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SARAH DIEFFENBACHER

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

SARAH DIEFFENBACHER,

Plaintiff,

v.

BETSY DEVOS, in her official capacity as Secretary of the United States Department of Education,

Defendant.

Case No.: 5:17-cv-00342-VAP-KK

PLAINTIFF'S NOTICE OF MOTION AND MOTION FOR RECONSIDERATION

Hearing Date: June 18, 2018
Hearing Time: 2:00 p.m.
Ctrm: 8A
Hon.: Virginia A. Phillips

TO THE HONORABLE COURT AND TO ALL PARTIES:

PLEASE TAKE NOTICE that on June 18, 2018, at 2:00 p.m. or as soon thereafter as this matter may be heard in the above-titled Court located at 350 West 1st Street, Los Angeles, California, 90012, Plaintiff Sarah Dieffenbacher will move this Court, pursuant Fed. R. Civ. P. 59(e) and Civil L.R. 7-18, to reconsider its decision granting Defendant's Motion to Dismiss with prejudice, ECF Nos. 63-64. Specifically, the Court should reconsider its conclusion that the case is moot or, in the alternative, the Court should reconsider its decision to dismiss the case with prejudice, rather than with leave to amend.

This motion is made upon this Notice, the attached Memorandum of Points and Authorities, documents already on record with the Court in this action, and upon such oral argument as may be presented at the hearing of this motion.

This motion is made following the conference of counsel which occurred via e-mail on May 18, 2018.

Dated: May 21, 2018

Respectfully submitted,

/s/ Toby R. Merrill
Eileen M. Connor
Deanne B. Loonin
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For over three years, Plaintiff Sarah Dieffenbacher has challenged the enforceability of federal student loans that she used to attend a worthless program operated by Corinthian Colleges, Inc. from which she received negative value. In dismissing Ms. Dieffenbacher's case on the basis of a "narrowly-tailored" complaint that was deemed mooted by subsequent events, the Court further delays any possibility of relief. Ms. Dieffenbacher respectfully requests that the Court reconsider this decision.

First, the Court's order was based on an erroneous determination that the challenged January 30, 2017 Administrative Wage Garnishment Hearing Decision ("the January 2017 Decision") is "defunct." Doc. No. 63 at 19. This conclusion ignores evidence that the guaranty agency, Educational Credit Management Corporation ("ECMC"), can still invoke the prior order to garnish Ms. Dieffenbacher's wages. Moreover, the conclusion disregards the possible preclusive effects of the January 2017 Decision, which constituted a final agency determination rejecting Plaintiff's 29-page letter and 254 pages of evidence showing that her loans are not enforceable as a matter of law. The preclusive effect of this final agency action extended to the February 28, 2018, Borrower Defense Adjudication ("Borrower Defense Adjudication"), and could apply to any future consideration by the Department of the legal enforceability of Plaintiff's loans, their collection through administrative wage garnishment, and possibly even a future court proceeding challenging the basis of the Borrower Defense Adjudication.

Second, even accepting the Court's view of the case, the Court failed to consider material facts when it dismissed the matter *with prejudice* instead of permitting Plaintiff to amend her complaint as a matter of course. On that question, the Court did not consider whether incorporating the post-complaint developments into an amended pleading would resolve the Court's mootness concerns. The Court should re-consider these facts in that context and permit Plaintiff to amend her complaint.

BACKGROUND[1]

Ms. Dieffenbacher took out seven Federal Family Educational Loan Program ("FFEL") loans to attend the Paralegal Associate Degree Program at Everest College-Ontario Metro. Doc. No. 63 at 2. After defaulting on three of these loans, Plaintiff received notice from ECMC of impending wage garnishment. Plaintiff, through counsel, submitted a timely objection in November 2016. *Id.* at 9. Plaintiff sent a 29-page letter explaining that her loans are not legally enforceable and subject to cancellation because she has a borrower defense; she submitted 254 pages of exhibits in support of this borrower defense. *Id.* at 10. Plaintiff's letter and exhibits argued that Everest violated the Consumer Legal Remedies Act, Cal. Civ. Code § 1750 *et seq.*, the Unfair Competition Law, Cal. Bus. & Prof. Code § 17200, and common law prohibitions on misrepresentation and fraud; that these violations constitute a complete defense to repayment of her federal student loans from Everest, AR 29–34; and that Plaintiff is entitled to a full discharge of her loans, as well as other relief, *id.* at 10.

In December 2016, ECMC referred Plaintiff's objection and hearing request to the U.S. Department of Education ("Department") for adjudication. *Id.* at 10. On January 30, 2017, the Department issued an "Administrative Wage Garnishment Hearing Decision" denying Plaintiff's objections to the legal enforceability of her loans and authorizing wage garnishment. *Id.* at 11. The Decision concluded, "the Department finds that the borrower [sic] student loan debt is still legally enforceable" and that Plaintiff's "account is subject to collection through administrative wage garnishment (AWG) at 15% of . . . disposable pay." *Id.* at 11-12. That decision was based on "file documents provided by ECMC."

Following this decision, ECMC issued a garnishment order to Plaintiff's employer ("AWG Order"). That order is fully enforceable by ECMC against Ms.

[1] As this Court is familiar with the background of this dispute, Ms. Dieffenbacher will only address the most pertinent facts and procedural history here.

Dieffenbacher's employer, and "does not expire" until ECMC rescinds it or the full loan balance is paid off. Doc. No. 11-1; 34 C.F.R. § 682.410(b)(9)(o).

On February 23, 2017, Plaintiff filed this suit against Defendant pursuant to the Administrative Procedure Act ("APA"), 5 U.S.C. § 702, and the Declaratory Judgment Act, 28 U.S.C. § 2201, in order to challenge the January 2017 Decision. *Id.* at 12. She simultaneously filed an application for a temporary restraining order ("TRO") directing the Secretary to notify ECMC and her employer that the wage garnishment order is withdrawn, and restraining the Secretary from permitting or authorizing ECMC or its agents to enforce any order to withhold Plaintiff's wages. *See* Doc No. 2 at ¶ 4; Doc. No. 2-2. Plaintiff sought a court order because she lived paycheck to paycheck, had $68 in her bank account, received no familial support, and a single garnishment would have left her unable to meet her family's basic needs. *See* Doc. No. 2-3 (Affidavit of Plaintiff Sarah Dieffenbacher).

In exchange for an agreement that "garnishment will remain suspended until final judgment is rendered in this civil action," the parties stipulated to a withdrawal of Plaintiff's application for a TRO. Doc. No. 11 at 2. Defendant simultaneously filed a letter that it caused ECMC to send to Plaintiff's employer ordering "suspen[sion] [of] garnishment . . . until further notice" and further stating that the garnishment order "does not expire" and "continues to exist on this individual." *Id.* at 12. The Court approved the parties' stipulation on March, 7, 2017. *Id.*

On May 8, 2017, Defendant filed a motion for voluntary remand so that she could "reconsider[] and re-issue[]," the challenged wage garnishment decision within 90 days, "in a way that would not be arbitrary, capricious or contrary to law." *Id.* at 12. On June 8, 2017, the Court denied Defendant's motion for remand, finding no "substantial or legitimate concern guiding [the] request for a remand," and concluding that the request appeared to be a "frivolous," "bad faith" "attempt to evade judicial review." *Id.* at 12-13.

Defendant, on June 15, 2017, issued an "interim" administrative wage garnishment decision ("Interim Decision") purporting to "withdraw" the January 2017 decision, because it "failed to consider the pending application for discharge of the student loan debt.". *Id.* at 13; Doc. No. 32 at 2. In light of this interim decision, in September 2017, the Court issued an order to show cause why the case should not be dismissed for lack of subject matter jurisdiction, noting that its subject matter jurisdiction was predicated on the January 2017 final agency decision. *Id.* at 15. On October 31, 2017, the Court vacated its order to show cause because it determined that it still had jurisdiction over the matter notwithstanding the Interim Decision, and ordered the Defendant to file an Answer. Doc. No. 15 at 15.

The Secretary filed her Answer on November 20, 2017, admitting that Plaintiff's objection to the wage garnishment was a borrower defense application, and that Plaintiff had submitted a 29-page letter and 254 pages of exhibits explaining why her loans are not legally enforceable. Doc. No. 41. On January 12, 2018, the Secretary filed the Administrative Record.

On February 28, 2018, the Department mailed Plaintiff a "Borrower Defense Claim—Adjudication Notice." Doc. No. 53-2. The Borrower Defense Adjudication purports to apply to all of Plaintiff's FFEL and Direct loans borrowed in connection with Everest. *Id.* at 1–2. It was based on a consideration of Plaintiff's March 2015 *pro se* application and unspecified data concerning "average earnings" of students at "comparable schools." The notice states that the Department intends to cancel only 50% of Plaintiff's loans and advises Plaintiff that, "[i]n order to receive loan forgiveness related to the outstanding balance of your FFEL loans, you must first consolidate these loans into a Direct Consolidation Loan. The Department cannot forgive your FFEL loans until you consolidate them." *Id.* at 2.

Plaintiff filed a motion for summary judgment on April 2, 2018. *See* Doc. Nos. 49, 52. The same day, Defendant filed a motion to dismiss under Fed. R. Civ. P. 12(h)(3). Doc. No. 53. The Court heard argument on the motions on April 30,

2018. At that hearing, the parties did not discuss *whether* Ms. Dieffenbacher was entitled to relief, but *how much* relief she was due.

On May 4, 2018, the Court granted Defendant's Motion to Dismiss. Doc No. 63. Without discussing the voluntary cessation exception to mootness (and thus failing to require Defendant to satisfy the "formidable burden of showing that it is absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur," *Friends of the Earth, Inc. v. Laidlaw Environmental Servs. (TOC), Inc.*, 528 U.S. 167, 190 (2000)), the Court concluded that "the now-withdrawn – and defunct – January 2017 Decision was the 'sole basis upon which Plaintiff sought APA review,'" and therefore Plaintiff "did not – and could not – challenge the DOE decision about the legal enforceability of her student loan debt issued on [sic] year later on February 28, 2017 [sic]." *Id.* at 19. Then, without discussing whether an amended complaint would resolve the Court's concerns, the Court dismissed the matter with prejudice. Doc No. 64.

THE COURT SHOULD RECONSIDER ITS DISMISSAL WITH PREJUDICE

Under Fed. R. Civ. P. 59(e), a party may move to "alter or amend a judgment" when the court has been "presented with newly discovered evidence, committed clear error, or if there is an intervening change in the controlling law." *Maryln Nutraceuticals, Inc. v. Mucos Pharma GmbH & Co.*, 571 F.3d 873, 880 (9th Cir. 2009) (citations omitted). In this District, a motion for reconsideration must show: "(a) a material difference in fact or law from that presented to the court before such decision that in the exercise of reasonable diligence could not have been known to the party moving for reconsideration at the time of such decision, or (b) the emergence of new material facts or a change of law occurring after the time of such decision, or (c) a manifest showing of a failure to consider material facts presented to the Court before such decision." Civil L.R. 7-18.

Here, the Court's decision failed to consider material facts in two ways. *First*, the order ignored evidence – including statements made by Defendant's counsel at oral argument – showing that ECMC retains the ability to garnish Ms. Dieffenbacher's wages on the basis of the AWG Order. Moreover, the Court bypassed evidence demonstrating the January 2017 Decision's preclusive effect on the Borrower Defense Adjudication and its potential preclusive effect in the future. *Second*, even if the Court's order was correct on the question of mootness (a proposition Ms. Dieffenbacher strongly disputes), the decision still ignored material facts demonstrating that an amended complaint would resolve the Court's concerns. The Court improperly dismissed the case without providing leave to amend.

I. The Court's Order ignored material facts showing that the January 2017 Decision continues to have effects.

The Court's decision hinged on the conclusion that the January 2017 Decision had been "withdrawn" and rendered "defunct" by the Borrower Defense Adjudication. This premise ignored material record evidence.

First, the order overlooked material evidence showing that ECMC can still garnish Ms. Dieffenbacher's wages on the basis of the AWG Order. A "garnishment order is effective until the *guaranty agency* rescinds the order or the agency has fully recovered the amounts owed by the borrower, including interest, late fees, and collection costs." 34 C.F.R. § 682.410(b)(9)(o); *see also* 34 C.F.R. § 682.209(b) (defining a guaranty agency as "A State or private nonprofit organization that has an agreement with the Secretary under which it will administer a loan guarantee program under the Act"). This remains true irrespective of any subsequent borrower defense adjudication.

Relying on the January 2017 Decision, ECMC sent an AWG notice to Ms. Dieffenbacher's employer, and there is no evidence that ECMC has rescinded that notice. As such, ECMC can continue to rely on it to garnish Ms. Dieffenbacher's

wages and to recover collection costs and fees incurred. Everything in the record on this point supports this conclusion, including:

- Plaintiff's Motion for a TRO specifically requested that "Defendant . . . notify ECMC and Plaintiff's employer that she withdraws the use of her authority to garnish or withhold Plaintiff's wages . . . restraining [Defendant] from permitting or authorizing ECMC or its agents to enforce any order to withhold Plaintiff's wages . . . [and] [R]equiring Defendant to instruct . . . ECMC to withdraw any and all orders to withhold Plaintiff's wages." Doc. No. 2 at 2.
- The parties' March 2017 stipulation to resolve Plaintiff's TRO states that "Undersigned counsel agree that the garnishment will remain suspended until final judgment is rendered in this civil action." Doc. No. 11. In other words: (1) ECMC could have collected on the loans absent the parties' agreement, and (2) that agreement is no longer operative due to the Court's entry of judgment.
- The Notice that ECMC sent to Ms. Dieffenbacher's employer expressly states that "The order withholding from Earnings (the order) previously sent to you does not expire. The Order continues to exist on this individual." Doc. No. 11-2. No evidence in the record shows that this notice has been withdrawn.
- Defendant's interim decision states that "No wage garnishment on these loans will be initiated *until* the review of your client's borrower defense application is complete." Doc. No. 33-1 (emphasis added). This suggests that the garnishment could continue as soon as the borrower defense adjudication issued and, notably, does not state that a new AWG order is required.

- The Borrower Defense Adjudication requires Ms. Dieffenbacher to consolidate her loans to obtain any relief (because, presumably, ECMC could continue to act absent such consolidation).
- At oral argument, Defendant's counsel explained that, "On the [FFEL] loans, the private lender's rights were assigned to the Department of Education, which is a step that the Department of Education took so that they could make sure that that an administrative wage garnishment would not erroneously issue during the pendency of this action." Again, the only thing stopping ECMC from garnishing Ms. Dieffenbacher's wages on the basis of the prior order was Defendant's temporary intervention. Counsel also argued at oral argument that the Department is not the holder of the loans and Ms. Dieffenbacher is "being requested to take the step to consolidate the loan" because she is not in privity with the Department.

The Court did not discuss or account for this evidence in its mootness analysis. Given the Court's obligation to draw all inferences in Plaintiff's favor on a Rule 12(h)(3) motion, Doc. No. 63 at 16, and given the absence of any evidence pointing the other direction, the unavoidable conclusion is that ECMC can still garnish Plaintiff's wages pursuant to the still-operative wage garnishment order, issued as a direct result of the challenged January 2017 Decision. The Court should account for these facts and reconsider its decision, because they show that a judicial order vacating the January 2017 Decision and declaring that Ms. Dieffenbacher's loans are unenforceable is still needed.

Second, even if ECMC could not garnish wages based on the January 2017 Decision and order, the Court nonetheless should have considered the January 2017 Decision's preclusive effect on the Borrower Defense Adjudication and the impact this preclusion has on Plaintiff's ability to meaningfully challenge that adjudication. *See United States v. Utah Construction & Mining Co.*, 384 U.S. 394 (1966) (explaining that agency decisions can be given preclusive effect in subsequent

agency proceedings); *cf. In re Hoffman*, 557 B.R. 177 (D. Colo. 2016) (applying issue preclusion to AWG Order to determine subsequent claims in bankruptcy).

Here, the Court bypassed the only evidence on this issue. In the initial January 2017 Decision, the Department determined that Ms. Dieffenbacher's loans are legally enforceable, despite her 29-page letter and 254 pages of exhibits supporting her objection to legal enforceability. All of its subsequent actions—seeking voluntary remand, issuing an interim decision purporting to withdraw the January 2017 decision pending consideration of her March 2015 *pro se* submission, and the February 2018 Adjudication Notice—do not take into account the evidence she submitted to the Department in support of her legal enforceability objection. This strongly suggests that the Department is applying preclusive effect to the January 2017 decision's rejection of Ms. Dieffenbacher's evidence establishing a complete defense to repayment.[2]

Put another way, the Borrower Defense Adjudication is infected with the exact same problem as the January 2017 Decision. But through its litigation tactics, the Department has successfully immunized the January 2017 decision, which rejected Ms. Dieffenbacher's evidence on the merits, from judicial review. In order for Ms. Dieffenbacher to effectively challenge the Department's incorrect determination that 50% of her loans are enforceable is to *first* get the AWG order judicially vacated. *See United States v. Munsingwear*, 340 U.S. 36, 39-40 (1950) (explaining that a court may have to vacate a decision that has become moot on appeal to ensure it is not endowed with preclusive effect in the future); *In re Burrell*, 415 F.3d 994, 999 (9th Cir. 2005) (stating that "collateral estoppel engenders legal consequences from which a party may continue to suffer harm after a claim has been

[2] Any confusion as to whether the Department is giving this decision preclusive effect stems from Defendant's litigation conduct, including her failure to issue a final administrative wage garnishment decision after Plaintiff's objections were fully considered. In any event, because the Court had an obligation to draw all inferences in Plaintiff's favor, the Court should have concluded that this preclusion did occur.

rendered moot," and thus the "established practice . . . is to reverse or vacate the judgment below"). Because the Court failed to account for this material fact, it should reconsider its mootness conclusion.

II. The Court's Order ignored material facts showing that an amended complaint would cure any jurisdictional defects

Even assuming that the Court did not err in its determination of mootness, it failed to consider material facts when it dismissed the matter with prejudice rather than providing Plaintiff with leave to amend as a matter of course. *See Carolina Cas. Ins. Co. v. Team Equip., Inc.*, 741 F.3d 1082, 1086 (9th Cir. 2014) (reversing a denial of a motion for reconsideration because "dismissing the complaint without leave to amend was still improper" where "the district court did not conclude that amendment would be futile"). In this circuit, a complaint should only be dismissed without leave to amend "when it is clear that the complaint cannot be saved by further amendment." *Big Bear Lodging Assoc. v. Snow Summit*, 182 F.3d 1096 (9th Cir. 1999); *see also McQuillion v. Schwarzenegger*, 369 F.3d 1091, 1099 (9th Cir. 2004). In the interest of judicial economy, the goal is to ensure "as complete an adjudication of the dispute between the parties as possible." *William Inglis & Sons Baking Co. v. ITT Continental Baking Co.*, 668 F.2d 1014, 1057 (9th Cir. 1982); *see also Keith v. Volpe*, 858 F.2d 467, 473-74 (9th Cir. 1988) (explaining that Fed. R. Civ. P. 15(d) enables "a court to award complete relief, or more nearly complete relief, in one action, and to avoid the cost, delay and waste of separate actions which must be separately tried and prosecuted").

Moreover, Fed. R. Civ. P. 15(d) permits parties to supplement their complaint with "new claims, new parties, and allegations regarding events that occurred after the original complaint was filed," *Lyon v. U.S. Imm. & Customs Enf't*, 308 F.R.D. 203, 214 (N.D. Cal. 2015), and allows for the avoidance of "the needless formality and expense of instituting a new action when events occurring after the original filing indicated a right to relief," *Northstar Fin. Advisors Inc. v. Schwab Investments*, 779

F.3d 1036, 1044 (9th Cir. 2015); *see also Aten Int'l Co., Ltd. v. Emine Tech. Co.*, No. 09-0843, 2010 WL 1462110 at *3 (C.D. Cal. Apr. 12, 2010) (permits supplemental pleadings for "any transaction, occurrence, or event that happened after the date of the pleading," to "promote the economical and speedy disposition of the controversy"). Courts examine five factors to determine whether amendment under Rule 15(d) is proper: (1) futility, (2) undue delay, (3) bad faith or dilatory motive on the part of the movant, (4) repeated failure of previous amendments, and (5) undue prejudice to the opposing party. *Lyon*, 308 F.R.D. at 214. Here, all of the factors overwhelmingly favor amendment rather than dismissal with prejudice.

First, amending the complaint to clarify the relief sought, including a declaration that Plaintiff's loans are unenforceable, an order vacating the still-operative garnishment order, and AWG order accounting for the Borrower Defense Adjudication, would be far from futile. The Court dismissed the complaint after finding the wage garnishment decision moot and then correctly observed that the Adjudication Notice of February 2018 was not challenged in the February 2017 complaint. Doc. No. 63 at 19. The Court's concern was not with the "detailed factual allegations regarding Everest's misconduct," but the "plain wording regarding the narrowly-tailored relief sought." *Id.* However, the Order fails to consider the broader factual allegations when dismissing "with prejudice." Instead, the Court should have asked whether the jurisdictional problem could have been cured through an amendment that: (1) expressly addressed the Borrower Defense Adjudication, and (2) explicitly requested a declaration that Plaintiff's loans are unenforceable. In particular, the Court disregarded the following facts that Plaintiff could add in an amended complaint:

- On February 28, 2018, the Secretary issued a "Borrower Defense Claim – Adjudication Notice." This Adjudication Notice states: "The Department of Education ('Department') has approved your claim for forgiveness of your federal student loans under the borrower defense to

repayment rule, 34 C.F.R. § 685.206(c)." The Adjudication Notice further states "Accordingly, based on your enrollments in the Criminal Justice (Bachelor) and Paralegal (Associate) programs, 50% of the Federal Student Aid loans you received from the programs of study related to your approved claim are eligible for discharge (forgiveness)."

- As justification for this partial denial, the Notice explains: "The amount of loan relief you will receive is based on the Department's assessment of the value of the education that you received. The Department has determined the value of your education by comparing the average earnings of students who attended your program(s) of study to the average earnings of students who graduated from similar programs at other schools that adequately prepare students for gainful employment."
- The Notice states that it covers both Plaintiff's Direct and FFEL loans. With respect to Plaintiff's Direct loans, the Notice provides, "The Department will direct your loan servicer to discharge 50% of the Direct loans relating to your claim. The forgiveness should be completed within the next 90-12 days." With respect to Plaintiff's FFEL loans, the notice states: "In order to receive loan forgiveness related to the outstanding balance of your FFEL loans, you must first consolidate those loans into a Direct Consolidation Loan. The Department cannot forgive your FFEL loans until you consolidate them. . . . If all of the loans included in your Direct Consolidation Loan are eligible for discharge, the Department will discharge your FFEL loan(s) so that you receive a 50% discharge of your FFEL balance." The Adjudication Notice does not explain how Plaintiff can consolidate her FFEL loans notwithstanding the prohibition on consolidation of

federal student loans subject to a garnishment order. See 34 C.F.R. § 685.220(d)(1)(ii)(C).[3]

- The Adjudication Notice shows that the Department, as it failed to do with its January 2017 Decision, did not consider the evidence that Plaintiff submitted regarding the legal enforceability of her debt.
- The Department, as it did in its January 2017 Decision, disregarded evidence presented by Plaintiff demonstrating that under California law, she would be entitled to damages amounting to more than her total federal student loan balance as a result of Corinthian's misconduct.

In an amended complaint, Plaintiff could incorporate these facts and specifically request a declaration that her loans are unenforceable and that the Borrower Defense Adjudication violates the APA in failing to account for the evidence she submitted in November 2016. She could also amend her prayer for relief to include a request to vacate the still-operative wage garnishment order, and to request relief consistent with her original and continued contention that her loans are not legally enforceable by any means and must be discharged. By the plain terms of the Court's May 4 Order, these changes would resolve the Court's mootness concerns. *See Northstar*, 781 F. Supp. 2d at 932-33 (noting the propriety of permitting amendment to correct jurisdictional defect).[4]

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[3] Plaintiff does not intend to consolidate her loans because doing so could threaten her ability to pursue her challenge to the legal enforceability of the loans, Doc. No. 54 at 15, and, given the way that Plaintiff has been treated over the past several years, has no interest in entering a new loan agreement with Defendant.

[4] As Rule 15(d) envisions, Plaintiff could also supplement her complaint with additional claims and facts that she has learned since filing her initial complaint. By way of example, Plaintiff learned that Defendants, without her consent, disclosed her social security number to the Social Security Administration in order to deny discharge to 50% of her loans. Defendant's actions violated the Privacy Act. *See* 5 U.S.C. § 552a (b(3), e(2-3), o-p & r-u). Similarly, Plaintiff's due process rights were violated by the Borrower Defense Adjudication because, among other defects, the Department failed to provide proper notice of its decision and failed to inform her

The other relevant factors also support amendment. *First*, although Plaintiff did not previously request an amendment, there was no undue delay or bad faith on her part because: (1) despite the Court's order requiring the Department to decide Plaintiff's borrower defense last summer, the Department only issued its adjudication on the eve of dispositive briefing, less than three months ago, and (2) Plaintiff relied on the Court's prior Order on jurisdiction to reasonably conclude that the mootness issue was settled and that amendment was not needed, *see* Doc Nos. 38, 40. *Second*, because Plaintiff has not moved for an amendment, there have been no futile attempts at amendment. *Third*, Defendant will not suffer any prejudice if Plaintiff amends her complaint. The Court did not decide whether Plaintiff's loans are enforceable and whether the Department's Borrower Defense Adjudication was proper. As such, Plaintiff is not precluded from bringing a new case challenging the adjudication and has every intent to do so. If anything, it would be *more convenient* for everyone to resolve this matter expeditiously through a narrow amendment here, particularly because the Court is already familiar with the underlying facts of the dispute.[5]

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of how her information would be used and what information would be relevant to the decision. *See, e.g.*, *Latif v. Holder*, 28 F. Supp. 3d 1134, 1160-62 (9th Cir. 2014) (emphasizing the need for proper notice of what will be involved in the decision-making process); *Kapps v. Wing*, 404 F.3d 105, 123-126 (2d Cir. 2005) (explaining that an individual must be given enough information in the post-decision notice to understand the basis for the action). Finally, the Department's use of irrelevant third-party "average earnings" data to decide Plaintiff's borrower defense is arbitrary and capricious.

[5] Plaintiff also notes that reconsideration and amendment is particularly appropriate given the Court's prior finding regarding Defendant's bad faith litigation conduct, and its continuous attempts to moot this case by any means necessary.

CONCLUSION

Despite her best efforts, Ms. Dieffenbacher still does not have the finality that she has long sought. The Court should reconsider its decision and either reverse its prior decision or it should provide Plaintiff with leave to file an amended complaint.

Dated: May 21, 2018

Respectfully submitted,

/s/ Toby R. Merrill
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