

United States District Court  
Northern District of California

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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

THERESA SWEET, et al.,  
Plaintiffs,

No. C 19-03674 WHA

v.

MIGUEL CARDONA, et al.,  
Defendants.

**ORDER RE MOTION TO STAY  
JUDGMENT PENDING APPEAL**

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**INTRODUCTION**

On November 16, 2022, a settlement between the United States Secretary of Education and a class of student-loan borrowers received final approval. The entry of final judgment started a 60-day clock to appeal. Of roughly half a million class members, none appealed the final approval order. But on day 58, three intervenor schools did. They now move this district court for a stay pending appeal. Specifically, they move to stay the entire judgment or, in the alternative, the judgment as to them.

Recall this settlement is independent from the more far-reaching loan forgiveness initiative under review by the Supreme Court. And notwithstanding the broad relief that this settlement provides, the instant motion turns on a narrow question: have these three intervenor schools shown that they are likely to succeed on the merits of their appeals and suffer irreparable harm absent a stay? This order concludes that they have not.

1 For the following reasons, the motion to stay judgment pending appeal is **DENIED**. To  
2 the extent stated below, this order temporarily stays judgment with respect to discharges and  
3 discharge requests for loans associated with the three intervenor schools to allow the three  
4 intervenor schools to present a stay motion to our court of appeals.

#### 5 **STATEMENT**

6 The final approval order described the factual background and procedural history at  
7 length. *See Sweet v. Cardona*, 2022 WL 16966513, at \*1–4 (N.D. Cal. Nov. 16, 2022). Here,  
8 they will be sketched in broader strokes and supplemented with the latest developments.

#### 9 **1. FROM “FLOOD OF CLAIMS” TO FINAL APPROVAL.**

10 In 1994, the Secretary of Education established the first “borrower defense” program for  
11 federal student loans, allowing a borrower to “assert as a defense against repayment[] any act  
12 or omission of the school attended by the student that would give rise to a cause of action  
13 against the school under applicable State law.” 59 Fed. Reg. 61,664, 61,696 (Dec. 1, 1994);  
14 *see also* 60 Fed. Reg. 37,768 (July 21, 1995).

15 Twenty years passed in which the borrower-defense regulations largely lay dormant  
16 (AR 590). But after the collapse of one of the nation’s largest for-profit college chains in  
17 2015, the Department of Education faced a “flood of borrower defense claims.” 81 Fed. Reg.  
18 39,330, 39,330 (June 16, 2016). The agency updated its regulations to expedite application  
19 processing and created a “Borrower Defense Unit” to address the backlog. 81 Fed. Reg.  
20 75,926 (Nov. 1, 2016); (AR 341). Yet thousands more applications poured in, including from  
21 borrowers who attended other schools, and the backlog persisted (AR 339–41).

22 In 2017, a new Secretary paused claim adjudications to review the borrower-defense  
23 procedures and then stopped conducting claim adjudications entirely (AR 502–03). For  
24 eighteen months, well into this suit, she issued zero decisions (AR 350). As of June 2019,  
25 borrowers had filed 272,721 total applications, 210,168 of which remained pending (AR 399–  
26 400). Named plaintiffs filed this action to require the Secretary to carry out her statutory duty  
27 to adjudicate borrower-defense applications.  
28

1 After the certification of a Rule 23(b)(2) class and the filing of cross-motions for  
2 summary judgment, plaintiffs (a class of borrowers) and defendants (the Secretary and the  
3 Department) ostensibly reached a settlement and moved for preliminary approval. That  
4 settlement received preliminary approval in May 2020 but failed to receive final approval four  
5 months later once it became known that there was, in fact, no meeting of the minds;  
6 unbeknownst to the class and the undersigned, the Secretary had adopted a practice of sending  
7 form-denial notices to borrowers. Following a trip to our court of appeals to clarify  
8 permissible discovery and the filing of new cross-motions for summary judgment, plaintiffs  
9 and defendants reached the instant settlement and again moved for preliminary approval. This  
10 settlement received preliminary approval in August 2022 and final approval that November  
11 (Dkt. No. 246-1).

12 In brief, the settlement agreement sorts class members into three groups. For group one  
13 (approximately 200,000 borrowers), it provides for “full,” “automatic” relief, *i.e.*, discharge of  
14 federal loans, cash refunds of amounts paid to the Department, and credit repair. This relief  
15 goes to class members who attended one of the 151 schools listed in Exhibit C to the  
16 agreement. As explained in the joint motion for final approval, “certain indicia of misconduct  
17 by the listed schools, including the high volume of Class Members with applications related to  
18 the listed schools, led the Department to conclude that these Class Members were entitled to  
19 summary settlement relief without any further time-consuming individualized review process”  
20 (Dkt. No. 323 at 11).

21 Meanwhile, for groups two and three, the agreement provides for streamlined borrower-  
22 defense application adjudication. Specifically, for group two (approximately 64,000  
23 borrowers), it provides for decisions within specified periods of time correlated to how long  
24 the applications have been pending, with certain presumptions in favor of the borrower. And  
25 for group three (those who submitted applications after the execution of the settlement but  
26 before final approval, approximately 206,000 borrowers), it provides for decisions within three  
27 years of final approval without such presumptions. If the Secretary does not render decisions  
28

1 on applications for borrowers in groups two and three within the periods of time set out in the  
2 agreement, those borrowers receive full, automatic relief like borrowers in group one.

3 At the preliminary approval stage, four schools moved to intervene to oppose the  
4 settlement: American National University (ANU), the Chicago School of Professional  
5 Psychology (CSPP), Everglades College, Inc. (Everglades), and Lincoln Educational Services  
6 Corporation (Lincoln). These schools took issue with their inclusion on Exhibit C, which they  
7 labeled a “scarlet letter.” An order found the schools could not intervene as of right but could  
8 permissively intervene to object to the settlement. When plaintiffs and defendants moved for  
9 final approval, each intervenor school filed an opposition, which the final approval order  
10 discussed in detail. The settlement received final approval on November 16, 2022, and the  
11 entry of final judgment that day started a 60-day clock to appeal the final approval order.<sup>1</sup>

12 **2. THE LATEST DEVELOPMENTS.**

13 Fifty-eight days later, on January 13, 2023, three of the four intervenor schools noticed  
14 appeals and jointly moved this district court to stay judgment pending the resolution of their  
15 appeals.<sup>2</sup> In their motion, ANU, Everglades, and Lincoln explained that they filed “[i]n an  
16 abundance of caution,” convinced the settlement agreement “itself is best read to delay the  
17 Effective Date during an appeal or until the final judgment is not subject to any further review”  
18 (Br. 1–2) (internal quotation and citation omitted). Movants requested a stay of the entire  
19 judgment or, in the alternative, a stay of the judgment only as to movants, recognizing they  
20 “represent only a miniscule fraction of the claims included in the class” and “do not wish to  
21 prevent a legitimate settlement of this case or prevent granting of meritorious [borrower-  
22 defense] applications” (Br. 25). All parties were subsequently notified that the impact of the

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24  
25 <sup>1</sup> Because the United States is a party to this litigation, the original deadline to file a notice of  
26 appeal was sixty days after the entry of final judgment. Fed. R. App. P. 4(a)(1)(B). Sixty days  
27 after November 16, 2022, was January 15, 2023. That day, however, fell on a Sunday, and the  
28 following Monday was Martin Luther King Day. Thus, had the three intervenor schools not  
extended the deadline by noticing appeals, the original deadline would have been January 17,  
2023. Fed. R. App. P. 4(a)(3).

<sup>2</sup> CSPP neither noticed an appeal nor joined the motion to stay.

1 stay motion and its pendency on the settlement would be discussed at a status conference set  
2 for January 26, 2023.

3 At the status conference, fireworks erupted. After explaining that plaintiffs and  
4 defendants disputed movants’ reading of the Effective Date — which they believed was  
5 actually two days away, on January 28, 2023 — counsel revealed that the Department planned  
6 to undertake “immediate actions” the following business day, on January 30, 2023 (Tr. 5).  
7 These immediate actions included “sending lists to servicers so that those servicers could start  
8 performing discharges, and that would include about 99-percent of borrowers in Exhibit C,”  
9 with the expectation that some servicers would discharge loans “within that week” (Tr. 6, 9).  
10 The Department also planned to email “borrowers, including substantially all Exhibit C  
11 borrowers, letting them know about settlement relief,” email “borrowers notifying them that  
12 the denials had been rescinded and their cases had been reopened,” “update its own internal  
13 tracking system to reflect . . . [that those borrowers’] status had been changed,” and “begin the  
14 adjudication process for reopening cases” (Tr. 5–6). According to the defendants, “the  
15 Department really need[ed] all the time that[] [was] allowed under the settlement to fully  
16 satisfy its obligations” (Tr. 6). Movants asked, “at the very least[,] that the Court implement an  
17 administrative stay through its decision on the underlying stay motion” (Tr. 15).

18 Seeking to balance fairness to plaintiffs and defendants in maintaining the settlement’s  
19 momentum with fairness to movants in allowing them an opportunity to be heard, the  
20 undersigned proposed delaying loan discharges and discharge requests for borrowers who  
21 attended movants’ schools until the stay motion could be heard and ruled upon. But counsel  
22 for defendants explained that the Department could not, at that time, separate out discharge  
23 requests for borrowers who attended movants’ schools.<sup>3</sup> In light of this disclosure, the  
24 undersigned ordered that no discharge requests be sent and no loans be discharged until a  
25 hearing took place and an order on the stay motion issued. That hearing occurred on February  
26 15, 2023. This order follows full briefing and oral argument.

27  
28 <sup>3</sup> Defendants have since filed declarations describing changes made to facilitate separating out these requests (Dkt. Nos. 363, 376).

1 Before proceeding, it is important to reiterate that this order does not involve President  
2 Biden’s plan to forgive student debt under review by the Supreme Court. *See Biden v.*  
3 *Nebraska*, No. 22-506; *Dep’t of Educ. v. Brown*, No. 22-535. Rather, it involves approval of a  
4 discrete settlement involving a group of borrowers who filed borrower-defense applications.  
5 And this discrete settlement is based on a separate policy, enacted under a separate legal  
6 authority, designed to serve different purposes under different circumstances. *See Sweet*,  
7 2022 WL 16966513, at \*4–7.

### 8 ANALYSIS

9 It is well-established that a “stay is not a matter of right” but “an exercise of judicial  
10 discretion.” *Virginian Ry. Co. v. United States*, 272 U.S. 658, 672 (1926). “The party  
11 requesting a stay bears the burden of showing that the circumstances justify an exercise of that  
12 discretion,” and the “propriety” of the stay “is dependent upon the circumstances of the  
13 particular case.” *Nken v. Holder*, 556 U.S. 418, 433–34 (2009); *Virginian Ry. Co.*, 272 U.S.  
14 at 672–73.

15 In ruling on a motion to stay pending appeal, a district court considers four factors:  
16 “(1) whether the stay applicant has made a strong showing that he is likely to succeed on the  
17 merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance  
18 of the stay will substantially injure the other parties interested in the proceeding; and (4) where  
19 the public interest lies.” *Nken*, 556 U.S. at 426 (citation omitted). Under our court of appeals’  
20 “sliding scale” approach, a stronger showing of one factor may offset a weaker showing of  
21 another. *Leiva-Perez v. Holder*, 640 F.3d 962, 964 (9th Cir. 2011). But the Supreme Court has  
22 made clear that the “most critical” factors are the first two; once they are satisfied, the third and  
23 fourth factors are considered. *Nken*, 556 U.S. at 434–35.

#### 24 1. EFFECTIVE DATE OF THE SETTLEMENT: JANUARY 28, 2023.

25 Prior to considering the stay factors, however, this order must address a threshold  
26 question raised by the motion: whether the settlement is now in effect. Movants maintain that  
27 the settlement “provides for a self-executing stay pending appeal” (Reply Br. 2). Accordingly,  
28 “[i]f the Court recognizes that the Settlement cannot take effect until appeals are resolved, the

1 Court need not consider equitable stay relief” (*ibid.*). The implication seems to be that if there  
 2 is no settlement in effect, there is no reason to stay judgment. Movants base their arguments  
 3 on interrelated provisions in the settlement agreement: Sections II.K and XIII.A.

4 **A. SECTION II.K.**

5 Section II.K defines Effective Date based on two potential events:

6 the date upon which, if this Agreement has not been voided under  
 7 Section XIII, the Final Judgment approving this Agreement,  
 8 entered by the Court in the form attached hereto as Exhibit B,  
 9 becomes non-appealable, or, in the event of an appeal by a Class  
 Member based upon a timely filed objection to this Agreement,  
 upon the date of final resolution of said appeal.

10 (Dkt. No. 246-1 § II.K). Movants assert that the first potential event, final judgment  
 11 “becom[ing] non-appealable,” has not occurred because final judgment “*has been appealed*”  
 12 (Reply Br. 2 (emphasis in original); *see* Br. 22). Meanwhile, acknowledging that the second  
 13 potential event, “the date of final resolution of said appeal,” anticipates “appeal by a Class  
 14 Member,” movants declare that this language is best read to cover their appeals as well because  
 15 it was “written prior to intervention” (Br. 20). Walking this back a bit, they add that even if  
 16 this language does not cover their appeals, it establishes that the settling parties agreed  
 17 delaying the Effective Date would be necessary to prevent harm upon reversal (*ibid.*).

18 For their part, the settling parties reiterate that the Effective Date is January 28, 2023,  
 19 pursuant to Section II.K. Both read final judgment “becom[ing] non-appealable” as “the  
 20 expiration of the time to appeal the District Court’s final judgment” (Plaintiffs’ Opp. 18; *see*  
 21 *also* Defendants’ Opp. 8). As explained by plaintiffs, because movants timely noticed appeals  
 22 on January 13, 2023, this extended the deadline for others to notice appeals fourteen days from  
 23 that date under Federal Rule of Appellate Procedure 4(a)(3). Thus, final judgment “bec[ame]  
 24 non-appealable” the following day, January 28, 2023, and Section II.K’s first potential event  
 25 defined the Effective Date (Plaintiffs’ Opp. 18 n.9).

26 Both settling parties vehemently contest movants’ suggestion that the second potential  
 27 event is applicable when no class member appealed the settlement. According to defendants,  
 28 “[n]othing in the settlement agreement contemplates delaying the [E]ffective [D]ate based on

1 an appeal by a non-class member . . . [a]nd for good reason, as this litigation concerns the  
2 rights of borrowers and the harm that attends delay in resolving their borrower defense claims”  
3 (Defendants’ Opp. 8). According to plaintiffs, “[t]he Settlement is not ambiguous; there is no  
4 need to turn to canons of construction to see that it intends for the Effective Date to be delayed  
5 only by a class member’s appeal” (Plaintiffs’ Opp. 18).

6 This order finds that the plain language of the settlement agreement supports the  
7 interpretation of its signatories. Movants conflate “the date upon which . . . Final Judgment  
8 approving this Agreement . . . becomes non-appealable” (§ II.K) and the date of “a non-  
9 appealable judgment” (Reply Br. 2). This is a paradigmatic distinction with a difference.  
10 Once movants noticed appeals on January 13, 2023, they extended the deadline for other  
11 parties to notice appeals fourteen days from that date, through January 27, 2023. Fed. R. App.  
12 P. 4(a)(3). Thus, final judgment “bec[ame] non-appealable” the next day, January 28, 2023.  
13 That is the Effective Date — a steady point of reference in a turbulent world.

14 True, Section II.K demonstrates the settling parties had agreed that delaying the Effective  
15 Date would be necessary to prevent harm upon reversal. As plaintiffs and defendants attest,  
16 however, this provision was drafted (and approved) with an eye to the harm that would befall  
17 *class members* eager to move on with their lives and without the threat of collection. For that  
18 reason, the settlement agreement allows for delaying the Effective Date “in the event of an  
19 appeal by a Class Member based upon a timely filed objection to this Agreement.”

20 This order will not read in “intervenor” or “school” where the settlement agreement  
21 clearly says “Class Member.” Not only would this contravene the stated intent of the  
22 signatories — and brazenly violate some of the more widely accepted canons of construction  
23 — but it would unduly equate the (accepted) rights and harms of class members and  
24 (contested) rights and harms of movants that are implicated by the settlement. Movants are  
25 parties to this litigation, but they were not parties to this settlement agreement, which was  
26 carefully negotiated after years of heated litigation between the class of borrowers and the  
27 Secretary. The Court allowed movants to permissively intervene to oppose the agreement, but  
28 it will not entertain their attempts to re-write it.

**B. SECTION XIII.A.**

1  
2 Movants also invoke Section XIII.A, which provides: “This Agreement shall be void if it  
3 is not approved as written by a final Court order not subject to any further review” (Dkt. No.  
4 246-1 § XIII.A). According to movants, this provision “powerfully confirms that the Effective  
5 Date is delayed until all appeals are resolved” (Reply Br. 2). Defendants do not address this  
6 provision specifically, but plaintiffs counter that “[t]he plain, logical reading of the interaction  
7 between Section II.K and Section XIII.A is that the Settlement would not become effective if it  
8 were not finally approved” in a final approval order (Plaintiffs’ Opp. 18 n.8). Meanwhile,  
9 movants’ “counter-textual interpretation would create the absurd result of rendering the  
10 Settlement Agreement void from the moment it was approved” (*ibid.*).

11 This order agrees with plaintiffs. In the motion to stay, movants reason that “the  
12 Settlement is *void* altogether unless approved by a final order that is ‘not subject to any further  
13 review’” (Br. 22) (emphasis in original). By extension, movants suggest that the agreement is  
14 now void under Section XIII.A because their appeals reflect “it is not approved as written by a  
15 final Court order not subject to any further review.” Consequently, the Effective Date cannot  
16 be “the date upon which, if this Agreement has not been voided under Section XIII, the Final  
17 Judgment approving this Agreement . . . becomes non-appealable” under Section II.K because  
18 the agreement *has* “been voided under Section XIII.” But if this agreement is now void, there  
19 can be no “self-executing stay pending appeal” because there can be no Effective Date to  
20 delay. Indeed, there can be no approved settlement to appeal. As counsel for Lincoln  
21 acknowledged at the status conference, “the agreement provides that if the agreement is void,  
22 the consequence of that is the parties resume litigating . . . as they were before the settlement  
23 agreement” (Tr. 13; *see* Dkt. No. 246-1 § XIV.A).

24 The undersigned is not convinced that plaintiffs and defendants negotiated a settlement  
25 that could conceivably lock them into settlement negotiation forever, sending them back to the  
26 drawing board with each noticed appeal irrespective of its merit. Movants do not appear  
27 convinced either, as they equivocate in their reading of the term “void.” At the status  
28 conference, for example, counsel for Lincoln explained, “[w]e can’t know whether the

1 agreement is void until the judgment is not subject to any further review” (Tr. 11). Yet if *this*  
 2 is the case, and Section XIII.A delays the Effective Date indefinitely until all appeals are  
 3 resolved, it short circuits Section II.K. That provision’s two potential events for defining  
 4 Effective Date would then only be evaluated “if this Agreement has not been voided under  
 5 Section XIII,” at which point the second potential event would always be superfluous. In the  
 6 event of an unsuccessful class member appeal, “the date of final resolution of said appeal” and  
 7 “the date upon which . . . the Final Judgment approving this Agreement . . . bec[ame] non-  
 8 appealable” would invariably be identical. The settlement agreement cannot be read to create  
 9 such redundancy.

10 In sum, this order concludes that the Effective Date of the settlement agreement is  
 11 January 28, 2023. As such, the settlement is now in effect. The actions anticipated by the  
 12 settlement that have yet to take effect — effecting loan discharges and sending discharge  
 13 requests — are actions administratively stayed awaiting this order. Because there is no “self-  
 14 executing stay pending appeal,” this order turns to whether movants have carried their burden  
 15 of showing that the circumstances warrant a stay of judgment based on the stay factors.

16 **2. INADEQUATE SHOWING OF IRREPARABLE INJURY TO MOVANTS.**

17 Whether movants will be irreparably injured absent a stay will be considered first.  
 18 “[S]imply showing some possibility of irreparable injury fails to satisfy [this] factor.” *Nken*,  
 19 556 U.S. at 434. “An applicant for a stay pending appeal must show that a stay is necessary to  
 20 avoid likely irreparable injury to the applicant while the appeal is pending.” *Al Otro Lado v.*  
 21 *Wolf*, 952 F.3d 999, 1007 (9th Cir. 2020) (citing *Nken*, 556 U.S. at 434). Thus, “[t]he  
 22 minimum threshold showing for a stay pending appeal requires that irreparable injury is likely  
 23 to occur during the period before the appeal is likely to be decided.” *Ibid.* (citing *Leiva-Perez*,  
 24 640 F.3d at 968). Accounting for all evidence on this record — even the new and tardy  
 25 evidence plaintiffs sought to strike from movants’ reply and attached declarations — movants  
 26 do not make the minimum threshold showing here.

27 Their irreparable injury arguments fall into two categories: purported regulatory harm  
 28 and purported reputational harm. (Conspicuously absent is purported financial harm: recall,

1 the settlement does not require any school to make any payment.) These categories will be  
2 taken up in turn.

3 **A. PURPORTED REGULATORY HARM.**

4 Starting with purported regulatory harm, movants argue that their rights enshrined in the  
5 Department’s borrower-defense regulations stand to be violated in effecting the settlement.  
6 According to movants, the settlement “will eliminate an essential step of the administrative  
7 process” because “[t]here will no longer be [borrower-defense] proceedings at the Department  
8 in which the schools can participate to defend their reputations” and they “will also be denied a  
9 reasoned decision on each [borrower-defense] claim” (Br. 18–19). Thus, the “schools will  
10 immediately be denied *their* right to an agency process defined by duly promulgated  
11 regulations” (Br. 19) (emphasis in original). But as plaintiffs and defendants explain, movants  
12 seriously overstate their rights under the borrower-defense regulations, which are not even  
13 implicated.

14 The final approval order summarized the regulations that govern a school’s participation  
15 in the borrower-defense administrative process. *See Sweet*, 2022 WL 16966513, at \*9; *see*  
16 *also* 87 Fed. Reg. 65,904 (Nov. 1, 2022) (new regulations effective July 2023). Briefly here,  
17 while carrying out fact-finding in review of a borrower-defense application, the Department  
18 gives a school notice and an opportunity to file a responsive statement. 34 C.F.R.  
19 §§ 685.222(a)(1), (a)(2), (e)(3)(i); 685.206(c)(2), (e)(8)–(12). The school is not required to  
20 respond, and only a borrower is entitled to a reasoned decision (upon *denial* of a borrower-  
21 defense application). *Id.* § 685.222(e)(4)(ii). Upon approval of a borrower-defense  
22 application, if the Department elects to initiate a proceeding against a school for recoupment of  
23 an amount discharged, it gives this school a statement of facts and law, as well as an  
24 opportunity to respond, request a hearing, and litigate the merits *de novo*. *Id.* §§ 685.308(a)(3);  
25 668.87(a)–(b).

26 As defendants point out, however, “[t]he settlement does not call for the Department to  
27 adjudicate the borrower defense applications of the group of class members to which Exhibit C  
28 applies, nor does the provision of full settlement relief to those class members constitute

1 borrower defense decisions” (Defendants’ Opp. 7). In other words, the settlement does not call  
2 for the Department to adjudicate the borrower-defense applications of class members who  
3 attended movants’ schools, nor does the provision of full settlement relief to these class  
4 members constitute decisions on their borrower-defense applications. Accordingly, the relief  
5 provided to class members who attended movants’ schools does not trigger the borrower-  
6 defense regulations. Movants therefore cannot be deprived of any rights under the borrower-  
7 defense regulations through effecting the settlement.

8 Plaintiffs stress that “the Department has repeatedly stated that it will not seek to recoup  
9 any of the amounts discharged pursuant to the settlement” (Plaintiffs’ Opp. 6) (emphasis  
10 omitted). The reader should keep in mind, however, that the Department *cannot* recoup  
11 amounts discharged pursuant to the settlement from movants. This is because the settlement  
12 does not call for the adjudication of borrower-defense applications of class members who  
13 attended movants’ schools (as explained above). Thus, “[t]he school’s actions that gave rise to  
14 a successful claim for which the Secretary discharged a loan, in whole or in part, pursuant to  
15 § 685.206, § 685.214, § 685.216, or § 685.222” (the borrower-defense regulations) cannot be  
16 the predicate for the Department to initiate proceedings against movants for recoupment.  
17 34 C.F.R. § 685.308(a)(3). Under the settlement, the loans of class members who attended  
18 movants’ schools are discharged pursuant to a separate authority. *See Sweet*, 2022 WL  
19 16966513, at \*4–7.

20 Recoupment of amounts discharged pursuant to the settlement from movants is also  
21 foreclosed by the Miller Declaration. As explained in the final approval order, the Department  
22 has “represented in the sworn declaration of Benjamin Miller that it does not consider inclusion  
23 on Exhibit C a finding of misconduct and that inclusion does not constitute evidence that could  
24 or would be considered in an action by the Department against a school. The Court relied  
25 upon, and the Court expects the government to stand behind, the statements made in the Miller  
26 Declaration.” *Id.* at \*10 (citing Dkt. No. 288-1). Because there can be no recoupment from  
27 movants pursuant to the settlement, there can be no deprivation of movants’ rights in  
28 recoupment proceedings pursuant to the settlement.

1 To summarize, movants’ rights under the borrower-defense regulations are simply not  
 2 implicated by the settlement and the relief it provides to class members who attended movants’  
 3 schools. Thus, movants do not suffer any regulatory harm — let alone irreparable regulatory  
 4 harm — in the absence of a stay.

5 **B. PURPORTED REPUTATIONAL HARM.**

6 Next, this order turns to purported reputational harm. In some instances, movants  
 7 contend that they “are experiencing irreparable harm by being branded with the Exhibit C  
 8 scarlet letter, and that harm will intensify after the Settlement’s Effective Date” (Br. 18). In  
 9 others, they claim that they “will suffer irreparable harm to their reputations, goodwill, and  
 10 standing with regulators if the Settlement takes effect” (*id.* at 20). According to movants, “all  
 11 schools on Exhibit C will immediately suffer the stigma of having all [borrower-defense]  
 12 claims against them summarily granted — without any administrative process, judicial fact-  
 13 finding, or reasoned decision on the merits” (*id.* at 19). They aver that “this unproven stigma  
 14 will carry the imprimatur of both the Department and the final judgment of a federal court that  
 15 deemed the Department’s finding fair and reasonable,” and “[i]t will be impossible to fully  
 16 reverse that stigma after class members receive their promised relief” (*ibid.*). Plaintiffs and  
 17 defendants respond, *inter alia*, that movants fail to offer satisfactory evidence of any  
 18 reputational injury likely to befall movants as a result of the settlement that a stay would allow  
 19 movants to avoid (Plaintiffs’ Opp. 6–8; Defendants’ Opp. 9–10). This proves to be the silver  
 20 dagger to the “scarlet letter.”

21 At the outset, to the extent that movants argue they “*are* experiencing irreparable harm by  
 22 being branded with the Exhibit C scarlet letter” (back in June 2022), they cut off their noses to  
 23 spite their faces (Br. 18) (emphasis added). Recall, “[a]n applicant for a stay pending appeal  
 24 must show that a stay is necessary to avoid likely irreparable injury to the applicant while the  
 25 appeal is pending.” *Al Otro Lado*, 952 F.3d at 1007 (citing *Nken*, 556 U.S. at 434). If the  
 26 reputational injury experienced by movants is already irreparable, it is unclear why a stay  
 27 would be necessary to avoid irreparable injury pending appeal. As movants recognize, the  
 28 harm inquiry requires consideration of “the significance of the change from the status quo

1 which would arise in the absence of a stay” (Br. 18 (quoting *John Doe Co. v. CFPB*, 235 F.  
2 Supp. 3d 194, 206 (D.D.C. 2017) (Judge Rudolph Contreras)). According to movants’ theory  
3 of harm here, however, in the absence of a stay, there would be no change from the status quo.  
4 Exhibit C would continue to “brand” them, either indefinitely or until our court of appeals  
5 reverses or vacates judgment. Put simply, issuing a stay would have no effect.

6 But to the extent that movants argue they “will suffer irreparable harm to their  
7 reputations, good will, and standing with regulators if the Settlement takes effect,” their  
8 showing is weak (Br. 20) (emphasis added). Movants were on notice they would have to make  
9 this showing here. In their stay motion, they cite the correct legal standard and entitle a section  
10 “Intervenors Will Suffer Irreparable Harm Absent a Stay” (*id.* at 2, 18–22). What’s more, the  
11 final approval order expressly cautioned that “intervenors’ speculative assertions of harm fail  
12 to render the settlement unfair, especially in light of the significant benefits to both the class  
13 and the Department in settling this litigation.” *Sweet*, 2022 WL 16966513, at \*10. Two  
14 months after that order issued — and more than seven months after the settlement and Exhibit  
15 C were made public — movants’ assertions of reputational harm remain markedly speculative,  
16 “grounded in platitudes rather than evidence.” *Herb Reed Enters., LLC v. Fla. Ent. Mgmt.,*  
17 *Inc.*, 736 F.3d 1239, 1250 (9th Cir. 2013).

18 (i) ***Evidence Presented with the Motion.***

19 In support of the reputational harm arguments made in their stay motion, movants cite a  
20 report from a students’ rights advocacy group, the National Student Legal Defense Network,  
21 that has purportedly “leveraged Lincoln’s mere inclusion on Exhibit C to pressure and criticize  
22 the Department for recently renewing its Program Participation Agreement [(PPA)] with  
23 Lincoln College of Technology,” an agreement that is necessary for receipt of Title IV funding  
24 (Br. 21 (citing Townsend Decl. Exh. 1)). The report is attached to the motion in an attorney  
25 declaration, along with an article from the publication *Higher Ed Dive* describing this report  
26 (Townsend Decl. Exh. 2). Neither the report nor the article supports a showing of irreparable  
27 reputational harm to movants that a stay would counteract.  
28

1           The National Student Legal Defense Network report explains that “[i]n recent months,  
2 the Department has affirmatively granted new PPAs to numerous for-profit colleges with a  
3 history of law enforcement activity and consumer fraud abuses,” and “[t]his includes schools  
4 that the Department itself has determined to have ‘strong indicia’ of having engaged in  
5 ‘substantial misconduct’ that had either been ‘credibly alleged’ or ‘proven’” (Townsend Decl.  
6 Exh. 1 at 2). As defendants observe, movants make no effort to explain why, in light of this  
7 “history of law enforcement activity and consumer fraud abuses,” any reputational harm  
8 experienced by Lincoln that is reflected in or compounded by the report is attributable to  
9 Exhibit C (Defendants’ Opp. 9 n.3). In fact, the heading for the section in the report discussing  
10 Lincoln is titled, “The Department Awarded a New Contract to Lincoln Tech After  
11 *Massachusetts Attorney General Maura Healey Issued a Civil Investigatory Demand and while*  
12 *the MA AG Borrower Defense Claim on Behalf of Lincoln Tech Students Remains Pending at*  
13 *[the Department]”* (Townsend Decl. Exh. 1 at 2) (emphasis added).

14           This section recounts a series of enforcement activities involving Lincoln:

15           In July 2015, the Massachusetts Attorney General (“MA AG”) entered a consent judgment with Lincoln Tech and Lincoln  
16 Educational Services (collectively “Lincoln”) to resolve allegations that the school violated state consumer protection law regarding its  
17 enrollment, disclosure, admissions, and educational practices. Lincoln agreed to pay \$850,000 and forgive \$165,000 in student  
18 debt to resolve an investigation into the disclosure and reporting of job placement data for a single program of study at two Lincoln  
19 Tech campuses in Massachusetts. In January 2016, the MA AG sent a letter to the Department of Education seeking a discharge of  
20 debt for affected students.

21           In the meantime, Lincoln has been the subject of numerous law enforcement inquiries. In September 2021, the Department’s  
22 Inspector General determined that Lincoln failed to follow federal requirements associated with COVID-19 emergency relief  
23 programs. In December 2021, the school received a letter from the Consumer Financial Protection Bureau (“CFPB”) stating that the  
24 CFPB was requesting information and assessing conduct regarding the school’s “extensions of credit” to its students. That same  
25 month, the Department cited Lincoln for “untimely refunds,” demanding that Lincoln provide a financial surety to the  
26 Department. On June 7, 2022, the MA AG issued a new civil investigative demand to investigate consumer misconduct “in  
27 connection with their policies regarding fee refunds and associated disclosures to students and prospective students.” Lincoln reports  
28 to be “cooperating” with the MA AG investigation.

1 (id. at 2–3) (footnotes omitted). It is only after a survey of “numerous law enforcement  
2 inquiries” that the report matter-of-factly states: “Meanwhile, as noted above, in 2022, the  
3 Department included Lincoln on its list of schools with a ‘strong indicia’ of having engaged in  
4 ‘substantial misconduct’ that had either been ‘credibly alleged’ or ‘proven’” (id. at 3). The  
5 relationship between alleged stigma and approved settlement is thereby strained. Perhaps this  
6 report could support a showing of stigma afflicting Lincoln, but it does not support a showing  
7 of stigma *likely deriving from Exhibit C* or a showing of stigma *that a stay would likely offset*.  
8 Lincoln seems to make a scapegoat of the settlement here.

9 The article from *Higher Ed Dive* also discusses law enforcement inquiries (see Townsend  
10 Decl. Exh. 2 at 1 (“The U.S. Department of Education is allowing several for-profit colleges to  
11 continue accessing federal financial aid even though they’re facing scrutiny from state  
12 attorneys general and their accreditors, according to a new report from the National Student  
13 Legal Defense Network.”)). And it offers an even-handed summary of Exhibit C, going so far  
14 as to observe that “some institutions on the list have objected to the idea that the settlement  
15 proves wrongdoing on their behalf” and “[a] federal judge who approved the settlement wrote  
16 that the list of 151 colleges does not brand them with ‘an impermissible scarlet letter’” (id.  
17 at 2). Lincoln even provided a statement for the article: “We believe the report strongly  
18 mischaracterizes the issues and does not properly reflect the respective outcomes” (id. at 3).  
19 Again, in light of the “scrutiny from state attorneys general and their accreditors,” the asserted  
20 connection between stigma and settlement is too attenuated. Using this article, movants have  
21 not shown that Exhibit C will cause them any reputational injury. Indeed, the very issuance of  
22 a PPA to Lincoln and other schools listed on Exhibit C powerfully signals that the Department  
23 sees no stigma arising from Exhibit C.

24 Based on the evidence presented with their motion, movants have not shown that a stay  
25 would avoid any reputational injury to them, let alone irreparable reputational injury.<sup>4</sup>

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26  
27 <sup>4</sup> Elsewhere, movants cite a public statement by plaintiffs’ counsel, about schools that “cheated”  
28 students, as a direct consequence of Exhibit C that caused movants harm (Br. 21 (citing Dkt.  
No. 325-4 at 5)). Counsel’s statement did not mention Exhibit C or any school on Exhibit C, so  
the statement cannot be read that way.

*(ii) Evidence Presented with the Reply.*

1  
2 Tellingly, movants raise new evidence in their reply, drawing from new declarations  
3 (Reply Br. 9–13). They cite Lincoln executive Francis Giglio’s declaration for the illustrative  
4 example that “six months after Exhibit C was released, Lincoln was denied an opportunity to  
5 speak with a class at Centennial High School in Nevada specifically because ‘Lincoln Tech is  
6 on the U.S. Department of Ed’s list of predatory schools’” (Reply Br. 11 (citing Giglio Decl.  
7 ¶ 4)). For his part, Mr. Giglio cites and attaches a post on the Federal Trade Commission’s  
8 website that he alleges “expressly equates inclusion on Exhibit C with deceptive practices,”  
9 and he describes harm to Lincoln flowing from disclosure of this litigation as a material risk in  
10 securities filings with the Securities Exchange Commission (Giglio Decl. ¶¶ 6, 9). Meanwhile,  
11 movants rely on Everglades executive Joseph Berardinelli’s declaration for its proposition that  
12 “[s]ome lenders have expressed concern and begun inquiring about the Settlement as part of  
13 their due diligence, which has (1) required [Everglades] to dedicate resources to addressing  
14 those questions and concerns, (2) delayed and/or increased the cost of financing, and  
15 (3) caused in some instances, potential lenders not to provide financing” (Berardinelli Decl.  
16 ¶ 13; *see* Reply Br. 11). Plaintiffs formally object to these excerpts and request they be struck  
17 from the record because they allegedly involve untimely evidence that should have been  
18 presented with the motion to stay (Dkt. No. 361).<sup>5</sup>

19 Generally, a district court declines to consider information and arguments presented for  
20 the first time in a reply. Although it has discretion to consider new evidence presented in a  
21 reply, it generally exercises this discretion when “the new evidence appears to be a reasonable  
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23 <sup>5</sup> Plaintiffs also request leave to file a sur-reply in response to Mr. Giglio and Mr. Berardinelli’s  
24 claims that their respective institutions were unable to locate records relating to three class  
25 members who filed declarations in support of plaintiffs’ opposition and claimed to attend these  
26 institutions (Dkt. No. 366 (citing Giglio Decl. ¶ 8; Berardinelli Decl. ¶ 9)). Plaintiffs seek to  
27 attach supplemental declarations from these class members that explain why the claims in the  
28 Giglio and Berardinelli Declarations were inaccurate and/or incomplete: two class members who  
attended Keiser University (owned by Everglades) changed their names after marriage, and one  
class member attended a school that was later acquired by Lincoln (the New England Institute of  
Technology). Recognizing that movants do not object to this sur-reply or the supplemental class  
member declarations, this order **GRANTS** plaintiffs’ motion but **DENIES** the request in the sur-reply  
to strike the associated language from the Giglio and Berardinelli Declarations.

1 response to the opposition” or upon “giving the non-movant the opportunity to respond.”  
2 *Hodges v. Hertz Corp.*, 351 F. Supp. 3d 1227, 1249 (N.D. Cal. 2018) (Judge Donna M. Ryu);  
3 *Harris v. City of Kent*, 2022 WL 1310080, at \*5 (W.D. Wash. Mar. 11, 2022) (Judge Theresa  
4 L. Fricke) (citing *Provenz v. Miller*, 102 F.3d 1478, 1487 (9th Cir. 1996)).

5 This order agrees with plaintiffs that it was unfair to lard the record on reply and thus  
6 deprive the settling parties of the opportunity to address the new material in their oppositions.  
7 The incident with the high school teacher that Mr. Giglio describes reportedly took place on  
8 January 9, 2023 (Giglio Decl. ¶¶ 4–5). The FTC post he cites is dated September 16, 2022 (*id.*  
9 ¶ 6). And the securities filings he references are from August 8, 2022, and November 7, 2022,  
10 respectively (*id.* ¶ 9). Movants could have appended all of the evidence in the Giglio  
11 Declaration to their stay motion filed on January 13, 2023. Meanwhile, although Mr.  
12 Berardinelli does not date his assertions, he also does not in any way indicate that the harms he  
13 describes took place between January 13, 2023, when movants filed their stay motion, and  
14 February 3, 2023, when movants filed their reply.

15 Ordinarily, judges would not allow movants to introduce this evidence, and the relevant  
16 passages from the reply and attached declarations would be struck. Here, however, these  
17 passages will be considered. Plaintiffs’ objections are **OVERRULED**. Even so, on this new and  
18 late evidence, movants have failed to show that they are likely to experience irreparable  
19 reputational harm that a stay would counteract.

20 *First*, with respect to the incident involving the high school teacher, it should be noted at  
21 the outset that any alleged reputational harm associated with this incident (and other potential  
22 incidents of this sort) is repairable through correction. Lincoln could provide essentially the  
23 same statement it provided to *Higher Ed Dive*: “We believe [this characterization] strongly  
24 mischaracterizes the issues . . .” (Townsend Decl. Exh. 2 at 3). What is more problematic,  
25 however, is that movants have not shown that the alleged reputational harm associated with  
26 this incident could be avoided with a stay in place. There is no indication that a *stay of*  
27 *judgment* would divest this teacher of the false impression that “Lincoln Tech is on the U.S.  
28

1 Department of Ed’s list of predatory schools.” Recall, a stay would not remove Lincoln or  
2 other movants from Exhibit C. Only our court of appeals’ merits ruling could do that.

3 *Second*, with respect to the FTC post, movants are not candid. This order reproduces the  
4 language that Mr. Giglio discusses in full:

5 Some of the names on the list of schools included in the *Sweet*  
6 settlement may look familiar — and they should. The FTC has  
7 also sued the University of Phoenix, DeVry, and the operators of  
8 American InterContinental University and Colorado Technical  
9 University for their allegedly deceptive practices. Students who  
10 took out loans to attend those schools got more than \$300 million  
11 in payments and debt cancellation through these FTC actions. If  
12 you got a check from one of these settlements: You’re still eligible  
13 to get your federal loans forgiven through the borrower defense  
14 program, so file your application.

15 (Giglio Decl. ¶ 6). This post does not impugn the non-movant schools listed on Exhibit C on  
16 account of their inclusion on Exhibit C such that it could cause reputational harm to movants.  
17 Exhibit C is invoked in a neutral, accurate fashion here, solely to inform borrowers that they  
18 may still be entitled to debt relief even if they have already received money from an FTC  
19 settlement. Yes, the post mentions “scammers,” but that does not refer to schools listed on  
20 Exhibit C but rather con artists who will try to rip-off borrowers by “helping” them get their  
21 borrower-defense claims approved.

22 *Third*, with respect to Lincoln’s securities filings with the SEC, this order finds that  
23 plaintiffs captured the deficiency in their objection:

24 Mr. Giglio claims that disclosing the existence of the Settlement in  
25 this case in Lincoln’s securities filings has “caused concrete and  
26 material consequences for the company, its financial reporting, and  
27 its shareholder relations.” Giglio Decl. ¶ 9. Yet a brief perusal of  
28 Lincoln’s listing on the NASDAQ exchange shows that Lincoln’s  
stock was higher as of the date of the Reply Brief (\$6.58) than it  
was on the date Exhibit C was made public (\$6.00). *See*  
<https://finance.yahoo.com/chart/LINC>. Indeed, the stock equaled  
its 2022 high point (\$7.71) on August 2, 2022, after Exhibit C had  
been public for over a month, and hit its 2022 low (\$4.69) on  
October 14, 2022, which was not anywhere near the disclosure  
dates cited in the Declaration. *See id.*

(Dkt. No. 365 at 2 n.1). No harm, no foul.

1           *Fourth*, with respect to Mr. Berardinelli’s assertions, they are simply too speculative.  
 2 How is the undersigned (or Mr. Berardinelli, for that matter,) to know whether the “delayed  
 3 and/or increased . . . cost of financing” or decisions “in some instances . . . not to provide  
 4 financing” came about on account of “inquir[ies] about the Settlement”? (Berardinelli Decl.  
 5 ¶ 13). The undersigned will not connect the dots and delineate reputational harm for movants.  
 6 “[C]onclusory factual assertions and speculative arguments that are unsupported in the record”  
 7 will not suffice. *Doe #1 v. Trump*, 957 F.3d 1050, 1059–60 (9th Cir. 2020).

8           This order recognizes movants may be correct that, if our court of appeals reverses or  
 9 vacates judgment, class members may have new claims of reliance and assertions of hardship  
 10 (Br. 20). This could result in harm — even irreparable harm — but not irreparable harm to  
 11 movants. The key question for this order is whether movants can show that *movants* will be  
 12 irreparably injured absent a stay. The showing here is too weak. At bottom, movants fail to  
 13 show that a stay is necessary to avoid likely irreparable injury to movants while their appeals  
 14 are pending.<sup>6</sup>

### 15           **3.       INADEQUATE SHOWING OF LIKELIHOOD OF SUCCESS ON THE** 16           **MERITS.**

17           “An applicant for a stay pending appeal must make ‘a strong showing that he is likely to  
 18 succeed on the merits.’ Where, as here, the showing of irreparable harm is weak at best, the  
 19 [applicant] must make a commensurately strong showing of a likelihood of success on the  
 20 merits to prevail under the sliding scale approach.” *Al Otro Lado*, 952 F.3d at 1010 (quoting  
 21 *Nken*, 556 U.S. at 434). In brief, movants have not made a commensurately strong showing of  
 22 a likelihood of success on the merits.

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25           <sup>6</sup> Two days ago, one week after the hearing, movants sought leave to file yet another piece of  
 26 evidence in support of its showing of harm: a letter from plaintiffs’ counsel and other  
 27 organizations submitted to an entity that is considering affiliating with a non-movant school listed  
 28 on Exhibit C, the University of Phoenix (Dkt. No. 381). According to movants, “[t]his letter is  
 another example of how Plaintiffs and others are using Exhibit C to harm schools on that list, how  
 the harm manifests itself over time, and why effectuation of the settlement during appeal will  
 cause irreparable harm to Interveners” (Mot. 1–2). The Court has already generously considered  
 tardy evidence. The motion to consider even more tardy evidence is **DENIED**.

1 The bulk of the stay motion is dedicated to the same merits arguments that movants made  
2 at the final approval stage (Br. 2–18). The final approval order attended to every legal  
3 argument that movants have repeated in their stay motion, often verbatim, and the Court stands  
4 by its analysis. At any rate, this order need not revisit these arguments because what tips the  
5 scales for this factor is a different issue — and a threshold one.

6 Noticeably absent from movants’ stay motion is any discussion of Article III standing.  
7 Such discussion is also noticeably absent from movants’ reply, despite plaintiffs raising Article  
8 III standing in their opposition (Plaintiffs’ Opp. 19–23; *cf.* Defendants’ Opp. 9). An intervenor  
9 who appeals a judgment when neither original party has appealed must demonstrate  
10 independent Article III standing to maintain that appeal. *See Wittman v. Personhuballah*,  
11 578 U.S. 539, 543–44 (2016) (holding that intervenors lack standing and dismissing appeal for  
12 lack of jurisdiction). The Supreme Court has explained:

13 A party has standing only if he shows that he has suffered an  
14 “injury in fact,” that the injury is “fairly traceable” to the conduct  
15 being challenged, and that the injury will likely be “redressed” by a  
16 favorable decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555,  
17 560–561. . . (1992) (internal quotation marks and ellipsis omitted).  
18 The need to satisfy these three requirements persists throughout the  
19 life of the lawsuit. *Arizonaans for Official English [v. Arizona]*,  
20 520 U.S. [43,] 67 [(1997)] . . . .

21 An “intervenor cannot step into the shoes of the original party”  
22 (here, the Commonwealth) “unless the intervenor independently  
23 ‘fulfills the requirements of Article III.’” *Id.*, at 65 . . . (quoting  
24 *Diamond v. Charles*, 476 U.S. 54, 68 . . . (1986)).

25 *Ibid.*

26 As alluded to in the final approval order and this order’s discussion of harm, movants  
27 have not identified an injury in fact, a “legally protected interest” they have that the settlement  
28 affects in a sufficiently “concrete and particularized” way. *Lujan*, 504 U.S. at 560; *see also*  
*TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2212 (2021). This district court is at a loss to  
identify an injury to movants arising from this settlement agreement (that they were not a party  
to) resolving this litigation (that did not involve them). As discussed above and at even greater  
length in the final approval order, “the schools have lost no procedural rights, nor has their  
status been altered. No liberty or property interest has been disturbed.” *Sweet*, 2022 WL

1 16966513, at \*10. And it is well-recognized that case law “does not establish the proposition  
 2 that reputation alone, apart from some more tangible interest such as employment, is either  
 3 ‘liberty’ or ‘property’ by itself sufficient to invoke the procedural protection of the Due  
 4 Process Clause.” *Paul v. Davis*, 424 U.S. 693, 701 (1976); *see also Sweet*, 2022 WL  
 5 16966513, at \*10. As plaintiffs observe, even if there were evidence of reputational harm on  
 6 this record, movants fail to establish a “plus factor,” “the denial of a more tangible interest” in  
 7 connection with alleged stigmatization (Plaintiffs’ Opp. 21 (quoting *Hart v. Parks*, 450 F.3d  
 8 1059, 1069 (9th Cir. 2006) (internal quotation and citation omitted)).

9 In light of this, movants’ showing on this stay factor is unsatisfactory. “Whether  
 10 [movants have] failed to show any irreparable harm during the pendency of the appeal or  
 11 [have] made only a minimal showing, [they have] not carried [their] burden to establish a  
 12 sufficient likelihood of success on the merits.” *Al Otro Lado*, 952 F.3d at 1010.

13 **4. BALANCE OF THE EQUITIES AND THE PUBLIC INTEREST WEIGH**  
 14 **AGAINST A STAY.**

15 “Because the [movants] ha[ve] not satisfied the first two factors, we need not dwell on  
 16 the final two factors — harm to the opposing party and the public interest.” *Id.* at 1014  
 17 (internal quotations and citations omitted). But this order would be remiss not to mention that  
 18 both heavily weigh against a stay. Seeing as “[t]hese factors merge when the Government is  
 19 [an] opposing party,” they are addressed together here. *Nken*, 556 U.S. at 435.

20 With respect to the third factor — whether issuance of the stay will substantially injure  
 21 the other parties interested in the proceeding — movants emphasize that a stay would not cause  
 22 irreparable harm to plaintiffs because their loans are in forbearance and because movants could  
 23 potentially receive loan cancellation from President Biden’s debt relief initiative (Reply Br.  
 24 13). They also aver that a stay would *benefit* defendants because they would not have to  
 25 expend resources effecting the settlement when it could later be reversed (Br. 22–23).

26 Whereas movants’ claims of harm experienced by movants are acutely overstated, their  
 27 claims of harm experienced by plaintiffs and defendants are acutely understated. In short, that  
 28 loans are currently in forbearance is of little consolation to plaintiffs when the sword of

1 Damocles hangs over their heads. There is ample evidence on this record of abiding and  
 2 evolving harm to plaintiffs who are awaiting decisions on their borrower-defense applications  
 3 that forbearance or hope for other debt relief cannot allay. These include reputational harms,  
 4 not to mention financial, physical, and emotional ones (*see* Plaintiffs’ Opp. Exh. A  
 5 (declarations of 144 borrowers in opposition to stay motion)). Meanwhile, this order credits  
 6 defendants’ assertion that defendants do not, in fact, benefit from a stay that frustrates their  
 7 strong interest in resolving this litigation and eliminating their backlog of borrower-defense  
 8 applications — especially when defendants have already devoted substantial resources to  
 9 resolving this matter (Defendants’ Opp. 11). On this record, it is evident that a stay would  
 10 substantially injure plaintiffs and defendants.<sup>7</sup>

11 With respect to the fourth factor — where the public interest lies — movants argue: (1) a  
 12 stay would protect the Ninth Circuit’s jurisdiction; (2) a stay would promote the orderly  
 13 administration of justice, with the Supreme Court presently reviewing President Biden’s debt  
 14 forgiveness program; and (3) the public has no legitimate interest in constricting appellate  
 15 review (Br. 23–25). But the public interest favors the significant benefits to roughly half a  
 16 million class members and the Department in settling this litigation here.

17 Movants state that “[a] stay would preserve the status quo while the appeal plays out”  
 18 (Br. 23). As defendants emphasize, however, movants fail to earnestly reckon with the fact  
 19 “that the status quo before settlement — a massive, ever-expanding backlog of unresolved  
 20 borrower-defense claims — was the impetus of this lawsuit” (Defendants’ Opp. 11). There is  
 21

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22 <sup>7</sup> Movants also call attention to the fact that the Supreme Court recognized the propriety of  
 23 maintaining a stay pending appeal of President Biden’s debt forgiveness initiative in a parallel  
 24 context, and that plaintiffs’ claims of harm are undermined by the fact that they “chose not to  
 25 advance” this litigation for seventeen months while they unsuccessfully appealed a discovery issue  
 26 (Br. 22 n.12, 23). This order (again) cautions that President Biden’s initiative is separate and apart  
 27 from this settlement, so drawing parallels about the harm arising from stays in these actions is  
 28 perilous. And this order considers it unfair to suggest that plaintiffs “chose not to advance” this  
 litigation while appealing a discovery issue and that this thereby calls into question the harm they  
 would suffer upon grant of a stay. Indeed, this argument is particularly feeble given that movants  
 waited until the tail end of the appeal window to notice appeals of the final approval order despite  
 the alleged irreparable harm they discuss in their stay motion. Movants’ other arguments,  
 including those involving the Effective Date and the students who allegedly did not attend  
 movants’ schools, are addressed elsewhere in this order and the final approval order.

1 no public interest in the preservation of this stubborn and burgeoning backlog. The settlement  
2 breaks a logjam that has vexed several Secretaries and allows the Department to redirect  
3 resources to other initiatives. And it gives plaintiffs, who have languished in borrower-defense  
4 application limbo, their long-awaited relief. Note the relief provided by this settlement  
5 (financial and otherwise) will allow plaintiffs to breathe easier, sleep easier, repair their credit  
6 scores, take new jobs, enroll in new educational programs, finish their degrees, get married,  
7 start families, provide for their children, finance houses and vehicles, and save for retirement  
8 (Plaintiffs' Opp. Exh. A). It will allow them not only to move on, but also to move up,  
9 elevating others in the process. The public interest favors this settlement.

10 Resolution of a lawsuit concerning monumental delay should not be delayed any longer  
11 by three intervenor schools who were not parties to the settlement agreement and who were not  
12 involved in the long, hard-fought litigation that preceded it. For the foregoing reasons, the  
13 joint motion to stay the entire judgment pending appeal is **DENIED**. For the same reasons, the  
14 alternative request to stay judgment pending appeal only as to movants is **DENIED** as well.

15 **5. TEMPORARY STAY.**

16 Nevertheless, this order **GRANTS** a temporary, same-day stay of judgment with respect to  
17 discharges and discharge requests for loans associated with movants to allow them to present a  
18 stay motion to our court of appeals. *See* Fed. R. App. P. 8(a)(2). The judgment with respect to  
19 discharges and discharge requests for loans associated with movants is hereby stayed for  
20 **SEVEN DAYS** pursuant to Ninth Circuit Rule 27-2. If movants file a motion to stay in our court  
21 of appeals within seven days of the entry of this order, the temporary stay will continue until  
22 our court of appeals rules on the stay motion. If movants fail to so file, however, then the  
23 temporary stay shall expire seven days after the entry of this order. Movants shall please  
24 notify the Court if they seek a stay in our court of appeals.

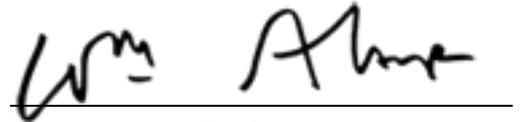
25 **CONCLUSION**

26 For the reasons stated herein, the motion to stay judgment pending appeal is **DENIED**.  
27 This order temporarily stays judgment with respect to discharges and discharge requests for  
28

1 loans associated with movants for **SEVEN DAYS** to allow them to present a stay motion to our  
2 court of appeals.

3 **IT IS SO ORDERED.**

4  
5 Dated: February 24, 2023.



6  
7 WILLIAM ALSUP  
8 UNITED STATES DISTRICT JUDGE  
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