Nos. 23-15049, 23-15050, 23-15051 (consolidated)

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

THERESA SWEET et al.,
Plaintiffs-Appellees,

v.

EVERGLADES COLLEGE, INC., LINCOLN EDUCATIONAL SERVICES CORP., and AMERICAN NATIONAL UNIVERSITY,
Intervenor-Appellants,

v.

U.S. DEPARTMENT OF EDUCATION, MIGUEL A. CARDONA, in his official capacity as Secretary of the U.S. Department of Education,
Defendants-Appellees

On Appeal from the United States District Court for the Northern District of California
Case No. 3:21-mc-80075-WHA, Hon. William Alsup

PLAINTIFF-APPELLEES' OPPOSITION TO INTERVENOR-APPELLANTS' MOTION FOR STAY PENDING APPEAL AND CROSS-MOTION TO DISMISS APPEALS FOR LACK OF JURISDICTION

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INTRODUCTION

Appellants' Motion for a Stay Pending Appeal does not require a lengthy background, complex legal analysis, or consideration of any questions of "unprecedented" importance (Mot. at 2). Rather, it turns on one simple fact: Appellants have not shown that they will experience any irreparable harm absent a stay of the district court's judgment pending their appeals. They thus fail this Circuit's test for a stay. Appellants' motion should be denied.

But moreover, Appellants have not shown that anything about the Settlement has caused or is likely to cause them *any* cognizable legal injury. Put differently: they lack Article III standing. An intervenor who appeals a final judgment when neither of the original parties below have appealed must demonstrate independent Article III standing to maintain that appeal. Appellants have failed to do so, as demonstrated by the record in the district court and their deficient Motion. Plaintiffs therefore cross-move for dismissal of these appeals for lack of appellate jurisdiction.

BACKGROUND

In short, the underlying litigation here is, and has always been, between the federal student loan borrowers who constitute the Plaintiff Class and the U.S. Department of Education ("Department"). Class members submitted applications to the Department to have their student loans canceled based on misconduct by their schools, in a process known as borrower defense to repayment ("BD").

For the better part of five years, the BD process stood at an unlawful standstill. Plaintiffs initiated this suit in June 2019 to force the Department to restart the process, alleging that its failure to adjudicate BD applications constituted agency action unlawfully withheld or unreasonably delayed under the Administrative Procedure Act ("APA"). *See* A.102-103. After an abortive attempt at a settlement and a finding by the district court of bad faith by the Department, *see* Plaintiff-Appellees' Supplemental Appendix ("Supp.A.") at 11-16, the parties entered into discovery. Based on materials adduced in discovery, Plaintiffs filed a Supplemental Complaint that significantly expanded the scope of the case. They alleged that Defendants adopted an unlawful "presumption of denial" policy for BD applications and issued thousands of unlawful form denial notices pursuant to this policy, in violation of Sections 706(2) and 555(e) of the APA and the Due Process Clause of the U.S. Constitution. A.195-197.

Following further litigation and a lengthy negotiation process, the parties signed the Settlement Agreement at issue in these appeals (the "Settlement") on June 22, 2022. *See* A.201, A.224. As relevant here, the Settlement included a list of schools, referred to in the litigation as "Exhibit C"; class members who borrowed federal loans for the cost of attendance at these schools would receive automatic relief under the Settlement, consisting of discharges of their relevant federal loans, refunds of amounts paid, and credit repair. *See* A.227, A.229, A.260-263. The

Department has consistently stated (including under oath), and the district court has found, that the Department will not—indeed, *cannot*—seek to recoup any amounts discharged or refunded under the Settlement from the schools that the class members attended. *See* A.376-377, A.482, A.541-543.

Three weeks after the parties moved for preliminary approval of the Settlement, four educational institutions—including the three Appellants here—moved to intervene in the litigation. *See* A.35 (Dkt. 254, 261). Each argued, in effect, that it had an interest in the case because it was named on Exhibit C. At a hearing on August 4, 2022, the district court granted preliminary approval of the Settlement from the bench. Supp.A.100, 108. The court explained that it might allow the intervenors to "oppose the settlement," Supp.A.109, but the Court was "not saying that any ... intervenors have a property interest that's at stake," Supp.A.112. Rather, the court was "inclined to let [intervenors] in ... to keep the system honest" by "help[ing] [the court] see the opposing arguments." *Id.* On August 31, 2022, the court denied Appellants' motions 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." A.390.

Appellants did oppose final approval of the Settlement, *see* A.40 (Dkt. 325, 326, 327), and were heard at the fairness hearing, *see* Supp.A.137-164. The class, meanwhile, overwhelmingly supported the Settlement: the district court received

over a thousand comments in favor of it and less than 175 objecting or requesting changes, out of approximately 264,000 class members. *See* A.489. On November 16, 2022, the district court granted final approval of the Settlement. A.467 ("Final Approval Order"). The Final Approval Order addressed each of the arguments Appellants had raised—the same arguments they raise in the instant Motion—and explained in detail why those arguments did not prevail. *See generally* A.467-491.

On January 13, 2023—the final business day before the appeal deadline—the Appellants filed notices of appeal, along with a motion to stay the judgment pending appeal. *See* A.42 (Dkt. 350). Their motion raised arguments substantively identical to the ones in Appellants' briefs opposing final approval and, now, in their Motion before this Court. The district court entered an administrative stay that prevented the Department from discharging any loans for class members from Exhibit C schools until the court could hear the stay motion. A.43 (Dkt. 356).

Following full briefing and argument, the court denied Appellants' motion to stay on February 24, 2023. A.532 ("Stay Order"). The court found that Appellants had failed to demonstrate that they would suffer irreparable injury if the Settlement were to take effect pending appeal. *See* A.541-551. Regarding Appellants' allegations of "regulatory" harm, the court reiterated its finding from the Final Approval Order that Appellants' procedural rights were not impaired by the Settlement. A.542. As to alleged reputational harm, the court concluded that, despite

multiple opportunities, "movants' assertions of reputational harm remain markedly speculative, 'grounded in platitudes rather than evidence.'" A.545 (quoting *Herb Reed Enters., LLC v. Fla. Ent. Mgmt., Inc.*, 736 F.3d 1239, 1250 (9th Cir. 2013)). Further, Appellants' protestations regarding "bureaucratic momentum" that might result from allowing the Settlement to take effect would not result in "irreparable harm *to movants*." A.551 (emphasis added). Indeed, the court was "at a loss to identify an injury to movants arising from this settlement agreement (that they were not a party to) resolving this litigation (that did not involve them)." A.552.

Though the failure to demonstrate irreparable injury was fatal to Appellants' motion, the district court nonetheless addressed Appellants' other arguments. First, the court rejected Appellants' tortured reading of the Settlement, under which they claimed that they were entitled to an automatic stay of the judgment. A.537-541. Next, rejecting Appellants' arguments that they were likely to succeed on the merits of their appeals, the court not only reiterated its conclusions of law from the Final Approval Order, *see* A.552, but also found that Appellants likely lacked standing to appeal because they had not suffered any Article III injury, A.552-553.

Finally, the court found that the balance of equities and public interest favored the Settlement. A.553-555. Whereas the "claims of harm experienced by movants are acutely overstated," Appellants' portrayal of the likely harms to Plaintiffs from further delay was "acutely understated." A.553. So too here: Appellants' flippant

reference to "vague assertions of intangible harm" to the Class, Mot. at 37, actually refers to 144 sworn declarations that detail specific harms that class members will suffer if settlement relief is delayed, including mental and physical health struggles, delays to marriage and retirement, job losses, even homelessness. *See* Supp.A.201-359. As long ago as October 2020, the district court had already found that members of the class were subjected to a "disturbingly Kafkaesque" BD process, Supp.A.8, which devolved into an "impossible quagmire" across three administrations, A.477. Forcing the class to wait even longer for relief would exacerbate the "financial, physical, and emotional" harms they had already suffered. A.554.

Having confirmed that the Effective Date of the Settlement was January 28, 2023, A.539, the court permitted the Department to begin effectuating relief for the vast majority of the class, including those with loans from Exhibit C schools other than Appellants. As to Appellants' former students, the court granted a seven-day administrative stay to give Appellants time to file the instant Motion in this Court. Appellants having now filed this Motion, the administrative stay will remain in place until this Court rules on Appellants' request for a stay pending appeal.

PLAINTIFF-APPELLEES' OPPOSITION TO MOTION FOR STAY

I. Legal Standard

A stay pending appeal is an "intrusion into the ordinary processes of administration and judicial review, and accordingly is not a matter of right." *Nken v.*

Holder, 556 U.S. 418, 427 (2009) (cleaned up). Rather, a stay is discretionary, and "[t]he party requesting a stay bears the burden of showing that the circumstances justify an exercise of that discretion." *Id.* at 433-34 (internal quotation marks and citation omitted). In deciding whether a stay is warranted, a court considers four factors: "(1) whether the stay applicant has made a strong showing that [it] is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *Nken*, 556 U.S. at 434 (quoting *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987)).

The first two of these factors are the "most critical." *Id.* Consideration of the first factor is not necessary, however, if the movant fails to satisfy the second factor: "[I]f the petition has not made a certain threshold showing regarding irreparable harm ... then a stay may not issue, regardless of the petitioner's proof regarding the other stay factors." *Leiva-Perez v. Holder*, 640 F.3d 962, 965 (9th Cir. 2011) (per curiam) (citing *Nken*, 556 U.S. at 433-34). The mere "possibility" of irreparable harm is not enough—a stay applicant must show that "irreparable injury is likely to occur during the period before the appeal is decided." *Doe #1 v. Trump*, 957 F.3d 1050, 1059 (9th Cir. 2020); *see also Al Otro Lado v. Wolf*, 952 F.3d 999, 1007 (9th Cir. 2020) (citing *Leiva-Perez*, 640 F.3d at 968) ("minimum threshold showing" for stay pending appeal is that "irreparable injury must be is likely to occur during the

period before the appeal is likely to be decided").

II. Appellants Will Not Experience Any Harm Absent a Stay

The question presented by Appellants' Motion is whether they have carried their burden of showing that they will likely experience irreparable harm *as a result of the Settlement going into effect while their appeals are pending*.[1] As detailed below in Plaintiffs' cross-motion, Appellants have not shown that anything about the Settlement has caused or will cause them *any* cognizable legal injury. But much less have they shown that they will suffer irreparable harm from the fact that class members will begin receiving discharges of their federal student loans while Appellants pursue their arguments in this Court.

A. Appellants' Asserted "Procedural" Harms Do Not Exist

As the district court has explained twice, Appellants' claims of procedural harm are rooted in fundamental misunderstandings of both the Settlement and the BD process. The Settlement is an exercise of the Attorney General's authority to settle litigation and the Secretary of Education's authority to compromise, waive, or

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[1] Appellants also fail to satisfy the other three prongs of the stay analysis. Plaintiffs focus here on the dispositive "irreparable harm" factor. As to likelihood of success on the merits, balance of equities, and the public interest, Plaintiffs rely on the factual findings and well-reasoned conclusions of the district court in the Stay Order and Final Approval Order. *See* A.551-555; A.472-491. Additionally, for the reasons stated in the Stay Order, the Settlement does not provide for a self-executing stay in the event of an appeal by an intervenor. *See* A.537-541.

release claims of the Department, including claims on student loan obligations. *See* 28 U.S.C. §§ 516, 519; 20 U.S.C. §§ 1082(a)(6), 1087e(a)(1); A.473-475. The Secretary's "settlement and compromise" authority is plenary. As the district court detailed, the Secretary could have compromised the student loan debt of each class member, one by one; doing so on a class basis via the Settlement does not alter the Secretary's authority or affect the legal rights of anyone outside the Class. A.477.

For that reason, Appellants' complaints about being "deprived" of their procedural rights under the BD regulations are entirely beside the point—the BD regulations do not control Settlement relief. *See* A.542. But regardless, Appellants are also wrong about what the BD regulations require. The 1995 BD regulations—which would govern most of the class's BD applications absent the Settlement—do not require that institutions receive *any* notice of BD claims. *See* 59 Fed. Reg. 61664-01, *61696 (1995 Final Rule). The 2016 BD regulations introduced the concept that the Department would provide schools with notice of BD applications—but a school's (optional) response to that notice is simply part of a fact-finding process, not a veto right. *See* 81 Fed. Reg. 75,926-01, *76,084 (2016 Final Rule).

The 2020 regulations—which Appellants focus on, even though they apply to a scant minority of BD applications—require the Department to "invite the school to respond and to submit evidence" regarding BD applications from their former students. 34 C.F.R. § 685.206(e)(10). Again, the opportunity to respond does not

mean (as Appellants seem to assume) that the Department will accept the school's version of events. But regardless, this procedure does not confer a protectable property interest because, as the district court pointed out, the approval of a BD claim does not trigger any financial liability for the school. *See* A.480-482; A.541-543. The school's liability, if any, is determined separately, in recoupment proceedings that preserve full due process. A.480-481; A.542-544; 81 Fed. Reg. at 75,963.[2]

And here—precisely *because* the Settlement is an exercise of separate statutory authority, and Settlement relief does not constitute an approved application under the BD regulations—Appellants (and all schools on Exhibit C) will not be subject to any recoupment proceedings for amounts discharged and refunded under the Settlement. *See* A.480-482; A.541-544. As the district court correctly observed, this makes Appellants "the luckiest guy[s] in the room": they have "already gotten the money and [they] don't have to pay it back." Supp.A.84.

B. Appellants' Claims of Reputational Harm Are Vague, Conclusory, and Unconnected to Implementation of the Settlement

To the extent Appellants identify any supposed reputational harms, they point

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[2] Likewise, while the 2020 regulations entitle the school to a copy of a written BD decision, the APA guarantees a "brief statement of the grounds" for such decision only in the event of a *denial* of the application. 5 U.S.C. § 555(e). A BD grant is not a denial of any right of the school, and the school is thus not entitled to any detailed accounting of the Department's approval decision.

to incidents that allegedly have already occurred—not harms that will occur as a result of the Settlement going into effect pending appeal. For example, Lincoln complains of an advocacy group's blog post from November 2022—which criticized the Department *for having already approved* Lincoln's Program Participation Agreement to receive Title IV funds.[3] *See* Mot. at 33; A.546-547. Given this timing, the Department clearly did not take any adverse action against Lincoln based on public criticism regarding Exhibit C; indeed, quite the opposite.

Lincoln similarly points to a post on the Federal Trade Commission's website from September 2022—which, as in the district court, Appellants badly mischaracterize, *see* A.550—and to securities disclosures it made in 2022 that had no discernible effect on its stock price. *See* Mot. at 34-36. (Plaintiffs struggle to see how a "stock price need not go down to be negatively affected by material events," Mot. at 36 n.9—there is no other way to negatively affect a stock price.) ECI and ANU do not identify *any* specific instances of supposed reputational harm; they point only to public statements that mention schools that are not involved in these appeals. *See* Mot. at 34.

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[3] As the district court pointed out, that blog post also identified numerous other law enforcement actions against Lincoln that are unrelated to the Settlement. *See* A.546-547; Supp.A.193-194. "The relationship between alleged stigma and approved settlement is thereby strained," the court found, and Lincoln was merely trying to "make a scapegoat of the settlement here." A.547.

All of these allegations—weak as they are—concern events that have already occurred. As to alleged future harms, Appellants offer no reason to believe that the Settlement going into effect pending appeal will change anything about their situation. The effective date of the Settlement controls only the timing for when class members will receive relief. A stay would do nothing to alter the inclusion of Appellants on Exhibit C, which is the source of their grievances.

Appellants cite two cases on irreparable harm, neither of which support their position. In *adidas America, Inc. v. Skechers USA, Inc.*, 890 F.3d 747 (9th Cir. 2018), a trademark infringement case, the court affirmed a preliminary injunction where consumer surveys showed that people were, in fact, confusing plaintiff's product with the allegedly infringing product. *Id.* at 756. Notably, the court *reversed* the injunction as to a second product, explaining that plaintiff failed to provide evidence to support their theory of reputational harm relating to that product. *Id.* at 759-60. Likewise, in *Reuters Ltd. v. United Press International, Inc.*, 903 F.2d 904 (2d Cir. 1990), the court upheld a preliminary injunction preventing a wire service from terminating its supply of photographs to another wire service, where the plaintiff showed with survey evidence that many of its subscribers "would immediately drop their subscription if UPI became unable to provide Reuters photographs." *Id.* at 908. The risk of irreparable harm existed only because "interrupting the flow of pictures even briefly threatens a wire service company's continued viability." *Id.*

Here, Appellants themselves describe their risk as the possibility of injury that could "manifest itself over time in subtle ways"—ways that might not even be discernible by Appellants, or traceable to the Settlement, or that might never occur at all. Mot. at 33; *see also id.* at 35 ("reputational consequences" might "materialize silently," and Appellants "may never be able to identify" anyone whose opinion was affected by the Settlement). It is difficult to imagine a description of harm further from "irreparable injury [that] is likely to occur during the period before the appeal is decided." *Doe #1*, 957 F.3d at 1059. Rather than providing evidence of actual, concrete risks of imminent harm, Appellants rely on the rhetorical force of phrases like "stigma" and "branded." Mot. at 27, 28, 33. But a mere assertion of "self-evident harm, rather than evidence of such harm," is insufficient to warrant a stay. *Scholl v. Mnuchin*, 494 F. Supp. 3d 661, 682 (N.D. Cal. 2020).

* * *

PLAINTIFF-APPELLEES' CROSS-MOTION TO DISMISS

An intervenor who appeals a final judgment when neither of the original parties below have appealed must demonstrate independent Article III standing to maintain that appeal. *See Wittman v. Personhuballah*, 578 U.S. 539, 543-44 (2016); *Diamond v. Charles*, 476 U.S. 54, 68 (1986). Here, for many of the same reasons that Appellants fail to establish a likelihood of irreparable injury, they also fail to show they have suffered or will suffer *any* injury traceable to the Settlement.

Because Appellants do not satisfy the requirements of Article III, they do not have standing to appeal the Final Approval Order. Their appeals should be dismissed for want of jurisdiction. *See* Circuit Rule 3-6(b); *Nalder v. United Auto. Ins. Co.*, 817 F. App'x 347, 349 (9th Cir. 2012) (granting motion to dismiss appeal for lack of standing). In the alternative, this Court should grant summary affirmance of the Final Approval Order because it is "manifest that the questions on which" the appeals rest "are so insubstantial as not to justify further proceedings." Circuit Rule 3-6(a)(2).

I. Legal Standard

The familiar "irreducible constitutional minimum" of standing consists of three elements: the party "must have (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Spokeo, Inc. v. Robins*, 578 U.S. 330, 338 (2016) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992)). An "injury in fact" consists of "an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical." *Lujan*, 504 U.S. at 560 (cleaned up). To satisfy redressability, "it must be 'likely,' as opposed to merely 'speculative,'" that a favorable decision from the court will ameliorate the alleged injury. *Lujan*, 504 U.S. at 560 (quoting *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 38 (1976)).

II. Appellants Lack Article III Standing

A. Appellants Have Not Suffered Any Injury-in-Fact

Over the span of eight months and four rounds of briefing, Appellants have not produced any evidence to demonstrate a legally cognizable interest that has been injured as a result of the Settlement.

First, in denying Appellants' requests to intervene as of right, the district court found that Appellants lacked any property interest in the litigation. Supp.A.112; *see* A.390. The court merely allowed them permissive intervention to "keep the system honest" by "help[ing] [the court] see the opposing arguments," Supp.A.112—in other words, essentially as amici.

Next, Appellants' oppositions to the Final Approval Order did not demonstrate any injury, nor even a legal interest that needed protecting. At that time, Appellants pressed the same theories of regulatory and reputational harm that they assert now. *See* A.475-483. But the district court found, correctly, that "the schools have lost no procedural rights, nor has their status been altered. No liberty or property interest has been disturbed" by the Settlement. A.482; *see supra* at 8-10. Further, the court recognized that Appellants' assertions about reputational harm were "speculative" at best, A.482, and that "because the class and Secretary's briefing advocating for approval of the settlement had no legally binding effect on the intervenors, no actionable reputational harm exists on that basis either," *id.*

Appellants' motion to stay in the district court did not demonstrate any injury, even after the court agreed to consider Appellants' late-filed declarations. *See* A.548-549. The district court found, again, that Appellants have no financial interest at stake in the litigation, *see* A.541-542, and that their asserted rights under the BD regulations "are not even implicated" by the Settlement, A.542; *see also* A.544.

As to alleged reputational harm, the court found that "movants' assertions of reputational harm remain markedly speculative, 'grounded in platitudes rather than evidence.'" A.545 (quoting *Herb Reed*, 736 F.3d at 1250). As described above, Lincoln cited three public statements that had zero effect on its business, *see supra* at 11; A.545-547, A.549-550; ECI vaguely suggested that "some lenders have expressed concern" about the Settlement during due diligence, *see* A.548, A.551; ANU said nothing about its own experience, *see generally* A.545-551; and all three mischaracterized statements that did not even relate to them, *see* A547 n.4, A.550. In considering Appellants' arguments regarding likelihood of success on their appeals, the district court held that Appellants likely lacked standing. A.551-553. The district court indeed was "at a loss to identify an injury to movants arising from this settlement agreement (that they were not a party to) resolving this litigation (that did not involve them)." A.552.

The instant Motion fares no better. Appellants simply repeat the same arguments they already made twice in the district court, relying on the same faulty

evidence and misreadings of the applicable law. Behind the sound and fury, there is nothing: Appellants' "claim, simply stated, is that they disagree with the judgments made by the Executive Branch," and they have offered only "speculative apprehensiveness that [someone] may at some future date misuse the [Settlement] in some way that would cause direct harm." *Laird v. Tatum*, 408 U.S. 1, 13 (1972). That is not enough for Article III standing. *See id.*; *cf. Local 93, Int'l Ass'n of Firefighters, AFL-CIO C.L.C. v. Cleveland*, 478 U.S. 501, 529-30 (1986) (intervenor could not block consent decree where decree did not "bind [intervenor] to do or not to do anything," did not "impose[] [any] legal duties or obligations on [intervenor] at all," and did not "purport to resolve any claims [intervenor] might have" under applicable law).

Appellants devote a scant page and a half of their nearly double-length Motion to the issue of standing and cite only three inapposite cases. *See* Mot. at 29-31. None of these cases supports Appellants' proposition that a mere assertion of potential reputational damage, without any real-world harm, is sufficient to create Article III standing. In *Meese v. Keene*, 481 U.S. 465 (1987), the Supreme Court addressed First Amendment standing—a distinct doctrine—in a context where the appellee had submitted affidavits, opinion polls, and an expert opinion to show that he would likely experience cognizable injury, not a mere "subjective chill" to his speech, from

the government's application of the term "political propaganda" to his activities. *See id.* at 473-74.

In *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190 (2021), a class of individuals alleged that TransUnion failed to use reasonable procedures to ensure the accuracy of their credit files, but the Supreme Court found that only about 20% of the class had standing—consisting of the people for whom TransUnion had actually provided misleading credit reports to third-party businesses. *See id.* at 2200. The case did not hold broadly that "reputational injuries are cognizable in their own right," Mot. at 30—rather, a portion of the class had suffered actionable harm because being falsely labeled a "potential match" with terrorists and drug traffickers in the eyes of potential creditors was sufficiently similar to the harm caused by the tort of defamation. *Ramirez*, 141 S. Ct at 2208-09. Here, by contrast, there has been no false statement: both the record in this litigation and the public record contain ample evidence that Appellants do bear "strong indicia regarding substantial misconduct." *See* Supp.A.29-30, 51-53.[4] And the Court in *Ramirez* rejected the standing claims of those who had yet to experience any false statements: though they may have been "exposed … to a risk of future harm," that "risk [did] not materialize," which "would

[4] Appellants do not seriously contend otherwise, complaining primarily that the Department was not specific enough about which misconduct it was looking at. *See* Mot. at 25-26.

ordinarily be cause for celebration, not a lawsuit." *Ramirez*, 141 S. Ct. at 2211.

Finally, in *Fikre v. FBI*, 35 F.4th 762 (9th Cir. 2022), the plaintiff alleged that his reputation was harmed by his inclusion in the government's Terrorist Screening Database, which had caused him to be subjected to enhanced screening at airports and impeded his ability to travel. *See id.* at 768. As in *Ramirez*, this real-world effect—the burdens on plaintiff's liberty to travel—gave rise to his claim. *See id.* at 776. While it is true that *Fikre* considered the plaintiff's allegations on a motion to dismiss for failure to state a claim, rather than for lack of standing, the underlying principles could not have been stated more clearly: "Damage to reputation alone is not actionable," and a plaintiff can only assert the deprivation of a cognizable liberty interest if he "was stigmatized in connection with the denial of a 'more tangible' interest." *Id.* (quoting *Hart v. Parks*, 450 F.3d 1059, 1069-70 (9th Cir. 2006)); *see also Paul v. Davis*, 424 U.S. 693, 711-12 (1976); *cf. Grae v. Corrections Corp. of Am.*, 57 F.4th 567, 569-70 (6th Cir. 2023) (intervenor who asserts "intangible harm" must show that he "suffered adverse effects" as a result to establish Article III injury). In other words, without that "more tangible" invasion, a plaintiff who is merely concerned about his reputation does not have a liberty interest to protect.

In sum, Appellants have not been able to identify a "legally protected interest" they have that the Settlement actually affects in a "concrete and particularized" way. *Lujan*, 504 U.S. at 560. Appellants' mere speculation that their inclusion on Exhibit

C might, someday, cause them some yet-to-be-identified harm does not rise to the level of Article III injury. *See, e.g.*, *Laird*, 408 U.S. at 13; *Przywieczerski v. Blinken*, No. 20-cv-02098, 2021 WL 2385822, at *4 (D.N.J. June 10, 2021) (finding plaintiff lacked standing where "there has been no action or threatened action by the Government that could harm" him, and explaining that government's stated position in litigation "is not equivalent to a final adjudication of [plaintiff's] legal rights").

B. Appellants' Claimed Injuries Could Not Be Redressed by a Favorable Ruling

The form of relief that Appellants seek reveals that their purported injuries are not redressable by a decision in their favor. Appellants request that this Court invalidate the Settlement or, at minimum, carve their former students out of the certified class.[5] *See* Mot. at 2, 41-42. Yet either of these options would likely *expose* Appellants to liability that they would *avoid* under the Settlement.

This is because, if Appellants were removed from Exhibit C, their former students' BD applications would then be adjudicated and could very well be granted. Indeed, Appellants insist that they "do not wish to prevent ... [the] granting of

[5] Appellants have not identified, and Plaintiffs are not aware of, any precedent in which a stranger to a class settlement obtained a change to the class definition that deprived certain class members of relief to which they would otherwise be entitled.

meritorious BD applications."[6] Mot. at 41-42. The Department would then have every right to begin recoupment proceedings against Appellants and recover the amounts discharged and/or refunded pursuant to those BD grants. *See* A.480-481 (explaining recoupment regulations). Under the Settlement, by contrast, Appellants will *not* be subject to recoupment for any amounts discharged or refunded to class members. *See* A.481-482; A.541-543. Perversely, then, Appellants are suffering no harm from the Settlement now, but would willingly invite potential future harm upon themselves—simply to force borrowers to wait even longer for justice. This cynical ploy turns Article III's redressability requirement on its head.

CONCLUSION

For the reasons stated above, Appellants' motion for a stay pending appeal should be denied, and their appeals should be dismissed for lack of Article III jurisdiction, or in the alternative, the Court should grant summary affirmance of the Final Approval Order.

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[6] Appellants' apparent assumption, never directly stated, is that a "fair" BD process would result in the denial of all of their former students' applications. There is no evidence to support this assumption.

Dated: March 9, 2023

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this motion complies with the limits set forth in Fed. R. App. P. 27(d)(2)(A) and Ninth Circuit Rule 32-3(2) because, excluding the parts of the document exempted by Fed. R. App. P. 27(a)(2)(B), it contains 5,080 words.

This motion complies with the typeface requirements of Fed. R. App. P. 27(d)(1)(E) and 32(a)(5), and the type-style requirements of Fed. R. App. P. 27(d)(1)(E) and 32(a)(6), because this document has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in 14-point Times New Roman font.

Dated: March 9, 2023

Rebecca C. Ellis
Rebecca C. Ellis

CERTIFICATE OF SERVICE

I hereby certify that on March 9, 2023, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

Dated: March 9, 2023

Rebecca C. Ellis
Rebecca C. Ellis

PLAINTIFF-APPELLEES' SUPPLEMENTAL APPENDIX

OPPOSITION TO MOTION FOR STAY PENDING APPEAL AND

CROSS-MOTION TO DISMISS APPEALS FOR LACK OF JURISDICTION

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

THERESA SWEET, et al.,

Plaintiffs,

v.

ELISABETH DEVOS, et al.,

Defendants.

No. C 19-03674 WHA

ORDER DENYING CLASS SETTLEMENT, TO RESUME DISCOVERY, AND TO SHOW CAUSE

INTRODUCTION

Following preliminary approval of a proposed class settlement meant to restart Department of Education review of student-loan borrower-defense applications under the Higher Education and Administrative Procedure Acts, the Secretary's new perfunctory denial notices undermine the proposed settlement, contradict her original justification for delay, raise substantial questions under the APA, and may impose irreparable harm upon the class of student-loan borrowers. Final approval of the proposed class settlement is **DENIED**. **DISCOVERY** shall resume immediately. Both parties shall **SHOW CAUSE** why the Secretary should not be enjoined from further perfunctory denials. This case resumes on the merits.

STATEMENT

Title IV of the Higher Education Act directs the Secretary of Education "to assist in making available the benefits of postsecondary education to eligible students" through financial-assistance programs. Education affords most a significant opportunity, but all too

often, for-profit colleges, using fraudulent enrollment tactics (such as inflated job-placement numbers), leave students saddled with debt and little to show for it. To remedy this misconduct, Title IV authorizes the Secretary to cancel a federal student loan (in whole or part) and directs her to "specify in regulations which acts or omissions of an institution of higher education a borrower may assert as a defense to repayment of a loan." 20 U.S.C. §§ 1070, 1087e(h).

In 1994, Secretary Richard W. Riley promulgated the first variation of the "borrower defense" rule for certain federal loans, which allowed a borrower to "assert as a defense against repayment of his or her loan 'any act or omission of the school attended by the student that would give rise to a cause of action against the school under applicable State law.'" 60 Fed. Reg. 37,768, 37,770 (July 21, 1995). Yet the system lay dormant for the next twenty years (AR 505).

In May 2015, Corinthian Colleges, Inc., a for-profit college with more than 100 campuses and over 70,000 students, collapsed. Secretary John B. King found "that the college had misrepresented its job placement rates." Predictably, Corinthian students submitted a "flood" of student-loan borrower-defense applications. So, Secretary King quickly moved to update the infrastructure for adjudicating borrower-defense applications and appointed a special master in June 2015 "to create and oversee a process to provide debt relief for these Corinthian borrowers." 81 Fed. Reg. 39,329, 39,330, 39,335 (June 16, 2016). But it remained a game of catch up.

Over the next year, the special master granted full loan discharges to 3,787 applicants. Yet by December, borrowers had submitted 6,691 defense applications, and by June 2016, they'd submitted 26,603. The newly created "Borrower Defense Unit" ("BDU") took over and by October approved 11,822 applications and denied 245, for a total of 15,609 approvals and a 98.5% grant rate. But by that time, borrowers had submitted a total of 72,877 defense applications (AR 339–40, 347, 369, 384–85, 392–94, 502).

In November 2016, the BDU promulgated the new borrower-defense regulations — scheduled to take effect on July 1, 2017 — to codify the process for adjudication and to set a

new standard for borrower-defense claims. 81 Fed. Reg. 75,926 (Nov. 1, 2016). The regulations would require a borrower to submit an application with evidence supporting his or her claim and allow the Secretary to designate an official to resolve the claim. *See* 34 C.F.R. §§ 685.206, 685.222 (2018).

In the new year, the Secretary approved another 16,164 applications, but failed to discharge the loans before January 20. In total, by the end of the Obama Administration, the Secretary had approved 31,773 applications for discharge (though not necessarily effected relief) and found 245 ineligible, for a 99.2% grant rate. Borrowers, however, had had submitted 72,877 applications (AR 392–94, 502–03).

With the new administration came new policy. In March 2017, newly-installed Secretary Elisabeth DeVos (our present defendant) created a Borrower Defense Review Panel to examine the entire review process and recommend changes. After the panel also requested an Inspector General review, the BDU "was advised" that "no additional approvals would be processed" until the completion of both the panel and IG reviews. Nevertheless, the panel honored — and the Secretary approved, though "with extreme displeasure" — the 16,164 borrower-defense applications that the prior administration had approved but not discharged before January 20, 2017. By July, however, borrowers had submitted 98,868 applications in total (AR 348–49, 502–05; Dkt. No. 66-3, Ex. 7).

The IG ultimately recommended only "improved documentation and information systems" and "did not recommend any changes to existing review processes and protocols." The Secretary, however, decided to develop new method for awarding relief to eligible borrowers. She disagreed with the previous administration, which had granted full loan discharges on (as the Secretary puts it) the assumption that borrowers subject to school misconduct had received no value from their education. Instead, the new method would discharge more or less of a loan based empirically upon the difference between the average earnings of borrowers subjected to school misconduct and of students who completed similar programs from other, misconduct-free schools (AR 006–007, 349–50, 590–91).

Between December 2017 and May 2018, the Department reportedly decided more than 26,000 more claims — approving over 16,000 and denying over 10,000 — before a court in this district preliminarily enjoined this new "partial relief methodology" for its likely violation of the Privacy Act, 5 U.S.C. § 552a (AR 006–07, 350). *Calvillo Manriquez v. DeVos*, 345 F. Supp. 3d 1077 (N.D. Cal. 2018) (Magistrate Judge Sallie Kim). So, in total by June 2018, the Secretary had granted 47,942 applications (though not necessarily effected relief) and denied or closed 12,314, for a 79.6% grant rate (or, Secretary DeVos's decisions taken alone, a 61.5% grant rate). Yet the flood continued. By that point, borrowers had submitted, in total, 165,880 applications, leaving 105,998 still to be decided (AR 401).[1]

Then, despite the backlog, the decisions stopped. By September, 139,021 applications awaited review. That count rose to 158,110 by the end of December, and to 179,377 by the end of March 2019. By June 2019, borrowers had filed 272,721 applications and 210,168 languished. *For eighteen months*, from June 2018 until December 2019 — *well into this suit* — the Secretary issued no decisions at all (AR 397–404, 587–88).

Plaintiffs Theresa Sweet, Chenelle Archibald, Daniel Deegan, Samuel Hood, Tresa Apodaca, Alicia Davis, and Jessica Jacobson filed borrower-defense applications. Contending the Secretary's delay to be unlawful stonewalling, they sued in June 2019 to compel the Secretary to begin deciding applications again. An October 2019 order certified a nationwide class of approximately 160,000 borrower-defense applicants who still awaited decision and were not already members of *Calvillo Manriquez v. DeVos*, No. C 17-07210 SK, 2018 WL 5316175 (N.D. Cal. Oct. 15, 2018) (Magistrate Judge Sallie Kim).

In November, the Secretary certified an administrative record to explain her delay and cross motions for summary judgment followed (Dkt. Nos. 56, 63, 67). On December 10, 2019, with around 225,000 claims pending, the Secretary released an updated "tiered relief methodology" which, similar to the previously enjoined method, would award partial loan

[1] Additionally, shortly before the 2016 regulations' effective date (July 1, 2017), the Secretary had stayed the regulations under Section 705 of the APA. In September 2018, the District Court for the District of Columbia found the delay arbitrary and capricious. *Bauer v. DeVos*, 325 F. Supp. 3d 74 (D.D.C. 2018) (Judge Randolph Moss).

discharges based upon the difference in earning potential between borrowers subjected to school misconduct and those not; though this method appeared to use data gathered at a higher level to assuage the earlier privacy concerns (AR 589–601).

The next day, the Secretary issued 16,045 decisions; but in a marked departure from the previous grant-denial ratio, she approved only 789 applications and denied the remaining 15,256 (AR 587–88). Previously, as noted, the Secretary's grant ratio had been 61.5%. These December decisions, however, represented a 95.1% *denial* rate. Though class counsel knew of these early numbers, they maintain that they did not learn of the form denials, and, it seems, could not know of the scope of their use, until later (Dkt. Nos. 121 at 13–14; 129-1 at 2–3).

Before the undersigned ruled on the motions for summary judgment, however, the parties apparently reached a proposed class settlement. A May 22, 2020, order preliminarily approved the proposal as it appeared to impose an adequate eighteen-month deadline for the Secretary to decide claims and a twenty-one month deadline to effect relief, penalties for the Secretary's failure, reporting requirements, and it did not prejudice the merits of borrowers' applications. Following preliminary approval, the parties distributed class notice and solicited comments in time for the October 1 fairness hearing. About one hundred thirty borrowers timely responded.

Then came the snag. Class counsel discovered that the Secretary had been issuing alarmingly-curt denial notices for several months, in violation (as class counsel put it) of both the spirit of the proposed settlement and the Administrative Procedure Act. The undersigned requested more information from the Secretary and, given the lack of briefing, reserved the problem for the October 1 fairness hearing (Dkt. No. 121).

In her requested response, the Secretary admitted to using four different form denial notices. Continuing her rate of denials from December, the Secretary had, as of April, granted only 8,800 applications and denied 36,200. By August, she had approved 13,500 applications, yet denied 118,300, for an 89.8% denial rate. Of those applications from our class of

borrowers, the Secretary has denied 74,000 applications and granted only 4,400, for a 94.4% denial rate (Dkt. No. 116).[2]

As the fairness hearing approached, it became clear the parties could not jointly move for approval. A September 16 order kept the fairness hearing on calendar to ensure borrowers would be heard, whatever the outcome, but invited the parties to move for relief as they wished on the standard 35-day track (Dkt. No. 123).

On October 1, approximately 620 participants, counsel, borrowers, and members of the public joined the proposed-settlement fairness hearing by telephone. Of the approximately three hundred requests to speak, the Court chose fourteen representative borrowers to comment on the proposed settlement. The representatives expressed serious concern with the proposed settlement, particularly in light of the Secretary's recent string of form denials.

In the meantime, class counsel have moved for approval of the proposed settlement *and* for its enforcement, seeking an order requiring the Secretary, in denying applications, to issue explanatory details under the Department's own regulations, the Administrative Procedure Act, and due process. The Secretary would consent to approval of the settlement *as written*, but opposes class counsel's view of it. This motion has been fully briefed. Time is of the essence. The parties have been heard at two recent hearings. This motion is appropriate for disposition on the papers.

ANALYSIS

One hundred sixty thousand student-loan borrowers, defrauded by for-profit schools and saddled with debilitating debt, have asked the Secretary of Education for the relief which Congress has provided. All may not be entitled to relief, but all are entitled to a comprehensible answer. For eighteen months, the Secretary refused, largely on the grounds that such answers required backbreaking effort and, thus, substantial time. Now, the Secretary has begun issuing decisions at breakneck speed. But most are a perfunctory "Insufficient Evidence" — without explanation.

[2] It remains unclear on this record when borrowers filed these newly-decided applications.

1. THE SETTLEMENT IS DENIED; ENFORCEMENT IS MOOT.

A class settlement must offer fair, reasonable, and adequate relief. *Lane v. Facebook, Inc.*, 696 F.3d 811, 818 (9th Cir. 2012). Our proposed settlement primarily offered a timeline for the Secretary to decide the delayed student-loan borrower-defense applications. Given the borrower-defense applications had already languished without decision for eighteen months (and some had languished much longer), allowing the Secretary another eighteen months from final approval to decide the applications hardly gave cause to celebrate. But the proposed settlement did offer the substantial benefit that neither party would seek appellate relief. Upon final approval, the class would face acceptable delay; the Secretary would hit the ground, well, not running, but at least moving forward.

Upon closer inspection, however, this long-awaited restart of borrower-defense application review brings cause for alarm. The Secretary has been issuing four different form denial notices over the past several months, since even before the settlement. The class appears to challenge only the fourth form (Dkt. Nos. 116-4, 129 at 9). This one reads, as received by class member Y. Colon:

> **Applicable Law**
>
> For Direct Loans first disbursed prior to July 1, 2017, a borrower may be eligible for a discharge (forgiveness) of part or all of one or more Direct Loans if the borrower's school engaged in acts or omissions that would give rise to a cause of action against the school under applicable state law. See § 455(h) of the Higher Education Act of 1965, as amended, 20 U.S.C. § 1087e(h), and 34 C.F.R. § 685.206(c) and 685.222 (the Borrower Defense regulations). ED recognizes a borrower's defense to repayment of a Direct Loan only if the cause of action directly relates to the Direct Loan or to the school's provision of educational services for which the Direct Loan was provided. 34 C.F.R. §§685.206(c)(1), 685.222(a)(5); U.S. Department of Education, Notice of Interpretation, 60 Fed. Reg. 37,769 (Jul. 21, 1995).
>
> **Why was my application determined to be ineligible?**
>
> ED reviewed your borrower defense claims based on any evidence submitted by you in support of your application, your loan data from National Student Loan Data System (NSLDS®), and evidence provided by other borrowers.
>
> Allegation 1: Educational Services
> You allege that Sanford-Brown College engaged in misconduct related to Educational Services. This allegation fails for the

following reason(s): Insufficient Evidence. Your claim for relief on this basis therefore is denied.

Allegation 2: Other
You allege that Sanford-Brown College engaged in misconduct related to Other. This allegation fails for the following reason(s): Insufficient Evidence. Your claim for relief on this basis therefore is denied.

Allegation 3: Transferring Credits
You allege that Sanford-Brown College engaged in misconduct related to Transferring Credits. This allegation fails for the following reason(s): Insufficient Evidence. Your claim for relief on this basis therefore is denied.

Allegation 4: Employment Prospects
You allege that Sanford-Brown College engaged in misconduct related to Employment Prospects. This allegation fails for the following reason(s): Insufficient Evidence. Your claim for relief on this basis therefore is denied.

What evidence was considered in determining my application's ineligibility?

We reviewed evidence provided by you and other borrowers who attended your school. Additionally, we considered evidence gathered from the following sources:

NY Attorney General's Office
PA Attorney General's Office
Evidence obtained by the Department in conjunction with its regular oversight activities
Publicly available securities filings made by Career Education Corporation (now known as Perdoceo Education Corporation)
Multi-State Attorney General Assurance of Voluntary Compliance (effective January 2, 2019)

(Dkt. No. 108-16 at 183–85). In both written letters to the court and in the Zoom chat at the October 1 fairness hearing, many borrowers reported receiving almost identical denial notices (Dkt. No. 141). Borrowers cannot possibly understand why their applications have been denied. They do not believe the Secretary has reviewed their borrower-defense applications in good faith and do not know, realistically, how to proceed.

It's no wonder borrowers are confused. The Secretary's perfunctory denial notice does not explain the evidence reviewed or the law applied. It provides no analysis. And, the borrower's path forward rings disturbingly Kafkaesque. Any request for reconsideration must: (1) explain "[w]hy you believe that ED incorrectly decided your borrower defense to repayment application;" and (2) "[i]dentify and provide any evidence that demonstrates why

ED should approve your borrower defense to repayment claim under the applicable law set forth above" (Dkt. No. 116-4). Without any meaningful analysis of the evidence under the law, how might a borrower articulate such bases for reconsideration? It is, after all, impossible to argue with an unreasoned decision.

Class counsel contend this perfunctory denial notice violates the Administrative Procedure Act, which (they argue) requires the Secretary's denial notices to contain not just the conclusion but a meaningful statement of reasoning that could actually be reviewed for error. Counsel acknowledge the APA does not require much, but it does at least require that a "notice shall be accompanied by a brief statement of the grounds for denial." 5. U.S.C. § 555(e). That is, "[t]he agency's statement must be one of 'reasoning'; it must not be just a 'conclusion'; it must 'articulate a satisfactory explanation' for its action." *Butte County, Cal. v. Hogen*, 613 F.3d 190, 194 (D.C. Cir. 2010). Counsel also argue that an unexplained application denial violates due process, which requires a benefits determination to "provide claimants with enough information to understand the reasons for the agency's action," and the Secretary's own regulations, which require her to resolve applications "through a fact-finding process" resulting in a notification "of the reasons for the denial [and] the evidence that was relied upon." *See Kapps v. Wing*, 404 F.3d 105, 123 (2d Cir. 2005); 34 C.F.R. § 685.222. Against this backdrop, then, class counsel contend that the Secretary has not, in fact, been issuing "final decisions" and move not only for approval of the settlement, but also for the Court to enforce counsel's reading of "final decision" as used in the settlement agreement.

The Secretary responds that this case only concerns the timeline of decision — emphatically *not* the substance of the decisions — and that the proposed settlement merely requires her to "issue final decisions," *i.e.* "decision[s] . . . resolving . . . borrower defense application[s]" (Prop. Agmt., Dkt. No. 97-2 at § IV.A.1). In the Secretary's view, the form denials do just that and the APA, to the extent it applies, requires no more. The Secretary stresses that she had been issuing this perfunctory denial notice for months *before and throughout* the settlement negotiations and expected to continue that course. At bottom, the Secretary says that if she had understood a "final decision" to require any more then she would

not have agreed to the eighteen-month decision timeline. Thus, the Secretary does not oppose approval of the proposed settlement as written, but opposes any enforcement or approval of the class's interpretation of the proposed settlement.

The essence of the problem is that we have no meeting of the minds. Federal common law governs contracts with the United States and "we look to general principles." *Klamath Water Users Prot. Ass'n v. Patterson*, 204 F.3d 1206, 1210 (9th Cir. 1999). "[W]here there appears to be a manifestation of assent initially, but, following appropriate interpretation or construction, it becomes clear that the parties' apparent assent did not in fact indicate assent at all . . . there is no contract." 1 WILLISTON ON CONTRACTS § 3:4 (4th ed. 2020). During settlement negotiations, our parties used the term "final decision" to refer to the Secretary's work product. Each incorrectly believed its interpretation to be peerless. The Secretary interpreted "final decision" to encompass her perfunctory denial notices, while class counsel (yet unaware of the new form of notice) believed otherwise. The Secretary would not have agreed to counsel's more rigorous interpretation, and counsel would not have agreed to the Secretary's more liberal interpretation. Simply put, the parties bargained for materially different rights and duties and, thus, never reached an agreement.

Counsel appears to argue that under the APA and due process the Secretary could only have agreed to counsel's interpretation of "final decision." But the Secretary *didn't have to agree* to the settlement at all. *If* the Secretary agreed to anything, it would surely have been *her* understanding of the proposed settlement. On appeal, we will, first, lose any hope of keeping to the eighteen-month timeline (the primary benefit offered by proposed settlement) and, second, the Secretary will very reasonably argue that she negotiated under a consistent, material course of conduct and fairly expected the agreement to encompass that course of conduct. We will not saddle the class with the risk of moving forward with a disputed settlement that may fall out from underneath their feet on appeal. In these circumstances, we ought to step back and resolve the dispute on the merits, moving as expeditiously as circumstances permit. Final approval of the proposed class settlement is denied and counsel's motion to enforce falls moot.

* * *

The Court is disappointed that it has come to this. This settlement was supposed to jumpstart a long delayed regulatory process, intended to at least get reasoned decisions, even if reasoned denials, to hundreds of thousands of student-loan borrowers. We will return to litigating the merits. Questions of legality plague the Secretary's new perfunctory denial notice, and the circumstances of its use appear to contradict one of the primary justifications for her original delay. We need an updated record and updated discovery to determine what is going on before we again attempt to resolve the merits of this case. And, in the meantime, we need to decide whether the Secretary may continue issuing this challenged form of denial to borrowers.

2. EXPEDITED DISCOVERY IS ORDERED.

Absent a showing otherwise, an agency's certified record, in support of either action or inaction, enjoys a presumption of completeness and regularity. *See Portland Audubon Soc. v. Endangered Species Comm.*, 984 F.2d 1534, 1548 (9th Cir. 1993); *Dep't of Commerce v. New York*, 588 U.S. ___, 139 S. Ct. 2551, 2573–74 (2019). Narrow circumstances, such as a showing of agency bad faith, permit consideration of evidence outside the administrative record. *Lands Council v. Powell*, 395 F.3d 1019, 1029–30 (9th Cir. 2005). Here, in reviewing agency *inaction*, the scope of review broadens (as no specific dates bound the record). Even so, our review would ordinarily remain bounded by what the agency directly or indirectly considered. *Independence Mining Co. v. Babbitt*, 105 F.3d 502, 511 (9th Cir. 1997); *Thompson v. U.S. Dep't of Labor*, 885 F.2d 551, 555 (9th Cir. 1989).

Yet meaningful review of agency conduct (activity or not) depends utterly on the record adequately reflecting the basis for that conduct. *Commerce*, 139 S. Ct. at 2573. "An incomplete record *must* be viewed as a 'fictional account of the actual decisionmaking process.'" *Portland*, 984 F.2d at 1548 (citing *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 54 (D.C. Cir. 1977)) (emphasis added). In these cases, record supplementation and, in "compelling" cases, discovery become appropriate. *Portland*, 984 F.2d at 1548–49; *Public*

Power Council v. Johnson, 674 F.2d 791, 793–95 (9th Cir. 1982) (Kennedy, J.). We have such a case here.

Pretext is the paradigm of agency bad faith. Even where the challenged agency conduct itself may ultimately be lawful,

> [A]gencies [must] offer genuine justifications for important decisions, reasons that can be scrutinized by courts and the interested public. Accepting contrived reasons would defeat the purpose of the enterprise. If judicial review is to be more than an empty ritual, it must demand something better . . . .

Commerce, 139 S. Ct. at 2573–76.

Here, "[w]e are presented . . . with an explanation for agency action that is incongruent with what the record reveals about the agency's priorities and decisionmaking process." *Id.* at 2575. In justifying her delay of borrower-defense decisions at summary judgment, the Secretary expounded upon the work involved in evaluating each application:

> [T]he Department must determine whether the borrower's school engaged in acts or omissions which would give rise to a cause of action against the institution under applicable State law. Applying such a standard necessarily *involves a legal analysis of what state law applies* to a given application and *whether evidence provided by the borrower establishes a cause of action* under the applicable standard.
>
> * * *
>
> [T]the Department has primarily focused its efforts to date on identifying certain categories of claims, based on systemic institutional conduct. For each such category that has been approved, the Department's BDU has *analyzed and summarized the relevant evidence, determined and applied applicable law, established criteria for approval of that type of claim*, and drafted claim-specific review protocols.
>
> * * *
>
> [F]or each claim that does not fit within an established category . . . the BDU must *individually review the application and any accompanying evidence* from the borrower and determine whether the borrower has established a defense under the relevant regulation.
>
> * * *
>
> In addition to its work processing claims and determining their eligibility on the merits for borrower defense relief, the BDU has also initiated review and analysis of evidence pertaining to

> additional schools and campuses, which will allow the Department to make streamlined determinations about whether borrowers who attended those programs can meet the regulatory standards for asserting a defense and, ultimately, whether they are entitled to loan relief as a result.

and, most importantly:

> ***Issuing final decisions on such claims is time-consuming and complex, with many steps in the adjudicatory process***, and agencies must be given, within reason, the time necessary to analyze the issues presented so that they can ***reach considered results***.

(Dkt. No. 63 at 18–19) (cleaned up) (emphasis added).

And yet, these form denial letters bear *no indication* of such "time-consuming," "complex," legal analysis of both borrower-submitted and agency evidence, "under applicable State law," to "reach considered results." Recall the perfunctory recitation of law in Ms. Colon's denial notice:

> **Applicable Law**
>
> For Direct Loans first disbursed prior to July 1, 2017, a borrower may be eligible for a discharge (forgiveness) of part or all of one or more Direct Loans if the borrower's school engaged in acts or omissions that would give rise to a cause of action against the school under applicable state law. See § 455(h) of the Higher Education Act of 1965, as amended, 20 U.S.C. § 1087e(h), and 34 C.F.R. § 685.206(c) and 685.222 (the Borrower Defense regulations). ED recognizes a borrower's defense to repayment of a Direct Loan only if the cause of action directly relates to the Direct Loan or to the school's provision of educational services for which the Direct Loan was provided. 34 C.F.R. §§685.206(c)(1), 685.222(a)(5); U.S. Department of Education, Notice of Interpretation, 60 Fed. Reg. 37,769 (Jul. 21, 1995).

the recitation of evidence:

> **What evidence was considered in determining my application's ineligibility?**
>
> We reviewed evidence provided by you and other borrowers who attended your school. Additionally, we considered evidence gathered from the following sources:
>
> NY Attorney General's Office
> PA Attorney General's Office
> Evidence obtained by the Department in conjunction with its regular oversight activities
> Publicly available securities filings made by Career Education Corporation (now known as Perdoceo Education Corporation)

> Multi-State Attorney General Assurance of Voluntary Compliance (effective January 2, 2019)

and analysis:

> Allegation 1: Educational Services
> You allege that Sanford-Brown College engaged in misconduct related to Educational Services. This allegation fails for the following reason(s): Insufficient Evidence. Your claim for relief on this basis therefore is denied.

(Dkt. No. 108-16 at 183–85).

This lack of explanation becomes more all the more galling given Ms. Colon, as so many of our borrowers did, attended a school that has since been found to have misled students. Indeed, after the New York Attorney General sued Sanford-Brown College, Ms. Colon received a restitution check. Her denial notice even acknowledges that the Secretary had the NY AG's evidence (Dkt. Nos. 129 at 11; 142; 145). Which begs the question, why did a student who already qualified for relief based on her school's misconduct under state law not now qualify for relief based on a claim "that would give rise to a cause of action against the school under applicable State law?" *See* 34 C.F.R. § 685.206(c). These cases call for adequate explanation — just as the Secretary told us they would when justifying her delay — and yet the Secretary's perfunctory denial notice does not come close to offering such an explanation.

We also cannot ignore that these perfunctory denial notices have accompanied a drastic increase in both the pace of decisions and the rate of denials. In the 19 months leading up to January 2017, the previous administration decided 32,018 applications, granting 31,773 (including those 16,164 that had been approved and for which Secretary DeVos later authorized relief), for a 99.2% percent grant rate. When Secretary DeVos took control and began deciding claims for the first time under her first iteration of the partial relief methodology, she approved about 16,000 applications and denied 10,000, for a 61.5% grant rate. In the ten months since she began issuing decisions again, however, the Secretary has denied 118,300 of the 131,800 applications decided, an *89.8% denial rate*. For our class of borrowers specifically, the Secretary has denied 74,000 of the 78,400 applications reviewed — a *94.4% denial rate*.

Simply put, where there's smoke, there's fire. After justifying eighteen months of delay largely on the backbreaking effort required to review individual applications, distill common evidence, and "reach considered results," the Secretary has charged out of the gate, issuing perfunctory denial notices utterly devoid of meaningful explanation at a blistering pace. Set aside even the question of whether this form denials is, in fact, a legally sufficient "final decision" under the proposed agreement, the APA, department regulations, and due process. The issue here is that "the evidence tells a story that does not match the explanation the Secretary gave for h[er] decision." Judicial review of agencies is deferential — not naïve. Courts will not suffer pretext in the review of agency conduct. *Ibid*.

In an ordinary case, pretext leads to remand so the agency may explain itself. *Id.* at 2576. Extraordinary circumstances, however, such as a pressing deadline, compel discovery. *See Public Power*, 674 F.2d at 793–95; *Portland*, 984 F.2d at 1548–49.

Here, time is of the essence. We don't enjoy the luxury of seeking simply to forestall harm — it descended upon the class long ago. Our borrowers live under the severe financial burden of their loans. They have waited for relief, or at least decision, for eighteen months. Many have waited much longer; and many are still waiting. In the meantime, we have lost a full eight months chasing this failed settlement. The time to direct supplementation of the record was eight months ago.

Atop this, the harm from delay has been compounding for the last eight months. This form denial puts borrowers in worse positions than they started. They may have a "decision" (though that is hotly contested), but they have neither a meaningful explanation nor (as discussed above) any meaningful opportunity to appeal or request the Secretary's reconsideration. The form denial, frankly, hangs borrowers out to dry.

In sum, we are faced with a strong showing of agency pretext and the class has been prejudiced by delay enough. We need to know what is really going on. This compels expedited discovery. Bearing in mind that discovery against agencies is disfavored, it will be limited, but broad enough to be effective.

Two months should do it. The class may take both written discovery and up to five fact depositions of relevant decisionmakers to inquire into, broadly:

> 1. The development and use of the form denial letters, including: (a) the submission, timeline of review, and disposition of any requests for reconsideration; and (b) the form of denial issued before this suit and under the previous administration;
>
> 2. The extent to which the difficulty of reviewing borrower-defense applications actually caused or justified the Secretary's eighteen-month delay;
>
> 3. The extent to which the Secretary has denied applications of students who have attended schools subject to findings of misconduct by the Secretary or any other state or federal body or agency, and the rationale underlying those denials.

For now, discovery is limited to the offices of Federal Student Aid, Postsecondary Education, and Career, Technical, and Adult Education within the Office of the Under Secretary. Additionally, at this time, given "[h]eads of government agencies are not normally subject to deposition," class counsel may not yet depose the Secretary. *Kyle Engineering Co. v. Kleppe*, 600 F.2d 226, 231 (9th Cir. 1979). Extraordinary circumstances, however — for example, if the Secretary has unique first-hand knowledge or necessary information cannot be obtained through other, less intrusive means — may justify such a deposition at a later date. *See, e.g.*, *Lederman v. New York City Dep't of Parks & Rec.*, 731 F.3d 199, 203 (2d Cir. 2013).

The class may seek further depositions, or expansion or extension of discovery via letter brief, to which the Secretary will have the opportunity to respond. At the end of this discovery period, the class shall move for summary judgment as to the lawfulness of the Secretary's delay and the lawfulness of the perfunctory denial notice. The Secretary may then oppose and/or cross move for the same.

3. ORDER TO SHOW CAUSE.

This leads to the final question. May the Secretary keep issuing potentially unlawful perfunctory denials while we complete discovery and litigate the merits?

Through the class comment period and at the October 1 hearing, the undersigned has been struck by the scope of the problem here. The consistency and passion with which the nearly one hundred thirty written commenters, three hundred speaking requests, and the

fourteen speakers at the fairness hearing have told their stories leads to the conclusion that their voices are not individual, special cases within the class, but representatives of the class's shared trauma. This is not an attorney-driven case. Class members have a genuine interest; they sought opportunity via higher education only to be to be deceived by for-profit institutions and, at least in some cases, saddled with crushing debt.

To maintain the status quo until the merits can be litigated, the question arises whether the denials ought to be preliminarily enjoined. Both parties shall show cause why the Secretary should not be enjoined from further denial of class members' borrower-defense applications until a ruling on that form of denial can be had.

CONCLUSION

Final approval of the proposed settlement is **DENIED**. Discovery (within the bounds described above) closes **DECEMBER 24**. The class's motion for summary judgment is due **JANUARY 7 AT NOON**, to be heard on the ordinary 35-day track (subject to the Secretary's cross motion). The October 22 hearing is **VACATED**. The parties **SHALL SHOW CAUSE** why the Secretary should not be enjoined as described above by **OCTOBER 30 AT NOON**.

IT IS SO ORDERED.

Dated: October 19, 2020.

WILLIAM ALSUP
UNITED STATES DISTRICT JUDGE

United States District Court
Northern District of California

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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

PLAINTIFFS' CONSOLIDATED OPPOSITION TO MOTIONS TO INTERVENE

HEARING DATE: August 4, 2022

(Class Action)
(Administrative Procedure Act Case)

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I. INTRODUCTION

On June 22, 2022, after three years of hard-fought litigation,[1] the parties in this action filed a motion for preliminary approval of a settlement agreement to resolve this class action case. The proposed settlement aims to accomplish what Plaintiffs have been seeking for years: a timely and lawful resolution of the borrower defense ("BD") applications they submitted to the U.S. Department of Education ("Department"). Two weeks before the scheduled hearing on preliminary approval, four institutions—Lincoln Educational Services Corporation ("Lincoln"), American National University ("ANU"), Everglades College, Inc. ("ECI"), doing business as Keiser University and Everglades University, and the Chicago School of Professional Psychology ("CSPP") (together, "Movants")—filed motions to intervene in this case to register their disagreement with the proposed settlement. Not one Movant had shown any interest in this litigation before. None identifies, much less pleads, any cause of action it could pursue against either Plaintiffs or Defendants. Movants are certainly not class members; they neither gain nor relinquish anything under the proposed settlement agreement. Yet they arrive at the eleventh hour, seeking to veto the proposed settlement and further delay these proceedings.

Movants do not actually want to intervene in this action. Rather, they are seeking simply to disrupt the orderly process for approval of a settlement they do not like—one which they cannot modify, are not entitled to negotiate, and do not have standing to block. Movants were content to sit on the sidelines while members of the class fought tirelessly to vindicate their rights. Now, they attempt to force their way into this case not because they have a legal claim or defense to assert, nor because they are suffering any imminent threat to a legal interest, but because they think they should have a veto over their former students' settlement. They do not. The motions should be denied, and the settlement process should continue.

II. BACKGROUND

On June 22, 2022, the parties filed their Joint Motion for Preliminary Approval ("Joint

[1] As this Court is very familiar with the history of this case, Plaintiffs will not belabor the point.

Mot.") and settlement agreement ("Agreement"). *See* ECF Nos. 246, 246-1. The Agreement sets out the manner in which the Department will process the BD applications of the Class in this case, defined by this Court as "[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,* No. 17-7106 (N.D. Cal.)." ECF No. 46 at 14; *see* Agreement § III.A. The Agreement closes the class as of the execution date, June 22, 2022. Agreement § III.D.

Movants' complaints about the Agreement center primarily on Section IV.A, under which Class Members who borrowed federal student loans for attendance at one of 153 schools, set forth in Exhibit C to the Agreement, will receive full settlement relief. *Id.* § IV.A.1. As explained in the Joint Motion, the schools that appear on the Exhibit C list are ones for which "the Department has identified common evidence of institutional misconduct." Joint Mot. at 17. This common evidence supports "presumptive relief" for Class Members "due to strong indicia regarding substantial misconduct by the listed schools, whether credibly alleged or in some instances proven, and the high rate of class members with applications related to the listed schools." *Id.* at 18. In their Supplemental Complaint, Plaintiffs alleged in detail how the Department had ignored this common evidence under its unlawful 'presumption of denial' policy. *See* ECF No. 198 ¶¶ 196-236 ("Supp. Compl."). Critically for the structure of the settlement as a whole, "[c]learing these claims through provision of expeditious upfront relief will significantly reduce the backlog of pending claims," which "will allow the Department to more quickly provide decisions to remaining class members than would otherwise be possible." Joint Mot. at 18.

Class Members whose BD applications do not relate to one of the schools on Exhibit C will, under the proposed settlement, receive final written decisions on their applications according to a timeline that corresponds to how long their applications have been pending. *See* Agreement § IV.C.3. In making these decisions, the Department will "determine whether the application states a claim that, if presumed to be true, would assert a valid basis for borrower defense relief under

the standards in the borrower defense regulations published by the Department on November 1, 2016." *Id.* § IV.C.1.i. The Department will "presume that the Class Member reasonably relied on" alleged misrepresentations, and will not deny applications "on the basis of insufficient evidence." *Id.* § IV.C.1.ii-iii. These remedial steps relate to Plaintiffs' allegations that the Department's 'presumption of denial' policy had, *inter alia*, refused to consider borrowers' sworn statements as evidence supporting an application and imposed undisclosed requirements for the sufficiency of evidence. *See* Supp. Compl. ¶¶ 122-150, 172-195. If the Department fails to issue a decision within the applicable timeframe, the Class Member will receive full settlement relief. *Id.* § IV.C.8.

Finally, the proposed settlement makes certain provisions for "Post-Class Applicants": individuals who apply for BD between the execution date of the Agreement and the final approval date. Post-Class Applicants will receive a final written decision within 36 months of the effective date of the Agreement; if the Department fails to issue a decision in that time, the applicant will receive full settlement relief. Agreement § IV.D.1. Post-Class Applicants will *not* receive automatic relief even if their application relates to one of the schools listed in Exhibit C, and they will *not* receive the streamlined claim evaluation procedures applicable to Class Members who receive individual written decisions under Section IV.C of the Agreement. *See id.* §§ IV.D.1-2; Joint Mot. at 4, 8 n.4. This remedial provision is an important component of the consideration underpinning the settlement, including the agreement to close the class as of the execution date.

On July 13 and 14, 2022, Movants filed their motions for intervention. Although the four Movants filed three separate briefs, all advance the same arguments. First, each Movant claims it has a right to notice of and an opportunity to respond to BD claims, which would be impaired by approval of the Agreement. *See* ECF No. 254 ("Lincoln/ANU Mot.") at 15; ECF No. 261 ("ECI Mot.") at 15-16; ECF No. 265 ("CSPP Mot.") at 13. Each also focuses on concerns that it may, in the future, be held financially liable as a result of the proposed settlement, whether by the Department, other regulators, or private plaintiffs. *See* Lincoln/ANU Mot. at 16; ECI Mot. at 10; CSPP Mot. at 14-15. Finally, each complains of a risk of reputational harm from being included in Exhibit C—although none points to actual negative consequences. *See* Lincoln/ANU Mot. at 17

n.4 (citing a news article about the settlement that does not mention Lincoln or ANU but refers to a *different* institution as "notorious"); Decl. of Brandon Biederman, ECF No. 261-3 ¶ 12 (ECI employee stating a "belief" that the Agreement is "already causing [ECI] reputational harm," but declining to identify the "third parties" who are causing this harm or how they have done so); Decl. of Ted Scholz, ECF No. 265-4 ¶ 15 (CSPP vice president stating that he "has already received questions from current and prospective students related to" the proposed settlement, but declining to identify actual effects on the school's "ability to recruit and retain students and faculty" or "effectuate its educational mission," CSPP Mot. at 16). Movants all assert that their motions are timely because they did not know until the Agreement was filed that the resolution of this case could affect their interests. *See* Lincoln/ANU Mot. at 11; ECI Mot. at 13; CSPP Mot. at 10.

III. ARGUMENT

Movants fulfill none of the conditions required for intervention as of right: their motions are not timely, and they do not have a significant protectable interest that will be impaired or impeded by resolution of this litigation. Nor do Movants meet the standard for permissive intervention, because they cannot demonstrate either timeliness or a question of law or fact in common with the existing claims. Finally, and perhaps most fundamentally, these shortcomings expose the motions for what they are: premature requests to file objections to a proposed class-action settlement of a case that does not involve them. Movants seek to elevate their concerns—which are trumped up and entirely addressed by separate proceedings *from which borrowers are expressly barred*—over those of absent class members. Intervention is neither necessary nor appropriate for Movants to make their opinions about the settlement known.

A. Movants Are Not Entitled to Intervene as of Right

The Ninth Circuit submits motions to intervene as of right to a four-part test: "(1) the motion must be timely; (2) the applicant must claim a 'significantly protectable' interest relating to the property or transaction which is the subject of the action; (3) the applicant must be so situated that the disposition of the action may as a practical matter impair or impede its ability to protect that interest; and (4) the applicant's interest must be inadequately represented by the parties to the

action." *Callahan v. Brookdale Senior Living Communities, Inc.*, -- F. 4th ---, 2022 WL 2336656, at *4 (9th Cir. 2022) (citation omitted). "Proposed intervenors must satisfy all four criteria, as '[f]ailure to satisfy any one of the requirements is fatal to the application.'" *E. Bay Sanctuary Covenant v. Barr*, 500 F. Supp. 3d 1030, 1037 (N.D. Cal. 2020) (alteration in original) (quoting *Perry v. Proposition 8 Official Proponents*, 587 F.3d 947, 950 (9th Cir. 2009)). "The applicant bears the burden of showing that each of the four elements is met." *Freedom from Religion Fndn. v. Geithner*, 644 F.3d 836, 841 (9th Cir. 2011). Because Movants fail to satisfy the first three criteria, their motions must be denied.[2]

1. The Motions Are Not Timely

a) Movants Were or Should Have Been Aware of Their Asserted Interests Long Ago

"Three factors should be evaluated to determine whether a motion to intervene is timely: '(1) the stage of the proceeding at which an applicant seeks to intervene; (2) the prejudice to other parties; and (3) the reason for and length of the delay.'" *Cal. Dep't of Toxic Substances Control v. Commercial Realty Projects, Inc.*, 309 F.3d 1113, 1119 (9th Cir. 2002) (quoting *United States v. Washington*, 86 F.3d 1499, 1503 (9th Cir. 1996)). Waiting until the settlement stage, after years of active litigation, "weighs heavily against" a putative intervenor. *Id.* Movants claim that their motions are nonetheless timely because they did not learn until the proposed settlement was filed that their interests could be implicated. *See* Lincoln/ANU Mot. at 11; ECI Mot. at 13; CSPP Mot. at 10. As detailed further *infra*, Movants' interests are not implicated to any extent that could justify intervention. But even if Movants believe them to be, they could and should have known of this alleged implication well before the Joint Motion. *See Sarrassat v. Sullivan*, 961 F.2d 217, 1992 WL 86580, at *2 (9th Cir. 1992) (motion to intervene is untimely where movant "should have known of the possible effects of the litigation long before the parties settled").

As defined by Movants, their interests at stake in this case are a purported right to notice

[2] The fourth element is not applicable because, as explained *infra*, Movants do not have a protectable interest for either existing party to represent.

of and an opportunity to respond to BD claims, and a risk of future financial liability and reputational harm. *See* Lincoln/ANU Mot. at 16; ECI Mot. at 15-16; CSPP Mot. 265 at 13-15. Put another way, they claim to have an interest in the BD process when BD claims are raised by their former students. A brief perusal of the docket reveals that this litigation has always implicated this asserted interest, and indeed Movants themselves. It was apparent from the outset that some of the BD claims at issue in this litigation would be from applicants who attended Movants' institutions. Although Movants profess to be shocked—shocked!—to find their names associated with this case, each of them has been previously named in the public docket, and two—Lincoln and ECI—have featured prominently. *See* Exhibit A (summarizing Movants' appearances in docket filings).

This is all in addition to Movants' public records of wrongdoing, which quite naturally and foreseeably led to the filing of BD claims by their former students. A few examples: Lincoln settled a consumer protection suit brought by the Massachusetts Attorney General in 2015, under which it discharged student debt and agreed to change its disclosures and job placement calculations.[3] ECI entered into an Assurance of Voluntary Compliance with the State of Florida in 2012, under which it agreed to offer thousands of students free re-training and to cease misrepresenting what the school offered.[4] ECI also settled a False Claims Act lawsuit with the federal government in 2015, which alleged violations of the incentive compensation ban,[5] and in 2010, three senior admissions officials of ECI's predecessor entity were found to have been admitting students with fake high school diplomas from a diploma mill.[6] The U.S. House of Representatives has recently

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[3] *See* Final Judgment by Consent, *available at* http://www.republicreport.org/wp-content/uploads/2015/07/Lincoln-Tech-settlement.pdf.

[4] *See* Assurance of Voluntary Compliance, *available at* https://www.republicreport.org/wp-content/uploads/2017/04/Keiser-FL-AVC-2012.pdf.

[5] *See* Order Granting Motion for Indicative Ruling, *United States ex rel. Christianson v. Everglades College, Inc.*, No. 12-60185-CIV (S.D. Fla. Apr. 1, 2015), ECF No. 435.

[6] *See* Scott Travis, "Controversial High School Diplomas Create Turmoil at Keiser University," *South Fla. Sun-Sentinel* (Sept. 3, 2010), https://www.sun-sentinel.com/news/fl-xpm-2010-09-03-fl-keiser-diploma-mill-20100903-story.html.

investigated ECI and asked the Internal Revenue Service to review whether ECI has complied with the requirements of its non-profit status.[7] A recent class action lawsuit alleges that ECI sent a flood of unsolicited text messages to consumers urging them to enroll at Keiser.[8] CSPP settled a class action in 2016, under which it paid $11.2 million to 87 students who alleged that they invested in a worthless education.[9] ANU was found liable of violating Kentucky's consumer protection statute in a case brought by the state's Attorney General, and the decision was upheld on appeal.[10]

Finally, both Lincoln and CSPP admit in their briefing and supporting documents that *they have already received actual notice from the Department about BD applications by their former students*. Lincoln's declarant acknowledges that the Department "transmitted approximately 307 borrower defense applications to Lincoln in two tranches in May and July 2021"—and not only that, but Lincoln has already provided written responses to the Department. Decl. of Francis Giglio, ECF No. 254-2 ¶¶ 7, 9. CSPP likewise admits that it received a set of BD applications from the Department in January 2021; it apparently did not submit a response because the Department did not offer a meeting to discuss a schedule. Decl. of Terance A. Gonsalves, ECF No. 265-3 ¶ 6.

Movants cite *United States v. Carpenter*, 298 F.3d 1122 (9th Cir. 2002), and its progeny to support their position that the motions are timely, but those cases are plainly distinguishable. The

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[7] *See* Danielle Douglas-Gabriel, "House Panel Says Nonprofit Everglades College Enriches Its Owner," *Wash. Post* (Feb. 2, 2022), https://www.washingtonpost.com/education/2022/02/01/keiser-everglades-university-for-profit/; *see also* Patricia Cohen, "Some Owners of Private Colleges Turn a Tidy Profit by Going Nonprofit," *N.Y. Times* (Mar. 2, 2015), https://www.nytimes.com/2015/03/03/business/some-private-colleges-turn-a-tidy-profit-by-going-nonprofit.html.

[8] *See Fernanda Soto Leigue v. Everglades College, Inc. d/b/a Keiser University*, No. 1:22-cv-22307 (S.D. Fla. Jul 22, 2022).

[9] *See Truit v. The Chicago School of Professional Psychology*, No. BC495518 (Cal. Super. L.A. Cnty. 2012); Lucy Campell, "Students Win $11.2m Settlement in Chicago School of Psychology Fraud Lawsuit," *LawersandSettlements.com* (Sept. 22, 2016), https://www.lawyersandsettlements.com/settlements/19167/students-win-11-2m-settlement-in-chicago-school-of.html.

[10] *See* Veronica Jean Seltzer, "American National Univ. found guilty of violating Ky. Consumer Protection Act," *WTVQ-ABC36* (June 18, 2019), https://www.wtvq.com/american-national-univ-found-guilty-violating-ky-consumer-protection-act/.

Ninth Circuit's reasoning in *Carpenter* "was grounded in the need to encourage the assumption that when the government is a party, the interests of others will be protected." *Allen v. Bedolla*, 787 F.3d 1218, 1222 (9th Cir. 2015). The *Carpenter* intervenors initially "had reason to believe the government would take action consistent with" its responsibility to protect endangered species, and then sought to intervene when "they realized the government was not adequately representing [that] interest." *Ctr. for Biological Diversity v. Bartel*, No. 09-CV-1864, 2010 WL 11508776, at *4 (S.D. Cal. Sept. 22, 2010). But here, the Department "is being sued for failure to follow [its] regulations," and under those regulations the Department "is not required to act on behalf of the [Movants'] economic interests." *Id.* Moreover, the subject of litigation in *Carpenter* was real property—the case was a zero-sum equation between federal and non-federal or private ownership. Although Movants seek to obfuscate this point, there is simply no zero-sum equation here. The fate of borrowers in the BD process is completely separate from the Department's regulation of, and potential recoupment from, schools such as Movants. Given the nature of this case and the evidence in the record, Movants cannot plausibly claim that the filing of the Joint Motion and Agreement marked "the first time that [Movants] realized that the end result of the protracted litigation would not be entirely to [their] liking." *Orange County v. Air California*, 799 F.2d 535, 538 (9th Cir. 1986). "Consequently, the applicants here are not similarly situated to the applicants in *Carpenter*." *Ctr. for Biological Diversity*, 2010 WL 11508776, at *4.

So what actually changed with the filing of the Agreement? Why were Movants not upset earlier that the Department was apparently neglecting processes that the BD regulations required, including giving notice to schools? Why were they not upset that the Department was not speedily adjudicating BD claims of their former students?[11] Quite simply, it seems that Movants did not

[11] Movants cannot, of course, claim any legally protected interest in an unlawful procedure, including the process that led to the unlawful form denial notices. *See, e.g.*, *Kirkland v. N.Y. State Dep't of Corr. Servs.*, 711 F.2d 1117, 1126 (2d Cir. 1983) ("Non-minorities do not have a legally protected interest in the mere expectation of appointments which could only be made pursuant to presumptively discriminatory employment practices." (citing *Franks v. Bowman Transportation Co.*, 424 U.S. 747, 775-78 (1976))).

believe that the Department would actually resolve claims in Class Members' favor, at least not without a further years-long "information-gathering" process that Movants and other schools could have attempted to prolong through administrative levers. When the Department announced its conclusion that it already had enough evidence to support the approval of many Class Members' applications, *see* Joint Mot. at 17-18, Movants disagreed with the Department's assessment of that evidence. Their displeasure with this outcome does not justify their belated bid for intervention.[12]

b) Intervention at This Late Stage Would Severely Prejudice Class Members

Class Members have been waiting years for a resolution of their BD claims—indeed, that was the original impetus for this lawsuit when it began in 2019. Allowing Movants to intervene in the litigation at this late stage, with the apparent intention of blowing up a hard-fought and long-awaited settlement on deficient legal grounds, would impose severe hardship on the class.

Since the Joint Motion and Agreement were filed, Plaintiffs have received numerous messages from Class Members showing how important a timely settlement approval process is to them. For example, a Class Member recently wrote to Plaintiffs' counsel:

> I have been waiting for an answer about my student loan forgiveness application since May 15, 2019, but have not heard anything yet. . . . The reason for me reaching out is because I am in the process of purchasing a home and (long story short) have been denied for the last 3 years. I have been denied because of my $45,000 student loan debt I have due to the deception from the University of Phoenix. . . . Because of the Sweet v. Cardona case, the lenders are now considering providing me and my family (my fiance, [redacted], and my 3 year old, [redacted]) with a home loan. The last thing they are asking for is for some form of documentation stating that I

[12] Movants' apparent contention that their intervention is timely now because the parties should have conducted all of their settlement negotiations in full view of the public similarly fails. *See, e.g.*, Lincoln/ANU Mot. at 6-7; ECI Mot. at 3, 10, 11, 13, 18. The parties, quite naturally, discussed settlement confidentially, pursuant to Federal Rule of Evidence 408. There is certainly no evidence of "collusion" that ECI can point to (*see* ECI Mot. at 11)—the parties have litigated this case to summary judgment twice and engaged in extensive discovery, including motion practice. And ECI should know: their counsel represented Betsy DeVos in ancillary litigation over Plaintiffs' deposition subpoena of the former Secretary of Education. *See In re DeVos*, No. 3:21-mc-80075-WHA (N.D. Cal.), ECF No. 31-1 (Declaration of Jesse Panuccio). ECI appears to believe that its mere presence on Exhibit C is proof enough of "collusion," rather than proof of the Department weighing available evidence and finding that ECI's conduct supports BD relief.

am a part of the Sweet v. Cardano [sic] case and that my loans will be forgiven once the settlement is completed.

Exhibit B, Connor Decl., Attachment 1. Below is a small selection of additional examples:

- "I applied to the Borrow[er] Defense back in 2019 since then went through a divorce and bankruptcy and had to move out of our home that is in foreclosure. We are trying to start a new life but this is hanging over our heads. . . . I am now 66 years of age and don't know how much longer I can work."

- "I cannot afford to work in this field and was lied to multiple times about the program, job expectations and income expectations. . . . I submitted these lies with my application years ago. I cannot get a loan for a home for my children and I cannot get a loan for a car without a co-sign. This one for profit school has ruined my life and my children's lives. I've lost job prospects due to credit checks and I've contacted DOE multiple times to get any status update on my application with no answers. I don't know what else to do."

- "I have worked extremely hard to not have any luxuries in my life or start a family to make sure I can afford these [loans] (I eat little, have never owned a car). I was told by financial aid collectors when payments were late that I need to eat less to afford my loans. I receive many harassing phone calls asking for more, but I've never been able to afford more. I've worked hard to not default because I fear they would go after my mother's assets, as I don't own a home or car and have assets and she's a co-signer, with a very low income."

- "Today I work at an Amazon Fulfillment Center which I am grateful that I have a job, but all the horror stories being said are true and not an easy place to work. I have no retirement and at age 64 will soon be collecting Social Security which is nothing."

See Ex. B ¶¶ 5-7.

As these examples show, many Class Members are struggling to get by, and approval of the settlement would fundamentally change their lives. Movants' flippant assertions that their intervention "will not cause any prejudice, let alone undue prejudice to the other parties" (CSPP Mot. at 12) and that they "present[] no conflict with the speedy and fair adjudication of Plaintiffs' borrower-defense applications" (Lincoln/ANU Mot. at 14) demonstrate both a callous disregard for the interests of borrowers and a fundamental lack of knowledge about this litigation.

2. Movants Do Not Have a Significant Protectable Interest

"'An applicant for intervention has a significantly protectable interest if the interest is protected by law and there is a relationship between the legally protected interest and the plaintiff's claims.' However, 'a mere interest in property that may be impacted by litigation is not a passport

to participate in the litigation itself.'" *Abdurahman v. Alltran Fin., LP*, 330 F.R.D. 276, 280 (S.D. Cal. 2018) (quoting *United States v. Alisal Water Corp.*, 370 F.3d 915, 919, 920 n.3 (9th Cir. 2004)). "An applicant generally satisfies the 'relationship' requirement only if the resolution of the plaintiff's claims actually will affect the applicant." *Donnelly v. Glickman*, 159 F.3d 405, 410 (9th Cir. 1998) (citing *Montana v. EPA*, 137 F.3d 1135, 1141-42 (9th Cir. 1998)). Movants assert that the proposed settlement infringes on their right to notice of and an opportunity to respond to BD claims, and places them at risk of future financial liability and reputational harm. *See* Lincoln/ANU Mot. at 16; ECI Mot. at 15-16; CSPP Mot. at 13-15. None of these assertions constitutes a significant protectable interest that would justify intervention.

a) Movants Do Not Have a Significant Protectable Property Interest in Receiving Notice of Borrower Defense Claims

Movants do not have a property interest in notice of and an opportunity to respond to BD claims involving them. As an initial matter, they cannot point to a law that clearly affords them this supposed interest. A significant portion of the Class has federal loans that were distributed before July 1, 2017—including all seven of the named Plaintiffs. *See* Complaint, ECF No. 1 ¶¶ 237, 259, 279, 300, 318, 337, 356; Defendants' Response to Court's February 4, 2020 Order, ECF No. 90, at 2 (noting that, as of February 4, 2020, nearly 20,000 BD *claims* had been pending without a decision since at least February 2017—which does not account for all applications concerning loans *disbursed* before that date). BD applications relating to these loans are governed by the 1994 BD regulations, which do not require that institutions receive any notice of BD claims. *See* U.S. Dep't of Education, William D. Ford Federal Direct Loan Program, 59 Fed. Reg. 61664-01, *61696 (1995 Final Rule, 34 C.F.R. § 685.206(c)).

The 2016 BD regulations, which govern loans issued between July 1, 2017, and July 1, 2020, provide that the Department, "[a]s part of the fact-finding process" undertaken to resolve BD claims, "notifies the school of the borrower defense application" and "considers any evidence or argument presented by the borrower and also any additional information, including . . . [a]ny response or submission from the school," but they do not expressly give institutions the right to

respond to BD applications. *See* U.S. Dep't of Education, Student Assistance General Provisions *et alia*, 81 Fed. Reg. 75,926-01, *76,084 (2016 Final Rule, 34 C.F.R. § 685.222(e)(3)).

The 2020 BD regulations, which apply only to loans issued after July 1, 2020—the subject of a scant minority of pending BD applications—do require the Department to notify the school of any BD applications and "invite the school to respond and to submit evidence." 34 C.F.R. § 685.206(e)(10). But this procedural right does not confer a protectable *property* interest. This is because the approval of a BD claim does not trigger any financial liability for the school. Instead, as Movants acknowledge, the school's liability—if any—is determined separately. *See* Lincoln/ANU Mot. at 16 ("[T]he Department has the right to seek recoupment against the institution for the amount of the forgiven loan (again, subject to procedural safeguards)."); ECI Mot. at 4 ("[T]he regulations state that the Department can initiate proceedings to recover the discharged amount from the school with which that debt was associated.").

Movants' claims that their "due process rights to defend against a [BD] claim are critical . . . because the borrower defense regulations . . . provide an avenue for the Department to recoup the loans that it decides to discharge" (CSPP Mot. at 14) thus completely misrepresent, or misunderstand, the recoupment process. The regulation governing recoupment sets out a fulsome process, including a requirement that the Department provide a statement of facts and law sufficient to show its entitlement to recovery, and an opportunity for the institution to both file a written response and request a hearing. *See* 34 C.F.R. §§ 668.87(a)-(b). This process is much more than the "other means" available in cases like *Alisal Water*. *See* 370 F.3d at 921 (putative intervenor's interest not impaired where it has access to a summary claims process).

Indeed, as the Department has explained, the BD regulations "do not include an appeals procedure [for institutions] in the individual borrower claim process" because they instead "afford an opportunity to present a defense when the Department seeks to hold a school liable and recover funds." 81 Fed. Reg. at 75,963; *see also id.* at 75,959 ("Schools will not be held liable for borrower defense claims until after an administrative proceeding that provides them due process."). Furthermore, the recoupment regulation—***which not a single Movant even cites, let alone***

discusses—specifies that "[t]he parties in any . . . recovery proceeding are the Department and the institution(s) against which the Department seeks to recover losses," and "[b]orrowers are not permitted to intervene or appear in this proceeding, either on their own behalf or on behalf of any purported group, except as witnesses put forth by either party." 34 C.F.R. § 668.87(c). It is equally as inappropriate for institutions to attempt to insert themselves into the BD decision, as Movants do by seeking intervention in this case, as it would be for borrowers to claim a role in the recoupment procedure between the Department and a school.[13]

Finally, as to Lincoln and CSPP in particular, their own declarants admit that they have *already* had an opportunity to review and respond to BD applications involving them.[14] Giglio Decl., ECF No. 254-2 ¶¶ 7, 9; Gonsalves Decl., ECF No. 265-3 ¶ 6. Their claims that intervention is the only way to protect their procedural interests are thus entirely unfounded.

b) Movants Are Raising a Preemptive Defense to a Speculative Future Proceeding That Is Distinct from the Claims in This Case

To the extent that Movants have an interest in potential recoupment proceedings relating to loan amounts forgiven pursuant to the Agreement, such an interest "is financial and collateral to the property or transaction that is the subject of the action." *Moore v. Verizon Commc'ns Inc.*, No. 09-cv-1823, 2013 WL 450365, at *12 (N.D. Cal. Feb. 5, 2013) (internal quotation marks

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[13] As explained by the Department, the BD regulations "work[] toward evening the playing field" by creating "a non-adversarial process managed by a Department official." 81 Fed. Reg. at 75,962. This bifurcation is a bulwark against "resource inequities between schools and borrowers," *id.* at 75,974, the nature of which are perfectly illustrated by the present motions, brought by no less than four multinational law firms: Alston & Bird, LLP (CSPP), McGuire Woods, LLP (ANU), Gibson, Dunn & Crutcher, LLP (Lincoln), and Boies Schiller Flexner LLP (ECI).

[14] CSPP selectively quotes from certain BD applications and claims that the applications are deficient, *see* Gonsalves Decl. ¶¶ 10-11, but as far as Plaintiffs are aware, Class Members have had no opportunity to respond to CSPP's assertions because CSPP never submitted them to the Department. Although Lincoln reports that it did respond to the Department, Plaintiffs likewise are not aware of Class Members being invited to respond—as they would entitled to do under the 2020 regulations. 34 C.F.R. § 685.206(e)(10)(ii). In any case, Lincoln's responses were not made under penalty of perjury, unlike BD applications themselves. *See* U.S. Dep't of Education, Notice of Proposed Rulemaking, 87 Fed. Reg. 41,878, 41,901 (July 13, 2022) (proposing to institute such a "penalty of perjury" requirement for school responses).

omitted). In *Moore*, a class action challenging Verizon's alleged practice of assessing unauthorized charges, a nonparty moved to intervene for the sole purpose of addressing class counsels' fee application, claiming to have a significant protectable interest because it was required to indemnify Verizon for certain costs. *Id.* at *12. The Court explained that the putative intervenor's obligation to indemnify Verizon was not an issue in the litigation, and thus its interest was not significant and could not justify intervention. *Id.* Further, the putative intervenor's "financial interest in limiting its indemnity exposure . . . is purely economic and is premised on a contingency that may never materialize; namely, the initiation of a subsequent lawsuit or arbitration proceedings by Verizon seeking indemnification." *Id*. at *13. The analysis in *Moore* is equally applicable here. This case arises out of the Department's unlawful delay and unlawful policies in adjudicating hundreds of thousands of BD applications. Movants' future financial liability, if any, is not at issue in this litigation. *See id.* at *12-13; *Alisal Water*, 370 F.3d at 919-20 (affirming denial of judgment creditor's motion to intervene because financial interest was too speculative to be "concrete" and was "several degrees removed from" the issues that formed "the backbone of [the] litigation").

Moreover, Movants' purported concerns are premised on a contingency that likely *will not* materialize: Movants do not identify, and Plaintiffs are not aware of, a *single* recoupment action brought by the Department against an institution after approval of a BD application, under any of the BD regulations in force since 1994. *See* Ex. B ¶¶ 8-10. Further, as previously discussed, any financial liability will be determined in a separate proceeding solely between the Department and the institution. *See* 34 C.F.R. § 668.87(c). Such proceedings are governed by regulations that afford institutions significant procedural safeguards, *see* 34 C.F.R. § 668.87(b), and clear statutes of limitations on recovery actions, *see* 81 Fed. Reg. at 76,084 (2016 Final Rule, 34 C.F.R. § 685.222(e)(7)); 34 C.F.R. § 685.206(e)(16).[15] These safeguards distinguish Movants from the intervenors in *United States v. Aerojet Gen. Corp.*, 606 F.3d 1142, 1150 (9th Cir. 2010) (cited in

[15] The same applies to any potential administrative or litigation proceedings involving other regulators or private plaintiffs. *See, e.g.*, Lincoln/ANU Mot. at 17. Not only is the prospect of such proceedings entirely speculative, but each would come with its own due process protections.

ECI Mot. at 14; CSPP Mot. at 9), who had a statutory right to contribution that could arise without any further determinations of liability.

c) Allegations of Harm to Movants' Reputational Interests Are Ill-Supported and Immaterial

The alleged "other potential consequences that could flow from the Department's forgiveness of loans under the terms of the proposed settlement" (Lincoln/ANU Mot. at 16)—primarily, reputational harm—are similarly too speculative and collateral to establish that Movants have a significant protectable property interest in this litigation. As an initial matter, Movants fail to adequately describe this alleged reputational harm: Lincoln and ANU only point to an excerpt from a news article that does not even mention the Exhibit C list, let alone either school, *see* Lincoln/ANU Mot. at 17, while CSPP asserts that its "sterling reputation . . . has already been harmed" without pointing to *any* evidence, CSPP Mot. at 5. As detailed *supra*, Part III.A.1.a, none of the Movants has a "sterling reputation" to protect.

Furthermore, "[a]bsent allegations of detriment arising from the subject matter of the lawsuit, courts are generally skeptical of allowing intervention based on . . . indirect reputational harm." *Floyd v. New York City*, 302 F.R.D. 69, 104 (S.D.N.Y. 2014) (collecting cases), *aff'd in part, appeal dismissed in part*, 770 F.3d 1051 (2d Cir. 2014). For example, in *Roe v. Lincoln-Sudbury Regional School District*, No. 18-cv-10792, 2019 WL 5685272 (D. Mass. Oct. 31, 2019), a student sued her school district and school officials for their inadequate response to her sexual assault by two fellow students. One of the accused perpetrators moved to intervene, "asserting that he needs to do so in order to protect . . . his reputational interests." *Id*. at *2. Denying his motion, the district court observed: "The substance of Roe's claims is the school's response to her allegation of assault. The perpetration of the assault is certainly a factual issue underlying the claims in this case, but the focus of the legal claims is on the school's response, not the assault itself." *Id*. at *3 n.1. In a similar vein, while allegations of misconduct underlie the BD claims at issue in this case, the litigation is centered around the Department's response to those claims, not the misconduct itself.

Going further, the Seventh Circuit has observed that "[t]o hold that the prospect of a judge's adverse finding or comment [about a non-party] could support intervention as a party . . . would amount to a stunning expansion of standing and would invite prolonged and even endless litigation." *Grochocinski v. Mayer Brown Rowe & Maw, LLP*, 719 F.3d 785, 798 n.10 (7th Cir. 2013). Where the adverse finding is not even made by the judge, but rather implied by the terms of a settlement agreement, intervention is even less appropriate.

3. The Disposition of This Action Will Not Impair or Impede Movants' Ability to Protect their Interests.

Assuming, *arguendo*, that Movants had protectable property interests in this litigation—which they do not—the disposition of this action would not impair or impede their ability to protect those interests. Movants fail to establish that, should the Department seek to recover amounts forgiven pursuant to the settlement, they will be unable to challenge recoupment or introduce evidence that they did not engage in any misconduct. *See supra* Part III.A.2.b. Because they will have the opportunity to contest their liability in future proceedings, they will not be substantially affected in a practical sense by the resolution of this action. *See Moore*, 2013 WL 450365, at *13.

B. Movants Fail to Meet the Standard for Permissive Intervention

Just as Movants fail to demonstrate that they are entitled to intervention as of right, so too do they fail to qualify for permissive intervention. "[A] court may grant permissive intervention where the applicant for intervention shows (1) independent grounds for jurisdiction; (2) the motion is timely; and (3) the applicant's claim or defense, and the main action, have a question of law or a question of fact in common." *United States v. Los Angeles*, 288 F.3d 391, 403 (9th Cir. 2002). "Even if an applicant satisfies those threshold requirements, the district court has discretion to deny permissive intervention." *Donnelly*, 159 F.3d at 412. In exercising its discretion, the district court must consider whether intervention will unduly delay the main action or will unfairly prejudice the existing parties. *Id*. (citing Fed. R. Civ. P. 24(b)(2)).

Movants fail to satisfy the timeliness requirement for the reasons discussed at length *supra*, Part III.A.1. *See League of United Latin Am. Citizens v. Wilson*, 131 F.3d 1297, 1308 (9th Cir.

1997) ("In the context of permissive intervention . . . [courts] analyze the timeliness element more strictly than [they] do for intervention as of right."). Movants also fail to establish that their claims or defenses have a question of law or a question of fact in common with the main action. Finally, allowing permissive intervention would unduly delay the main action and prejudice Plaintiffs.

1. There Is No Common Question of Law or Fact

It is not at all clear from their requests for permissive intervention what claims or defenses Movants are raising. Lincoln and ANU seem to assert that their "claim" is of a right to participate in settlement negotiations, *see* Lincoln/ANU Mot. at 20, while ECI and CSPP characterize their "defense" as one to perceived allegations against them contained in the proposed settlement, *see* ECI Mot. at 18-19; CSPP Mot. at 23. None of these questions, such as they are, resemble the legal issues in this case—*viz.*, whether the Department unlawfully withheld or unreasonably delayed BD decisions, whether it unlawfully adopted a 'presumption of denial' policy, and whether its form denial notices violated the APA and/or due process. *See, e.g.*, Supp. Compl. ¶¶ 1-9.

Even if the Court were to ignore the nature of the underlying action and consider only the questions of law and fact presented in the Joint Motion, Movants could not identify a common question. At the preliminary approval stage, a court must make a preliminary determination that the settlement "is fair, reasonable, and adequate" ***to the class*** when considering the factors set out in Fed. R. Civ. P. 23(e)(2). Preliminary approval is appropriate if "the proposed settlement appears to be the product of serious, informed, non-collusive negotiations, has no obvious deficiencies, does not improperly grant preferential treatment ***to class representatives or segments of the class***, and falls within the range of possible approval." *In re Tableware Antitrust Litig.*, 484 F. Supp. 2d 1078, 1079 (N.D. Cal. 2007) (Chief Judge Vaughn Walker) (emphasis added).

As the Parties explain in their Joint Motion, the Agreement meets the standard for preliminary approval. Named Plaintiffs and Class Counsel have adequately represented the Class, negotiations were conducted at arm's length, and the Agreement offers relief to all Class Members that is comparable to or better than what Plaintiffs might have expected through continued litigation. *See* Joint Mot. at 12-18. In the context of preliminary approval, negotiations are

considered not to be conducted at arm's length where class counsel "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). Movants do not offer any evidence of "collusion"—nor can they, because no such evidence exists. Counsel for each party have zealously represented their clients' interests throughout extensive settlement negotiations, and any fee award is governed by the Equal Access to Justice Act. *See* Joint Mot. at 14. Notwithstanding the assertion by ECI that the parties "colluded in secret, for months" to arrive at the Agreement (ECI Mot. at 11), there is nothing improper about the fact that the parties engaged in confidential, non-public settlement negotiations. *See, e.g.*, Fed. R. Evid. 408.

Movants disclaim any interest in the merits of this case's underlying claims. *See, e.g.*, Lincoln/ANU Mot. at 10 n.3 ("Proposed Intervenors seek intervention to be heard on the proposed settlement, not with an aim to litigating the case on the merits."). Instead, they expressly seek intervention to object to the effects they anticipate the Agreement might have ***on them*** if it is ***finally*** approved. *See, e.g.*, Lincoln/ANU Mot. at 1 (seeking intervention "to ensure that [Lincoln/ANU's] interests are protected in any finalization and implementation of the proposed settlement of this litigation"); ECI Mot. at Notice of Motion (seeking intervention "to object to the settlement as not fair, reasonable, or adequate" to ECI in light of its own interests); CSPP Mot. at 8 (seeking intervention "to be heard in opposition to the proposed settlement"). In effect, Movants are trying to challenge a settlement that does not concern them, but with which they disagree. "The intervention rule is . . . not intended to allow the creation of whole new lawsuits by the intervenors." *Donnelly*, 159 F.3d at 412 (omission in original) (quoting *Deus v. Allstate Ins. Co.*, 15 F.3d 506, 525 (5th Cir. 1994)). Movants cannot establish that their claims or defenses—to the extent they identify any—have a question of law or fact in common with the main action, and therefore are not entitled to permissive intervention.

2. Granting Permissive Intervention Would Prejudice the Plaintiffs

"In evaluating prejudice, courts are concerned when relief from long-standing inequities is delayed." *Alisal Water*, 370 F.3d at 922 (citations omitted). As this Court is well aware, Class

Members have been waiting for the relief promised in the proposed settlement for years. As detailed *supra*, Part III.A.1.b, allowing Movants to intervene at this late stage, for the sole and express purpose of frustrating settlement proceedings, would unduly prejudice Plaintiffs. *See id.* ("In the past, we have affirmed the denial of motions to intervene in cases where granting intervention might have compromised long-litigated settlement agreements."); *In re Cathode Ray Tube Antitrust Litig.*, No. 07-cv-05944, 2020 WL 5224241, at *5 (N.D. Cal. Aug. 27, 2020) (intervention "in order to appeal [movants'] objections to a settlement for which they are not a part would create undue delay and prejudice to the settling parties").

C. The Motions Are an Attempt by Non-Parties to Exercise a Veto Over a Settlement That Does Not Affect Them

Movants, by their own admission, lack any actual stake in the claims or defenses at issue in this lawsuit. *See, e.g.*, Lincoln/ANU Mot. at 10 n.3; ECI Mot. at 11; CSPP Mot. at 8. Only one of the four Movants, ECI, even attempted to file its own proposed pleadings, and those simply disclaimed knowledge of Plaintiffs' allegations—even the ones relating to ECI's own schools. *See, e.g.*, ECF No. 261-2 ¶ 199 (claiming to lack sufficient knowledge or information about Supplemental Complaint paragraph detailing Everglades University's Assurance of Voluntary Compliance with the state of Florida). Moreover, the proposition that ECI would intervene as a defendant makes no sense in the structure of this lawsuit: ECI's asserted interests present a conflict with the Department, not with Plaintiffs.[16]

Furthermore, to the extent certain Movants seek to re-open settlement negotiations (*see* Lincoln/ANU Mot. at 1; CSPP Mot. at 3, 8), intervention would not get them what they want. At this stage of the litigation, the proposed settlement will be approved as written or not at all. *See* Agreement § XIII.A ("This Agreement shall be void if it is not approved as written by a final Court order not subject to any further review."). Plaintiffs will not agree to modify the proposed

[16] Movants could attempt plead their own APA claims against the Department in cross-complaints. But none has done so, nor expressed any intention to do so—and as described, those claims would not actually share a legal or factual nexus with Plaintiffs', and thus do not belong in this case. Plaintiffs express no opinion on whether any such claims would have merit if brought separately.

settlement in the manner that Movants appear to desire. *See id.* § XV.A ("Before the Preliminary Approval Date, this Agreement, including the attached exhibits, may be modified only upon the written agreement of the Parties."). Plaintiffs will not negotiate an alternative settlement with Movants—nor could they, as Movants lack any interest in or ability to settle any of Plaintiffs' claims. Rather, even if Movants were granted intervention and party status,[17] Plaintiffs could and would continue to pursue approval of their settlement with the Department as it is written. *See Local 93, Int'l Ass'n of Firefighters, AFL-CIO C.L.C. v. City of Cleveland*, 478 U.S. 501, 528-29 (1986) ("It has never been supposed that one party—whether an original party, a party that was joined later, or an intervenor—could preclude other parties from settling their own disputes.").

If the Agreement were approved, Movants would simply remain in the case as non-settling parties—without any claims or defenses that could keep the case live. *See id.* at 529 ("[W]hile an intervenor is entitled to present evidence and have its objections heard at the hearings on whether to approve a consent decree, it does not have power to block the decree merely by withholding its consent."). And because Movants lack Article III standing,[18] they would not have standing to appeal a final approval order if the Department did not. *See Wittman v. Personhuballah*, 578 U.S. 539, 543-44 (2016) (an intervenor "cannot step into the shoes of the original party" on appeal, "unless the intervenor independently fulfills the requirements of Article III"); *Diamond v. Charles*, 476 U.S. 54, 68 (1986) ("status as an intervenor below, whether permissive or as of right, does not

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[17] Of course, intervention does not necessarily have to equal party status—it can be conditional. *See, e.g.*, *Kirkland*, 711 F.2d at 1126; *see generally* David L. Shapiro, *Some Thoughts on Intervention Before Courts, Agencies, and Arbitrators*, 81 Harv. L. Rev. 721, 727-28 (Feb. 1968).

[18] Lincoln/ANU argue that they satisfy Article III standing because "they face concrete and particularized injuries that are directly traceable to the proposed settlement," Lincoln/ANU Mot. at 21, but make no effort to establish how they could have standing as a party in the underlying litigation. ECI and CSPP do not address the standing issue. As explained *supra*, however, all of Movants' asserted interests are entirely speculative, not concrete or particularized. It is an open question whether intervenors must establish Article III standing independent of the parties to intervene as of right at all. *See, e.g.*, *Prete v. Bradbury*, 438 F.3d 949, 956 (9th Cir. 2006) (noting that there is "a circuit split . . . whether an intervenor-applicant must also independently satisfy Article III standing to intervene as of right," and citing cases).

confer standing sufficient to keep the case alive in the absence of the State on this appeal" unless intervenor can demonstrate independent Article III standing).

As all of the shortcomings described above make clear, what Movants are pursuing here is not intervention as it is normally understood under Rule 24. Rather, they are seeking an on-the-record forum to air their grievances about a settlement that they think will make them look bad.

Intervention is not necessary or appropriate to address Movants' concerns. Movants are free, for instance, to ask the Court for permission to file amicus briefs during the time for objections following preliminary approval (if granted).[19] This course of action would be consistent with how courts have frequently treated motions for intervention by class members at the settlement stage—and class members certainly have a stronger interest than Movants have here. *See, e.g.*, *Allen*, 787 F.3d at 1222 (in class action settlement, movant's concerns "could largely be addressed through the normal objection process"); *Zepeda v. PayPal, Inc.*, No. 10-cv-02500, 2014 WL 1653246, at *4 (N.D. Cal. Apr. 23, 2014), *objections overruled*, No. 10-cv-1668, 2014 WL 4354386 (N.D. Cal. Sept. 2, 2014) (courts have "frequently denied intervention in the class action settlement context, citing concerns about prejudice, as well as putative intervenors' ability to protect their interests by less disruptive means," such as by "participat[ing] in the fairness hearing process"); *In re Volkswagen "Clean Diesel" Mktg., Sales Practices, and Prods. Liability Litig.*, MDL No. 2672, 2016 WL 4376623, at *4 (N.D. Cal. Aug. 17, 2016) (denying intervention because movant's interest could be adequately protected by "opt[ing] out of the Settlement and litigat[ing] his claims independently, or. . . instead object[ing] to it").

More importantly, Movants are not waiving any rights under the Agreement, and it does

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[19] Arguably, Movants could file their own objections to the settlement. *See* Agreement § X.A.5 ("Within 14 calendar days of the Execution Date, the Parties shall jointly submit this Agreement and its exhibits to the Court, and shall apply for entry of an Order in which the Court: . . . Provides that ***any person*** who wishes to object to the terms of this Agreement, or to the entry of an Order approving this Agreement, must file a written Notice of Objection with the Court." (emphasis added)). *But see* Proposed Order, ECF No. 246-2 at 2, ¶ 3.c ("Each ***Class Member*** will have the opportunity to object to the Proposed Settlement. ***Class Members*** must submit any objections to the Settlement Agreement in writing to the Court." (emphasis added)).

not resolve any questions regarding their future obligations or liabilities—whether to the Department, to individuals, or to other regulators. Movants can assert all of their arguments regarding notice, process, and/or the factual predicates for any allegations of misconduct in any future proceeding against them. *See Local 93,* 478 U.S. at 529-30 (intervenor could not block consent decree where the decree did not "bind [intervenor] to do or not to do anything," did not "impose[] [any] legal duties or obligations on [intervenor] at all," and did not "purport to resolve any claims [intervenor] might have" under applicable law). As to alleged reputational harm, Movants have both the resources and the wherewithal to publicize their opposition to the proposed settlement and their assertions regarding the quality of the education they provide. *See, e.g.*, Non-Profit Explorer: Everglades College Inc., *ProPublica* (last visited July 20, 2022), https://projects.propublica.org/nonprofits/organizations/650216638 (collecting tax return data showing that ECI had nearly $560 million in revenue in 2020).

D. Movants Fail to Establish Any Other Reason to Deny Preliminary Approval

ECI raises several additional arguments to suggest that this Court should deny preliminary approval regardless of its decision on intervention. Movants have no standing to raise these arguments. But regardless, the arguments fail on their own terms.

ECI first cites the assertion, recently raised in Defendants' summary judgment brief, that this case is moot because the Department has already begun to take action on some pending BD applications. *See* ECI Mot. at 1, 6 (citing Defendants' Cross Motion for Summary Judgment ("Defs.' Cross Motion"), ECF No. 249 at 1-2). But Defendants' mootness argument, if it had been considered on its merits, would have been wholly insufficient to strip this Court of jurisdiction to approve the proposed settlement. "A policy change not reflected in statutory changes or even in changes in ordinances or regulations will not necessarily render a case moot." *Rosebrock v. Mathis*, 745 F.3d 963, 971 (9th Cir. 2014) (citations omitted). "Ultimately, the question [is] whether the party asserting mootness has met its ***heavy burden*** of proving that the challenged conduct cannot reasonably be expected to recur." *Id.* at 972 (citations and quotations omitted) (emphasis added). While the declaration submitted by Defendants in support of their mootness argument suggests

that the challenged policies are not currently being followed, it does not even attempt to establish that they will not recur. *See* Decl. of Richard Cordray ("Cordray Decl."), ECF No. 249-1 ¶¶ 9-18 (describing actions taken to work through the BD backlog, but nowhere challenging the Department's authority to delay or cease adjudication of BD applications).

Moreover, when administrative delay has been "created and perpetuated by [an agency's] inefficiencies," and "has not been significantly reduced" under current policy, the agency retains a duty to rectify that delay. *Pacharne v. DHS*, No. 1:21-cv-115, 2021 WL 4497481, at *12 (N.D. Miss. Sept. 30, 2021); *cf. Rai v. Biden*, No. 21-cv-863, 2021 WL 4439074, at *7 (D.D.C. Sept. 27, 2021) (although the unlawful policy underlying plaintiffs' claims had been revoked, claims were not moot because the effects of the resulting delay had not been "completely or irrevocably eradicated" (citation omitted)). There is no authority to support the position that "because an agency acts on some similarly situated applications, it cannot be sued for unreasonably delaying or unlawfully withholding other applications." *Filazapovich v. Dep't of State*, 560 F. Supp. 3d 203, 235 (D.D.C. 2021). For the vast majority of the Class, the Department's failure to decide BD applications continues, and the Department has not announced any timeline to address these claims, other than through the proposed settlement. Defendants have therefore ceased to meet their "heavy burden" to establish mootness, and the Court's jurisdiction to approve the settlement is unchanged. *See Rosebrock*, 745 at 972; *Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc.*, 528 U.S. 167, 170 (2000) ("The heavy burden of persuading the court that the challenged conduct cannot reasonably be expected to recur lies with the party asserting mootness.").

Likewise, evidence that the Department may have abandoned its policy of inaction does not render class certification inappropriate. *See* ECI Mot. 261 at 1 (citing Defs.' Cross Motion at 1-2). By Defendants' own admission, "[a]pproximately 264,000 borrowers are waiting for a decision on their BD applications." Cordray Decl. ¶ 12. While "the reasons their applications remain pending [may] vary," Defs.' Cross Motion at 12, it is implausible to suggest that any currently pending application was unaffected by the Department's failure to "issue[] *any* final borrower defense decisions for well over a year," *id*. Because ample evidence, including

Defendants' own submissions, demonstrates that a common policy of inaction has impacted the entire class, decertification is inappropriate. *See Lyon v. Immigr. & Customs Enf't*, 171 F. Supp. 3d 961, 984 (N.D. Cal. 2016) ("That the claims of individual class members may differ factually should not preclude certification under Rule 23(b)(2) of a claim seeking the application of a common policy." (quoting *Adamson v. Bowen*, 855 F.2d 668, 676 (10th Cir. 1988))).

Finally, the APA does not prevent this Court from granting preliminary approval of the Agreement. ECI's suggestion that the proposed settlement constitutes unlawful regulation by concession, *see* ECI Mot. at 16-17, is both insufficiently argued and wrong as a matter of law. In *Conservation Northwest v. Sherman*, 715 F.3d 1181, 1187 (9th Cir. 2013), the Ninth Circuit considered a consent decree that established new standards for the Northwest Forest Plan "unless and until [the relevant agencies] decide to conduct further analysis and decision making." *Id.* If the agencies decided not to conduct further decision making, "they could simply let [the new standards] stand indefinitely." *Id.* Holding that the district court abused its discretion by issuing the consent decree, the Ninth Circuit observed that a settlement is improper if it allows a federal agency "effectively to promulgate a substantial and permanent amendment to [its regulations] without having followed statutorily required procedures." *Id.* at 1188.[20] In this case, the Department has not proposed *any* amendment to its regulations, let alone "a substantial and final" one. It has simply agreed to a process and timeline to resolve the Class's claims within the existing BD framework. Applications submitted after final approval of the settlement will be processed according to the rules governing the affected loans.[21] This is thus not a case of regulation, or rescission, by concession—it is a case of the Department resolving litigation by taking steps to

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[20] *Mexichem Specialty Resins, Inc. v. E.P.A.*, 787 F.3d 544 (D.C. Cir. 2015), cited by ECI, is similarly inapposite. There, the court was considering whether to prevent a duly promulgated regulation from going into effect, *see id.* at 549, 557-58—a far cry from the situation here, where the Department is taking steps to resolve a discrete set of pending individual applications for relief.

[21] Indeed, the Department recently announced an *actual* proposed amendment to its BD regulations. *See* 87 Fed. Reg. 41,878.

redress the injuries that its actions and inactions caused to the Class. Nor has the proposed settlement "essentially transformed" the case into one about "blanket debt cancellation." ECI Mot. at 18. Cancellation is a borrower defense remedy, and the Agreement applies to a defined and closed class of BD applicants who are entitled to that remedy.[22] Indeed, Plaintiffs sought, in their recent Motion for Summary Judgment, an order for the Department to show cause why *every* pending application should not be granted, immediately. *See* ECF 245 at 36-37. The APA does not prevent approval of the Agreement.

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Movants' antics should not be allowed to derail or delay this case. As this Court recognized nearly two years ago, "Here, time is of the essence. We don't enjoy the luxury of seeking simply to forestall harm—it descended upon the class long ago. Our borrowers live under the severe financial burden of their loans." ECF No. 146 at 15. Class members "have waited for relief, or at least decision, for" up to *seven years* at this point. *Id.* The parties have reached agreement on a settlement that, as explained in the Joint Motion, will provide fair and timely relief to the Class—and Movants seek to throw sand in the gears to delay resolution of this case even further. Their legal arguments do not support such a ploy. The motions to intervene should be denied, and Rule 23 approval proceedings should go forward on their planned track.

IV. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request the Court deny Lincoln/ANU's Motion to Intervene (ECF No. 254), ECI's Motion to Intervene (ECF No. 261), CSPP's Motion to Intervene (ECF No. 265), and CSPP's Motion to Continue (ECF No. 265-1).

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[22] ECI's assertion that the Post-Class Applicant provisions are a backdoor for the Department to "unilaterally cancel ALL student loan debt" (ECI Mot. at 9) is facially absurd. There are currently 43.4 million borrowers with federal student loan debt. *See* Melanie Hanson, "Student Loan Debt Statistics," *Education Data Initiative* (last updated May 30, 2022), https://educationdata.org/student-loan-debt-statistics. ECI's theory would require (1) a hundred-fold increase in BD applications, (2) all of which would have to be submitted over approximately the next four months, and (3) all of which the Department would have to refuse to adjudicate for three years—the exact conduct that got the Department into this lawsuit to begin with.

Dated: July 25, 2022

/s/ *Rebecca C. Ellis*

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Exhibit A

School Owner(s)	School/Brand Name	Doc. No.	Description	Date of Filing	Page/Paragraph
American National University	American National University	ECF No. 220-2	Cases By School Owner - Open - 2020	2/24/2022	7
American National University	American National University	ECF No. 245-4	Exhibits to Plaintiffs' Motion for Summary Judgment: FRE 1006 Summary Exhibit of School-Specific Memoranda Prepared by BDU	6/9/2022	Ex. 61 p. 236
Everglades College, Inc.	Everglades University	ECF No. 1	Complaint	6/25/2019	¶ 110
Everglades College, Inc.	Everglades University	ECF No. 66-6	U.S. Senate Health, Education, Labor and Pensions Committee Report: For Profit Higher Education (July 30, 2012)	12/23/2019	149
Everglades College, Inc.	Everglades University	ECF No. 198	Supplemental Complaint	5/4/2021	¶ 199
Everglades College, Inc.	Everglades University	ECF No. 198-8	Initial Review of Medium Batch Applications: Everglades University and Everglades College, d/b/a Keiser University	5/4/2021	DOE10818-10825
Everglades College, Inc.	Everglades University	ECF No. 198-8	Everglades College, Inc. - Evidence Considered Protocol	5/4/2021	DOE10834
Everglades College, Inc.	Everglades University	ECF No. 220-2	Cases By School Owner - Open - 2020	2/24/2022	5, 11
Everglades College, Inc.	Everglades University	ECF No. 245	Plaintiffs' Motion for Summary Judgment	6/9/2022	27
Everglades College, Inc.	Everglades University	ECF No. 245-4	Exhibits to Plaintiffs' Motion for Summary Judgment: FRE 1006 Summary Exhibit of School-Specific Memoranda Prepared by BDU	6/9/2022	Ex. 61 p. 221
Everglades College, Inc.	Keiser University	ECF No. 1	Complaint	6/25/2019	¶¶ 110, 161
Everglades College, Inc.	Keiser University	ECF No. 66-3	Breakdown of Non-CCI Schools with Borrower Defense Claims Pending	12/23/2019	Ex. 9 at DOE_3357
Everglades College, Inc.	Keiser University	ECF No. 66-6	U.S. Senate Health, Education, Labor and Pensions Committee Report: For Profit Higher Education (July 30, 2012)	12/23/2019	passim

Everglades College, Inc.	Keiser University	ECF No. 198-8	Initial Review of Medium Batch Applications: Everglades University and Everglades College, d/b/a Keiser University	5/4/2021	DOE10818-10825
Everglades College, Inc.	Keiser University	ECF No. 198-8	Everglades College, Inc. - Evidence Considered Protocol	5/4/2021	DOE10834
Everglades College, Inc.	Keiser University	ECF No. 220-2	Cases By School Owner - Open - 2020	2/24/2022	5
Everglades College, Inc.	Keiser University	ECF No. 245-4	Exhibits to Plaintiffs' Motion for Summary Judgment: FRE 1006 Summary Exhibit of School-Specific Memoranda Prepared by BDU	6/9/2022	Ex. 61 p. 221
Lincoln Educational Services Corporation	International Technical Institute	ECF No. 220-2	Cases By School Owner - Open - 2020	2/24/2022	13
Lincoln Educational Services Corporation	Lincoln Technical Institute, Lincoln College of Technology	ECF No. 1	Complaint	6/25/2019	¶¶ 161, 188
Lincoln Educational Services Corporation	Lincoln Technical Institute, Lincoln College of Technology	ECF No. 20-20	Questions Submitted by Senator Patty Murray to Dep't of Education re: Borrower Defense	7/23/2019	5
Lincoln Educational Services Corporation	Lincoln Technical Institute, Lincoln College of Technology	ECF No. 21	Affidavits in Support of Class Certification (class members who filed borrower defense against Lincoln Tech)	7/23/2019	Ex. B, Part 3, pp. 199, 202
Lincoln Educational Services Corporation	Lincoln Technical Institute, Lincoln College of Technology	ECF No. 66-3	Breakdown of Non-CCI Schools with Borrower Defense Claims Pending	12/23/2019	Ex. 9 at DOE_3357
Lincoln Educational Services Corporation	Lincoln Technical Institute, Lincoln College of Technology	ECF No. 66-6	U.S. Senate Health, Education, Labor and Pensions Committee Report: For Profit Higher Education (July 30, 2012)	12/23/2019	passim
Lincoln Educational Services Corporation	Lincoln Technical Institute, Lincoln College of Technology	ECF No. 67	Plaintiffs' Cross-Motion for Summary Judgment	12/23/2019	21

Lincoln Educational Services Corporation	Lincoln Technical Institute, Lincoln College of Technology	ECF No. 142	Plaintiffs' List of Schools With Prior Findings of Fraud	10/8/2020	11
Lincoln Educational Services Corporation	Lincoln Technical Institute, Lincoln College of Technology	ECF No. 145-2	Defendants' List of Schools With "Common Evidence" of Misconduct	10/14/2020	12
Lincoln Educational Services Corporation	Lincoln Technical Institute, Lincoln College of Technology	ECF No. 198-5	Exhibit to Supplemental Complaint: Submissions by Attorneys General Seeking Relief for Constituents	5/4/2021	DOE2342
Lincoln Educational Services Corporation	Lincoln Technical Institute, Lincoln College of Technology	ECF No. 198-5	Exhibit to Supplemental Complaint: Summary of Information Requested by Diane Regarding Loan Discharges Pursuant to 2016 Regulation	5/4/2021	DOE4319
Lincoln Educational Services Corporation	Lincoln Technical Institute, Lincoln College of Technology	ECF No. 220-2	Cases By School Owner - Open - 2020	2/24/2022	4, 6, 12
Lincoln Educational Services Corporation	Lincoln Technical Institute, Lincoln College of Technology	ECF No. 245-4	Exhibits to Plaintiffs' Motion for Summary Judgment: FRE 1006 Summary Exhibit of School-Specific Memoranda Prepared by BDU	6/9/2022	Ex. 61 p. 230
TCS Education System	Chicago School of Professional Psychology	ECF No. 220-2	Cases By School Owner - Open - 2020	2/24/2022	11

Exhibit B

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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

DECLARATION OF EILEEN M. CONNOR, ESQ.

I, Eileen M. Connor, state as follows:

1. I am an attorney in the Project on Predatory Student Lending at the Legal Services Center of Harvard Law School. This office has been appointed to represent the certified class in this action. Per Order of the Court, effective August 1, 2022, the Project on Predatory Student Lending, Inc., will replace the Legal Services Center of Harvard Law School as counsel for the class. As of that date, I will be an attorney at the Project on Predatory Student Lending, Inc.

2. I submit this declaration in support of Plaintiffs' Consolidated Opposition to Motions to Intervene.

3. Attached hereto is a true and correct copy of an email I received from Mr. Jimmy Chafloque on July 18, 2022. Mr. Chafloque has given me permission to file this email on the record, with certain information redacted.

4. Plaintiffs' Counsel maintain a form on their website that individuals can fill out to submit questions about issues relating to predatory student lending. The form is available at https://predatorystudentlending.org/get-help/.

5. Since June 26, 2022, the form has included a question that reads: "Are you reaching out to us specifically about an issue pertaining to the *Sweet v. Cardona* settlement?" Respondents who choose "Yes" to this question are then prompted to respond to a set of questions relating to the proposed settlement. These prompts include an open text field where respondents can choose to write a narrative describing their questions or concerns about the proposed settlement.

6. Since June 26, 2022, Plaintiffs' Counsel have received over 1,000 submissions of this form that answer "Yes" to this question.

7. The quotations from class members included in Plaintiffs' Consolidated Opposition to Motions to Intervene are drawn from the open text field that individuals have filled out in response to the prompts following a "Yes" response to the question "Are you reaching out to us specifically about an issue pertaining to the *Sweet v. Cardona* settlement?" The quotations are true and accurate reflections of information supplied by the individuals identified in the Opposition.

8. I have assisted federal student loan borrowers with borrower defense applications since 2014. I served as a negotiator representing the legal aid community in Department of Education

negotiated rulemaking proceedings concerning borrower defense and institutional accountability. I have filed and litigated Freedom of Information Act requests concerning borrower defense. I am not aware of any instance in which the Department of Education has initiated an action to recoup the cost of borrower defense discharges from an institution.

9. In February of this year, the Department of Education announced that it was granting a number of borrower defense applications related to DeVry University. In its announcement, the Department stated that it "will seek to recoup the cost of the discharges from DeVry."[1]

10. It is my understanding that any such recoupment action would be initiated before the Department's Office of Hearing and Appeals. As of today's date, there are no decisions regarding recoupment from DeVry (or any other institution) posted on the Office's website. The docket of the Office is not available to the public.

Signed under the penalty of perjury on July 25, 2022.

/s/ *Eileen M. Connor*

Eileen M. Connor, Esq.

[1] https://www.ed.gov/news/press-releases/education-department-approves-415-million-borrower-defense-claims-including-former-devry-university-students

Attachment 1

From: Jimmy Chafloque
To: Connor, Eileen
Subject: CHAFLOQUE, Bert / Sweet vs. Cardona / Proof of Case Participation
Date: Monday, July 18, 2022 5:47:25 PM
Attachments: CHAFLOQUE_Student Loan App Confirmation.pdf

Hello Ms. Connor,

I apologize for reaching out to you via email.

First I would like to say thank you to you and your team for the hard work you have put into the Sweet vs. Cardona case. I have been waiting for an answer about my student loan forgiveness application since May 15, 2019, but have not heard anything yet. (Please see the attached PDF showing confirmation of my application).

The reason for me reaching out is because I am in the process of purchasing a home and (long story short) have been denied for the last 3 years. I have been denied because of my $45,000 student loan debt I have due to the deception from the University of Phoneix.

Because of the Sweet v. Cardona case, the lenders are now considering providing me and my family (my fiance, [redacted], and my 3 year old, [redacted]) with a home loan. The last thing they are asking for is for some form of documentation stating that I am a part of the Sweet v. Cardano case and that my loans will be forgiven once the settlement is completed.

I would like to ask (even if it's via email) confirmation of my participation and that my loans will be forgiven once the settlement is completed. If there is any way I can get this via email or a signed PDF document, my family and I will be truly grateful.

If you would like me to provide any documentation to assist you with this, please feel free to send me an email or you can call me at [redacted]. Anything I can provide to help you with this or with the case, please let me know.

Thank you,
Jimmy Chafloque

FSA Borrower Defense Application [redacted] ref 00Dt0Gyiq 500t0IsYp1 ref

From: Borrower Defense Customer Service (borrowerdefense@ed.gov)

To: [redacted]

Date: Wednesday, May 15, 2019, 01:17 PM PDT

Dear Mr./Ms. Chafloque:

We have received your application for borrower defense. Your application number is [redacted].

If you have chosen on your application to have your loans placed on forbearance or stop collection activity while your application is reviewed, you will be contacted by your loan servicer with further information.

You will be notified once a decision has been made on your application

Visit StudentAid.gov/borrower-defense to learn more. If you have questions, you may respond to this email or call our borrower defense hotline **(855) 279 6207** Representatives are available Monday through Friday from 8 00 a m to 8 00 p m Eastern time

Sincerely,
Borrower Defense Unit
Federal Student Aid
U.S. Department of Education

To respond to this email, please reply to this email thread without modifying the Subject line. That way, your response will automatically attach to your application.

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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Official Reporter, CSR No. 12219

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BY: **JESSE M. PANUCCIO, ATTORNEY AT LAW**

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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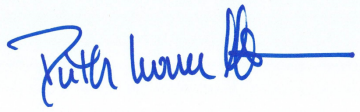
CERTIFICATE OF REPORTER

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

Pages 1 - 75

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 19-03674-WHA**
MIGUEL CARDONA, Secretary of the United States Department of Education, et al.,	)	
Defendants.	)	

San Francisco, California
Wednesday, November 9, 2022

TRANSCRIPT OF PROCEEDINGS

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Also Present: **Theresa Sweet**
Alicia Davis

Wednesday, November 9, 2022 **1:00 p.m.**

P R O C E E D I N G S

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

Counsel, please approach the podium and state your appearances for the record, beginning with counsel for plaintiffs.

MS. ELLIS: Good afternoon, Your Honor. I'm Rebecca Ellis from the Project On Predatory Student Lending for the plaintiffs. And with me is Eileen Connor, also from PPSL, Rebecca Eisenbrey from PPSL, and Joe Jaramillo from Housing and Economic Rights Advocates.

THE COURT: Great. Welcome to all of you.

And who else?

MR. MERRITT: Good afternoon, Your Honor. Charlie Merritt from the United States Department of Justice on behalf of the defendants. With me at counsel's table is Stuart Robinson.

THE COURT: Who is Stuart Robinson?

MR. ROBINSON: Good afternoon, Your Honor.

THE COURT: Okay. Good afternoon. Welcome to all of you.

Now, so everybody over there has been introduced? Anyone not yet introduced?

MS. ELLIS: Also at counsel table are two of the named plaintiffs, Theresa Sweet and Alicia Davis.

THE COURT: Welcome to you two. Thank you for coming.

Okay. Over here on this side of the room, who do we have?

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

THE COURT: Got it. Thank you.

MR. AKERMAN: Good afternoon, Your Honor. Alexander Akerman, also on behalf of the Chicago School.

THE COURT: Thank you.

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

THE COURT: Okay.

MR. PANUCCIO: Good afternoon, Your Honor. Jesse Panuccio on behalf of Everglades College. With me at counsel's table is Jason Hilborn.

THE COURT: Thank you.

MR. TOWNSEND: Good afternoon, Your Honor. My name is Lucas Townsend. I'm with Gibson Dunn. I represent Lincoln Educational Services Corporation. And with me at counsel's table is Katherine Worden.

THE COURT: Your name again?

MR. TOWNSEND: Lucas Townsend.

THE COURT: Okay. Got it.

So Katherine Worden is where?

(Ms. Worden raises her hand.)

THE COURT: Okay. Welcome to you too.

All right. Everyone over here been introduced?

Thank you.

When you're speaking at the lecturn, you can take your mask off so I can hear you better. I may even take mine off at times if I think I'm going to be speaking enough. But it's just so we can all hear you better.

We're here on a hearing on final approval of a class action settlement. And I think the first thing that is in order is for plaintiffs to summarize, in two minutes or less, what the settlement actually is.

And I want to acknowledge before you get started -- my apologies -- there are, I don't know, maybe 40 people back there -- not that many -- 30 people, I would say, in the gallery. It looks like they're waving their hands and wearing red shirts. So red, I guess, is the color for today's hearing.

Welcome to all of you. Thank you for coming.

And I understand there are people on the telephone.

THE CLERK: Your Honor, there are attendees that are listening.

THE COURT: One? Ten? How many?

THE CLERK: 1,000.

THE COURT: 1,000?

(Laughter.)

THE COURT: Are you making that number up?

THE CLERK: No.

THE COURT: Okay. 1,000 on the telephone. So, good for you, to get so many people.

Now, I don't know if I'm going to let any of you speak. I want to hear mainly from the lawyers. But I'm glad you're here, and thank you for coming.

All right. Now, please summarize the settlement.

MS. ELLIS: Thank you, Your Honor.

Under the settlement, about 75 percent of the class in this case will receive automatic cancellation of their federal student loans relating to their borrower defense applications, they'll receive refunds on any amounts they paid to the Department of Education on those loans, and they'll receive removal of the lines for those loans from their credit report. That's what we've been calling the Automatic Relief Group, and those are people whose borrower defense applications relate to one of the schools on Exhibit C to the settlement.

The other 25 percent of the class is in what we've been calling the Decision Group. Those are class members whose applications relate to other schools not on Exhibit C. And they will receive a decision on their borrower defense application within a set timeline that corresponds to how long their applications have been pending. So the people whose applications have been pending longest will receive a decision within six months; the next longest, within 12 months,

et cetera.

And their applications will be evaluated using a settlement-specific set of a streamlined procedure under which the Department will make certain presumptions; for instance, a presumption that they relied on any misrepresentations they described and a presumption that the allegations in the application are sufficient evidence without needing to look to extrinsic evidence.

And then, if you're in the Decision Group and your application is approved, you'll get full settlement relief, so the same as the Automatic Relief Group. If your application is not approved on that first pass, you'll get an opportunity to revise and resubmit your application after the Department sends a notice to explain what your application was missing, essentially why it didn't meet the standard. And if you do getting a denial even after revise and resubmit, you can challenge that denial in the district court.

The settlement, finally, contains certain provisions for what we've called post-class applicants. So the groups I've just described apply to people who met the class definition as of the date the settlement was signed, June 22nd, 2022. For people who've applied after that date and up until the date that the agreement receives final approval, if it does, they will have their applications decided within three years of the effective date of this settlement, 36 months. And that's

basically one step longer than the longest in the Decision Group. And if the Department doesn't meet that deadline, they'll receive full settlement relief.

THE COURT: On the Decision Group, did you say that's one quarter of the class?

MS. ELLIS: Approximately, yes, Your Honor.

THE COURT: Okay. All right. Now, on the people who are in the -- what'd you call the first group?

MS. ELLIS: The Automatic Relief Group.

THE COURT: -- in the Automatic Relief Group, will they receive some kind of written confirmation in the mail or by e-mail from the Government that says, "You have been discharged"?

The reason I ask is, I try to imagine, if I was one of those people out there and this gets approved, how will you tell the rest of the world that you no longer owe this money unless there's something in writing you can hold up? So what's going to happen on that front?

MS. ELLIS: Yes, Your Honor. They should receive notice that their loans will be discharged, and the actual discharge process --

THE COURT: No, not -- will be or has been?

MS. ELLIS: Well --

THE COURT: Those are different. "Has been" is what they need.

MS. ELLIS: I see. Yes.

I don't believe the settlement agreement specifies that they will receive written confirmation that the loans have been discharged. I think that's something --

THE COURT: Well, do you see my point, that if some bank or some collection agency or some processing agent comes to a class member and says, "Okay. You missed the last payment"; they say, "Well, wait a minute, wait a minute. I'm a member of the class"; and they say, "Well, too bad. We're foreclosing on your car," they take the car?

So don't those people need a statement saying, "This loan has been discharged in full"?

MS. ELLIS: I understand, Your Honor, yes.

What the Department has done in other discharges, for instance, the Corinthian Colleges general discharge that was announced earlier this year, is send people notice that their loans are going to be discharged. And I think the reason for that is because the actual behind-the-scenes discharge process can take some time.

My colleague from DOJ might be better able to address what the Department's able to do in terms of notice.

THE COURT: Well, maybe we'll get that comment in a minute.

There's nothing wrong with doing both.

MS. ELLIS: I agree.

THE COURT: Number one, "is going to be"; and number two, "has been."

I've got a different question for you, though. What are the tax implications for forgiveness of debt?

MS. ELLIS: For federal taxes, Your Honor, there is a provision that -- I want to say it was in the American Rescue Plan Act, although it may have been in one of the earlier coronavirus relief acts -- that says that student loan discharges won't be taxed through 2025. So any relief under the class settlement up until January 1st, 2026, is exempt from federal income taxes.

On the state level, I believe that's a state-by-state determination. My understanding is that it's a minority of states that tax student loan discharges.

But in terms of whether that raises a fairness issue, I think the important --

THE COURT: No, it does not raise a fairness issue.

MS. ELLIS: Okay.

THE COURT: I'm raising this so -- I would be worried if a class member went out and celebrated, assuming we approve this, and then only a couple of years later, find out that they're in trouble with, say, the Franchise Tax Board for not having reported the forgiveness.

And how are you going to solve -- you don't want to put those class members in that mess. So don't they need to be

advised in some way that maybe there are tax consequences?

MS. ELLIS: On our FAQ on our website right now, Your Honor, we do include an FAQ about taxation, where we suggest that they consult a tax expert in their state or a legal aid attorney who has some experience with taxes.

We're not tax attorneys. That's about the best we can do.

I don't know if there's something else you envisioned the Department might do.

THE COURT: Well, I don't know if that's -- I mean, that's what lawyers do, is they kick the can down the road and put a FAQ on the website. But I think maybe some kind of a better notice than that should be considered. I'm not requiring that. I'm not even sure yet whether to approve this, but that was a -- that was an issue.

All right. You did a great job summarizing it. Let me hear the Government's summary.

Before I let you go -- I'm sorry -- there's one -- I suspect there's some members of the press and maybe even members of the class that are here who could have confusion over one point. I think it's worth saying this.

As I understand this settlement, this settlement is independent and apart from the broader student loan forgiveness plan that President Biden has announced. This is separate from that. Am I right about that?

MS. ELLIS: Yes, that's correct, Your Honor.

THE COURT: So even if that plan -- and this one is under different statutory authority than the President Biden plan. Am I right about that?

MS. ELLIS: Yes.

THE COURT: All right. So even though this does involve a lot of money, $6 billion -- that's a huge amount -- it is separate from the $30 billion that President Biden is talking about; and this settlement does not turn one way or the other on what happens with the litigation involving President Biden's plan. Am I right on that?

MS. ELLIS: Yes, that's all correct.

THE COURT: All right. I want to get other views on that point from the intervenors too, but I -- that's the way I see it and I have been analyzing it.

All right. With that having been said, let's hear from the Government on -- I know you want the settlement, but what else would you like to say by way of setting the stage for the main issues we need to address today?

MR. MERRITT: Certainly, Your Honor.

I won't rehash the details of the settlement agreement itself. I would just, of course, add that we believe the settlement agreement should be approved under the standards set forth in Rule 23. We think that should be the Court's primary focus.

THE COURT: You're Charlie Merritt?

MR. MERRITT: Yes, Your Honor.

THE COURT: Right. Okay.

MR. MERRITT: I apologize.

THE COURT: Yes. Okay.

MR. MERRITT: Charlie Merritt for the United States.

The Court's primary focus should be on the factors set forth in Rule 23. The parties' briefing explains why those are met here.

The class responded favorably overall to the notice of preliminary approval. And we think that looking at the Rule 23(e) factors, the Hanlon Factors, everything the Court is to look at when approving a class action settlement justifies approval in this case.

I will address, because it's an issue Your Honor has raised and has been discussed in this case, the Government's authority to enter into the settlement agreement and carry out the obligations set forth for the Department of Education therein.

And just a starting point, we are not claiming unreviewable authority here because the settlement agreement has been effectuated pursuant to the Attorney General's settlement authority. We cited case law that says that settlement authority is presumptively unreviewable and that it -- but that it can be subject to challenge in limited circumstances, as the Ninth Circuit stated in the *Carpenter*

case; but that should be limited to allegations that the Agency exceeded its legal authority, acted unconstitutionally, or failed to follow its regulations.

And as we cite in the briefs, the Attorney General's plenary authority over settling cases involving the United States can be overcome only by a clear statutory directive saying that the actions set forth in the settlement agreement are not allowed.

So that is not the case here. There is clear statutory authority for the relief being provided in the settlement agreement, and that's set forth at 20 U.S.C. 1082(a)(6), which grants the Secretary the authority to compromise, waive, or release any right, claim, or demand, however acquired, in his administration of the federal student loan programs. That extends to waiving and releasing his right to collect repayment from federal student loan debts, including by discharging those loans, and to determine repayment obligations on the terms outlined according to the Secretary and as set forth in the settlement agreement here.

That has often been used to settle individual cases in litigation, as we noted in today's supplemental filing in response to the Friday order; but it has also been used, especially recently, to provide broader group discharges. And that is applicable here based on the determination of how to deal with a larger problem of a large number of pending

borrower defense applications, given the litigation context that we find ourselves in and the Government's assessment of litigation risk as to what would have happened had the case proceeded to judgment.

THE COURT: Let me ask you a question about that very point.

As of now, or as of your most recent information, how many evaluators or hearing officers, or whatever the right term is, are there in the BDU, the Borrower Defense Unit, at the Department of Education?

MR. MERRITT: I don't have that information available today, Your Honor.

THE COURT: Okay.

MR. MERRITT: I can tell you that the Department has -- this was a carefully negotiated settlement that took into account resource constraints at the Department and its best estimates based on its current review of the evidence before it and the nature of the group of pending applications.

The timeline set forth in this agreement and the procedures for accomplishing those timelines are something that the Department believes it can accomplish, and it is committed to allocating the necessary resources to providing the relief in the settlement if Your Honor approves it.

THE COURT: All right. But there's a big table with lots of lawyers. Maybe one of them can send an e-mail -- is your

client here, by the way, the Department of Education, somewhere out there?

MR. MERRITT: My client is not here, Your Honor, no.

THE COURT: Okay. Maybe somebody on your side could e-mail a representative of the Department of Education and find out, while this hearing is underway, how many lawyers, decision-makers, whatever their role is, are there in the BDU. I'm talking about the people who actually process the borrower defense claims.

MR. MERRITT: That would be in charge of reviewing claims according to the procedures set forth in the settlement agreement?

THE COURT: No, no.

MR. MERRITT: More generally?

THE COURT: I'm talking about before the settlement agreement. Let's say as of May 1 or as of June 1. So I want to know how many there were at that point.

MR. MERRITT: Prior to the settlement agreement being --

THE COURT: Yeah. I think it's in the neighborhood of eight. Somewhere I read eight, but that may be old information.

MR. MERRITT: I think there may be old information about that in the case. My understanding is there had been more hiring over time in that office. More than eight. I don't want to commit to a number --

THE COURT: Okay. Well, then --

MR. MERRITT: -- right here.

THE COURT: -- can you see if you can find out?

MR. MERRITT: We'll see what we can do.

THE COURT: All right. Thank you.

Okay. Did you finish your argument on the authority?

MR. MERRITT: I can be brief. I just had a couple other points.

I did just want to say, you know, acknowledge that the statutory authority that we cited to appears in Part B of the Higher Education Act, which is applicable specifically to FFEL loans.

But there's a separate provision of the Higher Education Act at 20 U.S.C. 1087e(a)(1) that provides that loans made to borrowers under the Direct Loan Program, Part D, shall have the same terms, conditions, and benefits and be available in the same amounts as loans made to borrowers under Part B, which addresses FFEL loans.

So under what is referred to as the parallel terms and conditions statute, the Secretary's authority, settlement and compromise authority, applies equally to direct loans as FFEL loans. That's a long-standing interpretation of the Secretary, as it stated in the preamble to the 2016 Borrower Defense Rule cited in our briefs, recognized by the D.D.C. decision in the ***Weingarten*** case. And, you know,

the Secretary's authority to waive or release the right to repayment is certainly a term, condition, or benefit of a direct loan.

THE COURT: All right.

MR. MERRITT: I think that's the main issue of the statutory authority.

Intervenors have raised other arguments that we don't believe are relevant to the Court's consideration of the final approval here.

THE COURT: I'm going to give you a --

MR. MERRITT: Happy to address them.

THE COURT: -- rebuttal -- I'll give you a rebuttal after we hear from the intervenors.

But before we go to the intervenors, I want to give Ms. Ellis a chance.

Did you want to have one of your plaintiffs, like Ms. Sweet, say anything briefly? Yes or no?

MS. ELLIS: Yes, Your Honor, we would.

THE COURT: Who is that going to be?

MS. ELLIS: That'll be --

MS. SWEET: That'll be me.

THE COURT: Come up here.

MS. ELLIS: -- Theresa Sweet, Your Honor.

THE COURT: Well, she should come up here and not speak from way back there.

Please come up here to the lecturn. Speak into the microphone so everyone can hear you. Welcome to the Court.

MS. SWEET: Thank you.

THE COURT: Tell us -- start with, what is your name?

MS. SWEET: My name is Theresa Sweet, and I'm a named plaintiff in this case.

THE COURT: Great. And would you adjust the mic so it's a little closer to your voice so that it picks your voice up.

All right. How long do you need?

MS. SWEET: Under two minutes.

THE COURT: Go ahead.

MS. SWEET: Okay. So in the nearly two decades since I graduated from the now-shuttered Brooks Institute, I have been fighting for some measure of justice --

THE COURT: Take three minutes, but go slower.

MS. SWEET: Okay.

(Laughter.)

MS. SWEET: Sorry. I rehearsed it to make sure it was short.

Okay. In the nearly two decades since I graduated from the now-shuttered Brooks Institute, I have been fighting for some measure of justice for the education fraud that I and thousands of others experienced.

For more than a decade, I approached hundreds of attorneys and had door after door slammed in my face. Many times these

attorneys told me that they knew I had a case but they were unwilling to go up against the massive corporation that owned my school.

When borrower defense was seemingly resurrected from the minutia of education regulations, I knew that it was probably our only chance to end this nightmare.

When it became clear that Betsy DeVos would be appointed Secretary of Education, that sense of hope immediately transformed into a sense of absolute dread. Sure enough, she surrounded herself with for-profit education cronies and did her level best to rob us of justice, going so far as to negotiate, in bad faith, a settlement in the case that bears my name. Seemingly without conscience, she denied us our right to due process.

Too often in this country regular people can only sit on the sidelines and watch in horror as our rights are trampled by corporations with big pockets and shifty government officials with dollar signs in their eyes. These companies, such as those trying to intervene in this settlement, aren't truly afraid for their rights. They're afraid that we, like my friends, finally got a seat at the table.

Approval of the settlement would serve to show that it is possible for people like us to fight back, that we can hold government agencies accountable, and that people are more important than greedy corporations.

So respectfully, I do ask and hope very much that you will approve the settlement.

THE COURT: What do you do for a living now?

MS. SWEET: Normally, I'm a nursing assistant, but I injured my back a couple of years ago and I've been off on workers' comp disability ever since.

THE COURT: What city do you live in?

MS. SWEET: Right now, I live in Oakland.

THE COURT: Okay. Well, thank you, Ms. Sweet, for that statement.

All right. To set the stage -- what we're about to do is hear from the intervenors -- I want to say a few things about the settlement which are really the obvious.

This is not your ordinary settlement of a class action. In the ordinary case, it's a different setup. The ordinary case may be, I have a job to make sure the class members are not cheated in the settlement.

And sometimes that actually does happen. There might be a class action settlement where you get 35 cents as a class member for a claim that's worth a thousand dollars but the lawyer gets a huge fee. Now, thankfully, that doesn't happen too often; but it happens often enough that the rules require me to make sure the settlement is fair to the class members and not just to the lawyer.

This case, there's no doubt that this is a good settlement

for the class. In fact, last time I referred to it as a grand slam home run. When the lawsuit started, it was just to get a hearing, and that would have been getting to first base. Well, the settlement provides not only do you get to first base, but for at least three-fourths of the class, you get a grand slam home run. Everybody gets knocked in. So there's no way that this is not good for the class. This is good for the class.

But a settlement has to be within the statutory authority of the agency. I'll give you an obvious example. Let's say that the FTC were to settle a lawsuit and give some company permission to sell a drug, a new pharmaceutical drug. Well, that might sound good and it might be a grand slam home run for the pharmaceutical company, but the FTC doesn't have that authority. That's a different agency. That's called the FDA, Food and Drug Administration. So there has to be authority for the agency to do what it's doing. It can't settle a case by giving away things it doesn't have the right to give away.

Now, in this case, the Government contends that there is authority to settle lawsuits and there is authority to cancel loans. The intervenors disagree with that and say: No, there is not authority.

Now, I want to give -- who's going to speak for the intervenors? One of you, or -- I hope it's just one of you.

MR. MORAN: I think we've tried to make sure we're not overlapping with one another, but if you allow it, we'd each

appreciate the opportunity.

THE COURT: Well, how much time do you need? Three minutes? The other side got three minutes. I'll give you time. You should have time to make your point. I've read all your briefs. But there's too many of you over there. I just don't have time to give everybody a long-winded presentation because I know what you're going to say anyway, but I want to give you a chance to say it. But then I've got to give the other side a rebuttal.

So please come forward and make your point. I do not want to hear any argument on mootness or standing. You're totally wrong on that, and that will not be argued. You're wasting your time on that. So "no" on that. But I will let you argue about statutory authority.

So whoever wants to speak to that, please go ahead.

MR. MORAN: Good afternoon, Your Honor. John Moran for American National University.

If I may briefly, before I get specifically to statutory authority, you know, the Court raised at the last preliminary approval hearing the question of why are we here. And, you know, I think the Court said: You're the luckiest guy in the room. You've already gotten the money, and you don't have to pay it back.

And so I'd just like to briefly address why the intervenor schools have good reason not to be as sanguine about their

position under the settlement as the Court.

This settlement is just one of several actions that the Department of Education is taking to target for-profit private institutions of higher education that make it harder, if not impossible, for them to stay open in some instances.

Under Secretary James Kvaal has publicly described this sector as not just a few bad apples but as a rotten orchard.

The Department is putting out new regulations, including brand-new borrower defense to repayment regulations, in recent weeks that make it easier to assert claims against schools while making it harder for schools to defend themselves.

And we have groups like the student -- or the Project On Predatory Student Lending, whose very name makes clear what they think about these institutions. And to be clear, they don't think that the predatory lending is perpetrated by the United States, who's the one that actually makes the loans, sets their terms and interest rates. They're leveling that accusation against the schools who accept students who come to them seeking an education and bring their Title IV money with them.

So I hope the Court will forgive the schools if we don't view it as we're the luckiest person in the room that the Department has pursued this settlement.

And I think the thing I'd like to focus on --

THE COURT: But you haven't made a single point yet about

authority. You're just making a political speech about how great the schools are without -- they have authority. They have cited authority to me to do this settlement. So why shouldn't I just say, "Fine, go ahead"?

Now, your brief makes a point that you think they don't have authority under the major questions rule in ***EPA vs. West Virginia***. I would be interested to hear that kind of an argument. That's something I'm interested in. But a political speech? No. I'm sorry. That doesn't cut mustard with me.

MR. MORAN: Your Honor, I apologize. I wasn't trying to waste the Court's time, but I think it frames why we're here. And we don't view it as a windfall for the schools.

So to address -- I'm happy to address the point about --

THE COURT: Please, go ahead. I'd like to hear about ***EPA vs. West Virginia***.

MR. MORAN: Yes. So under ***West Virginia vs. EPA***, the Supreme Court articulated the major questions doctrine, which is that the -- that when federal agencies attempt to acquire from themselves broad authority that has significant effects on the American economy based on vague, limited, or otherwise unclear statutory language, that the Court presumes that Congress did not intend to give them that authority.

And I think here, the most salient point is that this entire regime of not only having a borrower defense to repayment, but allowing the Department of Education to actually

adjudicate the claims and discharge it, hangs on one sentence in the Higher Education Act which gives the Secretary of Education the authority to promulgate by regulation what shall be a defense to repayment of a loan.

It says nothing about the Department receiving applications, adjudicating those applications, discharging loans en masse, let alone individually, other than the very specific context where, for example, before the Department can refer someone to the IRS for garnishment and collection to repay the loan, they have to consider whether or not they have a valid borrower defense to repayment.

So even before we get to the authority of the Department of Justice to compromise the claims, we have to recognize that this entire regime, to the extent it purportedly allows the Department of Education to adjudicate applications and forgive loans, rests on this single sentence that says that they can declare by regulation what defenses will be available.

And I think under ***West Virginia vs. EPA***, it's clear that you can't do that; that the Department cannot declare for itself that broad authority that has $6 billion of economic impact in this case, but certainly more if it were applied more broadly, based on a single sentence in the Higher Education Act.

THE COURT: Well, let me ask you a question about that.

In 2019, the Department -- this was back in the prior

administration. In 2019, the Department had a mass settlement covering 7,400 borrowers related to an institution called Dream Center Education. So under your argument, that was illegal?

MR. MORAN: Well, Your Honor, yes. Under that view, this entire regime, since 1995 when the Department promulgated these regulations, has been in excess of its statutory authority. But like a lot of things, this is the fraud that was boiled in the slow-burning pot.

We started in 1995 with the first set of borrower defense regulations that were rarely used and that provided that if a student borrower would have a claim against their school under state law, then they could -- then they would also have a defense to repayment of their federal student loans.

And until the 2016 rule in the second term of the Obama Administration, as others have acknowledged today, this was a largely dormant provision that was not viewed as a basis for the Department to adjudicate and grant debt relief to students who filed claims in front of --

THE COURT: Well, all right. Let's say that -- I've forgotten the number. I've forgotten how many students are involved in our case, but it's a lot. Is it 500,000? How many? Just give me --

MS. ELLIS: 260,000 in the class.

THE COURT: 260 in the class? Okay. So let's say -- that

means there are 260,000 applications pending.

All right. So let's say that instead of doing it on a mass basis, the Agency decided to adjudicate these on an individual basis.

So then let's say they get to the first case. And the first -- and then the first case, they're litigating it away in front of the -- whoever's in the Borrower Defense Unit; and the Government lawyer decides "Hey, you know what? It's just easier and better. We're going to lose this case. We're going to settle it." So they settle that one.

MR. MORAN: Well, Your Honor --

THE COURT: You say they can't even --

MR. MORAN: -- I defer to Mr. Merritt, but I believe the United States has expressly disclaimed the position that they're compromising the underlying borrower defense application.

Instead, they claim that they're compromising the procedural claims that were brought here in the *Sweet* litigation. And, again, he can correct me if he thinks I'm wrong, but that they've disavowed that they're actually compromising the underlying borrower defense claim.

THE COURT: Let's take it on those terms, then. That's all the better.

Let's say that they're in the middle of it and then the Government lawyer says, "You know, they've got all these

procedural rights. Let's just skip over that and give them the -- discharge the entire loan."

But it's just for one person, for one borrower. Are you saying that the Government could not do even that?

MR. MORAN: Well, Your Honor, again, there's a question about the scope of the authority, depending on what the context is. But I think one notable difference that that hypothetical highlights is that there are different sets of borrower defense rules that would apply to that procedure, depending on when the loan was taken out and what would govern the relief in this case.

And so the other aspect of the settlement that circumvents that is that for the Decision Group that we talked about a few minutes ago, either in the pre-settlement Decision Group, the Department and the plaintiffs have created their own new set of streamlined borrower defense rules that they're going to apply in lieu of the actual regulatory rules, and for the post-settlement Decision Group, they say that those will be adjudicated under the 2016 borrower defense regulations.

And you might ask: Well, why would they choose the 2016? Because there are actually now -- we now have four different sets of borrower defense regulations that exist. There was the 1995 regulations that were in place for a long time; there were the 2016 regulations that were implemented during the second term of the Obama Administration; there was the 2019 rule that

was implemented during the Trump Administration; and then there's -- just this past two weeks, there was the new 2022 Borrower Defense Rule.

And the reason that they picked the 2016 Borrower Defense Rule we think is clear, is because it makes it -- of the three that are not the brand-new one, it's the easiest to bring a claim and it provides the least process and rights for the schools that are involved. Because under the 2019 rules, the schools would get notice of the application; they would get an opportunity to review and comment on the information that was submitted about their alleged misconduct in conjunction with the application, and that would be formalized under those regulations.

And so when they -- you know, they didn't pick 2016 out of a hat. They said, we're effectively going to amend the regulations without going through the rulemaking process by saying, under the terms of this alleged compromise, that -- they're going to pick which regulations they want to apply.

Now, normally, the regulations apply to the loans that were issued in the years that those regulations were in effect. So the 2016 regulations started into effect in 2017. And so for loans that were issued between 2017 and the effective date of the 2019 rule, that's three years' worth of loans that would be governed by the 2016 rule, although now the new rule purports to spring it back into effect. But that is, you know,

likely to be challenged, and that will play out in the courts over time.

But they've taken what should be a rule that only governs applications that were filed in a three-year window and said we're just going to apply this to everything, again, because it sets the lowest threshold for what counts as a borrower defense claim and it sets the lowest threshold for the rights that are afforded to schools under the process.

And I don't think they've offered a satisfactory explanation as to how the right to compromise claims gives them the right to rewrite the regulations and pick and choose which regulations they're going to apply to adjudicate those applications.

And I guess the one last point, Your Honor, with your indulgence, that I would ask is that if the Court does -- we've talked a lot in the briefing about the declaration from Deputy Under Secretary Ben Miller, who made representations in the intervention stage about what the Department would or would not do vis-à-vis schools based on their inclusion on Exhibit C.

And so the one request I would make is that if the Court ultimately does decide, based on that declaration, that the schools don't have -- you know, that this will not affect the schools and so they shouldn't be, you know, complaining about that, that it incorporates those key terms into its findings of fact and conclusions of law in approving the settlement and not

just leave them buried in a declaration that's an attachment to the opposition --

THE COURT: What's the name --

MR. MORAN: -- to the motion to intervene.

THE COURT: What's the name of that person?

MR. MORAN: Ben Miller. The declaration is ECF Number 288-1. It's Exhibit E to the United States' opposition to our motion to intervene.

And I think there are four key paragraphs in that declaration that set out the arguments that the parties have relied on to oppose at least a good chunk of our position.

Paragraph 9, which says that (as read):

> "Providing a class member with Full Settlement Relief . . . does not constitute the granting or adjudication of a borrower defense pursuant to the Borrower Defense Regulations, and therefore provides no basis to the Department for initiating a borrower defense recoupment proceeding against any institution identified on Exhibit C to the Settlement . . . ."

Paragraph 11, which has two provisions (as read):

> "The fact of an institution's inclusion on Exhibit C . . . does not constitute evidence that can or will be considered by the Department in bringing any Subpart G Proceeding, including a borrower defense recoupment proceeding, against an

institution."

And then later in the same paragraph (as read):

". . . any institution on Exhibit C against whom the Department might bring a Subpart G Proceeding in the future would have all the due process rights that any institution would be entitled to under Subpart G . . . ."

Paragraph 13 (as read):

"The fact of an institution's inclusion on Exhibit C to the Settlement . . . does not constitute evidence that can or will be considered by the Department in making Program Findings or establishing Program Liabilities against an institution."

And paragraph 14 (as read):

"The fact of an institution's inclusion on Exhibit C will be used by the Department solely for purposes of effectuating its obligations under the Settlement Agreement to award Full Settlement Relief to certain class members. In any action or proceeding that the Department might take in the future against an institution . . . the fact that an institution is included on Exhibit C to the Settlement . . . does not itself provide any evidentiary support or basis for initiating any such action against any of the listed institutions. If

the Department were to initiate any such actions or proceedings . . . it will comply with all applicable regulations without any reliance on the fact of an institution's inclusion on Exhibit C and each institution would be afforded all due process and opportunities to defend itself to which it would otherwise be entitled in any such action or proceeding."

And so I think --

THE COURT: Wait, wait. Pause there.

Mr. Merritt, can the Court rely upon Mr. Miller's sworn statement, or are you going to backtrack?

MR. MERRITT: Yes, you can rely on the statement.

I think we would have to discuss and have something to say about whether that should be incorporated explicitly into the settlement agreement. But yes, it's a sworn statement of a --

THE COURT: Not into the settlement --

MR. MERRITT: -- government official.

THE COURT: -- agreement.

MR. MERRITT: I'm sorry?

THE COURT: He's saying into my order.

MR. MERRITT: Yeah. Sorry. Into your order.

THE COURT: Look, the Government has got to keep its word.

MR. MERRITT: I'm not --

THE COURT: You have to keep your word. You can't give me

a declaration for one -- at one early point and then wiggle off of it later on.

MR. MERRITT: I'm not trying to wiggle off, Your Honor. It's a sworn statement by the Department of Education. We stand by it.

THE COURT: That's what you need to say.

MR. MERRITT: It's in the record in this case.

THE COURT: Thank you. That's all you need to say.

All right. Can I let another intervenor speak?

MR. MORAN: Sure, Your Honor. Thank you for your time.

THE COURT: Anyone else?

MR. PANUCCIO: Good afternoon again, Your Honor. Jesse Panuccio for Everglades and Kaiser Universities --

THE COURT: Great.

MR. PANUCCIO: -- non-profit intervenors in this case.

THE COURT: Welcome. How can you help me?

MR. PANUCCIO: Thank you.

I want to make one pragmatic point, and then I want to try to address the authority issues that Your Honor is interested in.

The first pragmatic point I just want to make is, there are 150 schools on the Exhibit C list.

THE COURT: 151.

MR. PANUCCIO: 151. Well, they changed the list after the fact but --

THE COURT: Oh, they did? Okay.

MR. PANUCCIO: Yes. So I believe it might be --

THE COURT: Just 150.

MR. PANUCCIO: -- 150, 151, and that underscores some of our points.

But here, as intervenors -- and you gave plenty of time for schools to intervene. There are only four. So one prag- -- and we all have, we think, very serious objections, and those objections may play out over time if anyone wants to appeal.

But one pragmatic way for the Court to deal with this would simply be to carve these four schools out and ask the parties to agree. And that would mean no Exhibit C, no secondary path, no Path 3 with these post- -- these undefined post-class applicants, but simply say these four schools have raised significant objections.

If you want to move forward, one easy way is you can move forward with 146 other schools; and as for us, we will have the lawful process that is in regulations. Those claims can still be adjudicated. And that is all we've ever asked for. We just want the law to apply to us as it's written in the federal regulations.

So that's just one pragmatic point that I would ask the Court to consider.

THE COURT: I ask the audience. I know there are a

thousand people on the phone but they can't speak. Raise your hand if you went to one of these four schools.

You better read out who the four schools are. Tell us. They need to know who they are.

MR. PANUCCIO: I believe it's -- I represent Everglades University and Kaiser University.

American National University.

The -- I won't get the full -- Chicago School of Professional --

MR. GONSALVES: Psychology.

MR. PANUCCIO: -- Psychology.

And then Lincoln --

MR. TOWNSEND: Educational Services.

MR. PANUCCIO: -- Educational Services.

THE COURT: Anybody go to any of those four?

(No response.)

THE COURT: Okay. No one's raising their hand here, but I suspect on the telephone, there are some.

Have you totaled up how many people -- how many student loans there are for those four?

MR. PANUCCIO: We haven't, Your Honor.

As for my client, we haven't even received notice from the Department that there are BD applications. They haven't even followed their regulations with respect to our client and anyone in this class to this point. So it is impossible for us

to even know, which is another reason why we should not be included, because rights are being compromised the way things are happening. There's never even been proper notice to the institution under any of the regulations. And my point is just pragmatically, the Court can deal with this by keeping us out of it.

And all we're asking for is the law, Your Honor. We're not asking for anything different.

THE COURT: When a lawyer says "all we're asking for" --

MR. PANUCCIO: Well, but, truthfully, Your Honor, there are regulations.

THE COURT: -- it's usually a pretty big thing.

MR. PANUCCIO: We're not say- -- we're not saying that these claims shouldn't be processed in the normal course. And the Department has sworn, in the Cordray declaration, that they have restarted their process, that they have the resources to do it. This is all in their summary judgment papers, which were filed after the proposed settlement.

And all we want is that. We want the lawful BDR process to apply. We don't want this transmogrified different process that they have set out in a settlement agreement to apply because it's not the law.

And if I may, Your Honor, in terms of the objections, I know you don't want to hear about mootness, so I'll stand on our briefs on that, and on standing, although we think those

are very serious and the Court has to have subject-matter jurisdiction. And I'll just note one point on that.

The United States' current position before this Court is that the Court does not currently have subject-matter jurisdiction. That is the last filing it submitted. It has not changed its position. If it believes the settlement is fair and reasonable, it ought to be put to its paces on the Court's current subject-matter jurisdiction.

Also true, you didn't mention this so I don't know if the Court wants to hear about it, Your Honor, but class certification is very significant at this point. The Supreme Court has made clear, the Ninth Circuit has made clear that the class must be certifiable at all points of the litigation. And Your Honor's own order, when you certified the (b)(2) class, you were very careful, Your Honor, to point out why you were certifying a (b)(2) class and that that class definition would apply all the way through settlement.

There is no way the plaintiffs can maintain a (b)(2) class at this point with the settlement they are proposing. It is no longer --

THE COURT: Give me just one good reason.

MR. PANUCCIO: Well, one good reason is they cannot satisfy typicality and commonality under just Rule 23(a) at this point.

Now, let's just take, for example, what they call the

post-class applicants; we call it Path 3. Post-class applicants are not in Your Honor's definition of the class. This is a class that they made up for settlement purposes. These are people who had not filed BD applications until the day after they filed the settlement.

So they have an ever-expanding class that has never been reviewed by this Court for typicality or commonality or any of the other requirements. It is not in the Court's class definition. There is just no way --

THE COURT: What is the "it" that you're referring to that's not? Which group?

MR. PANUCCIO: This would be what they call post-class applicants.

So what they've said is: If you file -- from the day after we lodge the proposed settlement up until the day the Court provides final approval, if you file a borrower defense application, you will be subsumed within the settlement, even though none of those people were ever part of the class definition and cannot be, because the class definition was set, it was set for people who had filed claims up until the time Your Honor certified the class. And now they're making a new class.

So what are the problems with that? Well, one, the Court's never done the Rule 23 analysis. Two, there is no named plaintiff that represents that class by definition. All

of those people come after the named plaintiffs.

None of the named plaintiffs are similarly situated as those people because those are new -- remember what this case began as, Your Honor. This was a case challenging an alleged policy of delay and then later they said an alleged policy of form denials.

Mr. Cordray has put in a sworn declaration to this Court saying that those policies no longer exist. So the people who are applying, just by way of example, as post-class applicants cannot possibly be affected by the policies that no longer exist.

So that is just one example of how this case was about one thing when it started and, only upon the lodging of the settlement, became about something completely, completely different. I mean, it's worth Your Honor going back to their complaint.

THE COURT: I know what it says. It's to get a hearing.

MR. PANUCCIO: Yeah. I mean, it's --

THE COURT: To get a decision. It's to get a decision.

MR. PANUCCIO: It says more than that. They said -- this is what they said in paragraph 10 of their complaint, still operative (as read):

> "[Plaintiffs] do not ask this Court to adjudicate their borrower defenses. Nor do they ask this Court to dictate how the Department should

prioritize their pending borrower defenses. Their request is simple: They seek an order compelling the Department to start granting or denying . . . ."

The settlement does all of the things that they told this Court repeatedly in the complaint to get class certification, it does all of the things that they said they weren't asking the Court to do.

So the Court never engaged in a Rule 23 analysis about whether a class is a sufficient vehicle for dealing with all these things they've now put in the settlement. So we think the Rule 23 analysis is significantly important and must be conducted before the Court can approve this settlement.

In terms of authority --

THE COURT: Well, even for the -- you're saying that's true for even the decision class? The decision --

MR. PANUCCIO: Yeah.

THE COURT: Why would that be, though? Those class members wanted the Agency to hurry up and make up its mind one way or the other and wanted me to order them to do that. Okay. But instead, they have leaped over that and gone straight to grand slam home run. But why doesn't that give them even more relief? And how could that possibly not be certifiable?

MR. PANUCCIO: This goes back to the *Wal-Mart* case in the Supreme Court, Your Honor. (b)(2) is a very specific and narrow class certification provision. It has to be a single

policy that is being challenged that applies to the entire class, and the relief has to be dealt with by a single injunction that can solve everyone's problem, not multivariate relief.

And the very fact that they have to have three different classes that they've now made up for settlement purposes -- not the class the Court certified, but three new classes -- shows that there is no single injunction. They're asking for multivariate relief. And that multivariate relief is quite individualized, which a (b)(2) class cannot be seeking individualized relief.

So let's take what they call the Automatic -- I think the Automatic Relief class. We call it Pathway 1. So they've got 150, 151 schools on a list, and the Department says: We've made 150 or 151 individualized determinations about alleged wrongdoing by those schools.

That cannot possibly be the predicate for a (b)(2) class. That is individualized determinations. And so they need to show that they have plaintiffs that represent each of those schools.

And I think it's very significant that you asked, Your Honor, is there anyone even in the courtroom that, you know, is a class member who relates to any of these schools and no hands went up. They certainly don't have a named plaintiff that relates to any of these schools, Your Honor.

And so that's extremely significant that they cannot maintain the (b)(2) class. That's the only class that exists in this case.

THE COURT: Just on this point, my Deputy here, Clerk said that when I asked that question, no one in the room raised their hand, but six people raised their hands on the phone. I don't know how you do that on the phone, but there's a way to do that. And so six people raised their hands on the phone.

MR. PANUCCIO: And, Your Honor, a robust Rule 23 analysis, we would have to see who those people are.

We're all separately represented. These are all separate schools here. We're not a group. We just were grouped in by the Department together.

But a Rule 23 analysis would have to see who those people are. Do they have class representatives? Are their circumstances typical and common such that there could be class certification? None of that has been done. The only class certification analysis the Court did related to a very different case, not the case they are attempting to settle today.

THE COURT: All right. You're repeating yourself.

MR. PANUCCIO: Okay.

THE COURT: All right. Let me hear from another intervenor.

MR. PANUCCIO: Thank you, Your Honor.

THE COURT: Okay.

MR. TOWNSEND: Good afternoon, Your Honor. Lucas Townsend on behalf of intervenor Lincoln.

We agree with the points that have been made so far. I won't repeat them.

On the authority question, we're told that authority is rooted in 20 U.S.C. Section 1082(a)(6), the Secretary's authority to compromise litigation.

That authority can't be viewed without considering what is the claim that is being compromised here. The claim is a claim under 5 U.S.C. 706, Subsection 1, to compel agency action unlawfully withheld or unreasonably delayed.

This case was about getting a hearing. Getting a hearing is the home run. It isn't first base. It's the home run on that claim.

This settlement is a home run and a touchdown. It is something --

THE COURT: Well, I called it a grand slam.

MR. TOWNSEND: It is a grand --

THE COURT: You don't like my --

MR. TOWNSEND: -- slam and a touchdown and Super Bowl on top of it. It is settling something else than what is before the Court.

The borrower defense claims are before the Agency, before the Department of Education, in an administrative process that

the Department has exclusive jurisdiction over. They're not in this proceeding.

The claim that is in this proceeding before this Court is a claim for a hearing. And we're told that the parties are compromising that claim. A claim -- a compromise implies each party gives up something and the parties meet in the middle. This is far beyond what the plaintiffs could have obtained by litigating their claim successfully to a final judgment.

And the leading case on this question is *Norton v. Southern Utah Wilderness Alliance*, 542 U.S. 55-65, and here's the relevant quote (as read):

> ". . . when an agency is compelled by law to act within a certain time period, but the manner of its action is left to the agency's discretion, a court can compel the agency to act, but has no power to specify what the action must be."

This settlement determines what the action will be on hundreds of thousands of bor- --

THE COURT: But it's not the judge -- it's not the judge forcing that on the Agency. The Agency wants to do that. So the Agency has made that determination that you say is within the Agency's -- I agree with you. I couldn't -- if it went the original way, the most I could do would be to say: You've got to make a decision one way or the other.

And so now the Agency is saying: Okay. We're going to

make a decision, and we're giving -- we're giving up. They all win.

So why is that so out of line with what was requested in this case?

MR. TOWNSEND: Well, Your Honor, I would say two things.

Those claims are not in front of the Court. They are still in front of the Agency.

There is no example that we've been cited or that I'm aware of of an agency in court settling litigation, compromising litigation that includes hundreds of thousands of rights outside of court.

THE COURT: Well, no. The Corinthian -- I thought the Corinthian case just recently in our own Court was 560,000 borrowers and $5.8 billion. Same kind of thing, wasn't it?

MR. TOWNSEND: Well, I am not sure that that forgiveness was in court. But Corinthian no longer exists. There's no one to challenge the authority in that case. So I really can't -- I'm not in a position to defend that settlement. That was something that I think the Department did unilaterally in another case and it wasn't challenged.

And I would not cite that as authority for -- in fact, every one of the schools in the list that was submitted today in response is no longer in business. There's no one to challenge any of those. This is the first instance in which anyone is challenging this assertion of settlement authority,

and we're not cited any prior instance of this happening.

So it's settling things that -- claims that are not in court, claims that are committed to the Agency's exclusive jurisdiction.

In fact, this settlement is deciding issues, claims that hadn't even been asserted at the time that the settlement was filed in this Court in June. 179,000 post-class claims have been filed since then, and this settlement is asserting all of those rights.

Again, this settlement qualifies as a rule under the Administrative Procedure Act. A rule is defined as a statement of general or particular applicability that has future effect, 5 U.S.C. -- U.S.C. Section 551(4). And that's exactly what this settlement does. It has general effect because it applies to class members and non-class members and it applies well into the future.

And there is Ninth Circuit authority that says judicial acts in approving consent decrees and settlements can constitute rules.

THE COURT: Give me a decision that says that.

MR. TOWNSEND: *Conservation Northwest vs. Sherman*, 715 F.3d at page 1187. And the Ninth Circuit held that the settlement authority in that case does not authorize effectively creating a new substantive rule.

That's exactly what this settlement would do. It would

create a new framework applying into the future, binding the Secretary in the future, governing claims that hadn't been filed at the time the settlement was announced. It's a rule. It has to be -- it has to comply with the Administrative Procedure Act. And moreover, it can't -- a settlement can't violate other substantive law.

There's no authority under the Higher Education Act or the Department's own rules, legislative rules, passed -- enact- -- or promulgated through notice and comment rulemaking for granting borrower defense claims without any regard to the merits of those claims. But that is exactly what this settlement would do.

So it is violating the Agency's own regulations, which have the force and effect of law. So --

THE COURT: But it would only be binding on the Agency as to those people who are members of the class. It would not be binding on even you four. You're recoupment rights are fully preserved. And any other class member would not -- not class member, but any other future borrower or past borrower would not get the -- have any entitlement to have the benefit of this settlement. That's the way I see it.

So why is this a -- why does this extend beyond the four corners of the class such that notice and comment would be required?

MR. TOWNSEND: Well, the first point I would make is that

the judgment would cover members, individuals who are not members of the class, all of the post-class applicants, 179,000, we're told, as of late September when the parties filed their final motion. So it does bind individuals outside of the class.

But we do also believe -- we're very concerned that being on List C, Schedule C, would have an effect on schools going forward. The Agency has to have consistent adjudicative processes. Future borrower defense claims might be filed after a final judgment. What justification is the Agency going to give for denying borrower defense claims filed by any person who attended a school on Schedule C after the judgment but automatically granting all of them before the judgment?

It does have an effect on agency decision-making processes. It would be an unfair process. And the decision-maker is not an ALJ. It's not a judge. It's not someone who's neutral. It is someone who works for the Secretary, the Secretary who is in court telling this Court that there is a list of presumptive wrongdoers. How can schools possibly get a fair shake in such a process?

So a settlement of this nature, the settlement that the parties are asking for, does have an effect on outside parties and non-class members.

THE COURT: All right. Any other intervenor wish to be heard?

It's your choice, but you can take your mask off, if you wish.

MR. GONSALVES: I would love to.

THE COURT: There you go.

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

My client is here in the courtroom today.

THE COURT: Raise your hand, please.

(A hand is raised.)

THE COURT: Okay. Welcome.

MR. GONSALVES: It's the general counsel for the Chicago School. It's the largest non-profit school of professional psychology in the country.

Judge, I want to touch on a couple of things with respect to the authority.

The Department points to 1082(a)(6) as their authority to enter into this $6 billion settlement. They would have you believe that that provision, read in isolation, gives the Department the authority to settle any claim for any reason for any amount so long as the Department sees fit. But that provision cannot be read or looked at in isolation. It has to be read in context with the other regulations.

So, for example, Judge, 1082 -- 20 U.S.C. 1082(b) imposes a $1 million cap on the Secretary's authority to settle litigation unless she gets approval from the Attorney General

of the United States. That cap that is in 1082(b) is also listed in 34 CFR 30.70(e)(1), where it again describes the cap on her authority to settle claims absent approval from the Attorney General of the United States.

THE COURT: Do they have that approval?

MR. GONSALVES: Well, we don't know, Judge.

Now, Mr. Merritt may step up and say: Yes, we do have that approval.

The plaintiffs may step up and say: You know, that provision doesn't apply to this particular settlement.

I'm aware of a letter from plaintiffs' counsel to Senator Elizabeth Warren, dated September 14th, 2020, advocating on behalf of mass student debt relief, where she discusses this $1 million cap on the Secretary's authority. And I have a copy of that letter if you'd like to see it, Your Honor.

The point here, Judge, is not whether they have the authority or whether it applies. It's that 1082(a)(6) cannot be looked at in a vacuum. It must be read in conjunction with the other regulations and the other statutes, including the borrower defense regulations.

It is our position that any settlement cannot exceed what those regulations provide for.

By way of example, Judge, the borrower defense regulations require an offset of any amount discharged through those regulations; and that offset must be reduced -- or any relief

must be reduced by the amount of any refund, reimbursement, indemnification, restitution, compensatory damages, settlement, debt forgiveness, et cetera.

This settlement that's before Your Honor doesn't provide for any sort of offset to those class members who have already received relief from other class action settlements or other federal government regulatory investigations, such as settlements with the FTC.

So those class members who have already received full or partial relief are going to have a great day, an even better day than a grand slam because they are going to be unjustly enriched because they've already had their compensation -- or partial compensation from those other settlements.

And this settlement agreement provides no mechanism --

THE COURT: Just give me a hypothetical concrete example of how somebody could be benefited like that. I just am not following your point about offsets.

MR. GONSALVES: So there is -- if -- there have been consumer class actions brought against some schools, such as my client's school -- okay? -- where there was a class action filed and it was settled, and each one of those students who were in that class received $90,000.

If they did not use that money to repay their loans and they have filed a borrower defense application -- and of the 37 that we are aware of that's pending against my client, four of

them were in that prior class, that *Truitt* class -- if they didn't use that money to repay their loans and filed a borrower defense application, like we know four did, they're going to get an extra benefit because they got the 90,000, plus now they're going to get all of their loans discharged. And there's no mechanism in the settlement agreement to account for that.

THE COURT: Okay.

MR. GONSALVES: The other point that I'd like to make, Your Honor, is with respect to the filing from the Department today about when has 1082(a)(6) been used as authority to discharge group debt, group loans.

And they have a list of six or seven cases here, but when you go back and look at the press releases that the Department released about those discharges, the press release says those were done pursuant to the borrower defense regulations, not pursuant to 1082(a)(6).

So, for example, one of them that's listed here is the Marinello Schools of Beauty, April 28th, 2022, 28,000 people.

Give me one minute, Judge.

(Pause in proceedings.)

MR. GONSALVES: Well, let me skip that one.

Let me go to the Minnesota School of Business, Judge, where that one was June 15th. And the press release says, with respect to the Minnesota School and Westwood -- both of them

are on this list -- (as read):

"Borrowers will receive $415 million in borrower defense to repayment discharges."

That's a different provision, Judge. Those are the borrower defense regulations. Those are not under 1082(a)(6).

And so I'm not sure -- and we can look at these other press releases. Marinello School of Beauty, that $238 million group discharge, that was based on borrower defense findings.

For Corinthian --

THE COURT: But does it refer in any way to any other statutory authority, those press releases?

MR. GONSALVES: The only thing these press releases -- and for each one of these schools where there was a press release, the only thing they refer to is the borrower defense regulations. They don't refer to any other authority.

Now, we don't know what --

THE COURT: How about the settlements in court? Did they refer to -- weren't they settlements in court, or not?

MR. GONSALVES: These were not, Judge.

THE COURT: Okay. These were --

MR. GONSALVES: They have one listed here, the *Weingarten* case; but these other cases were instances in which the Department had received large volumes of borrower defense applications. Some of these were for closed schools.

Corinthian, for example, there were discharges pursuant to

the borrower defense regulations; and then there may have been some of them that were discharged even though they had not submitted a borrower defense.

But we -- under your order, we're not allowed discovery. We don't know what the basis was for those settlements, and we only got this today.

I can only tell you what I was able to find off of the press releases that all of us have been following for many years of watching these regulations play out.

THE COURT: Okay. Thank you.

MR. GONSALVES: The last -- one last point, Judge.

THE COURT: All right.

MR. GONSALVES: And that is the question of whether 1082(a)(6) applies to the direct loans. This is referenced in the briefing.

1086 -- I'm sorry. 1082(a)(6) applies to FFEL. The Department says it also applies to direct loans. I don't know that that is a settled proposition, and I think it's something that the Court should take a hard look at.

The Government points to 20 U.S.C. 1087e(a)(1) as the basis, which says they have the same terms, conditions, and benefits as FFEL loans. But those are very different than functions, powers, and duties that are provided for under 1082(a)(6).

I'd like to draw the Court's attention to *Pennsylvania*

Higher Education Assistance vs. Perez, 416 F.Supp. 3d 75, where the Court concludes there is no language incorporating the Secretary's general powers from Part B into Part D.

The statute is very specific about functions, powers, and duties when it comes to debt cancellation, Judge, and we're not quite sure that *Weingarten*, the case that has sort of, in dicta, that they apply to both, answers the Court's question as to whether 1082(a)(6) applies to both FFEL and direct loans.

THE COURT: Thank you.

Let me ask my reporter. Are you doing okay? Can you keep going?

THE OFFICIAL REPORTER: Yes.

THE COURT: All right. Mr. Merritt, what do you say to the $1 million cap and the Attorney General?

MR. MERRITT: I think, like a lot of things we just heard, that is an inaccurate statement of the statute.

20 U.S.C. 1082(b) requires settlements of over a million dollars to be referred to the Attorney General for his review, but not approved specifically. There's nothing in the statute that says it has to be approved. It just has to be reviewed by the Attorney General.

Of course here, the Attorney General, through his delegated officials at the Department of Justice, has approved the settlement agreement; so there's no issue there.

I want to address a few points about the statutory

authority because we heard a few things about what it is and what it does.

So 20 U.S.C. 1082(a)(6) makes no reference to litigation. It's not specific to litigation. It just discusses the Department's ability to waive or right or -- waive, release, or compromise loan debts that are owed to it.

So what we're talking about here is a settlement agreement. And what the Department is doing pursuant to that settlement agreement is discharging loans or setting up streamlined procedures for the review of borrower defense applications, ultimately potentially resulting in the discharge of loans or not, however that process goes.

But it's all specific -- none of that is specific to a case having to be in litigation. So I would just stress that when the -- in most of the cases that we cited in today's filing, they did not involve cases in litigation.

You referenced Corinthian. There is a case with Judge Kim involving Corinthian, but that discharge that happened earlier this year was not through the litigation or specific to that litigation.

So this authority is foundational to the Secretary's ability to administer the student loans and is not specific to litigation, though litigation can obviously influence the Secretary's judgment about the benefits, the drawbacks of a particular exercise of the authority, as it has here.

You know, there's been a lot of talk today about how the -- what the case was originally set out to do and how it was about just 706(1) and getting decisions quickly.

After discovery and after the prior rejection of the settlement agreement, there were new claims added to that that attacked really all aspects of the Department's process for adjudicating borrower defense claims and challenged the substance and content of denial letters.

So in determining whether to resolve this case and provide for the discharges that the settlement agreement provides for, there was an assessment -- you know, litigation risk assessment of what was likely to happen if the case proceeded to judgment. And, obviously, that would be up to the Court. But there was more to it than just a request to provide timelines for decisions, implicating the procedures the Department had in place to review claims, implicating what the denial notices would say.

THE COURT: What about the post-settlement class? The class that I certified obviously didn't include them. So do I need to go through a Rule 23 process?

MR. MERRITT: Your Honor, I think this issue is mostly best addressed to plaintiffs' counsel.

But I will just note that the class was not certi- -- was not closed as of the date of your certification order. The class was defined as anyone who had filed a borrower defense

application; so it was, by definition, open-ended.

And the parties, as part of their settlement negotiations, had to -- you know, have, in the interest of efficiency and providing known timelines to the Department to carry out its obligations, decided a date to close the class. But by definition, the class was defined in an open-ended way.

And, of course, we opposed class certification in this case and don't need to get into, you know, all of our views on that. But -- and, again, I think those can be presented by plaintiff. But that is an important way of -- point to make about what the actual class definition is here.

I did just want to make a couple other points.

THE COURT: Yeah, go ahead, but I've got some -- I've got one or two other questions for you. Please, go ahead with your list.

MR. MERRITT: Okay. On the issue of double recovery or class members getting a windfall in some way, in our filing that we filed today in answer to the Court's third question having to do with the separate loan forgiveness plan recently announced by the President, there are specific federal statutes and regulations set forth that make clear that a borrower cannot recover -- or that any settlement relief in this case or any relief that the borrower receives from the Department cannot exceed the combined amount federal student loan debt owed to and collected by the Secretary; so, essentially, more

than the original disbursement of the loan.

THE COURT: Well, but what do you say to the different hypothetical of these students who each got $90,000 in a prior settlement directly against the school, and how is that 90,000 going to be factored in? Because we don't know how the student -- the student may not have given that money to the bank.

MR. MERRITT: Those are different things; right? I mean, all the Department can do is discharge outstanding loan debt the Department holds or provide refunds for amounts previously collected, and there is no chance that there will be kind of windfall recovery within that context.

You know, we have no way of knowing what recoveries might have been made in other contexts, and I don't think that's relevant to Your Honor's consideration here.

Just on the point of the list that was filed today about examples of group discharges, you know, the Department of Education doesn't make policy through press releases. That's not official government documents as to, like, the source of the authority for any of those particular discharges.

What you have in front of you is our, you know, court filing today where we stated what the source of authority was for each of those discharges, and it was the settlement and compromise authority.

It shouldn't be surprising, necessarily, that authority

isn't always cited. It's a foundational authority the Department has to administer debts, to release debts, to not always require repayment. It's not, as we noted, not necessarily always citing it or tracking it. But, you know, the Court filing here should control over a press release.

A quick note about the *Perez* case from the District of Connecticut having -- that was raised on the issue of whether the 1082(a)(6) authority applies to direct loans. The Court in that case made clear that it was addressing arguments that were raised in a footnote, and just barely. The Court said that. And specifically what it was talking about was the Secretary's authority to sue and be sued.

So we don't agree with that decision. But whether the Secretary can sue or be sued in district court is different than the Secretary's authority to waive, compromise, or release loan -- amounts of loans that are owed to the Secretary, which clearly is a condition, term, or benefit of the underlying loan.

I'll make just a couple -- if Your Honor has questions, I was just going to address a quick rebuttal to the major questions doctrine issue.

THE COURT: Please, go ahead.

MR. MERRITT: So, again, we need to focus on the correct statute here. There's reference made to the statute governing borrower defense and what that says and, you know, statements

about the settlement and compromise authority only applying to litigation.

But what we have in front of us is 20 U.S.C. 1082(a)(6), the settlement and compromise authority which clearly, by its text, authorizes the relief provided for in the settlement agreement. The major questions doctrine is a departure from normal principles of statutory interpretation. It tells -- it's reserved for extraordinary cases because it tells a court to not give effect to the clear statutory language.

This is not that kind of case. We are not dealing with a novel reading of a long-standing statute for an unexpected purpose. Again, we're talking about the Secretary of Education administering and determining repayment obligations for student loans that the Secretary, for the most part, holds and that are owed to the Secretary.

This is not the kind of case involving regulation of private parties or broad swaths of the economy like some of the times that the major questions doctrine has been invoked, recently, in the ***West Virginia*** case that involved an EPA rule applying to private power plants, certain types of emitters.

There was recently the case in the OSHA vaccine-or-test case where it involved an agency rule requiring -- extending into the employer employment relationship, where employers were requiring their employees -- or, sorry -- the rule required employers to require their employees to either vaccinate

against COVID-19 or test, or the *Alabama Association of Realtors* case which involved restrictions on private landlords' ability to evict tenants.

Nothing like that is at issue here. It's a well-established statutory authority that the Secretary has often invoked and for clear statutory purposes and consistent with general powers under the HEA pursuant to which there are many options for the Secretary to reduce or eliminate student repayment obligations, including putting borrowers into deferment, forbearance, income-driven repayment plans, and providing loan forgiveness under multiple types -- multiple different statutory sources of authority.

So bottom line, there's no reason for Your Honor to apply any skepticism to the actual text of the statute here; and even if you did, the text is clear.

THE COURT: What do you say to the point that this should have -- this broad policy decision, even if it's within the Agency's authority, should -- because it should have gone through notice and comment?

MR. MERRITT: Well, a couple things.

The settlement agreement itself, there's no authority suggesting that a settlement agreement itself should have to go through notice and comment.

If there are rare cases -- if the settlement agreement itself were to provide, for example, for the Department to

actually promulgate a rule that had application outside of this case to parties who are not class members or post-class applicants to find in a certain way here, as was the issue in the *Sherman* case that was cited, that just simply said parties cannot do a settlement agreement, agree to actually amend regulations. That's not what's at issue here, Your Honor.

The Department recently did go through the process of amending its borrower defense regulations. A new rule was promulgated last week. That'll be applied -- or, sorry -- on November 1st. That will be applied to anyone who is not in the settlement agreement.

And what happens through the settlement agreement has no impact or effect on any parties, any individuals who are not parties to this case. It won't determine, you know, rules or precedents the Department would have to follow outside of this context.

So it's certainly not the type of situation where an agency was actually trying to promulgate a rule. We know that when the Department promulgates borrower defense rules, it goes through notice and comment.

THE COURT: All right. Thank you.

Did the plaintiffs wish to say anything more?

MS. ELLIS: Yes, Your Honor.

Your Honor, if I may, I'd like to begin by talking about what a borrower defense is, because the intervenors threw a lot

of things out there about what is the claim, what claims are being settled and by who, and I'm hoping to provide a bit of clarity on that.

The Higher Education Act specifically provides that a federal student loan borrower can assert a defense to repayment of their federal student loans based on the misconduct of their school. The borrower defense rules implement this statutory authority that the Higher Education Act gives to the Secretary.

They essentially -- what the borrower defense rules essentially do is they say: Here is how you assert your defense to repayment. You do it by filling out this application. The application will be reviewed, et cetera.

And --

THE COURT: Do those borrower defense rules -- first, they're legislative regulations -- am I correct on that?

MS. ELLIS: Yes. They go through --

THE COURT: -- as opposed to interpretive?

MS. ELLIS: -- notice and comment.

THE COURT: All right. So they're not interpretive; they're legislative. Correct?

MS. ELLIS: Yes.

THE COURT: All right. So then do those legislative rules say what the criteria will be for invalidating or forgiving a loan, discharging it?

MS. ELLIS: They do set out certain criteria, and this has

varied across the different versions of the rule. But the 2016, 2019, and 2022 rules, for instance, say, you know, here are examples of what is a misrepresentation that could give rise to a borrower defense claim.

There is other subregulatory guidance that borrower defense adjudicators use. We know this because of discovery in this case, and much of it we challenged as violating the APA. We don't know exactly what of that is still in place right now.

But the basics for how you assert your defense to repayment through a borrower defense application are addressed in these legislative rules.

And when the plaintiffs filed this lawsuit in 2019, their claim under the Administrative Procedure Act was that the Department had not lawfully handled their assertion of a defense to repayment because the Department was simply not making decisions, and the plaintiffs were owed a decision in a reasonable period of time.

Now that, obviously, evolved. We learned more about what was going on behind the scenes. And so in our supplemental complaint, we further alleged that the defenses to repayment had not been handled properly because of the presumption of denial policy, as we called it, which led to the form denial notices.

So what's happening now in the settlement agreement is that the Secretary is exercising his authority under

Section 1082(a)(6) to compromise the claims against -- to compromise the defense to repayment claims that the class has. He's doing that by, for many people, canceling their loans and, for other people, providing them with this streamlined procedure and specific timelines.

And by using his authority to provide redress to the plaintiffs, that settles our APA claims through this negotiated settlement with Ed's lawyers at the Department of Justice.

THE COURT: All right. Did anyone figure out how many people are in the BDU unit while we've been here?

Mr. Merritt, did you?

MR. MERRITT: Yes.

THE COURT: What's the answer?

MR. MERRITT: The point I made that I forgot to tell you. 33 total employees as of May/June 2022. That includes 28 initial reviewers of claims and five supervisors.

I'm told that there have been additional hires since then that we can track numbers on, but as of the time you asked for, those are the numbers.

THE COURT: What was the total again? 33?

MR. MERRITT: 33, yes.

THE COURT: Okay. Thank you. Good.

All right. Please continue.

MS. ELLIS: Thank you, Your Honor.

I'll also continue by noting that this is not the first

case to address the Secretary's settlement and compromise authority. That was addressed in the *Weingarten v. DeVos* case, which was listed in the filing this morning.

That was a case in sort of the opposite posture, where the plaintiffs had -- had tried to compel the Secretary to use the settlement and compromise authority to discharge their debts. This was a case that had to do with the Public Service Loan Forgiveness program.

And what the District of Columbia found in the *Weingarten* case is that matters concerning the Secretary's settlement and compromise authority are discretionary. The Secretary's decision not to exercise such authority or to exercise it in a particular way is committed to her absolute discretion.

And so that is just some background. I believe it was counsel for Lincoln who said this hasn't been addressed, and it has.

Counsel for the Chicago School also noted that we should read this authority in conjunction with other authorities. And some of the important authorities in that respect are in 34 CFR 30.70, in Subsection (e)(1).

Regulations implementing, in part, the settlement and compromise authority specifically state that this encompasses debt arising under the FFEL program authorized under Title IV, Part B, of the HEA or the William D. Ford Federal Direct Loan Program authorized under Title IV, Part D, of the HEA.

So that's additional authority, first of all, for the point that the authority applies equally to direct and to FFEL loans.

Then, furthermore, in this 34 CFR 30.70(e)(1), it states that the Secretary can look to 31 CFR, Part 902 or 903, in deciding whether to compromise a federal student loan.

And Section 902 enumerates some potential bases for compromise, one of which is significant doubt concerning the Government's ability to prove its case in court.

And we would submit that the class members' assertion of their defenses to repayment does raise a significant doubt about whether the Department could overcome that defense against the validity of the loan in any future collection proceeding. And that does provide a strong reason to compromise the debt.

THE COURT: All right. Anything more?

MS. ELLIS: Excuse me?

THE COURT: I'll let you make one more point. Then we're going to bring it to a close.

MS. ELLIS: Yes, Your Honor.

I want to address counsel for Everglade's point about class certification under Rule 23(b).

And the fact that some class members will receive monetary relief as part of the settlement does not convert this into a damages action. It's not a case as in *Wal-Mart v. Dukes* where

you have individualized damages. A defense to repayment is not a claim for damages. It is a claim that you do not have to repay your loan.

And in terms of the relief that the settlement agreement provides, it is, in its essence, injunctive relief. What it does is tell the Department: You have to resolve these people's defenses to repayment within a set timeline.

And then the details of it aren't creating separate subclasses or anything like that. It's simply going through the steps of how is the Government going to satisfy this obligation to resolve all of the backlog of BD claims by a date certain.

And as to the post-class applicants, I would just build slightly on what Mr. Merritt said, which is that if we had not, in the settlement, agreed to close the class as of the execution date, everyone who is called a post-class applicant in the settlement would be a class member.

And so even though we are not including them in the settlement class, even though we are not actually settling any claims that they may have, we wanted to include provisions that would make sure that they're treated fairly and that there wasn't a recurrence of the problems --

THE COURT: What relief will the post-settlement individuals get?

MS. ELLIS: They have a guarantee that their claims will

be decided within 36 months -- sorry -- that their BD applications will be decided within 36 months of the effective date of the settlement.

And if the Department doesn't meet that deadline, they'll get settlement relief. And that's all.

The post-class doesn't have the streamlined procedures. Exhibit C does not apply to the post-class applicants. They get a firm timeline.

THE COURT: Okay. Thank you very much.

All right. We've been going an hour and 35 minutes.

This is a very interesting problem. I'm going to bring it to a close unless there's some procedural, something like -- I don't know.

Is there any procedural point anyone wants to bring up that can be said in one minute or less?

(No response.)

THE COURT: No.

Yes? Okay.

MR. TOWNSEND: Your Honor, I would just point out -- Lucas Townsend for Lincoln -- that we just heard that this was actually an action for an injunction -- excuse me -- an injunction, that a borrower defense claim is an injunctive claim.

20 U.S.C. 1082(a)(2) bars injunctions against the Secretary. This is relief that could not have been

obtained through litigating these claims to a final judgment.

THE COURT: Okay.

MS. ELLIS: Your Honor, may I?

THE COURT: Okay. You get 15 seconds.

MS. ELLIS: First, I -- well, first of all, I don't believe that's a procedural point in the sense Your Honor meant.

THE COURT: No, it's not. But go ahead. If you want to argue about it, I'll give you equal time.

MS. ELLIS: The question of the anti-injunction provision was one that was actively litigated in this case in both the first and second rounds of summary judgment briefing.

Plaintiffs argued why the anti-injunction provision does not bar these claims. So it's not as open and shut of a situation.

We believe that the relief ultimately would have been permitted by the HEA and would have been appropriate.

THE COURT: All right. Time to move on.

So you members of the audience, again, I thank you for your attendance, and those people on the phone.

Just so you'll know what the score is, I am not making a decision right now. I need to study this a bit. And in about a few days to a week, I will get an order out that will be in writing that will explain who wins and who loses.

And so you have to stay tuned is, I guess, what I'm trying

to say.

I want to thank all of the lawyers on both sides for the excellent presentations.

Okay. We're in recess.

THE CLERK: Court is adjourned.

(Proceedings adjourned at 2:39 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: Friday, November 11, 2022

Ana M. Dub, CSR No. 7445, RDR, RMR, CRR, CCRR, CRG, CCG
Official United States Reporter

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Attorneys for Intervenor Lincoln Educational Services Corporation

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

THERESA SWEET, et al.,

Plaintiffs,

v.

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

Defendants.

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

DECLARATION OF LUCAS C. TOWNSEND IN SUPPORT OF INTERVENORS' JOINT MOTION FOR STAY PENDING APPEAL

Date: February 23, 2023
Time: 8:00 a.m.
Room: 12, 19th Floor
Judge: Honorable William Alsup

(Class Action)

(Administrative Procedure Act Case)

I, Lucas C. Townsend, declare as follows:

1. I am an attorney duly licensed by the Bar of the District of Columbia and admitted pro hac vice to practice before this Court. I am a partner of the law firm Gibson, Dunn & Crutcher LLP ("Gibson Dunn"), and I am one of the attorneys representing Lincoln Educational Services Corporation ("Lincoln"), an intervenor in the above-captioned action. I am competent to testify to the matters set forth in this declaration.

2. Attached hereto as **Exhibit 1** is a true and correct copy of *A Blank Check: U.S. Department of Education Renews Contracts with Troubled For-Profit Colleges*, NATIONAL STUDENT LEGAL DEFENSE NETWORK (Nov. 2022), https://www.defendstudents.org/news/body/NSLDN_BRIEF_Failing-to-Hold-Wrongdoers-Accountable_FINAL.pdf.

3. Attached hereto as **Exhibit 2** is a true and correct copy of Natalie Schwartz, *Education Department Shouldn't Have OK'd Federal Aid for 5 For-Profits on Sweet v. Cardona List, Advocacy Group Says*, HIGHER ED DIVE (Nov. 2, 2022), https://www.highereddive.com/news/education-department-financial-aid-for-profits-sweet-cardona-lincoln-tech-lajames-international/637247.

I declare under the penalty of perjury under the laws of the United States that these facts are true and correct. This Declaration is executed this 13th day of January, 2023 in Washington, D.C.

Lucas C. Townsend

EXHIBIT 1

STUDENT DEFENSE
NATIONAL STUDENT LEGAL DEFENSE NETWORK

1701 Rhode Island Ave NW, Suite 600
Washington, D.C., 20036
www.defendstudents.org

November 2022

A Blank Check

U.S. Department of Education Renews Contracts with Troubled For-Profit Colleges

A new Student Defense analysis reveals that the U.S. Department of Education—through both decisions and inaction—continues to allow predatory institutions to scam students and taxpayers with impunity and without rebuke. This analysis comes nearly two years after Student Defense called on the Biden Administration to use civil law enforcement authorities to better protect student loan borrowers.

Although the Department has made substantial strides in providing debt relief to defrauded borrowers, it has largely failed to ensure that students are protected—**before enrolling**—from fraud and abuse. Not only does the Department continue to fight efforts to immediately restore the Obama Administration's "Gainful Employment" rule, designed to ensure that students can only use taxpayer funded loans and grants to finance higher education that provides economic value, but they have delayed publishing their own proposals, such that no new rule can take effect until July 2024.

And while the Department repeatedly touts how it has reconstituted the Office of Federal Student Aid (FSA) Enforcement Unit, established in 2016 and gutted during the Trump Administration, that Office has failed to show tangible results. FSA has not announced a single termination, suspension or limitation enforcement action against an institution participating in Title IV Federal Student Aid Programs since the Biden Administration took office. Nor has the Department announced any fines against schools for any wrongs against students.

Worse yet, FSA has repeatedly awarded new contracts to troubled for-profit colleges or otherwise allowed schools to continue to receive Title IV student aid funds even when:

- The Department has acknowledged it has evidence of "substantial misconduct" and agreed to discharge debt for former students;
- State Attorneys General have publicly investigated or sued schools for harming federal student loan borrowers;
- Class action lawsuits detailing misconduct by schools have advanced; and
- Accreditors have placed schools on probation or brought actions.

I. The Department Renewed Contracts with Schools Despite Possessing Evidence of "Substantial Misconduct" and After Agreeing to Discharge Loans to Defrauded Students

When the Department enters or renews a "Program Participation Agreement" with a college or university, it reflects a determination that the school is "qualified" to participate in the student aid programs. By law, this means that the Department has determined that the school can "provide the services" advertised.[1] When the Department allows students to access taxpayer funded Pell Grants and Direct Loans to attend a school, it therefore places a seal of approval on that school.

The decision to enter a PPA with a school, or renew an expiring PPA, is therefore the single most important decision that the Department can make to protect students from unscrupulous programs and bad actors.

In recent months, the Department has affirmatively granted new PPAs to numerous for-profit colleges with a history of law enforcement activity and consumer fraud abuses. This includes schools that the Department itself has determined to have "strong indicia" of having engaged in "substantial misconduct" that had either been "credibly alleged" or "proven." The Department has also determined that a student who attended each of these schools is entitled to debt relief because of the school's prior conduct.[2]

School	PPA Approval Date	PPA Expiration Date
Gwinnett College	8/26/2022	2/19/2024
La' James International College	9/6/2022	6/30/2024
Lincoln College of Technology	8/23/2022	12/31/2024
Pittsburgh Career Institute	9/6/2022	2/19/2024
Southern Technical College	8/26/2022	2/19/2024

But the Department has seemingly not taken any steps to hold the institutions accountable. At a high level, **if the Department believes that there is a** "strong indicia" of these schools having engaged in "substantial misconduct," **why renew their Program Participation Agreements, which allow these schools to siphon taxpayer dollars and reap profits, without accountability for prior actions?**

That's just the tip of the iceberg. With respect to two of these schools (discussed below), the facts are far worse. And with other schools, the Department appears to ignore or disregard evidence gathered by accreditors.

II. The Department Awarded a New Contract to Lincoln Tech After Massachusetts Attorney General Maura Healey Issued a Civil Investigatory Demand and while the MA AG Borrower Defense Claim on Behalf of Lincoln Tech Students Remains Pending at FSA

Lincoln Tech is a group of for-profit colleges owned by the publicly traded Lincoln Educational Services Corporation. In July 2015, the Massachusetts Attorney General ("MA AG") entered a consent judgment with Lincoln Tech and Lincoln Educational Services (collectively "Lincoln") to resolve allegations that the school violated state consumer protection law regarding its

1 HEA § 498(a), 20 U.S.C. § 1099c(a); HEA § 498(c)(1)(A), 20 U.S.C. § 1099c(c)(1)(A).

2 The determination regarding relief provided is part of an approved class action settlement in *Sweet v. Cardona ("Sweet")*. In that case, the Department agreed to issue more than $6 billion in relief to more than 200,000 borrowers based on indicia of misconduct.

enrollment, disclosure, admissions, and educational practices. Lincoln agreed to pay $850,000 and forgive $165,000 in student debt to resolve an investigation into the disclosure and reporting of job placement data for a single program of study at two Lincoln Tech campuses in Massachusetts. In January 2016, the MA AG sent a letter to the Department of Education seeking a discharge of debt for affected students.

In the meantime, Lincoln has been the subject of numerous law enforcement inquiries. In September 2021, the Department's Inspector General determined that Lincoln failed to follow federal requirements associated with COVID-19 emergency relief programs.[3] In December 2021, the school received a letter from the Consumer Financial Protection Bureau ("CFPB") stating that the CFPB was requesting information and assessing conduct regarding the school's "extensions of credit" to its students. That same month, the Department cited Lincoln for "untimely refunds," demanding that Lincoln provide a financial surety to the Department. On June 7, 2022, the MA AG issued a new civil investigative demand to investigate consumer misconduct "in connection with their policies regarding fee refunds and associated disclosures to students and prospective students." Lincoln reports to be "cooperating" with the MA AG investigation.

Meanwhile, as noted above, in 2022, the Department included Lincoln on its list of schools with a "strong indicia" of having engaged in "substantial misconduct" that had either been "credibly alleged" or "proven." And on August 8, 2022, the Department sent Lincoln a letter providing a "generalized description of grounds for borrower defense," which was "premised on many of the same allegations made by the Massachusetts Attorney General."

While this was going on—and before Lincoln had even responded to the Department's inquiry—the Department issued Lincoln a new PPA, which does not expire until December 31, 2024. There is no public indication (from the Education Department or in Lincoln's own SEC filings) that the Department has required Lincoln to post a financial surety. Nor did the new PPA include any conditions that Lincoln viewed to be sufficiently material as to trigger an obligation to inform its shareholders.

For the twelve months ending June 30, 2022, Lincoln drew more than $100 million in taxpayer funded loans and grants.[4] With the execution of the new PPA, the Department seems inclined to let that happen again without additional oversight.

III. FSA Renewed La'James International College's Contract Despite an Ongoing Iowa Attorney General Investigation and a Student Class Action Lawsuit Heading Towards Trial

For more than 10 years, La'James International College ("La'James") has faced a combination of law enforcement inquiries, litigation from students, and media stories highlighting problems with the school.[5] In 2014, Iowa Attorney General Tom Miller sued the school, claiming that La'James systematically defrauded students. The lawsuit ultimately settled, with the school agreeing to pay nearly $550,000, forgiving $2.1 million in institutional debt, and submitting to an independent monitor. In May 2020, Student Defense sued La'James for these misrepresentations on behalf of four former and current La'James students, as well as a class of similarly situated students.

The problems didn't stop there. In May 2020, La'James agreed to pay the Department more than $503,000 to settle numerous potentially adverse findings in three campus program reviews, and attested that it had "established policies and procedures

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3 U.S. Dep't of Educ. Off. of Inspector Gen., *Lincoln College of Technology's Use of Higher Education Emergency Relief Fund Student Aid and Institutional Grants* (Sept. 24, 2021), https://www2.ed.gov/about/offices/list/oig/auditreports/fy2021/a20ca0016.pdf.

4 According to ED Data for OPIED 007938, in the Award Year ending 6/30/22, the Department disbursed $62,364,952 in Direct Loans plus an additional $29,593,504 in Pell Grants.

5 *See* William Morris, *Class-action lawsuit is the latest of many allegations against La'James International College,* Des Moines Register (Jan. 4, 2022, 5:45 AM), https://www.desmoinesregister.com/story/news/crime-and-courts/2022/01/04/lajames-international-college-class-action-lawsuit-complaints-timeline/9038711002/.

in place to ensure that repeat violations will not occur in the future."[6] Then in October 2021, the Iowa Attorney General informed La'James of its determination that the school had repeatedly violated the consent judgment insofar as it was continuing to "deceive[ ] students as to the timing, process, and availability of financial aid."[7] This, according to the Attorney General, created an "ongoing financial hardship for current and former students." As recently as July 2022, the Attorney General concluded that La'James failed to "adequately protect students from the possibility of future harm" and insufficiently "address[ed] the harm already caused to former and current students."

The Department is well-aware of the misconduct at La James and included the school on the list of institutions in the *Sweet* settlement where the Department noted it had evidence of "substantial misconduct."

And as of February 2022, the Department did not hold a financial surety to protect taxpayers in the event of losses caused by La'James' misconduct. **Moreover, in August 2022 the U.S. Department of Education recertified La' James for participation in the Title IV programs until July 2024.**

IV. Even After Accreditors Place Schools on Probation or Show Cause, FSA Fails to Take Meaningful Action

In addition to recertifying institutions in recent months, the Department is also failing to take actions against institutions. The recent case of North Coast College ("NCC") is a prime example.

NCC is a private, for-profit college located in Lakewood, Ohio. In 2022, the school received approximately $2.1 million in taxpayer funded loans and grants.[8]

Since at least June 2017, NCC has been under increased scrutiny from its accreditor, the Accrediting Commission of Career Schools and Colleges ("ACCSC"). In September 2017, ACCSC put the school on probation, reaching a determination that the school has "not fulfilled its obligations to its students or to ACCSC" and that there were "serious questions about the management and administrative capacity of the school." ACCSC also determined that NCC "failed to demonstrate successful student achievement in *any* of the school's programs" that have been operating long enough to be reportable to ACCSC, which "has persisted over a period [of] five years despite ongoing monitoring and directed action by [ACCSC]." Institutional efforts at improvement "have not been successful."

Historically, the Department has acted to protect students in analogous circumstances, *i.e.*, where an accreditor has imposed increasingly stringent measures on a school that was failing students. For example, in April and August 2016, the Department placed conditions on continued Title IV funding to ITT Technical Institute, after its accreditor placed the school on "show cause" status and then continued that status after additional review.[9] Ultimately, those conditions proved impossible for ITT to withstand, and the school shuttered in September 2016. That same year, the Department also took steps against the Charlotte School of Law, after it was found by its accreditor to be "substantial[ly]" and "persistent[ly]" out of compliance with critical accreditation standards.[10] As of February 2022, the Department did not hold any financial surety to guard against taxpayer losses from NCC misconduct.

The Department has not publicly announced any steps to curb abuses by NCC. At the same time, NCC publicly touts on its website that its accreditation by ACCSC "ensures the integrity of its educational programs," without reference to the fact that the school has been on probation for over five years.

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6 Settlement Agreement, U.S. Dep't of Educ. and La'James In'l Coll., *et. al.* (May 2020).

7 Letter from Max M. Miller, Assistant Att'y Gen., IA Off. of the Att'y Gen., to Douglas E. Gross, Att'y for La' James (Oct. 22, 2021).

8 According to ED Data for OPIED 00236900, in the Award Year ending 6/30/22, the Department disbursed $308,976 in Direct Loans plus an additional $1,839,593 in Pell Grants.

9 Letter from Ron Bennett, Dir., Sch. Eligibility Serv. Grp., to Kevin M. Modany, CEO, ITT Educ. Serv., Inc. (Aug. 25, 2016), https://www2.ed.gov/documents/press-releases/itt-letter-08252016.pdf.

10 Letter from Susan D. Crim, Dir., Admin. Actions and App. Serv. Grp., to Mr. Chidi Ogene, President, Charlotte Sch. of Law (Dec. 19, 2016), https://studentaid.gov/sites/default/files/csl-recert-denial.pdf.

EXHIBIT 2

Education Department shouldn't have OK'd federal aid for 5 for-profits on Sweet v. Cardona list, advocacy group says

highereddive.com/news/education-department-financial-aid-for-profits-sweet-cardona-lincoln-tech-lajames-international/637247

Natalie Schwartz

Dive Brief

Miguel Cardona speaks in Dec. 23, 2020 in Wilmington, Delaware, after his nomination for education secretary was announced. Joshua Roberts / Stringer via Getty Images

Dive Brief:

- The U.S. Department of Education is allowing several for-profit colleges to continue accessing federal financial aid even though they're facing scrutiny from state attorneys general and their accreditors, according to a new report from the National Student Legal Defense Network.
- The advocacy group says the Education Department has recently allowed five for-profit colleges to sign program participation agreements, which are contracts giving institutions access to federal student loans and Pell Grants under the condition they follow federal higher education laws and regulations. The PPAs allow the colleges to keep tapping federal financial aid until 2024.

- Each of the colleges in question are on a list of institutions whose former students will automatically receive debt relief under a recent $6 billion settlement with the Education Department. And one, the Pittsburgh Career Institute, is closing this week after its accreditor lost federal recognition.

Dive Insight:

Student Defense argues that the Education Department's decision to enter into or renew a PPA with a college is the most important one it can make "to protect students from unscrupulous programs and bad actors." However, the organization accuses the agency of striking PPAs with colleges that have a history of consumer fraud.

The report singles out the department's decision to approve PPAs for five for-profit colleges: Gwinnett College, La' James International College, Lincoln College of Technology, Pittsburgh Career Institute and Southern Technical College. All the PPAs were signed in August and September of this year, according to the report.

Earlier this month, the Education Department settled a lawsuit that affects borrowers who attended the five colleges in Student Defense's report. The agreement will automatically discharge student loan debts for certain borrowers who attended any of the colleges on a list of 150-plus institutions.

The Education Department said it placed colleges on the list because of strong signs of "substantial misconduct," which in some instances has been proven. The settlement agreement covers those who filed borrower defense to repayment claims, which can clear debts for students who were misled by their colleges.

However, some institutions on the list have objected to the idea that the settlement proves wrongdoing on their behalf. A federal judge who approved the settlement wrote that the list of 151 colleges does not brand them with "an impermissible scarlet letter."

The Student Defense report calls attention to other legal matters involving the colleges. In 2015, Lincoln Tech agreed to pay $850,000 to resolve an investigation into allegations that the college violated Massachusetts consumer protection law.

Since then, the institution has faced other federal and state inquiries, according to the report. For instance, the Consumer Financial Protection Bureau requested information last year about the school's "extensions of credit" to its students. Around the same time, the Education Department's internal watchdog determined the college didn't follow federal requirements for coronavirus emergency relief programs.

In a statement, Lincoln Tech said it has provided detailed explanations to the regulators mentioned in the Student Defense report.

“We believe the report strongly mischaracterizes the issues and does not properly reflect the respective outcomes,” it said.

The report also focused on La’James International College. In 2020, Iowa’s attorney general determined that the college hadn’t been complying with a 2016 settlement that resolved fraud allegations, the Des Moines Register reported. Under the agreement, the college had agreed to pay $500,000 to the state and forgive $2.1 million in student debt.

Representatives from the Education Department and the other four colleges did not immediately respond to requests for comment.

Exhibit A

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

THERESA SWEET, *et. al*,
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

DECLARATION OF Nyo McGirt

1. My name is Nyo McGirt. I submit this declaration in opposition to the Motion for Stay filed by Intervenor Schools. If called upon to do so, I am willing and able to testify to the information in this declaration.

2. I attended Argosy University San Francisco Bay Area Campus and submitted a borrower defense application on or before June 22, 2022.

3. If the Court stays the Settlement Agreement, I will be affected in the following manner:

It is very stressful and have caused mental instability due to the anxiety I have felt with the loans that I owe. It has affected my mental health and financial health as I have tried buying a house and have higher interest offers, for example. I've literally been losing sleep over the delays around the sweet vs cardona settlement. Each time a decision has been made toward possibly cancelling my debt, basically giving my life back, there is a delay from the interveners. It's been one nightmare after another. I know I'm mot alone in saying my life was turned upside down.

Signed under the penalty of perjury.

January 23, 2023

Nyo McGirt

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

THERESA SWEET, *et. al*,
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

DECLARATION OF Alyssia Gonzalez

1. My name is Alyssia Gonzalez. I submit this declaration in opposition to the Motion for Stay filed by Intervenor Schools. If called upon to do so, I am willing and able to testify to the information in this declaration.

2. I attended ANTHEM BRYMAN COLLEGE, Florida Technical Institute, UEI and submitted a borrower defense application on or before June 22, 2022.

3. If the Court stays the Settlement Agreement, I will be affected in the following manner:

My entire life is on hold because these for profit colleges wanted to make a quick buck off the backs of young and unsuspecting students. I was lied to and was given promises of a well paying job in my field of study. I was taken advantage of and this has followed me every single day I wake up and keeps me up at night. How can I pay groceries? How can I pay rent? How can I buy a home? How can I start a family with this good for nothing loan hanging over my head like a noose waiting for me to just give up. I've waited years for my application to be reviewed with no decision. I want to go back to school and build a future but I'm filled with doubt, distrust, and disgust as I recall my very first college experience. Its been years and I cannot move on in life because this has affected everything from my mental health to my credit score. We deserve to move on. I deserve to live my life.

Signed under the penalty of perjury.

January 23, 2023

Alyssia Gonzalez

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

THERESA SWEET, *et. al*,
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

DECLARATION OF Varney Outland

1. My name is Varney Outland. I submit this declaration in opposition to the Motion for Stay filed by Intervenor Schools. If called upon to do so, I am willing and able to testify to the information in this declaration.

2. I attended Devry University and Keller and submitted a borrower defense application on or before June 22, 2022.

3. If the Court stays the Settlement Agreement, I will be affected in the following manner:

This case has been a burden to my family and me as I am always worried about what is going to happen to my finances as a I do not have the job base on the education that I have received from Devry to pay back the debt that I have incurred. The stress from this has made my life a living hell. I am always worrying which takes a tow on everything I do. I have anticipated all this to be over until I heard of the Appeal that was submitted. Delaying this appeal will continue to affect my livelihood the loans has ruined my credit and it has kept a huge debt to income on my credit

Signed under the penalty of perjury.

January 23, 2023

Varney Outland

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

THERESA SWEET, *et. al*,
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

DECLARATION OF Lacey Hendershot

1. My name is Lacey Hendershot. I submit this declaration in opposition to the Motion for Stay filed by Intervenor Schools. If called upon to do so, I am willing and able to testify to the information in this declaration.

2. I attended University of Phoenix and submitted a borrower defense application on or before June 22, 2022.

3. If the Court stays the Settlement Agreement, I will be affected in the following manner:

My physical and mental health would continue to be negatively impacted due to stress. My hopes of possibly purchasing a car or home in the next couple of years will be put on hold as this keeps getting extended and my financial well-being remains unsure. I'm emotionally spent as are the majority of full and post-class members. It's disheartening, overwhelming, and frustrating each time we get closer to an end date only to have these "schools" remind us that their profits are more important than their distressed students.

Signed under the penalty of perjury.

January 23, 2023

Lacey Hendershot

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

THERESA SWEET, *et. al*,
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

DECLARATION OF Karlene Liranzo

1. My name is Karlene Liranzo. I submit this declaration in opposition to the Motion for Stay filed by Intervenor Schools. If called upon to do so, I am willing and able to testify to the information in this declaration.

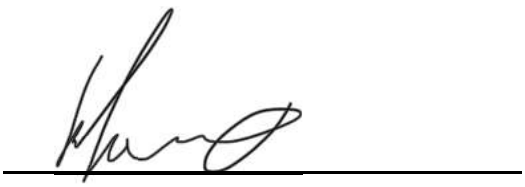
2. I attended Art Institute of NYC and submitted a borrower defense application on or before June 22, 2022.

3. If the Court stays the Settlement Agreement, I will be affected in the following manner:

The delay would bring more dread into my existence. I have been settled with this debt, doing the best I can to come to terms with the harm that was done by this fraudulent school. It has affected my life in trying to get a car, a home, trying to live. Trying to keep my head above water and juggle payments. The overwhelming debt has made me anxious and overwhelmed to take out loans and I try in my best to pay off anything with fear. My peace of mind is at stake, my financial freedom is at stake. My heart dropped when the appeals were first discussed. The anxiety returns. I want to have a family and have children without the fear of this debt hanging over them. I won't even marry my boyfriend because of my student debt in fear that they will burden him if something happened to me. Please, do not let this continue. Not for just my sake, for the countless of other that are also in worse situations. The ones that want to die, the ones who can barely make it.

Signed under the penalty of perjury.

January 24, 2023



Karlene Liranzo

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

THERESA SWEET, *et. al*,
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

DECLARATION OF Carolyn Rose-Smith

1. My name is Carolyn Rose-Smith. I submit this declaration in opposition to the Motion for Stay filed by Intervenor Schools. If called upon to do so, I am willing and able to testify to the information in this declaration.

2. I attended Walden University and submitted a borrower defense application on or before June 22, 2022.

3. If the Court stays the Settlement Agreement, I will be affected in the following manner:

If a stay is issued and settlement is delayed by the Courts, the negative effects for me will continue financially, emotionally, and mentally. Not obtaining relief does have a negative impact on my ability to purchase a home due to the high student loan debt. In addition, I feel as if my borrower defense has been stuck in time and this part of my life is stuck in time due to the delay. I have been trying to obtain relief since 2018. Any continued delay results in continued stress, which has resulted in high blood pressure. I now take two types of blood pressure medicine each day. Immediate relief now would help in improving my physical, emotional, and mental health as well as the quality of life for my family and me. Therefore, I am respectfully requesting that the Courts do not issue a stay or delay the delivery of settlement relief due to the continued negative effect on all class members. Thank you for your time and consideration!

Signed under the penalty of perjury.

January 24, 2023

Carolyn T. Rose-Smith

Carolyn Rose-Smith

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

THERESA SWEET, *et. al*,
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

DECLARATION OF Nichole Peterson

1. My name is Nichole Peterson. I submit this declaration in opposition to the Motion for Stay filed by Intervenor Schools. If called upon to do so, I am willing and able to testify to the information in this declaration.

2. I attended DeVry University and submitted a borrower defense application on or before June 22, 2022.

3. If the Court stays the Settlement Agreement, I will be affected in the following manner:

I am a single mom, drowning in student loan debt and barely surviving while my payments are on pause. I have $85,000 in student loans that started out as $25,000 and I have been paying them for almost 19 years. I'm also battling Stage 3 cancer. The stress from not having this resolved is awful and not helping my recovery, to put it lightly

Signed under the penalty of perjury.

January 24, 2023

Nichole Peterson

Nichole Peterson

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

THERESA SWEET, *et. al*,
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

DECLARATION OF Dannielle Pope

1. My name is Dannielle Pope. I submit this declaration in opposition to the Motion for Stay filed by Intervenor Schools. If called upon to do so, I am willing and able to testify to the information in this declaration.

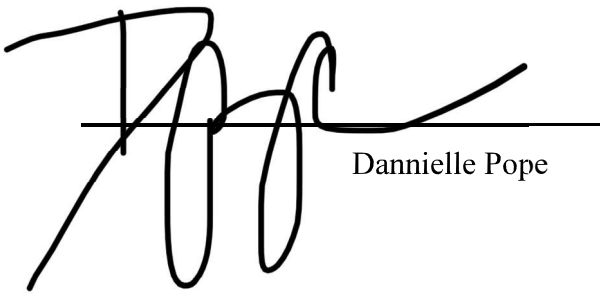
2. I attended DeVry University and TESST College (Kaplan) and submitted a borrower defense application on or before June 22, 2022.

3. If the Court stays the Settlement Agreement, I will be affected in the following manner:

I am in the process of trying to purchase a house and this is delaying the process via my approval for a mortgage. For now this is drastically affecting my debt to income ratio tremendously. We have been waiting patiently for the outcome and the release of the debt. It has been a long process and the procrastination is ridiculous. There is no need to hold up the process any longer

Signed under the penalty of perjury.

January 23, 2023



Dannielle Pope

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

THERESA SWEET, *et. al*,
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

DECLARATION OF Meghan Hall

1. My name is Meghan Hall. I submit this declaration in opposition to the Motion for Stay filed by Intervenor Schools. If called upon to do so, I am willing and able to testify to the information in this declaration.

2. I attended University of Phoenix, Everest University and submitted a borrower defense application on or before June 22, 2022.

3. If the Court stays the Settlement Agreement, I will be affected in the following manner:

My whole life has been on hold for 10 years due to these fraudelent, upside down loans! I am wanting to buy a home at age 34 for my 3 children in 2023 or 2024. Extending a stay and delaying relief will cause me and other class members more harm than already endured over the last 10 years of fighting these fraudelent loans. I ask that you do NOT allow a stay and that you rule fairly for the victims of these schools to prevent us all further delay and harm. I am missing milestones in my life every second these loans are on my credit. They prevent me from living the american dream!

Signed under the penalty of perjury.

January 23, 2023

Meghan Hall

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

THERESA SWEET, *et. al*,
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

DECLARATION OF Casey Dempsey

1. My name is Casey Dempsey. I submit this declaration in opposition to the Motion for Stay filed by Intervenor Schools. If called upon to do so, I am willing and able to testify to the information in this declaration.

2. I attended Charlotte School of Law and submitted a borrower defense application on or before June 22, 2022.

3. If the Court stays the Settlement Agreement, I will be affected in the following manner:

I would be affected because these student loans from Charlotte Law have been a proverbial "albatross." I have been denied for obtaining a mortgage on my own because my debt to income ratio is too high due to the nature of the debt accrued from my school that misrepresented employment rates, bar passage rates, and ultimately closed. I can never get rid of the stigma in my profession for having attended a law school that was shut down by the ABA. That burden will forever be tied to the name of the school on my JD degree. What I can do is finally be relieved of the debt incurred at a school that misled its students. I have had a borrower's defense to repayment application pending since 2017 (for nearly 6 years) and continually have to explain why it has not yet been resolved and why it should not be counted against me when being considered for loans. I recently had trouble purchasing a vehicle due to the pending borrower defense to repayment application because lenders do not understand the nuances of the claim and will deny you as a result. 6 years is long enough to wait for a resolution. Further stay and delays in approval of the settlement will cause me delays in moving forward with my normal aspects of life.

Signed under the penalty of perjury.

January 23, 2023

Casey Dempsey

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

THERESA SWEET, *et. al*,
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

DECLARATION OF Brian J Pajak

1. My name is Brian J Pajak. I submit this declaration in opposition to the Motion for Stay filed by Intervenor Schools. If called upon to do so, I am willing and able to testify to the information in this declaration.

2. I attended The Art Institue of Pittsburgh and submitted a borrower defense application on or before June 22, 2022.

3. If the Court stays the Settlement Agreement, I will be affected in the following manner:

My name is Brian Pajak and I am a full class member of Sweet v Cardona. From 2007-2010, I attended the Art Institute of Pittsburgh Online division, for a BA in Graphic/Web Design.

I would like to reiterate for the 3rd time now that I HAVE NEVER MISSED A SINGLE MONTHLY PAYMENT ON MY STUDENT LOANS.

My attendance there has led to a federal student debt that now totals $66,470.63.

Making these monthly payments of up to $500+ has had a massive impact on my financial plans. It is the equivalent of paying a second mortgage (I am fortunate to have an incredibly low mortgage payment of $550.)

When I heard about Borrower Defense, I knew it was my last chance at getting relief, due to the fraudulent actions taken by my school, which resulted in a penalty of $95 Million for EDMC. Obviously, due to the actions of the former head of the Department of Education, failure to process those claims has led to this lawsuit and now agreed by both parties to a settlement.

Due to the financial impact of these payments, my family's future is in limbo until this settlement is resolved. I am hesitant to consider any career changes, and have been holding off on home repair and improvement projects until I can be certain that we will be able to continue to pay our bills, without the looming threat of repayment on these loans.

I have received official confirmation that I am a full class member, and therefore, the settlement going into effect means an IMMEDIATE addition of $500+ a month into our family budget. Further delay due to these baseless claims by the interveners will keep this degree of uncertainty going for months, possibly years. Borrower Defense is a protected right all borrowers have when granted Federal student loans. It is ironic that they are claiming Due process, when

the judge has repeatedly informed them that their rights are completely federally protected. Yet they will trample on our rights to due process that many of us have been fighting since 2019 when this lawsuit was first filed.

Signed under the penalty of perjury.

January 24, 2023

Brian J Pajak

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

THERESA SWEET, *et. al*,
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

DECLARATION OF Elizabeth Gilbert

1. My name is Elizabeth Gilbert. I submit this declaration in opposition to the Motion for Stay filed by Intervenor Schools. If called upon to do so, I am willing and able to testify to the information in this declaration.

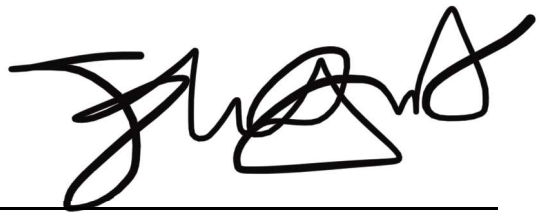
2. I attended IADT Tampa (now Sanford Brown) and submitted a borrower defense application on or before June 22, 2022.

3. If the Court stays the Settlement Agreement, I will be affected in the following manner:

The longer this gets delayed, the longer it's going to take for me to buy a house. I can get approved for a mortgage as soon as the settlement is finalized and the bank can consider an appropriate DTI. Until then, I'll continue to live in a sketchy part of town in a small 2-bedroom apartment with my toddler and no yard....

Signed under the penalty of perjury.

January 24, 2023



Elizabeth Gilbert

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

THERESA SWEET, *et. al*,
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

DECLARATION OF Laura Russell

1. My name is Laura Russell. I submit this declaration in opposition to the Motion for Stay filed by Intervenor Schools. If called upon to do so, I am willing and able to testify to the information in this declaration.

2. I attended Kaplan University and University of Phoenix and submitted a borrower defense application on or before June 22, 2022.

3. If the Court stays the Settlement Agreement, I will be affected in the following manner:

I am 58 years old and I hold almost $180,000 in false school loan debt due to my fraudulent schools. I have lost MANY years of being able to save for my retirement. Please DO NOT allow a stay! I must use the last few years to save for retirement and I need the monthly payments to do that. I have been dealing with this school loan defraud for YEARS and I am mentally at the end of my rope. I am ASHAMED of the United States in allowing these schools to cheat so many innocent individuals who were trying to better themselves and ended up being completely cheated out of their best years!

Signed under the penalty of perjury.

January 24, 2023

Laura Russell

Laura Russell

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

THERESA SWEET, *et. al*,
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

DECLARATION OF Rebecca Smith

1. My name is Rebecca Smith. I submit this declaration in opposition to the Motion for Stay filed by Intervenor Schools. If called upon to do so, I am willing and able to testify to the information in this declaration.

2. I attended IADT and submitted a borrower defense application on or before June 22, 2022.

3. If the Court stays the Settlement Agreement, I will be affected in the following manner:

The school I went to closed while I was on maturity leave with no notice. I was never informed what non-accredited meant until I tried to transfer my 112 credits to another school and couldn't. 72k and 112 credits that mean absolutely nothing to me or my family but a waste of time energy and money. My student loans have impacted my everyday life, prevented me from getting a mortgage at times in my life and have impacted my credit substantially. If the stay is considered and the loan goes back into payment status, I'll have to decide weather or not I can pay for the student loans that have had no benefit to my life financially (because I can't get a job in the field) or my car payment/ my mortgage or even food for my family. Knowing if I miss a payment it will then start a vicious circle and continue to impact my financial wellbeing due to credit dings and the lives of my children. I beg that you hold true to the judgment, this has been a huge burden on myself and my family for far to long.

Signed under the penalty of perjury.

January 24, 2023

Rebecca Smith

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

THERESA SWEET, *et. al*,
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

DECLARATION OF Christopher Malizia

1. My name is Christopher Malizia. I submit this declaration in opposition to the Motion for Stay filed by Intervenor Schools. If called upon to do so, I am willing and able to testify to the information in this declaration.

2. I attended DeVry University and submitted a borrower defense application on or before June 22, 2022.

3. If the Court stays the Settlement Agreement, I will be affected in the following manner:

A stay would greatly affect myself and many others who have had our lives put on hold for years now regarding these borrowers defense claims. These loans have halted my progress in life as I can't afford a house with them and they make getting a mortgage close to impossible. I've been making payments for 10 years and I owe 30% more than what I originally took the loan out for, which is ridiculous. These schools are intervening in a decision that has nothing to do with them. We have waited years for the DoE to even look at our claims and now we finally have an agreement both sides feel is fair and at the last minute these schools are trying to cause even more pain to all of these students. The students really only made one mistake in this and that was trusting these schools were legitimate institutions. Please don't let these schools greed continue to handicap so many people.

Signed under the penalty of perjury.

January 24, 2023

Christopher Malizia

Christopher Malizia

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

THERESA SWEET, *et. al*,
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

DECLARATION OF Cathryne Maciolek Waugh

1. My name is Cathryne Maciolek Waugh. I submit this declaration in opposition to the Motion for Stay filed by Intervenor Schools. If called upon to do so, I am willing and able to testify to the information in this declaration.

2. I attended Argosy University DC Campus and submitted a borrower defense application on or before June 22, 2022.

3. If the Court stays the Settlement Agreement, I will be affected in the following manner:

If a stay is issued I will be harmed in the following ways: First, my credit score has been and continues to be negatively impacted with my inability to make the full monthly payments on the student loans. The payments barely cover the interest rate due to the large loan that I was told to take out. Additionally, due to the student loans and inability to pay the loans down, I have been denied a multitude of loans- car loans, and most importantly a mortgage. I am currently living in an apartment with my son and triplet girls since I do not qualify for a home loan. I am depended on my family to cosign everything I have due to the outstanding student loans. As previously stated, I have 4 children that I may not be able to take out student loans for their college due to my outstanding debt. In summary, a stay and delayed relief would impact every aspect of my life: my family's financial stability, my living arrangement/delayed homeownership, interpersonal stress with my family that I still depend on for cosigning purchases and to borrow money from, and possibly my children's future and their ability to access higher education. A stay delays my ability to move forward in my life.

Signed under the penalty of perjury.

January 24, 2023

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

THERESA SWEET, *et. al*,
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

DECLARATION OF Robyn Frumento

1. My name is Robyn Frumento. I submit this declaration in opposition to the Motion for Stay filed by Intervenor Schools. If called upon to do so, I am willing and able to testify to the information in this declaration.

2. I attended DeVry University and submitted a borrower defense application on or before June 22, 2022.

3. If the Court stays the Settlement Agreement, I will be affected in the following manner:

This would immensely affect my financial health. If this is not approved I have no idea how I can pay necessities such as food and shelter. This school defrauded me and should be held accountable. I have over $90,000 in student loans that were based on lies and deception.

Signed under the penalty of perjury.

January 23, 2023

Robyn Frumento

Robyn Frumento

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

THERESA SWEET, *et. al*,
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

DECLARATION OF Scarlett Sears Brown

1. My name is Scarlett Sears Brown. I submit this declaration in opposition to the Motion for Stay filed by Intervenor Schools. If called upon to do so, I am willing and able to testify to the information in this declaration.

2. I attended Daymar College and submitted a borrower defense application on or before June 22, 2022.

3. If the Court stays the Settlement Agreement, I will be affected in the following manner:

It will be hurting my chances to go back to college, since the loans from Daymar have gone to default. These loans have been hurting me for over 10 years. I would love to see them discharged, so I can start again. Daymar tricked me into enrolling and then scammed me out of thousands of dollars. It will be so discouraging to not get them taken care of, since the school isn't one of the ones that are appealing the case. Just let the ones of us who went to the schools listed that aren't appealing get what you have agreed in the settlement.

Signed under the penalty of perjury.

January 24, 2023

Scarlett Sears Brown

Scarlett Sears Brown

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

THERESA SWEET, *et. al*,
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

DECLARATION OF Janell Durr

1. My name is Janell Durr. I submit this declaration in opposition to the Motion for Stay filed by Intervenor Schools. If called upon to do so, I am willing and able to testify to the information in this declaration.

2. I attended Vatterrott and submitted a borrower defense application on or before June 22, 2022.

3. If the Court stays the Settlement Agreement, I will be affected in the following manner:

This stay would be extremely detrimental to my continuing education. I am currently working toward my BA in Human Resource Management, and I will reach the end of my loan and grant eligibility because of the loans that I had originally taken out for Vatterrott. I have $30,000 in loans from a school that I was not able to use credits from, which caused me to have to start from scratch, and which I have a very expensive piece of paper that means nothing. This stay will keep me from being able to take out enough loans to finish my degree, which I need in order to have a career that I can make a meaningful, livable wage with. If this stay goes through I will have to come up with $9,000 before I can graduate next year which is not feasible considering I have a job that only pays $14/hour while I go to school.

Signed under the penalty of perjury.

January 24, 2023

Janell Durr

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

THERESA SWEET, *et. al*,
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

DECLARATION OF Sarah Mercer

1. My name is Sarah Mercer. I submit this declaration in opposition to the Motion for Stay filed by Intervenor Schools. If called upon to do so, I am willing and able to testify to the information in this declaration.

2. I attended Marinello School of Beauty and submitted a borrower defense application on or before June 22, 2022.

3. If the Court stays the Settlement Agreement, I will be affected in the following manner:

I have waited years for a settlement one that has already taken a toll on continuing my education, impacting my credit, garnishing my wages, taking my tax returns for a school that I can't get my transcripts from. I'm 33 years old and pregnant with my first child. Delay of this settlement postpones continuing my education to establish a career so that I can financially provide for my child as a single mothers.

Signed under the penalty of perjury.

January 24, 2023

Sarah Mercer

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

THERESA SWEET, *et. al*,
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

DECLARATION OF Tracey Quattlebaum

1. My name is Tracey Quattlebaum. I submit this declaration in opposition to the Motion for Stay filed by Intervenor Schools. If called upon to do so, I am willing and able to testify to the information in this declaration.

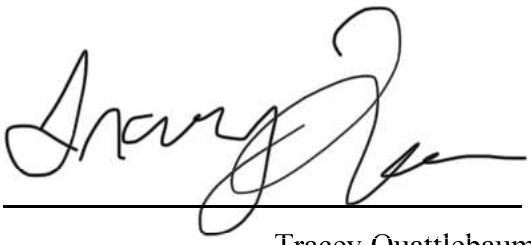
2. I attended Ashford Universitu and submitted a borrower defense application on or before June 22, 2022.

3. If the Court stays the Settlement Agreement, I will be affected in the following manner:

I will, once again, be at a standstill in my life with 55k in debt. Ashford's practices of maxing our federal aid have caused me to not be able to attend another college to get my degrees because I cannot qualify for more funding. I also can't use my Chapter 35 benefits through the Department of Veterans Affairs because no school wants to accept me due to no aid or loans available. My credit is damaged due to the amount of loans. So I am basically stuck in this situation until resolved with no degrees and no career. Our family has taken a financial hit because I have no degree, no money making career as was promised.

Signed under the penalty of perjury.

January 23, 2023



Tracey Quattlebaum

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

THERESA SWEET, *et. al*,
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

DECLARATION OF William Stevenson

1. My name is William Stevenson. I submit this declaration in opposition to the Motion for Stay filed by Intervenor Schools. If called upon to do so, I am willing and able to testify to the information in this declaration.

2. I attended DeVry and submitted a borrower defense application on or before June 22, 2022.

3. If the Court stays the Settlement Agreement, I will be affected in the following manner:

I will be struggling to pay my bills more and these mess holding up my life. So, I can go back to school and actually get a real education. I have been working jobs that is not in the field of my education. Every job I apply to with this education, they laugh at me. I really am ready to get this loan gone and move on from this horrible mistake.

Signed under the penalty of perjury.

January 23, 2023

William Stevenson

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

THERESA SWEET, *et. al*,
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

DECLARATION OF Aleshea Robinson

1. My name is Aleshea Robinson. I submit this declaration in opposition to the Motion for Stay filed by Intervenor Schools. If called upon to do so, I am willing and able to testify to the information in this declaration.

2. I attended Grand Canyon University and Ashford University and submitted a borrower defense application on or before June 22, 2022.

3. If the Court stays the Settlement Agreement, I will be affected in the following manner:

I am trying to get my kids and myself out of harsh living conditions and get a home. If this stay is approved and delivery of relief is delayed, it will put a strain on me and my children.

Signed under the penalty of perjury.

January 23, 2023

A. Robinson

Aleshea Robinson

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

THERESA SWEET, *et. al*,
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

DECLARATION OF Brittainy Young

1. My name is Brittainy Young. I submit this declaration in opposition to the Motion for Stay filed by Intervenor Schools. If called upon to do so, I am willing and able to testify to the information in this declaration.

2. I attended Colorado Technical University and submitted a borrower defense application on or before June 22, 2022.

3. If the Court stays the Settlement Agreement, I will be affected in the following manner:

If relief is issued a stay and delayed I may not be able to afford to live. If my loans go into affect it could mean large loan payments for me. I'm a single mother of 2 and I have been working so hard to give my children a future. The pressure of student loan debt is crushing my ability to move forward. I ask that Judge Alsup's approval moves forward and I can finally be at peace and focus on building a future for myself and my children.

Signed under the penalty of perjury.

January 23, 2023

DocuSigned by:
Brittainy Young
E5A582F710124BD...

Brittainy Young

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

THERESA SWEET, *et. al*,
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

DECLARATION OF April Hawthorne

1. My name is April Hawthorne. I submit this declaration in opposition to the Motion for Stay filed by Intervenor Schools. If called upon to do so, I am willing and able to testify to the information in this declaration.

2. I attended IADT/Sanford Brown and submitted a borrower defense application on or before June 22, 2022.

3. If the Court stays the Settlement Agreement, I will be affected in the following manner:

The harmful effects of my losses from aquiring a bachelor's degree has haunted nearly all of my adulthood and journey as a single mother. The catastrophic amounts of student loans and inability to secure gainful employment in my career has left me, as the head of my household, and my children in shackles out of the reach of financial independence, peace, and a healthy quality of life.

The greatest impact that settlement relief offers is to open the door to opportunities in the form of housing for my family. My children and I are in a cohabiting situation with family members due to the massive impact that a gross amount of debt and failed promises of career success potential has burdened me with. My family of four, pioneered by my ability to survive and provide as best I have been able to manage, reside within 400 square feet of shared space. We have been busting at the seems in our living space for far too long. The emotional, psychological, and health impacts have been extensive for all of us.

Delaying settlement relief for my family and other households in need of this places a severe burden upon our lives. It means more days, months, years ... that it takes to finally receive what is rightfully ours and causes stress and discourse that furthers the negative and painful effects of the situation we are already subject to and have been subject to for far too many years.

Signed under the penalty of perjury.

January 23, 2023

April Hawthorne

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

THERESA SWEET, *et. al*,
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

DECLARATION OF Katelin Mundy

1. My name is Katelin Mundy. I submit this declaration in opposition to the Motion for Stay filed by Intervenor Schools. If called upon to do so, I am willing and able to testify to the information in this declaration.

2. I attended DeVey University and Keller Graduate School of Management and submitted a borrower defense application on or before June 22, 2022.

3. If the Court stays the Settlement Agreement, I will be affected in the following manner:

I would lose the financing on my house and would be subject to a debt repayment that would prevent me from giving my husband and children the life that they deserve. As a veteran, a mother, and a wife all I wanted was to go to school to obtain an education to secure a higher paying job to support my family without a worry of where we will get our next meal. I chose DeVry University as the Student Advisor promised that obtaining my education through DeVry University would mean I'd be guaranteed to obtain a high paying job after graduation. Once I got my Bachelors, i was offered a discount on a Masters degree with the promise that DeVry University/Keller Graduate School of Management would hire me as a virtual professor. Needless to say, I graduated and never became a professor despite having the education they required. I don't want If this settlement doesn't go through and my loans discharge soon, I will lose everything im fighting for. I'm begging and pleading to please please please push this settlement through and provide relief very soon. All I want is to provide for my family while still being able to be a present mother for my children. Please help.

Signed under the penalty of perjury.

January 23, 2023

Katelin Mundy

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

THERESA SWEET, *et. al*,
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

DECLARATION OF Erica Kollmann

1. My name is Erica Kollmann. I submit this declaration in opposition to the Motion for Stay filed by Intervenor Schools. If called upon to do so, I am willing and able to testify to the information in this declaration.

2. I attended DeVry and submitted a borrower defense application on or before June 22, 2022.

3. If the Court stays the Settlement Agreement, I will be affected in the following manner:

I am a single mom of 2 children, one of whom is severely disabled. I have been struggling to save for a down-payment on a first home for my family. I need the loans discharged before a mortgage loan application would be approved, and I would be able to move my family into an appropriate and affordable home that would accommodate the special needs of my child. This appeal is lengthening our wait-time and is forcing me to continue to pay unaffordable and ever-increasing rental home rates.

Signed under the penalty of perjury.

January 24, 2023

Erica Kollmann

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

THERESA SWEET, *et. al*,
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

DECLARATION OF LaCresha Grigsby

1. My name is LaCresha Grigsby. I submit this declaration in opposition to the Motion for Stay filed by Intervenor Schools. If called upon to do so, I am willing and able to testify to the information in this declaration.

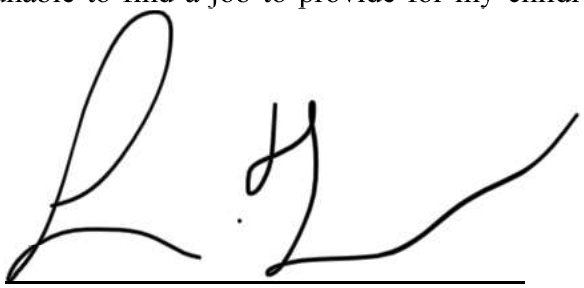
2. I attended Virginia College and submitted a borrower defense application on or before June 22, 2022.

3. If the Court stays the Settlement Agreement, I will be affected in the following manner:

I will literally be homeless and still be unable to find a job to provide for my children, which one is special needs.

Signed under the penalty of perjury.

January 24, 2023



LaCresha Grigsby

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

THERESA SWEET, *et. al*,
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

DECLARATION OF Jeffrey Adkins

1. My name is Jeffrey Adkins. I submit this declaration in opposition to the Motion for Stay filed by Intervenor Schools. If called upon to do so, I am willing and able to testify to the information in this declaration.

2. I attended DeVry University & Keller Graduate School and submitted a borrower defense application on or before June 22, 2022.

3. If the Court stays the Settlement Agreement, I will be affected in the following manner:

First and most importantly is the mental anguish this causes with not being able to figure out my longer term financial affairs. I feel like since graduation I have been held prisoner by this debt and with the pause due to covid I've been given hope and with the sweet settlement I've been given new life and that is being held hostage by parties that won't feel or be harmed in any way like myself and those like me are. Next, if this continues to get dragged out I will experience financial harms from payments coming due that I will need to figure out how to work back into my finances as well as potential for tax liabilities depending on if / when this is approved. So if the intervenors are successful at dragging this out I may very well continue to be financially harmed via taxes on this settlement that otherwise wouldn't exist. These 3 schools should not be allowed to hold up relief for everyone and a stay only has the potential to harm the students. Any stigma the school fears due to exhibit "C" is not going to be the reason why people view them in an unfavorable light. It will be because of the deceptive practices to put us in crippling debt that cannot be made whole with the worthless degrees issued and their obsessive attempts to deny relief which allows them to walk away without fear of retribution from the DOE.

Signed under the penalty of perjury.

January 23, 2023

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

THERESA SWEET, *et. al*,
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

DECLARATION OF Stormy Adkins

1. My name is Stormy Adkins. I submit this declaration in opposition to the Motion for Stay filed by Intervenor Schools. If called upon to do so, I am willing and able to testify to the information in this declaration.

2. I attended Art Institute and submitted a borrower defense application on or before June 22, 2022.

3. If the Court stays the Settlement Agreement, I will be affected in the following manner:

When Judge Alsup ruled in favor of the settlement I felt the glimmer of hope I'd been seeking out for the first time in years. My life is barely afloat. Over the past 14 months I've lost so much and I'm barely floating in the current economy. I no longer have a safety harness. The loans are crushing me and I'm balancing on the verge of homelessness. I need a vehicle. I can't get approved for a loan for a legitimately reliable vehicle. I'm working three jobs just to pay rent whereas if I had a vehicle I'd be able to commute into Houston for better pay and thereby achieve a better quality of life. The four cars I've cycled through the last couple of years have failed me within months and drained every cent I had in savings - what little that was to begin with. I've had many opportunities come and go that I was unable to grasp them due to distance. I'm terrified to fall any further because once you do, there's little to no help getting back up, especially in Texas. If the motion to Stay is granted, the extension of time will make it that much harder to keep fighting for my basic life necessities.

Signed under the penalty of perjury.

January 24, 2023

Stormy Adkins

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

THERESA SWEET, *et. al*,
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

DECLARATION OF Corwin Albers

1. My name is Corwin Albers. I submit this declaration in opposition to the Motion for Stay filed by Intervenor Schools. If called upon to do so, I am willing and able to testify to the information in this declaration.

2. I attended DeVry University (Kansas City) and submitted a borrower defense application on or before June 22, 2022.

3. If the Court stays the Settlement Agreement, I will be affected in the following manner:

Having this debt hanging over my head is an albatross that I have to weigh every financial decision against. I was finally starting to see light at the end of the tunnel with this ruling and now with the stay it seems like 2023 will be another year of waiting to make major life decisions due to personal finances and thinking "what if". I feel like I have lost years off my life from stress caused by this appeal and this whole ordeal. I wasn't even old enough to order a drink at a bar when I signed up for this debt and I was lied to every step of the way by every person in the system. If there is any justice this appeal will be struck down quickly.

Signed under the penalty of perjury.

January 24, 2023

Corwin Albers

Corwin Albers

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

THERESA SWEET, *et. al*,
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

DECLARATION OF Sahm Assan

1. My name is Sahm Assan. I submit this declaration in opposition to the Motion for Stay filed by Intervenor Schools. If called upon to do so, I am willing and able to testify to the information in this declaration.

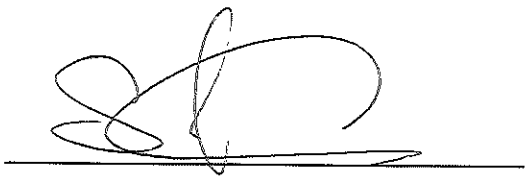
2. I attended Ashford University and submitted a borrower defense application on or before June 22, 2022.

3. If the Court stays the Settlement Agreement, I will be affected in the following manner:

I have paid thousand of dollars, and spent years of my life on an education that was worthless on the promise of a counselor who was no more than a salesman. I applied for relief and was declined relief after years of waiting for an answer. My school was on the list of schools included in the lawsuit as a school that used fraudulent means to soak funds from hard working people who wanted to better their lives. My family which includes my mother who is elderly and relies on us could benefit a lot by the relief that was approved. The schools who are delaying this are not even responsible for repayment. This is harmful that they are doing this. The department of education is doing the right thing to wrong their lack of oversight by approving these loans for schools that were defrauding their student. And they are stopping this for their reputation. They don't have to pay back to money they stole and they are stoping it. Its hurting everyone and its not right.

Signed under the penalty of perjury.

January 24, 2023



Sahm Assan

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

THERESA SWEET, *et. al*,
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

DECLARATION OF Aaron Atkinson

1. My name is Aaron Atkinson. I submit this declaration in opposition to the Motion for Stay filed by Intervenor Schools. If called upon to do so, I am willing and able to testify to the information in this declaration.

2. I attended Keller Graduate School of Management and submitted a borrower defense application on or before June 22, 2022.

3. If the Court stays the Settlement Agreement, I will be affected in the following manner:

It will postpone buying a house in which each of my 3 children will have space to play. Currently in a 2 bedroom duplex with my 3 children sharing one room. The money I would get back in the form of payments i have made will be a down payment on a new home. I am still paying on a loan that I took 5 years before the birth of my first child. I don't think they should be paying for the predatory lending practices of the for profit schools nor should any other child. It was the schools decisions and deceitful tactics that persuaded me to sign up for the school. I think they should be held 100% accountable for their gross misrepresentation of their schools and the origional judgement should be allowed to move forward, swiftly.

Signed under the penalty of perjury.

January 24, 2023

Aaron Atkinson

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

THERESA SWEET, *et. al*,
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

DECLARATION OF Kimberly Baillargeon

1. My name is Kimberly Baillargeon. I submit this declaration in opposition to the Motion for Stay filed by Intervenor Schools. If called upon to do so, I am willing and able to testify to the information in this declaration.

2. I attended University of Phoenix and submitted a borrower defense application on or before June 22, 2022.

3. If the Court stays the Settlement Agreement, I will be affected in the following manner:

This has caused so much mental strain and stress on me. University of Phoenix and it's enrollment staff knew what they were doing when they preyed on a single mom. I could barely afford to feed my kids let alone pay back these astronomical loans. They coerced me to truly believe this would change my financial circumstances and provide a beautiful future for me and my children. I believed them, and yet here I am decades later and I have had companies I interviewed with shame me for going to a for profit university it was humiliating. My family has been delayed in getting a home loan because our lender states the student loan debt is putting our DTI in too high. This is insane, I will never be able to move on with my life as a hard working middle class citizen with these loans haunting me. I will be paying on these till I pass away and it will still not be paid off, what kind of system is this.

Signed under the penalty of perjury.

January 24, 2023

Kimberly Baillargeon

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

THERESA SWEET, *et. al*,
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

DECLARATION OF Nicholas Belcher

1. My name is Nicholas Belcher. I submit this declaration in opposition to the Motion for Stay filed by Intervenor Schools. If called upon to do so, I am willing and able to testify to the information in this declaration.

2. I attended University of Phoenix and submitted a borrower defense application on or before June 22, 2022.

3. If the Court stays the Settlement Agreement, I will be affected in the following manner:

We wouldn't be able to buy a house. My wife, daughter, a dog, and a cat are living in an apartment while we search for a house to buy. While we have done a good job at saving, our debt to income ratio will keep us from being approved for a mortgage due to my student loans. This debt from a school that I believe committed fraud with their promises, is keeping us from continuing the American dream.

Signed under the penalty of perjury.

January 23, 2023

Nicholas Belcher

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

THERESA SWEET, *et. al*,
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

DECLARATION OF Ryan Bergamini

1. My name is Ryan Bergamini. I submit this declaration in opposition to the Motion for Stay filed by Intervenor Schools. If called upon to do so, I am willing and able to testify to the information in this declaration.

2. I attended Brooks Institute and submitted a borrower defense application on or before June 22, 2022.

3. If the Court stays the Settlement Agreement, I will be affected in the following manner:

For 20 years I along with my fellow classmates have been forced into financial destitution due to the actions of Brooks Inst. We have suffered mentally, emotionally, and financially due to their lies and deceit. One would think an institution with such a prominent past would have had a grand gala, a final hurrah bringing students from the past and present along with future graduates in the celebration of such a storied school. Instead Brooks Inst. decided one day to literally close their doors forever, failing to inform students that their school was closing, in typical fashion they left landlords, contractors, and students on the hook for their expenses. That is the actions of CEC and the Brooks Inst.

Most importantly the court needs to remember why we are here in the first place, the lack of the DOE's recognition that we had been defrauded by Brooks Inst. They failed us as taxpayers to protect us against predatory educational institutions like Brooks Inst. This case has been the first time in my life that justice was served on my behalf. It took us 20+ years to have our "day in court", and now a handful of lawyers representing THREE schools intend to delay our long awaited relief just to protect their clients reputation. These schools and the lawyers representing them should have been happy to have had the privilege to have their voices heard in a trial that had nothing to do with them. This case was between us the class members and the DOE, they should have never had the ability to delay the relief of 100,000's of harmed students who were denied relief over the past two decades.

While I understand our judicial system works in the way it was intended, at some point the court needs to stand up to the interveners and remind them that they were payed while the students that were harmed by the DOE's neglect, we still bear the financial burden we legally

can't get out of. This is just another slap in the face to those of us who've been waiting 20+ years for some kind of relief, any kind of relief. The intervening schools and their legal counsel should be not only reprimanded for their actions, but they should be punished for only caring about their reputation's and career goals, and not the lives ruined by their clients behavior.

How will I be affected by the delay if the appeal stay is granted you ask? I will continue to be financially unable to buy anything of substance to make my life worth living. The debt I'm carrying with nothing to show for it has crushed my dreams of having a family, buying a home or even a new car. I never made any money with the "education" I received, only the non-stop mental wear and tear of having debt collectors hounding me for money I don't have. If the court is truly about Justice, they should deny the appeal and allow the thousands of us who were damaged the opportunity to prosper. I think it's important to remember, we all only get ONE life. For thousands of us, 20 of the 40 or so prosperous years to grow and prepare for the sunset years of our existence were taken from us by the same people who are intervening in our settlement today. They must be stopped, they must accept the terms agreed upon by the Court and our class and they must be taught a lesson for their actions. The court should claw back their ill-gotten gains and they should be punished for interjecting in a matter they were only given a courtesy voice for in the first place.

Do the right thing, deny their stay, deny their appeal, and give us the opportunity to turn our lives around before it's too late for many of us.

Best,
Ryan Bergamini

Signed under the penalty of perjury.

January 24, 2023

Ryan Bergamini

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

THERESA SWEET, *et. al*,
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

DECLARATION OF Jana Bergevin

1. My name is Jana Bergevin. I submit this declaration in opposition to the Motion for Stay filed by Intervenor Schools. If called upon to do so, I am willing and able to testify to the information in this declaration.

2. I attended The Art Institute of California - San Francisco and submitted a borrower defense application on or before June 22, 2022.

3. If the Court stays the Settlement Agreement, I will be affected in the following manner:

I've been waiting for 7 years for justice and this appeal of intervenors that have nothing to do with me since I didn't attend their school, directly impacts and prolongs my suffering. I demand that they be punted to a special legal hell for daring to come between 250,000 borrowers and our relief. This is cruel and unusual punishment for our class and post class members. We've been waiting for almost a decade!!! Want to know what happened in that decade? Lots of mental health stress and difficult financial choices. I have a three year old son, I have a family that I provide for, and the department of education has acknowledged that my school has overwhelmingly done us damage. Stop letting assholes intervene in cases that DO NOT CONCERN them. They're not involved, they're parasites trying to screw us all over again, let them pound sand and tell them to take the scenic tour of hell.

Signed under the penalty of perjury.

January 24, 2023

Jana Bergevin

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

THERESA SWEET, *et. al*,
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

DECLARATION OF Andrew Beyer

1. My name is Andrew Beyer. I submit this declaration in opposition to the Motion for Stay filed by Intervenor Schools. If called upon to do so, I am willing and able to testify to the information in this declaration.

2. I attended Capella University and submitted a borrower defense application on or before June 22, 2022.

3. If the Court stays the Settlement Agreement, I will be affected in the following manner:

The student debt that I have has prevented me from buying a home, getting refinancing loans.. My BDC has been pending for almost 2 years. I need this relief now not later. I was lied to by my University and was lead along with the promise of a PhD. Never happened. Once they milked me for all they could I was given a lesser degree and kicked out. Why do we have to wait for relief? The college that ripped me off did not appeal.

Signed under the penalty of perjury.

January 24, 2023

Andrew Beyer

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

THERESA SWEET, *et. al*,
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

DECLARATION OF Megan Boger

1. My name is Megan Boger. I submit this declaration in opposition to the Motion for Stay filed by Intervenor Schools. If called upon to do so, I am willing and able to testify to the information in this declaration.

2. I attended Charlotte school of law and submitted a borrower defense application on or before June 22, 2022.

3. If the Court stays the Settlement Agreement, I will be affected in the following manner:

I would be adversely affected financially. The delay is causing me undue hardship because I cannot move on with my life and afford to buy a house for my family. I cannot qualify to get a mortgage and am stuck in the repetitious cycle of renting and not being able to afford to buy my own home.

Signed under the penalty of perjury.

January 24, 2023

Megan Boger

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

THERESA SWEET, *et. al*,
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

DECLARATION OF Logan Brade

1. My name is Logan Brade. I submit this declaration in opposition to the Motion for Stay filed by Intervenor Schools. If called upon to do so, I am willing and able to testify to the information in this declaration.

2. I attended University of Phoenix and Grand Canyon University and submitted a borrower defense application on or before June 22, 2022.

3. If the Court stays the Settlement Agreement, I will be affected in the following manner:

This would further delay my ability to make any large financial decisions for me and my family as this continues to stay on my credit. It forces me to pay more money for any type of loan and, in some cases, leading to outright rejection when trying to get a home. The worst part is that the FTC already settled with my universities and Navient years ago but, because of the delay with Borrower's Defense process, I can't get the relief I should've gotten from those judgments nearly 5 years ago.

Signed under the penalty of perjury.

January 23, 2023

Logan Brade

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

THERESA SWEET, *et. al*,
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

DECLARATION OF Kristen Bretzius

1. My name is Kristen Bretzius. I submit this declaration in opposition to the Motion for Stay filed by Intervenor Schools. If called upon to do so, I am willing and able to testify to the information in this declaration.

2. I attended Kaplan and submitted a borrower defense application on or before June 22, 2022.

3. If the Court stays the Settlement Agreement, I will be affected in the following manner:

This debt has been a weight on my shoulders since 2008, between servicer deferments and forbearances the debt has almost tripled. I can buy a house, I cannot help my kids pay for school, I will never retire, I will work until the day I die. The "education" I received has not helped me in any way. The school talked me out of a masters degree and into another Bachelors, which they didn't even let me finish by not providing the class I needed to graduate. That two schools out of the 150 on the list are staying the decision due to "damage to their reputation" is heartbreaking.

Signed under the penalty of perjury.

January 24, 2023

Kristen Bretzius