The Project on Predatory Student Lending
769 Centre St, Boston, MA 02130
www.ppsl.org

February 14, 2024

VIA E-MAIL

Stuart Robinson
U.S. Department of Justice
Civil Division, Federal Programs Branch
1100 L Street, N.W.
Washington, DC 20005
Stuart.J.Robinson@usdoj.gov

Re: *Sweet v. Cardona*, No. 19-cv-03674 (N.D. Cal.)
Second Notice of Material Breach of Settlement Agreement

Dear Stuart,

Thank you for acknowledging receipt of our letter dated February 2, 2024, regarding our allegations of settlement breach with respect to the effectuation of relief for the automatic relief group. We look forward to receiving the Department's response and continuing the meet-and-confer process with respect to those issues.

We write today to allege a separate material breach of the Settlement Agreement. Specifically, the Department's quarterly reports pursuant to Paragraph IV.G of the Settlement have been materially incomplete because they do not account for all eligible Class Members. On numerous occasions over the past 18 months, Plaintiffs have identified multiple groups of borrowers who should be eligible for settlement relief and have asked the Department to confirm that those individuals are included in the Department's count of Class Members. The Department has refused to respond to our questions or provide assurances that these groups are included in the Class. Plaintiffs thus have no choice but to conclude that the Department has not properly included all eligible Class Members in its reports and has not provided relief to those Class Members on the appropriate schedule, in violation of Paragraphs IV.A.1 and IV.C.3 of the Settlement.

Pursuant to Paragraph V.D.1 of the Settlement Agreement, Plaintiffs hereby provide notice of Plaintiffs' allegations that Defendants are in material breach of the Settlement Agreement, along with details of the facts and circumstances regarding each alleged breach. In the event that a meet-and-confer process does not result in prompt and assured rectification of the material breach, Plaintiffs intend to seek an order from the Court pursuant to Paragraph V.B of the Settlement Agreement.

1. Failure to submit "timely and complete" quarterly reports

Defendants have materially breached Paragraph IV.G of the Settlement Agreement by failing to submit "timely and complete" quarterly reports to Plaintiffs' Counsel. Specifically, these reports have been materially incomplete because they have not accurately depicted the number of Class Members entitled to Settlement relief.

Paragraph IV.G.1 of the Settlement provides that, "[w]ithin 30 calendar days after the Effective Date"—that is, by February 28, 2023—Defendants were to deliver a report to Plaintiffs' Counsel containing, "as of the Final Approval Date, (i) the total number of Class Members, (ii) the total number of Class Members the Department has determined are eligible for Full Settlement Relief pursuant to Paragraph IV.A; (iii) the total number of Class Members who must receive decisions pursuant to Paragraph IV.C; and (iv) the total number of Class Members and Post-Class Applicants who must receive decisions by each deadline set forth in Paragraph IV.C.3(i) through (v) and Paragraph IV.D, respectively."

Paragraph IV.G.2 of the Settlement then provides that "Defendants will submit quarterly reports to Plaintiffs documenting their progress toward fulfilling their obligations under Paragraphs IV.A, IV.C, and IV.D." These reports are required to include, *inter alia*, "[t]he total number of Class Members with pending borrower defense applications," "[t]he total number of Class Members for whom Defendants have effectuated relief pursuant to Paragraph IV.A" (that is, the automatic relief group), and "the total number of Class Members for whom the Department did not provide a decision" as required under Paragraphs IV.C.3(i) through (v) (the decision group). *See* ¶ IV.G.4.

For each of the groups of Class Members set forth below, the Department has materially breached one or more of its obligations to set forth full and complete information in its reports.

a. Borrowers prevented from submitting timely applications by the Department's technical failures

From July 2022 through December 2023, we inquired, by our count, no fewer than 15 times about the class status of borrowers who attempted to submit online BD applications on or before June 22, 2022, but were unable to do so because of technical failures on the BD website. Despite initial indications from the Department that it understood the class should include borrowers who attempted to submit before the execution date, we have never received a satisfactory response to our questions about this issue, nor any confirmation about the class status of these individuals.

The problems with the BD submission website were widespread and began long before the Settlement's execution date. Putative Class Members have sent us extensive documentation of the

technical barriers they encountered, which we are happy to provide upon request (as we have offered to do on multiple occasions before).

In a phone call on August 30, 2022—nearly 18 months ago—representatives of Federal Student Aid (FSA) stated that they would use the date that an individual first attempted to submit a BD application as that individual's application date for purposes of the Settlement. They further stated that they would investigate whether they could use back-end processes to identify attempted submissions before June 22, 2022, that were interrupted or abandoned (similar to a process it had already undertaken for people who attempted to apply in the weeks immediately after the Settlement's execution date). Since that phone call, despite repeated requests, we have not heard any further update about those processes, nor has DOJ responded to our repeated requests to speak to FSA directly about the issue.

Moreover, on March 6, 2023; June 14, 2023; and July 18, 2023, we sent spreadsheets to DOJ with the names and identifying information of 1,311 putative Class Members and Post-Class Applicants who reported to us that they had been prevented from submitting a timely online BD application by technical failures on the BD website. We provided these lists at your request. Yet we have not received any response regarding the class status of any of the individuals listed.

Correct classification has crucial implications for Class Members—particularly those who borrowed for attendance at Exhibit C schools and attempted to apply for BD on or before June 22, 2022. Such individuals account for over 800 of the names on the lists we've provided. For these Class Members, the difference in an application date means the difference between automatic relief and a three-year wait in the post-class queue. As we have stated on multiple occasions, it is our position that these individuals are properly classified as Class Members and should have received Full Settlement Relief by the deadline of January 28, 2024.

The names on our lists, of course, represent only a sample of individuals who likely encountered the technical problems on the BD website. The most accurate way to identify people who should be classified as Class Members would be through analysis of the Department's back-end data, which the Department has apparently refused to undertake despite our repeated requests and their own commitment to investigate this option.

Accordingly, the Department's initial settlement report of February 2023 was materially incomplete because it did not include people who should have been classified as Class Members and Post-Class Applicants based on their attempted application dates in its counts of "(i) the total number of Class Members, (ii) the total number of Class Members the Department has determined are eligible for Full Settlement Relief pursuant to Paragraph IV.A; (iii) the total number of Class Members who must receive decisions pursuant to Paragraph IV.C; and (iv) the total number of Class Members and

Post-Class Applicants who must receive decisions by each deadline set forth in Paragraph IV.C.3(i) through (v) and Paragraph IV.D, respectively."

The Department's quarterly settlement reports of May 2023, August 2023, and November 2023 were likewise materially incomplete because they did not account for these individuals, and thus did not accurately reflect "[t]he total number of Class Members with pending borrower defense applications." The August 2023 and November 2023 quarterly reports were further materially incomplete for the same reason, in that they did not accurately reflect "the total number of Class Members for whom the Department did not provide a decision" by the applicable deadline under Paragraph IV.C.

b. Borrowers whose paper applications were lost or improperly processed

Likewise, as far back as August 2022, we raised the issue of borrowers whose paper BD applications were not being recorded with the correct (postmark) dates that would qualify them for Class Members status. In our phone call with FSA representatives on August 30, 2022, no one from FSA had knowledge of how the Department tracks paper applications. We have since requested information on the paper application tracking and recording process at least six additional times, with no response.

On June 14, 2023, at your request, we sent a list of seven Class Members who sent in paper BD applications and either had not received notice of their class status or had been misclassified based on an erroneous date. We requested that the Department investigate these borrowers' cases and confirm that they were included in the class. The Department never responded. We also do not have any visibility into complaints the Department may have received from borrowers who tried to submit paper applications.

It is admittedly more difficult (both for Plaintiffs' Counsel and, potentially, for the Department) to identify Class Members with missing or misclassified paper applications than Class Members who interacted with the Department's online application process. Nonetheless, the Department's 18-month silence on even the process that it uses to track paper applications is deeply concerning and suggests that Class Members are falling through the cracks.

Accordingly, Plaintiffs allege that the Department's initial settlement report of February 2023 was materially incomplete because it did not include all people who submitted timely paper applications in its counts of "(i) the total number of Class Members, (ii) the total number of Class Members the Department has determined are eligible for Full Settlement Relief pursuant to Paragraph IV.A; (iii) the total number of Class Members who must receive decisions pursuant to Paragraph IV.C; and (iv) the total number of Class Members and Post-Class Applicants who must receive decisions by each deadline set forth in Paragraph IV.C.3(i) through (v) and Paragraph IV.D, respectively."

The Department's quarterly settlement reports of May 2023, August 2023, and November 2023 were likewise materially incomplete because they did not account for these individuals, and thus

did not accurately reflect "[t]he total number of Class Members with pending borrower defense applications." The August 2023 and November 2023 quarterly reports were further materially incomplete for the same reason, in that they did not accurately reflect "the total number of Class Members for whom the Department did not provide a decision" by the applicable deadline under Paragraph IV.C.

c. Class Members who paid off their federal loans via private refinancing

Paragraph II.S of the Settlement establishes that Full Settlement Relief includes "a refund of all amounts the Class Member previously paid to the Department toward any Relevant Loan Debt (including, but not limited to, Relevant Loan Debt that was fully paid off at the time that borrower defense relief is granted)." In other words, the Department agreed in the Settlement to refund *all* amounts that Class Members had paid to the Department toward their Relevant Loan Debt, even if a Class Member no longer had any outstanding federal student loan debt at the time the Settlement Agreement was executed or (in the case of the decision group) at the time the Class Member becomes entitled to settlement relief.

On September 21, 2022, in an email to Plaintiffs' Counsel, DOJ stated for the first time that the Department did not "think there is any basis for ED to provide any payments to borrowers who refinanced their loans" with a private company (such as SoFi, Earnest/NaviReFi, or the like)—despite the Settlement Agreement containing no such caveat. The reasoning provided was that "[o]nce borrowers refinance their loans, they no longer have a federal loan or any associated BD claim. They are thus not class members as of the date of consolidation."

In response, we questioned why the Department would take the position that the source of the money that paid off a Class Member's loan (that is, a refinancing company versus the borrower's own funds, however derived) is dispositive of whether the Class Member is entitled to Full Settlement Relief. DOJ responded that "once the refinance company purchases the loan, that terminates ED's legal relationship with the borrower, and the borrower is not entitled to any benefits of the federal student loan program."

To begin, we do not believe this is an accurate portrayal of what happens when a federal student loan borrower undertakes a private refinancing. The Department does not "sell" or assign the borrower's federal loan to the refinancing company—rather, the company makes a new loan to the borrower, and the proceeds of that loan are used to pay off the federal loan. This is no different than if a borrower, for example, took out a home equity loan on their house and used the proceeds to pay off their federal student loans. Indeed, we have reviewed letters—on Department of Education letterhead—to one borrower who underwent a private refinancing, which state: "We are happy to report you have successfully completed full repayment of the U.S. Department of Education student loan listed above. Congratulations on reaching this exciting goal!"

Further, in response to the Department's stated position, we asked for clarification three times—on February 22, 2023; March 2, 2023; and December 14, 2023. Each time, we asked two questions: (i) Even if the Department contends that a borrower who would otherwise be a Class Member cannot get a refund of a payoff amount that came from a private refinancing, would that borrower be eligible for refunds of amounts they paid to the Department before refinancing?; and (ii) Did the Department inform these borrowers individually, at any point, that they were waiving their rights to BD relief in general or to relief as a *Sweet* Class Member in particular by opting for private refinance?[1] We have never received responses to these questions from the Department.

Class Members' choices to refinance their loans were the direct result of the Department misconduct at the heart of the *Sweet* case: the failure to issue timely and fair decisions on BD applications. After languishing in the Department's BD system for years, with no end in sight—and, for some borrowers, having already received a form denial letter—people understandably lost hope that the Department would ever hear their defenses and sought to make what seemed to be a reasonable financial decision, to transfer their loans to a lender who offered lower interest rates. Having driven borrowers to this situation—without, as far as we can tell, providing adequate notice of the consequences—the Department cannot deny them the same relief as other Class Members. There is no basis in the Settlement Agreement to do so.

The Department's initial settlement report of February 2023 was materially incomplete because it omitted people who met the definition of Class Member from its counts of "(i) the total number of Class Members, (ii) the total number of Class Members the Department has determined are eligible for Full Settlement Relief pursuant to Paragraph IV.A; (iii) the total number of Class Members who must receive decisions pursuant to Paragraph IV.C; and (iv) the total number of Class Members and Post-Class Applicants who must receive decisions by each deadline set forth in Paragraph IV.C.3(i) through (v) and Paragraph IV.D, respectively," based on a criterion (having undergone a private refinancing) that is not a condition of Class membership.

The Department's quarterly settlement reports of May 2023, August 2023, and November 2023 were likewise materially incomplete because they did not account for these individuals, and thus did not accurately reflect "[t]he total number of Class Members with pending borrower defense applications." The August 2023 and November 2023 quarterly reports were further materially incomplete for the same reason, in that they did not accurately reflect "the total number of Class Members for whom the Department did not provide a decision" by the applicable deadline under Paragraph IV.C.

[1] Significantly, documents we have reviewed that Class Members received from refinancing companies do *not* mention borrower defense, much less the *Sweet* case, as being among the rights that a borrower might lose by refinancing.

d. "Missing" decision group Class Members

In the Department's initial settlement report of February 27, 2023, the Department listed 33,172 people as being included in the first decision group (*i.e.*, people who submitted their BD applications between January 1, 2015, and December 31, 2017, and were not covered by automatic relief). Yet in the August 2023 report, only 11,779 people were listed as having received settlement decisions—leaving 21,393 decision group members unaccounted for.

In an email to DOJ on August 29, 2023, we asked whether all of these 21,393 class members were covered by footnote 3 of the August 2023 settlement report, which stated that 26,863 class members have received relief decisions as a result of "group borrower defense relief or another individually adjudicated approval of relief." And, if they were accounted for in that way, we asked the Department to confirm which schools those decision group members attended, or alternatively what sort of "individually adjudicated approval of relief" they received (total and permanent disability, false certification, etc.).

The Department never responded to our question. We reiterated the same question in our letter of December 14, 2023. Further, consistent with the return-to-repayment concerns that had arisen by that time, we also requested assurance that these 21,393 Class Members' accounts are being properly held in administrative forbearance pending the effectuation of relief.[2]

The Department still has not provided an adequate explanation for the apparent elimination of 21,393 Class Members from the decision group. Accordingly, to the extent that the August 2023 and November 2023 quarterly reports do not account for these individuals, they are materially incomplete because they do not accurately reflect "[t]he total number of Class Members with pending borrower defense applications" and "the total number of Class Members for whom the Department did not provide a decision" by the applicable deadline under Paragraph IV.C.

Further, to the extent that those 21,393 Class Members' accounts are not being properly held in administrative forbearance pending the effectuation of relief, Defendants have materially breached the assurances in Paragraphs IV.A.3 and IV.C.7 of the Settlement Agreement.

* * *

Pursuant to Paragraph V.B.3 of the Settlement Agreement, Plaintiffs intend to seek an order from the Court requiring Defendants to revise their post-settlement reporting to correctly account for the categories of eligible Class Members described above, and going forward to issue monthly, attested reports to Plaintiffs' Counsel and the Court that correctly account for all eligible Class Members. Plaintiffs will request that such attestations aver, under penalty of perjury, that the Department has taken specified steps to ensure the accuracy of its reports. Plaintiffs further intend to seek attorneys' fees

[2] Even after receiving an alternate form of discharge instead of a settlement discharge, a Class Member remains covered by the guarantees of the Settlement Agreement. See ¶ IV.A.4.

from Defendants for fees and costs incurred in bringing this claim, including the costs of investigating the facts that establish the claim of material breach.

2. Failure to effectuate relief by applicable due date

Defendants have materially breached Paragraph IV.A.1 of the Settlement Agreement by failing to effectuate Full Settlement Relief by the applicable deadline for at least 811, and perhaps hundreds or thousands more, Class Members who are entitled to relief pursuant to that paragraph.

As noted above, Plaintiffs' Counsel has provided Defendants with the names of at least 811 individuals who should be classified as Class Members in the automatic relief group because they borrowed for attendance at Exhibit C schools and attempted to submit borrower defense applications on or before June 22, 2022, but were unable to complete their applications due to the Department's technical errors. As members of the automatic relief group, these individuals should have received Full Settlement Relief by January 28, 2024. Due to the Department's failure to properly classify them, they did not.

Pursuant to Paragraph V.B.2 of the Settlement Agreement, Plaintiffs intend to seek an order from the Court requiring Defendants to promptly provide Full Settlement Relief to each affected individual on a schedule set by the Court. Plaintiffs will request that, as part of any such order, the Court require Defendants to make monthly, attested reports to Plaintiffs' Counsel and the Court on their progress of issuing relief to affected Class Members. Plaintiffs will request that such attestations aver, under penalty of perjury, that the Department has taken specified steps to ensure the accuracy of its reports. Plaintiffs further intend to seek attorneys' fees from Defendants for fees and costs incurred in bringing this claim, including the costs of investigating the facts that establish the claim of material breach.

* * *

In order to undertake a productive meet-and-confer process regarding these allegations of material breach, Plaintiffs request the following information from Defendants:

i. Copies of all borrower inquiries and/or complaints regarding technical problems with the BD online submission process received by Federal Student Aid, including but not limited to the Federal Student Aid Ombudsman's Office, from January 1, 2022, to the present.

ii. Any and all documents reflecting or regarding the Department's efforts to identify potential *Sweet* Class Members who were prevented from filing timely BD applications due to technical problems with the BD online submission process.

iii. Copies of all borrower inquiries and/or complaints regarding the receipt and/or processing of paper BD applications received by Federal Student Aid, including but not

limited to the Federal Student Aid Ombudsman's Office, from January 1, 2022, to the present.

iv. Copies of all written policies governing the handling and/or processing of paper BD applications.

v. Any and all documents reflecting or regarding lost and/or mishandled paper BD applications.

vi. The names of all individuals the Department excluded from Class Member status and/or excluded from receiving Full Settlement Relief (including but not limited to refunds of final loan payoff amounts) on the basis that those individuals undertook a private refinancing.

vii. Documents sufficient to show how the Department identifies when a federal student loan payoff originates from a private refinancer as distinct from other sources.

Thank you for your attention to this matter.

Sincerely,

Rebecca Ellis
Eileen Connor
Rebecca Eisenbrey
PROJECT ON PREDATORY STUDENT LENDING

cc: Joe Jaramillo