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UNITED STATES DISTRICT COURT

Northern District of California

San Francisco

ANGELO BOTTONI, *et al.*,

No. C 10-03602 LB

Plaintiffs,

**ORDER RE OUTSTANDING
DISCOVERY LETTERS**

v.

SALLIE MAE, INC,

[ECF Nos. 74 and 75]

Defendant.

I. INTRODUCTION

This putative diversity class action involves claims that Defendant Sallie Mae assessed collection charges of 25% of the principal and interest due (regardless of the actual collection costs incurred) against borrowers who defaulted on their private student loans. *See* Second Amended Complaint, ECF No. 37. The parties filed two joint discovery letters in February 2012 setting forth their many disagreements but subsequently stayed all discovery (including resolution of their disputes) until April 17, 2012. *See* 2/21/2011 and 2/23/2012 letters, ECF Nos. 74-75; 3/8/2012 Stipulation and Order.¹ On May 4, 2012, the parties advised the court that the case had not settled and asked the court to consider their disputes. *See* ECF No. 87. Thereafter, at the parties' scheduled case management conference on May 31, 2012, the court addressed all issues and now issues this order memorializing the decisions for the reasons stated on the record and summarized below.

¹ Citations are to the Electronic Case File ("ECF") with pin cites to the electronic page number at the top of the document, not the pages at the bottom.

1 **II. DISCUSSION**

2 **A. 2/21/2012 Letter**

3 **Issue 1: Sallie Mae’s Production of “Relevant” but not “Responsive” Documents**

4 The parties dispute whether Defendant’s response to Plaintiffs’ Request for Production No. 1
5 (“RFP 1”), which calls for all documents in Defendant’s possession that concern Plaintiffs, is
6 insufficient because Defendant appears to have withheld responsive documents that it deemed
7 irrelevant. 2/21/2012 Letter, ECF No. 74 at 2.

- 8
- The court accepts Sallie Mae’s representations in court that it produced all relevant,
9 nonprivileged documents that are responsive to Plaintiffs’ request for production.
 - Sallie Mae must produce a privilege log that complies with this court’s standing order absent
10 stipulation of the parties or further order of the court.
 - The court appreciates that everyone is trying to maintain their respective litigation positions
11 and that disagreements are stressful but probably counsel could have resolved this one on
12 their own.
- 13

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15 **Issue 2: Sallie Mae’s Failure to Produce Documents Involving Third-Party Debt Collectors**

16 The parties disagree about whether Sallie Mae’s response to Plaintiffs’ Request for Production
17 No. 1 (“RFP 1”), which calls for all documents in Defendant’s possession that concern Plaintiffs, is
18 insufficient because Sallie Mae produced no documents from its third-party debt collectors. *Id.* at 2.
19 In a similar vein, Plaintiffs argue that Sallie Mae should produce (1) communications with any third-
20 party debt collectors about the class, (2) documents that reflect actual collection costs, (3)
21 documents with credit reporting agencies regarding Plaintiffs, and (4) documents showing Sallie
22 Mae’s payments to third-party debt collectors that it hired to collect on the loans. *Id.* at 3.

- 23
- Sallie Mae said that it is producing its contracts with third-party debt collectors, and the court
24 orders it to do so promptly.
 - Information about collection efforts against class members may be in Sallie Mae’s
25 possession, or it may be in the possession of third-party debt collectors. If Sallie Mae has the
26 information, it should produce it (subject to the rules about class action discovery and
27 privacy issues set forth below). The court assumes collection efforts should be documented
28

1 in electronic form (such as a readily-accessible electronic format that is easy to generate in
2 the form of a data production). If information in Sallie Mae's possession is kept in a
3 difficult-to-access format (such as in individual paper files by borrower), Sallie Mae must
4 produce how it files information about its collection efforts to enable Plaintiffs to consider
5 how to access it.

- 6 • For now, pending the document productions contemplated by this order and Plaintiffs'
7 review of the contracts with the third-party collection agents, the court will not require Sallie
8 Mae to obtain and disclose debt collection efforts by its third-party contractors. Separate
9 Rule 45 subpoenas are pending, and to the extent that the third parties ask for Sallie Mae's
10 agreement to disclose the general categories of information contemplated by the court's
11 disclosure orders, Sallie Mae shall convey its agreement promptly. Put another way, the
12 court defers consideration of RFP 1(e) and (g).
- 13 • Bottom line: Sallie Mae must produce information in its possession that is responsive to
14 RFP 1 (a)-(d), (f), & (h)-(i).

15 **Issue 3: How To Produce Private Information About the Borrowers**

16 The court ruled that Sallie Mae must produce the class information that Plaintiffs request subject
17 to the procedures outlined here. *See* RFP 2 (seeking information in Sallie Mae's borrower data
18 base); RFP 1; 2/21/2012 Letter, ECF No. 74 at 3.

19 The court's broad discretion regarding class discovery has been discussed extensively in other
20 cases. *See, e.g., Currie-White v. Blockbuster, Inc.*, 2010 WL 1526314, No. C 09 2593 MMC (MEJ)
21 (N.D. Cal. Apr. 15, 2010); *Narayan v. EGL, Inc.*, 2006 WL 3507918, No. C 05-04181 RMW (HRL)
22 (N.D. Cal. Dec. 5, 2006). As the court explained on the record, for similar reasons, the court finds
23 the discovery here appropriate but is mindful of the privacy concerns that attach to potential class
24 members who defaulted on their loans.

25 Courts balance the following factors when assessing the potential intrusion of pre-certification
26 discovery on the putative class members' right to privacy in their contact information: (1) whether
27 the party has a legally protected privacy interest; (2) whether the party has a reasonable expectation
28 of privacy; and (3) whether production of the information constitutes a serious invasion of privacy."

1 *Murphy v. Target Corp.*, No. C 09 1436 AJB (WMC), 2011 WL 2413439, at * 3 (S.D. Cal. June 14,
2 2011) (citing *Pioneer Electronics (USA), Inc. V. Superior Court*, 40 Cal. 4th 360, 370-371 (2007)).

3 While some courts have held that an opt-out procedure is required to adequately protect the
4 privacy interests of putative class members, see *Pioneer Electronics (USA), Inc. V. Superior Court*,
5 40 Cal. 4th 360, 370-371 (2007); *Belaire-West Landscape, Inc. v. Superior Court*, 149 Cal. App. 4th
6 554, 561 (2007), other courts have required only a protective order. See *Currie-White v.*
7 *Blockbuster, Inc.*, No. C 09-2593 MMC (MEJ), 2010 WL 1526314, at *4 (N.D. Cal. April 15, 2010)
8 (holding that a protective order is sufficient to address the privacy issues regarding employer's
9 disclosure of employees' contact information in pre-certification discovery); *Artis v. Deere & Co.*,
10 No. C 10-5289 WHA (MEJ), 2011 WL 2580621, at *4-5 (N.D. Cal. June 29, 2011) (holding that
11 Plaintiffs had a right to discovery of putative class members' contact information with a protective
12 order in place); *Soto v. Commercial Recovery Systems, Inc.*, No. C-09-02842 PJH (DMR), 2011
13 WL 1298697 (N.D. Cal. Apr. 4, 2011) (stating that the court was "satisfied that the opt-out mailing
14 process proposed by the parties adequately protects the putative class members' privacy" in a case
15 involving a putative class of debtors).

16 The court's general view is that ordinarily, protective orders are enough, but this case involves
17 special privacy concerns because the class members defaulted on their loans. The court orders the
18 following:

- 19 • Sallie Mae is ordered to produce the information requested by Plaintiffs, and that information
20 shall be governed by the existing stipulated protective order.
- 21 • The parties agreed that it made sense to adopt an opt-out process with an anonymizing
22 process for any class members opting out but could not agree on the record what process
23 makes sense. The parties shall meet and confer and work it out. If they disagree (and the
24 court expects that they will not), any further dispute should include discussions of processes
25 employed by courts in cases involving similar privacy concerns.

26 **Issue 4: Accounting Treatment of Collection Penalties**

27 Plaintiffs ask in RFP Nos. 5 and 6 for documents about Sallie Mae's accounting treatment of
28 collection penalties and actual collection costs. Sallie Mae says that the request is vague. See

1 2/21/2012 Discovery Letter, ECF No. 74 at 5. Accounting treatment is relevant, but Plaintiffs need
2 to articulate more specifically what they want. They may do that now or (perhaps better) later after
3 they review the productions contemplated by this order about amounts actually collected.

4 **Issue 6: Complaints**

5 Plaintiffs ask in RFP 26 for documents and communications about complaints about its
6 assessment of collection penalties. Sallie Mae responds that they are irrelevant and potentially
7 inaccessible. 2/21/2012 Letter, ECF No. 74 at 6. They are relevant. As to accessibility, Sallie Mae
8 defined two categories of complaints: complaints in the form of court complaints and general
9 borrower complaints.

10 As to the first category, Sallie Mae said that it could search its litigation databases and produce
11 information about any similar cases. The court orders that.

12 As to the second category, Sallie Mae said that complaints were inaccessible in that they are kept
13 in individual borrower files. Sallie Mae represented that there were 36,000 borrowers and that
14 producing complaints would require a file-by-file review. The court does not order that review.
15 Instead, to the extent that Sallie Mae in fact documents complaints in a database, that information
16 should be accessible, and Sallie Mae should produce it. (The court appreciates that Sallie Mae said
17 that it does not track information that way, but many businesses do, so the court mentions it.) Sallie
18 Mae also must produce information about how it tracks complaints, whether that process is
19 documented in policies and procedures or is a matter of practice. Sallie Mae represented that its
20 practices, policies, and procedures should be the same in California and nationally, and it should
21 confirm that in its production.

22 **B. 2/23/12 Letter**

23 **Issue 1: Adequacy of Responses**

24 Plaintiffs argue that Sallie Mae did not respond adequately to the following:

25 **RFA Or Interrogatory**

Brief Summary of Request

26 RFA 19

Admit that Sallie Mae on behalf of itself and others
regularly engages in “debt collection.”

27 Interrogatory 6

If you contend that collection penalties are reasonable,
identify all documents supporting conclusion.

28

1 Interrogatories 7 and 9

If you contend that the 25% collection assessment is a reasonable assessment of costs, state each fact and identify all documents showing that.

2
3 Interrogatory 15

If you contend tht you did not breach the promissory note by collecting and demanding the 25% collection assessment, state each fact showing that.

4
5 For the reasons stated on the record, the contention interrogatories are premature, and the court
6 delays considering them until after document production illuminates the issues. RFA 19 does not
7 allow a yes/no answer, and it involves legal conclusions. All of this will be easier to consider once
8 discovery shows what actually happened with the debt collection and what Sallie Mae's relationship
9 is with its third-party debt collectors.

10 **Issue 2: Boilerplate Objections Preceding Interrogatory Responses**

11 Plaintiffs challenge Sallie Mae's "boilerplate" objections:

- 12 • Definition of "Sallie Mae" wrongly includes non-parties.
13 • Definition of "collection penalty" is a bad term that is derogatory.
14 • Interrogatories seek privileged attorney-client information.
15 • Contention interrogatories shift the burden of proof on the "reasonableness" prong.

16 The parties have a lot to accomplish in discovery, and Sallie Mae nonetheless is responding.
17 Given these circumstances, it is a waste of time to wade in the weeds of boilerplate, and the court
18 declines to collectively overrule the objections. Everyone should prefer to focus on the substance of
19 the responses.

20 The court observes that Rule 26(b) and the privilege log requirement is not limited to requests
21 for production. *See Abels v. JBC Legal Group, P.C.*, No. C 4 2345 JW(RS), 2005 WL 3839308 *4
22 (N.D. Cal. 2005) (ordering the responding party to "provide a further verified response to
23 Interrogatory No. 4 and/or a privilege log as appropriate"); *Bretana v. International Collection*
24 *Corp.*, No. C 07-05934 JF (HRL) 2008 WL 4334710 *3 (N.D. Cal. 2008) (granting a motion to
25 compel an interrogatory response and interpreting Rule 26(b)(5) to cover Interrogatories and
26 Requests for Admission; the responding party had "objected that the interrogatories call for
27 information protected by the attorney-client privilege. Defendant apparently has not produced a
28 privilege log as he is required to do under Fed. R. Civ. P. 26(b)(5).") Given the lack of context, the

1 court is not clear on how this might apply here but trusts that Sallie Mae will produce a privilege log
2 consistent with its obligations under Rule 26(b) and the requirements of this court’s standing order.

3 **Issue 3: Adequacy of Response to Interrogatory 17**

4 Interrogatory 17 asks how collection penalties are distributed and/or retained by the third-party
5 debt collectors. The court already ordered disclosure of the documents and information showing this
6 in the previous section. It also should be revealed by the contracts (which Sallie Mae says will show
7 a contingency arrangement) and the spreadsheets showing the allocations. Any answer presumably
8 will incorporate that context, whether (a) generally as to how collection assessments are retained by
9 debt collectors and/or given to Sallie Mae or (b) specifically in the context of the documents that
10 answer the interrogatory.

11 **Issue 4: Adequacy of Response to Interrogatory 18**

12 Interrogatory 18 asks for the basis for Sallie Mae’s formulation of its policy for a 25% collection
13 assessment. Sallie Mae gave a general answer, and that is fine. Sallie Mae also must produce its
14 communications, guidelines, policies, or procedures that discuss how it arrived at the 25%
15 “collection penalty.” The court does not intend this to be a burdensome production that requires
16 delving into all communications (like email) that surrounded the development of the assessment.
17 But the court assumes that Sallie Mae has policies or procedures that are relevant to establish why it
18 settled on the the 25%.

19 **Issue 5: Interrogatory 19**

20 Interrogatory 19 asks how long Sallie Mae has had the 25% collection assessment in place.
21 Among other things, Sallie Mae says that the request is overbroad. The court is most concerned
22 with burden. The court assumes that Sallie Mae can – by informal sampling – go back some years to
23 see whether the 25% assessment was imposed then. The court assumes that for the category of loans
24 at play in this class actions, the documentation for the loans (including the promissory note with the
25 collection assessment) is standard for all similar loans. And as discussed in the previous section and
26 on the record, Sallie Mae’s development of the 25% amount is relevant. But at the same time, the
27 court is mindful of burden arguments, and – leaving aside information about the formulation of the
28 25% that is the subject of interrogatory 18 – the need for the information probably is met by going

1 back for a fixed period of time before 2006 (such as ten years back from now).

2 Given this context, the court orders the parties to meet and confer to work out a relevant time
3 period.

4 **Issue 6: Interrogatory 25**

5 Interrogatory 25 asks for facts about Sallie Mae’s affirmative defense of “third parties.” Sallie
6 Mae said that the parties limited discovery before mediation, its investigation so far does not permit
7 a more robust response, and it will amend its answer when it has more information. The court
8 approves this process.

9 **C. Process Going Forward**

10 The court may have revised its discovery procedures slightly since this case’s inception. For the
11 parties’ convenience, the court excerpts them here (with certain relevant issues bolded).

12 **8. Expedited Procedures for Discovery Disputes.** The parties shall not file formal discovery
13 motions. Instead, and as required by the federal rules and local rules, the parties shall meet and
14 confer to try to resolve their disagreements. *See* Fed. R. Civ. P. 37(a)(1); Civil L. R. 37-1. After
15 attempting other means of conferring such as letters, phone calls, or emails, lead counsel for the
16 parties must meet and confer **in person**. (If counsel are located outside of the Bay Area and
17 cannot confer in person, lead counsel may meet and confer by telephone.) Either party may
18 demand such a meeting with ten days' notice. If the parties cannot agree on the location, the
19 location for meetings shall alternate. Plaintiff's counsel shall select the first location, defense
20 counsel shall select the second location, and so forth. If the parties do not resolve their
21 disagreements through this procedure, the parties shall file a joint letter brief **of no more than
22 five pages** instead of a formal motion five days after lead counsels' in-person meet-and-confer.
23 The letter brief must be filed under the Civil Events category of “Motions and Related Filings >
24 Motions – General > Discovery Letter Brief.” Lead counsel for both parties must sign the letter
25 and attest that they met and conferred in person. **The joint letter shall set out each issue in a
26 separate section and include in that section each parties’ position (with appropriate legal
27 authority) and proposed compromise. (This process allows a side-by-side analysis of each
28 disputed issue.)** If the disagreement concerns specific discovery that a party has propounded,
such as interrogatories, requests for production of documents, or answers or objections to such
discovery, the parties shall reproduce the question/request and the response in its entirety in the
letter. The Court then will review the letter and determine whether future proceedings are
necessary. In emergencies during discovery events such as depositions, the parties may contact
the Court pursuant to Civil Local Rule 37-1(b).

24 The court understands the costs of in-person meetings, but so far, discovery in this case is not
25 working all that well. The court will not require in-person meetings (yet) but urges the parties to try
26 different processes (e.g., video conferencing as opposed to email wars) that might lead to a greater
27 ability to resolve issues without the court’s intervention. If the parties are unable to work out a new
28 process, the court may order more routine in-person case management conferences that are preceded

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by a several-hour opportunity to meet and confer in the court's jury room.

III. CONCLUSION

This disposes of ECF Nos. 74 and 75.

IT IS SO ORDERED.

Dated: June 1, 2012



LAUREL BEELER
United States Magistrate Judge