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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

	)	
	)	Case Number: C 17-cv-07210-SK
	)	
MARTIN CALVILLO MANRIQUEZ, JAMAL CORNELIUS, RTHWAN DOBASHI, and JENNIFER CRAIG on behalf of themselves and all others similarly situated,	)	**PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION TO STAY CERTAIN PROCEEDINGS PENDING APPEAL**
	)	
Plaintiffs,	)	Date Filed: July 27, 2018
	)	
v.	)	Date: September 17, 2018
	)	Time: 9:30 a.m.
ELISABETH DEVOS, in her official capacity as Secretary of the United States Department of Education,	)	Place: Courtroom A, 15th Floor
	)	Judge: Hon. Sallie Kim
	)	

And

THE UNITED STATES DEPARTMENT OF EDUCATION,

Defendants.

Unable to defend its indefensible conduct, the Department of Education ("Department") turns to the only tool in its kit: delay. Although Plaintiffs agree that cross-motions for summary judgment should be stayed pending the Ninth Circuit's decision, peripheral litigation (including class certification, privilege questions, the filing of an answer, and the lodging of the administrative record) can and should move forward. Broadly, the Court can mitigate harm to Plaintiffs by addressing issues unrelated to the appeal and by preparing the case for a swift resolution following the Ninth Circuit's decision. More specifically, Plaintiffs' 132-day-old request for provisional class certification is relevant to Defendants' appeal and should be decided immediately (indeed, the Department should not be permitted to indefinitely delay class certification or provisional certification only to appeal the scope of injunctive relief based on the absence of class certification). Similarly, delaying a ruling on the Motion for Declaration that Documents are Not Privileged, ECF No. 80, and delaying the filing of the administrative record, prejudices Plaintiffs ability to timely mitigate ongoing irreparable harm. Finally, a continuance provides Defendants with an unfair litigation advantage.[1]

By way of background, the pending deadlines in this case are as follows: Defendants' Opposition to Motion for Class Certification is due August 10, 2018, Plaintiffs' Reply is due August 24, 2018, and a hearing is calendared for September 17, 2018. The parties have stipulated to continue all other deadlines pending the Court's decision on this motion.

[1] Irrespective of how the Court rules on this motion, the Court retains the authority to supervise the Department's compliance with the injunction (or, as seems to be the case, their lack of compliance, ECF No. 78 at 2; ECF No. 79 at 4 (placing the onus on individuals to call the Department if their loans are not in forbearance or in stopped collection status)). *See*, *e.g.*, *A&M Records, Inc. v. Napster, Inc.*, 284 F.3d 1091, 1099 (9th Cir. 2002) (explaining that Fed. R. Civ. P. 62(c) permits "a district court to continue supervising compliance with the injunction" during an interlocutory appeal).

Broadly, a blanket stay is inappropriate because any delay in resolution of the litigation harms Plaintiffs, and the Court can mitigate that harm by preparing the case for a quick resolution following the Ninth Circuit's decision.[2] As Defendants correctly note, the Ninth Circuit is set to determine whether "the Privacy Act was violated in the Department's fashioning of the 'Average Earnings Rule'." ECF No. 82 at 7. Defendants also correctly state that an appeal on that issue will be relevant to summary judgment. But, Defendants do not explain how the Ninth Circuit's decision could plausibly provide guidance on other outstanding issues. Indeed, given that the Court's order on the preliminary injunction did not discuss the substance of Plaintiffs' request for class treatment, issues related to the administrative record (except, of course, to note that the full record may well establish other bases to set aside the rule on the merits), or whether the Department admits or denies the facts in the amended complaint, it is difficult to see how the Ninth Circuit could opine on those topics. *See, e.g., Jensen v. Kelly*, 187 Fed. App'x 694, 695 (9th Cir. 2006) (leaving to the district court to address issues in the first instance).

Given that the appeal will not provide the Court with guidance on these peripheral issues, any delay will unnecessarily prolong the resolution of the case for a year or more and that delay will harm Plaintiffs. *See* Fed. Judicial Ctr., *U.S. Court of Appeals Summary* (March 2018), *available at:* http://www.uscourts.gov/sites/default/files/data_tables/fcms_na_appsumary0331.2018.pdf (showing that the median time for disposition is 12.3 months in the Ninth Circuit).[3]

[2] Defendants correctly enumerate the factors that the Court must consider in evaluating this motion, but are incorrect to assert, for the reasons stated in this opposition, that the factors favor a stay.

[3] Although preliminary injunction appeals are generally expedited, this appeal is already slowing down as Defendants have indicated that they will be requesting additional time to file an opening brief.

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Contrary to Defendants' assertions, the Court itself acknowledged that it has not "frozen all the harm" that Plaintiffs are experiencing by virtue of the Department's failure to discharge their unlawful loans, ECF No. 76 at 12:15; *see also* ECF No. 60 at 32 (preliminary injunction order finding that economic harm constituted irreparable harm in this case, and noting that "[b]oth parties discuss the economic harm from denial of full relief from debt."); *id.* at 33 (finding loss of opportunity to constitute irreparable harm in this case, and noting that "Plaintiffs assert[tion] in this area is linked to the failure to obtain a full discharge"); ECF No. 35-3, ¶¶ 13 & 23 (Decl. of Rthwan Dobashi) (discussing the impact of his loans on the possibility of seeking further education and on his ability to save money); ECF No. 48-1 ¶¶ 20-24 (Decl. of Marta Mercado) (discussing inability to obtain affordable, stable housing on account of the Department's failure to fully discharge her debt). Delaying any progress of the case for approximately a year compounds that harm for no reason. The Court should instead require the parties to continue litigating issues that are independent of the interlocutory appeal so that they may quickly engage in dispositive briefing once the Ninth Circuit renders its decision. *See, e.g., Karnoski v. Trump*, No. 17-cv-01297 (W.D. Wash. *filed* Aug. 28, 2017) (proceeding with litigation, including on issues related to the deliberative process privilege, during interlocutory appeal in challenge to military ban on transgender individuals).

More specifically, Plaintiffs' longstanding request for class certification is relevant to the appeal and should be resolved immediately. In both their Motion for a Preliminary Injunction, and in their Motion for Class Certification, Plaintiffs asked the Court to provisionally certify the class

for purposes of the injunction.[4] ECF No. 35 at 4 n.1; ECF No. 47 at 3-4 ("And . . . Plaintiffs seek provisional certification of the class for purposes of that motion"). That request has been pending for 132 days. Although the Court presumably delayed any decision on provisional certification to ensure that the Department could be fully heard, the Department has foreshadowed that its appeal may focus on the scope of the Court's preliminary injunction and the absence of any provisionally (or fully) certified class. *See* ECF No. 59 at 34:17-35:8 ("[W]e think the Ninth Circuit forecloses these kind of analysis into harm suffered by putative class members who have not been made party to this litigation . . ."); ECF No. 76 at 7:7-12 ("So according to the specific terms of your honor's order, it provided forbearance to individuals who – specifically the Named Plaintiffs, which, you know, the Court did not make any determination on class certification, conditional or otherwise, so we have interpreted that to apply only with respect to Named Plaintiffs"). It would be a cruel and perverse irony to allow Defendants to indefinitely postpone a decision on class certification, only for them to argue on appeal that the scope of the injunction is improper because the Court failed to certify (or provisionally certify) the class.[5] That argument, and a reversal on that ground, would be particularly egregious because the Department itself defined this proposed class, ECF No. 47 at 3-4, and because Defense counsel practically conceded the class certification motion when he said, "[that the] kind of the relief that is available to these borrowers is available to as

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[4] Plaintiffs reserve the right to defend the scope of the injunction on alternative grounds, including the arguments Plaintiffs highlighted at the hearing on June 11, 2018. *See, e.g.,* ECF No. 76 at 6.

[5] Defendants urge the Court to stay "its *decision* on this issue until appellate review has concluded," ECF No. 82 at 6, but do not offer any specific reason why the Court should do so. Nor do Defendants explain why this makes any sense given their agreement to complete briefing on the motion.

(sic) their membership as a class or a group that went to these specific Corinthian programs," ECF No. 59 at 44:22-25.

Similarly, further delay on Plaintiffs' Motion for Declaration that Documents are Not Privileged, ECF No. 80, and any delay in the filing of the administrative record, also prejudices Plaintiffs' ability to timely curb ongoing irreparable harm. As noted above, although the Court ordered the Department to stop inflicting harm on students by using the Average Earnings Rule, the Court itself acknowledged that it had not "frozen all the harm." ECF No. 76 at 12-15. Specifically, the Court was unable to limit the damage stemming from the Department's refusal to discharge Plaintiffs' unlawful loans because it lacked "key documentation" about the Corinthian Rule, ECF No. 60 at 37. As the Court's order reflects, these documents will shed light on the ultimate merits of Plaintiffs' case, but they are not presently before this Court nor, therefore, will they be before the Ninth Circuit. There is no ruling that could issue from Defendants' interlocutory appeal that would eliminate the need to decide this motion. Any litigation burden to the Department – briefing five pages on an issue that Plaintiffs have already briefed and filed, *see* ECF No. 72 (limiting the Department's brief to five pages), and lodging an administrative record that the Department is *already* likely to file in the related, *California v. DeVos* case **--** is vastly outweighed by the continued harm to Plaintiffs.[6]

Finally, a continuance is prejudicial to Plaintiffs as it provides Defendants with an unfair litigation advantage. Plaintiffs' Motion for Class Certification has been pending for 99 days; the

[6] Defendants complain about a "large and potentially wasteful drain on resources," ECF No. 82 at 9, without providing any further detail. Presumably, Defendants can only make this claim in a conclusory manner because, at some point in this litigation, Defendants are going to have to answer Plaintiffs' complaint, deal with class certification, address the privilege questions, and lodge the administrative record.

Department has known its opposition deadline for 46 days; and, the Department has waited to the eve of that deadline to file this request. Similarly, the Department has not filed any responsive pleading in this case, even though Plaintiffs filed this case 219 days ago, and the Court deemed the amended complaint filed 70 days ago. There is no reason that the Department should have such an extensive period of time to simply admit or deny Plaintiffs' allegations, particularly when the typical litigant has far less time to respond. *See* Fed. R. Civ. P. 12(a)(1) (stating that a defendant "must serve an answer. . . within 21 days after being served" unless the Defendant waived service or was outside any judicial district in the U.S.); Fed. R. Civ. P. 12(a)(2) (providing the United States with 60 days to respond). An extended delay is even more unreasonable because the Ninth Circuit's legal conclusions are irrelevant to whether the Department agrees or disagrees with Plaintiffs' allegations.[7]

Ultimately, any long-term delay in this case hurts the very people that the Department should be protecting. There is no good reason to halt briefing on issues unrelated to the appeal and the Court should prepare this case for a swift resolution following the Ninth Circuit's decision.[8]

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[7] The Court should also discourage the Department's games respecting the Motion for Declaration that Documents are Not Privileged. In an initial discussion about the possibility of a motion to stay, the Department refused to provide Plaintiffs with any detail on when it would likely file its notice of appeal and the motion to stay. Instead, the Department waited for Plaintiffs to file their Motion for Declaration that Documents are Not Privileged on July 23, 2018. A mere 15 minutes after that filing, the Department informed Plaintiffs that they had decided to file a Notice of Appeal and this motion the following day. The Department should not be rewarded with months (or longer) to review and prepare a response to Plaintiffs' motion.

[8] Plaintiffs also respectfully request an opportunity to be heard on this motion and that the Court deny Defendants' request to "decide the motion on the papers submitted," ECF No. 82 at 2.

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Dated: July 27, 2018

Respectfully submitted,

<u>/s Joshua D. Rovenger</u>

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