IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

SARA ROGERS, *Plaintiff*, v. THOMAS J. VILSACK, in his official capacity as Secretary of Agriculture, *et al.*, *Defendants*.	No. 2:21-cv-01779-DDD-SKC

DEFENDANTS' REPLY IN SUPPORT OF THEIR MOTION TO STAY PROCEEDINGS PENDING RESOLUTION OF RELATED CLASS ACTION

Plaintiff Rogers is indisputably a member of classes certified in ongoing litigation in the Northern District of Texas. And like the central claim here, the class claim being pressed on her behalf in Texas is substantively identical to that asserted here: that § 1005 of the American Rescue Plan Act ("ARPA") violates equal protection under the Constitution. As explained, courts in these circumstances routinely stay, or even dismiss, the individual action while the class action is litigated on behalf of the individual plaintiff. Indeed, three district courts, including one in this circuit, recently granted Defendants' motions to stay challenges to § 1005. *See* Orders Granting Defs.' Mots. to Stay, *Carpenter v. Vilsack*, No. 21-0103 (D. Wyo.) (Aug. 16, 2021), Dkt. 33 ("*Carpenter* Or."); *Joyner v. Vilsack*, No. 21-1089 (M.D. Tenn.) (Aug. 19, 2021), Dkt. 21 ("*Joyner* Or."); *Faust v. Vilsack*, No. 21-548 (E.D. Wis.) (Aug. 23, 2021), Dkt. 66 ("*Faust* Or."). In *Carpenter*, the plaintiff raised nearly identical claims, and arguments in opposition to a stay, as Plaintiff raises here.

As those courts recognized, a stay in these circumstances promotes judicial economy and avoids the risk of conflicting judgments. *See Carpenter* Or. 5, 9-10; *Joyner* Or. 5-6; *Faust* Or. 2-3; Defs.' Mem. 6-8. This common practice flows from the need to "avoid duplicative actions as well as inconsistent interpretations of the same decree." *Goff v. Menke*, 672 F.2d 702, 704 (8th Cir. 1982) (cited with approval in *McNeil v. Guthrie*, 945 F.2d 1163, 1166 (10th Cir. 1991)). As the Tenth Circuit has explained, permitting an individual suit to proceed simultaneously "would allow interference with the ongoing class action." *McNeil*, 945 F.2d at 1165. It has thus held that such individual suits "cannot be brought where there is an existing class action." *Id.* Instead, the plaintiff must "cooperate with class counsel or intervene in the class action." *Sensabaugh v. U.S. Dist. Ct. for the Dist. of Col*, 389 F. App'x 784, 786 (10th Cir. 2010).

In her opposition, Plaintiff relies on the wrong legal standard to oppose a stay and thus largely fails to address this reasoning supporting stays in cases like this one. As a result, she does not undermine Defendants' showing that a stay is likewise warranted here.

I. Judicial Economy And The Need To Avoid Inconsistent Results Warrant A Stay.

At the outset, Plaintiff's Opposition relies on the wrong legal standard, as recently confirmed in *Carpenter*. *See Carpenter* Or. 4 n.1. As explained in *United Steelworkers of Am. v. Or. Steel Mills*, 322 F.3d 1222 (10th Cir. 2003), a district court may either stay *proceedings*, *id.* at 1227 (citing *Landis v. N. Am. Co.*, 299 U.S. 248, 254 (1936)), or it may proceed to judgment but then stay the *judgment*, *id.* (citing *Battle v. Anderson*, 564 F.2d 388, 397 (10th Circ. 1977)).[1] The former uses the *Landis* factors, the latter, those in *Battle* (or the "*Nken* factors," *see Nken v. Holder*, 556 U.S. 418 (2009)). To be sure, the Tenth Circuit's mention of two tests has caused confusion,

[1] All internal alterations, citations, and subsequent history are omitted unless otherwise indicated.

but the "courts that have directly confronted the question have overwhelmingly concluded that the *Landis* test or something similar governs" a motion to stay proceedings. *Kuang v. DoD*, 2019 WL 1597495, at *3 (N.D. Cal. Apr. 15, 2019) (citing cases); *see also Carpenter* Or. 4 n.1. Courts in this circuit have thus applied the *Landis* factors when assessing a motion to stay proceedings and, consistent with that test, have not required the movant to show irreparable harm or a likelihood of prevailing in the related proceeding, as Plaintiff suggests, Pl.'s Opp. 2. *See Carpenter* Or. 3-4, 4 n.1 (explaining that likelihood of success factor is irrelevant), 7 ("Defendants need not show irreparable harm"); *see also Kendall State Bank v. Fleming*, 2012 WL 3143866, at *2 (D. Kan. Aug. 1, 2012); *Sexton v. Col. Springs*, 2020 WL 6393111, at *4 (D. Colo. Nov. 2, 2020).[2]

Importantly then, contrary to Plaintiff's suggestion that judicial economy is irrelevant, *see* Pl.'s Opp. 10, judicial economy is a key factor when considering a motion to stay proceedings given the equities it is meant to address. *See Kuang*, 2019 WL 1597495, at *3 (quoting *Landis*, 299 U.S. at 254 ("'[T]he power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants.'")). Even more so here. Because class actions seek "to facilitate judicial economy by avoidance of multiple suits on the same subject matter" and "to deter inconsistent results," *Yazzie v. Ray Vickers' Special Cars*, 180 F.R.D. 411, 414 (D.N.M. 1998), those are the key factors in considering stay motions in cases like this one, *see* Defs.' Mem. 6-8.

Plaintiff largely ignores this rationale and cites cases that did not involve concurrent class actions to suggest that stays, particularly stays based on judicial economy, should be "rare[]." Pl.'s

[2] The factors cited by Plaintiff from *String Cheese Incident, LLC v. Stylus Shows, Inc.*, 2006 WL 894955, at *2 (D. Colo. Mar. 30, 2006), are substantially similar to those in *Landis*.

Opp. 10. But the principle in the cases Plaintiff cites is that "'[t]he right to proceed in court should not be denied except under the most extreme circumstances.'" *Id.* at 2 (quoting *Commodity Futures Trading Comm'n v. Chilcott Portfolio Mgmt.*, 713 F.2d 1477, 1484 (10th Cir. 1983)). That principle has no application here because "Plaintiff will not be deprived of 'h[er] day in court' … because [s]he is a member of a mandatory class action litigating the same claim" in *Miller*. *Joyner* Or. 6. In *those* circumstances—*i.e.*, "where, as here, the claims made in an individual lawsuit overlap with the claims being pursued by a certified class of which the individual is a member"—stays are "routine[]."*Richard K. v. Utd. BeHavioral Health*, 2019 WL 3083019, at *7 (S.D.N.Y. June 28, 2019); Defs.' Mem. 8-10.

They are routine for good reason: "If a class member cannot relitigate issues after final judgment in a class action suit, by analogy a class member should not be able to prosecute a separate equitable action once the member's class has been certified." *Bennett v. Blanchard*, 802 F.2d 456 (6th Cir. 1986); *see also Goff*, 672 F.2d at 704 (explaining same). Indeed, allowing a member of a certified class to proceed with individual litigation in another court would "contravene the general principle that a party has no right to maintain two separate actions involving the same subject matter at the same time against the same defendant." *Richard K.*, 2019 WL 3083019, at *6. And it would "undermine the efficiency goals of class litigation," including "'avoiding a multiplicity of actions,' 'enabling claim processing through representatives,' and 'preventing inconsistent adjudications.'" *Id.* (quoting 1 *Newberg on Class Actions* § 1:9 (5th ed.)); *see also Horns v. Whalen*, 922 F.2d 835 (4th Cir. 1991) (explaining same).

Plaintiff attempts to circumvent this case law by arguing that the *Miller* litigation is "not truly duplicative" because Plaintiff has brought "a wholly distinct claim" from those in *Miller*,

namely her "loan forgiveness" claim in Count II. Pl.'s Opp. 7, 11. The plaintiff raised, and the court rejected, the same argument in *Carpenter*, where the plaintiff's complaint contained the same loan forgiveness claim. *See Carpenter* Or. 6. This Court should follow suit for multiple reasons. First, "in *Landis*, the Supreme Court rejected the argument that a court's authority to stay proceedings before it in favor of proceedings in another court is limited to those instances when the parties and issues in the several cases are identical." *Commodity Futures*, 713 F.2d at 1484–85. Second, Plaintiff fails to contend with the fact that her claims largely *do* overlap with those in *Miller*, with the consequent potential for inconsistent results. Third, Plaintiff's claim is not "wholly distinct" from those in *Miller*; indeed, if the classes in *Miller* were to succeed in invalidating § 1005, Plaintiff's "loan forgiveness" claim would be moot because it depends on the distribution of payments under § 1005. Fourth, "Plaintiff's interests in her second claim are adequately protected by the *Miller* court's preliminary injunction because no person will receive loan forgiveness under ARPA for purposes of gaining eligibility for future FSA loans." *Carpenter* Or. 6. And fifth, Plaintiff's "loan forgiveness" claim should be dismissed because, *inter alia*, § 1005 does not provide "debt forgiveness" as the term is statutorily defined.[3] For all of these reasons, the mere existence of Plaintiff's second claim is not sufficient to warrant denial of a stay here.[4]

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[3] For the various reasons stated, the mere existence of Plaintiff's second meritless claim should not prevent this Court from staying this case. However, if the Court is reluctant to grant a stay due to the existence of Plaintiff's second claim, Defendants would propose that the Court defer proceedings except for briefing a motion to dismiss and defer ruling on the stay motion until after it resolves Defendants' motion to dismiss Plaintiff's second claim. *See Sexton*, 2020 WL 6393111, at *4 (stay pending a ruling on motion to dismiss).

[4] For this and other reasons, Defendants respectfully disagree with the decision in *Holman v. Vilsack*, 2021 WL 3354169 (W.D. Tenn. Aug. 2, 2021), which relied in part on the existence of the same "loan forgiveness" claim, *see id.* at 3. That decision ignored the Supreme Court's recognition that suits need not be identical to warrant stays in these circumstances, and it also misunderstood a class member's ability to opt out of a Rule 23(b)(2) class. *See* discussion *infra*. This Court should

Plaintiff also opposes a stay on the ground that "the district court in Texas may yet allow [her] to opt out of the *Miller* classes." Pl.'s Opp. 11 n.9. The court in *Carpenter* again rejected this "speculative" argument. *Carpenter* Or. 5. As an initial matter, Plaintiff has not even sought to opt out of the classes in *Miller*. She thus "remains [a] member" of the *Miller* classes and is litigating her claim in two fora, contrary to the purpose of a 23(b)(2) class, the rule against maintaining two separate, like actions, and the overwhelming weight of authority on this issue. *Richard K.*, 2019 WL 3083019, at *8. Moreover, as recognized in *Carpenter* and *Joyner*, Plaintiff is unlikely to succeed in any attempt to opt out of the *Miller* classes because "Rule 23(b)(2) classes are 'mandatory classes' with no opt-out opportunity." *Carpenter* Or. 5 (quoting *Wal-Mart Stores v. Dukes*, 564 U.S. 338, 361-62 (2011)); *Joyner* Or. 6 (recognizing the mandatory nature of 23(b)(2) classes and "Plaintiff's inability to opt out of the *Miller* class action"). And in any event, Defendants' request for a stay, rather than dismissal, "accommodates the possibilit[y]" that the *Miller* classes are decertified or that Plaintiff is excluded from the classes. *Richard K.*, 2019 WL 3083019, at *8; *see also Carpenter* Or. 6 (plaintiff could seek to lift stay if later excluded from *Miller* litigation).

Lastly, Plaintiff tries to distinguish the cases Defendants rely on by focusing on their procedural history. *See* Pl.'s Opp. 12-13. But "the chronology of events [here] supports a stay," because "[j]urisdiction vested with the *Miller* court prior to the commencement of this action, and the *Miller* court has already taken significant action through its preliminary injunction and certification of classes" while "this action has not proceeded beyond the filing of Plaintiff's complaint

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not compound that error by permitting additional duplicative litigation. Indeed, the same court that denied Defendants' motion in *Holman*, granted it in *Joyner*, after Defendants had the opportunity to reply in the latter case, leading the court to correct its view of the plaintiff's potential to opt-out of the *Miller* litigation and of Defendants' stay motion in that case. *See Joyner* Or. 6.

and Defendants' motion for stay." *Carpenter* Or. 6-7; *see also Joyner* Or. 5 (recognizing same). Plaintiff does not dispute that *Miller* is the first-filed case. And rather than undermining Defendants' request, the procedural posture of the cases in *Taunton Gardens* and *Richard K.* supports it; as in those cases, the court in *Miller* "has already taken significant action" while this case is in its nascent stages. *Carpenter* Order 6-7; *see Taunton Gardens Co. v. Hills*, 421 F. Supp. 524, 526 (D. Mass. 1976); *Richard K.*, 2019 WL 3083019, at *5.

Moreover, by focusing on their procedural history, Plaintiff fails to deal with the central reasoning in the cases Defendants cite. The reasons for upholding the stay in *Taunton Gardens* apply equally here: "the public interest, the court's interest in efficient procedures, and the interest of justice would best be served by allowing [the Government] … to resolve its obligations in the national class action" where the "case presents issues of public moment"; "involves the administration of a major federal program"; and the Government "has been called upon to litigate the same issue in more than ten district courts." 557 F.2d at 879. So too in *Aleman* and *Richard K.* Plaintiff calls *Aleman* "inapplicable" because it "was not addressing a stay motion." Pl.'s Opp. 12. But the court's *reasoning* for earlier granting a stay—that resolution of the issues in the class action would necessarily impact proceedings in the individual case—is applicable here, and Plaintiff does not dispute that based on that reasoning, the court had entered a stay comparable to that Defendants seek here. *See Aleman ex rel. Ryder Sys., Inc. v. Sancez*, 2021 WL 917969, at *2 (S.D. Fla. Mar. 10, 2021); Defs.' Mem. 10-11. Plaintiff also attempts to discredit *Richard K.* by noting that a district court in Utah distinguished it. *See* Pl.'s Opp. 12 (quoting *David P. v. United Healthcare Ins.*, 2020 WL 607620, at *9 n.7 (D. Utah Feb. 7, 2020)). Defendants do not dispute the ways in which *David P.* distinguished *Richard K.*: the latter is not binding in Utah and it did apply the Second

Circuit's first-to-file doctrine. *See David P.*, 2020 WL 607620, at *9 n.7. But, again, nowhere does Plaintiff confront the *reasons* that warranted a stay in *Richard K.*, *see* discussion *supra*; *Richard K.*, 2019 WL 3083019, at *6-7, all of which support a stay here, *see* Defs.' Mem. 6-8, 10-12.

II. The Balance Of Harms Also Warrants A Stay.

The Court should also grant a stay because it will not prejudice Plaintiff but would harm Defendants and the public interest. Plaintiff relies heavily on her assertion that a stay will prejudice her, *see* Pl.'s Opp. 6-8, but she fails to note that the interests she seeks to vindicate are protected by three nationwide injunctions that prohibit Defendants from making payments under § 1005. *See* Order, *Faust v. Vilsack*, No. 21-548 (E.D. Wis.), Dkt. 49 (staying consideration of plaintiffs' motion for a preliminary injunction because plaintiffs "have the protection they seek" by virtue of a nationwide injunction of § 1005); *Carpenter* Or. 6 (finding the plaintiff's interests "adequately protected by the *Miller* court's preliminary injunction"). And, far from prejudicing Plaintiff, a stay would benefit her because she would not be required to expend further resources in this Court while maintaining the opportunity to obtain the relief she seeks as a class member in *Miller*.

Plaintiff nonetheless argues that she would be prejudiced by a stay because "other legal counsel" will be determining the "legal arguments" and "pace" of the *Miller* proceedings. Pl.'s Opp. 2, 6-7. But "[t]hese interests are present in every situation wherein courts stay individual actions which overlap with claims pursued by a certified class of which the individual is a member." *Carpenter* Or. 6. Hence, as part of the certification in *Miller*, a district judge already determined that class counsel (who have already obtained a preliminary injunction for their clients while Plaintiff's complaint has been pending) "will adequately represent the interests of class members

similarly situated in zealously pursuing the requested relief." Order 12, Dkt. 60. "Plaintiff's argument that her interests are only adequately served by her own attorneys flies against" that finding by the court in *Miller*, *Carpenter* Or. 6, but principles of judicial comity counsel against this Court second-guessing or interfering with that determination, *see id.*; *Joyner* Or. 5 ("credit[ing]" the court's finding of adequate representation in *Miller*); *Faust* Or. 3 (similar); *cf. Med. & Chiropractic Clinic v. Oppenheim*, 981 F.3d 983, 992 (11th Cir. 2020) (certifying court decides Rule 23 questions). Further, to the extent Plaintiff has concerns with the approach taken by class counsel, "mechanisms such as intervention are available to h[er] should [s]he wish to raise any concerns in the Texas litigation." *Joyner* Or. 5; *Faust* Or. 3 (same). And any such concerns will hold regardless of whether a stay is entered in this case, because her claims *are* being litigated in *Miller*, by class counsel, in the Northern District of Texas. Any prejudice Plaintiff could possibly suffer because her counsel is not in control of the *Miller* proceedings is not sufficient to deny a stay here, as evidenced by the numerous decisions granting stays in the context of concurrent class actions. *See* Defs.' Mem. 8-10; *Carpenter* Or.; *Joyner* Or.

Given the scant evidence of prejudice to Plaintiff, it is questionable whether "there is even a fair possibility that the [requested] stay … will work damage to [her]." *Kendall*, 2012 WL 3143866, at *2. But even if there were, "Defendants have made a case of hardship and inequity if required to defend against twelve cases simultaneously on varying schedules and in different jurisdictions." *Carpenter* Order 7. As the court found in *Carpenter*, "[t]here is no dispute" that the multiplicity of duplicative lawsuits challenging § 1005 "is a burden on the government and, consequently on the taxpaying public." *Id.* at 7; *see also Faust* Or. 3 ("[A] stay would avoid hardship to the government, which would otherwise be tasked with defending against numerous, identical

actions across the country at the same time."). That burden is magnified by the significance of the issues in the cases, which "seek[] a constitutional ruling [that] … would invalidate federal legislation." *Id.* at 8. Plaintiff emphasizes that the Department of Justice is "the largest law firm in the world." Pl.'s Opp. 1. It is also the busiest. *See, e.g.,* https://www.justice.gov/usao/page/file/1285951/download (over 140,000 cases in 2019, *excluding* Main Justice).[5]

And in any event, "a stay will serve not only the interest of … the Parties," but also, of "the courts" "and the public in an orderly and efficient use of judicial resources." *Richard K.*, 2019 WL 3083019, at *9; *see also Joyner* Or. 5 ("Not only will Defendants be prejudiced by litigating identical claims in two separate courts, but the judicial system itself will be harmed by [such] inefficiencies."); *Faust* Or. 3 (similar). As the court explained in *Carpenter*, the "public interests at stake include not just the prompt and efficient handling of this case," but also "the importance of the issues at stake," "the prompt and efficient resolution of those issues … in all twelve district courts," "[t]he taxpayer interests" in avoiding "multiple suits on the same subject matter in all twelve courts," "[t]he interests of farmers and ranchers … (including Plaintiff)" who face "the potential for inconsistent results announced at varying times," and the "interests which prompted Congress to enact § 1005." Those interests, it found, "strongly" outweighed the individual plaintiff's interest in litigating her individual claim. *Id.* at 10. So too here. This case should be stayed.

Dated: August 23, 2021

Respectfully submitted,

BRIAN M. BOYNTON

[5] Plaintiff also calls Defendants' request for a stay "an extraordinary turn of events" because Defendants previously opposed requests for nationwide preliminary injunctions, in part, to allow legal issues to percolate through the courts. Pl.'s Opp. 5. But of course Defendants opposed nationwide relief before the classes had been certified in *Miller*, which raises different concerns, such as the risk of conflicting judgments and the simultaneous litigation of Plaintiff's claims in two forums.

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I hereby certify that the foregoing pleading complies with the type-volume limitation set forth in Judge Domenico's Practice Standard III(A)(1).

CERTIFICATE OF SERVICE

I hereby certify that on August 23, 2021, a copy of the foregoing motion was filed electronically via the Court's ECF system, which effects service on counsel of record.

/s/ Emily Newton
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