UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CALIFORNIA ASSOCIATION OF PRIVATE POSTSECONDARY SCHOOLS, Plaintiff, v. ELISABETH DEVOS, in her official capacity as Secretary of the U.S. Department of Education, *et al.*, Defendants, MEAGHAN BAUER, 80 Foster Street, Apt. 308 Peabody, MA 01960, [Proposed] Defendant-Intervenor, STEPHANO DEL ROSE, 7 Pleasant Garden Road Canton, MA 02021, [Proposed] Defendant-Intervenor.	)	Civil Action No. 17-999 (RDM)

MEAGHAN BAUER AND STEPHANO DEL ROSE'S
MOTION TO INTERVENE AS DEFENDANTS

Meaghan Bauer and Stephano Del Rose respectfully request that they be granted leave to intervene in this action as defendants under Federal Rule of Civil Procedure 24(a) or (b). They have interests relating to the subject matter of this action—the Department of Education's recently promulgated regulations protecting student borrowers—and the disposition of this action may impede or impair their ability to protect those interests, which are not adequately represented by existing parties to this litigation. Specifically, Ms. Bauer and Mr. Del Rose are federal Direct Loan borrowers with claims against a proprietary school that will be directly affected by the challenged rules' provisions concerning arbitration and class action waivers. They have an interest in

defending the lawfulness and timely effectuation of the rules, and that interest will not be adequately represented by the federal defendants, who have already announced a delay of the effective date of the rules and have suggested that they may not defend the lawfulness of the challenged provisions.

Proposed intervenors have contacted counsel for all parties to obtain their views on this motion. Plaintiff has advised that it opposes the relief sought by Ms. Bauer and Mr. Del Rose, and defendants take no position on the motion.

For the reasons set forth in the accompanying memorandum of points and authorities and declarations, this Court should grant Ms. Bauer and Mr. Del Rose's motion to intervene as defendants. Should this Court go forward with the motion hearing scheduled for June 21, 2017, Ms. Bauer and Mr. Del Rose respectfully request the opportunity through counsel to be heard.

Pursuant to Local Rule 7(c), a proposed order is attached.

Respectfully submitted,

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Dated: June 15, 2017

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FOR THE DISTRICT OF COLUMBIA

CALIFORNIA ASSOCIATION OF PRIVATE POSTSECONDARY SCHOOLS, Plaintiff, v. ELISABETH DEVOS, in her official capacity as Secretary of the U.S. Department of Education, *et al.*, Defendants, MEAGHAN BAUER and STEPHANO DEL ROSE, [Proposed] Defendant-Intervenors.	)	Civil Action No. 17-999 (RDM)

MEMORANDUM OF POINTS AND AUTHORITIES
IN SUPPORT OF THE MOTION TO INTERVENE AS DEFENDANTS
FILED BY MEAGHAN BAUER AND STEPHANO DEL ROSE

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Counsel for Proposed Defendant-Intervenors Meaghan Bauer and Stephano Del Rose

Dated: June 15, 2017

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Meaghan Bauer and Stephano Del Rose respectfully request that they be granted leave to intervene in this action as defendants under Federal Rule of Civil Procedure 24(a) or (b). As explained in this memorandum and accompanying declarations, they have interests relating to the subject matter of this action—regulations recently promulgated by the Department of Education (ED) to protect student borrowers—and the disposition of this action may impede or impair their ability to protect those interests, which are not adequately represented by existing parties to this litigation. Specifically, Ms. Bauer and Mr. Del Rose are federal Direct Loan borrowers with claims against a proprietary school that will be directly affected by the challenged rules' provisions concerning arbitration and class action waivers. They have an interest in defending the lawfulness and timely effectuation of the rules, and that interest will not be adequately represented by the federal defendants, who have already announced a delay of the effective date of the rules and have suggested that they may not defend the lawfulness of the challenged provisions.

Proposed intervenors have contacted counsel for all parties to obtain their views on this motion. Plaintiff has indicated that it will oppose this motion, and defendants take no position on the motion.

FACTUAL BACKGROUND

I. The Rules

The federal government spends more than $125 billion annually on student aid distributed under Title IV of the Higher Education Act, 20 U.S.C. § 1070 *et seq*. Title IV is the largest stream of federal postsecondary education funding, and the bulk of funds available under it are distributed through the federal Direct Loan Program. Students use Direct Loans to attend colleges, career training programs, and graduate schools authorized to participate in the program. In exchange for these federal funds, participating schools must enter into Program Participation Agreements (PPA)

with ED and confirm in those agreements that they will comply with the Higher Education Act and all applicable regulations. 34 C.F.R. § 685.300(b).

In 2016, ED initiated a rulemaking to amend its Title IV regulations, including regulations governing a school's obligations attendant to Direct Loan Program participation. ED subsequently adopted two rules: the "Borrower Defense Regulations," 81 Fed. Reg. 75,926 (Nov. 1, 2016), and the "Borrower Defense Procedures," 82 Fed. Reg. 6253 (Jan. 19, 2017) (collectively, Borrower Defense Provisions). The amendments to ED's Title IV regulations were intended "to protect student loan borrowers from misleading, deceitful, and predatory practices of, and failures to fulfill contractual promises by institutions participating" in federal student aid programs. 81 Fed. Reg. at 75,926.

The Borrower Defense Provisions implement a statutory provision giving students the right to seek loan cancellation based on the illegal conduct of their schools. They strengthen financial responsibility standards applied to participating schools and require some institutions to provide warnings regarding their former students' loan repayment rates. Of particular importance here, the Borrower Defense Provisions also amend 34 C.F.R. § 685.300 to address the extent to which a school wishing to participate in the Direct Loan Program may rely on predispute arbitration agreements or class action waiver provisions with students to resolve claims related to the making of a Direct Loan or the education financed by that loan. Specifically, the rule provides that a school may not "enter into a predispute agreement to arbitrate a borrower defense claim, or rely in any way on a predispute arbitration agreement with respect to any aspect of a borrower defense claim." 81 Fed. Reg. at 76,088 (proposed § 685.300(f)(i)). The Final Rule similarly amends § 685.300 to require a participating school to forgo reliance on any predispute agreement with a student that

waives the student's right to participate in a class action against the school related to a borrower defense claim. *Id.* (proposed § 685.300(e)).

Once the rule takes effect, schools participating in the Direct Loan Program must include language incorporating the policy into any new contracts with students. *Id.* at 76,087, 76,088 (proposed § 685.300(e)(3)(i), (f)(3)(i)). For those contracts entered into before the effective date of the rule, schools have the option of attempting to amend the previous contracts or simply notifying affected students or former students that the schools will no longer elect to rely on predispute arbitration or class action waiver provisions included in a student's earlier contract. *Id.* at 76,087, 76,088 (proposed § 685.300(e)(3)(ii)-(iii), (f)(3)(ii)-(iii)).

II. The Proposed Intervenors

As set forth in declarations filed with this motion, proposed defendant-intervenors Meaghan Bauer and Stephano Del Rose are former students of the for-profit college New England Institute of Art (NEIA) in Brookline, Massachusetts. Bauer Decl. ¶ 3; Del Rose Decl. ¶ 3. On behalf of themselves and other former NEIA students, Ms. Bauer and Mr. Del Rose are preparing to file a lawsuit under the Massachusetts Consumer Protection Act against NEIA and its corporate parent, EDMC. Bauer Decl. ¶ 25; Del Rose Decl. ¶ 32.

The Massachusetts Consumer Protection Act requires plaintiffs to notify prospective defendants of their claims by sending a demand letter prior to filing suit, describing the defendants' unfair and deceptive practices and the injury suffered by plaintiffs. Mass. Gen. Laws ch. 93A, § 9(3). Ms. Bauer and Mr. Del Rose, on behalf of themselves and other former NEIA students, sent a demand letter asserting that NEIA and EDMC violated the Massachusetts Consumer Protection Act by arranging for them to take out unaffordable loans, and by employing high-pressure tactics and making misleading statements when recruiting students and facilitating their

loans. *See* Bauer Decl., Exh. 1. In their demand letter, Ms. Bauer and Mr. Del Rose called upon NEIA and EDMC not to enforce forced arbitration clauses to prevent students from bringing suit together. *See id.*

NEIA and EDMC responded to the demand letter by explicitly refusing Ms. Bauer and Mr. Del Rose's request that the school and its parent agree not to enforce the arbitration provision in the students' enrollment contracts. Bauer Decl. ¶ 24; Del Rose Decl. ¶ 31. Accordingly, the former students decided to file their lawsuit later this year, after the Borrower Defense Provisions' prohibition on the enforcement of forced arbitration clauses and class action waivers by schools receiving Direct Loans was slated to take effect.

III. This Litigation and ED's Recent Actions.

Plaintiff California Association of Private Postsecondary Schools (CAPPS) filed suit in late May 2017 to challenge the Borrower Defense Provisions. On June 2, it moved for a preliminary injunction against those portions of the rule that would prohibit participating schools from entering into or relying on predispute arbitration clauses and class action waivers to deny students the right to seek relief in court. ECF No. 6.

On June 14, 2017, ED announced that it will delay the effective date (July 1, 2017) for many of the Borrower Defense Provisions, including the arbitration and class action waiver provisions, until "judicial challenges to the final regulations are resolved." *See* ED, Notification of Partial Delay of Effective Dates (June 14, 2017), at 4, https://s3.amazonaws.com/public-inspection.federalregister.gov/2017-12562.pdf. ED's announcement asserted that CAPPS had "raised serious questions concerning the validity of certain provisions of the final regulations," and stated that ED plans to "review and revise the regulations through the negotiated rulemaking process required" by the Higher Education Act. *Id.* at 6. In light of ED's notice, CAPPS withdrew

its motion for a preliminary injunction. ECF No. 21.

This Court has ordered the parties and another set of proposed intervenors to confer and file a joint status report by 6:00 pm on June 16, 2017. Ms. Bauer and Mr. Del Rose are prepared to participate in those discussions.

ARGUMENT

I. Ms. Bauer and Mr. Del Rose Are Entitled to Intervene as a Matter of Right.

Federal Rule of Civil Procedure 24(a)(2) allows for intervention as a matter of right if the prospective intervenor demonstrates the "1) timeliness of the application to intervene; 2) a legally protected interest; 3) that the action, as a practical matter, impairs or impedes that interest; and 4) that no party to the action can adequately represent the potential intervenor's interest." *Crossroads Grassroots Policy Strategies v. FEC*, 788 F.3d 312, 320 (D.C. Cir. 2015). The proposed intervenors satisfy all four requirements.[1]

A. The Motion to Intervene Is Timely.

This motion—which is filed only three weeks after the commencement of this action, before the filing of the defendants' responsive pleading—is unquestionably timely. The timeliness of a motion to intervene is "'to be judged in consideration of all the circumstances.'" *Roane v.*

[1] Ms. Bauer and Mr. Del Rose have moved to intervene before the government's filing of any responsive pleadings to ensure the opportunity to participate at the earliest possible point in this litigation and to permit the Court to consider their motion to intervene alongside a separate intervention motion filed by state attorneys general. Consistent with the D.C. Circuit's practical approach to interpreting Rule 24(c), they have not filed a proposed pleading to accompany this motion to intervene. *See Massachusetts v. Microsoft Corp.*, 373 F.3d 1199, 1236 n.19 (D.C. Cir. 2004); *see also, e.g.*, *Tachiona ex rel. Tachiona v. Mugabe*, 186 F. Supp. 2d 383, 393 n.8 (S.D.N.Y. 2002) (rejecting technical reading of Rule 24(c) where the "position of the movant is apparent from other filings and where the opposing party will not be prejudiced"). Ms. Bauer and Mr. Del Rose intend to file an answer by the government's deadline to do so and, through their declarations, have provided the parties with notice of the specific nature of their interest in the case and their intent to defend the legality of the Borrower Defense Provisions.

Leonhart, 741 F.3d 147, 151 (D.C. Cir. 2014) (quoting *Smoke v. Norton*, 252 F.3d 468, 471 (D.C. Cir. 2001)). "'The most important consideration in deciding whether a motion for intervention is untimely is whether the delay in moving for intervention will prejudice the existing parties to the case.'" *Id.* (quoting 7C Charles Alan Wright et al., *Federal Practice and Procedure* § 1916, at 541 (3d ed. 2007)).

The timeliness factor is easily met in this case, where the complaint was filed on May 24, 2017—just over three weeks ago—and the government has not yet filed an answer. *See* ECF No. 1. No substantial proceedings on the merits have yet occurred, nor is there any schedule for dispositive motions. The D.C. Circuit has held that a motion to intervene is timely when it was filed "less than two months after the plaintiffs filed their complaint and before the defendants filed an answer." *Fund for Animals, Inc. v. Norton*, 322 F.3d 728, 735 (D.C. Cir. 2003); *see also Karsner v. Lothian*, 532 F.3d 876, 886 (D.C. Cir. 2008) (finding motion timely because it was filed less than one month after an intervenor became interested in the dispute).

B. Ms. Bauer and Mr. Del Rose's Interest in the Effectuation of the Borrower Defense Provisions Is Legally Protected.

A proposed intervenor as of right "need not show anything more than that it has standing . . . to demonstrate the existence of a legally protected interest for purposes of Rule 24(a)." *Mova Pharm. Corp. v. Shalala*, 140 F.3d 1060, 1076 (D.C. Cir. 1998); *accord Defs. of Wildlife v. Perciasepe*, 714 F.3d 1317, 1323 (D.C. Cir. 2013) (acknowledging that "Article III standing satisfies [the] second element of Rule 24(a)(2)"). Like other litigants, a putative defendant-intervenor demonstrates standing by showing "injury in fact, causation, and redressability." *Crossroads Grassroots Policy Strategies*, 788 F.3d at 316. This Circuit has "generally found a sufficient injury in fact" under circumstances like those here "where a party benefits from agency

action, the action is then challenged in court, and an unfavorable decision would remove the party's benefit." *Id.* at 317.

Because the Borrower Defense Provisions require schools that receive Direct Loans to forgo reliance on predispute arbitration clauses and class action waivers, Ms. Bauer and Mr. Del Rose intended to file their class action lawsuit in 2017 after the Borrower Defense Provisions were to take effect. Ms. Bauer and Mr. Del Rose chose this timing in light of NEIA and EDMC's plan to attempt to enforce the forced arbitration clause and class action waiver that the school has used in its enrollment contracts. As CAPPS' now-withdrawn motion for a preliminary injunction expressly acknowledged, once the Borrower Defense Provisions go into effect, schools that intend to continue to participate in the Direct Loan Program "will need to . . . actually litigate cases, including class actions, in federal and state court." ECF No. 6 at 31. Accordingly, Ms. Bauer and Mr. Del Rose are direct beneficiaries of the Borrower Defense Provisions. The relief sought by CAPPS—invalidation of the Borrower Defense Provisions—would imminently injure Ms. Bauer and Mr. Del Rose by substantially increasing the likelihood that NEIA and EDMC will seek to enforce the forced arbitration clause and class action waiver, which Ms. Bauer and Mr. Del Rose would have to succeed in opposing in order to access the courts on behalf of themselves and a class of similarly situated borrowers.

Thus, Ms. Bauer and Mr. Del Rose meet all three standing requirements. If the Borrower Defense Provisions are invalidated, Ms. Bauer and Mr. Del Rose will suffer imminent injury: NEIA and EDMC have indicated their intention to attempt to compel Ms. Bauer, Mr. Del Rose, and other class members to individual arbitration, forcing them to litigate in opposition. This injury is traceable to the relief sought by CAPPS—invalidation of the Borrower Defense Provisions—and redressable by an order from this Court denying CAPPS' requested relief.

C. The Relief Sought by CAPPS Would Impair Ms. Bauer and Mr. Del Rose's Interest.

Whether a proposed intervenor's interest is impaired depends on "the 'practical consequences' of denying intervention." *Fund for Animals*, 322 F.3d at 735 (quoting *Nat. Res. Def. Council v. Costle*, 561 F.2d 904, 909 (D.C. Cir. 1977)). The impairment requirement "is not a rigid one." *Forest Cty. Potawatomi Cmty. v. United States*, 317 F.R.D. 6, 10 (D.D.C. 2016) (citing *Fund for Animals*, 322 F.3d at 735).

If granted, the relief sought by CAPPS would severely impair Ms. Bauer and Mr. Del Rose's interest. As discussed above, if the Borrower Defense Provisions were invalidated, Ms. Bauer and Mr. Del Rose would be forced to litigate NEIA and EDMC's motion to compel individual arbitration in order to press their claims in court in a class action lawsuit. Furthermore, invalidation of the Borrower Defense Provisions would potentially subject Ms. Bauer and Mr. Del Rose—beneficiaries of the regulations—to the harms the Borrower Defense Provisions were intended to redress, including schools' use of forced arbitration clauses and class action waivers to "insulat[e] themselves from direct and effective accountability for their misconduct" and "deter[] publicity that would prompt government oversight agencies to react." 81 Fed. Reg. at 76,022.

D. ED and Secretary DeVos Cannot Adequately Represent Ms. Bauer and Mr. Del Rose's Interest.

The adequate representation factor is a "minimal" burden that is satisfied when a proposed intervenor "'shows that representation of [its] interest may be inadequate.'" *Fund for Animals*, 322 F.3d at 735 (quoting *Trbovich v. United Mine Workers*, 404 U.S. 528, 538 n.10 (1972)). Courts ordinarily permit intervention "'unless it is clear that the party will provide adequate representation for the absentee.'" *Id.* (quoting *United States v. Am. Tel. & Tel. Co.*, 642 F.2d 1285, 1293 (D.C.

Cir. 1980)). The D.C. Circuit "look[s] skeptically on government entities serving as adequate advocates for private parties." *Crossroads Grassroots Policy Strategies*, 788 F.3d at 321.

The presumption of skepticism against government representation of private interests is especially warranted in this case because the government's desire to move forward with the Borrower Defense Provisions is, to say the least, in doubt. ED has announced it intends to postpone until the close of litigation the effective date of many of the Borrower Defense Provisions, including the arbitration and class action provisions. *See* ED, Notification of Partial Delay of Effective Dates, at 4, https://s3.amazonaws.com/public-inspection.federalregister.gov/2017-12562.pdf. ED's notice further asserts that CAPPS has "raised serious questions concerning the validity of certain provisions of the final regulations," and that ED will initiate a new negotiated rulemaking to reconsider the Provisions. *Id.* at 6.

The Department's actions make clear that it will not adequately defend Ms. Bauer and Mr. Del Rose's interests with respect to the arbitration and class action waiver provisions. Indeed, the proposed intervenors not only will have to defend the terms of the rules, but may also need to assert cross-claims against ED to challenge its delay of the effectiveness of the Borrower Defense Provisions.[2] Accordingly, Ms. Bauer and Mr. Del Rose must be permitted to participate in the litigation as of right to protect their interest.

II. Alternatively, This Court Should Grant Permissive Intervention.

In the alternative, the Court should permit Ms. Bauer and Mr. Del Rose to intervene under Rule 24(b). On timely motion, courts may permit intervention by anyone who "has a claim or

[2] Should Ms. Bauer and Mr. Del Rose determine that such claims are necessary and appropriate, the case for permitting their intervention is even stronger, as it would ensure resolution of these related claims in a single case involving the same interested parties rather than in a separate action, which would inevitably be treated as a related case to this one.

defense that shares with the main action a common question of law or fact." Fed. R. Civ. P. 24(b)(1)(B). In this Circuit, that requirement is given a "flexible" reading that "permits intervention even in situations where the existence of any nominate 'claim' or 'defense' is difficult to find." *EEOC v. Nat'l Children's Ctr., Inc.*, 146 F.3d 1042, 1046 (D.C. Cir. 1998). In exercising discretion to permit intervention under Rule 24(b), courts also consider whether intervention would "unduly delay or prejudice the adjudication of the original parties' rights." Fed. R. Civ. P. 24(b)(3).

Ms. Bauer and Mr. Del Rose seek to intervene in this litigation to defend on the merits the lawfulness of the Borrower Defense Provisions. Moreover, as discussed above, Ms. Bauer and Mr. Del Rose's motion, filed just over three weeks after the complaint and before the government has filed an answer, will not cause undue delay or prejudice the adjudication of the existing parties' rights. And even assuming that Ms. Bauer and Mr. Del Rose must show Article III standing in this Circuit to intervene permissively in support of defendants, *see Defs. of Wildlife*, 714 F.3d at 1327, as demonstrated in Part I, they have met that burden.

Thus, if this Court does not find that Ms. Bauer and Mr. Del Rose have a right to intervene under Rule 24(a), it should nonetheless permit them to intervene under Rule 24(b)(1)(B).

CONCLUSION

For the foregoing reasons, this Court should grant Ms. Bauer and Mr. Del Rose's motion to intervene as defendants.

Respectfully submitted,

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