with attachments / exhibits from various lawsuits and sources supporting both the claim for the APPLICATION FOR BORROWER DEFENSE TO LOAN REPAYMENT and in conjunction documents supportive and filed with a CLOSED SCHOOL DISCHARGE.

I received a response from the (borrowerdefense.ed.gov) on November 23, 2021, to the online query and application submitted stating that After reviewing your application for Borrower Defense, we believe you may be eligible for the CLOSED SCHOOL DISCHARGE.

I received the correspondence dated November 24, 2021 MANDY WE'RE UNABLE TO APPROVE YOUR REQUEST FOR CLOSED SCHOOL DISCHARGE OF YOUR STUDENT LOANS. with a denial reason code 7, which states Your application isn't complete. Please review and complete any incomplete or missing fields on the application. Please ensure your application is also signed, dated and your personal information completed in section 1. I completed, submitted and signed another BORROWER DEFENSE APPLICATION and sent on January 7, 2022.

After letting 30 days pass, with no updates, no correspondence, I again printed out the application, completed again SIGNED and returned again, February 14, 2022, to date no response has been received. It has now been 6 more months, which I have heard nothing from my applications.

I have 2 initial loans that totaled approximately $19,902.58 and 17,093.15 after being consolidated in 2007 to be able to purchase a home for a total amount at that time of $36,995.73. The total of those loans plus the years of interest are now at $41,906 and $48,794

for a total of $90,700.00 for a school that was closed, a degree that is not accepted and/or transferred due to fraud and the inability for to secure any further assistance academically to attend and secure a valid degree.

I believe that the Dept of Education activities through forbearance, postponement, etc. has contributed to this, as I've never been able to secure a position to pay such high loan amounts. I would appreciate any assistance, acknowledgement or response to this since the Dept. of Educaiton, while sending promising information and responses, does not timely respond.

Thank you,
Mandy Garcia.
[redacted]

From: scottsch@optonline.net
To: Ellis, Rebecca C.
Cc: Connor, Eileen; HLS-Project on Predatory Student Lending
Subject: Re: RE: [EXTERNAL] Sweet v. Cardona
Date: Friday, July 15, 2022 11:58:05 AM

Thank you so much for the explanation. Have a nice weekend.

------ Original Message ------
From: rellis@law.harvard.edu
To: scottsch@optonline.net
Cc: econnor@law.harvard.edu; ppsl@law.harvard.edu
Sent: Wednesday, July 13, 2022 9:46 AM
Subject: RE: [EXTERNAL] Sweet v. Cardona

Dear Mr. Schneider,

We received your email below from the Department of Justice. Our organization represents the plaintiffs in *Sweet v. Cardona*.

In short, no, there was not a procedure in place to contact individual borrowers who had not filed for borrower defense prior to June 22, 2022. There are a few reasons for this. First, the certified class in the *Sweet* case has always consisted of people who have already filed a borrower defense application. *See* Order Granting Class Certification, No. 3:19-cv-03674-WHA (N.D. Cal. Oct. 30, 2019), ECF No. 46. People who hadn't yet filed were therefore outside the scope of the class. Second, before June 22, 2022, there was nothing to notify people about: the June 22 date was not a deadline set in advance, but rather the date that the parties were able to reach agreement on a proposed settlement, following extensive negotiations conducted under Fed. R. Civ. P. 408.

Under the terms of the settlement, Mr. Enam will qualify as a post-class applicant. Our FAQs here provide more information about the provisions applicable to post-class applicants.

I hope this helps answer your questions. Please let me know if you have further questions.

Best,

Rebecca Ellis

From: scottsch@optonline.net <scottsch@optonline.net>
Sent: Monday, July 11, 2022 4:46 PM
To: Merritt, Robert C. (CIV) <Robert.C.Merritt@usdoj.gov>

Subject: [EXTERNAL] Sweet v. Cardona

I have a friend, Sanjar Enam who attended Ross University - school of Medicine, a branch of Devry. He filed his BD application today and was given case # 09157987. I would like to know if he can be included in the pre-class applications as he was never personally notified of this action or the 6/22/22 deadline. Was there a notification procedure in place to contact the students who did not file a BD application of the 6/22/22 deadline? Thank you for looking into this.

Law Office of Scott R. Schneider, P.C.
117 Broadway
Hicksville, New York 11801
(516)433-1555
Fax (516)433-1511

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From: Ali Kazempour
To: Connor, Eileen; Ellis, Rebecca C.; jjaramillo@heraca.org
Subject: THERESA SWEET, et al., v. MIGUEL CARDONA, in his official capacity as Secretary of Education, and the UNITED STATES DEPARTMENT OF EDUCATION
Date: Wednesday, June 29, 2022 4:27:35 PM

Hi all,

Does the settlement agreement in this matter only apply to individuals who filed a previous borrower defense application?

Who decided to make the deadline June 22, 2022, for individuals to opt into the class?

It appears the settlement agreement was filed with the Court on June 22, 2022. The deadline to opt into the class was that same day. Am I correct? If so, doesn't that seem unjust?

Is there any way the settlement agreement can be revised and resubmitted to the Court?

Can you all propose to the State Department of Education to enter new terms on the agreement? Specifically, pushing the deadline of June 22, 2022, to meet class certification?

The deadline to meet class certification should at least be a couple of weeks beyond June 22, 2022. Can you all propose July 6, 2022?

Please let me know; thanks.