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

THERESA SWEET, *et al.*, on behalf
of themselves and all others similarly situated,

Plaintiffs,

v.

ELISABETH DEVOS, Secretary of
Education, and THE UNITED STATES
DEPARTMENT OF EDUCATION,

Defendants.

Case No. 19-cv-03674-WHA

NOTICE OF MOTION AND JOINT
MOTION FOR PRELIMINARY
APPROVAL OF SETTLEMENT AND
DIRECT NOTICE TO CLASS

Date: May 21, 2020

Time: 8:00 am

Courtroom: 12, 19th Floor

Hon. William Alsup

NOTICE OF MOTION

PLEASE TAKE NOTICE THAT on May 21, 2020, at 8:00 a.m., or on a date selected by the Court, in the courtroom of the Honorable William Alsup, Courtroom 12, 19th Floor of the United States District Court for the Northern District of California, located at 450 Golden Gate Avenue, San Francisco, CA 94102, the Parties will and hereby do respectfully move the Court, for an order preliminarily approving the proposed class action settlement and directing notice of settlement to be given to class members.¹

This Motion is supported by the accompanying memorandum of points and authorities, the attached declarations and exhibits, the pleadings and other papers filed in this case, oral argument (if any), and any other matters in the record or of which this Court takes notice.

¹ In light of the Covid 19 crisis, and pursuant to Civil L-R 7-1(b), the Parties consent to having the motion decided without a hearing. *See* General Order 72 In Re: Coronavirus Disease Public Health Emergency (N.D. Cal. Mar. 16, 2020).

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MEMORANDUM OF POINTS AND AUTHORITIES**I. INTRODUCTION**

After nearly a year of litigation and months of settlement negotiations, the Parties have reached an agreement that would fully resolve the claims asserted in this class action through settlement. The Parties present the negotiated Settlement Agreement, attached as Exhibit 1, to the Court for preliminary approval. Additionally, the Parties propose a plan to provide notice to Class Members and afford them the opportunity to object to the proposed settlement. The proposed settlement (Settlement) is fair, reasonable, and adequate, as required by Rule 23(e)(2) and guarantees that all Class Members will receive timely resolution of their borrower defense claim.

The Named Plaintiffs are seven federal student loan borrowers who filed borrower defense applications with the Department of Education (Department) requesting that the Department discharge their federal student loan debt because of misconduct allegedly committed by their school. They initiated this case because the Department slowed and eventually halted issuing final decisions on borrower defense applications for a period of approximately 18 months. Plaintiffs alleged that the Department's inaction was the natural outcome of its deliberate and uniform policy abandoning borrower defense decisionmaking, an alleged choice that caused a mounting backlog of more than 200,000 claims. Plaintiffs further contended that since the Department's alleged adoption of this policy, borrowers have been in a state of indefinite limbo, unsure of whether or when they would need to repay their federal student loan debts. Defendants, on the other hand, argued that the Department's delay in issuing final decisions was reasonable due, in part, to the development of a new methodology for determining relief for successful borrower defense applicants; that this case is moot because the Department has resumed issuing final borrower defense decisions when the new methodology was finalized; and that the Court lacks jurisdiction to issue injunctive or other coercive relief against the Secretary of Education.

Plaintiffs brought this case to relieve student borrowers from this indefinite limbo. The case presents a single cause of action alleging that the Department has unlawfully withheld and unreasonably delayed final borrower defense decisions in violation of Section 706(1) of the Administrative Procedure Act.

1 The Settlement will deliver Plaintiffs' relief without the delay, risk, or expense incurred
 2 through continued litigation. Plaintiffs sought to ensure that the Department would provide student
 3 borrowers with the timely borrower defense decisions they are entitled to. The Settlement promises
 4 borrower defense applicants, who have claims pending as of the execution date of the Agreement,
 5 that they will get final decisions within 18 months and, where appropriate, relief within 21 months
 6 of the agreement's effective date. It further ensures that Plaintiffs may monitor the Department's
 7 fulfillment of its obligations under the Settlement, by requiring it to provide quarterly progress
 8 reports to Plaintiffs' Counsel.

9 This Settlement Agreement was reached only after the Parties engaged in extensive
 10 adversarial proceedings and formal, court-ordered settlement negotiations. Prior to settlement
 11 negotiations, the Court granted class certification pursuant to Fed. R. Civ. P. 23(b)(2) and the
 12 Parties briefed and argued cross motions for summary judgment. The Parties engaged in formal
 13 settlement negotiations before Magistrate Judge Ryu and continued negotiations via phone and
 14 email until they reached a settlement in principle on March 20, 2020. The Settlement addresses
 15 the terms that resolve the claims of the class, and provides that Plaintiffs will move for attorneys'
 16 fees under the Equal Access to Justice Act, 28 U.S.C. § 2412, after a settlement is approved.

17 Because the relief provided by this Settlement is a fair and reasonable resolution of
 18 Plaintiffs' case and eliminates the uncertainty of appeal, the Court should grant preliminary
 19 approval of this settlement agreement.

20 **II. BACKGROUND AND PROCEDURAL HISTORY**

21 Plaintiffs filed their class action complaint on June 25, 2019. They filed the action after the
 22 Department had not issued a final decision on any borrower defense application for over a year.
 23 Compl. ¶¶ 5, 135, 181-82. When Plaintiffs filed their complaint, there were more than 158,110
 24 pending borrower defense applications. Compl. ¶ 186. The complaint sought declaratory and
 25 injunctive relief and alleged two causes of action: (1) the absence of any borrower defense
 26 decisions by the Department since June 2018 constituted agency action unlawfully withheld or
 27 unreasonably delayed, Compl. ¶¶ 377-89, and (2) the Defendants' alleged policy of not issuing
 28 decisions for a subclass of borrowers whose applications had been designated as approved, but

1 whose applications have not been formally granted, was arbitrary and capricious, Compl. ¶¶ 390-
 2 404. Plaintiffs alleged that the Department's halt in decisionmaking was influenced by high-level
 3 Department officials who had relationships to the for-profit colleges implicated by large numbers
 4 of borrower defense claims. Compl. ¶¶ 150-51, 163-64. Plaintiffs argued that the Department made
 5 a choice to stop issuing final decisions on claims, which was unlawful because the Department has
 6 a mandatory duty under the Higher Education Act, 20 U.S.C. § 1087e(h), and its own regulations,
 7 34 CFR § 685.206, 222, to decide and resolve borrowers' claims. Defendants have never disputed
 8 that they have such a duty, but maintain that their delay in issuing final decisions was reasonable
 9 and thus not unlawful under the APA. *See, e.g.*, Defs.' Mot. for Summ. J., ECF No. 63; Defs.'
 10 Opp'n to Pls.' Mot. for Summ. J. and Reply in Supp. of Defs.' Mot. for Summ. J., ECF No. 72.

11 Defendants moved to dismiss Plaintiffs' second claim on September 12, 2019, ECF No.
 12 35, which Plaintiffs did not oppose, and it was subsequently dismissed. *See* Order, ECF No. 41
 13 (Sept. 28, 2019).

14 On July 23, 2019, Plaintiffs moved for class certification. ECF No. 20. The Court certified
 15 a class of "[a]ll people who borrowed a Direct Loan or FFEL loan to pay for a program of higher
 16 education, who have asserted a borrower defense to repayment to the U.S. Department of
 17 Education, whose borrower defense has not been granted or denied on the merits, and who is not
 18 a class member in *Calvillo Manriquez v. DeVos*." Order, ECF No. 46 at 14 (Oct. 30, 2019).
 19 Defendants notified all Class Members of the lawsuit. Order, ECF No. 61 (Nov. 19, 2019).

20 On November 14, 2019, Defendants certified an Administrative Record, ECF No. 56, and
 21 filed their Answer, ECF No. 55. On December 5, 2019, Defendants moved for summary judgment,
 22 ECF No. 63. On December 23, 2019, Plaintiffs filed their own Motion for Summary Judgment and
 23 opposed Defendants' Motion for Summary Judgment, ECF No. 67, and filed a Motion to
 24 Supplement and Complete the Administrative Record, ECF No. 66, and a Motion to Deny or Defer
 25 Decision on Defendants' Motion for Summary Judgment Under Rule 56(d). ECF No. 68. When
 26 Plaintiffs moved for Summary Judgment, more than 225,000 borrowers were awaiting a borrower
 27 defense decision. ECF No. 67 at 16.

Defendants supplemented the Administrative Record on January 9, 2020 with evidence that they had adopted a new methodology to determine how much federal student loan debt should be discharged for successful borrower defense applicants. ECF No. 71. They also asserted that as of December 10, 2019, they had resumed issuing final borrower defense decisions. *Id.* Defendants opposed Plaintiffs' Summary Judgment and Rule 56(d) Motions, ECF Nos. 72, 76, and partially opposed Plaintiffs' Motion to Supplement and Complete the Administrative Record, ECF No. 75. On February 4, the Court ordered the parties to file supplemental statements to inform the Court how many pending and undecided borrower defense claims were more than three and four years old. ECF No. 87. Defendants asserted that a small percentage of the total number of pending claims fit this definition: 18,884 claims that had been pending for over three years and 2,828 claims that had been pending for over four years. ECF No. 90 (Feb. 4, 2020). On February 20, 2020, the Court heard argument on the summary judgment, Rule 56(d) and administrative record motions.

On November 1, 2019, the Court ordered the Parties to participate in formal settlement negotiations before Magistrate Judge Donna Ryu. Order, ECF No. 47. After exchanging settlement briefs, the Parties engaged in day-long, in-person settlement negotiations before Judge Ryu on January 30, 2020. Significant headway was made toward an agreement, and the Parties continued negotiations via telephone and email. By March 20, the Parties had reached an agreement and the Defendants sought final internal approval. By March 27, the Parties finalized the Agreement. The Agreement was executed on April 7, 2020, and is attached as Exhibit 1.

III. SUMMARY OF SETTLEMENT TERMS

A. Settlement Class

The Settlement Class includes the Named Plaintiffs and all individuals who met the class definition² as of the date the Settlement was executed, April 7, 2020 ("Settlement Class Members"). Ex. A §§ III.A, IV.A.1, 2, 3. The Settlement Class is finite and determined as of the execution date of the Settlement, so that the size of the class and the length of performance of the

² "All people who borrowed a Direct Loan or FFEL loan to pay for a program of higher education, who have asserted a borrower defense to repayment to the U.S. Department of Education, whose borrower defense has not been granted or denied on the merits, and who is not a class member in *Calvillo Manriquez v. DeVos*." Order, ECF No. 46 at 14 (Oct. 30, 2019).

1 Settlement Agreement do not expand indefinitely. The Settlement Class does not include people
 2 who have already received a borrower defense decision, who are class members in the *Calvillo*
 3 *Manriquez* litigation, or who submit a borrower defense application after the Parties executed the
 4 Settlement.

5 **B. Relief**

6 Under the Agreement, Defendants will provide all Settlement Class Members with a
 7 decision on the merits of their borrower defense claims within 18 months of the date upon which
 8 the Court enters an order finally approving the Agreement and that order becomes non-appealable
 9 (or, in the event of an appeal by a Class Member, upon the date of final resolution of said appeal)
 10 (“Effective Date”). Ex. A § IV.A.1. The Department will effectuate relief (*i.e.* issue a complete or
 11 partial loan discharge) for all Settlement Class Members who it has deemed eligible for borrower
 12 defense relief within 21 months of the Effective Date. Ex. A § IV.A.2. For Settlement Class
 13 Members whose borrower defenses the Department has already determined are eligible for
 14 borrower defense relief as of the April 7, 2020 execution date of the Settlement, but who had not
 15 received a decision as of that date, the Department will provide them with notice of their final
 16 decision within three months and effectuate any relief within six months of the Effective Date. Ex.
 17 A § IV.A.3.

18 Within a week of the Effective Date, the Department will provide Plaintiffs a report, as of
 19 the April 7, 2020 execution date, of the total number of Settlement Class Members and the total
 20 number of class members the Department has already determined are eligible for borrower defense
 21 relief. Ex. A § IV.B.1. While the Department is deciding the Settlement Class Members’ claims
 22 during the 18 month period following the Effective Date, it will report to Plaintiffs every 90 days:
 23 (1) how many borrower defense decisions it has made, (2) how many class members it has
 24 provided relief to, (3) the names of schools for which the Department has made borrower defense
 25 eligibility findings, and (4) the status of decisions on applications relating to schools that have
 26 been the subject of 100 or more borrower defense applications. Ex. A § IV.B.2, 3. The Department
 27 and Plaintiffs’ Counsel will publish these reports on their respective websites.
 28

Defendants also provide other assurances. They confirm, consistent with existing policy, that they will provide Class Members written decisions resolving their borrower defense claims, that they will not engage in any involuntary collection activities against Class Members while their borrower defense claims are pending, and that they will provide a credit for any interest that accrued while a Class Member's claim was pending. Ex. A § IV.C.

C. Dismissal; Waiver; Continued Jurisdiction of the Court

In exchange for this relief, Plaintiffs agree to waive all claims alleged in this action, and dismiss the case. Ex. A § VII. Any future claims challenging the Department's final decisions on Class Members' borrower defenses are unaffected by the waiver, but the agreement does not waive or narrow any res judicata defense Defendants could assert in future actions brought by Class Members.

The Parties agree that the Court will retain jurisdiction only to adjudicate allegations of material breach as defined in the Settlement, and to provide the prescribed remedies. Ex. A § V.A, XI. The Settlement provides that the Parties will follow specific steps in the event of a breach before seeking the Court's involvement. Ex. A § V.D.

Once Defendants have decided all Settlement Class Members' borrower defense applications, notified all Settlement Class Members of their final decisions, and effectuated all appropriate relief, the Parties will file a notice with the Court. Upon the date of that notice, the Court's limited jurisdiction over this Action shall terminate.

D. Breach

Should Defendants breach their obligation to provide notice to or effectuate relief for Settlement Class Members by the deadlines specified in the Settlement Agreement, the Settlement provides relief for affected Settlement Class Members, as follows: 30% discharge of their relevant federal student loan debt for each month beyond the deadline, prorated by day. Ex. A § V.B.1, 2. If Defendants use involuntary collection methods on any Settlement Class Member while their claim is pending, the Settlement provides relief for affected Settlement Class Members as follows: 80% discharge of their relevant federal student loan debt. Ex. A § V.B.4. If Defendants fail to

1 provide timely and complete reporting every 90 days, the Department would be required to report
2 its progress on a monthly basis thereafter. Ex. A § V.B.3.

3 In the event that the Department is enjoined from using its current partial relief
4 methodology, the Settlement nonetheless requires the Department to notify all borrowers of the
5 Department's decision whether or not their application is eligible for borrower defense relief,
6 without regard to the type or amount of relief that will be issued, within the 18-month timeframe.
7 The deadline to effectuate relief would then be adjusted by the length of the injunction or the
8 amount of time until the Department adopts a new methodology. Ex. A §§ IV.A.1.i, V.D.6. The
9 Settlement also provides that extraordinary circumstances beyond Defendants' control shall be an
10 excuse to performance according to the timelines set forth in the Settlement Agreement.

11 **IV. THE SETTLEMENT AGREEMENT MERITS PRELIMINARY APPROVAL**

12 "Strong judicial policy . . . favors settlements, particularly where complex class action
13 litigation is concerned[.]" *Class Plaintiffs v. City of Seattle*, 955 F.2d 1268, 1276 (9th Cir. 1992).
14 Courts assess class action settlements by considering the factors in Rule 23(e)(2). The relevant
15 factors to assess the settlement of this injunctive relief class are: 1) whether the class
16 representatives and class counsel adequately represented the class; 2) whether the proposal was
17 negotiated at arms length; 3) whether the relief provided by the agreement is adequate for the class;
18 4) whether the benefits of the agreement outweigh the cost, risk, and delay of trial and appeal; 5)
19 the terms of any proposed award of attorney's fees, including timing of payment; 6) whether the
20 parties have other agreements relating to the settlement; and 7) whether the settlement treats class
21 members equitably relative to each other. *See* Fed. R. Civ. P. 23(e)(2).³ Here, all factors weigh in
22 favor of settlement. Named Plaintiffs and Class Counsel have adequately represented the class,
23 negotiations were conducted at arms length, and the Settlement offers equal relief to all Class
24 Members that is comparable to or better than what Plaintiffs could have reasonably expected
25 through continued litigation. The Settlement is fair, adequate, and reasonable and the Court should
26

27 ³ Rule 23(e)(2)(C)(ii) also requires that Courts assess "the effectiveness of any proposed method
28 of distributing relief to the class, including the method of processing class-member claims." That
factor does not apply here, where there are no money damages.

1 grant preliminary approval.

2 **A. Named Plaintiffs and their Counsel Adequately Represented the Class**

3 Named Plaintiffs and Class Counsel have zealously prosecuted this case and adequately
4 represented the Class. The Named Plaintiffs kept themselves apprised of each stage in the
5 litigation. They submitted affidavits in favor of class certification. ECF Nos. 20-2, 20-3, 20-4, 20-
6 5, 20-6, 20-7, 20-8. Theresa Sweet attended the January 30 settlement negotiations, and the rest of
7 the Named Plaintiffs were involved in negotiations via phone and email. All of the Named
8 Plaintiffs understand the terms of the Settlement and favor it.

9 Class Counsel have vigorously litigated this case and adequately represented the class.
10 They utilized all litigation tools available under the Administrative Procedure Act to advance the
11 interests of the class. They won class certification on a motion that included almost 900 affidavits
12 from class members, and fully briefed an Administrative Record Motion, a Rule 56(d) Motion,
13 and a Motion for Summary Judgment.

14 Additionally, Class Counsel developed a website responsive to the most common of
15 hundreds of questions raised by Class Members. *See Information for Sweet v. DeVos Class*
16 *Members*, Harvard Law Legal Services Center's Project on Predatory Student Lending,
17 <https://predatorystudentlending.org/sweet-v-devos-class-members/>.

18 **B. Parties Negotiated at Arms-Length**

19 Courts assess whether settlement negotiations were conducted at arms length to guard
20 against the possibility that class counsel would “collude with defendants . . . in return for a higher
21 attorney’s fee” or use the settlement to “pursu[e] their own self-interests.” *In re Bluetooth Headset*
22 *Prod. Liab. Litig.*, 654 F.3d 935, 946-47 (9th Cir. 2011). Collusion typically arises where
23 attorneys’ fees will be paid out of the settlement funds that would be otherwise distributed to class
24 members; unlike here, where Plaintiffs seek only injunctive relief. *See Moreno v. San Francisco*
25 *Bay Area Rapid Transit Dist.*, No. 17-CV-02911-JSC, 2019 WL 343472, at *3, n.2 (N.D. Cal. Jan.
26 28, 2019) (citing cases).

27 Moreover, the Parties’ negotiation of this Settlement through mediation with Judge Ryu
28 indicates the lack of collusion. *See* Advisory Committee’s Comments to Fed. R. Civ. P. Rule

23(e)(1)(a), (b) (collusion unlikely where parties reached settlement with “the involvement of a neutral or court-affiliated mediator or facilitator”); *In re Hyundai & Kia Fuel Econ. Litig.*, 926 F.3d 539, 569 (9th Cir. 2019) (holding settlement negotiations “over multiple mediation sessions with a respected and experienced mediator” was indicative of no collusion). Here, the Parties first contemplated settlement after the Court certified the class and ordered the parties to participate in formal negotiations before Judge Ryu. Order, ECF No. 47 (Nov. 1, 2019). The Parties participated in formal in-person negotiations on January 30, 2020. Minute Entry, ECF No. 84 (Jan. 31, 2020). Additionally, the Parties reached this Settlement while awaiting a summary judgment ruling, at which point they had an intimate understanding of the relative strengths and weaknesses of their case. All of these circumstances indicate that the Settlement was properly negotiated at arms-length. *See In re Hyundai & Kia Fuel Econ. Litig.*, 926 F.3d at 569; *Moreno*, No. 17-CV-02911-JSC, 2019 WL 343472, at *5.

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

Courts must assess whether “the relief provided for the class is adequate,” Fed. R. Civ. P. 23(e)(2)(C), by comparing plaintiffs’ likelihood of succeeding and obtaining relief from the court against the relief provided by the proposed settlement. *Carson v. Am. Brands, Inc.*, 450 U.S. 79, 88, n.14 (1981) (“Courts judge the fairness of a proposed compromise by weighing the plaintiff’s likelihood of success on the merits against the amount and form of the relief offered in the settlement.”). The relief in this Settlement is comparable to—or exceeds—what Plaintiffs and the Class could have reasonably expected to obtain in litigation.

Plaintiffs brought this case to ensure that the Department provides Class Members with timely decisions on their borrower defenses. As noted above, Defendants argued that their delay was not unreasonable and the case is moot due to the resumption of the issuance of final borrower defense decisions. Had Plaintiffs prevailed, however, the Court could have ordered Defendants to resolve the backlog of claims in a set period of time, the length of which would be at the Court’s discretion. By this Settlement, Class Members will receive a decision within 18 months of the Effective Date of the Agreement. Ex. A § IV.A. Although the negotiated period is longer than the 12-month period Plaintiffs proposed during Summary Judgment briefing, *see* ECF No. 67 at 30, it

1 does not veer far from the timeline sought by Plaintiffs in an adversarial setting. Moreover,
 2 ongoing litigation on the complicated matters presently before the Court, as well as the possibility
 3 of appeal, could further extend timely decisions on Class Members' applications. To avoid the
 4 uncertainty of a judicial outcome and the delay of appeal—in a case that is fundamentally about
 5 avoiding delay—expeditious relief is the superior outcome for the Class.

6 In addition to the agreement that the Department will timely resolve Class Members'
 7 claims, the breach provisions and reporting obligations provide Class Members with heightened
 8 protections to ensure that Defendants comply with the terms of the agreement, including some
 9 remedies for breach that they could not obtain in litigation. The Settlement provides Class
 10 Members with discharge of percentages of their loans in case of breach, regardless of whether the
 11 Department eventually grants or denies their borrower defense. Ex. A §§ V.B.1, 2, 4. This relief
 12 would not otherwise be available as a remedy for an agency's unlawful withholding or
 13 unreasonable delay under the Administrative Procedure Act.

14 Likewise, the reporting obligations provide significantly more information than
 15 Defendants currently provide to the public and shed light on Defendants' borrower defense
 16 activities. The Settlement requires the Department to specify how many applications it grants and
 17 denies for schools with large numbers of pending claims, to identify schools for which the
 18 Department has established borrower defense findings, and to disclose all of the relief formulas it
 19 applies to granted claims. Ex. A § IV.B.3. As a result, the relief attained by this Settlement is likely
 20 superior to the relief that Plaintiffs could have obtained as a remedy for their APA claim through
 21 continued litigation.

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

23 Courts also assess whether the relief in the settlement is adequate when measured against
 24 “the costs, risks, and delay of trial and appeal.” Fed. R. Civ. P. 23(e)(2)(C)(i). Where Plaintiffs
 25 would face an uncertain outcome through continued litigation, courts favor settlement. *Chun-Hoon*
 26 *v. McKee Foods Corp.*, 716 F. Supp. 2d 848, 851 (N.D. Cal. 2010); *In re Omnivision Techs., Inc.*,
 27 559 F. Supp. 2d 1036, 1041 (N.D. Cal. 2008) (favoring “[s]ettlement, which offers an immediate
 28 and certain award” in light of the litigation barriers the plaintiffs anticipated). In this case—which

centered on allegations of delay—settlement will bring borrowers’ state of limbo to an end and guarantees that a decision is in sight. That favorable resolution is not certain should the parties continue litigating. Plaintiffs believe they have advanced strong legal and factual arguments. Defendants likewise believe they asserted strong defenses and counterarguments. But the Parties’ summary judgment briefing raises several novel issues of law . Plaintiffs likewise acknowledge the serious likelihood that Defendants would appeal if Plaintiffs prevail, potentially further delaying decisions for Class Members. And additional litigation would cause both parties to incur additional litigation costs. This Settlement provides an outcome comparable to, or potentially better than, Plaintiffs’ reasonably likely litigation outcomes, and removes the uncertainty and delay of further litigation. As a result, this factor weighs in favor of the Settlement.

E. The Parties Reserve Attorneys’ Fees for the Court

Courts review “the terms of any proposed award of attorney’s fees, including timing of payment.” Fed. R. Civ. P. 23(e)(2)(C)(iii). Under this Settlement, Plaintiffs will petition the Court for fees pursuant to the Equal Access to Justice Act, 28 U.S.C. § 2412(d). Ex. A §VI. The Parties have not negotiated attorney’s fees as part of this Settlement, and have only agreed that the Plaintiffs are the prevailing party in this action for purposes of a fee petition. *Id.* This factor weighs in favor of settlement.

F. This Settlement is the Only Agreement the Parties Have with Each Other

The Settlement Agreement that the parties negotiated is the only agreement the Parties have made in connection with the proposed settlement. It is attached as Exhibit 1. *See* Fed. R. Civ. P. 23(e)(2)(C)(iv), (e)(3).

G. The Settlement Treats All Class Members Equally

Finally, the Court must inquire whether the proposed settlement “treats class members equitably relative to each other.” Fed. R. Civ. P. 23(e)(2). Under this Settlement, all Class Members are treated the same: they will all receive a decision on their borrower defense claim within 18 months of the Effective Date and they will all receive any resulting relief within 21 months of the Effective Date. Only those Class Members who the Department has *already* determined as eligible for borrower defense but has not notified get a shortened timeline—decisions within three months

and relief within six months of the Effective Date. Ex. A § IV.A.3. Because the Department has already made eligibility determinations for those individuals, it is appropriate for the Department to resolve those individuals' claims faster.

V. THE COURT SHOULD APPROVE THE CLASS NOTICE AND NOTICE PLAN UNDER RULE 23(E)(1)

Courts order direct notice of a proposed settlement to class members if the Court approves the settlement as fair, adequate, and reasonable. Fed. R. Civ. Pro. 23(e)(1). If the Court grants preliminary approval for this Settlement, the Parties propose the following schedule to notify Class Members, provide Class Members with time to object, hold a fairness hearing, and hold a final approval hearing. Parties propose that Defendants will send the proposed class notice, attached as Exhibit A to the Settlement Agreement, to all Class Members via email, and via postal mail where the Defendants have no email for the Class Member. Defendants will also send a second notice via postal mail where the Department receives notice that any initial email notice was undeliverable.

| | |
|---|--|
| Defendants will provide notice by emailing all Class Members for whom Defendants have an email address, mailing hard copies of notices to Class Members for whom Defendants do not have an email address, and updating their websites. Plaintiffs will also update their website. | Within 15 days of preliminary approval order |
| Deadline for Class Members to Object to Settlement | 60 days after preliminary approval order |
| Deadline to Submit Replies in Favor of Final Approval | 75 days after preliminary approval order |
| Deadline to File Motion for Final Approval | 85 days after preliminary approval order |
| Deadline for Defendants to File Affidavit Attesting that Notice Was Provided As Ordered | 3 Days Prior to Fairness Hearing For Final Approval |
| Fairness Hearing for Final Approval | At the Court's discretion, but not before 100 days after preliminary approval order. |

If the Court orders final approval of the Settlement, Plaintiffs will submit a timely fee petition pursuant the Equal Access to Justice Act, 28 U.S.C. § 2412(d).

VI. CONCLUSION

For the reasons discussed, the Parties respectfully request that the Court grant preliminary approval of the Settlement and schedule a Fairness Hearing for Final Approval.

Dated: April 10, 2020

Respectfully submitted,

/s/ R. Charlie Merritt

/s/ Kyra A. Taylor

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

THERESA SWEET, *et al.*, on behalf
of themselves and all others similarly situated,

Plaintiffs,

v.

ELISABETH DEVOS, Secretary of
Education, and THE UNITED STATES
DEPARTMENT OF EDUCATION,

Defendants.

Case No. 19-cv-03674-WHA

[PROPOSED] ORDER GRANTING
PRELIMINARY APPROVAL OF
SETTLEMENT

1 Plaintiffs, individually and on behalf of the class whom the Court certified on October 30,
 2 2019, ECF 46, entered into a settlement agreement with Defendants, Secretary of Education
 3 Elisabeth DeVos and the United States Department of Education on April 7, 2020. The Court,
 4 having considered that Settlement Agreement, the Joint Motion for Preliminary Approval of the
 5 Settlement Agreement, the materials filed in support of the motion, any oral argument, and the
 6 records filed in this case, finds that the motion should be **GRANTED. THEREFORE, THE**
 7 **COURT FINDS AND ORDERS THAT:**

- 8 1. The Settlement Agreement is fair, reasonable, and adequate pursuant to Rule 23 of the
 9 Federal Rules of Civil Procedure. The Court finds that Parties entered the Settlement
 10 Agreement after engaging in arms-length negotiations. The Court also finds that the relief
 11 that Class Members receive from the settlement is reasonable, especially in light of the
 12 significant risk of delay if the parties continued litigation. The Parties have no other
 13 agreement, and have agreed that Plaintiffs will submit a fee petition to the Court pursuant
 14 to the Equal Access to Justice Act if final approval is granted. The agreement applies the
 15 same terms to all Class Members, and therefore treats them equitably as to one another.
 16 Because this settlement is fair, reasonable, and adequate, it is preliminarily approved. It
 17 will be considered for final approval following the Fairness and Final Approval Hearing
 18 described below.
- 19 2. The Court approves the form, substance, and requirements of the proposed Notice to
 20 Class Members, Exhibit A to the Settlement Agreement.
- 21 3. In accordance with the Parties' Agreement, the Court adopts the following schedule:
 22 a. Within 15 days of this Order, Defendants will email all Class Members for whom
 23 Defendants have an email address the Notice attached as Exhibit A to the
 24 Settlement Agreement and send a postal mail copy of the notice to all Class
 25 Members for whom Defendants do not have an email address. If Defendants
 26 receive notice that the initial email was undeliverable to any Class Member,
 27 Defendants will at that time send a postal mail copy of the notice to any such
 28 Class Member.

- 1 b. Each Class Member will have the opportunity to object to the Proposed
2 Settlement. Class Members must submit any objections to the Settlement
3 Agreement no later than 60 days from this Order on [DATE].
4 c. The Parties must submit replies to any objections in favor of final approval within
5 75 days of this Order, before [DATE].
6 d. Parties must move for final approval within 85 days of this Order, before
7 [DATE].
8 e. Defendants must file an affidavit attesting that they provided notice to all Class
9 Members no later than 3 days prior to the Fairness Hearing for Final Approval.
10 f. The Fairness Hearing for Final Approval is scheduled for [DATE]. Due to the
11 COVID-19 pandemic and the resulting travel restrictions, as well as the fact that
12 class members reside all over the country, Class Members who object to the
13 Settlement Agreement will be permitted to appear telephonically. Counsel shall
14 appear in person, unless travel restrictions, public building closures, or other
15 circumstances related to the COVID-19 pandemic prevent in-person appearances.
16

17 **IT IS SO ORDERED.**

18
19 Dated: _____

William H. Alsup
United States District Judge

**UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA**

THERESA SWEET, *et al.*,

Plaintiffs,

v.

ELISABETH DEVOS, in her official capacity
as Secretary of Education, and the UNITED
STATES DEPARTMENT OF EDUCATION

Defendants.

No. 3:19-cv-03674-WHA

SETTLEMENT AGREEMENT

1 **I. INTRODUCTION**

2 WHEREAS, in this class action the Plaintiffs assert that the U.S. Department of Education
3 (“Department”) has unreasonably delayed and unlawfully withheld decisions on pending
4 “borrower defense” claims, *i.e.*, claims for relief from certain federal student loan obligations
5 based on institutional misconduct;

6 WHEREAS, Defendants, the Department and its Secretary, Betsy DeVos, in her official
7 capacity, deny any wrongdoing and deny that Plaintiffs are entitled to the relief they have sought
8 in this Action. Where appropriate hereafter, Plaintiffs and Defendants are referred to collectively
9 as “the Parties”;

10 WHEREAS, the Parties now mutually desire to avoid the delay, uncertainty, inconvenience
11 and expense of protracted litigation, and have determined to settle this Action, including all claims
12 that Plaintiffs, the certified Class (as defined below), and the members of that Class have brought
13 in this case;

14 NOW, THEREFORE, in reliance upon the representations, mutual promises, covenants,
15 releases, and obligations set forth in this Settlement Agreement, and for good and valuable
16 consideration, the Parties hereby stipulate and agree to compromise, settle, and resolve this case
17 on the following terms and conditions.

18 **II. DEFINITIONS**

19 Unless otherwise noted, the following definitions apply in this Settlement Agreement, and
20 for purposes of this Settlement Agreement alone.

21 A. **2016 Borrower Defense Regulations** refer to the regulations published in the
22 Federal Register on November 1, 2016 at 84 Fed. Reg. 75,926, which are presently
23 codified in the Code of Federal Regulations in various provisions of 34 C.F.R. parts
24 30, 668, 674, 682, 685, and 686.

25 B. **2019 Methodology** refers to the methodology the Department announced for
26 awarding relief to successful borrower defense claimants on December 10, 2019,
27 in the Press Release entitled *Secretary DeVos Approves New Methodology for*
28 *Providing Student Loan Relief to Borrower Defense Applicants*, available at

<https://www.ed.gov/news/press-releases/secretary-devos-approves-new-methodology-providing-student-loan-relief-borrower-defense-applicants>

- C. **Action** means the litigation styled *Sweet, et al. v. DeVos, et al.*, No. 3:19-cv-3674-WHA (N.D. Cal.).
- D. **Agreement** means this Settlement Agreement, including any attached exhibits.
- E. **Borrower defense application** means a request by a Direct Loan or Federal Family Education Loan Program borrower for relief from his or her repayment obligations with respect to those loans based on the asserted misconduct of the borrower's school. A borrower's application can include multiple claims of alleged wrongdoing on behalf of his or her school.
- F. **Borrower defense relief** refers to the relief provided to a borrower who asserts a successful borrower defense claim, which can include a full or partial discharge of the student loan debt the borrower incurred to attend the school that is the subject of the borrower defense application, and other appropriate relief.
- G. **Class** or **Class Members** are the members of the class that has been certified by this Court and refers to individuals who meet the criteria set forth in Section II below. When used in this Agreement, the terms Class and Class Members refer, individually and collectively, to the Plaintiffs, the Class, and each Member of the Class.
- H. **Class Counsel** or **Plaintiffs' Counsel** refers to Plaintiffs' attorneys of record in this Action.
- I. **Class Notice** means the document attached hereto as Exhibit A, which shall be distributed pursuant to subsection X.B, below.
- J. **Court** means the U.S. District Court for the Northern District of California.
- K. **Department** refers to the U.S. Department of Education.
- L. **Direct Loan** means and refers to a loan made pursuant to the William D. Ford Federal Direct Loan Program, 20 U.S.C. § 1087a *et seq.*

- 1 M. **Effective Date** means the date upon which, if this Agreement has not been voided
2 under Section XIII, the Final Judgment approving this Agreement, entered by the
3 Court in the form attached hereto as Exhibit B, becomes non-appealable, or, in the
4 event of an appeal by a Class Member based upon a timely filed objection to this
5 Agreement, upon the date of final resolution of said appeal. When this Agreement
6 refers to the date on which the Agreement became “Effective,” such date is the
7 Effective Date.
- 8 N. **Execution Date** means the date upon which all Parties to this Agreement, and/or
9 their counsel of record, have signed the Agreement.
- 10 O. **Fairness Hearing** means a hearing held by the Court at which time the Court will
11 determine whether this Agreement should be approved under Federal Rule of Civil
12 Procedure 23(e).
- 13 P. **FFEL** means and refers to a loan made pursuant to the Federal Family Education
14 Loan Program, 20 U.S.C. §§ 1071-1087-4.
- 15 Q. **FSA** is the Department’s Federal Student Aid office.
- 16 R. **Involuntary collection activity** means and refers to any attempt by the Department
17 or its agents to collect a past due, delinquent debt from a borrower in default,
18 including but not limited to certifying the borrower’s debts for collection through
19 the Treasury Offset Program and/or administrative wage garnishment.
- 20 S. **Preliminary Approval Date** refers to the date on which the Court enters a
21 Preliminary Approval Order, as set forth in subsection X.A.
- 22 T. **Relevant Loan Debt** refers to federal student loan debt associated with the school
23 that is the subject of the Class Member’s borrower defense application. That debt
24 includes the original principal of the affected federal student loan plus any and all
25 interest that accrued on that loan before the Class Member filed their borrower
26 defense application and any and all fees incurred by those loans.
- 27 U. **School group** refers to the name of a multi-institution or multi-campus
28 organization as defined in FSA’s Postsecondary Education Participants System

(“PEPS”), to the extent that data is included in the borrower defense review platform.

V. **“Step 1” Determinations** refers to the Department’s decision whether a Class Member’s borrower defense application is eligible for relief, *i.e.*, granted or denied, without regard to the amount or type of relief that will be issued.

III. CLASS

A. Pursuant to Federal Rule of Civil Procedure 23(b)(2), the Court has certified a plaintiff class consisting of all people who borrowed a Direct Loan or FFEL loan to pay for a program of higher education, who have asserted a borrower defense to repayment to the 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. 3:17-cv-7210 (N.D. Cal.). *See* ECF No. 46 (Oct. 30, 2019). In this Agreement, this plaintiff class is referred to as “the Class” and members of the Class are referred to as “Class Members.”

B. As of the Effective Date, all Class Members are bound by the terms of this Agreement.

IV. DEFENDANTS’ CONSIDERATION

In consideration for the promises of Plaintiffs set forth in this Agreement, Defendants agree as follows:

A. Timeline for clearing backlog of Class applications pending as of the Execution Date.

1. Within 18 months of the Effective Date, Defendants will issue final decisions on any and all Class Members’ borrower defense applications that are pending as of the Execution Date and provide each Class Member written notice of such final decision. For purposes of this subsection IV.A.1, the following definitions shall apply:

i. A “final decision” is a decision by Defendants resolving a borrower defense application, including a determination of how much relief the claimant is entitled to, if any, except insofar as any court (not

1 limited to the U.S. District Court for the Northern District of
2 California, as defined above) enjoins Defendants from applying the
3 2019 Methodology to Class Members or otherwise enjoins
4 Defendants from issuing relief to Class Members. Should that occur,
5 Defendants' written notification of a "Step 1" determination on a
6 claimant's borrower defense application along with information
7 about any court order enjoining the issuance of relief will also be
8 considered a "final decision."

9 ii. Defendants provide the notice required by this subsection when they
10 send an e-mail containing the final decision to the relevant Class
11 Member's e-mail address or, where Defendants do not have such an
12 e-mail address available, Defendants send a copy of the written
13 decision to the Class Member's last known mailing address.

14 iii. The decision is final once this notice is provided, regardless of
15 whether the borrower seeks reconsideration of Defendants'
16 decision.

17 2. Within 21 months of the Effective Date, Defendants will effectuate relief
18 for any and all Class Members who had applications pending as of the
19 Execution Date and who Defendants determine are eligible for borrower
20 defense relief.

21 i. Defendants have "effectuated relief," for purposes of this
22 subsection, when they and their loan servicers have taken all steps
23 necessary to discharge the determined portion of the claimant's
24 relevant student loan debt, including (1) reapplying all prior
25 payments to the reduced loan amount and recalculating interest, (2)
26 applying all applicable interest credits, including discharging the
27 interest that accrued while the borrower defense application was
28 pending, (3) determining if the claimant is entitled to any refund, (4)

to the extent any balance remains outstanding on the loan, placing the claimant back in a repayment status, and (5) correcting any adverse credit reporting.

3. Within three (3) months of the Effective Date, Defendants will issue final decisions on the borrower defense applications of all Class Members whom Defendants have already determined are eligible for borrower defense relief as of the Execution Date and provide each such Class Member written notice of such final decision. Within six (6) months of the Effective Date, Defendants will effectuate relief for all Class Members whose applications Defendants have determined are eligible for borrower defense relief as of the Execution Date.

i. For the purposes of this subsection IV.A.3, “final decision” shall have the same meaning set forth in subsection IV.A.1.i above.

ii. For purposes of this subsection IV.A.3, “effectuate relief” shall have the same meaning set forth in subsection IV.A.2, above.

B. Reporting Requirement.

1. Within seven (7) days of the Effective Date, Defendants will provide Plaintiffs with, as of the Execution Date, the total number of Class Members, the total number of Class Members who have been subject to involuntary collections while their borrower defense application has been pending, and the total number of Class Members the Department has determined are eligible—*i.e.*, their application has been approved—for borrower defense relief.

2. Defendants will submit quarterly reports to Plaintiffs documenting their progress towards fulfilling their obligations under subsection IV.A of this Agreement. Defendants will submit reports to Plaintiffs’ Counsel via electronic mail and will post them publicly on their Federal Student Aid website.

1 i. The first report shall be submitted 90 days after the Effective Date,
2 unless that day falls on a weekend or Federal holiday, in which case
3 the report shall be submitted on the next business day. The reports
4 shall be submitted every 90 days thereafter, subject to the same
5 exceptions where the 90th day falls on a weekend or Federal holiday

6 3. The reports described herein shall contain the information listed below. The
7 first report will reflect progress Defendants have made since the Effective
8 Date and later reports will reflect the progress Defendants made from the
9 last date reported in the prior report to the end of each reporting period. The
10 first reporting period will start on the Effective Date. Each subsequent
11 reporting period will start on the last date for which progress was reported
12 in any previous report. Each reporting period shall exclude a period not
13 exceeding 30 days immediately preceding the submission of a report, during
14 which Defendants pull, confirm, and validate the data provided in each
15 report.

16 i. Aggregate borrower defense decision information

- 17 a. The total number of Class Members with pending borrower
18 defense applications;
19 b. The total number of pending borrower defense applications;
20 c. The total number of final decisions that Defendants issued to
21 Class Members, including the number of final decisions
22 issued to Class Members during the reporting period;
23 d. The total number of Class Members whose borrower defense
24 applications were granted;
25 e. The total number of Class Members for whom Defendants
26 effectuated relief, including the number of Class Members
27 for whom Defendants effectuated relief during the reporting
28 period.

- f. The total number of Class Members who have been subject to involuntary collection activities by Defendants while their borrower defense application was pending (if any).
 - ii. For each school group, as defined above, on the basis of whose alleged wrongdoing Defendants have received more than 100 borrower defense applications:
 - a. The number of applications that the Department determined were either eligible or ineligible for borrower defense relief during the reporting period;
 - b. The number of final borrower defense decisions issued and communicated to Class Members during the reporting period, including information about how many claims had been approved for borrower defense relief and how many claims had been denied; and
 - c. The total number of Class Members for whom the Department effectuated relief during the reporting period.
 - iii. The names of schools or school groups for which the Department has established a category of eligible borrower defense claims. If the Borrower Defense platform does not contain information for school groups, the Department will provide the names of schools, school groups, or school campuses for which the Department has established a category of eligible borrower defense claims.
 - iv. Any and all relief formulas and tables that the Department has used to effectuate relief for Class Members during the reporting period.
 4. All of the data required in this section is subject to privacy restrictions and will be anonymized where the total number of Class Members for any data point is less than 10.

1 C. Other Assurances. In accordance with applicable statutory and regulatory
 2 requirements, and additional governing policies and procedures specific to
 3 Defendants' consideration of borrower defense claims, Defendants represent and
 4 confirm that the following policies will apply to all Class Members throughout the
 5 time covered by the Agreement:

- 6 1. Defendants issue written decisions resolving borrower defense applications
 7 and communicate those decisions to borrower defense applicants, as
 8 required by the Department's 2016 Borrower Defense Regulations.
- 9 2. Defendants do not take action to collect outstanding student loan debts
 10 through involuntary collection activity against individuals with pending
 11 borrower defense applications, as required by the Department's 2016
 12 Borrower Defense Regulations. However, this Agreement does not preclude
 13 a Class Member from proactively and voluntarily paying their student loans.
- 14 3. Defendants provide an interest credit for any interest that accrues on the
 15 relevant federal student loan accounts of borrowers between the time that
 16 the borrower submits his or her borrower defense application and the time
 17 the Department issues a final decision on the application and notifies the
 18 borrower of that decision.

19 V. ENFORCEMENT

20 A. Notwithstanding all other provisions outside Section V of this Agreement, the
 21 Court shall only retain jurisdiction to review claims set forth in this Section V, and
 22 only in the manner explicitly provided in Section V. In connection with each such
 23 claim, the Court shall retain jurisdiction only to order the relief explicitly specified
 24 for each particular claim and only where Defendants have not provided that relief
 25 pursuant to the procedures specified in this Section. The Court shall lack
 26 jurisdiction to imply any claims, or authority to issue any other relief, under this
 27 Agreement.

28 B. The only claims permissible to enforce this Agreement are as follows:

1 1. **Failure to Issue a Final Decision by Decision Due Date.** Plaintiffs may
 2 bring a claim alleging that Defendants have materially breached subsection
 3 IV.A of the Agreement if Defendants have failed to issue within 18 months
 4 of the Effective Date a final decision, as defined by subsection IV.A.1.i., on
 5 any Class Member's borrower defense application that was pending as of
 6 the Execution Date. The date by which Defendants are required to issue
 7 these final decisions under this Agreement shall be referred to in this
 8 subsection V.B.1 as the "Decision Due Date."

9 i. Should Plaintiffs prevail on this claim, the only relief available from
 10 the Court shall be an order requiring Defendants to discharge 30%
 11 of every affected Class Member's Relevant Loan Debt for every 30
 12 days beyond the Decision Due Date that the Class Member's
 13 decision is delayed plus the amount prorated for the days that do not
 14 amount to 30 days.

15 a. Discharges to Class Members under this provision will be
 16 calculated starting on the first calendar day following the
 17 Decision Due Date that no final decision has been issued.

18 b. The order shall specify that, for every 30 calendar day
 19 interval following the Decision Due Date that Defendants do
 20 not issue a final decision, Defendants must discharge an
 21 additional 30% of the affected Class Member's Relevant
 22 Loan Debt, or the prorated amount, as defined above, in
 23 addition to the amount of loan discharge the Department
 24 otherwise determines that the Class Member is entitled to.

25 c. The order shall further specify that when issuing a final
 26 discharge under this subsection either (1) as part of
 27 effectuating a loan discharge on an approved application or
 28 (2) when a loan is placed in repayment based on a

determination of ineligibility, the Defendants will use the following protocol: Defendants will discharge (A) the portion of the Class Member's Relevant Loan Debt as determined by the Department and required above, to include percentages accrued monthly due to breach, if applicable, and (B) any interest that accrued while the Class Member's borrower defense application was pending. The Defendants will reapply any and all payments previously made toward the Relevant Loan Debt. If no balance remains on the reduced loans, the Defendants will apply previously-made payments to the balance of other Direct Loans on the Class Member's account. If there are no other Direct Loans, then the Defendants will return the remaining amount to the Class Member. If the Class Member's Relevant Loan Debt was previously in default, the debt shall be removed from default status and credit reporting shall be corrected accordingly. This process shall be referred to as a "Breach-based Discharge."

- d. The Court may order Defendants to report to Plaintiffs' counsel and the Court on its progress of issuing Breach-based Discharges, as provided herein, to individual Class Members whose final decisions were not rendered by the Decision Due Date.

2. **Failure to Issue Relief by Relief Due Date.** Plaintiffs may bring a claim alleging that Defendants have materially breached subsection IV.A of the Agreement by failing to effectuate relief within 21 months of the Effective Date for any Class Member with an application pending as of the Execution Date and who Defendants determined is eligible for borrower defense relief.

Plaintiffs may also bring a claim alleging that Defendants have materially breached subsection IV.A.3 of the Agreement by failing to effectuate relief within 6 months of the Effective Date for any Class Member who Defendants determined is eligible for borrower defense relief as of the Execution Date. The date by which Defendants are required to effectuate relief under this Agreement shall be referred to in this subsection V.B.2 as the “Relief Due Date.”

i. Should Plaintiffs prevail on this claim, the only relief available from the Court shall be an order requiring Defendants to discharge 30% of the affected Class Member’s Relevant Loan Debt for every 30 days beyond the Relief Due Date the Class Member’s relief is delayed.

a. The order shall specify that at the conclusion of every 30 calendar day interval following the Relief Due Date that the Class Member’s relief is delayed, Defendants must discharge an additional 30% of the affected Class Member’s Relevant Loan Debt, as defined above, in addition to the amount of loan discharge the Department otherwise determines that the Class Member is entitled to.

b. When issuing a discharge under this subsection, Defendants will follow the protocol described in subsection V.B.1.i.c.

ii. The Court may order Defendants to report to Plaintiffs’ counsel and the Court on its progress of issuing discharges, as provided herein, to individual Class Members whose final decisions were not rendered by the Relief Due Date.

3. **Failure to Submit Timely Quarterly Reports.** Plaintiffs may bring a claim alleging that Defendants have materially breached subsection IV.B of the Agreement by failing to submit a timely and complete quarterly report

to Plaintiffs' Counsel via electronic mail according to the timelines specified in subsection IV.B. Should Plaintiffs prevail on this claim, the only relief available from the Court shall be an order requiring Defendants to submit their reports on a monthly basis from the point of the order forward.

4. **Involuntary Collections of Class Members' Student Loan Debt.**

Plaintiffs may bring a claim alleging that Defendants have materially breached subsection IV.C of the Agreement by taking action, after the Effective Date, to collect a debt through involuntary collection activity against a Class Member, whose borrower defense application was pending as of the Execution Date, while his or her application was pending. Should Plaintiffs prevail on their claim, the only relief available from the Court shall be an order requiring the Department to refund the payments and to discharge 80% of the Relevant Loan Debt of the affected Class Member. Defendants shall be liable for a material breach under this subsection if involuntary collection activity occurs because they, their agents, or their contractors took action to collect a debt through an involuntary collection activity. Defendants shall not be liable based on events outside of Defendants' control, including but not limited to a situation where a third party, such as an employer, undertakes debt collection activities, such as wage garnishment, inconsistent with Defendants' instructions that collection activity cease. The Department will refund all amounts wrongfully collected through wage garnishment where a third party undertakes debt collection activities inconsistent with Defendants' instructions that collection activity cease.

- i. When issuing a discharge under this subsection, Defendants will follow the protocol described in subsection V.B.1.i.c.

1 C. All claims listed above are subject to the complete defense of impracticability or
2 impossibility of performance, as set forth below in subsection V.D.5, subsection
3 V.D.6, and Section XII.

4 D. The exclusive procedure for bringing a claim to enforce the terms and conditions
5 of this Agreement shall be as follows:

6 1. Prior to asserting any claim pursuant to subsection V.B, above, Plaintiffs'
7 counsel shall submit written notice alleging a material breach of this
8 Agreement to counsel for Defendants. Such notice shall be submitted by
9 electronic mail, and shall specify what alleged breach has occurred; describe
10 the facts and circumstances supporting the claim; and state that Plaintiffs
11 intend to seek an order from the Court, as set forth in subsection V.B.
12 Plaintiffs shall not inform the Court of their allegation(s) at that time.

13 2. Within two (2) business days of receipt of the notice from Plaintiffs'
14 counsel, Defendants will acknowledge receipt of Plaintiffs' notice.

15 3. Defendants shall have a period of fourteen (14) calendar days after receipt
16 of such notice by Plaintiffs' counsel as described in subsection V.D.1,
17 above, to inform Plaintiffs' counsel in writing of its determination on
18 whether a material breach has occurred, including relevant information that
19 informed Defendants' determination.

20 i. If Defendants agree that a material breach has occurred, Defendants
21 will disclose any action they propose to take to resolve the alleged
22 material breach in the written notice to Plaintiffs as described by
23 subsection V.D.3. The Parties will meet and confer to determine
24 whether those actions are sufficient within five (5) business days of
25 Defendants' notice as described in subsection V.D.3.

26 a. Upon Defendants' request, Plaintiffs shall provide to
27 Defendants any information and materials available to
28 Plaintiffs that support the violation alleged in the notice.

- 1 b. Defendants will have twenty-one (21) calendar days
2 following the parties' meet and confer to take the action
3 specified in subsection V.D.3, above, and/or any further
4 action agreed upon in writing by the parties.
- 5 c. If the Parties agree about the existence of a material breach,
6 but cannot reach consensus on the appropriate action to
7 resolve that breach within 21 calendar days after Plaintiffs'
8 counsel provides the notice described in subsection V.D.1,
9 above, either Party may file a motion for enforcement of the
10 Agreement.
- 11 ii. If Defendants do not agree that a material breach has occurred, the
12 Parties will meet and confer to determine if a consensus can be
13 reached. If a consensus cannot be reached within 21 calendar days
14 after Plaintiffs' counsel provides the notice described in subsection
15 V.D.1, above, either party may file a motion for enforcement of the
16 agreement.
- 17 4. Absent the prior, written agreement of the Parties, any application to the
18 Court for an order compelling the relief specified in this Section V, must be
19 brought within two (2) years after Defendants notify the Court that they
20 have decided all Class Members' borrower defense applications, notified all
21 Class Members of their final decisions, and effectuated all appropriate relief
22 to Class Members. Otherwise, any claim of material breach not brought
23 within two years shall be forever waived by Plaintiffs.
- 24 5. If Defendants are reasonably prevented from or delayed in fully performing
25 any of the obligations set forth in Section IV, above, due to extraordinary
26 circumstances beyond Defendants' control, including without limitation a
27 court order enjoining the Department from applying the 2019 Methodology
28 or any other relief calculation to the Class, Defendants will notify Plaintiffs'

Counsel within 14 calendar days of Defendants' determination that they will not be able to fully perform their obligations. Within that notification, Defendants will describe the facts providing their basis for believing extraordinary circumstances beyond Defendants' control prevent Defendants from fully performing their obligations. Within 14 calendar days of that notice, the Parties will meet and confer as to whether the circumstances are beyond the Defendants' control and to what extent they affect Defendants' ability to issue final decisions or effectuate relief. If the Parties agree an extension is warranted, the Parties will negotiate the length of an appropriate extension, and the deadlines set forth for Defendants' performance in Section IV may be altered accordingly. If the Parties cannot agree as to whether extraordinary circumstances exist or what the appropriate length of an extension is, Plaintiffs may raise a claim of material breach of Section IV with the Court prior to the expiration of the timelines provided in that Section. Defendants shall be permitted to oppose the filing of such a claim upon the grounds of extraordinary circumstances, and the Court will at that point have jurisdiction to determine whether Defendants are entitled to any extension of the deadlines set forth in Section IV on the basis of extraordinary circumstances.

i. The extension set forth in this V.D.5 shall be for a minimum of 7 days beyond the deadlines for performance set forth in Section IV without requiring any action by any Party other than Defendants, and may be longer than that period pursuant to written agreement among the Parties.

6. If any court enters an order enjoining the Department from applying the 2019 Methodology or any other relief calculation to the Class, Defendants shall be temporarily excused from their obligations under subsection IV.A.2, above, for the duration of that order or until Defendants have

adopted a new relief methodology, whichever occurs first. Defendants will be required to continue making “Step 1” determinations, as defined above and described in subsection IV.A.1.i during this time and provide written notice of those determinations for all Class Members prior to the deadline described in subsection IV.A.1.

- i. If such order is reversed on appeal, or if Defendants adopt a new relief methodology or otherwise develop a method for issuing final decisions to Class Members notwithstanding the court order, Defendants’ obligations under subsection IV.A.2, above, shall be reinstated. Once Defendants’ obligations are reinstated, the parties shall meet and confer on a reasonable time period for Defendants to perform those obligations, provided that the deadline to complete the obligation in subsection IV.A.2 will be, at minimum, 60 days beyond the date that Defendants’ obligations are reinstated unless the parties agree to a shorter deadline in writing.

7. The Parties hereby waive and disclaim any right to seek enforcement of this Agreement through contempt sanctions.

E. The Court relinquishes jurisdiction over all claims, causes of actions, motions, suits, allegations, and other requests for relief in this Action that are not expressly stated in this Section V.

F. The Court shall have no jurisdiction to supervise, monitor, or issue orders in this Action, except to the extent that Plaintiffs invoke the Court’s jurisdiction pursuant to the procedures set forth in this Section V.

VI. ATTORNEYS’ FEES

To resolve Plaintiffs’ claim for attorneys’ fees, costs, and expenses, Plaintiffs will submit a petition for fees under the Equal Access to Justice Act, 28 U.S.C. § 2412(d), to the Court.

A. Defendants agree that Plaintiffs are the prevailing party in this action for purposes of a fee petition under the Equal Access to Justice Act.

VII. WAIVER AND RELEASE

Plaintiffs, the Class Members, and their heirs, administrators, representatives, attorneys, successors, and assigns, and each of them hereby forever waive, release, and forever discharge Defendants, and all of their officers, employees, and agents, from, and are hereby forever barred and precluded from prosecuting, any and all claims, causes of action, motions, and requests for any injunctive, declaratory, and/or monetary relief, including but not limited to damages, tax payments, debt relief, costs, attorney's fees, expenses, and/or interest, whether presently known or unknown, contingent or liquidated, alleged in this Action against Defendants through and including the Effective Date, including but not limited to the right to appeal any and all claims Plaintiffs asserted in this Action. This Agreement is not intended to release any claim based on an act or omission or other conduct occurring after the Effective Date, including but not limited to claims by Class Members based on the substance of their borrower defense decisions. The parties do not intend to waive or narrow any res judicata defense Defendants could assert against a future claim brought by any Plaintiff.

VIII. NO ADMISSION OF LIABILITY

A. Nothing in this Settlement Agreement shall constitute or be construed to constitute an admission of any wrongdoing or liability by Defendants, an admission by Defendants of the truth of any allegation or the validity of any claim asserted in this Action, a concession or admission by Defendants of any fault or omission of any act or failure to act, or an admission by Defendants that the consideration provided to Plaintiffs under Section IV, above, represents relief that could be recovered by Plaintiffs in this Action.

B. Plaintiffs may not offer, proffer, or refer to any of the terms of this Agreement as evidence in any civil, criminal, or administrative proceedings other than proceedings that may be necessary to enforce the Agreement as set forth in Section V, above, or to obtain approval from the Court as set forth in Section X, below.

IX. PLAINTIFFS' COVENANTS NOT TO SUE

- 1 A. Plaintiffs hereby covenant not to commence any action, claim, suit, or
2 administrative proceeding against Defendants related to the non-performance,
3 failed performance, or otherwise unsatisfactory performance in fulfilling their
4 duties and responsibilities under this Agreement; provided, however, that Plaintiffs
5 may initiate an action against Defendants pursuant to the continuing jurisdiction of
6 the Court to compel Defendants' performance of their obligations under this
7 Agreement, but only as expressly articulated in this Agreement in Section V, above.
- 8 B. Plaintiffs hereby covenant not to commence against Defendants any action, claim,
9 suit, or administrative proceeding on account of any claim or cause of action that
10 has been released or discharged by this Agreement.

11 **X. PROCEDURES GOVERNING APPROVAL OF THIS AGREEMENT**

- 12 A. Within 14 calendar days of the Execution Date, the Parties shall jointly submit this
13 Agreement and its exhibits to the Court, and shall apply for entry of an Order in
14 which the Court:
- 15 1. Grants preliminary approval to this Agreement as being fair, reasonable,
16 and adequate to Plaintiffs;
 - 17 2. Approves the form of the Class Notice attached hereto as Exhibit A;
 - 18 3. Directs the Parties to provide Class Notice as set forth in subsection (B) of
19 this Section X below, and grants approval of such plan as reasonable under
20 Federal Rule of Civil Procedure 23(e)(1);
 - 21 4. Schedules a Fairness Hearing to determine whether this Agreement should
22 be approved as fair, reasonable, and adequate, and whether an order
23 approving the settlement should be entered pursuant to Federal Rule of Civil
24 Procedure 23(e);
 - 25 5. Provides that any person who wishes to object to the terms of this
26 Agreement, or to the entry of an Order approving this Agreement, must file
27 a written Notice of Objection with the Court specifying the objections and
28

the basis for such objections as provided in the Class Notice, with copies served on all Parties' counsel;

6. Provides that between the Execution Date and the Fairness Hearing, the Defendants shall direct all inquiries from Class Members regarding the Agreement to Plaintiffs' Counsel;
7. Provides that in order to have an objection considered and heard at the Fairness Hearing, such written Notice of Objection must be filed with the Court and served on counsel by the date specified in the Class Notice;
8. Provides that the Parties shall each be entitled to respond, in writing, to any Objections up to 14 days prior to the Fairness Hearing; and
9. Provides that the Fairness Hearing may, from time to time and without further notice to the Class, be continued or adjourned by order of the Court.

B. After the Court enters an Order containing all of the items set forth in subsection X.A, above, the Parties shall promptly distribute the Class Notice as follows:

1. Defendants shall email all Class Members who provided their e-mail addresses to the Department on their borrower defense applications, or, where Defendants do not have such an e-mail address available, Defendants send a copy of the notice to the Class Member's last known mailing address by first class mail.
2. Defendants will also add to the Department's StudentAid.gov website the same information included in the Class Notice.
3. Class Counsel will update the Class Member website's "Frequently Asked Questions" page regarding the lawsuit. A link to the Class Members' website will be included in the Class Notice and will be included on the Department's website.
4. Plaintiffs will also circulate the Class Notice to legal aid and advocacy organizations across the country providing borrower defense assistance.

1 C. No later than three (3) business days before the Fairness Hearing, the Parties shall
2 each file with the Court a declaration confirming compliance with the Notice
3 procedures approved by the Court.

4 D. At the Fairness Hearing, the Parties shall jointly request the Court's final approval
5 of this Agreement, pursuant to Federal Rule of Civil Procedure 23(e). The Parties
6 agree to take all actions necessary to obtain approval of this Agreement.

7 E. If, after the Fairness Hearing, the Court approves this Agreement as fair, adequate,
8 and reasonable, the Parties consent to entry of Final Judgment in a form
9 substantively identical to the Final Judgment attached hereto as Exhibit B.

10 **XI. DISMISSAL AND JURISDICTION OF THE COURT TO ENFORCE THIS AGREEMENT**

11 The Parties hereby stipulate and agree to entry of Final Judgment in a form substantively
12 identical to the Final Judgment attached hereto as Exhibit B. As provided in that exhibit, Plaintiffs'
13 claims in this Action are dismissed with prejudice, except that the Court shall retain limited
14 jurisdiction for the sole purpose of enforcing the terms of this Agreement as expressly set forth in
15 Section V of this Agreement. Once Defendants have decided all Class Members' borrower defense
16 applications, notified all Class Members of their final decisions, and effectuated all appropriate
17 relief to Class Members, the Parties will file a notice with the Court. Upon the date of that notice,
18 the Court's jurisdiction over this Action shall completely terminate.

19 The parties agree that any order of the Court granting approval of this Agreement does not
20 render the terms and conditions of this Agreement subject to the contempt powers of the Court.

21 **XII. IMPOSSIBILITY OF PERFORMANCE**

22 In addition to the excuses to performance listed in subsection V.D, above, if Congress
23 renders Defendants' performance under this Agreement impossible, in whole or in part, then
24 Defendants shall forever be relieved of all obligations that would, as a result of such Congressional
25 action, be impossible to perform. Defendants shall not be required to take any action, or attempt
26 to take any action, which would circumvent or violate, or have the effect of circumventing or
27 violating, the intent of Congress.

28 **XIII. CONDITIONS THAT RENDER THIS AGREEMENT VOID OR VOIDABLE**

1 A. This Agreement shall be void if it is not approved as written by a final Court order
2 not subject to any further review.

3 B. This Agreement shall be voidable by Plaintiffs and/or Defendants if the Court does
4 not enter a Final Judgment, or other Final Approval Order, that is substantively
5 identical to the one attached hereto as Exhibit B. Any Party's decision to void the
6 Agreement under this provision is effective only if that Party provides notice of its
7 decision, in writing, to the Counsel of Record for all other Parties within 30
8 calendar days of the date on which the Court entered Final Judgment.

9 **XIV. EFFECT OF AGREEMENT IF VOIDED**

10 A. Should this Agreement become void as set forth in Section XIII above, none of the
11 Parties will object to reinstatement of this Action in the same posture and form as
12 it was pending immediately before the Execution Date.

13 B. All negotiations in connection herewith, and all statements made by the Parties at
14 or submitted to the court as part of the Fairness Hearing process, shall be without
15 prejudice to the Parties to this Agreement and shall not be deemed or construed to
16 be an admission by a party of any fact, matter, or proposition, nor admissible for
17 any purpose in the Action other than with respect to the settlement of same.

18 C. The Parties shall retain all defenses, arguments, and motions as to all claims that
19 have been or might later be asserted in this Action, and nothing in this Agreement
20 shall be raised or construed by any Party to defeat or limit any claims, defenses,
21 arguments, or motions asserted by either Party.

22 **XV. MODIFICATION OF THIS AGREEMENT**

23 A. Before the Preliminary Approval Date, this Agreement, including the attached
24 exhibits, may be modified only upon the written agreement of the Parties.

25 B. After the Preliminary Approval Date—including the time after which Final
26 Judgment has been entered—this Agreement, including the attached exhibits, may
27 be modified only with the written agreement of all the Parties and with the approval
28 of the Court, upon such notice to the Class, if any, as the Court may require.

XVI. RULES OF CONSTRUCTION

- A. The Parties acknowledge that this Agreement constitutes a negotiated compromise. The Parties agree that any rule of construction under which any terms or latent ambiguities are construed against the drafter of a legal document shall not apply to this Agreement.
- B. This Agreement shall be construed in a manner to ensure its consistency with federal law. Nothing contained in this Agreement shall impose upon Defendants any duty, obligation, or requirement, the performance of which would be inconsistent with federal statutes, rules, or regulations in effect at the time of such performance.
- C. The headings in this Agreement are for the convenience of the Parties only and shall not limit, expand, modify, or aid in the interpretation or construction of this Agreement.

XVII. INTEGRATION

This Agreement and its exhibits constitute the entire agreement of the Parties, and no prior statement, representation, agreement, or understanding, oral or written, that is not contained herein, will have any force or effect.

XVIII. EXECUTION

This Agreement may be executed in counterparts. Facsimiles, Adobe PDF, and electronic versions of signatures shall constitute acceptable, binding signatures for purposes of this Agreement.

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Eileen M. Connor (SBN 248856)
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Kyra A. Taylor (*Pro Hac Vice*)
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Dated: April 7, 2020

For Defendants:

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Dated: April 6, 2020

EXHIBIT A

DRAFT

Internal Name: BD Sweet v. DeVos – General Notification

Internal Number: 01

Subject if sent electronically: Notice of Proposed Class Action Settlement - important borrower defense information for you

DATE

Borrower Defense Application #: [Case Number]

Dear [Primary Contact Name]:

Your rights may be affected, please read carefully.

You filed an application asking the U.S. Department of Education to cancel some or all of your federal student loan debt because the school you (or your child) attended did something wrong. This is known as a borrower defense application.

As a borrower defense applicant, you may have been previously informed that you may be part of a class action lawsuit in a case called *Sweet v. DeVos*, which challenges the Department of Education's delay in issuing final decisions on borrower defense applications, including yours.

We now write to inform you that there is a proposed settlement of the lawsuit. The settlement will not become final until it is approved by the court as fair, adequate, and reasonable. This Notice describes how your legal rights may be affected by this settlement.

What is the case about?

A lawsuit was filed in a federal court in California by seven borrower defense applicants who represent, with certain exceptions, all borrowers with pending borrower defense applications as of April 7, 2020. The lawsuit challenges the fact that the Department of Education did not issue a final decision on any borrower defense applications from any school between June 2018 and December 2019. The case is *Sweet v. DeVos*, No. 19-cv-3674 (N.D. Cal.).

The lawsuit is ONLY about the fact that final decisions were not issued during that period of time, NOT whether those applications should result in loan cancellation or not. Now, both parties are proposing to settle this lawsuit. This proposed settlement is a compromise of disputed claims, and Defendants continue to deny that they have acted unlawfully.

What are the terms of the proposed settlement?

In the proposed settlement, the Department of Education agrees to resolve pending borrower defense applications of people who have borrower defense applications pending as of April 7, 2020 on the following terms:

- The Department of Education will approve or deny all *Sweet* Class members' pending borrower defense applications **within 18 months** of when the settlement agreement is approved by the

Court. The Department will notify you of whether your claim was approved, whether you will receive any loan cancellation, and if so, how much loan cancellation you will receive.

- If your application is approved and you are entitled to any loan discharge, the Department of Education will complete the process of cancelling some or all of your outstanding loan debt **within 21 months** of the date on which the settlement agreement is approved by the Court.
- The Department of Education will provide your lawyers with information about its progress making borrower defense decisions every three months, including how many decisions the Department has made, how many borrowers have received a loan discharge, and any new borrower defense findings the Department has made.
- The Department of Education confirms, consistent with governing law and existing policies, that if you are in default, it will not take action to collect your debt, such as by garnishing your wages (that is, taking part of your paycheck) or taking portions of your tax refund, while your application is pending.

What happens next?

The Court will need to approve the proposed settlement before it becomes final. The Court will hold a public hearing, called a fairness hearing, to decide if the proposed settlement is fair. The hearing will be held on _____, 2020, beginning at _____, at the following address:

United States District Court
Northern District of California
450 Golden Gate Avenue, Courtroom 12, 19th Floor
San Francisco, California 94102

What should I do in response to this Notice?

IF YOU AGREE with the proposed settlement, you do not have to do anything. You have the right to attend the fairness hearing, at the time and place above, but **you are not required to do so**.

IF YOU DISAGREE WITH OR HAVE COMMENTS on the proposed settlement, you can write to the Court or ask to speak at the hearing. You must do this by writing to the Clerk of the Court, at the following mailing address:

Clerk of the Court
United States District Court
Northern District of California
450 Golden Gate Avenue
San Francisco, California 94102

Your written comments or request to speak at the fairness hearing must be postmarked by ____, 2020. The Clerk will provide copies of the written comments to the lawyers who brought the lawsuit.

Where can I get more information?

There is more information about the *Sweet v. DeVos* lawsuit on Class Counsel's website at <https://predatorystudentlending.org/sweet-v-devos-class-members/> and on the Department of Education's website at [INSERT STUDEN AID.GOV URL]. Check this site periodically for updated information about the lawsuit.

A copy of the proposed settlement is available online at <https://predatorystudentlending.org/cases/sweet-v-devos/>.

If you have questions about your borrower defense application or the status of your federal student loans, contact our borrower defense hotline at 1-855-279-6207. The hotline is available from 8:00 a.m. to 8:00 p.m. Eastern Time on Monday through Friday.

If you have questions about this lawsuit or about the proposed settlement, please visit this Frequently Asked Questions page, <https://predatorystudentlending.org/sweet-v-devos-class-members/>, which also has contact information for the lawyers who brought the lawsuit.

Sincerely,

U.S. Department of Education

Federal Student Aid

EXHIBIT B

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Attorneys for Plaintiffs

**UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA**

THERESA SWEET, *et al.*,

Plaintiffs,

v.

ELISABETH DEVOS, in her official capacity
as Secretary of Education, and the UNITED
STATES DEPARTMENT OF EDUCATION

Defendants.

No. 3:19-cv-03674-WHA

**ORDER APPROVING SETTLEMENT
AGREEMENT AND ENTERING FINAL
JUDGMENT**

Hon. William Alsup

1 Following this Court's Order preliminarily approving the proposed Settlement Agreement
2 ("Agreement"), the parties disseminated a Notice of Proposed Settlement and Fairness Hearing to
3 the Plaintiff Class. After consideration of the written submissions of the parties, the Agreement
4 between the parties, any objections to the Agreement, all filings in support of the Agreement, and
5 the presentations at the hearing held by the Court to consider the fairness of the Agreement, the
6 Court hereby Orders, Finds, Adjudges, and Decrees that:

7 1. The Agreement between Plaintiffs and Defendants ("the Parties") is finally
8 approved as fair, reasonable, and adequate. The Court hereby incorporates the terms of the
9 Agreement, executed by the parties on April 7, 2020, into this Judgment Order.

10 2. Except as provided in paragraph 3 of this Order, this action is hereby dismissed
11 with prejudice.

12 3. The Court shall retain jurisdiction over this action solely to enforce the terms of the
13 Agreement, but only such jurisdiction as expressly set forth in Section V of the Agreement.

14 4. Once Defendants have decided all Class Members' borrower defense claims,
15 notified all Class Members of their final decisions, and effectuated all appropriate relief to Class
16 Members, the Parties will file a notice with the Court. Upon the date of that notice, the Court's
17 jurisdiction over this action shall completely terminate.

18
19 **IT IS SO ORDERED.**

20
21 Dated:

22
23
24
25 _____
26 The Honorable William Alsup
27 United States District Judge
28