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16 **UNITED STATES DISTRICT COURT**
17 **NORTHERN DISTRICT OF CALIFORNIA**

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

23 *Plaintiffs,*

24 v.

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

28 THE UNITED STATES DEPARTMENT OF
EDUCATION,

Defendants.

Case No. 19-cv-03674-WHA

**DEFENDANTS' RESPONSE TO
PLAINTIFFS' MOTION TO ENFORCE**

HEARING DATE: April 24, 2024

(Class Action)
(Administrative Procedure Act Case)

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Introduction

1
2 Just under two years ago, when the Department of Education and Plaintiffs jointly moved
3 for preliminary approval of the Settlement Agreement, the Department believed in good faith that
4 it could provide full settlement relief (i.e., discharging eligible student loans, refunding amounts
5 paid to the Department toward those loans, and facilitating corresponding credit reporting relief)
6 to Exhibit C borrowers within one year of the Agreement’s effective date. And until a few months
7 ago, the Department continued to believe in good faith—based on the numbers it was seeing—that
8 it could provide full settlement relief in that timeframe.

9 When the Department agreed to the one-year deadline, however, it failed to appreciate (1)
10 how long it would take to provide full settlement relief to borrowers with consolidation loans (i.e.,
11 multiple loans rolled together) and (2) how many such borrowers there were. In December 2023,
12 the Department began to realize that the complexities of the consolidation loans among Exhibit C
13 borrowers were far greater than it had appreciated. Even so, the Department believed that 95
14 percent of Exhibit C borrowers had received full settlement relief as of January 2024. The
15 Department was incorrect, however. Its error resulted from the Department’s data recording only
16 the discharge performed by the original loan servicer, even though consolidation loans require
17 further steps from other servicers for the current loan to reflect the discharge. For loans with many
18 layers of consolidation, the Department’s data gave only a limited window into the status of
19 settlement relief. This erroneous picture, coupled with the number of borrowers with consolidation
20 loans, lead to a significant minority of Exhibit C borrowers—specifically, those who had highly
21 complex multiple-consolidation loans—not receiving full settlement relief within one year of the
22 Agreement’s effective date.
23

24 When the Department discovered these errors, it immediately took steps to assess the scale
25 of the problem and develop—at Plaintiffs’ understandable insistence—a reasonable timeframe to
26 provide full settlement relief. Plaintiffs were not satisfied with the Department’s inability to set
27 forth a concrete schedule—again, understandably so—and accordingly filed their Motion to
28 Enforce, ECF No. 397 [hereinafter Pls.’ Mot.]. The purpose of this response is *not* to sidestep the

1 Department's responsibility for this problem. To the contrary, the Department deeply regrets that
2 not all Exhibit C borrowers have received full settlement relief and it accepts full responsibility
3 for that unfortunate fact. Rather, the purpose of this response is to explain what happened, what
4 degree of compliance is achievable in the immediate future, and what steps towards compliance
5 will require a longer period, given the magnitude and the complexity of the situation facing the
6 Department.

7 There are no shortcuts. Having provided full settlement relief for approximately 73 percent
8 of Exhibit C borrowers, the remaining relief requires discharging complex consolidation loans
9 involving many independent servicers, some of which are decommissioned; distinguishing
10 between loans to attend Exhibit C schools, which are eligible for relief, and loans to attend non-
11 Exhibit C schools; paying associated refunds on eligible loans; and updating credit reports via yet
12 another set of independent actors, credit reporting agencies. Ordering a schedule that the
13 Department cannot meet will not facilitate the Department's efforts. The focus should be on how
14 these borrowers can receive full settlement relief in a realistically expeditious timeframe.
15 Unsatisfactory as it might be in light of the Department's previous mistakes, the Department
16 respectfully submits that the Court should rely on the insights that the Department has developed
17 into how these loans can be most expeditiously discharged. To that end, the Department is
18 determined to help the Court—through this response, the attached declaration, and at the
19 forthcoming hearing—to set the best timeline to provide full settlement relief.
20

21 **Background**

22 **A. The Parties' Settlement Agreement**

23
24 First filed in 2019, this case concerns the Department's delay in issuing borrower-defense
25 decisions. Following three years of litigation, the parties jointly moved on June 22, 2022, for
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1 preliminary settlement approval.¹ ECF No. 246. Attached to the motion was the proposed
2 Settlement Agreement, which provided a framework for comprehensively addressing the backlog
3 of hundreds of thousands of borrower-defense applications. The Department entered into the
4 Agreement based on its expectation that loan servicers would be able to take the steps necessary
5 to effectuate settlement relief under the applicable timelines. Decl. of Richard Cordray ¶ 32
6 [hereinafter Cordray Decl.], attached hereto.

7 The Agreement generally divides borrower-defense applicants into three groups. *See*
8 Settlement Agreement ¶ IV. Group One consists of the approximately 196,000 class members
9 who received federal student loans to attend one of the 151 schools identified in the settlement’s
10 Exhibit C (often referred to as “Exhibit C borrowers”). As explained to the Court, this provision
11 of the settlement reflects the parties’ determination that borrowers “associated with those schools
12 should be provided presumptive relief under the settlement due to strong indicia regarding
13 substantial misconduct by the listed schools, whether credibly alleged or in some instances proven,
14 and the high rate of class members with applications related to the listed schools.” ECF No. 246
15 at 17–18. Under the settlement, these class members are entitled to a discharge of their remaining
16 student loans associated with the relevant school, a refund of amounts already paid to the
17 Department toward those loans, and corresponding credit reporting relief. *See* Settlement
18 Agreement ¶¶ II.S, IV.A. Such “full settlement relief” was required within one year after the
19 Effective Date of the Agreement. *Id.* ¶ IV.A.

21 Group Two consists of the remaining class members who submitted borrower-defense
22 claims on or before the date of the Agreement’s execution. The Agreement provides that these
23 class members will receive a streamlined adjudication within set timeframes and with certain
24 presumptions in the borrower’s favor. *See id.* ¶ IV.C. The Agreement also provides that if the
25

26
27 ¹ Defendants respectfully refer the Court to their previously filed summary judgment briefs for a
28 complete statement of the facts predating the filing of the parties’ joint motion for preliminary
settlement approval. *See* ECF No. 63, ECF No. 249.

1 Department fails to meet the negotiated timetable for resolution of an application, it will provide
2 that applicant with full relief (including both a discharge of remaining balances and a refund of
3 past payments made to the Department). *See id.* ¶ IV.C.8.

4 Group Three consists of borrowers who submitted borrower-defense applications after the
5 Agreement’s execution but before this Court’s final approval. *Id.* ¶ IV.D. The Agreement provides
6 that these applications will be adjudicated within three years of the Agreement’s effective date,
7 using normal adjudication procedures. *Id.* ¶ IV.D.1. As with the Group Two deadlines, if an
8 application is not adjudicated within the prescribed period, the applicant will receive full
9 settlement relief. *Id.* ¶ IV.D.2.

10 The parties also agreed that the Department would adhere to certain reporting requirements.
11 *Id.* ¶ IV.G. Specifically, within thirty calendar days of the Agreement’s Effective Date, the
12 Department was required to provide Plaintiffs with information regarding the total number of class
13 members, the number of class members eligible for full settlement relief because they fall within
14 Group One, the number of class members who must receive decisions because they fall within
15 Group Two, and the number of class members who must receive decisions because they fall within
16 Group Three. *Id.* ¶ IV.G.1. The Agreement also provides that the Department must transmit to
17 Plaintiffs, and post on its website, quarterly reports documenting the Department’s progress in
18 meeting its obligations. *Id.* ¶ IV.G.2-4. Such reports are to include five separate categories of
19 information concerning settlement implementation. *Id.* ¶ IV.G.4.i-v.

20
21 Additionally, the Agreement includes detailed provisions regarding enforcement. *Id.* ¶ V.
22 Pursuant to the Agreement, “the Court shall retain jurisdiction only to review claims set forth in
23 this Section V, and only in the manner explicitly provided in Section V.” *Id.* ¶ V.A. For claims
24 arising under this section, the Court’s jurisdiction is limited “only to order the relief explicitly
25 specified for each particular claim[,]” and the Court “lack[s] jurisdiction to imply any claims, or
26 authority to issue any other relief, under th[e] Agreement.” *Id.* As relevant here, the Agreement
27 provides that, if the Department fails to effectuate full settlement relief for an Exhibit C borrower
28 within the prescribed time period, “the only relief available from the Court shall be an order

1 requiring Defendants to promptly provide Full Settlement Relief to each affected individual on a
2 schedule set by the Court.” *Id.* ¶ V.B.2. The Agreement states that “Defendants shall also be
3 liable for Plaintiffs’ reasonable attorney’s fees and costs incurred in bringing the claim.” *Id.* ¶
4 V.B.2. The Agreement further specifies that, in the event of an involuntary collection of a class
5 member’s student loan debt, “Defendants shall not be liable based on events outside of Defendants’
6 control, including but not limited to a situation where a third party, such as an employer, undertakes
7 debt collection activities, such as wage garnishment, inconsistent with Defendants’ instructions
8 that collection activity cease.” *Id.* ¶ V.B.4.ii. Finally, the Agreement sets out a procedure for the
9 parties to meet and confer regarding allegations of material breach. *Id.* ¶ V.D.

10 The Court granted preliminary approval to the settlement on August 4, 2022. ECF No.
11 307. On August 31, 2022, the Court granted the motion to permissively intervene filed by The
12 Chicago School of Professional Psychology, Everglades College, Inc., American National
13 University, and Lincoln Educational Services Corporation. ECF No. 322. These schools sought
14 to intervene to object to and oppose the Agreement. *Id.* The following month, Plaintiffs and
15 Defendants jointly moved for final settlement approval, ECF No. 323, which the Court granted on
16 November 16, 2022, ECF No. 345. Three of the intervenor schools subsequently appealed, ECF
17 No. 347, 348, 349, and moved to stay the final judgment pending appeal, ECF No. 350. The Court
18 held a settlement status conference on January 26, 2023; following that conference, the Court
19 ordered that “[b]ecause defendants state that they cannot separate out loan discharge requests for
20 borrowers who attended appealing intervenor schools, no loan discharge requests shall be sent and
21 no loans shall be discharged until appealing intervenors have an opportunity to have their motion
22 heard and the order on their motion issues on or about 2/15/23.” ECF No. 356. The Court
23 ultimately denied the intervenors’ motion to stay judgment pending appeal on February 25, 2023,
24 though it temporarily stayed the judgment “with respect to discharges and discharge requests for
25 loans associated with movants for [seven days] to allow them to present a stay motion to our court
26 of appeals.” ECF No. 382 at 24-25. The Ninth Circuit denied the intervenors’ motion to stay on
27
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1 March 29, 2023. ECF No. 390. The Supreme Court denied the intervenors' emergency stay
2 application on April 13, 2023. No. 22A867 (Apr. 13, 2023).²

3
4 **B. The Department's Implementation of the Agreement**

5 Even before the Court approved the Agreement, the Department began to take steps
6 towards compliance. *See generally* Cordray Decl. Part II.A. Beginning in June 2022, these efforts
7 included preparing discharge requests that would instruct servicers to complete the necessary steps
8 to provide full settlement relief to Exhibit C borrowers (i.e., discharge the relevant loan(s), issue
9 refunds for payments made on the loan(s), and update credit reporting). *Id.* ¶¶ 29–31. The
10 Department also used this time to implement procedures to ensure that it could meet its settlement
11 obligations with respect to class members who were not Exhibit C borrowers, including by drafting
12 guidance documents for adjudicators and publishing information on the Department's website. *Id.*
13 ¶ 32. Both at the time the Department executed the Agreement and when the Court entered final
14 approval, the Department believed it had the resources and procedures in place to meet the
15 applicable deadlines. *Id.* ¶ 28.

16
17 On February 28, 2023, the Department sent to servicers the discharge requests for 180,826
18 Exhibit C borrowers, carving out requests for those borrowers who attended the appealing
19 intervenors' schools. *Id.* ¶ 40. The remaining discharge requests were sent on March 30, 2023,
20 and May 10, 2023, after the Ninth Circuit denied the intervenors' motion for stay. *Id.* ¶¶ 41, 42.
21 Shortly after the Agreement went into effect, the Department met with loan servicers "to
22 emphasize the timeline associated with the *Sweet* Class cases, answer servicer questions, and
23 receive updates on servicer progress." *Id.* ¶ 69.

24 The loan servicers began to promptly implement the discharge requests. *Id.* ¶¶ 44, 69. The
25 specific process followed by servicers is discussed in detail in the accompanying declaration, *see*
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² As of April 2, 2024, the Intervenor-Schools' appeal is pending. *See Sweet v. Everglades College, Inc.*, No. 23-15049 (9th Cir. filed Jan. 17, 2023). Oral argument was held on December 5, 2023.

1 *id.* ¶¶ 44–68, though certain aspects of that process bear emphasis. First, regardless of the type of
2 loan, the Department sent discharge requests to the original loan servicer. *Id.* ¶¶ 51–53. Second,
3 the specific steps required for effectuating full settlement relief, and the complexity of the process,
4 depend on the type of loan. *Id.* ¶ 44; *see generally id.* Part II.B. For Direct Loans that were not
5 subsequently consolidated, the original servicer would reduce an eligible loan³ balance to zero, *id.*
6 ¶ 47.a; identify loan payments and create a “refund file,” which—after approval from the
7 Department—was sent to the Department of the Treasury, which then issued payment to the
8 borrower, *id.* ¶ 47.b; notify credit reporting agencies about a change in loan balance, which
9 required credit reporting agencies to remove the tradeline as applicable, *id.* ¶ 47.c; and update the
10 National Student Loan Data System (“NSLDS”) to reflect the processing of a discharge, *id.* ¶ 47.d.
11 Loans made pursuant to the Federal Family Education Loan Program (“FFEL”) and held by
12 commercial lenders were to be handled similarly. *See generally id.* Part II.B.3. After receiving a
13 discharge request, the guaranty agency (“GA”) would pay off the loan and provide for the borrower
14 to receive a credit reporting update. *Id.* ¶¶ 63–65.⁴

15
16 Consolidation loans, by contrast, require more steps—sometimes considerably more—by
17 more parties. *See generally id.* Part II.B.2. Consolidation loans are not taken out to pay for
18 attendance at a college or university, but rather consolidate one or more existing student loans into
19 a new loan. *Id.* ¶ 23. As with Direct Loans, the Department sent the discharge request for
20 consolidation loans to the original servicer of an eligible loan. *Id.* ¶¶ 50–62. Because the eligible
21 loan was paid off by a consolidation loan, the account maintained by the eligible loan’s original
22 servicer will already show a zero balance. *Id.* ¶ 23.c. That servicer must nonetheless calculate a

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24
25 ³ An “eligible loan” is one that is subject to discharge, refund, and credit reporting relief based on
the borrower’s using the loan to attend an Exhibit C school.

26 ⁴ Unlike in cases of Direct loans, the Department does not have contractual obligations with GAs.
27 *Id.* ¶ 64. Nonetheless, historically these entities have cooperated with the Department to process
28 borrower-defense discharge requests, and they have cooperated here to effectuate full settlement
relief. *Id.* Pursuant to the Agreement, refunds are not provided for such loans because payments
were not made to the Department. *Id.* ¶ 66.

1 refund amount for any payments made to it on the eligible loan, and then send a record, or
2 instruction, to the consolidation servicer to reduce the consolidation loan by the amount of the
3 eligible loan (i.e., discharge the eligible loan), calculate a refund for any payments made to it, and
4 update the credit reporting on the borrower’s account. *Id.* ¶ 23.d. If the consolidation loan has
5 been consolidated more than once—as was the case for many borrowers—a record must be created
6 and sent to each subsequent servicer. This ensures that, by the end of the process, a discharge of
7 the eligible loan is reflected in the current consolidation loan, all payments on subsequent loans
8 that are attributable to the eligible loan are identified for refunds, and the credit reporting is updated
9 appropriately. *Id.* ¶ 24. The timing associated with completing full settlement relief for an Exhibit
10 C borrower with one or more consolidations depends on multiple complicating factors, including
11 (1) the number of consolidations; (2) whether the underlying loan was serviced by a now-
12 decommissioned servicer (i.e., servicers that have gone out of business or ceased servicing federal
13 student loans); (3) whether the originator and servicer for the underlying loan were the same entity;
14 and (4) whether a consolidation loan’s original underlying school loans are all eligible for
15 settlement relief or also include loans to attend a school not listed on Exhibit C. *Id.* ¶¶ 50, 55, 56,
16 57, 59.

17
18 The Department’s oversight of the servicers has occurred through various channels. The
19 Department discussed *Sweet* with the servicers in weekly calls, periodically reminded them of the
20 settlement deadlines, and received regular reports on servicers’ progress in fulfilling discharge
21 requests. *Id.* ¶¶ 69, 70. Servicers had a 15-business-day deadline to fulfil the discharge request
22 for the original loan. *Id.* ¶ 71. The Department closely monitored servicers’ adherence to this
23 deadline, and while the Department granted extensions to complete this step (e.g., when a servicer
24 was faced with a complicated loan history), it “notified servicers in October 2023 that the February
25 2023 discharge requests for origination loans should be completed by November that year[.]” *Id.*
26 ¶ 71. When two servicers reported in November 2023 that discharge requests remained
27 incomplete, the Department began to hold twice weekly meetings with them, “receive updates,
28 answer questions, and reinforce the timeline required for completion under the settlement.” *Id.* ¶

1 72. That month the Department also informed the servicers that it was undertaking new efforts to
2 validate their information and emphasized the importance of communication between the
3 Department and the servicers. *Id.* ¶¶ 73, 74.

4 As late as January 2024, the Department believed that discharges had been applied for 95
5 percent of Exhibit C borrowers. *Id.* ¶ 76. That belief, it turns out, was wrong for several reasons.
6 First, the Department failed to appreciate the implications of the consolidation loans held by
7 Exhibit C borrowers; specifically, the amount of time and number of steps needed to effectuate
8 full settlement relief for consolidation loans given the complexity of the process described above.
9 *Id.* ¶¶ 5, 28 96. The Department failed to account for the fact that adjusting consolidation loans to
10 account for the underlying loans' discharge—especially consolidation loans with ineligible
11 underlying loans, inaccessibly stored payment records, or records from a since-decommissioned
12 servicer—would add such significant time for full processing. *Id.* ¶ 70. Second, the Department
13 failed to establish a process to track the status of discharges for consolidation loans. *Id.* ¶¶ 76, 96.
14 The Department was focused on the status of discharges completed by the original servicer, and—
15 despite emphasizing to the servicers the January 2024 deadline—neglected to carefully consider
16 the time subsequent servicers took to discharge eligible loans, create refund files, and send updates
17 to credit reporting agencies. *Id.* ¶ 71. Third, the Department failed to impose strict and enforceable
18 deadlines on servicers processing consolidation loans beyond the origination loan. *Id.* ¶ 96. As
19 noted above, the Department imposed a 15-business day deadline on original servicers but did not
20 impose a corresponding deadline on subsequent services. Finally, the Department failed to
21 correctly interpret servicer-provided information, which did not indicate that consolidation loans
22 were fully discharged, as the Department believed and reported. *Id.* ¶ 96. Rather, that information
23 indicated only that the *original* servicer discharged its portion of the consolidation loan, not that
24 *subsequent* servicers discharged their portions. *Id.* ¶ 85.

25
26 In November 2023, the Department notified servicers that it was reviewing for
27 completeness the processing of *Sweet* loans. *See id.* ¶ 74. Around December 2023, as part of the
28 process of reconciling servicer-reported progress with NSLDS data, the Department detected a

1 complication with discharges of consolidation loans and began to focus on processing these
2 adjustments so that the discharges were applied to the eligible loans' subsequent consolidations.
3 *Id.* ¶ 75. The Department also instructed the servicers to prioritize Exhibit C consolidation loans
4 at that time. *Id.*

5 On January 24, 2024, representatives from the Department, the Department's attorneys,
6 and class counsel held a telephonic conference to discuss the status of full settlement relief for
7 Exhibit C borrowers. *Id.* ¶ 77. The Department conveyed to class counsel its belief that, as of that
8 date, full settlement relief had been effectuated for approximately 95 percent of Exhibit C
9 borrowers, and that full settlement relief for the remaining portion of Exhibit C borrowers would
10 be effectuated in the next few months, according to information provided by loan servicers. *Id.* ¶¶
11 76, 77. The Department explained that for most of these borrowers, additional review was needed
12 to determine if a refund is due, and the delay for the remaining borrowers was attributed to
13 complications related to loan consolidation. *Id.* ¶ 77. During the call, class counsel disputed the
14 accuracy of the 95% figure cited by the Department. *Id.* ¶ 79.

16 C. Plaintiffs' Allegations of Material Breach

17 On February 2, 2024, Plaintiffs formally alleged that the Department was in material breach
18 of the Agreement. *Id.* ¶ 84. As relevant here, Plaintiffs alleged that the Department failed to
19 provide full settlement relief to all Exhibit C borrowers and again disputed the accuracy of the
20 95% figure. *Id.*

21 The Department responded on February 16, 2024. *Id.* ¶ 85. In its response, the Department
22 confirmed that the numbers it had previously reported were inaccurate. *Id.* Specifically, as of
23 February 15, 2024, the Department's analysis of its records indicated the following:

- 24 • 135,526 borrowers (approximately 69 percent of Exhibit C borrowers) had received
25 fully processed discharges;

- 1 • 31,437 borrowers (approximately 16 percent of Exhibit C borrowers) had not received
2 fully processed discharges (of these, 3,581 borrowers had received fully processed
3 discharges for some but not all eligible loans); and
- 4 • 28,964 borrowers (approximately 15 percent of Exhibit C borrowers) required further
5 investigation as to whether they have received fully processed discharges.

6
7 *Id.* ¶ 86.a–c. As of February 15, 2024, the Department was unable to determine the number of
8 Exhibit C borrowers who had received full refunds, or whose credit reporting has been accurately
9 updated as a result of discharges. *Id.* ¶ 86.d.

10 These numbers were based on the Department’s review of NSLDS files, which maintain a
11 record of various attributes about a borrower’s loans. *Id.* ¶ 87. Further, the Department identified
12 three reasons that not all Exhibit C borrowers had received full settlement relief: (1) “certain
13 borrowers have highly complex consolidation loan histories that must be manually researched and
14 reconstructed to determine the appropriate discharge and/or refund amounts”; (2) “the payment
15 histories of certain borrowers are not readily available, such that the servicers must reconstruct the
16 borrower’s billing history from records that are often dated and contained only in imaged PDFs”;
17 and (3) “the Department found that servicers have initiated the relief process for certain borrowers,
18 but that process has not been completed, likely because a series of transactions must be executed
19 across multiple servicers, particularly with loans that have been consolidated multiple times.” *Id.*

20 The Department also provided information about the types of loans for which NSLDS data
21 indicated had not been fully processed. *Id.* ¶ 88. Many included loans that had been consolidated
22 multiple times, in which case, as explained above, servicers need to coordinate about the various
23 stages of how the loans developed through multiple consolidations to fully discharge the Exhibit
24 C loan (and ensure that any non-Exhibit C loans are not discharged). *Id.* In some cases, a
25 consolidation loan was previously serviced by a decommissioned entity, which can present
26 logistical challenges to the successor servicer because of deficient or nonexistent records (e.g.,
27 payment histories) related to the loans. *Id.* Exhibit C borrowers with non-consolidated loans were
28

1 also among those who had not yet received full settlement relief.⁵ *Id.* For borrowers whose loans
2 required additional verification as of February 15, 2024, the Department noted that while a
3 substantial number likely have received fully processed discharges, others were likely delayed
4 because consolidation loans consisted of both eligible and ineligible loans that needed to be
5 accurately untangled. *Id.* This untangling involves each servicer recalculating the balance,
6 interest, fees, and payments associated with each Exhibit C loan in the consolidation loan,
7 beginning with the initial loan and ending with the borrower’s current consolidation loan. *Id.* ¶ 55.
8 Take, for example, a student who has a consolidation loan associated with The Art Institute, an
9 Exhibit C school, and UC San Francisco, which is not an Exhibit C school. After the loans were
10 consolidated, the servicer recorded a single balance, imposed a single interest rate, imposed a
11 single set of fees, and collected a single payment from the borrower. Now that the servicer has
12 been instructed to discharge only debt associated with The Art Institute, however, the servicer must
13 refund the payments and calculate how much the balance, interest rate, and fees, *would have been*
14 if they were separated from the loan associated with UC San Francisco. Because of this
15 recalculation, which servicers must do for each consolidation, the processing times for discharging
16 consolidation loans can be lengthy—longer at least than if servicers could discharge both eligible
17 and ineligible debt. *See id.* ¶¶ 120-25 (describing processing times).

19 The Department also addressed the status of the other aspects of full settlement relief—
20 refunds and updates to credit bureaus. *Id.* ¶ 89. As to the former, the Department acknowledged
21 that there may be some Exhibit C borrowers who are entitled to, but have not yet received, refunds
22 pursuant to the Agreement, and that “a substantial number of these borrowers are prior defaulted
23

24 ⁵ These borrowers largely fall into two groups. The first group is borrowers with zero balances
25 because they received a different discharge that does not provide refunds. Servicers for these
26 borrowers must therefore take additional steps to ensure that the borrower receives their entitled
27 refunds. This group contains approximately 1,800 borrowers. The second group is borrowers with
28 unknown processing errors or glitches that must be individually assessed for quality control. Many
of these borrowers may have changed servicers since the discharge requests were built (and thus
were sent to the wrong servicer) or had a coding error when the discharge was applied. This group
contains approximately 1,000 borrowers.

1 borrowers, or borrowers whose loans have been transferred from decommissioned servicers that
2 failed to provide complete and readily accessible records (e.g., payment histories) related to the
3 loans.” *Id.* The servicers have informed the Department that, under these circumstances, obtaining
4 additional payment information can be difficult if not impossible. *Id.* With respect to the deletion
5 of tradelines, the Department confirmed that it “timely directed servicers to request that the credit
6 bureaus delete the relevant tradeline.” *Id.* But because the steps for refunds and credit-reporting
7 depend on the discharge process being reflected in a borrower’s current consolidation loan, the
8 Department nonetheless “acknowledge[d] that the relevant loan debt for some Exhibit C borrowers
9 has not yet been removed from their credit reports.” *Id.*

10 The Department subsequently conveyed its agreement with Plaintiffs that, in light of the
11 failure to effectuate full settlement relief for all Exhibit C borrowers, the Department is in material
12 breach of the Settlement Agreement. *Id.* ¶ 90.

14 **D. The Department’s Efforts to Remedy the Material Breach**

15 The Department deeply regrets that not all Exhibit C borrowers have received the relief to
16 which they are entitled. The Department accepts full responsibility for its errors and acknowledges
17 the effects on borrowers. *See id.* ¶¶ 5, 96, 117 The Department has taken multiple steps to remedy
18 the material breach, focusing specifically on tracking and accelerating discharges and refunds for
19 consolidation loans.

20 First, the Department initiated an emergency process that would require servicers to track
21 in a single record the loans for a given Exhibit C borrower. *Id.* ¶¶ 106–11. This new reporting
22 mechanism will allow both servicers and the Department to follow in real time the status of
23 discharging a consolidation loan and the creation of refund files, and will facilitate communication
24 between the Department and the servicers about particular adjustments (i.e., discharges, refunds,
25 and credit reporting updates) required by additional servicers beyond the original servicer. *Id.*
26 ¶ 109.

1 Second, the Department has repeatedly emphasized that servicers must prioritize the
2 processing of consolidation loans. *Id.* ¶ 75. To that end, the Department has instructed servicers
3 to process adjustments within ten business days. *Id.* ¶ 102. Beginning April 1, 2024, if a servicer
4 beyond the original servicer does not meet the ten-day deadline, the Department can impose
5 consequences on that servicer, including reducing loan allocations and assessing financial
6 penalties. *Id.* ¶ 105.

7 Third, the Department has initiated a process that will provide prompt credit reporting
8 relief. *Id.* ¶¶ 112, 114–115. Specifically, the Department “has begun the process to require the
9 servicer of each class member’s current consolidation loan to direct the CRAs to delete the
10 tradeline associated with the consolidation loan immediately rather than following the completion
11 of steps by servicers that serviced the loans underlying the current consolidation loan.” *Id.* ¶ 115.
12 These updates should be reflected in the reports to the credit reporting agencies for the month of
13 May for federally held loans and generally by May or June for commercial FFEL loans. *Id.*

14 With respect to the number of Exhibit C borrowers who have not yet received full
15 settlement relief, the Department has analyzed its records and confirmed the following as of March
16 29, 2024:

- 17 • 142,676 Exhibit C class members (72.8 percent) have fully processed discharges.
- 18 • 2,280 Exhibit C class members (1.2 percent) with unconsolidated school loans (and
19 no eligible consolidated loans) for whom relief remains incomplete.
- 20 • 50,967 Exhibit C class members (26.0 percent) with consolidation loans associated
21 with Exhibit C loans for whom relief remains incomplete.
- 22 • Additionally, there is a small number of borrowers whose records are conflicting
23 as to whether they have any eligible loans and that are being reviewed by the
24 Department.
- 25

26 *Id.* ¶ 118.
27
28

Discussion

A. The Department’s Failure to Effectuate Full Settlement Relief for All Exhibit C Borrowers

Despite fully processing discharges for 72.8% of Exhibit C borrowers, the Department acknowledges that it has failed to effectuate full settlement relief for all such borrowers, and that the Court may therefore “order Defendants to promptly provide [such relief] to each affected individual on a schedule set by the Court.” Settlement Agreement ¶ V.B.2.i. In view of the Department’s reliance on loan servicers to take the necessary steps to provide full settlement relief, the number of remaining Exhibit C borrowers, and its own efforts to remedy the breach, the Department respectfully proposes that the Court set a schedule consistent with the following forecasts.

1. May 31, 2024: Full Settlement Relief for 5,500 additional Class Members, which is roughly equivalent to the estimated number of remaining Exhibit C class members with Direct Loans and loans that were consolidated once.

2. July 31, 2024: Full Settlement Relief for 30,000 additional Class Members, which is roughly equivalent to the estimated number of remaining Exhibit C class members with loans that were consolidated twice.

3. August 31, 2024: Full Settlement Relief for 12,000 additional Class Members, which is roughly equivalent to the estimated number of remaining Exhibit C class members with loans that were consolidated three or four times.

4. September 6, 2024: Report to Plaintiffs and the Court on the number of remaining Class Members who have not received Full Settlement Relief. Because relatively few borrowers have loans with five or more consolidations, the Department estimates that this population will be no more than 7,000 and may be substantially lower. Because these loans are exceedingly complex, however, the Department is unable to predict specifically how many borrowers will remain.

See Cordray Decl. ¶¶ 109–12, 118–24.

1 The accompanying declaration also describes new processes that the Department is refining
2 with servicers to speed up relief for consolidation loans and improve the ways to confirm it. *See*
3 Cordray Decl. ¶¶ 106–17. Although that process is not final and remains subject to numerous
4 caveats and dependencies based on the complexity involved, the improvements in that new process
5 could facilitate full relief for approximately 20,000 additional Exhibit C class members by May
6 31, 2024, and full relief for nearly all remaining Exhibit C class members by July 31, 2024. *Id.* ¶¶
7 106–11, 121.

8 Plaintiffs ask that the Court order Defendants to “provide Full Settlement Relief to each
9 Class Member in the automatic relief group by May 31, 2024.” Pls.’ Mot. at 17. Using the
10 procedures described above and in the accompanying declaration, the Department is unable to
11 effectuate full settlement relief by that time, particularly for consolidation loans with two or more
12 consolidations. *Id.* ¶ 123; *see Am. Hosp. Ass’n v. Price*, 867 F.3d 160, 167 (D.C. Cir. 2017) (“And
13 just as a court may not require an agency to break the law, a court may not require an agency to
14 render performance that is impossible.”). To the contrary, the Department can only commit, at
15 present, to providing full settlement relief to an additional 5,500 Exhibit C borrowers by May 31.
16 Cordray Decl. ¶ 121. Plaintiffs do not provide any basis for believing that the Department can
17 meet their May 31, 2024, deadline, though they have previously indicated their belief that the
18 Department can meet this deadline by simply sending a discharge request to current servicers of
19 consolidation loans with instructions to discharge both eligible and ineligible debt and refund all
20 payments made on both eligible and ineligible loans. ECF No. 397 at 122–23. Expanding the
21 scope of relief as Plaintiffs propose would materially expedite the process of discharging
22 consolidated loans. Indeed, the Department assesses that if it were not required to disaggregate
23 eligible and ineligible loans, “it would become practicable for the Department to discharge the
24 remaining loans within 60 days of implementing a CR to carry that out.” Cordray Decl. ¶ 125.e.
25 Under such a framework, it would still not be possible to provide refunds of payments under
26 eligible loans by May 31. *Id.* However, the relief proposed by Plaintiffs would exceed the scope
27
28

1 of the Agreement and would result in the discharge of an estimated several hundred millions of
2 dollars in ineligible debt. *Id.* ¶ 125.c.

3 Finally, Plaintiffs propose that the Court’s order setting a schedule “would be best
4 effectuated if the Court were to designate a single individual within the government to oversee the
5 Department’s compliance—in particular, an individual who has not previously been involved in
6 overseeing the Department’s botched handling of the Settlement.” Pls.’ Mot. at 15. Plaintiffs
7 identify no basis for the Court to award such relief under the Agreement. “Federal courts ‘have
8 no inherent power to enforce settlement agreements entered into by parties litigating before
9 them.’” *K.C. ex rel. Erica C. v. Torlakson*, 762 F.3d 963, 967 (9th Cir. 2014) (quoting *Arata v. Nu*
10 *Skin Int’l Inc.*, 96 F.3d 1265, 1268 (9th Cir. 1996)). “Rather, courts have ancillary jurisdiction to
11 enforce a settlement agreement only ‘if the parties’ obligation to comply with the terms of the
12 settlement agreement ha[s] been made part of the order of dismissal—either by separate provision
13 (such as a provision ‘retaining jurisdiction’ over the settlement agreement) or by incorporating the
14 terms of the settlement agreement in the order.” *Id.* (quoting *Kokkonen v. Guardian Life Ins. Co.*
15 *of Am.*, 511 U.S. 375, 381 (1994)). The Settlement Agreement explicitly limits the Court’s
16 enforcement “jurisdiction only to order the relief explicitly specified for each particular claim and
17 only where Defendants have not provided that relief pursuant to the procedures specified in this
18 Section.” Settlement Agreement ¶ V.A. Further underscoring this limitation, the Agreement
19 states, “The Court shall lack jurisdiction to imply any claims, or authority to issue any other relief,
20 under this Agreement.” *Id.* Beyond the Agreement, there is no “order of dismissal” that provides
21 additional ancillary jurisdiction; to the contrary, in its Final Judgment, the Court confirmed that it
22 “should retain jurisdiction to monitor and oversee implementation of the settlement *as set forth in*
23 *the settlement agreement.*” ECF No. 346 (emphasis added). The Court’s jurisdiction is therefore
24 limited to the role outlined in the Settlement Agreement. And the Agreement provides that in
25 response to the Department’s failure to provide Class Members with Full Settlement Relief, “the
26 only relief available from the Court shall be an order requiring Defendants to promptly provide
27 Full Settlement Relief to each affected Class Member on a timetable set by the Court.” Settlement
28

1 Agreement ¶ V.B.1.i. Plaintiffs’ additional requested relief is unequivocally beyond the Court’s
2 jurisdiction, and the Court should accordingly reject it.⁶

3
4 **B. Plaintiffs’ Request for Additional Reporting**

5 In their motion, Plaintiffs ask the Court to order Defendants to submit reports every
6 fourteen days that include detailed information, including “a description of the steps the
7 Department has taken to verify that these reported numbers are accurate” that is “attested to under
8 oath by a senior Department official[.]” Pl.’s Mot. at 15–17. The Court lacks jurisdiction to order
9 this relief as well. Pursuant to the Agreement, if the Court orders Defendants “to promptly provide
10 Full Settlement Relief to each affected Class Member on a timetable set by the Court[.]”
11 Defendants will report to Plaintiffs’ Counsel and the Court on its progress of issuing such relief,
12 *as provided herein,*” to affected Class Members.” Settlement Agreement, ¶ V.B.2.i–ii (emphasis
13 added). The section of the Agreement expressly discussing the reporting of progress in the event
14 of a material breach is found in ¶ V.B.3, which provides that “the only relief available from the
15 Court shall be an order requiring Defendants to submit their reports on a monthly basis from the
16 point of the order forward.” *Id.*, ¶ V.B.3; *see id.* ¶ IV.G (describing reporting requirement). Here
17 too, Plaintiffs identify no basis for the Court to award additional reporting relief under the
18 Agreement. *See id.* ¶ V.A. Additionally, the parties have engaged in separate discussions, and
19 now reached an agreement, to address Plaintiffs’ concerns about the accuracy of the Department’s
20 reporting.
21

22
23 ⁶ For these reasons, the Court also lacks jurisdiction to compel the servicers—who are not parties
24 to the Agreement or to this case—to perform any obligation under the Agreement or Final
25 Judgment or, by extension, to hold them in contempt for failing to do so. Neither the Agreement
26 nor Final Judgment reserves such ancillary jurisdiction to the Court. In an abundance of caution,
27 the Department forwarded to all the servicers the Court’s order requiring Defendants to “promptly
28 notify their loan servicers whom they blame for delay that they are ordered to appear at the hearing
on April 24, 2024, at 8:00 A.M., and show cause why they should not be held in contempt for
frustrating the settlement and the final settlement approval order of the United States District
Court,” ECF No. 399. But the Department does not blame the servicers for the current situation
and, as noted above, takes responsibility for it.

1
2 **C. Plaintiffs' Request for Reasonable Attorney's Fees**

3 Defendants agree that Plaintiffs are entitled to reasonable attorney's fees in connection with
4 their Motion to Enforce. *Id.* ¶ V.B.2.

5
6 **Conclusion**

7 Defendants respectfully request that the Court enter an order allowing the Department to
8 effectuate full settlement relief to those Exhibit C borrowers who are entitled to, but have not yet
9 received, such relief in accordance with the schedule set forth above.

10
11 Dated: April 2, 2024

Respectfully submitted,

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17

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