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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

SARAH DIEFFENBACHER,

*Plaintiff*,

v.

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

*Defendant*.

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

**PLAINTIFF'S MEMORANDUM IN OPPOSITION TO MOTION FOR VOLUNTARY REMAND**

Hearing Date: June 5, 2017
Hearing Time: 2:00 p.m.
Ctrm.: 8A
Hon.: Virginia A. Phillips

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Plaintiff, Sarah Dieffenbacher, strongly opposes remand of this fully ripe and justiciable case because it would subject her to prejudice and delay with no indication that Defendant would fully and fairly adjudicate her claims. Plaintiff has challenged the legal enforceability of her federal student loans four times over the course of more than two years. She has consistently asserted that her loans are not legally enforceable because her school's violations of state law create a borrower defense to repayment. Yet more than a year after her first challenge to her loans' enforceability, Plaintiff received notice of proposed wage garnishment of her federal loans. In response and in accordance with the relevant procedure, Plaintiff timely submitted an objection along with extensive evidence and a request for an in-person hearing. In its "Administrative Wage Garnishment Hearing Decision" ("Decision"), Defendant approved wage garnishment, issuing a decision on the merits of legal enforceability that disregards Plaintiff's arguments and evidence and appears to misunderstand the standard for legal enforceability. Defendant's Decision instructed Plaintiff to "bring[] a lawsuit in Federal District Court" if she "disagree[s] with this decision."

Defendant's Decision violated the Administrative Procedure Act because it was arbitrary, capricious, and contrary to law. The Decision failed to address Plaintiff's arguments, failed to consider her evidence, and rendered a decision on legal enforceability that misstates the applicable legal standard. Defendant's proposed voluntary remand offers no relief for Plaintiff. Because Defendant admits no error and specifies no meaningful guidelines for reconsideration—a process not contemplated by the relevant statute or regulations applicable to this case—Defendant's remand should be denied. Defendant's remand will not serve the interests of judicial economy; instead, it will only delay the adjudication of Plaintiff's ripe and exhausted claims and prolong the harms that Plaintiff continues to experience.

Defendant's Motion appears to be the product of strategic litigation tactics to avoid ever having to discharge loans subject to borrower defense to repayment claims. Plaintiff has done everything in her power to assert her borrower defense rights in accordance with Defendant's procedures. However, two years later, with her family's wellbeing now threatened by wage garnishment, Plaintiff is no closer to discharge. Defendant's proposed remand offers further unnecessary delay and is unacceptable.

## BACKGROUND

*1. Plaintiff has challenged the legal enforceability of her loans four times.*

Plaintiff attended Everest College-Ontario Metro, in Ontario, California ("Everest") between 2007 and 2012, where she incurred approximately $50,000 in federal student loan debt, including the three Federal Family Education Loan ("FFEL") Program loans directly at issue in this case. Everest was part of Corinthian Colleges, Inc. ("Corinthian"), a notorious chain of for-profit schools that shut down in 2015 amidst findings of widespread fraud. Plaintiff experienced this misconduct firsthand at Everest, where school staff misrepresented Plaintiff's career prospects after attending Everest, the career assistance provided by Everest, the program quality and career training offered by Everest, the transferability and usefulness of Everest credits toward further education, and program cost. Everest representatives also unfairly targeted Plaintiff as a single mother and used unfair and deceptive financial aid practices. After graduating from Everest, Plaintiff was unable to find a job in her field and quickly fell behind on her loan payments.

By law, Everest's violations of state law constitute a "defense to repayment" of Plaintiff's federal student loans that renders these loans legally unenforceable. In particular, Department of Education ("Department") regulations specify that the holder of a FFEL loan is "subject to all claims and defenses that the borrower could assert against the school with respect to that loan" if a sufficiently close relationship existed between the school and the lender. 34 C.F.R. § 682.209(g).

Similarly, Plaintiff's loan contract, called a Master Promissory Note ("MPN"), provides that she is entitled to assert, as a defense to repayment of the loan, "all claims and defenses that [she] could assert against the school" with respect to the loans.

Plaintiff has challenged the legal enforceability of her federal student loans from Everest four times, including in the context of the wage garnishment proceedings giving rise to this case. Compl. ¶ 2 (Dkt. #1); *see also* App. for TRO 6–9 (Dkt. #2) (summarizing Plaintiff's efforts). Each time, Plaintiff has asserted that her loans are not enforceable because she has a defense to repayment. After Plaintiff's first defense to repayment application in March 2015, almost two years passed without any resolution of these assertions. The wage garnishment hearing decision challenged in this case is the Department's first decision regarding the legal enforceability of her loans. This Decision, however, is arbitrary, capricious, and contrary to the evidence.

2. *Defendant ordered wage garnishment notwithstanding Plaintiff's challenges, evidentiary submissions, and request for a hearing.*

Plaintiff first received a notice of proposed garnishment from Educational Credit Management Corporation ("ECMC"), the guaranty agency for her federal student loans, on October 19, 2016, approximately a year and a half after her first objection to the legal enforceability of her loans. *See* Compl. ¶¶ 39, 46. In response, through counsel, Plaintiff objected to the proposed wage garnishment on the grounds that her loans are not legally enforceable and requested an in-person hearing. *Id.* ¶¶ 47–49. Her objection included 29 pages of legal analysis and 254 pages of evidence. *Id.* ECMC referred Plaintiff's objection to wage garnishment and to the legal enforceability of her loans to the Department for adjudication. *Id.* ¶¶ 57, 59, 61. On January 30, 2017, the Department issued an "Administrative Wage Garnishment Hearing Decision" denying Plaintiff's objections to the legal enforceability of her loans and authorizing wage garnishment. *See* Decision (Dkt.

#2-6 at *100–03). The Decision states: "the Department finds that the borrower [sic] student loan debt is still legally enforceable" and concludes that her "account is subject to collection through administrative wage garnishment (AWG) at 15% of . . . disposable pay." *Id.* at 1–2.

Defendant's Decision fails to address Plaintiff's arguments and extensive evidentiary submissions and applies the wrong standard. While the Decision asserts that it is based upon "careful review of [Plaintiff's] arguments and all available records related to [Plaintiff's] account, including those submitted by [Plaintiff] and those maintained by ECMC," *id.* at 1, and lists "[f]ile documents provided by ECMC" as the "Evidence Considered, *id.*, the entire "Reason for Decision" given is:

> Your client objected that she believe [sic] that her loans are not an enforceable debts [sic]. On November 14, 2016, ECMC explained to you and your client why these loans were enforceable and they had addressed your concerns and enclosed copy of the borrower's promissory notes. Because ECMC holds the promissory note(s) and other and other [sic] records supporting the existence of this debt, the borrower has the burden to prove that the debt is not owed. The Promissory note that forms the basis of this debt is a contract between the borrower and the lender, and any subsequent holder of the promissory note. Please have the borrower establish a repayment arrangement to avoid the possibility of wage garnishment with ECMC's Internal Collection Department at 800-367-1589, whereas the Department finds that the borrower [sic] student loan debt is still legally enforceable; therefore the borrower objection is denied.

*Id.* at 2. The Department further instructs, "If you disagree with this decision, you may have this decision reviewed by bringing a lawsuit in Federal District Court." *Id.* at 1.

After receiving Defendant's decision and learning that her employer had been ordered to begin garnishing her wages, Plaintiff was forced to initiate this action and seek emergency relief to halt garnishment that would have devastated her family. *See* Compl.; App. for TRO. On March 2, 2017, the parties stipulated to a suspension of garnishment pending final judgment in this case (Dkt. #11), and the Court approved the stipulation on March 6, 2017 (Dkt. #18).

On May 8, 2017, Defendant filed a Motion for Voluntary Remand, stating, "The DOE is reconsidering the . . . decision at issue" and seeking "voluntary remand of this matter so that the challenged decision can be reconsidered and re-issued in a way that would not be arbitrary, capricious or contrary to law." Def.'s Mot. for Vol. Remand 1–2 (Dkt. #25). Defendant promises a "reconsideration decision . . . within 90 days of remand." *Id.* at ii.

*3. Plaintiff suffers ongoing harm while this matter is pending.*

Plaintiff's inability to resolve her federal student loan debt from Everest continues to hurt her finances and her mental health. Plaintiff is a single mother of four with less than $100 to her name. Decl. of Pl. in Supp. of TRO ¶¶ 4, 10 (Dkt. #2-3). She has tens of thousands of dollars of federal student loan debt that should be dischargeable based on her defense to repayment. Pl.'s Obj. to Prop. Admin. Wage Garnishment 2 (Dkt. #2-4 at *31–59). As a result of that debt and its uncertain status, Plaintiff suffers great anxiety. Aff. of Sarah Dieffenbacher ¶ 98 (Dkt. #2-4 at *61–70) ("I am always so stressed out because of this debt."). Plaintiff's outstanding federal student loan debt has also damaged her consumer credit, forcing her to use an expensive auto loan to finance the car she needs to work as a home healthcare phlebotomist, and further threatening her precarious financial situation. *See id.* ¶ 96. The emotional strain and adverse credit impacts of her federal student loans continue unabated by the suspension of garnishment.

## ARGUMENT

### I. Defendant's Decision was arbitrary, capricious, and contrary to law.

Defendant's Decision regarding Plaintiff's administrative wage garnishment violates the Administrative Procedure Act, 5 U.S.C. § 706(2)(A), because it is arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with law. In particular, the Decision fails to address any of Plaintiff's arguments, fails to consider or address the evidentiary record provided by Plaintiff, and appears to misunderstand the relevant standard for legal enforceability.

Because Plaintiff challenged the legal enforceability of her debt, she had the burden to "prove by the preponderance of the evidence that . . . [her defaulted student loan] debt is not enforceable under applicable law." 34 C.F.R. § 682.410(b)(9)(i)(F)(1)(i). In her written objection to the proposed wage garnishment and request for an in-person hearing, Plaintiff objected to the wage garnishment on the grounds that her loans are not legally enforceable because of the misconduct committed by Everest. She included a 29-page letter explaining why her loans are not enforceable. *See* Pl.'s Obj. to Prop. Admin. Wage Garnishment. She also included 254 pages of exhibits, including a sworn statement from Plaintiff, records from Plaintiff, sworn declarations by other Corinthian students, and findings by the California Attorney General. *See id.* at 29 (summarizing supporting documentation enclosed). Her arguments and evidence are more than sufficient to meet her burden of demonstrating that her debt is not enforceable under applicable law.

Defendant entirely failed to respond to any of the arguments that Plaintiff raised in her written objection to wage garnishment. In her objection to garnishment, Plaintiff challenged the enforceability of the loans, citing Everest's misrepresentations regarding its program costs and quality, availability of career assistance, transferability of credits, and career prospects, as well as its unfair and predatory targeting of Plaintiff as a single mother and its unfair and deceptive

financial aid practices, all of which constitute "fraudulent," "unfair," and "misleading" conduct proscribed by California law. *See id.* at 3. However, Defendant did not discuss these issues in its cursory dismissal. Instead, Defendant stated simply that, "ECMC holds the promissory note(s) and other and other [sic] records supporting the existence of this debt." Decision 2. Plaintiff did not contest the existence of a promissory note. She objected to its enforceability on the basis of her borrower defense to repayment. Defendant's stated rationale misunderstands the relevant standard for legal enforceability by asserting that the debt is enforceable solely because the promissory note exists. Moreover, Defendant failed to address any of the evidence submitted by Plaintiff, citing only her promissory note. Defendant's cursory and illogical rejection of Plaintiff's detailed objections and supporting evidence was arbitrary, capricious, and contrary to law.

## II. Defendant's proposed remand admits no error, offers no guidelines for improved agency review, and imposes ongoing harm.

Defendant asserts that the Department has "already undertaken review and reconsideration" of the Decision and requests a voluntary remand in the interest of judicial economy. Def.'s Mot. for Vol. Remand ii, 2–3. However, nowhere does Defendant admit any deficiencies in its substantive decision of legal enforceability, nor in the process used to arrive at that decision. Remand, without further direction from the Court, would enable Defendant to prolong Plaintiff's ordeal unjustifiably and without any assurances that Defendant will correct the legal shortcomings of the process to date.

Compounding this problem, the Debt Collection Improvement Act ("DCIA") and implementing regulations do not contemplate reconsideration of the kind proposed by Defendant. *See* 31 U.S.C. §§ 3716 *et seq.*; 31 C.F.R. § 285.11 (Treasury regulations); 34 C.F.R. §§ 30.20–31 (Department regulations).[1] In other

[1] The Department's regulations contemplate reconsideration when requested by the borrower on the basis of either financial hardship or new evidence not submitted

words, Defendant's request for remand for reconsideration "in accordance with the standards set forth by the Debt Collection Improvement Act of 1996 and the regulations promulgated thereunder," Def.'s Mot. for Vol. Remand 1, offers no guidance as to what standard Defendant would apply. Unanswered questions about Defendant's proposed reconsideration include the following:

- Whether Defendant will approach reconsideration as a review of its prior decision with an accompanying standard of review or a completely new proceeding;
- What evidence Defendant actually considered when making the first Decision;
- Whether Defendant intends to issue a decision regarding legal enforceability, which would affect Plaintiff's right to loan discharge under defense to repayment;
- Whether Defendant intends to treat any reconsideration decision about legal enforceability as determinative not only of the legality of wage garnishment but also of Plaintiff's right to loan discharge under borrower defense to repayment; and
- Whether, upon reconsideration, the Department will consider any additional evidence in its possession, including evidence submitted by Plaintiff in conjunction with her request for hearing and other evidence in the Department's possession regarding misconduct at Corinthian schools.

Without clarity on these questions, a remand offers the prospect of delay—including ongoing harm—with no assurances of proper agency review on remand.

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with the borrower's initial objection to wage garnishment. *See* 34 C.F.R. § 34.12. Such circumstances are not present in this case.

## III. Voluntary remand is not appropriate where the agency does not admit error or demonstrate a commitment to a changed approach.

Where an agency has not admitted error and also not committed to a changed approach on remand, voluntary remand is inappropriate because the agency's lack of commitment to changing its approach indicates bad faith. *See SKF USA Inc. v. United States*, 254 F.3d 1022, 1029 (Fed. Cir. 2001); *see also Cal. Cmtys. Against Toxics v. EPA*, 688 F.3d 989, 992 (9th Cir. 2012) (citing *SKF USA Inc.*, 254 F.3d at 1029) ("[C]ourts only refuse voluntarily requested remand when the agency's request is frivolous or made in bad faith."); *accord N. Coast Rivers All. v. U.S. Dep't of the Interior*, No. 116-CV-00307, 2016 WL 8673038, at *3 (E.D. Cal. Dec. 16, 2016).[2] Thus, the appropriateness of voluntary remand depends upon whether the agency has confessed error, or at a minimum, committed to a changed approach. *See SKF USA Inc.*, 254 F.3d at 1027–28 (outlining five scenarios of voluntary remand); *accord N. Coast Rivers All.*, 2016 WL 8673038, at *3 ("Courts in this Circuit generally look to the Federal Circuit's decision in *SKF USA* for guidance when reviewing requests for voluntary remand.").

This rule ensures that voluntary remand promotes judicial economy. *See Nat. Res. Def. Council, Inc. v. U.S. Dep't of Interior*, 275 F. Supp. 2d 1136, 1141 (C.D. Cal. 2002) ("[v]oluntary remand . . . promotes judicial economy by allowing the relevant agency to reconsider and *rectify an erroneous decision* without further

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[2] Conversely, admission of error and commitment to corrections below demonstrate good faith supporting voluntary remand. *See Cal. Cmtys. Against Toxics*, 688 F.3d at 992 ("Because the EPA has recognized the merits of the petitioners' challenges and has been forthcoming in these proceedings, there is no evidence that the EPA's request is frivolous or made in bad faith. We therefore grant the EPA's request for remand."); *accord United States v. Gonzales & Gonzales Bonds & Ins. Agency, Inc.*, No. C-09-4029, 2011 WL 3607790, at *4 (N.D. Cal. Aug. 16, 2011) (granting voluntary remand because agency "has not only identified that errors were made, but has also indicated which specific errors were made").

expenditure of judicial resources") (emphasis added). Admissions of error by the agency and instructions from the court create law of the case that binds the agency on remand, ensuring that the agency does not repeat its mistakes. *See, e.g.*, *Ischay v. Barnhart*, 383 F. Supp. 2d 1199, 1213 (C.D. Cal. 2005) ("[A]n administrative agency is bound on remand to apply the legal principles laid down by the reviewing court."); *accord Ford Motor Co. v. N.L.R.B.*, 305 U.S. 364, 372 (1939) (noting that representations to court made in agency's request for remand "created a condition which the [agency] was bound to observe" on remand). For example, in *Natural Resources Defense Council*, this Court granted voluntary remand of an agency decision because the decision was based upon an estimation methodology that had been subsequently invalidated by a federal court. 275 F. Supp. 2d, at 1141. Importantly, the agency itself recognized that its initial decision was flawed in light of subsequent developments, and sought to reconsider its decision under a new methodology. *Id.* On remand, the Court issued specific instructions to the agency about the methodology to be used on reconsideration, *id.* at 1142, the time for reconsideration, *id.* at 1142–43, and the status of the agency action pending reconsideration, *id.* at 1143–56. This disposition ensured improved agency review on remand.

The decisions that Defendant cites support this rule. Unlike in the case at hand, in the cited cases, (1) the agency admitted errors to be corrected on remand, *see ASSE Int'l, Inc. v. Kerry*, 182 F. Supp. 3d 1059, 1063 (C.D. Cal. 2016) (granting voluntary remand "to correct . . . errors identified by the Ninth Circuit"); *Nat. Res. Def. Council, Inc.*, 275 F. Supp. at 1141; *Ethyl Corp. v. Browner*, 989 F.2d 522, 524 (D.C. Cir. 1993) (granting voluntary remand where agency "acknowledge[d] that evidence developed since [agency action] has undermined the stated basis for [action]"), (2) the agency sought to withdraw its own decision, *see Ford Motor Co.*, 305 U.S. at 372, or (3) the agency's regulations specifically authorized *sua sponte* reconsideration, *see Trujillo v. Gen. Elec. Co.*, 621 F.2d

1084, 1086 (10th Cir. 1980) ("A District Director has the right to reconsider such an order under [agency regulations]" (citing 29 C.F.R. § 1601.21(b), which authorizes agency to reconsider "on its own initiative")).

**IV. The Court should deny voluntary remand.**

The Court should deny voluntary remand in this case because Defendant's refusal to admit any error or commit to a changed approach on remand, and its two-year history of delay demonstrate bad faith. *See, e.g.*, *SKF USA Inc.*, 254 F.3d at 1029; *N. Coast Rivers All.*, 2016 WL 8673038, at *3. Despite the blatant defects in the challenged Decision, Defendant has admitted no error, has not withdrawn the Decision, and points to no statutory or legal authority permitting reconsideration of the kind proposed. In short, Defendant has committed to no corrections on remand. Indeed, the only possible guidance provided by Defendant—that reconsideration will proceed "in accordance with the standards set forth by the [DCIA] and the regulations promulgated thereunder," Def.'s Mot. for Vol. Remand 1—appears illusory because these authorities do not specify applicable standards or procedures for reconsideration. Moreover, this Decision comes after Plaintiff has waited two years to adjudicate the legal enforceability of her loans. Absent Court intervention, remand promises only to further delay adjudication of Plaintiff's claims.

Plaintiff's case is entitled to judicial review. Plaintiff's case is fully exhausted because she has challenged the legal enforceability of her loans four times, using all available administrative procedures. *See Darby v. Cisneros*, 509 U.S. 137, 146 (1993). Her case is ripe because she challenges final agency action and would be harmed by further delay. *See Abbott Labs. v. Gardner*, 387 U.S. 136, 149 (1967), *abrogated on other grounds by Califano v. Sanders*, 430 U.S. 99 (1977). In addition, wage garnishment regulations expressly provide for judicial review of this kind, *see* 31 C.F.R. § 285.11(f)(12) ("The hearing official's decision will be the final agency action for the purposes of judicial review under the

Administrative Procedure Act (5 U.S.C. 701 et seq.)"), and Defendant invited Plaintiff to seek judicial review in the challenged Decision: "If you disagree with this decision, you may have this decision reviewed by bringing a lawsuit in Federal District Court," Decision 1.

Denying remand will expedite meaningful relief for Plaintiff. At this stage, the Court has not yet had the opportunity to evaluate Defendant's Decision on the administrative record. After such an evaluation, the Court may vacate Defendant's Decision before remanding, creating meaningful law of the case for the parties. *See* 5 U.S.C. § 706(2)(A) ("The reviewing court shall . . . hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or not otherwise in accordance with law . . . ."); *see also* Compl. 12 (requesting that Court strike or set aside Defendant's Decision). Once the Court has reviewed the record, it may also declare Plaintiff's student loan debt unenforceable, without further agency review. *See* 5 U.S.C. § 706 ("To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law . . . and determine the meaning or applicability of the terms of an agency action."); *see also* Compl. 12–13 (asking Court to find Defendant's determination, that Plaintiff's debt is legally enforceable, arbitrary, capricious, and contrary to law).

Denying remand and allowing Plaintiff's case to move forward in this Court will provide Plaintiff and this Court additional information about Defendant's position. For instance, Defendant asserts that the Department has "already undertaken review and reconsideration of the underlying final agency decision giving rise to this matter. . . ." Def.'s Mot. for Vol. Remand ii. In a supporting declaration dated May 5, 2017, Supervisory Program and Management Analyst Myra Tyler states, "Education has begun the process of reconsidering its Administrative Wage Garnishment Hearing Decision dated January 30, 2017." Tyler Decl. ¶ 4 (Dkt. #25-1). Plaintiff has not yet had an opportunity to question or

depose this witness and the nature and scope of the reconsideration that Defendant has allegedly already begun is completely unknown to Plaintiff. Indeed, in light of Defendant's refusal to admit any defect in the challenged Decision, it is not clear why, from Defendant's perspective, the Department has "already undertaken review and reconsideration."

Defendant has had more than two years to evaluate Plaintiff's borrower defense claims and the legal enforceability of her loans, and has failed to do so in a legally acceptable manner in that time frame. Defendant is not now entitled to voluntary remand. The Court can best move this dispute toward a meaningful resolution and an end to Plaintiff's ongoing hardship.

## V. In the alternative, the Court should direct Defendant to correct the deficiencies of the challenged Decision.

Should the Court grant Defendant's Motion for Voluntary Remand, Plaintiff respectfully requests that the Court direct Defendant to:

- Consider the evidence presented by Plaintiff and rule on the legal enforceability of her loans;
- Issue a well-reasoned decision regarding the legal enforceability of Plaintiff's loans that is based on the complete record, including, but not limited to, the materials submitted by Plaintiff in her objection to the proposed wage garnishment;
- As part of its ruling, consider evidence the Department has in its possession regarding misconduct at Corinthian and Everest;
- Acknowledge that Defendant's decision on legal enforceability will also apply to Plaintiff's pending defense to repayment claims and not solely to the proposed wage garnishment; and
- Acknowledge that the Court retains jurisdiction to consider and review the Defendant's decision on remand.

Defendant seeks to delay the adjudication of this case by seeking remand for reconsideration without committing to correcting its errors. By denying remand or attaching specific conditions to reconsideration, the Court can allow Plaintiff a legally sufficient resolution of her claims without adding to the extraordinary delay she has already suffered.

## CONCLUSION

For the forgoing reasons, Plaintiff respectfully requests that the Court deny the Defendant's Motion for Voluntary Remand.

Dated: May 15, 2017

Respectfully Submitted,

/s/ *Alec P. Harris*

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