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UNITED STATES DISTRICT COURT
Northern District Of California
San Francisco Division

ANGELO BOTTONI, PAUL ROBERTS;
TRACIE SERRANO, and SHAWNEE
SILVA, individually and on behalf of all others
similarly situated,

Plaintiffs,

v.

SALLIE MAE, INC., and DOES 1 through
1,000, inclusive,

Defendants.

No. C 10-03602 LB

**ORDER (1) CONDITIONALLY
CERTIFYING SETTLEMENT CLASS; (2)
PROVISIONALLY APPOINTING CLASS
COUNSEL AND CLASS
REPRESENTATIVES; (3)
PRELIMINARILY APPROVING
SETTLEMENT; (4) APPROVING
NOTICE TO CLASS; (5) SETTING
HEARING FOR FINAL APPROVAL AND
PLAINTIFFS' MOTION FOR FEES AND
COSTS AND SERVICE AWARD; AND (6)
TEMPORARILY ENJOINING CLASS
MEMBERS FROM ASSERTING
RELEASED CLAIMS**

INTRODUCTION

Plaintiffs are four former students at the California Culinary Academy who took out private (not federally-guaranteed) student loans serviced by Sallie Mae, Inc. (“Sallie Mae”) and thereafter defaulted on the loans. Second Amended Complaint, ECF No. 37 at 3, 5-8, ¶¶ 8-10, 22-33.¹ Each of the plaintiffs signed promissory note(s), which provided that they agreed to pay reasonable collection costs incurred by the note holder in enforcing the terms of the notes. *Id.* at 4,

¹ Citations are to the Electronic Case File (“ECF”) with pin cites to the electronically-generated page numbers at the top of the document.

1 ¶ 14. Upon each plaintiff’s default, Sallie Mae charged off the loan and placed it with one of
2 numerous third-party collection agencies for collection. *Id.* at 4, ¶ 16; Valerian Decl. ¶ 14. At the
3 time of charge-off, Sallie Mae assessed a “Collection Cost Assessment” (generally 25% of the
4 unpaid balance), generally reflecting the contingency fees charged to Sallie Mae by its collection
5 agencies on amounts collected. Valerian Decl. ¶¶ 15-16.

6 The operative complaint charges six claims based on Sallie Mae’s collection fees and debt
7 collection practices: (1) a violation of Cal. Civ. Code §1671(b), which prohibits unreasonable
8 liquidated damages provisions in contracts; (2) violations of California Business & Professions
9 Code § 17200 *et seq.*, known as the Unfair Competition Law, which prohibits unfair or unlawful
10 conduct; (3) a breach of the promissory note’s express terms, which allow only the collection of
11 reasonable and actually-incurred costs; (4) a cause of action for declaratory relief based on the
12 assessment, collection, and attempted collection of the collection fees; (5) a violation of the
13 Rosenthal Fair Debt Collection Practices Act (“RFDCPA”), California Civil Code § 1788 *et seq.*,
14 which prohibits the collection of unlawful fees and unlawful debt collection practices; and (6) a
15 violation of the Consumer Credit Reporting Agencies Act, California Civil Code § 1785.1 *et seq.*,
16 which prohibits the furnishing of incomplete or inaccurate information to a credit reporting
17 bureau. Second Amended Complaint, ECF No. 37 at 8-13.

18 Following some discovery (including document production by Sallie Mae of more than
19 20,000 pages of documents, Sallie Mae’s responses to interrogatories, and the depositions of all
20 plaintiffs) and two private mediation sessions with Judge Layn Phillips (Ret.), the parties reached
21 a settlement agreement, and on July 11, 2013, plaintiffs filed an unopposed motion for an order:
22 (1) conditionally certifying the proposed settlement class and appointing Gallo LLP as class
23 counsel and plaintiffs as class representatives; (2) preliminarily approving the proposed
24 settlement; (3) approving the parties’ proposed form of notice and notice program, and directing
25 that notice be disseminated pursuant to this program; (4) setting a schedule for the fairness hearing
26 and other remaining procedures; and (5) temporarily enjoining plaintiffs, all class members, and
27 all persons purporting to act on behalf of class members from asserting, commencing, or
28 prosecuting any of the released claims against Sallie Mae or any of the other released parties. *See*

1 ECF No.138-2; Notice of Non-Opposition, ECF No. 138-2 at 3.

2 In summary form, the settlement agreement is as follows. *See Settlement Agreement,*
3 *Valerian Decl. Exh. 1.* Sallie Mae shall reduce the Collection Cost Assessment to 8.75% for each
4 of the class members' private education loans. *Settlement Agreement § III.B.1.* For each loan
5 with an outstanding balance: 1) any and all amounts previously allocated toward collection costs
6 in excess of 8.75% of post charge-off payments shall be reallocated to principal, interest or other
7 fees in accordance with the terms of the promissory notes; in any case where this reallocation
8 satisfies the outstanding loan balance and results in a credit to the borrower, Sallie Mae shall issue
9 a refund in the amount of that credit; 2) prospectively, no more than 8.75% of any and all future
10 payments shall be allocated toward collection costs. *Id. § III.B.1.(a).* For loans that have been
11 paid or settled in full: 1) where the amount of collection costs paid in excess of the adjusted 8.75%
12 Collection Cost Assessment exceeds the amount that Sallie Mae wrote off in principal, interest and
13 other fees (excluding collection costs), Sallie Mae shall refund the difference; 2) where the amount
14 of collection costs paid in excess of the adjusted 8.75% Collection Cost Assessment is less than
15 the amount that Sallie Mae wrote off in principal, interest and other fees (excluding collection
16 costs), Sallie Mae shall refund the sum of forty dollars (\$40). *Id. § III.B.1.(b).* All refund
17 payments shall be made by check payable to the borrower, except that in the case of loans that
18 have a co-borrower(s) or co-signer(s), payment shall be made by check payable jointly to the
19 borrower and co-borrower(s) or co-signer(s). *Id. § III.B.1.(c).* All refund checks not cashed
20 within one hundred eighty (180) days of issuance shall be allocated as *Cy Pres* to Operation
21 HOPE, www.operationhope.org, within thirty (30) days, to provide services in California. *Id. §*
22 *III.B.1.(d).*

23 The settlement agreement will be administered by an independent claims administrator
24 called Kurtzman Carson Consultants, which will mail the notices (as described below), establish a
25 website, distribute funds to class members, and otherwise administer the settlement. *Id. §§ II.M,*
26 *III.B.1.(d), III.E.*

27 This order grants conditional class certification, preliminarily approves the settlement,
28 appoints the class representatives and class counsel, approves the plan for notice to the class, sets

1 the schedule for the final approval process (including plaintiffs’ attorney’s fees and incentive
2 award), and temporarily enjoins class members from asserting released claims.

3 **ANALYSIS**

4 **I. JURISDICTION**

5 The court has jurisdiction under 28 U.S.C. § 1332(d)(2).

6 **II. CONDITIONAL CERTIFICATION OF CLASS**

7 For settlement purposes only, the parties propose conditional certification of the following
8 class:

9 [A]ll persons in California² who, within the period from July 13, 2006 through May 31, 2013
10 (the “Class Period”), were assessed and/or paid a Collection Cost Assessment in connection
11 with a private education loan serviced by Sallie Mae, as identified in the class list to be
12 generated by Sallie Mae from its records using its best efforts.

13 Settlement Agreement § II.N.

14 The court reviews the propriety of class certification under Federal Rule of Civil Procedure
15 23(a) and (b). In a settlement context, the court must pay “undiluted, even heightened, attention”
16 to class certification requirements because the court will not have the opportunity to adjust the
17 class based on information revealed at trial. *See Staton v. Boeing*, 327 F.3d 938, 952-53 (9th Cir.
18 2003) (quoting *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 620 (1997)); *Hanlon v. Chrysler*
19 *Corp.*, 150 F.3d 1011, 1019 (9th Cir. 1998) (same).

20 The court finds that the proposed settlement class here meets the requirements of Federal
21 Rule of Civil Procedure 23(a) and (b).

22 **A. Rule 23(a)**

23 Class certification requires the following: (1) the class must be so numerous that joinder of
24 all members individually is “impracticable;” (2) there are questions of law or fact common to the
25 class; (3) the claims or defenses of the class representatives must be typical of the claims or

26 ² Persons shall be deemed to be “in California” if: 1) they were assessed a Collection Cost
27 Assessment during the Class Period while residing in California, or 2) they were a California
28 resident at the end of any month during the Class Period in which any payment was applied to
their Collection Cost Assessment. Settlement Agreement § II.N.

1 defenses of the class; and (4) the person representing the class must be able to fairly and
2 adequately protect the interests of all class members. *See* Fed. R. Civ. P. 23(a); *Staton*, 327 F.3d
3 at 953.

4 Here, the factors support class certification. First, the class members – all identifiable from
5 Sallie Mae’s records – number at least 40,245 (Valerian Decl. ¶ 21), which makes joinder
6 impracticable. *See Jordan v. County of L.A.*, 669 F.2d 1311, 1319 (9th Cir.), vacated on other
7 grounds, *County of L.A. v. Jordan*, 459 U.S. 810 (1982). Second, each of the class members had
8 similar contract provisions allowing for assessment of collection costs “incurred” by Sallie Mae
9 and it appears that each of the class members had accounts for which Sallie Mae: (1) assessed a
10 Collection Cost Assessment, (2) attempted to collect the Collection Cost Assessment through
11 collection agencies, and (3) reported Collection Cost Assessments to credit reporting agencies.
12 Valerian Decl. ¶¶ 10-11, 16. This gives rise to common claims as well as common questions of
13 law and fact. Third, plaintiffs’ claims are typical of the claims of other class members: plaintiffs’
14 claims are co-extensive with the claims of absent class members because they were all subject to
15 the aforementioned Sallie Mae practices (Valerian Decl. ¶ 32) and their claims are based on the
16 same contractual rights and legal theories. *See Hanlon*, 150 F.3d at 1019-20 (claims are typical if
17 they are reasonably coextensive with that of absent class members; they need not be substantially
18 identical). Fourth, the named plaintiffs are able to fairly and adequately protect the interests of all
19 class members. The factors relevant to a determination of adequacy are as follows: (1) the
20 absence of potential conflict between the named plaintiff and the class members; and (2) counsel
21 chosen by the representative parties is qualified, experienced and able to vigorously conduct the
22 proposed litigation. *Id.* at 1020. The court is satisfied that those factors exist here. As discussed
23 already, the named plaintiffs have shared claims and interests with the class. Also, plaintiffs have
24 retained qualified and competent counsel. *See* Valerian Decl. ¶¶ 35-36; *Local Joint Executive Bd.*
25 *of Culinary/Bartender Trust Fund v. Las Vegas Sands, Inc.*, 244 F.3d 1152, 1162 (9th Cir. 2001);
26 *Brown v. Ticor Title Ins. Co.*, 982 F.2d 386, 390 (9th Cir. 1992).

27 **B. Rule 23(b)(3)**

28 In addition to meeting the prerequisites of Rule 23(a), a proposed class must be appropriate

1 for certification under one of the categories in Rule 23(b). *See* Fed. R. Civ. P. 23(b); *Hanlon*, 150
2 F.3d at 1022. The court finds that certification is appropriate under Rule 23(b)(3). Questions of
3 law and fact common to class members predominate over any questions affecting only individual
4 members. *See* Fed. R. Civ. P. 23(b)(3). The case involves multiple claims for relatively small
5 sums, and a class action is superior to an alternative method for fairly and efficiently adjudicating
6 the claims. *See Amchem Products*, 521 U.S. at 625; *Culinary/Bartender Trust Fund*, 244 F.3d at
7 1163 (class action appropriate because “if plaintiffs cannot proceed as a class, some – perhaps
8 most – will be unable to proceed as individuals because of the disparity between their litigation
9 costs and what they hope to recover”).

10 **C. Conclusion: Provisional Certification is Appropriate**

11 Pursuant to Federal Rule of Civil Procedure 23(a) and (b)(3), the court conditionally
12 certifies the class set forth above for the purpose of giving the class notice of the proposed
13 settlement in this matter, and conducting a fairness hearing.

14 **III. APPOINTMENT OF CLASS REPRESENTATIVE AND CLASS COUNSEL**

15 For the reasons set forth in the previous section, the court appoints plaintiffs Angelo
16 Bottoni, Paul Roberts, Tracie Serrano, and Shawnee Silva as the class representatives. The court
17 finds provisionally that they have claims that are typical of the claims of class members generally
18 and that they are adequate representatives of the other members of the proposed class. The court
19 also provisionally finds that Ray Gallo and Dominic Valerian of Gallo LLP have sufficient
20 qualifications, experience, and expertise in prosecuting class action cases and appoints them as
21 class counsel for settlement purposes only.

22 **IV. PRELIMINARY APPROVAL OF SETTLEMENT AGREEMENT**

23 Procedurally, the approval of a class action settlement has two stages: (1) the preliminary
24 approval, which authorizes notice to the class; and (2) a final fairness hearing, where the court
25 determines whether the parties should be allowed to settle the class action on the agreed-upon
26 terms. In reviewing the proposed settlement, the court need not address whether the settlement is
27 ideal or the best outcome, but determines only whether the settlement is fair, free of collusion, and
28 consistent with plaintiffs’ fiduciary obligations to the class. *See Hanlon*, 150 F.3d at 1027. The

1 *Hanlon* court identified factors relevant to assessing a settlement proposal: (1) the strength of the
2 plaintiff's case; (2) the risk, expense, complexity, and likely duration of further litigation; (3) the
3 risk of maintaining class action status throughout the trial; (4) the amount offered in settlement;
4 (5) the extent of discovery completed and the stage of the proceeding; (6) the experience and
5 views of counsel; (7) the presence of a government participant; and (8) the reaction of class
6 members to the proposed settlement. *Id.* at 1026 (citation omitted).

7 The court has evaluated the proposed settlement agreement for overall fairness under the
8 *Hanlon* factors and concludes that preliminary settlement is appropriate.

9 Under the proposed settlement, Sallie Mae would be limited to charging class members
10 8.75% Collection Cost Assessments and class members who settled their loans without paying any
11 collection costs in excess of the adjusted 8.75% Collection Cost Assessment will receive a forty
12 dollar refund. Settlement Agreement § III.B. This compromise appears reasonable in light of the
13 litigation costs and risks plaintiffs face, including that Sallie Mae could defeat class certification
14 altogether by showing that measuring class members' damages (which could require a
15 determination of each class member's actual collection costs) presents insurmountable
16 individualized issues. *See, e.g., Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2546 (2011)
17 (rejecting plaintiffs attempt to use a formulaic model to determine each class member's damages
18 as impermissible "Trial by Formula."). It also could exclude the significant number of borrowers
19 who signed arbitration agreements from the class and thereby effectively prevent them from
20 obtaining any relief. Motion at 20-21; Valerian Dec. ¶ 13.

21 Continued litigation also would result in significant costs, including additional work by
22 experts to calculate damages, and the litigation of motions for class certification and summary
23 judgment. Discovery could prove particularly costly as plaintiffs might reasonably choose to
24 depose some or all of Sallie Mae's thirty or more Collectors to establish their actual costs, and
25 potentially obtain their consumer databases. Motion at 22-23. In addition, this case presents
26 numerous potential appellate issues for both sides, which could extend the litigation for years.
27 These considerations weigh in favor of settlement. *Id.*

28 The settlement appears to treat all class members fairly. The only class members who fall

1 outside the 8.75% formula are borrowers who settled their loans without paying any collection
2 costs in excess of the adjusted 8.75% Collection Cost Assessment (after taking into account the
3 amount that Sallie Mae wrote off in principal, interest and other fees (excluding collection costs)).
4 These borrowers receive \$40 instead. This appears to be reasonable compensation. The \$5,000
5 incentive awards plaintiffs plan to request also appear to be appropriate to compensate plaintiffs
6 for their time and effort and for the risk they undertook in prosecuting the case against Sallie Mae.
7 Valerian Decl. ¶ 34.

8 The settlement is also the product of serious, non-collusive, arms' length negotiations and
9 was reached during mediation before an experienced mediator, a retired Federal District Judge
10 with a national reputation. Valerian Decl. ¶¶ 24-25; Phillips Decl. ¶ 5. In sum, the court finds that
11 viewed as a whole, the proposed settlement is sufficiently "fair, adequate, and reasonable" such
12 that preliminary approval of the settlement is warranted. *See Officers for Justice v. Civil Serv.*
13 *Comm'n of the City and County of San Francisco*, 688 F.2d 615, 625 (9th Cir. 1982). The court
14 thus approves the settlement agreement preliminarily.

15 **V. APPROVAL OF CLASS NOTICE**

16 The court approves the proposed notice, which will be sent by electronic mail, to the extent
17 Sallie Mae has a valid email address for the settlement class member, and otherwise by U.S. Mail.
18 Settlement Agreement § III.E. The notice and other documents will also be available online at
19 www.bottoniclassaction.com. *Id.* Class members will have 45 days from the date the class notice
20 is sent to request exclusion or object to the settlement. This gives class members sufficient time to
21 consider their options and make a fully informed decision. *See, e.g., Torrasi v. Tucson Elec.*
22 *Power Co.*, 8 F.3d 1370, 1375 (9th Cir. 1993) (approving notice sent 31 days before the deadline
23 for objections and 45 days before the hearing).

24 The court also finds that the notice fairly, plainly, accurately, and reasonably informs class
25 members of the following: (1) the nature of the litigation, the settlement class, the identity of class
26 counsel, and the essential terms of the settlement agreement; (2) the amounts that will be requested
27 as attorney's fees, costs, and class representative incentive awards; (4) how to challenge or opt out
28 of the settlement, and the effect of failing to do so; (5) the time and place of the fairness hearing;

1 and (6) how to obtain additional information regarding this litigation, the settlement agreement
2 and the approval process.

3 In sum, the form of the notice is approved, and the manner of distributing the class notice
4 is approved.

5 **VI. COMPLIANCE WITH CLASS ACTION FAIRNESS ACT**

6 On July 31, 2013, Sallie Mae filed a declaration of compliance with the Class Action
7 Fairness Act of 2005, 28 U.S.C. § 1715. In that declaration, Sallie Mae’s counsel established that
8 on July 19, 2013, KCC mailed notice of the settlement agreement to the Attorney General of the
9 United States and the appropriate California state official. *Id.* According to the declaration, the
10 notice contains the documentation required by 28 U.S.C. § 1715(b)(1-8). *See id.* Any final
11 settlement approval will be more than 90 days after service. *See* 28 U.S.C. § 1715.

12 **VII. OTHER ACTIONS ENJOINED/STAYED**

13 Pending the fairness hearing, and in aid to this court’s jurisdiction to implement and
14 enforce the settlement, plaintiffs and all settlement class members and all persons purporting to act
15 on behalf of settlement class members are enjoined, individually, on a representative basis or in
16 any other capacity, from asserting, commencing, prosecuting, or continuing any of the released
17 claims against Sallie Mae or any of the other released parties in any action, arbitration or
18 proceeding in any court, arbitral forum or tribunal.

19 **VIII. PROCEDURES FOR FINAL APPROVAL OF SETTLEMENT**

20 The schedule for dates and deadlines is set forth in the table below and discussed in the
21 sections that follow.

<u>Event</u>	<u>Date</u>
Deadline to send class notice	21 days after issuance of this order
Deadline for plaintiffs to file motion for award of attorney’s fees and costs and motion for incentive awards to representative plaintiffs	15 days after class notice is sent
Deadline for submission of objections or exclusion requests to Settlement Administrator	45 days after class notice is sent
Deadline for plaintiffs to file motion for final approval	35 days before the fairness hearing or 21 days if unopposed

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1 2	Deadline for plaintiffs to file Settlement Administrator declaration identifying class members who submitted exclusion requests	14 days before the fairness hearing
3	Deadline to file responses to objections to final approval or fee	7 days before the fairness hearing
4	Fairness hearing	

5 **A. Fairness Hearing**

6 At the hearing, the court will determine whether to grant final certification of the
7 settlement class, confirm the appointment of Gallo LLP as class counsel and the plaintiffs as class
8 representatives, finally approve the settlement agreement, and award the requested incentive
9 awards to the class representatives and attorney’s fees and costs to class counsel.

10 **B. Mailing of Notice by No Later Than 21 Days From Today**

11 The court orders the parties (through the Settlement Administrator) to send the notice in
12 the form approved by this order within 21 days of this order as follows:

13 1. The Settlement Administrator will provide notice by electronic mail, to the extent Sallie
14 Mae has a valid email address for the settlement class member, and otherwise by U.S. Mail, to be
15 sent to the last known addresses of the settlement class member, according to Sallie Mae’s
16 records.

17 2. The Settlement Administrator will establish and maintain an Internet site using a domain
18 name of www.bottoniclassaction.com, dedicated to the settlement, on which the class notice will
19 be posted.

20 Class counsel shall file proof of distribution of notice at or before the final hearing.

21 **C. Requests for Exclusion from the Settlement**

22 1. Class members may exclude themselves, or opt out, of the class settlement, and that
23 request for exclusion must be made in the manner set forth in the class notice.

24 2. To be excluded from the settlement, the opt-out request must be postmarked or submitted
25 electronically no later than forty-five days after the date that the class notice is sent.

26 3. Not later than 10 days before the fairness hearing, class counsel shall file a declaration
27 from the Settlement Administrator that identifies all settlement class members for whom the
28 Settlement Administrator timely received valid exclusion requests, as well as any apparently

1 invalid exclusion requests with an explanation of the reason(s) for their invalidity.

2 **D. Objections to the Settlement**

3 1. Any class member who has not opted out of the settlement and who wishes to object to the
4 fairness, reasonableness or adequacy of the settlement must do so in writing and must include the
5 information indicated on the class notice.

6 2. Objections shall be filed with the court and served on class counsel, and Sallie Mae's
7 counsel, and must be postmarked or delivered no later than 45 days after the date the class notice
8 is sent.

9 3. Objections raised at the fairness hearing will be limited to those previously submitted in
10 writing. Any member of the class who does not timely serve such a written objection shall not be
11 permitted to raise such objection, except for good cause shown, and any member of the class who
12 fails to object in the manner prescribed herein shall be deemed to have waived, and shall be
13 foreclosed from raising, any such objection.

14 4. If a settlement class member hires an attorney to represent him or her, the attorney must
15 file a notice of appearance with the clerk of court no later than forty-five (45) days after class
16 notice is sent.

17 **E. Deadline for Submitting Motion Seeking Final Approval**

18 Plaintiff shall file a motion for final approval of the settlement and settlement agreement at
19 least 35 days before the fairness hearing if the motion is opposed (i.e., if a timely objection to the
20 settlement is made) or at least 10 court days before the hearing if unopposed.

21 **F. Deadline for Petition for Attorney's Fees, Costs, and Expenses**

22 Pursuant to *In re Mercury Interactive Corp. Sec. Litig.*, 618 F.3d 988, 994–95 (9th Cir.
23 2010), class counsel shall file with this court their petition for an award of attorney's fees and
24 reimbursement of costs no later than 15 days after class notice is sent. The motion shall be heard
25 at the time of the fairness hearing.

26 **G. Plaintiffs' and Class Members' Release**

27 If, at the fairness hearing, this court grants final approval to the settlement and the
28 settlement agreement, then the named plaintiffs and each individual settlement class member who

1 does not timely opt out will release claims, as set forth in the settlement agreement, by operation
2 of this court's entry of the judgment and final approval.

3 **CONCLUSION**

4 For the reasons previously stated, the court GRANTS plaintiffs' unopposed motion for
5 preliminary approval of class action settlement. This disposes of ECF No. 138.

6 **IT IS SO ORDERED.**

7 Dated: August 2, 2013



8 LAUREL BEELER
9 United States Magistrate Judge

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