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

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

18 *Plaintiffs,*

19 v.

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

23 *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**

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

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

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<sup>1</sup> 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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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

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

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

25 Plaintiffs brought this case to relieve student borrowers from this indefinite limbo. The  
26 case presents a single cause of action alleging that the Department has unlawfully withheld and  
27 unreasonably delayed final borrower defense decisions in violation of Section 706(1) of the  
28 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.

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

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

### 20 **III. SUMMARY OF SETTLEMENT TERMS**

#### 21 **A. Settlement Class**

22 The Settlement Class includes the Named Plaintiffs and all individuals who met the class  
 23 definition<sup>2</sup> as of the date the Settlement was executed, April 7, 2020 ("Settlement Class  
 24 Members"). Ex. A §§ III.A, IV.A.1, 2, 3. The Settlement Class is finite and determined as of the  
 25 execution date of the Settlement, so that the size of the class and the length of performance of the  
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27 <sup>2</sup> "All people who borrowed a Direct Loan or FFEL loan to pay for a program of higher education, who have  
 28 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

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

6 **C. Dismissal; Waiver; Continued Jurisdiction of the Court**

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

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

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

20 **D. Breach**

21 Should Defendants breach their obligation to provide notice to or effectuate relief for  
22 Settlement Class Members by the deadlines specified in the Settlement Agreement, the Settlement  
23 provides relief for affected Settlement Class Members, as follows: 30% discharge of their relevant  
24 federal student loan debt for each month beyond the deadline, prorated by day. Ex. A § V.B.1, 2.  
25 If Defendants use involuntary collection methods on any Settlement Class Member while their  
26 claim is pending, the Settlement provides relief for affected Settlement Class Members as follows:  
27 80% discharge of their relevant federal student loan debt. Ex. A § V.B.4. If Defendants fail to  
28

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).<sup>3</sup> 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  
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27 <sup>3</sup> 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

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

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

14 Courts must assess whether “the relief provided for the class is adequate,” Fed. R. Civ. P.  
15 23(e)(2)(C), by comparing plaintiffs’ likelihood of succeeding and obtaining relief from the court  
16 against the relief provided by the proposed settlement. *Carson v. Am. Brands, Inc.*, 450 U.S. 79,  
17 88, n.14 (1981) (“Courts judge the fairness of a proposed compromise by weighing the plaintiff’s  
18 likelihood of success on the merits against the amount and form of the relief offered in the  
19 settlement.”). The relief in this Settlement is comparable to—or exceeds—what Plaintiffs and the  
20 Class could have reasonably expected to obtain in litigation.

21 Plaintiffs brought this case to ensure that the Department provides Class Members with  
22 timely decisions on their borrower defenses. As noted above, Defendants argued that their delay  
23 was not unreasonable and the case is moot due to the resumption of the issuance of final borrower  
24 defense decisions. Had Plaintiffs prevailed, however, the Court could have ordered Defendants to  
25 resolve the backlog of claims in a set period of time, the length of which would be at the Court’s  
26 discretion. By this Settlement, Class Members will receive a decision within 18 months of the  
27 Effective Date of the Agreement. Ex. A § IV.A. Although the negotiated period is longer than the  
28 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

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

#### 11 **E. The Parties Reserve Attorneys’ Fees for the Court**

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

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

19 The Settlement Agreement that the parties negotiated is the only agreement the Parties have  
20 made in connection with the proposed settlement. It is attached as Exhibit 1. *See* Fed. R. Civ. P.  
21 23(e)(2)(C)(iv), (e)(3).

#### 22 **G. The Settlement Treats All Class Members Equally**

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

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

4 **V. THE COURT SHOULD APPROVE THE CLASS NOTICE AND NOTICE PLAN UNDER RULE**  
 5 **23(E)(1)**

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

15 16 17 18 19 20	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
21	Deadline for Class Members to Object to Settlement	60 days after preliminary approval order
22	Deadline to Submit Replies in Favor of Final Approval	75 days after preliminary approval order
23	Deadline to File Motion for Final Approval	85 days after preliminary approval order
24	Deadline for Defendants to File Affidavit Attesting that Notice Was Provided As Ordered	3 Days Prior to Fairness Hearing For Final Approval
25 26 27 28	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.

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Respectfully submitted,

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