

United States District Court
Northern District of California

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

MARTIN CALVILLO MANRIQUEZ, et al.,
Plaintiffs,
v.
ELISABETH DEVOS, et al.,
Defendants.

Case No. 17-cv-07210-SK

**ORDER GRANTING IN PART AND
DENYING IN PART PLAINTIFF'S
MOTION FOR PRELIMINARY
INJUNCTION**

Regarding Docket No. 35

Plaintiffs move the Court for a preliminary injunction returning to the *status quo ante* by requiring the Department of Education to process certain non-discharged federal student loan debt in accordance with the “Corinthian Job Placement Rate Rule.” Defendant Elisabeth Devos, Secretary of the Department of Education (hereinafter “Secretary”) opposes the motion. Having considered the parties papers, relevant legal authority, and having heard oral argument, the Court **GRANTS IN PART** and **DENIES IN PART** Plaintiffs’ motion.

FACTUAL BACKGROUND

A. Regulatory Background.

The Department of Education (the “Department”) is responsible for overseeing and implementing Title IV of the Higher Education Act of 1965 (“Higher Education Act”) 20 U.S.C. § 1001 *et seq.*, including the William D. Ford Direct Loan Program (“Direct Loan Program”), 20 U.S.C. § 1087a *et seq.*, which provides loans (“Direct Loans”) to borrowers for use at “participating institutions of higher education.” (Dkt. 35, at page 4.) The Higher Education Act allows borrowers to seek cancellation of their Direct Loans based on a school’s misconduct and directs that “the Secretary shall specify in regulations which acts or omissions of an institution of higher education a borrower may assert as a defense to repayment of a loan made under this

1 part[.]” 20 U.S.C. § 1087e(h).

2 In 1995, the Secretary promulgated a regulation that permits a borrower to assert as a
3 defense to repayment, “any act or omission of the school attended by the student that would give
4 rise to a cause of action against the school under applicable State law.” 34 C.F.R. § 685.206(c)(1).
5 The regulation, also known as the “borrower defense rule,” relieves the borrower of the obligation
6 to repay all or part of the loan and associated costs and fees. The regulation further provides:

7 If the borrower’s defense against repayment is successful, the Secretary notifies the
8 borrower that the borrower is relieved of the obligation to repay all or part of the
9 loan and associated costs and fees that the borrower would otherwise be obligated
10 to pay. The Secretary affords the borrower such further relief as the Secretary
11 determines is appropriate under the circumstances. Further relief may include, but
12 is not limited to, the following:

- 13 (i) Reimbursing the borrower for amounts paid toward the loan voluntarily or
14 through enforced collection;
- 15 (ii) Determining that the borrower is not in default on the loan and is eligible to
16 receive assistance under title IV of the Act.
- 17 (iii) Updating reports to consumer reporting agencies to which the Secretary
18 previously made adverse credit reports with regard to the borrower’s Direct
19 Loan.

20 34 C.F.R. § 685.206(c)(2).

21 The loans that are the subject of this litigation were issued pursuant to a Master Promissory
22 Note, which states that the borrower may assert a defense against collection of the loan, if “the
23 school did something wrong or failed to do something that it should have done,” provided that
24 “the school’s act or omission directly relates to [the] loan or the educational services that the loan
25 was intended to pay for, and if what the school did or did not do what would give rise to a legal
26 cause of action against the school under applicable state law.” (Dkt. 35-5, at ¶ 3, Ex. 1, at page 7.)

27 A memorandum from James Runcie, the Chief Operating Officer of the Federal Student
28 Aid office of the Department, dated June 4, 2015, states: “Prior to 2015, the borrower defense
identified above was rarely asserted by any borrowers and no specific methods of collecting
information regarding borrower defense claims had been defined or found necessary.” (Dkt. 35-7,
Ex. 12, at page 1.) According to the Department’s Office of Inspector General’s report dated
December 8, 2017, from July 1, 1995 through June 24, 2015, the Department received only five

1 borrower defense claims. (Dkt. 35-6, Ex. 10, at page 6.)

2 **B. Corinthian Colleges.**

3 Corinthian Colleges, Inc. (“Corinthian”) was a for-profit college chain, operating under the
4 brands Everest, Heald, and WyoTech. (Dkt. 35-5, Ex. 2, at page 1.) At its peak in 2009 and 2010,
5 Corinthian operated over 100 campuses in 25 states, enrolled over 110,000 students and collected
6 over \$1.7 billion in revenue, over 80% of which was in the form of student loans provided under
7 the Direct Loan Program. (*Id.*, at page 2.) The Corinthian schools included different campuses for
8 a wide variety of subjects. For example, Corinthian schools included Heald Concord –
9 Accounting, Heald Fresno – IT Network Systems, Everest Los Angeles Wilshire – Dental
10 Assistant (Diploma), and WyoTech Long Beach – Plumbing Technology (Diploma). (Dkt. 35-6,
11 Exs. 6-7.)

12 In January 2014, the Department sought data supporting Corinthian’s advertised job
13 placement rates. (Dkt. 35-7, Ex. 11, at page 4.) Corinthian refused to provide the data, and in
14 June 2014, the Secretary placed Corinthian on a heightened cash monitoring status. (*Id.*) In July
15 2014, the Secretary and Corinthian entered into an operating agreement, pursuant to which
16 Corinthian would cease operations “by teaching out at least a dozen of its campuses and by selling
17 as many of the rest of the schools as possible.” (*Id.*) The Secretary also appointed a monitor to
18 oversee Corinthian’s operations and its wind-down activities, “including federal student aid draws,
19 expenditures (including refunds required under the operating agreement), and [Corinthian’s]
20 compliance with its obligations to the Department.” (*Id.*)

21 In March 2015, after Corinthian failed to file audited financial statements, the Secretary
22 requested a letter of credit from Corinthian. (*Id.*, at page 5.) In April 2015, the Secretary
23 determined that Corinthian made false statements about its placement rates and issued a fine
24 against Corinthian in the sum of \$30 million for “substantial misrepresentation” under 34 C.F.R. §
25 668.71-75. (Dkt. 35-5, Exs. 3-4; Dkt. 35-7, Ex. 11.) Specifically, the Secretary found that
26 Corinthian published falsely inflated job placement rates for 947 programs at its Heald College
27 locations. (Dkt. 35-5, Ex. 3.)

28 Corinthian closed its colleges in April 2015, and students who had borrowed federal

1 student loans to attend a Corinthian program asserted their rights to cancellation of their loans
2 under the borrower defense rule and terms of the Master Promissory Notes. (Dkt. 35-5, Ex. 5, at
3 pages 2-3.)

4 **C. The Secretary's Response to the Collapse of Corinthian.**

5 Faced with the collapse of Corinthian and over 100,000 borrowers with potential borrower
6 defenses, Under Secretary Ted Mitchell ("Under Secretary") of the Department appointed a
7 special master ("Special Master") to help the Department develop the processes and systems
8 needed to provide relief to borrowers who had relied upon false and misleading statements from
9 certain career colleges, including Corinthian. (Dkt. 35-7, Ex. 11, at page 1.) The goal of the
10 Special Master was to develop a system for providing debt relief that was "fair, transparent, and
11 efficient, with a minimal burden on borrowers." (*Id.*)

12 In June 2015, the Secretary requested that the Office of Management and Budget grant
13 emergency approval of an attestation form, waiving the requirement for public notice in the
14 Federal Register. (Dkt. 35-7, Ex. 12, at page 3.) It appears that the Office of Management and
15 Budget granted approval, as the Secretary disseminated the attestation forms and set up a process
16 to review claims and to provide expedited relief for certain Corinthian borrowers. (Dkt. 35-5, Ex.
17 5.) The attestation forms advise borrowers of Corinthian's publication of misleading job
18 placement rates and the location of a website containing two lists of covered programs and dates
19 of enrollment covered by the attestation (the "Lists"). (Dkt. 35-6, Exs. 6, 7, 8, 9.) The Lists
20 include names of schools and dates of enrollment from 2010 to 2014. (Dkt. 35-6, Exs. 6, 7.) For
21 example, borrowers listed in the examples above were eligible for relief under the Corinthian Rule
22 only if their first dates of enrollment were as follows: (1) Heald Concord – Accounting after
23 February 13, 2014; (2) Heald Fresno – IT Network Security after July 1, 2010; (3) Everest Los
24 Angeles Wilshire – Dental Assistant (Diploma), between July 1, 2010 and September 30, 2014;
25 and (4) WyoTech Long Beach – Plumbing Technology (Diploma) between July 1, 2010 and
26 September 30, 2014. (*Id.*) The attestation forms state that borrowers should submit the forms
27 only if their programs and dates of enrollment are included on the Lists. (Dkt. 35-6, Exs. 8, 9.)

28 In the case of a borrower who attended a Heald program on the Lists, the attestation form

1 states as follows:

2 I am submitting this attestation and additional materials in support of my
3 application for a borrower defense to repayment discharge of my Direct Loans
4 under 34 C.F.R. § 685.206(c).

.....

5 I believed that the job placement rates related to my program of study indicated the
6 level of quality a Heald education offered to students. I chose to enroll at Heald
7 based, in substantial part, on the information I received about job placement rates
8 related to my program of study and the quality of education I believed those
9 placement rates represented.

10 (Dkt. 35-6, Ex. 8.) The combined attestation form for the Everest and WyoTech programs is
11 identical to the attestation form for the Heald program attestation form but substitutes the names of
12 Everest and WyoTech for Heald. (Dkt. 35-6, Ex. 9.)

13 On March 26, 2016, the Special Master reported that he had reviewed 546 claims from
14 borrowers and recommended to the Under Secretary that “full relief (including restitution of all
15 amounts paid) be provided for [certain] loans.” (Dkt. 35-7, Ex. 13, at page 5.) Such loans
16 included programs at Heald, Everest, and WyoTech. (*Id.*)

17 **D. The Department’s Actions in Relieving Debt before January 20, 2017.**

18 The Department reached out to borrowers who were potentially eligible for discharge of
19 their loans under the borrower defense rule by electronic mail and postal mail. (Dkt. 35-7, Ex. 15,
20 at pages 5-6.) The outreach was to 280,000 Everest and WyoTech students and over 55,000 Heald
21 students. (*Id.*) The Department received 72,877 claims between June 25, 2015 and January 20,
22 2017 and reviewed and discharged 26,964 claims. (Dkt. 35-6, Ex. 10, at page 6.)

23 In October 2016, in response to the claims resulting from the collapse of the Corinthian
24 colleges, the Secretary announced the final regulations, which were scheduled to take effect on
25 July 1, 2017.¹ The regulations established a new federal standard for borrower defenses and
26 limitations periods for loans disbursed on or after July 1, 2017, but also included a separate
27 provision for those loans disbursed prior to July 1, 2017. 81 Fed. Reg. 75926-76089 (November
28 1, 2016). According to the revised, proposed regulation, 34 C.F.R. § 685.206(c), the borrower

¹ U.S. Department of Education:
<http://www2.ed.gov/policy/highered/reg/hearulemaking/2016/index.html> (last visited May 25,
2018.)

1 defense rule for loans made before July 1, 2017, provides a borrower defense for:

2 any act or omission of the school . . . that would give rise to a cause of action
3 against the school under applicable State law, and includes one or both of the
4 following:

5 (i) A defense to repayment of amounts owed to the Secretary on a Direct Loan,
6 in whole or in part.

7 (ii) A claim to recover amounts previously collected by the Secretary on the
8 Direct Loan in whole or in part.

9 81 Fed. Reg. 76080.

10 Plaintiffs claim that, before January 20, 2017, there was a “Corinthian Job Placement Rate
11 Rule” (the “Corinthian Rule”).² According to Plaintiffs, the Secretary based the Corinthian Rule
12 on the following determinations:

13 (1) California is the applicable state law for purposes of determining whether there is a
14 cause of action against the specific Corinthian school under 34 C.F.R. § 685.206(c)(1);

15 (2) Corinthian misrepresented its job placement rates at specified campuses, regarding
16 certain programs, during enumerated periods of time;

17 (3) Any Corinthian borrower who submits a simple attestation form provided by the
18 Department or otherwise submits sufficient information to establish a membership in a certain
19 group establishes a borrower defense; and

20 (4) The Department will provide relief under California law by cancelling all outstanding
21 amounts on related loans and returning any money collected by the Department. (Dkt. 35, at
22 pages 12-13.) According to Plaintiffs, the Corinthian Rule covers 800 Heald programs between
23 2010-2015, for the benefit of at least 50,000 borrowers, and 800 Everest and WyoTech programs
24 in over twenty states, with 85,000 borrowers who are eligible for cancellation under the borrower
25 defense rule. (*Id.*, at page 14.)

26 Plaintiffs contend that the Corinthian Rule was “codified” in three documents: (1) a
27 memorandum prepared by the Department’s Office of General Counsel, (2) a fine action letter
28 prepared by Federal Student Aid’s Administrative Actions & Appeals Service Group, and (3) an

² The Court understands that the Secretary challenges the very existence of the Corinthian Rule, but for purposes of this Order, the Court will refer to the Corinthian Rule as a shorthand for describing the process that was, for practical purposes, in place before January 20, 2017.

1 April 2015 document prepared by the Federal Student Aid’s Administrative Actions & Appeals
2 Services Group. (Dkt. 35, at pages 13-14 (citing Dkt. 35-6, Ex. 10); Dkt. 58 (First Amended
3 Complaint), at ¶ 80.) In addition, Plaintiffs claim that the Department issued consistent public
4 statements about the existence of the Corinthian Rule. (Dkt. 35, at pages 13-14 (citing Dkt. 35-7,
5 Ex. 11).)

6 Plaintiffs do not provide the three source documents cited above for this motion because
7 they do not possess them. (Dkt. 58, at ¶ 80; Dkt. 48, at page 10, n. 13.) Instead, Plaintiffs cite to
8 secondary sources to bolster the existence of the Corinthian Rule and to show that the above-cited
9 documents exist. None of the secondary sources refer to the Corinthian Rule by any name, and
10 none of the secondary sources lists the entire set of standards that Plaintiffs claim constitute the
11 Corinthian Rule. (Dkt. 35-5, Ex. 5; Dkt. 35-7, Exs. 11 - 15.) For example, Plaintiffs cite to the
12 report of the Special Master for the existence of the legal memorandum. (Dkt. 35-7, Ex. 11, at
13 page 5.) That report states: “Because Heald was headquartered in and managed from California,
14 the Department looked to California law and determined that Heald’s misrepresentation of
15 placement rates constituted prohibited unfair competition under California Unfair Competition
16 Law (UCL).” (Dkt. 35-7, Ex. 11, at page 5.) The Special Master further stated: “Accordingly,
17 students that relied on such misleading placement rates when they enrolled at Heald would have a
18 cause of action under state law.” (*Id.*)

19 There is one area of agreement. Plaintiffs and the Secretary agree that, if borrowers signed
20 the attestation forms to show that they had attended the schools on the Lists and that they had
21 relied upon the false statements, the Department did not require them to prove on an individual
22 basis that they were defrauded. (Dkt. 35-5, Ex. 5, at pages 2-3; Dkt. 42, at pages 6-7.) Instead of
23 proving their claims individually, those borrowers could assert their right to relief as part of an
24 expedited system. (*Id.*)

25 However, the Secretary challenges the existence of the Corinthian Rule. The Secretary
26 states that there was no rule that guaranteed full relief to any borrower who completed the
27 attestation form. The Secretary claims that the Department “maintained its discretion to . . .
28 discharge ‘all or part’ of a loan subject to a successful borrower claim.” (Dkt. 42, at page 1.) The

1 Secretary argues that the Department never represented to borrowers that they would be entitled to
2 full relief if they completed the attestation forms.

3 “Loan forgiveness” on the attestation forms does not specify the amount of forgiveness of
4 the debt. (Dkt. 35-6, Exs. 8, 9; Dkt. 42, at page 7.) None of the documents that Plaintiffs cite state
5 that borrowers are entitled to full relief even if they attended a program on the Lists and completed
6 the attestation form. As a practical matter, though, it appears that, before January 20, 2017, the
7 Department did provide full relief or total discharges for borrowers who completed the attestation
8 forms. The Secretary does not challenge or refute that factual statement.

9 **E. The Department’s Actions as of January 20, 2017.**

10 Starting on January 20, 2017, the Secretary stopped processing claims under the Corinthian
11 Rule. (Dkt. 35-6, Ex. 10, at pages 3, 13-14.)

12 **1. Delay of Previous Regulations.**

13 In June 2017, the Secretary announced that she was undertaking further rulemaking on the
14 issue of the borrower defense rule and delayed the regulations that were set to become effective
15 July 1, 2017, discussed above. (Dkt. 35-7, Ex. 18.) One news article reported that the Secretary
16 remarked: “Under the previous rules, all one had to do was raise his or her hands [sic] to be
17 entitled to so-called free money.” (Dkt. 35-8, Ex. 32.)

18 **2. The “Average Earnings Rule.”**

19 **a. Preliminary Assessment Using “Gainful Employment” Metric.**

20 The Secretary first reviewed a metric of “gainful employment” for Corinthian schools and
21 determined that some students who attended Corinthian schools obtained some educational
22 benefit. The metric of “gainful employment” assesses whether a program “has indeed prepared
23 students to earn enough to repay their loans, or was sufficiently low cost, such that students are not
24 unduly burdened with debt, and to safeguard the Federal investment in” Title IV. 79 Fed. Reg.
25 64891. A program passes the gainful employment requirement if students’ median annual loan
26 payments are less than or equal to 20% of discretionary income or 8% of their annual earnings. 34
27 C.F.R. § 668.403(c). The Secretary examined data already within the Department for Corinthian
28 programs and learned that many Corinthian programs had passing scores under the gainful

1 employment metric. (Dkt. 42-1, Ex. 2, at ¶¶ 12- 16.) For example, the Department analyzed the
 2 data for 106 Corinthian programs from 2015 and found that 51 of them had passing scores under
 3 the gainful employment metric. (Dkt. 42-2, ¶ 11.) This preliminary analysis suggested to the
 4 Secretary that a “more rigorous analysis of earnings” was appropriate as a test to provide relief for
 5 borrowers who asserted the borrower defense rule. (*Id.*, at ¶ 13.)

6 **b. December 15, 2017 Memorandum and December 20, 2017 Press Release.**

7 The Secretary claims that the Department quantified the lack of value actually received
 8 from the educational program attended “by comparing the average earnings of students who
 9 attended a given academic program with the average earnings of similar programs at schools the
 10 Department determined adequately prepared students for gainful employment.” (Dkt. 42, at page
 11 2.) The Secretary issued a memorandum, dated December 15, 2017, authored by the Senior
 12 Advisor to the Office of the Chief Financial Officer of the Department “in collaboration with FSA
 13 [Federal Student Aid office] and the Department’s Office of the General Counsel” (the “December
 14 15, 2017 Memorandum”). (Dkt. 42-2, at ¶¶ 2, 6 and Ex. 1.) The December 15, 2017
 15 Memorandum details the steps that the Department took in determining the new methodology for
 16 relief. (*Id.*, at ¶ 6.) The Secretary also issued a press release on December 20, 2017 explaining the
 17 new methodology for evaluating borrowers’ claims (the “December 20, 2017 Press Release”).
 18 The Secretary stated: “This improved process will allow claims to be adjudicated quickly and
 19 harmed students to be treated fairly. It also protects taxpayers from being forced to shoulder
 20 massive costs that may be unjustified.” (Dkt. 42-1, Ex. 1, at page 1.)

21 Instead of developing a “new rule” as Plaintiffs claim, the Secretary maintains that the
 22 Department came to the “common sense conclusion” that the relief for the successful borrower
 23 defense claims should be based on a measure of the actual harm that borrowers suffered as a result
 24 of Corinthian’s misconduct. (Dkt. 42, at page 2.) Plaintiffs refer to the Secretary’s new process as
 25 the “Average Earnings Rule.” (Dkt. 42-1, Ex. 1.)³ The Secretary maintains that the weakness of
 26

27 ³ For purposes of this Order, the Court will refer to the Secretary’s methodology as
 28 explained in the December 15, 2017 Memorandum and the December 20, 2017 Press Release as
 the “Average Earnings Rule.”

1 the previous administration's process for assessing claims of borrower defense is that that process
2 assumed that all Corinthian students received nothing of value, when in many cases graduates
3 received "substantial value from their education." (Dkt. 42-1, Ex. 2, at page 11.)

4 **c. Method for Determining Relief under Average Earning Rule.**

5 The Average Earning Rule, instead of granting full relief to borrowers who submitted
6 attestation forms for attending schools on the Lists, is a system which provides a percentage of
7 relief based on a comparison of earnings from a specific Corinthian program and a comparable
8 (non-Corinthian) school with a passing gainful employment score. (Dkt. 42-2, at ¶ 14, Ex. 1, at
9 pages 3-4.) To compare the earnings from Corinthian schools and comparable schools with a
10 passing gainful employment score, the Department identified 79 Corinthian programs and
11 submitted information identifying the names of 61,717 former Corinthian students to the Social
12 Security Administration ("Social Security Administration") to obtain the data regarding the
13 earning capacities of those students. (Dkt. 42-2, Ex. 1, at page 3.) Specifically, the Department
14 sent information with dates of birth and Social Security numbers of the applicants who submitted
15 attestation forms for Corinthian programs to claim the borrower defense. (*Id.*) In return, the
16 Social Security Administration provided the Department with aggregate data regarding the "mean
17 and median incomes" for each group of students in the Corinthian programs, based on data from
18 2014. (*Id.*) The Social Security Administration then provided that data "in a form that cannot be
19 associated with, or otherwise identify, directly or indirectly, a particular individual." (Dkt. 35-8,
20 Ex. 27, at page 41.) The Department refers to the information that the Social Security
21 Administration sends as "aggregate earnings information." (*Id.*) The Secretary claims that the
22 Department exchanged this information under the terms of an agreement between the two
23 agencies: *Amended Information Exchange Agreement between the Department of Education &*
24 *the Social Security Administration for Aggregate Earnings Data* (the "Gainful Employment
25 Agreement"). (Dkt. 35-8, Ex. 27.)

26 Using the data from the Social Security Administration, the Department compared the
27 earnings under four different formulas, using the mean and median earnings for Corinthian
28 students with the mean and median earnings of students at comparable programs with passing

1 gainful employment scores. (Dkt. 42-2, Ex. 1, at pages 3-4.) Although the process is more
 2 complicated than this general description, the general, relevant parameters are that the Department
 3 analyzed the difference between the earnings of Corinthian borrowers and the earnings of students
 4 from schools with passing gainful employment scores. If the earning from the passing school was
 5 higher than the earning of the Corinthian students, this difference represented the educational
 6 value or lack of educational value of the Corinthian program. (*Id.*)

7 Based on the methodology above, those borrowers in a Corinthian group who earned less
 8 than 50% of the earnings of comparable programs with passing gainful employment scores
 9 received 100% relief from their loans. (Dkt. 42-2, Ex. 1, at pages 4-5.) Borrowers in a Corinthian
 10 group who earned between 50% and 90% of the earnings of comparable programs with passing
 11 gainful employment scores received relief in amounts inverse to their earnings. (*Id.*, at page 4.)
 12 For example, if the average Corinthian borrower earned 60% of the average received in the
 13 comparable program, the Corinthian borrower received 40% relief. (*Id.*, at page 4.) All approved
 14 borrowers receive a minimum of 10% in relief. (*Id.*, at page 5.) The Secretary issued a table in
 15 the December 20, 2017 Press Release that shows in graphic form the amount of relief:

17 CCI Earnings as a Percentage of GE [Gainful Employment] Earnings	Amount of Relief
18 1% to 49%	100%
19 50% to 59%	50%
20 60% to 69%	40%
21 70% to 79%	30%
22 80% to 89%	20%
23 90% and above	10%

24 (Dkt. 42-1, Ex. 1.)

25 The December 20, 2017 Press Release reported that the Department approved 12,900
 26 pending claims for discharge and denied 8,600 claims. (*Id.*) Many of the denials were ones that
 27 the previous administration had identified but for which the previous administration had not yet
 28

1 acted. (*Id.*) The Secretary advised borrowers that the Department would notify them on a rolling
2 basis as the Department finalized their discharges. (*Id.*)

3 **d. Current Status.**

4 As of April 1, 2018, borrowers filed over 147,000 claims under the borrower defense rule,
5 and 99,000 claims remained pending. (Dkt. 42-3, at ¶ 4.)

6 **3. Claimants' Discharges under the Average Earnings Rule.**

7 Plaintiffs submit several declarations from borrowers who attended Corinthian programs,
8 borrowed Direct Loans, and asserted a borrower defense to obtain relief from repayment.

9 **a. Plaintiff Jennifer Craig.**

10 Named Plaintiff Jennifer Craig submitted a claim for relief from her student loan under the
11 borrower defense. (Dkt. 35-1.) She attended Everest College in California and relied upon
12 statistics that Corinthian's representatives showed her about the success of graduates in getting
13 jobs in medical insurance and billing. (*Id.*, at ¶¶ 7-10.) She enrolled in the Everest program in
14 April 2014 and borrowed \$9,019 to pay for her education. (*Id.*, at ¶¶ 10-11.) Although she
15 completed her course of study, she did not receive a diploma because Corinthian closed in 2015
16 before she could get her diploma. (*Id.*, at ¶¶ 14-17.) Craig was not able to find work in the area of
17 study – medical insurance billing – and later learned that, in order to get a job, she needed at least
18 one year of experience that she had not obtained in her practical training at Corinthian. (*Id.*, at ¶¶
19 18 - 19.) Craig submitted an attestation form to the Department for relief from repayment of her
20 Direct Loan, and she received notice that the Department had discharged only 20% of her Direct
21 Loan. (*Id.*, at ¶¶ 21, 23, Ex. 1.) The letter from the Department does not provide a detailed
22 explanation for the determination of relief of only 20%, but it states:

23 The amount of loan relief that you will receive is based on the Department's
24 assessment of the value of the education that you received. The Department has
25 determined the value of your education by comparing the average aggregate
26 earnings of students who attended yours program(s) of study to the average
27 aggregate earnings of students who graduated from similar programs at other
28 schools that have adequately prepared students for gainful employment, under the
standard set forth by the Department's regulations at 34 C.F.R. Part 668, Subpart
Q.

(*Id.*, Ex. 1.) There is no more information about the way in which the relief was calculated and no

1 information about a process of appealing or challenging the decision. The letter states:
2 “If you have questions about this notice, please contact the Department of Education at
3 FSAOperations@ed.gov or at 1-855-279-6027.” (*Id.*) Craig and her husband have a very limited
4 income or no income, and their expenses for their family exceed their income. (*Id.*, at ¶¶ 26 - 30.)
5 They appear to live, by any definition, in poverty. The existence of loans with the obligation to
6 repay 80% of her Direct Loan causes Craig stress on a daily basis. (*Id.*, at ¶¶ 31-32.)

7 **b. Plaintiff Jamal Cornelius.**

8 Plaintiff Jamal Cornelius attended a Heald College program in information technology
9 because recruiters told him that he could obtain a high-paying job. (Dkt. 35-2, at ¶ 6.) He began
10 his program in July 2013 and borrowed a total of \$25,555 in federal student loans and \$2,000.26
11 in private loans. (*Id.*, at ¶ 13.) In 2015, Cornelius began making repayments of \$273.64 per
12 month. (*Id.*, at ¶ 14.) Cornelius submitted his attestation form in the summer of 2016 and
13 resubmitted it in August 2016. (*Id.*, at ¶¶ 16-18.) Cornelius initially paid the loans but then
14 requested loan forbearance because he was not able to make the payments. (*Id.*, at ¶¶ 22-23.) He
15 learned that the only forbearance program he could seek would capitalize the interest on his loan.
16 (*Id.*, at ¶ 24.) Cornelius is still waiting for a decision on his request for discharge and repayment
17 of his federal loans. (*Id.*, at ¶ 25.) Cornelius has not been able to obtain a job in information
18 technology and is working at Taco Bell in Hercules, California. (*Id.*, at ¶¶ 11-12.)

19 **c. Plaintiff Rthwan Dobashi.**

20 Plaintiff Rthwan Dobashi attended a WyoTech program in automotive technology in
21 Fremont, California, after seeing advertisements about high-paying jobs. (Dkt. 35-3, at ¶ 5.)
22 Dobashi borrowed \$22,184 in federal student loans and \$3,183.73 in private loans. (*Id.*, at ¶ 11.)
23 He made monthly repayments, even though he was not able to find a job in the area where he
24 trained. (*Id.*, at ¶¶ 10, 12.) Dobashi wants to return to school but cannot do so because of the
25 loans he has to repay. (*Id.*, at ¶ 13.) He submitted an attestation form for discharge of his loans
26 and also asked for forbearance of his loans in April 2016. (*Id.*, at ¶¶ 16, 17.) The Department
27 notified him that his loans were in forbearance but accruing interest at the rate of \$76.27 per
28 month. (*Id.*, at ¶ 18.) He has not received a response from the Department, even though he

1 submitted his attestation form over two years ago. (*Id.*, at ¶¶ 16, 19-21.)

2 **d. Plaintiff Alina Farajian.**

3 Plaintiff Alina Farajian attended Everest College to become a medical assistant. (Dkt. 35-
4 4, ¶ 23.) Everest’s recruiters assured Farajian that she could attend even though she had a learning
5 disability and assured Farajian that Everest had a job placement program that could assist her in
6 getting a job. (*Id.*, at ¶¶ 9, 10, 12-13.) Farajian also reviewed brochures that listed very high job
7 placement rates. (*Id.*, at ¶ 18.) Farajian finally enrolled in the summer of 2013 and borrowed
8 \$5,000 in federal Direct Loans. (*Id.*, at ¶ 24.) Her mother borrowed \$10,000 in PLUS loans. (*Id.*,
9 at ¶ 24.) Farajian completed her program and received a diploma, but the only job she was able to
10 obtain in her field of study was a one-month, temporary job. (*Id.*, at ¶¶ 26-27.) Farajian began
11 repaying her loans in 2015 but then submitted an attestation form and asked for forbearance of her
12 loans. (*Id.*, at ¶¶ 30, 32.) Farajian’s mother also submitted an attestation form, and her entire
13 PLUS loan was discharged. (*Id.*, at ¶ 33.) On March 1, 2018, Farajian received a letter from the
14 Department indicating that only 30% of her loan would be discharged. (*Id.*, at ¶ 37.) Farajian is
15 working as a driver for Lyft but makes only \$250 per month over her expenses. (*Id.*, at ¶¶ 39-40.)
16 Farajian is suffering from stress as a result of the loans. (*Id.*, at ¶¶ 41.)

17 **PLAINTIFFS’ PROPOSED INJUNCTION**

18 Plaintiffs seek class-wide preliminary injunctive and declaratory relief to return to the
19 *status quo ante*. The proposed class of Plaintiffs is defined as:

20 all individuals who borrowed a Direct Loan to finance the cost of enrollment in a
21 program who are covered by the Department’s Corinthian Job Placement Rule,
22 who have applied or will apply for a borrower defense, and who have not been
23 granted the full relief provided for by the Rule.

(Dkt. 58, at ¶ 257.) Plaintiffs identify the class of borrowers who attended programs in the Lists
24 for the time periods in the Lists. (Dkt. 35-6, Exs. 6-7) Plaintiffs seek an injunction ordering the
25 Department:

26 to cease all efforts to collect outstanding federal student loan debt
27 from Plaintiffs, to ensure the removal of negative credit reporting on
28 Plaintiffs’ outstanding federal student loan debt, to restore federal
student loan eligibility to Plaintiffs in the amount of their non-
discharged Corinthian federal student loan debt, to stop applying the
“Average Earnings Rule” to members of the proposed class, and to

1 process Plaintiffs' claims under the "Corinthian Job Placement Rate
Rule[.]"

2 (Dkt. 35, at page 1.)

3 **ANALYSIS**

4 A preliminary injunction requires that Plaintiffs establish: "(1) likely success on the merits;
5 (2) likely irreparable harm absent preliminary relief; (3) [that] the balance of equities tips in
6 [Plaintiffs'] favor; and (4) that an injunction is in the public's interest." *Doe v. Kelly*, 878 F.3d
7 710, 719 (9th Cir. 2017) (citations omitted). A "possibility" of irreparable harm is insufficient;
8 rather it must be "likely" absent an injunction. *Am. Trucking Ass'n, Inc. v. City of L.A.*, 559 F.3d
9 1046, 1052 (9th Cir. 2009). Alternatively, "serious questions going to the merits' and a balance
10 of hardships that tip sharply towards the plaintiff can support issuance of a preliminary injunction,
11 so long as the plaintiff also shows that there is a likelihood of irreparable injury and that the
12 injunction is in the public interest." *All. for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1135 (9th
13 Cir. 2011). Plaintiffs bear the burden to show that these factors are met. *DISH Network Corp. v.*
14 *FCC*, 653 F.3d 771, 776-77 (9th Cir. 2011).

15 **A. Likelihood of Success on the Merits.**

16 Plaintiffs attack the actions of the Secretary under the Administrative Procedures Act (the
17 "APA"). The APA allows a court to set aside an "agency action" only under limited
18 circumstances:

19 To the extent necessary to decision and when presented, the reviewing court shall
20 decide all relevant questions of law, interpret constitutional and statutory
21 provisions, and determine the meaning or applicability of the terms of an agency
action. The reviewing court shall --

22 (1) compel agency action unlawfully withheld or unreasonably delayed; and

23 (2) hold unlawful and set aside agency action, findings, and conclusions found to
be --

24 (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance
25 with law; [or]

26 (B) contrary to constitutional right, power, privilege, or immunity[.]

27 5 U.S.C. § 706. Section 704 of the APA states that agency action is "subject to judicial review" if
28 the action is a "final agency action for which there is no other adequate remedy in a court." 5

1 U.S.C. § 704. Plaintiffs allege that the Average Earnings Rule is a “final agency action” that
2 violates §§ 706(2)(A) and (B). Specifically, Plaintiffs allege that the Average Earnings Rule is
3 unlawful under the APA for three reasons: (1) the Average Earnings Rule violates (A) because it
4 is “arbitrary and capricious,” (2) the Average Earnings Rule is unlawful under (A) because it
5 violates the Privacy Act, and (3) the Average Earnings Rule violates (B) by violating Plaintiffs’
6 Constitutional rights to due process.

7 **1. Is the Average Earnings Rule a Final Agency Action?**

8 The threshold question for any action under the APA is whether the challenged action is
9 the type of action – a “final agency action” – which the Court can review. Plaintiffs argue that the
10 Department’s abandonment of the Corinthian Rule and adoption of the Average Earning Rule
11 constitute a final agency action that is subject to judicial review. (Dkt. 35, at pages 26-27). A
12 “final agency action” is one that “mark[s] the consummation of the agency’s decision-making
13 process” and “one by which rights or obligations have been determined or from which legal
14 consequences will flow.” *Bennett v. Spear*, 520 U.S. 154, 177-78 (1977) (citations omitted). The
15 question of whether an action is final is “pragmatic and flexible” with the focus on “practical and
16 legal effects of agency action.” *Or. Nat’l Desert Ass’n v. U.S. Forest Serv.*, 465 F.3d 977, 982
17 (9th Cir. 2006) (citation omitted).

18 The Secretary argues that the adoption of the Average Earnings Rule is not a “final agency
19 action” and thus not subject to review. The Secretary’s argument fails under *Bennett*. First, the
20 adoption of the Average Earnings Rule marks the consummation of the Secretary’s decision-
21 making – that the Secretary will review and analyze applications from borrowers under a specific
22 plan. Second, legal consequences will follow based on these calculations for those borrowers. *See*
23 *Salazar v. King*, 822 F.3d 61, 83-84 (2d Cir. 2016) (“The APA does not require that the
24 challenged agency action be the agency’s final word on the matter for it to be ‘final’ for the
25 purposes of judicial review.”).

26 As noted above, the Secretary documented the Average Earnings Rule in the December 15,
27 2017 Memorandum and in the December 20, 2017 Press Release. (Dkt. 42-1, Ex. 1; Dkt. 42-2,
28 Ex. 1.) These two documents show that the Secretary made a final decision about how to evaluate

1 claims for borrowers who attended Corinthian schools on the Lists and show that the Secretary
 2 adopted specific methodology for that evaluation. Thus, the first part of the test is satisfied
 3 because the Secretary consummated decision-making. Second, there is no dispute that legal
 4 consequences flow from the Department’s adoption of the Average Earnings Rule, as the
 5 Department has applied and is applying the Average Earnings Rule to determine the amount of
 6 relief each borrower obtains. (Dkt. 42-2, at ¶¶ 23-34.) *See Salazar*, 822 F.3d at 82 (2d Cir. 2016)
 7 (“The second requirement of the *Bennett* test is also met, because legal consequences flow from
 8 the [Department’s] decision not to suspend the collection of the loans of the putative class
 9 members.”).

10 Because the Average Earnings Rule is a “final agency action” subject to review, the Court
 11 must then analyze the three arguments that Plaintiffs make to attack the Average Earnings Rule.

12 **2. Does the Average Earnings Rule Violate the Privacy Act?**

13 Plaintiffs argue that the Average Earnings Rule is “otherwise not in accordance with law”
 14 pursuant to 5 U.S.C. § 706 and specifically that the Average Earnings Rule violates the Privacy
 15 Act. The Privacy Act of 1974, 5 U.S.C. § 552a, “regulate[s] the collection, maintenance, use, and
 16 dissemination of information by [governmental] agencies.” *Doe v. Chao*, 540 U.S. 614, 618
 17 (2004). The purpose is to avoid “substantial harm, embarrassment, inconvenience, or unfairness
 18 to any individual on whom information is maintained.” 5 U.S.C. § 552a(e)(10).

19 **a. Does the Privacy Act Allow this Type of Injunctive Relief?**

20 Before even addressing the merits of the Privacy Act, the Secretary argues that Plaintiffs
 21 cannot seek injunctive relief here because the Privacy Act provides a “comprehensive remedial
 22 scheme” that limits injunctive relief to two narrow areas not sought here. In *Doe v. Chao*, the
 23 Court held that the Privacy Act authorizes injunctive relief only in the following circumstances:
 24 (1) to order an agency to amend inaccurate, incomplete, irrelevant or untimely records, or (2) to
 25 order an agency to allow an individual access to his or her records. 540 U.S. at 635. *See also See*
 26 *Cell Assoc., Inc. v. Nat’l Inst. of Health*, 579 F.2d 1155, 1160 (9th Cir. 1978) (“the detailed
 27 remedial scheme adopted by Congress [in the Privacy Act] would make little sense” if a party
 28 could seek general injunctive relief.) Neither situation applies here, as Plaintiffs seek to enjoin the

1 Department from using data compiled as a result of disclosing information to the Social Security
2 Administration and receiving information from the Social Security Administration to make
3 decisions about Plaintiffs' claims under the borrower defense rule.

4 Despite this restriction under the Privacy Act, the Supreme Court indicated in two later
5 cases that a party can seek injunctive relief *under the APA* – and not under the Privacy Act – to
6 attack a rule that violates the Privacy Act. *FAA v. Cooper*, 566 U.S. 284, 303 n. 12 (2012); *Doe v.*
7 *Chao*, 540 U.S. at 619, n.1. In *Doe v. Chao*, the plaintiff sued under the Privacy Act because the
8 Department of Labor used the plaintiff's Social Security number in "mult-captioned" notices sent
9 to people other than the plaintiff. *Id.* at 617. The Supreme Court noted in a footnote that the
10 Privacy Act contains no specific standards for equitable relief because the APA provides those
11 standards. *Id.* In *FAA v. Cooper*, the Supreme Court again addressed the issue of the APA's
12 relation to the Privacy Act and stated in a footnote: "The [Privacy] Act deters violations of its
13 substantive provisions in other ways – for instance, by permitting recovery for economic injury;
14 by imposing criminal sanctions for some violations . . . and possibly by allowing for injunctive
15 relief under the Administrative Procedures Act (APA)[.]" 566 U.S. at 303, n. 12. The Supreme
16 Court interpreted *Doe v. Chao* as "noting the absence of equitable relief in suits under §
17 552a(g)(1)(C) or (D) may be explained by the availability of such relief under the APA." *Id.* at
18 619, n.1.

19 Thus, a plaintiff cannot seek injunctive relief *under the Privacy Act* if that injunctive relief
20 exceeds the scope of the remedies allowed under the Privacy Act, but a plaintiff may seek
21 injunctive relief *under the APA* if an agency has taken an action in violation of the Privacy Act.
22 The Court therefore finds that Plaintiffs can seek injunctive relief under the APA for a final
23 agency action that violates the Privacy Act.

24 **b. Does the Privacy Act Allow Disclosure?**

25 The Privacy Act provides: "No agency shall disclose any record which is contained in a
26 system of records . . . to another agency." 5 U.S.C. § 552a(b). As noted above, the Department
27 sent to the Social Security Administration the following: names, dates of birth, and Social Security
28 numbers of the claimants who submitted attestation forms to obtain relief under the borrower

1 defense rule. (Dkt. 42-2, Ex. 1, at page 3.) The Social Security Administration then provided the
2 Department with the mean and median annual earnings of the students in aggregate form, without
3 any personal identifying information. (Dkt. 35-8, Ex. 27, at page 1.) Plaintiffs challenge this
4 exchange of information as a violation of the Privacy Act. There are two acts of disclosure: (1)
5 the Department's sending of names, Social Security numbers, and dates of birth of claimants to the
6 Social Security Administration, and (2) the Social Security Administration's sending of aggregate
7 statistical data about earnings to the Department.

8 There is no question that the Department and the Social Security Administration are both
9 agencies for purposes of the Privacy Act. There is no question that, with regard to the first act of
10 disclosure, the Department disclosed to the Social Security Administration a "record" contained in
11 its "systems of records." The Department disclosed to the Social Security Administration the
12 names of applicants with dates of birth and Social Security numbers. Section 552a(a)(4) defines a
13 "record" as "any item . . . of information about an individual that is maintained by an agency . . .
14 that contains . . . [an] identifying number . . . or other identifying particular assigned to the
15 individual." Section 552a(a)(5) defines a "system of records" as "a group of any records under the
16 control of any agency from which information is retrieved by the name of the individual or by
17 some identifying number, symbol, or other identifying particular assigned to the individual."
18 When the Department disclosed to the Social Security Administration information about the
19 applicants' Social Security numbers and dates of birth from the Department's files, that disclosure
20 violated the Privacy Act unless the Privacy Act exempts the disclosures.

21 The Privacy Act lists several specific exceptions to the prohibition of disclosure of
22 information, none of which apply here. 5 U.S.C. § 552a(b)(1) – (12). The exception the Secretary
23 asserts here is the alleged ability to share "aggregate statistical data." That term arises only in the
24 Privacy Act in a discussion of a process in which federal agencies may share data in "matching
25 programs." 5 U.S.C. § 552a(o). The Privacy Act defines "matching programs" as "any
26 computerized comparison of . . . two or more automated systems of records . . . for the purpose of,
27 . . . or continuing compliance with statutory and regulatory requirements by, applications for,
28 recipients or beneficiaries of, participants in, or providers of services with respect to, cash or in-

1 kind assistance or payments under Federal benefit programs, or recouping payments or delinquent
2 debts.” 5 U.S.C. § 552a(a)(8)(A). “Federal benefit programs” include “payments, grants, loans,
3 or loan guarantees to individuals.” 5 U.S.C. § 552a(12). On the face of the description, the
4 Department’s sharing of information is a matching program under the Privacy Act. The
5 Department shared information with the Social Security Administration for the purpose of
6 recouping payments or delinquent debts – collection of student loans.

7 Matching programs must satisfy several procedural requirements: (1) the agencies must
8 have entered into a written agreement specifying the purpose, legal authority and cost savings of
9 the matching program, 5 U.S.C. § 552a(o); (2) the executive department must inform applicants
10 for a federal benefit that matching programs may be used to verify their applications, 5 U.S.C. §
11 552a(o)(1)(D); (3) the agency must notify individuals that they have the right to contest the
12 agency’s findings from the matching program before the agency take any adverse action, 5 U.S.C.
13 § 552a(p); and (4) the agency must report any new or revised matching program to the House
14 Committee on Government Operations, the Senate Committee on Governmental Affairs, and the
15 Office of Management and Budget. 5 U.S.C. § 552a(o)(2)(A); 5 U.S.C. § 552a(r).

16 Thus, if the sharing of data between the Social Security Administration and the
17 Department is a matching program as defined by the Privacy Act, the agencies must comply with
18 the requirements listed above. It is undisputed that the Department and Social Security
19 Administration did not comply with the requirements above and thus violated the Privacy Act.

20 Probably because the Department did not adhere to the requirements of a matching
21 program, the Secretary argues that the sharing of information by the Department with the Social
22 Security Administration does *not* constitute a matching program, and the Gainful Employment
23 Agreement specifically disclaims that it is a matching program. (Dkt. 35-8, Ex. 27, at page 1.)
24 Instead, the Secretary argues that agencies generally may share aggregate statistical data, which is
25 what the agencies did here. Even if the Secretary is correct that the Department’s sharing of
26 information with the Social Security Administration was not a matching program and even if the
27 Secretary is correct that agencies may share aggregate statistical data, the Privacy Act nonetheless
28 bars the disclosure.

1 First, there is no simply no portion of the Privacy Act that states that agencies may share
2 aggregate statistical data. The Secretary has a convoluted reading of the Privacy Act, which relies
3 upon an exception to an exception that creates the alleged ability to share data. But the clear terms
4 of the Privacy Act lay out exceptions and do not include an exception for sharing of aggregate
5 statistical data.

6 But even assuming for the sake of argument that sharing of aggregate statistical data is
7 allowed, the Department did not share aggregate statistical data with the Social Security
8 Administration. The Department sent names, dates of births, and Social Security numbers to the
9 Social Security Administration. The Privacy Act defines a “statistical record” as information
10 “maintained for statistical research or reporting purposes only and not used in whole or in part in
11 making any determination about an identifiable individual.” 5 U.S.C. § 552a(a)(6). In addition,
12 the express terms of section 552a(a)(8)(B)(ii) forbid use of data to make decisions concerning the
13 “rights, benefits or privileges of specific individuals.” Here, the information the Department
14 disclosed to the Social Security Administration was used to make a determination about a specific
15 individual – how much of the borrower’s loan that the Department would forgive.

16 And with respect to the Social Security Administration’s sending of information to the
17 Department, which did not contain personal identifiers, the disclosure again violated the Privacy
18 Act because the disclosure was made to make a determination about an individual.

19 Thus, even if the Privacy Act allows agencies to share aggregate statistical data, the
20 Privacy Act prohibits the disclosures the Secretary made here to the Social Security
21 Administration because the Department then uses that information to make determinations about
22 the benefits of specific individuals. For the same reason, the Privacy Act also prohibits the Social
23 Security Administration’s disclosure of aggregate statistical data to the Department because again,
24 the Department used that information to determine benefits.

25 In conclusion, Plaintiffs have met their burden to show that they are likely to succeed on
26 the merits of their argument that the Privacy Act bars the Department’s disclosure of information
27 about applicants to the Social Security Administration and the receipt and use of information from
28 the Social Security Administration. First, the plain language of the statute bars the disclosure.

1 Second, even if the sharing of information between the Department and the Social Security
2 Administration falls under the exception of the matching program, the Department and the Social
3 Security Administration did not comply with the requirements of a matching program. Finally,
4 even if there is an exception that allows agencies to share aggregate statistical data, the Privacy
5 Act expressly forbids the use of that aggregate statistical data to make determinations about
6 individuals, as here the Secretary did under the Average Earnings Rule. The Secretary simply
7 fails to point to an exception to the Privacy Act that allows disclosure of the specific information
8 about the applicants to the Social Security Administration and that allows the disclosure of the
9 aggregate data from the Social Security Administration to the Department for the Department's
10 use in determining relief for borrowers.

11 **3. Does the Average Earnings Rule Violate Plaintiff's Due Process Rights?**

12 Separate and independent from their arguments under the APA, Plaintiffs contend that the
13 Secretary violated their due process rights by failing to provide them with "adequate procedural
14 protections" in evaluating their claims for relief under the borrower defense rule. (Dkt. 35, at page
15 35.) Plaintiffs allege that they have a "property interest" in the "outcome of their borrower defense
16 application[s]." (*Id.*) Plaintiffs have a slightly shifting definition of their property rights, as they
17 also contend that they have a right to the relief under the Corinthian Rule, which Plaintiffs claims
18 is full relief or total discharge: "Plaintiffs simply request that the [Department of Education]
19 continue to review applications [for relief under the borrower defense rule] under its prior
20 (streamlined and easier to administer) rule[.]" (Dkt. 48, at page 9.) The "prior . . . rule" is the
21 Corinthian Rule.

22 **a. Do Plaintiffs Have a Property Right?**

23 In order to proceed with a due process claim, Plaintiffs must show that they have a
24 protected interest in property or liberty and that the Secretary denied them adequate procedural
25 protections in depriving them of that right. *Bd. of Regents v. Roth*, 408 U.S. 564, 569-71 (1972).
26 A party does not have a property interest if the party has a "unilateral expectation" or an "abstract
27 desire or need for it." *Foss v. Nat'l Marine Fisheries Serv.*, 161 F.3d 584, 588 (9th Cir. 1998).
28 Where a regulation creates the alleged entitlement, the question is whether the benefit is

1 “mandatory in nature.” *Foss*, 161 F.3d at 588. An individual asserting a loss of due process must
 2 show that “an existing law, rule, or understanding makes the conferral of benefit mandatory.” *U.S.*
 3 *v. Guillen-Cervantes*, 748 F.3d 870, 872 (9th Cir. 2014) (citation omitted).

4 Here, by definition, there can be no “right to an outcome” that is mandatory in nature.
 5 Thus, by the way that Plaintiffs frame their purported property interest as a “right to an outcome,”
 6 they cannot show that it is mandatory in nature. To the extent that Plaintiffs claim that they are
 7 entitled to relief, they cannot show that they are entitled to full relief or total discharge. Plaintiffs
 8 do not have a property interest in total discharge of their loans. Although they do have a property
 9 interest in “some” relief once they establish their borrower defense, there is no property right to
 10 the amount of relief because the Higher Education Act provides discretion to the Secretary to
 11 determine the amount of relief. The Higher Education Act states that the “Secretary shall specify
 12 in regulations which acts or omissions of an institution of higher education a borrower may assert
 13 as a defense to repayment of a loan made under this part[.]” 20 U.S.C. § 1087e(h). The
 14 regulations do not require complete discharge but instead provide discretion to the Secretary. The
 15 regulation states that a borrower may assert, as a defense to repayment of a student loan, “any act
 16 or omission of the school attended by the student that would give rise to a cause of action against
 17 the school under applicable state law.” 34 C.F.R. § 685.206(c)(1). The regulation further
 18 provides:

19 If the borrower’s defense against repayment is successful, the Secretary notifies the
 20 borrower that the borrower is relieved of the obligation to repay *all or part of the*
 21 *loan* and associated costs and fees that the borrower would otherwise be obligated
 22 to pay.

23 34 C.F.R. § 685.206(c)(1) (emphasis added). The Secretary is allowed - but not required - to
 24 reimburse the borrower for amounts already paid, determine that the borrower is not in default,
 25 and update reports to consumer reporting agencies to remove any negative reporting. 34 C.F.R. §
 26 685.206(c)(2).

27 Plaintiffs, once they establish their claims for relief under the borrower defense rule by
 28 completing the attestation forms, have a mandatory right to *some* relief. Based on the language of
 the regulations, they also have a mandatory right to be notified about the amount of the relief they

1 are receiving. However, the regulations do not provide a mandatory right to a full discharge.
2 The Secretary has made clear in the Average Earnings Rule that borrowers who successfully
3 complete the attestation forms will be afforded relief in the form of 10% reduction at a minimum.
4 (Dkt. 42-2, Ex. 1, at page 5.) Even if the Secretary gives a borrower the minimum amount of
5 relief under the Average Earnings Rule, that borrower still receives some relief from that partial
6 discharge. Plaintiffs do not allege that the Secretary refused to provide at least *some* relief to
7 borrowers who successfully completed the attestation form. Because borrowers do not have a
8 mandatory right or entitlement to a specific amount of relief, as long as they are provided *some*
9 relief, they do not have a right to procedural safeguards to regarding the relief amount, including
10 the decision to provide less than a full discharge.

11 Plaintiffs cite to a case in which the Court held that the plaintiffs, who sought discharge of
12 their loans under the Higher Education Act, had a “protected property interest” in their right to
13 discharge. *Higgins v. Spellings*, 663 F. Supp. 2d 788, 795 (W.D. Mo. 2009). *Higgins* addressed a
14 different section of the Higher Education Act that provided no discretion to the Secretary in
15 discharging a student loan in full. In *Higgins*, the Higher Education Act mandated that the
16 Secretary provide full relief to a borrower who is disabled. The Higher Education Act provides
17 that, if a borrower dies or becomes permanently disabled or unable to work under certain
18 circumstances, “then the Secretary *shall* discharge the borrower’s liability on the loan by repaying
19 the amount owed on the loan.” 20 U.S.C. 1087(a)(1) (emphasis added). Where a borrower can
20 prove that she or he falls under those circumstances, a borrower has a property interest in the
21 complete discharge of the debt because the Secretary has no discretion to refuse to discharge the
22 debt in full. *Higgins*, 663 F. Supp. 2d at 794.

23 The right in *Higgins*, based on the section of the Higher Education Act which required a
24 full discharge, is different from the right here, which is the mandatory right to some relief but not a
25 full discharge, under the separate section of the Higher Education Act and its regulations.

26 Therefore, because Plaintiffs have not met their burden to show that they have a “property
27 right” in the “outcome” of the adjudication of their claims for relief under the borrower defense
28 rule, Plaintiffs cannot show likelihood of success on the merits of their argument that the

1 Secretary's adoption and implementation of the Average Earnings Rule violates their due process
2 rights.

3 **b. Did the Corinthian Rule Create a Property Interest?**

4 Plaintiffs then argue that the Corinthian Rule created their "right." However, there is much
5 uncertainty about the contours of the Corinthian Rule. As noted above, Plaintiffs allege that the
6 Corinthian Rule was based on documents that they do not have, and Plaintiffs infer the existence
7 of the Corinthian Rule from secondary sources that do not discuss the Corinthian Rule in detail.
8 As a practical matter, it appears that the Secretary did provide full relief or total discharge for
9 borrowers who completed attestation forms before 2017. The documentation that even the
10 Secretary submits shows that the Secretary considered the implementation of the Average
11 Earnings Rule to be a change in policy from previous policy. (Dkt. 41-1, at ¶¶ 9-10.) In
12 reviewing the previous approvals of borrower's applications for relief, the Secretary found that
13 "previous approvals had been based on the assumption that CCI borrowers received a worthless
14 education and therefore that the discharge of the total amount of borrowers' loans and
15 reimbursement of all payments was appropriate for all CCI borrowers with valid claims." (*Id.*, at ¶
16 9.) The Secretary then evaluated that assumption as incorrect and created a new methodology to
17 determine the value that students gained. (*Id.*, at ¶¶ 16-17.) The Secretary essentially admits that
18 there was a previous policy, even if informal, for full discharge of debt of borrowers who
19 completed the attestation forms.

20 For purposes of this motion, though, the Court is troubled by the fact that there is no
21 document in the record that lists or describes the Department's previous policy. The missing
22 element that matters most for this motion is whether the Secretary in the previous policy reserved
23 to the Secretary the ability to change the analysis at a later time. The Secretary has the power
24 under the regulations to determine the amount appropriate for discharge, and it is possible that the
25 Secretary could devise a policy that relinquished the Secretary's right to determine whether
26 borrowers who completed the attestation forms could have partial or full relief. It is also possible
27 that the Secretary could impose a policy that provides full relief but specifically reserves the
28 Secretary's power under the statute and regulations to override the relief for individual borrowers

1 at any time.⁴ Without any clear indication that the Secretary specifically gave up discretion to
 2 determine the amount appropriate for relief, the Court cannot find that the Corinthian Rule existed
 3 in such a way that bound the Secretary. An “agency process without binding effect” is not
 4 reviewable under 5 U.S.C. § 551 even if it leads to “significant practical consequences.” *Indus.*
 5 *Safety Equip. Ass’n, Inc. v. EPA*, 837 F.2d 1115, 1120 (D.C. Cir. 1988) (citation omitted).

6 Therefore, Plaintiffs do not meet their burden to show likelihood of success on the merits
 7 of their argument that they have a “property right” based on the Corinthian Rule. Because
 8 Plaintiffs have not met that burden, the Court will not address their argument that the Secretary in
 9 implementing the Average Earnings Rule violated their procedural rights.

10 **4. Is the Average Earnings Rule Arbitrary and Capricious?**

11 Because the Court finds that Plaintiffs demonstrated a likelihood of the merits that the
 12 Secretary violated the Privacy Act in her implementation of the Average Earnings Rule, it may
 13 appear that the Court need not discuss the issue of whether the Secretary’s adoption of the
 14 Average Earning Rule is arbitrary and capricious. However, as discussed below, the Court will
 15 need to determine the remedy to the Privacy Act violation. The Court finds that a discussion of
 16 the arbitrary and capricious standard is helpful to understand the scope of the Secretary’s
 17 permissible remedial actions.

18 The scope of review under the “arbitrary and capricious” standard is “narrow and
 19 deferential.” *Arrington v. Daniels*, 516 F.3d 1106, 1112 (9th Cir. 2008). The court in reviewing
 20 an agency’s action “is not empowered to substitute its judgment for that of the agency.” *Citizens*
 21 *to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971), overruled on other grounds by
 22 *Califano v. Sanders*, 430 U.S. 99, 105 (1977). The reviewing court should “uphold a decision of
 23 less than ideal clarity if the agency’s path may reasonably be discerned.” *Arrington*, 516 F.3d at
 24

25 ⁴ That the Department made no public statement of any kind indicating that borrowers
 26 would receive full discharge of loans or full refund of loans is telling. For example, the attestation
 27 forms do not state what relief the borrowers will receive. (Dkt. 35-6, Exs. 8-9.) In addition, Arne
 28 Duncan, the previous Secretary, stated: “[If] you’ve been defrauded by a school, we’ll make sure
 that you get every penny of the relief you are entitled to through a streamlined process – as
 streamlined as possible.” (Dkt. 35-5, Ex. 5, at page 2.) There was no explanation about what that
 relief was.

1 1112 (internal citation and quotation omitted). A rule is arbitrary and capricious if the agency: (1)
2 “has relied on factors which Congress has not intended it to consider,” (2) “entirely failed to
3 consider an important aspect of the problem,” (3) “offered an explanation for its decision that runs
4 counter to the evidence before the agency,” or (4) offers an explanation that is “so implausible that
5 it could not be ascribed to a difference in view or the product of agency expertise.” *Motor Vehicle*
6 *Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

7 Plaintiffs argue that the Secretary fails to meet the standard to show that the new policy,
8 the Average Earnings Rule, is better than the old policy, the Corinthian Rule. When an agency
9 changes policy, it “need not demonstrate to a court’s satisfaction that the reasons for the new
10 policy are *better* than the reasons for the old one; it suffices that the new policy is permissible
11 under the statute, that there are good reasons for it, and that the agency *believes* it to be better[.]”
12 *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009) (italics in original). As noted
13 above, there is not sufficient evidence to determine that a Corinthian Rule existed as Plaintiffs
14 describe it.

15 However, even assuming that the Secretary had previously adopted a Corinthian Rule, the
16 Secretary met the burden necessary to change the policy. In reviewing the previous approvals of
17 borrower’s applications for relief, the Secretary found that “previous approvals had been based on
18 the assumption that CCI borrowers received a worthless education and therefore that the discharge
19 of the total amount of borrowers’ loans and reimbursement of all payments was appropriate for all
20 CCI borrowers with valid claims.” (Dkt. 41-1, at ¶ 9.) The Secretary then evaluated that
21 assumption and determined that the assumption was false and made a new methodology for
22 determining the value gained. (*Id.*, at ¶¶ 16-17.) The Secretary provided a justification for the
23 Average Earnings Rule: the assumption that students who attended the Corinthian schools
24 obtained no value is not factually accurate for all students and thus basing relief from loans on that
25 assumption is a bad policy. (*Id.*, ¶¶ 15-17 and Ex. 1.) The Secretary’s concern is genuine, and the
26 attempt to create a policy to determine whether students obtained value and if so, how much, is
27 also a legitimate exercise of the Secretary’s discretion under the Higher Education Act. As noted
28 above, the regulations promulgated under the Higher Education Act provide that the Secretary can

1 relieve “all or part” of the loan of a borrower who successfully asserts a borrower defense and
2 provides that the Secretary has discretion to provide relief “as the Secretary determines is
3 appropriate under the circumstances.” 34 C.F.R. § 685.206(2). Here, there is no question that the
4 Secretary has the power to determine the amount of relief a borrower can obtain.

5 Nonetheless, Plaintiffs challenge the actions in implementing that discretion as arbitrary
6 and capricious. First, Plaintiffs challenge the Average Earnings Rule on a legal basis, since
7 Plaintiffs claim that the Department had previously issued a legal memorandum concluding that
8 California’s Unfair Competition law is the applicable law for determining borrower’s relief, and
9 specifically that borrowers who were defrauded were entitled to a full discharge of their debt. As
10 discussed above, Plaintiffs do not provide the legal memorandum, so the Court cannot determine
11 if that legal memorandum was the basis for the Secretary’s decision for the Corinthian Rule. The
12 Court also cannot determine what the legal memorandum concluded or whether it was the basis
13 for the Secretary’s decision for the Corinthian Rule. The specific regulation addressing the
14 amount or type of relief does not reference state law. *See* 34 C.F.R. § 685.206(c)(2).⁵ Moreover,
15 even if the Secretary were bound to apply California law, either by the legal memorandum or
16 regulation, California’s Unfair Competition law does not require full discharge in cases of fraud.
17 California’s Unfair Competition law, Cal. Bus. & Prof. Code § 17200 *et seq.*, provides either
18 equitable relief or restitution as a remedy. *Korea Supply Co. v. Lockheed Martin Corp.*, 29 Cal.
19 4th 1134, 1144 (2003). Restitution is defined as “the excess of what the plaintiff gave the
20 defendant over the value of what the plaintiff received” in order to “restore the defrauded party to
21 the position he would have absent the fraud.” *Pulaski & Middleman LLC v. Google, Inc.*, 802
22 F.3d 979, 988 (9th Cir. 2015) (citations omitted). Here, the Average Earnings Rule, in attempting
23 to determine the value of what plaintiff received, is not arbitrarily inconsistent with a restitution
24 calculation under California’s Unfair Competition law. Even if the percentage awarded under the
25 Average Earnings Rule is somewhat less than the Plaintiffs’ calculation of restitution under
26

27 ⁵In contrast, the specific regulation addressing the right to relief does reference state law.
28 34 C.F.R. § 685.206(c)(1). In addition, the Master Promissory Note references state law but does
not specify that the state law governs the amount of discharge. (Dkt. 35-5, Ex. 1, at page 7.)

1 California's Unfair Competition law, this differential does not render the Secretary's
2 determination arbitrary and capricious. Even if the Court disagrees with the relief amount, the
3 Court "is not empowered to substitute its judgment for that of the agency." *Citizens to Preserve*
4 *Overton Park*, 401 U.S. at 416.

5 Plaintiffs also argue that the Average Earnings Rule is arbitrary and capricious because:
6 (1) the Average Earnings Rule is "irrational" in the manner in which the Average Earnings Rule
7 applies the gainful employment standard, (2) the Average Earnings Rule ignores previous findings
8 and leads to inconsistent results for borrower who submitted claims before the Average Earnings
9 Rule and after the Average Earnings Rule, (3) the Average Earnings Rule relies upon data from
10 third parties that is not relevant or specific to the borrowers, and (4) the Average Earnings Rule
11 fails to take into account whether the borrower is working in the field she or he studied in
12 determining the amount of forgiveness. (Dkt. 35, at pages 40-42.) All of these attacks are
13 attempts to second-guess the Secretary's decision-making and substitute the Court's judgment for
14 the judgment of the Secretary. The Secretary, in adopting the Average Earnings Rule, provided a
15 rational reason for the Average Earnings Rule and a method – imperfect in many ways and illegal
16 under the Privacy Act – to assess the value of what the borrower actually received as compared to
17 the loans. However, aside from the illegal disclosure of information to the Social Security
18 Administration and use of that data from the Social Security Administration, the Secretary's
19 attempts to devise a more narrowly tailored system for determining the amount of relief is not
20 arbitrary and capricious.

21 Therefore, Plaintiffs do not meet their burden to show likelihood of success on the merits
22 of their argument that the Secretary's adoption and implementation of the Average Earnings Rule
23 is arbitrary and capricious.

24 **5. Does the Average Earnings Rule Constitute Retroactive Rule Making?**

25 Plaintiffs argue also that, separate from the alleged violations of the APA, the Secretary's
26 use of the Average Earnings Rule constitutes impermissible, retroactive rulemaking. Plaintiffs
27 argue that an agency cannot create a new rule and apply it retroactively. *Cort v. Crabtree*, 113
28 F.3d 1081 (9th Cir. 1997). The issue before the Court is whether the Secretary is applying the

1 Average Earnings Rule retroactively. It is undisputed that the Secretary is not clawing back any
 2 funds or changing any decisions made and communicated before the Average Earnings Rule was
 3 put in place with regard to borrowers who submitted their attestation forms before the Average
 4 Earnings Rule was put in place. Plaintiffs argue that the Average Earnings Rule is retroactive
 5 because the Secretary is applying the Average Earnings Rule to all borrowers in the proposed class
 6 of plaintiffs – whether they have submitted an attestation form or not. Plaintiffs’ argument turns
 7 on whether they have a vested right in a full discharge of their loans and that the adoption of the
 8 Average Earnings Rule took away that right. *See, e.g., Landgraf v. USI Film Prods.*, 511 U.S.
 9 244, 269-70 (1994) (a rule is “retrospective” if it “takes away or impairs vested rights acquired
 10 under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability,
 11 in respect to transactions or considerations already past”) (citation omitted). This analysis is
 12 similar to the analysis of due process rights discussed above, as a vested right is similar to a
 13 mandatory right. Because Plaintiffs cannot show, with the evidence before the Court now, that all
 14 borrowers in the proposed class were entitled to full relief as a matter of stated policy, Plaintiffs
 15 cannot show that the Average Earnings Rule is retroactive in nature.

16 The main case Plaintiffs cite, *Cort*, is distinguishable because in *Cort*, the plaintiffs⁶ had
 17 already received letters notifying them that they were eligible for relief, but the governmental
 18 agency (Bureau of Prisons) then changed its interpretation of a statute and determined that the
 19 plaintiffs were no longer eligible. *Cort*, 113 F.3d at 1082. The plaintiffs had a right that the
 20 Bureau of Prisons then took away. Here, because Plaintiffs cannot show – based on the record
 21 before the Court now – that they had a vested right or a mandatory right to full relief, they cannot
 22 show the Secretary engaged in retroactive rule making by taking away that right. Therefore,
 23 Plaintiffs do not meet their burden to show likelihood of success on the merits of their argument
 24 that the Secretary’s adoption and implementation of the Average Earnings Rule constitutes
 25 retroactive rule-making.

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 28 ⁶ The plaintiffs in *Cort* were three individuals who did not assert a class action. *Cort*, 113 F.3d at 1081-82.

B. A Preliminary Injunction Is Necessary to Stop Irreparable Harm.

Because the Court finds that Plaintiffs have shown a likelihood of success on the merits of the APA claim, the Court must determine whether they can show irreparable harm to justify a preliminary injunction. A plaintiff seeking a preliminary injunction must demonstrate that irreparable injury is likely in the absence of preliminary relief. *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 21 (2008). A mere possibility of irreparable injury is insufficient. *Id.*

“Irreparable harm is traditionally defined as harm for which there is no adequate legal remedy, such as an award of damages.” *Ariz. Dream Act v. Brewer*, 757 F.3d 1053, 1068 (9th Cir. 2014) (citation omitted). Further, the irreparable nature of a plaintiff’s injury is heightened when it involves the plaintiff’s “young age and fragile socioeconomic position.” *Ariz. Dream Act*, 757 F.3d at 1068. Plaintiffs claim irreparable injury because Plaintiffs are suffering extreme financial hardship, emotional distress, loss of opportunity, and invasion of Plaintiffs’ privacy rights.⁷

Because the Court finds that the Average Earnings Rule violates the Privacy Act, the Court will examine the harm largely in that context.

1. Do Privacy Act Violations and Emotional Distress Constitute Irreparable Harm?

Plaintiff Mercado states that, when she learned that her own Social Security information was used against her to forgive only 30% of her loan, she was “sad, distressed and betrayed.” (Dkt. 48-1, ¶ 17.) She felt that the use of her own information against her in determining the amount of her loan forgiveness was a “slap in the face.” (*Id.*)

As noted above, the Court finds that the Secretary’s disclosure to the Social Security Administration and receipt and use of data from the Social Security Administration violates the Privacy Act because the results are used in determining borrowers’ benefits – relief from loans. In this situation, borrowers can feel emotional distress, similar to Mercado’s sentiments. Here, Plaintiffs Craig, Farajian, and Dobashi discuss in general terms the emotional stress that the repayment system is causing them. (Dkt. 35-1 at ¶¶ 17, 32; Dkt. 35-3 at ¶¶ 22-23; Dkt. 35-4 at ¶¶

⁷ Plaintiffs contend that they are suffering irreparable harm of violation of their due process rights. Because the Court finds that Plaintiffs do not have a property interest in the outcome of their applications for borrower defenses, the Court will not analyze that harm.

1 36, 41.)⁸ Plaintiffs cannot recover for emotional distress under the Privacy Act, even if there is a
 2 final determination that the Secretary violated the Privacy Act, because the government had
 3 provided only limited avenues for relief in waiving sovereign immunity. *FAA v. Cooper*, 566 U.S.
 4 at 303-304 (no mental or emotional distress allowed under the Privacy Act). Where sovereign
 5 immunity bars certain types of damages, those damages can constitute irreparable harm. *See, e.g.*,
 6 *Caspar v. Snyder*, 77 F. Supp. 3d 616, 641 (E.D. Mich. 2015) (if sovereign immunity bars
 7 damages, damages can be irreparable). *See also Krebs v. Rutgers*, 797 F. Supp. 1246, 1259 (D.
 8 N.J. 1992) (Privacy Act harms are irreparable). Thus, the emotional distress that Plaintiffs are
 9 suffering from the violation of the Privacy Act is irreparable, and an injunction is warranted.

10 2. Does Economic Harm Constitute Irreparable Harm?

11 Both parties discuss the economic harm from denial of full relief from debt. Because the
 12 Court finds that the Secretary has discretion to determine the amount of relief a borrower can
 13 receive – as long as the rule does not violate laws – the issue of economic harm is not necessarily
 14 relevant here. The Secretary’s action in adopting the Average Earnings Rule is unlawful and
 15 therefore invalid under the APA, but the harm – loss of privacy – does not necessarily cause
 16 economic injury. The Secretary could devise a lawful rule to evaluate and determine relief for
 17 borrowers that does not provide full relief. Even if the Secretary were to devise a lawful rule for
 18 Plaintiffs, they might still suffer some economic harm.

19 However, the Court notes that, because the Court finds that the Average Earnings Rule is
 20 invalid, Plaintiffs whose claims are evaluated under the Average Earnings Rule might be forced to
 21 repay higher amounts than they would under a validly constructed rule. If that is the case, then
 22 economic harm is relevant. The Court finds that Plaintiffs have shown that they are suffering

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 25 ⁸ With their Reply, Plaintiffs also submit the declarations of two mental health
 26 professionals, both of whom discuss the psychological effects of student loans on individuals in
 27 general. (Dkt. 48-2; Dkt. 48-3.) Neither mental health professional examined the Plaintiffs but
 28 rather only reviewed their declarations. (Dkt. 48-2, 5; Dkt. 48-3, at ¶ 23.) Given that the Court
 has found that Plaintiffs have submitted evidence of emotional distress, there is no need for the
 Court to review the declarations of mental health professionals. Moreover, the Court is not
 inclined to accept these additional declarations on reply without giving the Secretary a chance to
 address them, because they contain more than factual allegations and provide expert opinions that
 are subject to attack.

1 irreparable harm in the form of economic harm. Although economic harm generally does not
 2 constitute irreparable injury, economic injury may be the basis for an injunction where a plaintiff
 3 lives on a fixed income and where minimal increases in the cost of living creates a “potential [for]
 4 financial disaster” and the possible deprivation of “life’s necessities.” *United Steelworkers of Am.,*
 5 *AFL-CIO v. Textron, Inc.*, 836 F.2d 6, 8 (1st Cir. 1987); *see also Golden v. Kelsey-Hayes Co.*, 73
 6 F.3d 648, 657 (6th Cir. 1996) (economic harm satisfied factor of irreparable injury because
 7 plaintiffs were “unable to absorb even relatively small increases in their expenses without extreme
 8 hardship”). Here, Plaintiffs Craig and Farajian provide detailed information to show that they are
 9 living in dire circumstances. (Dkt. 35-1; Dkt. 35-4.) In addition, Plaintiff Cornelius, who is
 10 working at a Taco Bell in Hercules, California, faces payments of at least \$273.64 per month.
 11 (Dkt. 35-2, at ¶¶ 2, 14.) It is difficult for workers at fast food restaurants to make ends meet in the
 12 San Francisco bay area, one of the most expensive areas in the country, even without a monthly
 13 loan payment of \$273.64 per month. These detailed declarations from Craig, Farajian, and
 14 Cornelius, show that repayment of loans threatens these borrowers’ ability to pay for basic life
 15 expenses like food and rent.⁹

16 The Secretary argues that Plaintiffs have not shown that the repayment of loans is causing
 17 the harm that they are suffering because they have other financial problems that caused the harm.
 18 This argument seems meaningless given the dire financial circumstances that Plaintiffs describe.
 19 Given their financial situations, any additional dollar they are required to repay takes away from
 20 basic need for food and shelter. In economic terms, the marginal utility of each dollar is extremely
 21 high to the Plaintiffs.

22 Under these circumstances, the Court finds that Plaintiffs have shown irreparable harm
 23 because the economic harm they are suffering affects their ability to pay for life’s most basic
 24 necessities.

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 27 ⁹ The briefs of *amici curiae* - the Debt Collective and Public Law Center - also provide
 28 examples of individual borrowers who are suffering economic hardships. (Dkt. 43; Dkt. 45.)
 These individual borrowers did not submit declarations under penalty of perjury, and therefore
 Court will not consider that information.

3. Does Loss of Opportunity Constitute Irreparable Harm?

1
2 Plaintiffs also claim that they are suffering a loss of opportunity and that loss constitutes
3 irreparable injury. Again, the harm that Plaintiffs assert in this area is linked to the failure to
4 obtain a full discharge and not linked to the violation of their privacy rights. But for the same
5 reasons as discussed with regard to the economic harm, the loss of opportunity for Plaintiffs who
6 are forced to repay more for their loans under the invalid Average Earnings Rule, compared with
7 the amount that they would repay under a valid rule, is relevant harm. Lost opportunities can
8 constitute irreparable injury. *Brewer*, 757 F.3d at 1068 (holding that loss of professional
9 opportunity constitutes irreparable harm); *see also Enyart v. Nat'l Conf. of Bar Examiners, Inc.*,
10 630 F.3d 1153, 1163 (9th Cir. 2011) (loss of opportunity to pursue one's chosen profession
11 constitutes irreparable harm). The Secretary argues that Plaintiffs fail to meet their burden of
12 proof to assert this area of damage as irreparable injury. However, Plaintiffs submitted, with their
13 Reply, an additional declaration of Plaintiff Mercado in which she explains that she has not been
14 able to obtain a mortgage for a home because of the existence of her loans. (Dkt. 48-1, at ¶ 23.)
15 Although the Mercado Declaration was submitted in such a way that the Secretary did not have a
16 chance to rebut it, the Court will accept the factual allegations of the Mercado Declaration. The
17 Mercado Declaration shows that Plaintiffs can suffer loss of opportunities similar to the type the
18 Court in *Brewer* found to constitute irreparable injury.

19 Under these circumstances, the Court finds that Plaintiffs have shown irreparable harm
20 because they cannot recover their lost opportunities.

C. Public Interest and Balance of Equities Weigh in Favor of Preliminary Injunction.

21 The Court finds that the balance of equities weighs in favor of a preliminary injunction and
22 that the public interest weighs in favor of a preliminary injunction. Although normally courts
23 consider the third and fourth factors of the test for a preliminary injunction separately, where the
24 federal government is a party, the last two factors of the balance of equities and public interest
25 merge. *Drakes Bay Oyster Co. v. Jewell*, 747 F.3d 1073, 1092 (9th Cir. 2014). There is a strong
26 public interest in ensuring that agencies comply with the law in enacting rules and regulations, and
27 here, preventing the use of data in violation of the Privacy Act is a compelling interest. The
28

1 Secretary argues that forcing the Secretary to forgive all loans to Plaintiffs costs the government
 2 money that the government should not pay, given that some Plaintiffs received some benefit from
 3 their education through the Corinthian schools. The Secretary argues that the relief Plaintiffs seek
 4 will divert resources from other educational programs, and that there is a strong public interest in
 5 saving funds. Saving money does not justify a violation of the law – the Privacy Act. The Court
 6 here, as discussed more fully below, is not ordering the Secretary at this time to return to the
 7 Corinthian Rule. The Court recognizes that the Secretary has discretion to enact rules regarding
 8 the amount of relief as long as the rules are lawful and not arbitrary and capricious. Given that the
 9 injunction below is narrowly tailored to the violation of the Privacy Act and temporary in nature,
 10 the Court finds that the balance tips in favor of Plaintiffs for an injunction.

11 **D. The Appropriate Remedy.**

12 Plaintiffs seek an injunction ordering the Secretary to take cease two actions and to take
 13 three other affirmative actions. As described above, Plaintiffs seek an injunction in five main
 14 areas: (1) to stop “all efforts to collect outstanding federal student loan debt from Plaintiffs,” (2)
 15 to remove negative credit reporting of “Plaintiffs’ outstanding federal student loan debt”, (3) “to
 16 restore federal student loan eligibility to Plaintiffs in the amount of their non-discharged
 17 Corinthian federal student loan debt,” and (4) to stop using the “Average Earnings Rule,” and (5)
 18 to apply the Corinthian Rule to Plaintiffs’ claims.

19 **1. Is Removal of Negative Credit Reporting and Restoring Eligibility for Student 20 Loans the Correct Relief?**

21 The Court will not order the Secretary to take the actions Plaintiffs seek with regard to the
 22 requests for removal of negative credit reporting and restoring eligibility for further student loans.
 23 Even if the Court were to assume that the Corinthian Rule existed, Plaintiffs’ definition of the
 24 Corinthian Rule does not include this relief. (Dkt. 35, at pages 12-13.) There is no other evidence
 25 in the record to show that the Corinthian Rule included these provisions.

26 Furthermore, the regulation provides that the Secretary has discretion to provide that relief.
 27 Section 685.206(c)(2) states that “[f]urther relief may include, but is not limited to, the following .
 28 . . . Determining that the borrower is not in default on the loan and is eligible to receive assistance

1 under Title IV of the Act,” and “Updating reports to consumer reporting agencies to which the
 2 Secretary previously made adverse credit reports with regard to the borrower’s Direct Loan.”
 3 Under the clear terms of the regulation, the Secretary can, but is not required, to provide this relief.
 4 The Court cannot, in the absence of any evidence, force the Secretary to take action that the
 5 Secretary is not required to do. The Court therefore **DENIES** Plaintiffs’ request for preliminary
 6 injunction to the extent that Plaintiffs seek an order requiring the Secretary to remove negative
 7 reports from Plaintiffs’ reports with credit reporting agencies and to restore Plaintiffs’ eligibility
 8 for further student loans.

9 **2. Is Enjoining Use of Average Earnings Rule, Return to the Corinthian Rule
 and Immediate Cessation of Collection of Plaintiffs’ Debts Appropriate?**

10 Because Plaintiffs have met their burden to show likelihood of success on the merits of the
 11 argument that Secretary violated the APA by implementing a rule, the Average Earnings Rule, that
 12 violates the Privacy Act, that implementation of the Average Earning Rule is causing irreparable
 13 harm, and that the balance of equities tips in favor of Plaintiffs on this serious issue, the Court
 14 **ENJOINS** the Secretary from using the Average Earnings Rule as it currently exists. Normally,
 15 when a court issues an injunction, the injunction orders a return to the *status quo*. In this case, it is
 16 unclear what the *status quo* is, since there is no clear documentation outlining the parameters of
 17 the Corinthian Rule.

18 At this time, the Court cannot compel the Secretary to return to the Corinthian Rule, since
 19 the parameters of the Corinthian Rule are not clearly defined. *See Norton v. Southern Utah*
 20 *Wilderness Alliance*, 542 U.S. 55, 64 (2004) (court can compel agency action “only where a
 21 plaintiff asserts that an agency failed to take a discrete agency action that it required to take.”)
 22 The action that the plaintiff seeks to compel must be so clear that it is subject to the traditional test
 23 of mandamus. *Vietnam Veterans of Am. v. CIA*, 811 F.3d 1068, 1075-76 (9th Cir. 2015). A *writ*
 24 *of mandamus* is appropriate only when “(1) the plaintiff’s claim is clear and certain, (2) the
 25 defendant official’s duty to act is ministerial, and so plainly prescribed as to be free from doubt,
 26 and (3) no other adequate remedy is available.” *Barron v. Reich*, 13 F.3d 1370, 1374 (9th Cir.
 27 1994) (internal quotations and citations omitted). Here, the Court cannot compel the Secretary to
 28 take specific actions allegedly under the Corinthian Rule when there is no evidence to show that

1 the Corinthian Rule included those specific actions. The Court therefore **DENIES** Plaintiffs'
2 request for preliminary injunction to the extent that Plaintiffs seek an order requiring the Secretary
3 to implement the Corinthian Rule in assessing claims under the borrower defense rule, filed by
4 borrowers who attended schools on the Lists.

5 Thus, the Court **GRANTS** Plaintiffs' motion for preliminary injunction to prevent the
6 Secretary from using the Average Earnings Rule but **DENIES WITHOUT PREJUDICE**
7 Plaintiffs' motion for preliminary injunction to return to the Corinthian Rule. With regard to the
8 injunction for the Secretary to stop all efforts to collect Plaintiffs' loans, the Court temporarily
9 **GRANTS** this request. The Secretary is **ORDERED** to cease all efforts to collect debts from
10 Plaintiffs until the Court can determine the proper course of action.

11 The Secretary has the right to assess claims for relief from borrowers who attended
12 Corinthian schools on the Lists who seek relief under the borrower defense rule as long as the
13 Secretary does not violate the Privacy Act or other laws in doing so. At this time, though, because
14 the Court is not sure how to define the *status quo* in the absence of key documentation, the Court
15 requests additional briefing on this issue and will hear oral argument on this issue on June 4, 2018,
16 the date currently scheduled for a case management conference. The hearing will be specially set
17 for 2:30 p.m. Parties may submit supplemental briefing on this subject, to be exchanged
18 simultaneously, on May 31, 2018. At the hearing on June 4, parties should be prepared to address
19 the following questions:

- 20 (1) Does the Court have the authority to order the Secretary to produce the three
21 documents that Plaintiffs allege constitute the Corinthian Rule: (1) a memorandum
22 prepared by the Department's Office of General Counsel, (2) a fine action letter
23 prepared by Federal Student Aid's Administrative Actions & Appeals Service Group,
24 and (3) an April 2015 document prepared by the Federal Student Aid's Administrative
25 Actions & Appeals Services Groups?
- 26 (2) What is the *status quo*? What is the date by which the Court measures the *status quo*?
27 The Court directs the parties to a recent case on this subject: *Animal Legal Defense*
28 *Fund v. U.S. Dept. of Agriculture*, 2017 WL 2352009, *3 (N.D. Cal. May 31, 2017).

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- (3) If the Court enjoins the Secretary from using the Average Earnings Rule and the Secretary does not return to the Corinthian Rule, what steps will the Secretary take to assess claims from Plaintiffs?
- (4) Do Plaintiffs contend that the Secretary has a mandatory duty to provide forbearance pending a determination of the discharge amount? If so, what is the authority for that position? Does the Secretary dispute that she has a mandatory duty to provide forbearance pending a determination of the discharge amount? If so, what is the authority for that position?
- (5) Should the Secretary treat in a different manner the borrowers who were not able to complete a program or receive a diploma or certification on the Lists because the school or program closed? If the students who were not able to complete their program did receive some value, would it be arbitrary to treat them the same (provide the same discharge amount) as those students who were able to complete their programs?

IT IS SO ORDERED.

Dated: May 25, 2018



SALLIE KIM
United States Magistrate Judge