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9 Attorneys for Plaintiffs

10 **UNITED STATES DISTRICT COURT**
11 **NORTHERN DISTRICT OF CALIFORNIA**

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

15 *Plaintiffs,*

16 v.

17 ELISABETH DEVOS, in her official
18 capacity as Secretary of the United States
Department of Education,

19 And

20 THE UNITED STATES DEPARTMENT OF
21 EDUCATION,

22 *Defendants.*

Case No.: 19-cv-03674-WHA

**MOTION FOR A SUBSEQUENT CASE
MANAGEMENT CONFERENCE**

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28 MOTION FOR A SUBSEQUENT
CASE MANAGEMENT CONFERENCE

1 The Plaintiffs request a subsequent case management conference in this matter, based on the
2 following:

3 1. On May 22, 2020, the Court granted preliminary approval of a settlement
4 agreement between the parties. ECF No. 103. The settlement agreement, which was executed on
5 April 7, 2020, ECF No. 97-2, commits Defendants to a timeline for issuing a “final decision” on
6 the merits of each class member’s borrower defense claim, ECF No. 97-2 at 5-7, or else be
7 required to cancel a portion of the borrower’s student loans, *id.* at 11-13. In the agreement, ED
8 represents and confirms that it “issues written decisions as required by the Department’s 2016
9 Borrower Defense Regulation.” *Id.* at 10.

10 2. The deadline for objections and comments to the settlement is August 20, 2020.
11 ECF No. 105. The parties’ replies are due September 3, 2020, and the parties must move for
12 final approval of the Agreement by September 17, 2020. *Id.*

13 3. On July 24, 2020, counsel for Plaintiffs wrote to Defendants identifying a concern
14 that arose since such time as the Court granted preliminary approval to the settlement agreement,
15 and seeking additional information. Declaration of Eileen Connor (Connor Decl.) Ex. A.

16 4. Counsel for Defendants replied by letter on August 10, 2020. Connor Decl. Ex. B.

17 5. On August 12, 2020, counsel conferred by phone. In short, Plaintiffs expressed a
18 concern that the Defendants have made substantial progress towards clearing the backlog of
19 borrower defense claims by issuing denials using boilerplate and conclusory language that does
20 not provide any rationale for the decision.

21 6. Plaintiffs’ position is that these denials are not final decisions on the merits as
22 contemplated by the settlement agreement because they do not comply with the Department’s
23 regulation, nor do they comply with the basic requirements of administrative decisionmaking as
24 set forth in the Administrative Procedure Act, particularly section 555(e) thereof.

25 7. That provision requires that, in issuing a denial, the agency provide prompt notice
26 “accompanied by a brief statement of the grounds for denial.” *Id.*

1 8. Since December 2019, the Department has denied over 45,000 of the class
2 members' applications for borrower defense. (Publicly available data is current through May 31,
3 2020.)

4 9. Undersigned counsel has reviewed hundreds of notifications of denial send by the
5 Department to members of the class. Connor Decl. In each, the Department's language is
6 formulaic and gives no indication that the Department has connected the evidence submitted by
7 the borrower or otherwise possessed by the Department with its ultimate determination. For the
8 Court's convenience, filed herewith are affidavits from fifteen class members, including three
9 named plaintiffs in this action. The affidavits include as exhibits the individual's application and
10 denial notice. *See* Affidavits of Alison Wright, Benjamin Thompson, Bobby Vang, Charlene
11 Espada, Clarissa Martinez, Daniel Deegan, Ernst Mutchnick, Jennifer Howell, Jessica Jacobson,
12 John Long, Roland Cardoza, Rudolph Howell, Sean Doe, Theresa Sweet, and Yvette Colon.

13 10. The reasons for denial ("failure to state a legal claim," "failure to state a legal
14 claim under borrower defense regulation," "insufficient evidence," "outside coverage date," and
15 "other") are undefined and conclusory. There is no way for an applicant or a reviewing court to
16 determine whether the Department's decision was reasoned. Some denials are nonsensical. *See,*
17 *e.g.*, Aff. of Rudolph Howard ("You allege that ITT Technical Institute engaged in misconduct
18 related to Educational Services. This allegation fails for the following reason(s): Educational
19 Services.").

20 11. There is no link between the evidence submitted by the borrower and the decision
21 reached. In some instances, borrowers are denied for claims that they did not assert. *See, e.g.*,
22 Aff. of Jennifer Howell. The denials reference a slate of materials as "evidence considered" in
23 what appears to be a standard template for each school or school group. This evidence is not
24 provided, nor is it identified as relevant to any particular claim. When one borrower emailed the
25 Borrower Defense Unit with a request for all the documents and evidence showing and
26 supporting the Department's decision, he was told, "Our office does not have access to this
27 documentation, we just have access to the letter that was sent to you. If you wanting [sic] that

1 documentation you would need to fill [sic] a Freedom of Information Act on FOIA.gov.” Aff. of
2 Sean Doe.

3 12. Moreover, the denials state that eligibility for relief depends on whether “the
4 borrower’s school engaged in acts or omissions that would give rise to a cause of action against
5 the school under applicable state law.” However, the Department fails to identify *which* state law
6 it has applied, making it impossible for a borrower to determine whether the decision was a
7 reasoned one. The notices simply parrot back the governing regulation without explaining *why*
8 the evidence failed to state a cause of action.

9 13. The notices advise of an option for borrowers to seek reconsideration based on
10 evidence not already submitted or considered—but borrowers have no guidance from the
11 Department as to why their evidence was insufficient, and how.

12 14. The notices do not apprise recipients of the ability to challenge the denial of their
13 borrower defense claim in federal district court under the APA. This fact alone throws into
14 question whether the parties agree upon the meaning of the term “final decision” as it is
15 contained in the settlement agreement.

16 15. Plaintiffs have serious concerns at present about the Defendants’ good faith and
17 fair dealing in its performance of its obligations under the settlement agreement.

18 16. The attached class member affidavits show that the Department has denied, in
19 cursory fashion, the claims of borrowers who have received restitution from enforcement actions
20 based on the consumer fraud of Sanford-Brown and DeVry. *See* Affs. of Benjamin Thompson,
21 Jennifer Howell, Yvette Colon.

22 17. The Department has denied, likewise in cursory fashion, the claims of borrowers
23 who submitted lengthy applications with affidavits, exhibits, and legal argumentation. *See* Affs.
24 of Charlene Espada, Ernst Muthcnick, Jessica Jacobson, Yvette Colon.

25 18. The Department has denied, again in cursory fashion, the applications of class
26 members who seemingly qualify for approval under existing Department memoranda concerning
27 ITT and Corinthian. *See* Affs. of Alison Wright, Bobby Vang, Roland Cardoza, Rudolph Howell.

1 19. The Department has denied in the same cursory fashion applications that were
2 submitted in 2015 and were under consideration for more than five years, *see* Affs. of Jessica
3 Jacobson, Yvette Colon, as those that were submitted in March 2020 and were under
4 consideration for less than ten weeks, *see* Aff. of John Long.

5 20. As a result, at present, Defendants' actions raise questions regarding their
6 performance of the agreement, should it be granted final approval by the Court, that will require
7 judicial resolution.

8 21. Plaintiffs are mindful of the need to conserve judicial resources, as well as the
9 role of the Court in granting approval to class action settlements under Federal Rule of Civil
10 Procedure 23(e)(2)(a). For that reason, Plaintiffs seek a case management conference in order to
11 fully air the issues identified by Plaintiffs and seek guidance from the Court as to the best
12 mechanism for resolving the issues.

13 22. Plaintiffs request that a case management conference be held prior to September
14 3, 2020, the deadline for responding to objections or, in the alternative, that the Court expand the
15 time for such responses until after a conference is held.

16 23. Defendants take no position with respect to Plaintiffs' request for a case
17 management conference. *See* Connor Decl.

18 Respectfully submitted,

19 */s/ Eileen M. Connor*

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