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 Betsy DeVos, in her official capacity as Secretary of the United States Department of
 11 Education

12 UNITED STATES DISTRICT COURT
 13 FOR THE CENTRAL DISTRICT OF CALIFORNIA
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 16 SARAH DIEFFENBACHER,
 17 Plaintiff,
 18 v.
 19 BETSY DEVOS, in her official capacity
 as Secretary of the United States
 20 Department of Education,
 21 Defendant.

Case No. 5:17-CV-342-VAP (KKx)
**FEDERAL DEFENDANT’S
 OPPOSITION TO PLAINTIFF’S
 MOTION TO DEEM FACTS IN THE
 FIRST AMENDED COMPLAINT
 ADMITTED**

**DECLARATION OF INDIRA
 CAMERON-BANKS**

Hearing Date: September 10, 2018
 Hearing Time: 2:00 p.m.
 Courtroom: 8A

Honorable Virginia A. Phillips

26
 27 Plaintiff Sara Dieffenbacher’s Motion to Deem Facts in Plaintiff’s First Amended
 28 Complaint Admitted should be denied for the reasons set forth herein.

1 *First*, the Answer filed by Federal Defendant on August 20, 2018 was neither
2 required nor untimely. On June 27, 2018, the Court, vacating its May 4, 2018 Order
3 granting judgment in the Federal Defendant’s favor, granted Plaintiff leave to supplement
4 her complaint on or before July 16, 2018 pursuant to Fed. R. Civ. P. 15(d) authorizing
5 supplemental pleadings, not under Rule 15(a), which is limited to amendments before trial.
6 (Dkt. 72.) On July 16, 2018, Plaintiff filed a voluminous “First Amended Complaint”
7 (“FAC”). (Dkt. 73.)

8 On August 7, 2018, Plaintiff filed the instant Motion for an Order deeming the facts
9 admitted in the FAC on the grounds that Federal Defendant failed to respond to the FAC
10 within 14 days as set forth in Fed. R. Civ. P. 15(a), which applicable to “Amendments
11 Before Trial.” (Dkt. 77.) Plaintiff’s Motion fails to acknowledge that the FAC was
12 authorized pursuant to Fed. R. Civ. P. 15(d) as a “Supplemental Pleading” and not Fed. R.
13 Civ. P. 15(a) as an “Amendment Before Trial.”

14 When a supplemental pleading is allowed pursuant to Fed. R. Civ. P. 15(d), “the
15 court may order that the opposing party plead to the supplemental pleading within a
16 specified time.” (emphasis added); see also *O’Connell & Stevenson, Rutter Group Prac.*
17 *Guide: Federal Civ. Pro. Before Trial ¶ 8:1763 (The Rutter Group 2018)* (“If the court
18 deems it advisable, it may order that the adverse party shall plead to the supplemental
19 pleading, and specify the time within which such pleading is due.” (emphasis added.)) As
20 contemplated in *Wright, Miller & Kane, Federal Practice and Procedure § 1509*:

21 The final sentence of Rule 15(d) indicates that a responsive
22 pleading is not automatically due when a motion for leave to file
23 a supplemental pleading is granted. Whether the adverse party
24 will be directed to answer a supplemental pleading and what the
25 time for doing so will be is a matter that is left to the trial court’s
26 discretion, which typically will be exercised at the time the
27 supplemental pleading is authorized.

28 In this case, the Court’s June 27, 2018 Order did not order Federal Defendant to file an

1 Answer to the supplemental complaint, much less set forth any deadline within which
2 Federal Defendant must respond to the supplemental pleading. (Id.) Notwithstanding this
3 fact, Federal Defendant filed an optional Answer to the FAC on August 20, 2018. (Dkt.
4 78.) Accordingly, Federal Defendant’s August 20, 2018 Answer should not be deemed
5 untimely.

6 *Second*, Plaintiff failed to comply with Local Rule 7-3, requiring a conference of
7 counsel at least seven (7) days prior to the filing of a motion to “discuss thoroughly . . .
8 the substance of the contemplated motion and any potential resolution.” In this case,
9 Plaintiff’s counsel emailed undersigned counsel on August 6, 2018 stating that he was
10 “writing to discuss Defendant’s failure to timely file a responsive pleading” to the FAC.
11 (Declaration of Indira Cameron-Banks [“Cameron-Banks Decl.”] ¶ 2.) Undersigned
12 counsel responded by requesting an August 7, 2018 teleconference, and noting that the
13 United States Attorney’s Office had automatically (perhaps erroneously) calendared a 60
14 day deadline to respond to the FAC as though a new action had been initiated in light of
15 the fact that judgment had been entered in this case. (Id.) During the August 7, 2018
16 teleconference, undersigned counsel indicated that Federal Defendants required an
17 additional week to file an Answer to the voluminous FAC. (Id. at ¶ 3.) Within hours of
18 the teleconference, however, Plaintiff’s counsel filed the instant Motion. (Id.; Dkt. 77.)
19 The failure of Plaintiff’s counsel to comport with Local Rule 7-3 has resulted in
20 unnecessary motion practice and a scheduled hearing.

21 *Third*, Plaintiff -- arguably a putative member of the class seeking certification in
22 *Martin Calvillo Manriquez v. Elisabeth Devos*, CV-17-07210-SK, pending in the District
23 Court for the Northern District of California -- has not suffered any prejudice as a result
24 of the Federal Defendant filing its Answer to the FAC on August 20, 2018. Indeed, the
25 Amended Preliminary Judgment Order in that case orders Federal Defendant to “cease
26 all efforts to collect debts from” Plaintiff and enjoins Federal Defendant from conducting
27 any collection activity on Plaintiff’s federal loans. See *Martin Calvillo Manriquez v.*
28 *Elisabeth Devos*, CV-17-07210-SK, July 19, 2018 “Amended Order Regarding

1 Plaintiffs’ Motion for Preliminary Injunction” (Dkt. 70) attached hereto as **Attachment**
2 **A.**

3 Thus for the foregoing reasons, Plaintiff’s Motion to Deem Facts in the FAC
4 Admitted should be denied.

5 DATE: August 20, 2018.

Respectfully submitted,

6 NICOLA T. HANNA
7 United States Attorney
8 DAVID M. HARRIS
9 Assistant United States Attorney
10 Chief, Civil Division

11 /s/ Indira J. Cameron-Banks
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15 BETSY DEVOS, in her official capacity
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