The Project on Predatory Student Lending
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February 2, 2024

VIA E-MAIL

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

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

Dear Stuart,

Thank you for speaking with us on January 24, 2024, regarding implementation of the *Sweet v. Cardona* settlement. We appreciate the Department of Education's engagement in dialog about the delivery of settlement relief, and we hope to continue this process with further productive discussions.

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

1. Failure to effectuate relief by applicable due date

Defendants have materially breached Paragraph IV.A.1 of the Settlement Agreement by failing to effectuate Full Settlement Relief[1] by the applicable deadline for at least 13,000, and perhaps as many as 53,000 or more, Class Members who are entitled to relief pursuant to that paragraph.

[1] Capitalized terms herein are as defined in the Settlement Agreement. For reference, "Full Settlement Relief" is defined as "(i) discharge of all of a Class Member's Relevant Loan Debt, (ii) a refund of all amounts the Class Member previously paid to the Department toward any Relevant Loan Debt (including, but not limited to,

The Effective Date of the Settlement Agreement was January 28, 2023. *See* Order Re Motion to Stay Judgment Pending Appeal at 10, ECF No. 382. Thus, under Paragraph IV.A.1, every Class Member whose Relevant Loan Debt was associated with a school, program, or School Group listed in Exhibit C to the Settlement Agreement (the "automatic relief group") was due to receive Full Settlement Relief by January 28, 2024.

The Department of Education ("Department") acknowledged, in a telephone conference on January 24, 2024, that it is in breach of this provision of the settlement. The information available to Plaintiffs indicates that the Department's failure to effectuate Full Settlement Relief for the automatic relief group is sufficiently widespread to constitute a material breach.

a. Failure to discharge Relevant Loan Debt

The Department has not discharged all of the Relevant Loan Debt for the automatic relief group. *First*, by the Department's own admission, there are approximately 6,700 Class Members in the automatic relief group who have not received their discharges as of the January 28 deadline. These Class Members, according to the Department, have consolidation loans that include both *Sweet*-eligible and non-*Sweet*-eligible underlying loans; the Department and its servicers have not completed the process of calculating the portions of these consolidation loans that should be discharged.

Second, the Department reported in our phone call of January 24, 2024, that the Department has not verified that the rest of the Class Members in the automatic relief group who have consolidated loans (aside from the above-mentioned 6,700) have actually received their discharges. This is because, the Department explained, the discharge requests were sent initially to the servicers of the original loans, not to borrowers' current consolidation loan servicers. The "expectation" was that the discharge requests would "roll up" to the consolidation loan servicers. However, the Department does not know whether that has occurred. Reports we are receiving from Class Members indicate that, in many cases, it has not. Over 1,000 Class Members have reported to us since January 29, 2024, that they have consolidation loans and have not received their discharge. This is, of course, only a sample of Class Members experiencing this issue.

The Department stated on our recent call that there are approximately 47,000 Class Members in the automatic relief group who have consolidation loans. It is not clear whether many or most, let alone all, of the 40,000 Class Members in this category who fall outside the Department's 6,700 "problem" accounts have received their full discharges. The Department stated as of January 24 that it could not estimate when the process of tracking down the relief status for all of these Class Members would be complete.

Relevant Loan Debt that was fully paid off at the time that borrower defense relief is granted), and (iii) deletion of the credit tradeline associated with the Relevant Loan Debt." Settlement Agreement ¶ II.S.

Third, Plaintiffs' counsel have already heard from approximately 400 other Class Members who do not have consolidation loans but nonetheless have not received their full discharges—indicating that the problems are broader than just the servicers' failure to "roll up" discharge instructions to consolidation servicers. This problem appears to be particularly acute for Class Members with commercially held FFEL loans—including, notably, lead plaintiff Theresa Sweet. Ms. Sweet's Federal Student Aid account portal currently shows over $65,000 in outstanding FFEL loans from her enrollment at Brooks Institute, an Exhibit C school.

With respect to FFEL loans in particular, Paragraph IV.F.2 of the Settlement provides, in relevant part: "Class Members . . . who receive relief under Paragraph[] IV.A . . . shall not be required to take steps to consolidate any Relevant Loan Debt into a Direct Loan to receive the relief to which they are entitled pursuant to those Paragraphs. *Defendants shall take all necessary steps to ensure that other loan holders effectuate the required relief*" (emphasis added). The Department has failed to comply with the assurance in the second sentence of this paragraph.

b. Failure to issue full and accurate refunds

The Department has not provided full and accurate refunds of amounts paid to the Department to all members of the automatic relief group who are entitled to such refunds. *First*, again by the Department's own admission, there are approximately 5,000 Class Members who have not received their full refunds as of the January 28 deadline. The Department has stated that this is due to missing or inaccessible payment histories that current servicer Aidvantage received from former servicer ACS.

Second, information we have received from Class Members demonstrates that the problem of missing or incomplete refunds is far more widespread than the 5,000 Class Members that the Department has identified. Given the servicers' track records,[2] it would not be surprising if there are missing or incorrect payment histories for more than just those 5,000 accounts. It is unclear whether Class Members have not received their refunds for that reason or for some other reason(s).

Regardless, in the past five days, we have heard from over 1,800 Class Members who have not received any refund or have not received a refund in the amount they believe they are owed. Of these, nearly 1,500 do *not* have Aidvantage as their current servicer, which means they would not be included in the 5,000 accounts referred to above. Again, this represents only a sample of Class Members who have reached out to us regarding this issue; the fact that we have heard from so many Class Members in just the past few days suggests that many more are experiencing problems with their refunds.

c. Failure to delete credit tradelines

The Department has not taken all steps necessary to ensure that the credit tradelines for Relevant Loan Debt are removed from the credit reports of Class Members in the automatic relief group by the

[2] *See, e.g.*, Cory Turner, "How the Most Affordable Student Loan Program Failed Low-Income Borrowers," *NPR* (Apr. 1, 2022), https://www.npr.org/2022/04/01/1089750113/student-loan-debt-investigation

January 28, 2024 deadline. *See* Settlement Agreement ¶ IV.F.1 ("Defendants have effectuated relief for purposes of Paragraph[] IV.A . . . when they and their loan servicers have taken all steps necessary to discharge the Relevant Loan Debt of the Class Member . . . including but not limited to . . . requesting the deletion of the relevant tradeline.")

Plaintiffs' counsel have heard from nearly 1,200 Class Members in the automatic relief group whose Relevant Loan Debt is still appearing on their credit reports. This includes 135 Class Members whose loans *have* been discharged.

Reporting federal student loan debt to a credit bureau when that debt no longer exists violates not only the Settlement Agreement in this case, but also the Fair Credit Reporting Act. *See, e.g.*, 15 U.S.C. § 1681s-2(a)(1)(A) ("A person shall not furnish any information relating to a consumer to any consumer reporting agency if the person knows or has reasonable cause to believe that the information is inaccurate."); *id.* § 1681s-2(a)(2) ("A person who . . . has furnished to a consumer reporting agency information that the person determines is not complete or accurate, shall promptly notify the consumer reporting agency of that determination and provide to the agency any corrections to that information, or any additional information, that is necessary to make the information provided by the person to the agency complete and accurate, and shall not thereafter furnish to the agency any of the information that remains not complete or accurate.").

* * *

Receiving settlement relief in a timely and predictable manner is a matter of urgency for Class Members. Many of them have been counting on their discharges, refunds, and credit repair in order to take other important steps in their lives—such as paying for medical care, buying houses or cars, supporting their families, and going back to school. The failure to receive this relief by the deadline is potentially devastating. Here are just a few examples of Class Members' situations that have been reported to us over the past week:

- "I have been waiting for my loans to be discharged so I can start applying for a mortgage that I have never been approved [for]."
- "Some of my loan was paid by my co signer (my grandmother []) neither of us have received a refund of any sort in the mail. This is still on my credit destroying my life. . . . I have waited 14 years for this and I'm still stuck. My grandmother is 96 years old and deserves to have[] this money given back to her while she is still here."
- "I have put off grad school and starting a business. I have called FSA, Navient, MOHELA, and Ascendium, ad nauseum. They all give me the run around."
- "We bought a house. Had been preapproved. Made an offer, it was accepted. After [it was] accepted, bank pulled full credit report for final mortgage approval and found trade lines last reported to the reporting agencies in December 2022 did not match current state on EdFinancial or Dept. of Education web portals. Took weeks of

attempting to reach EdFinancial by phone with factual data to verify the loan amounts. Upwards of 6 hours hold time and days waiting for call backs. Ultimately our mortgage got approved, but with a higher interest rate due to the outstanding student loans negatively impacting my credit report."

- "My house purchase will not go through without the discharge reflection on my credit."
- "I am afraid that with the shuffling of funds and lack of access to payment records that I will not get the money back that I desperately need to put towards my home repairs."
- "[Nelnet] removed [my loans] from my credit report then added them again causing my credit score to plummet by almost 100 points."
- "In October, my loans were officially listed as 'discharged' and a refund was shown to be issued, but EdFinancial claimed they were no longer responsible for issuing the check and told me to wait 3 months for it to arrive. That was in October, and no further information has been relayed to me. With my job cutting hours and expenses mounting, the lack of these funds is severely impacting my livelihood and mental health, and now the deadline has come and gone with still nothing to show for it all."

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

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

Defendants have materially breached Paragraph IV.G of the Settlement Agreement by failing to submit "timely and complete" quarterly reports to Plaintiffs' Counsel. Plaintiffs do not allege that the reports have been untimely, but rather that they have been materially incomplete. Specifically, these reports have not accurately depicted the number of class members for whom relief has been "effectuated" per the definition in the Settlement Agreement.

Paragraph IV.G.2 of the Settlement provides that "Defendants will submit quarterly reports to Plaintiffs documenting their progress toward fulfilling their obligations under Paragraph[] IV.A" (among other paragraphs). These reports are required to include, *inter alia*, "[t]he total number of Class Members for whom Defendants have effectuated relief pursuant to Paragraph IV.A, including the number of Class Members for whom Defendants effectuated relief during the reporting period." Settlement Agreement ¶ IV.G.4.iv.

Plaintiffs became aware of the potential incompleteness of the quarterly reports in or around September 2023, in connection with the "return to repayment" following the end of the COVID-19 payment pause. At that time, Plaintiffs' Counsel began receiving reports from Class Members of servicers attempting to collect on Class Members' loans that should have been discharged. News reports likewise indicated that this problem was widespread.[3]

In a phone call with DOJ on October 4, 2023, we questioned the accuracy of the Department's post-settlement reporting of the number of Class Members for whom relief had been "effectuated." As we pointed out at that time, under Paragraph IV.F.1 of the Settlement Agreement, "effectuated" means that Defendants "and their loan servicers have taken all steps necessary to discharge the Relevant Loan Debt of the Class Member . . . , including but not limited to (1) discharging any interest that accrued while the borrower defense application was pending; (2) determining if the Class Member . . . is entitled to any refund, and if so, issuing refund check(s) for payment of that refund; (3) if the Class Member's . . . Relevant Loan Debt was previously in default, removing such debt from default status; and (4) requesting the deletion of the relevant tradeline."

In our October 4 call, we questioned whether the Department had in fact confirmed that the servicers had cleared the relevant balances, issued refunds (where applicable), and requested deletion of credit tradelines for all of the Class Members whose relief was reported as "effectuated." DOJ stated at the time that it was investigating the accuracy of the data in the previous reports and would issue corrections of any errors. However, the settlement implementation report that DOJ and the Department delivered on November 27, 2023, contained no mention of any such analysis. The Department also never provided us with answers to various questions we raised about its processes for ensuring that Class Members are kept out of repayment and that they receive accurate information from their servicers.

We raised these issues again in our letter of December 14, 2023, and in our phone call of January 24, 2024. DOJ's and the Department's responses to date indicate that the Department has not verified whether the servicers have actually discharged Relevant Loan Debt, issued refunds, and/or requested deletion of credit tradelines before reporting to the Department that relief for certain Class Members had been "effectuated."

Given these representations, along with the evidence discussed above that demonstrates a significant number of Class Members who have not, in fact, received their Full Settlement Relief, we believe that the Department's quarterly reports are inaccurate and incomplete with respect to the number of Class Members in the automatic relief group for whom relief has been "effectuated."

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[3] *See, e.g.*, Danielle Douglas-Gabriel, "Biden Administration Begins Punishing Servicers for Student Loan Errors," *Wash. Post* (Oct. 30, 2023), https://www.washingtonpost.com/education/2023/10/30/student-loan-servicing-errors-mohela/ (reporting that more than 16,000 borrowers with approved or pending BD applications received bills from their servicers in October 2023).

Pursuant to Paragraph V.B.3 of the Settlement Agreement, Plaintiffs intend to seek an order from the Court requiring Defendants to issue monthly, attested reports to Plaintiffs' Counsel and the Court on their progress of issuing relief to affected Class Members. Plaintiffs will request that such attestations aver, under penalty of perjury, that the Department has taken specified steps to ensure the accuracy of its reports. Plaintiffs further intend to seek attorneys' fees from Defendants for fees and costs incurred in bringing this claim, including the costs of investigating the facts that establish the claim of material breach.

3. Violation of assurance regarding forbearance or stopped collection status

Defendants have materially breached Paragraphs IV.A.3 and IV.C.7 of the Settlement Agreement by allowing the Department's student loan servicers to send bills to, and even collect automatic debit payments from, Class Members whose Relevant Loan Debt is covered by the Settlement Agreement.[4]

Paragraphs IV.A.3 and IV.C.7 provide that Class Members' Relevant Loan Debt will remain in forbearance or stopped collection status pending the effectuation of settlement relief. Paragraph IV.C.7 additionally provides that, for "decision group" class members, their Relevant Loan Debt will remain in forbearance or stopped collection status while they await a decision on their application.

To date, Plaintiffs' Counsel has already provided Defendants with the names of hundreds of Class Members who reported that their loan servicers have demanded payment from them on their Relevant Loan Debt since September 2023, in violation of the Department's assurance that Class Members would remain in forbearance or stopped collection status. We sent lists of affected Class Members' names and identifying information to the Department on October 6, 2023; November 1, 2023; and December 14, 2023.

On October 27, 2023, DOJ reported to Plaintiffs' Counsel that a "do not bill list" had been recently distributed to servicers, in an effort to prevent collection on *Sweet*-eligible loans. However, even after that date we continued (and continue) to receive reports from Class Members that their servicers were and are sending bills and refusing to place their accounts into administrative forbearance, as required by the Settlement.

In fact, we have heard from 268 Class Members who have made payments on their Relevant Loan Debt since the "return to repayment" because they have been pressured to do so by their servicers and they fear the consequences if they don't pay. Some of these Class Members had money involuntarily

[4] Plaintiffs do not have sufficient information at this time to determine whether Defendants have also breached Paragraph IV.H.1 of the Settlement, which prohibits "involuntary collection activity" against Class Members. The Settlement defines "involuntary collection activity" as "any attempt by the Department or its agents to collect payments toward the Relevant Loan Debt . . . through involuntary means *from a borrower in default*" (emphasis added). Plaintiffs do not have the necessary data to know which Class Members' loans are in default. Plaintiffs reserve their right to assert a material breach of Paragraph IV.H.1 upon further investigation.

withdrawn from their bank accounts by their servicers. Others have experienced harassing debt collection activity from servicers, including servicers' use of false and misleading statements to try to trick borrowers into making payments on debts that they do not owe. For instance, multiple Class Members report being told by MOHELA and Nelnet that their Relevant Loan Debt is delinquent and they are not entitled to administrative forbearance. At least one Class Member has received debt collection calls from Navient demanding payment even though she has told Navient repeatedly that she is a *Sweet* class member. Another Class Member who has FFEL loans with Navient was told when she called for an update that since the January 28, 2024 deadline had passed, Navient now "has no deadline" to effectuate relief. These are just a few examples.

We appreciate the fact that servicers, particularly commercial FFEL servicers, are independent entities that the Department does not administer directly. But it is ultimately the Department's responsibility to maintain control over its own contractors.

Accordingly, Plaintiffs intend to seek an order from the Court requiring Defendants to issue refunds of any amounts collected from affected Class Members on their Relevant Loan Debt since September 1, 2023, and to take specific steps to ensure that the Department's loan servicers cease their violations of the Settlement Agreement.

* * *

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

i. A copy of the document or documents referred to as "2/28/2023 Sweet Cohort 1 file" in the spreadsheet that DOJ emailed to Plaintiffs' Counsel on January 16, 2024.

ii. Copies of all change reports and/or other instructions provided by Federal Student Aid ("FSA") to federal student loan servicers, including commercial FFEL servicers, regarding implementation of the *Sweet* settlement, from January 28, 2023 to the present.

iii. Copies of all communications from federal student loan servicers, including commercial FFEL servicers, to FSA regarding their compliance with the change reports and/or other instructions regarding implementation of the *Sweet* settlement, from January 28, 2023 to the present.

iv. Copies of documents showing the verification processes that FSA uses to confirm that servicers are accurately reporting whether relief has been "effectuated" for a particular Class Member.

v. Copies of documents showing the processes that FSA uses to confirm that the data included in post-settlement reporting pursuant to Paragraph IV.G of the Settlement Agreement are accurate.

vi. Copies of all complaints received from Class Members by Federal Student Aid, including but not limited to the Federal Student Aid Ombudsman's Office, from September 1, 2023 to the present.

vii. An updated version of the *Sweet* class list that indicates, for each Class Member, whether the Department has classified them as a member of the automatic relief group or the decision group.

viii. A list of the approximately 11,700 Class Members whom the Department has identified as not receiving their Full Settlement Relief by the January 28 deadline, including notation of whether each Class Member is awaiting a discharge, a refund, or both.

Thank you for your attention to this matter.

Sincerely,

Rebecca Ellis
Eileen Connor
Rebecca Eisenbrey
PROJECT ON PREDATORY STUDENT LENDING

cc: Joe Jaramillo
Noah Zinner