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 and STEPHANO DEL ROSE, Defendant-Intervenors.	)	Civil Action No. 17-999 (RDM)

DEFENDANT-INTERVENORS' OPPOSITION TO PLAINTIFF'S MOTION FOR LEAVE TO AMEND THE COMPLAINT

Plaintiff California Association of Private Postsecondary Schools (CAPPS) has moved for leave to amend its complaint to delete ten of the twelve claims at issue in this action. ECF No. 82. Defendant-Intervenors Meaghan Bauer and Stephano Del Rose (the Borrowers) oppose an unconditional grant of leave to amend the complaint to the extent it would permit CAPPS to refile any of these ten claims in the future. The Borrowers thus request that the court condition leave to amend on dismissal of Count Twelve, which asserts a constitutional challenge to the arbitration and class action waiver provision, with prejudice. As to the other nine claims, the Court should condition leave to amend on either dismissal with prejudice, CAPPS's agreement to a stipulated dismissal on the ground that CAPPS lacks standing to bring those claims, or an order requiring that any future attempt by CAPPS to raise these claims be brought in this action.

BACKGROUND

This action concerns a rule issued by the Department of Education (ED) more than two years ago. *See* 81 Fed. Reg. 75,926 (Nov. 1, 2016). Nearly seven months after that rule was issued, on the eve of its effective date, plaintiff commenced this action challenging all four major portions of the rule in a sweeping 242-paragraph complaint. ECF 1. As a result of that broad challenge, ED delayed the effective date of those four sections of the 2016 rule three separate times. *See Bauer v. DeVos*, 325 F. Supp. 3d 74, 79 (D.D.C. 2018); *see also* Defs. Mem. in Supp. of Renewed Mot. for Summ J., *Bauer* ECF No. 58 at 24 (justifying scope of 705 stay by noting breadth of CAPPS's complaint).

Within weeks of the filing of CAPPS's complaint, the Borrowers filed a motion to intervene in this case. ECF 22. As part of its argument against intervention, CAPPS argued that the Borrowers were required to file a proposed answer to their 76-page complaint. ECF 39 at 3-5. The Borrowers then prepared a 50-page proposed answer to the complaint, which they filed with the Court on September 6, 2017. ECF 51-1. The Court subsequently granted the Borrowers' motion to intervene at an oral hearing, Sept. 14, 2018 Minute Order, and that answer was deemed filed on September 17, 2018, ECF 62.

In September 2018, this Court concluded that the delay rules that ED promulgated because of CAPPS's lawsuit were unlawful. *See Bauer*, 325 F. Supp. 3d at 96, 101, 109-10. The Court did not require any of the challenged provisions to go into effect at that time. *Id.* Rather, the Court held a status conference in both cases. *See* Sept. 14, 2018, Minute Order. At that conference, CAPPS's counsel indicated that it intended to seek a preliminary injunction against not only the forced arbitration and class action waiver provisions it had sought to enjoin in June 2017, but as to all of its claims. *See* Trans. at 17-20. After that hearing, the Court stayed its decision in the

Bauer case with respect to all provisions of the 2016 Rule, basing its decision to do so, in part, on "the *CAPPS* plaintiff's entitlement to be heard on the merits of its preliminary injunction." *Bauer v. DeVos*, 332 F. Supp. 3d 181, 186 (D.D.C. 2018).

On September 22, 2018, CAPPS filed its motion for a preliminary injunction against all four portions of the 2016 rule. ECF 65. Its brief contained twenty-four separate arguments with respect to the merits of its case, which the Borrowers and other parties responded to on an expedited basis. *See* ECF 68 (Borrowers' brief); 67 (Brief of State amici); 69 (ED brief).

After a lengthy hearing and after the *Bauer* stay had lapsed, on October 16, 2018, the Court issued a decision denying the preliminary injunction motion. 2018 WL 5017749. As to the arbitration and class action waiver provisions, the Court found that CAPPS had not met its burden to establish irreparable injury. *Id.* at *7-8. As to each of the other three provisions, the Court concluded that CAPPS had not introduced sufficient evidence to show a substantial likelihood that it would ultimately be able to demonstrate standing and ripeness. In so doing, the Court did not rule out the possibility that CAPPS might be able to meet its burden at the summary judgment stage. *See, e.g.*, *id.* at *10 (stating with respect to financial responsibility provision, "CAPPS may well be able to cure this deficiency").

The Court ordered the parties to meet and confer and submit a proposed schedule by October 31, 2018. *See* Oct. 19, 2018 Minute Order. At that time, CAPPS requested the Borrowers' consent to dismiss the action without prejudice. The Borrowers declined, citing concerns about the potential refiling of some or all of the claims at issue. Accordingly, the parties agreed to a joint briefing schedule, which did not contemplate amended pleadings. That schedule, adopted by the Court, called for plaintiff to file its motion for summary judgment by December 28, 2018, and cross-motions to be filed by March 1, 2019. Oct. 31, 2018 Minute Order.

Two months later, on December 28, 2018, CAPPS filed the instant motion to amend the complaint to delete ten of its twelve claims ("the deleted claims"), concurrently with a motion for partial summary judgment, directed at the other two claims in the operative complaint. ECF 83.

ARGUMENT

The Borrowers oppose CAPPS's request that it be allowed to amend its complaint to dismiss ten of its twelve claims eighteen months into this litigation absent conditions that would limit CAPPS' ability to bring these claims again in another forum. Conditioning leave to amend in this way is well-supported by case law, and would minimize the risk of prejudice to the Borrowers and the federal defendants. Such conditions would limit the unfairness associated with allowing CAPPS the ability to raise the dismissed claims again in another court after the parties expended considerable resources litigating them in this case and CAPPS thought better of litigating them only after a signal from this Court that it would rule adversely to CAPPS.

In determining whether to grant leave to amend under Rule 15(a), district courts look to the absence or presence of the factors set out in *Foman v. Davis*, 371 U.S. 178, 182 (1962): "undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of the amendment, etc." *See also Harris v. Sec'y, U.S, Dep't of Veterans Affairs*, 126 F.3d 339, 344 (D.C. Cir. 1997); *Clark-Williams v. Wash. Metro. Area Transit Auth.*, No. CV 14-99 (RDM), 2016 WL 4186810, at *2 (D.D.C. Feb. 16, 2016). But "leave to amend is not an all-or-nothing proposition." *Mullin v. Balicki*, 875 F.3d 140, 150 (3d Cir. 2017). Rule 15(a) gives courts authority to impose reasonable conditions on the amendment of a complaint, particularly where doing so would minimize prejudice to the defendant. *See* 6 Charles Alan Wright et al., Fed. Prac. & Proc. Civ. § 1486 (3d Ed.); *see also Smith v. Ergo Sols., LLC*, No. CV 14-382

(JDB), 2016 WL 11018580, at *2 (D.D.C. Apr. 6, 2016); *Barnes v. District of Columbia*, 42 F. Supp. 3d 111, 120 (D.D.C. 2014). In determining the appropriateness of such conditions, courts "consider the same factors that are relevant to determining whether leave to amend should be granted in the first place." *Smith*, 2016 WL 110108580 at *2; *see also Mullin*, 875 F.3d at 150.

Here, undue prejudice to the opposing parties counsels in favor of imposing conditions that would limit CAPPS's ability to bring the deleted claims at a later date in another forum. In connection with the motion for a preliminary injunction, the parties have already extensively briefed each of the ten claims that CAPPS now seeks to dismiss. And although the Court has not issued a dispositive ruling as to those claims, it has carefully considered them and tentatively reached conclusions adverse to CAPPS. After CAPPS has tested the waters in this action, it would be inefficient to allow CAPPS to initiate new litigation on the same issues, and unfair for the Borrowers to have to address these issues again in another court at a later date and time.

In analogous cases, "due to such concerns over preservation of judicial and parties' resources and fairness to the defendant," courts have regularly conditioned leave to amend a complaint to delete claims on the dismissal of those claims with prejudice. *Barnes*, 42 F. Supp. 3d at 120 (collecting cases). In so doing, courts have noted the time and expense already incurred responding to the claims sought to be dismissed, and the "prejudice [that] could befall [the defendant] were it forced to litigate the [dismissed] claims at some point *in futuro* after receiving the repose occasioned by the granting of" leave to amend. *Pride Mobility v. Dewert Motorized Sys.*, No. 05-CV-807, 2009 WL 10687317, at *2 (M.D. Pa. Nov. 13, 2009); *see also Barnes*, 42 F. Supp. 3d at 121; *Consumer Fin. Prot. Bureau v. Mortg. Law Grp., LLP*, No. 14-CV-513-WMC, 2017 WL 3581146, at *4 (W.D. Wis. Apr. 19, 2017); *Matlink, Inc. v. Home Depot U.S.A.*, Inc., No. 07CV1994 DMS(BLM), 2008 WL 11338407, at *2 (S.D. Cal. July 10, 2008); *Jones v. Sci.*

Colors, Inc., No. 00 C 0171, 2001 WL 883689, at *2 (N.D. Ill. Aug. 6, 2001). Here, the passage of time and the prejudice to the Borrowers associated with the pendency of the claims, which served as the basis for ED's unlawful stay, mean the equities weigh even more strongly against dismissal of the claims without prejudice.

CAPPS may argue that dismissal with prejudice is inappropriate because, at the preliminary injunction stage, the Court found that CAPPS failed to meet its evidentiary burden for standing as to nine of the ten claims it seeks to dismiss, and if the Court were to proceed to a final adjudication on that basis, a dismissal for lack of standing would be without prejudice (although it would have preclusive effect on the issue of standing itself in another case).[1] But courts have not limited conditions for dismissal to cases in which they have already expressed a view on the merits, and conditions need not be exactly congruent with the likely outcome of litigation. It would be just as prejudicial for the Borrowers to have to re-brief standing in another forum as it would be to re-brief the merits, and just as unfair for CAPPS to be able to bring those claims before another court that might take a different view as to its standing. *Cf. Legalforce, Inc. v. Legalzoom.com, Inc.*, No. 218CV06147ODWGJS, 2018 WL 6179319, at *3 (C.D. Cal. Nov. 27, 2018) ("A key 'interest of justice' factor is the prevention of forum shopping."). It would also be inefficient for the parties to brief and this Court to consider cross-motions for summary judgment as to two of the claims, and then have the remaining claims briefed—as to standing or the merits—in another court. For these reasons, conditioning amendment on dismissal with prejudice would be appropriate even though adjudication on the claims might result in a dismissal for lack of subject-matter jurisdiction.

[1] Count Twelve of the initial complaint, which CAPPS seeks to dismiss, was a constitutional challenge to the arbitration and class action provisions. *See* ECF No. 82-2 at 76. The Court concluded that CAPPS had shown standing as to these provisions. 2018 WL 5017749, at *6. As to the other nine claims, the Court did not hold that CAPPS lacked standing but that it had failed to meet its evidentiary burden at the preliminary injunction stage.

Alternatively, however, the Borrowers would not oppose dismissal if CAPPS were to stipulate to a dismissal for lack of standing on those nine claims and/or that any future attempts to litigate those claims would be brought in this action. *Cf. Ashley Furniture Indus., Inc. v. Am. Signature, Inc.,* No. 2:11-CV-00427, 2012 WL 1031411, at *3 (S.D. Ohio Mar. 27, 2012) (noting district court's inherent authority to "require that [p]laintiff re-file any future action within that district").

More than two years after ED issued the 2016 rule, CAPPS should not be allowed to hold over the heads of student borrowers the specter of potential future litigation over provisions important to the students' welfare. If CAPPS seeks to abandon certain claims, it should do so with finality—or the Court should require it to do so. For these reasons, the Borrowers respectfully request that the Court deny CAPPS's motion for leave to amend absent dismissal with prejudice of the one claim related to the arbitration and class action waiver provision (Count Twelve) and, with respect to the other nine claims, either dismissal with prejudice, CAPPS's agreement to a stipulated dismissal on the ground that CAPPS lacks standing to bring those claims, or an order requiring that any future attempt by CAPPS to raise these claims be brought in this action.

Respectfully submitted,

/s/ Adam R. Pulver

Toby R. Merrill
Mass. BBO No. 601071
PROJECT ON PREDATORY STUDENT LENDING,
LEGAL SERVICES CENTER OF HARVARD LAW SCHOOL
122 Boylston Street
Jamaica Plain, MA 02130
(617) 522-3003
tomerrill@law.harvard.edu

Adam R. Pulver
D.C. Bar No. 1020475
Scott L. Nelson
D.C. Bar No. 413548
PUBLIC CITIZEN LITIGATION GROUP
1600 20th Street NW
Washington, DC 20009
(202) 588-1000
apulver@citizen.org

Counsel for Defendant-Intervenors

Dated: January 11, 2019