

1 Janet Lindner Spielberg (SBN 221926)  
2 **LAW OFFICES OF JANET**  
3 **LINDNER SPIELBERG**  
4 12400 Wilshire Boulevard, # 400  
Los Angeles, California 90025  
Telephone: 310-392-8801  
Email: jlspielberg@jlsplp.com

Michael D. Braun (SBN 167416)  
**BRAUN LAW GROUP, P.C.**  
10680 West Pico Boulevard, Suite 280  
Los Angeles, California 90064  
Telephone: 310-836-6000  
Email: service@braunlawgroup.com

5 Joseph N. Kravec, Jr. (*pro hac vice*)  
6 Stephen M. Pincus (*pro hac vice*)  
7 Wyatt A. Lison (*pro hac vice*)  
8 Maureen Davidson-Welling (*pro hac vice*)  
9 **STEMBER FEINSTEIN DOYLE**  
10 **PAYNE & KRAVEC, LLC**  
11 429 Forbes Avenue  
12 Allegheny Building, 17th Floor  
Pittsburgh, Pennsylvania 15219  
Telephone: 412-281-8400  
Email: jkravec@stemberfeinstein.com  
spincus@stemberfeinstein.com  
wlison@stemberfeinstein.com  
mdavidsonwelling@stemberfeinstein.com

William J. Genego (SBN103224)  
**LAW OFFICE OF WILLIAM**  
**GENEGO**  
2115 Main Street  
Santa Monica, California 90405  
Telephone: 310-399-3259  
Email: bill@genegolaw.com

13 **Attorneys for Plaintiffs Tina M.**  
14 **Ubaldi and Chanee Thurston**

15 UNITED STATES DISTRICT COURT  
16 NORTHERN DISTRICT OF CALIFORNIA  
17 SAN FRANCISCO DIVISION

18 TINA M. UBALDI and CHANEE  
19 THURSTON, on behalf of  
20 themselves and all others similarly  
situated,

21 Plaintiffs,

22 vs.

23 SLM CORPORATION; a Delaware  
24 Corporation; SALLIE MAE, INC.;  
25 and SLM PC STUDENT LOAN  
TRUST 2004-A

26 Defendants.

**Case No. 3-11-cv-01320-EDL**

**CLASS ACTION**

**[MODIFIED] THIRD AMENDED**  
**COMPLAINT**  
**FOR DAMAGES, EQUITABLE,**  
**DECLARATORY AND INJUNCTIVE**  
**RELIEF PURSUANT TO COURT**  
**ORDER [DKT. NO 169]**

**DEMAND FOR JURY TRIAL**

1 Plaintiffs Tina Ubaldi and Chanee Thurston, by their attorneys, bring this class  
2 action against SLM Corporation and Sallie Mae Inc., (collectively referred to as “Sallie  
3 Mae”), and Plaintiff Ubaldi brings this action against SLM PC Student Loan Trust  
4 2004-A, on their own behalf and on behalf of all others similarly situated, and allege  
5 as follows based upon the investigation of their counsel:

6 **I. INTRODUCTION**

7 1. This class action seeks relief on behalf of Plaintiffs and others similarly  
8 situated who, while residing in California, were provided Sallie Mae Private  
9 Education Loans for which Sallie Mae was the *de facto* actual lender as described  
10 below. Plaintiffs Ubaldi and Thurston bring claims under California Law seeking  
11 relief on behalf of borrowers who were assessed a late fee by Sallie Mae. Plaintiff  
12 Thurston also brings claims under California Law on behalf of borrowers who were  
13 charged usurious interest, i.e., a rate in excess of 10 percent per annum.  
14 Additionally, Plaintiffs seek declaratory relief on behalf of all California borrowers  
15 who were provided Private Education Loans for which Sallie Mae was the *de facto*  
16 actual lender, and, specifically, a ruling that the choice of law provision in the Sallie  
17 Mae Private Education Loans is unenforceable.

18 2. Sallie Mae has been allowed to commit the wrongs this suit seeks to  
19 remedy by disguising and keeping secret from unsuspecting student borrowers its true  
20 role as the *de facto* actual lender for Sallie Mae Private Education Loans. By making  
21 it appear that the loans were made by lending institutions subject to federal  
22 regulation, and the oversight that comes with that regulation, Sallie Mae has been  
23 able to evade and violate state law by charging usurious rates of interest and  
24 assessing punitive late fees. It was not until March of 2011 when the Department of  
25 Treasury released a draft report on Sallie Mae which revealed Sallie Mae’s true role as  
26 the *de facto* actual lender that the information first became publicly available which  
27 revealed Sallie Mae’s true role as the *de facto* actual lender. Even then the

1 information was buried and released without publicity, such that class members  
2 continue not to have notice of facts that would allow them to pursue and enforce their  
3 rights under state law. As a consequence of Sallie Mae's concealment, the class period  
4 extends as far as back as Sallie Mae has engaged in its unlawful practices that are the  
5 subject of this complaint and its heretofore successful effort at concealing them.

6 3. As used herein, Sallie Mae "Private Education Loans" are loans made by  
7 Sallie Mae to students to pay for the students' cost of education, including tuition,  
8 fees, and associated costs and living expenses, commonly known and marketed by  
9 such Sallie Mae brand names as CEC Signature Loans, and which are not Federal  
10 Family Education Loans and are not guaranteed by the federal government. The loans  
11 are made by Sallie Mae, in that Sallie Mae develops and markets the loans, creates  
12 and copyrights the loan application forms and promissory notes, the loan applications  
13 are returned to Sallie Mae, Sallie Mae underwrites and determines whether to  
14 approve the loan to the borrower, Sallie Mae services the loans and receives all  
15 payments, all payments are to be made to Sallie Mae as specified in the promissory  
16 note, Sallie Mae provides the funding for the loans, directly and/or indirectly through  
17 such means as credit extensions and forward purchase agreements, it directs and  
18 controls the disbursement of the loan proceeds, and it insures the loans. In short,  
19 Sallie Mae is the *de facto* actual lender.

20 4. Sallie Mae charges class members a late fee of 5% of the payment amount  
21 not received by the scheduled payment date or \$5.00, whichever is greater, each time  
22 any part of a payment is not received by Sallie Mae within 15 days of the scheduled  
23 payment date. This late fee, as determined and assessed by Sallie Mae, is a  
24 liquidated damages penalty and is unlawful under California law.

25 5. In order for a liquidated damages provision such as a late fee to be  
26 lawful, it must be compensatory and not punitive, *i.e.*, it must compensate the lender  
27 for the cost of not receiving a payment on the scheduled date, or represent a  
28

1 reasonable attempt to anticipate the cost. Sallie Mae's revenue from late fees far  
2 exceeds the costs it incurs as a result of late payments.

3         6. The method by which Sallie Mae calculates the amount of a late fee – 5%  
4 of the payment amount not received or \$5.00, whichever is greater -- establishes that  
5 it is not, nor is it intended to be compensatory, as the amount of the late fee increases  
6 according to the amount of the payment, but the transactional servicing costs do not.  
7 Moreover, the rate itself is exorbitant, as it is equivalent to an annual interest rate of  
8 120%.

9         7. For example, the transactional servicing costs for a monthly payment  
10 \$1,321.51 (the monthly installment payment on education debt of \$100,000 at 10%  
11 interest for a 10 year term) is the same as it is for a monthly payment of \$330.38 (the  
12 monthly payment on a debt of \$25,000 with the same terms), yet Sallie Mae assesses a  
13 late fee of \$66.07 as to one, and \$16.51 as to the other. Both are far in excess of what  
14 implicitly represents the highest cost Sallie Mae actually incurs, \$5.00, although it is  
15 believed and therefore averred that \$5.00 itself still exceeds Sallie Mae's actual costs  
16 associated with a late payment on a Private Education Loan.

17         8. Sallie Mae's late fee charges are punitive in another respect, as well.  
18 Although Sallie Mae Private Education Loans are fixed term loans that are repaid in  
19 monthly installments of equal amount, Sallie Mae computes and charges daily  
20 interest on its Private Education Loans. Accordingly, Sallie Mae continues to earn  
21 daily interest on the outstanding principal every day until it is actually repaid. This  
22 means that Sallie Mae both assesses the borrower a \$5.00 or 5% fee because s/he has  
23 not repaid the funds, and, additionally, continues to charge the borrower daily interest  
24 for use of the funds. The result is the borrower pays Sallie Mae twice – in two different  
25 ways - for being late on a single loan payment.

26         9. Sallie Mae's late fee liquidated damages provision serves to create a  
27 revenue stream for Sallie Mae by unlawfully penalizing borrowers far in excess of its  
28

1 true costs associated with the late payment. In other words, Sallie Mae's late fee does  
2 not serve to compensate Sallie Mae for its true damages resulting from not receiving a  
3 payment on the scheduled date. The provision is nothing more than the illegal  
4 assessment of a penalty and is therefore unenforceable.

5 10. Sallie Mae also violates the law and overcharges borrowers in other  
6 respects related to the Private Education Loans. In particular, Sallie Mae charges  
7 interest on the Private Education Loans in excess of the maximum legal limit set by  
8 the California Constitution, which is 10 percent per annum.

9 11. Sallie Mae determines the annual interest rate to be charged a borrower  
10 by taking the prime rate and increasing it by a set amount (referred to as the  
11 "margin") according to the credit tier in which Sallie Mae places the borrower at the  
12 time the loan is approved. The "margin" ranges from 1.5% to 9.85%. For example, the  
13 margin for a borrower placed in credit tier 5 is 9.85%, and thus if the prime rate were  
14 3%, the interest rate charged the borrower would be 12.85%, and if the prime rate  
15 were 10%, the interest charged the borrower would be 19.85%. The "margin" amount  
16 (i.e., the amount added to the prime rate) remains the same for the life of the loan.

17 12. Because the prime rate fluctuates, the interest rate charged the borrower  
18 varies over time even though the margin set by Sallie Mae does not change.  
19 Depending upon the prime rate and the amount of the margin, the interest rate  
20 charged to student borrowers by Sallie Mae can and has exceeded the 10% legal limit  
21 established by the California Constitution. Given that the prime rate has been as  
22 high as 9% during the class period, even the most credit worthy borrowers (credit tier  
23 1 with a margin of 1.5%) have been charged usurious interest. (See ¶50, Table 2,  
24 *infra*.) The interest rate charged student borrowers placed in credit tiers 4 and 5 have  
25 exceeded the lawful rate of 10% for the entire class period.

26 13. In addition, the *effective rate of interest* on the Private Education Loans is  
27 often even higher than the stated annual rate because Sallie Mae assesses a variety  
28

1 of loan fees, including late fees and supplemental fees upon disbursement and  
2 repayment of the loan.

3 14. Both Sallie Mae's late fees and its supplemental fees charged upon  
4 disbursal or repayment of funds constitute additional forms of interest charged by  
5 Sallie Mae on the Private Education Loans. Cal. Const., art. XV, § 1.

6 15. Thus, Sallie Mae has during the class period frequently charged student  
7 borrowers usurious interest rates on the Private Education Loans, either directly  
8 through the assessment of interest at the variable rate, or indirectly through the  
9 assessment of interest at the variable rate in combination with late and/or  
10 supplemental fees creating an effective rate of interest in excess of the 10 percent  
11 annual limit.

12 16. As a result of its illegal liquidated damage penalty and usurious interest  
13 rates, Sallie Mae has collected and continues to collect millions of dollars from class  
14 members to which it is not entitled. This class action seeks to stop Sallie Mae from  
15 continuing to assess these unlawful late payments and interest rates going forward,  
16 and to restore to Plaintiffs and class members the amount of unlawful late fees and  
17 interest paid on the Private Education Loans, or alternatively to disgorge Sallie Mae's  
18 profits from its unlawful conduct to Plaintiffs and class members.

19 17. Sallie Mae attempts to evade California law and the protections it  
20 provides student loan borrowers against punitive, non-compensatory late fees and  
21 usurious interest rates by making it appear as if the loans are made by a National  
22 Bank or state chartered bank located in a different state, and subject to the laws of the  
23 bank's home state, pursuant to the National Bank Act, 12 U.S.C. sections 85, 86, the  
24 Federal Deposit Insurance Act, or similar laws. Sallie Mae does so by selecting a  
25 National Bank or state chartered bank to include its name on Sallie Mae's preprinted  
26 loan application and referring to it as the lender. According to the terms of the  
27 promissory note, the loan contract is with the nominee lender.

28

1           18. Further, Sallie Mae includes a one-sided assignment clause in its  
2 copyrighted promissory notes, and by advance agreement and understanding, the  
3 nominee lender assigns the loan contract to Sallie Mae. Sallie Mae maintains the  
4 assignment includes a National Bank Act, Federal Deposit Insurance Act or similar  
5 laws' preemption defense, which allows it to charge late fees and interest according to  
6 nominee bank's home state laws. In effect, the nominee bank monetizes its National  
7 Bank or state bank charter by allowing its name to be used by Sallie Mae, and Sallie  
8 Mae pays to use the name of the bank so that it may evade and violate California law.  
9 The assignment, however, does not include a National Bank Act or a Federal Deposit  
10 Insurance Act preemption defense because the nominee bank did not make the loan  
11 and thus has no National Bank Act, Federal Deposit Insurance Act or similar laws  
12 preemption defense to assign in the first instance, as the loan is made by Sallie Mae,  
13 which is the *de facto* actual lender.

14           19. Sallie Mae also attempts to evade California law and the protections it  
15 provides student loan borrowers by including in its promissory notes a choice of law  
16 provision selecting the law of the state in which the nominee bank is located.  
17 However, Sallie Mae's nominee banks have no substantial relationship to the student  
18 loan borrowers or the Private Education Loans transactions, as the nominee banks do  
19 not set or control the terms and conditions of the loans, do not approve or disapprove  
20 borrowers, do not direct disbursement of the loan monies, and do not originate the  
21 loans. As such, there is no nexus sufficient to support or justify application of the  
22 choice of law clause and it is unenforceable.

## 23 **II. PARTIES**

24           20. Plaintiff Tina M. Ubaldi is a citizen of the State of California residing in  
25 San Mateo County, California. On June 24, 2003, Ms. Ubaldi entered into a Private  
26 Education Loan agreement in the State of California that has been owned for most or  
27 all of the loan's lifetime by Sallie Mae, and serviced since it was made by Sallie Mae,  
28

1 Inc. (or by Sallie Mae Servicing LLP until it was merged into Sallie Mae, Inc.), which  
2 charged her late fees on several occasions. Ms. Ubaldi was a citizen and resident of the  
3 State of California at the time she entered this loan on June 24, 2003, and has  
4 continued to be a citizen and resident of the State of California at all times since then.

5 21. Plaintiff Chanee Thurston is a citizen of the State of California residing  
6 in Benicia in Solano County, California. On October 10, 2001 and October 16, 2002,  
7 Ms. Thurston entered into Private Education Loan agreements in the State of  
8 California that have been owned for most or all of the life of the loans by Sallie Mae,  
9 and serviced since they were made by Sallie Mae, Inc. (or by its predecessor that was  
10 merged into Sallie Mae, Inc.), which charged her usurious interest as well as late fees  
11 on multiple occasions. Ms. Thurston was a citizen and resident of the State of  
12 California at the time she entered into each of these Private Education Loan  
13 agreements, and has continued to be a citizen and resident of the State of California at  
14 all times since then.

15 22. Defendant SLM Corporation is a publicly traded Delaware corporation  
16 with its principle executive office at 300 Continental Drive, in Newark, Delaware,  
17 according to its 2012 Form 10-K. Defendant SLM Corporation, directly and/or  
18 through one or more of its subsidiaries, is engaged in the business of originating,  
19 servicing and purchasing loans that finance the cost of a student's education.

20 23. SLM Corporation, or its predecessor in interest, the Student Loan  
21 Marketing Association, made, as the *de facto* actual lender, Plaintiffs' and other class  
22 members' Private Education Loans and serviced them under the name Sallie Mae  
23 Servicing LLP, which was a division of Defendant SLM Corporation until December  
24 31, 2003, when Sallie Mae Servicing LLP was merged into Sallie Mae, Inc., and  
25 thereafter Sallie Mae, Inc. serviced them. Sallie Mae owns Plaintiffs' and other  
26 education loans under various names (*e.g.*, Sallie Mae Trust). Sallie Mae owns,  
27 manages or services over 11 million student loans totaling more than \$235 billion.



1           24. Defendant Sallie Mae, Inc., a private company, is the corporate  
2 management and marketing subsidiary of Defendant SLM Corporation, and services  
3 Private Education Loans. Sallie Mae, Inc. has serviced Plaintiffs' loans and other class  
4 members' Private Education Loans since they were made to the present, either under  
5 its own name or through Sallie Mae Servicing LLP which was merged into Sallie Mae,  
6 Inc. in December, 2003. Sallie Mae, Inc. has assessed and collected Late Fees from  
7 Plaintiffs and other class members and has charged Plaintiff Thurston and other class  
8 members an annual interest rate in excess of 10 percent per annum.

9           25. Defendant SLM PC Student Loan Trust 2004-A, purchased Plaintiff  
10 Ubaldi's loan on March 25, 2004 and remains the owner of her loan. As the owner of  
11 Plaintiff Ubaldi's loan and other Private Education Loans, SLM PC Student Loan  
12 Trust 2004-A has and continues to benefit from the assessment and collection of Late  
13 Fees and usurious interest.

### 14 **III. JURISDICTION AND VENUE**

15           26. Jurisdiction of this Court is proper under 28 U.S.C. § 1332 as complete  
16 diversity between the parties exists. Representative Plaintiff Tina M. Ubaldi is a  
17 citizen of California residing in San Mateo County. Representative Plaintiff Chanee  
18 Thurston is a citizen of California residing in Solano County, California. Sallie Mae is  
19 incorporated in the State of Delaware and has its primary offices in Newark,  
20 Delaware.

21           27. Upon information and belief, the amount in controversy exceeds  
22 \$5,000,000 for Representative Plaintiffs and class members collectively, exclusive of  
23 interest and costs, by virtue of the revenue and profit reaped by Sallie Mae from its  
24 transactions with Plaintiffs and the class, as a direct and proximate result of the  
25 wrongful conduct alleged, and by virtue of the injunctive and equitable relief sought.

26  
27  
28

1           28. Upon information and belief, based upon the number of Private  
2 Education Loans Sallie Mae services annually, the total number of class members is  
3 likely to number in the thousands if not hundreds of thousands.

4           29. Venue is proper within this judicial district pursuant to 28 U.S.C. §  
5 1391(b) and (c). Sallie Mae has agents, transacts business or is found within this  
6 judicial district. A substantial portion of the underlying transactions and events  
7 complained of occurred in this district, and affected persons who reside or resided, in  
8 this judicial district. Sallie Mae has received substantial compensation from such  
9 transactions and business activity in this judicial district, including as the result of  
10 servicing student loans for persons residing in this judicial district. Finally, Sallie  
11 Mae resides and/or may be found in this judicial district and the interstate trade and  
12 commerce described herein is and has been carried out in part within this judicial  
13 district.

14 **IV. FACTUAL ALLEGATIONS**

15           30. Sallie Mae makes “Private Education Loans” to students to pay for the  
16 students’ cost of education, including tuition, fees, and associated costs and living  
17 expenses, commonly known and marketed by such Sallie Mae brand names as CEC  
18 Signature Loans, and which are not guaranteed by the federal government.

19           31. Sallie Mae develops and markets its Private Education Loans, creates  
20 and copyrights the loan application forms and promissory notes, the loan applications  
21 are returned to Sallie Mae, Sallie Mae underwrites and determines whether to  
22 approve the borrower, Sallie Mae services the loans and receives all payments, all  
23 payments are to be made to Sallie Mae as specified in the promissory note, Sallie Mae  
24 provides the funding for the loans, directly and/or indirectly through such means as  
25 credit extensions and forward purchase agreements, it directs and controls the  
26 disbursement of the loan proceeds, and it insures the loans. In short, Sallie Mae is the  
27 *de facto* actual lender.

1           32. Borrowers taking out Private Education Loans are required to sign a  
2 student loan promissory note. These student loan promissory notes are standard form  
3 contracts of adhesion offered on a “take it or leave it” basis. Borrowers taking out  
4 Private Education Loans have no opportunity to negotiate the terms of their student  
5 loan promissory notes. Each promissory note for the Private Education Loans have  
6 the same or materially similar provisions, which, along with Sallie Mae’s uniform loan  
7 servicing activities, form the basis of Plaintiffs’ complaint.<sup>1</sup>

8           **A. SALLIE MAE CHARGES UNLAWFUL FEES**

9           33. Private Education Loans that Sallie Mae services require borrowers to  
10 make a payment on or before a specific date as established by their repayment  
11 schedule. If a payment is not received by the scheduled date, it is a breach of the  
12 promissory note. Upon a breach for failing to make a payment on time, the borrower  
13 is considered in default and Sallie Mae can assess a “Late Charge” as defined by the  
14 promissory note. *See* Exh. 1, ¶¶ A, D5, E and J.

15           34. The Private Education Loans define “Late Charge” as follows: “I will pay  
16 a Late Charge if I fail to make any part of an installment payment within 15 days  
17 after it becomes due. The amount of the Late Charge will be identified on my  
18 Disclosures.” Exh. 1, ¶ E. Sallie Mae’s Disclosure Statement identifies the Late  
19 Charge as follows: “If any part of an installment is more than 15 days late, you may  
20 have to pay a late charge of \$5.00 or 5% of the installment, whichever is greater.”  
21 While the language in Sallie Mae’s Disclosure Statement is *permissive*, Sallie Mae  
22 *always* assesses this Late Charge each time a payment is more than 15 days late in  
23 the amount of 5% of the amount due, with a minimum charge of \$5.00.

24  
25  
26 <sup>1</sup> An example of a promissory note from the time period in which Plaintiffs took out  
27 their loans is attached as Exhibit 1. Plaintiff Ubaldi’s substantively identical  
28 promissory note is attached at Exhibit 2.

1           35. Sallie Mae's transactional servicing costs of a late payment are  
2 unaffected by, and have no relationship to, the amount of the payment. For example,  
3 the transactional servicing costs for a monthly payment of \$1,321.51 (the monthly  
4 installment payment on education debt of \$100,000 at 10% interest for a 10 year term)  
5 is the same as it is for a monthly payment of \$330.38 (the monthly payment on a debt  
6 of \$25,000 with the same terms), yet Sallie Mae assesses a late fee of \$66.07 as to one,  
7 and \$16.51 as to the other. Both of which are far in excess of what implicitly  
8 represents the highest cost Sallie Mae actually incurs, \$5.00, although it is believed  
9 and therefore averred that \$5.00 itself still exceeds Sallie Mae's actual costs associated  
10 with a late payments on a Private Education Loan.

11           36. Although Sallie Mae Private Education Loans are fixed term loans that  
12 are repaid in monthly installments of equal amount, Sallie Mae computes and charges  
13 daily interest on its Private Education Loans. Accordingly, Sallie Mae continues to  
14 earn daily interest on the outstanding principal every day until it is actually repaid.  
15 This means that Sallie Mae both assesses the borrower a \$5.00 or 5% fee because s/he  
16 has not repaid the funds, and, additionally continues to charge the borrower daily  
17 interest for use of the funds. The result is the borrower pays Sallie Mae twice - in two  
18 different ways - for being late on a single loan payment.

19           37. Under California law, a liquidated damages clause such as Sallie Mae's  
20 Late Charge is an unlawful penalty if it bears no reasonable relationship to the actual  
21 costs that the parties could have anticipated would flow from a breach, or if the  
22 amount does not represent the result of a reasonable endeavor to estimate a fair  
23 average compensation for any loss that may be sustained. Cal.Civ.Code § 1671. In a  
24 consumer contract, a liquidated damages clause such as Sallie Mae's Late Charge is  
25 only allowed if it was impracticable or extremely difficult to fix the actual damages  
26 resulting from a breach, which is not the case here. Cal.Civ.Code § 1671(d). Sallie  
27 Mae's Late Charge violates California Law under both of these principals.

28

1           38. The Late Charge is not reasonably related to any damages actually  
2 suffered by Sallie Mae due to a late payment. The accounting for payments made,  
3 interest charged, and payments missed is done by a computer with little, if any,  
4 human interaction. Sallie Mae's servicing costs thus are the same no matter the  
5 amount of the overdue installment. Yet, Sallie Mae's Late Charge is a percentage of  
6 the amount owed, no matter the size of the installment.

7           39. It is neither impossible nor extremely difficult for Sallie Mae to fix its  
8 actual costs resulting from a late payment. Indeed, Sallie Mae already specifies in  
9 writing that its required late payment penalty may be as little as five dollars.

10           40. The true purpose behind Sallie Mae's Late Charge is to punish borrowers  
11 who make a payment late, and to create an additional revenue stream for itself. Sallie  
12 Mae is reaping hundreds of millions of dollars in profits from late fees alone.  
13 According to Sallie Mae's annual report filed with the Securities and Exchange  
14 Commission, Sallie Mae collects late fees as part of its servicing revenue for third  
15 party serviced loans, as well as loans in its own portfolio. 2010 10-K, p. F-21. In its  
16 revenue statements, Sallie Mae considers late fees as part of its fee income and  
17 records it as "other income" along with forbearance fees in its consolidated statements  
18 of income.

19           41. In 2007, Sallie Mae earned approximately \$134 million from late fees  
20 alone, and along with forbearance fees, reported \$135.6 million as "Other Income."  
21 Sallie Mae's 2007 10-K, pp. 86 and F-64. In 2008, Sallie Mae collected approximately  
22 \$143 million in late and forbearance fees (2008 10-K, p. 37), and \$146 million in 2009  
23 (2009 10-K, p. 42).

24           42. During these same periods, Sallie Mae by comparison collected only a  
25 fraction of this amount as actual servicing fees on the loans it services. In 2007, it  
26 collected just over \$26 million (2007 10-K, p. F-64), \$26 million in 2008 (2008 10-K, p.  
27 37) and \$53 million in 2009 (2009 10-K, p. 42). Thus, Sallie Mae's revenue from late  
28

1 fees was on average some 3 to 5 times greater than its actual fees for servicing the  
2 loans. This illustrates that Sallie Mae late fees were not merely compensatory, but  
3 instead were a profit center for Sallie Mae and an unlawful liquidated damages  
4 penalty charged to Plaintiffs and class members.

5 43. Sallie Mae's 2010 10-K indicates that service revenue for its Consumer  
6 Lending segment primarily includes late fees and forbearance fees. 2010 10-K, p. 49.  
7 This is the segment that includes originating and servicing Private Loans specifically.  
8 Sallie Mae netted service revenue for its Consumer Lending segment totaling \$72  
9 million in 2010, \$70 million in 2009, and \$65 million in 2008.

10 44. Because Sallie Mae charges interest daily until it receives a payment, the  
11 only actual cost of a late payment is the transactional cost associated with the late  
12 payment. The manner in which Sallie Mae computes the late fees it assesses on  
13 Private Education Loans – as a percentage of the payment -- establishes that the late  
14 fee is as a matter of fact and law not compensatory since its transactional costs do not  
15 increase based on the amount of the late payment. It is rather a penalty exacted to  
16 create a revenue source and, as such, it is an unlawful liquidated damages provision  
17 under California law. Plaintiffs further believe and therefore aver that the \$5.00  
18 minimum late charge itself still exceeds Sallie Mae's actual costs associated with late  
19 payments on a Private Education Loan, and likewise is an unlawful liquidated  
20 damages provision under California law.

21 **B. SALLIE MAE CHARGES USURIOUS INTEREST RATES**

22 45. California law limits the amount of interest that may be charged on loans  
23 such as the Private Education Loans to 10% annually. *See* Cal. Const., art. XV, § 1(1)  
24 (Permitting the charging of interest based upon a written contract “[f]or any loan or  
25 forbearance of any money, goods, or things in action, if the money, goods, or things in  
26 action are for use primarily for personal, family, or household purposes, at a rate not  
27 exceeding 10 percent per annum”). This limit applies not only to annual percentage  
28

1 rates referred to by a lender as “interest” but also includes interest charged in the  
2 form of fees. *Id.* (“No...corporation shall by charging any fee...or other compensation  
3 receive from a borrower more than the interest authorized by this section upon any  
4 loan or forbearance of any money, goods or things in action.”).

5 46. Sallie Mae’s Private Education Loans accrue interest from the date of  
6 disbursement until payment in full at a “Variable Rate” set by Sallie Mae. *See* Exh.1 ¶  
7 C.1.

8 47. The Variable Rate is defined as:

9 the annual rate equal to the sum of the highest Prime Rate published in  
10 The Wall Street Journal Credit Markets’ section, “Money Rates’ table  
11 on the fifteenth day of the last month of the quarter prior to a  
12 borrower’s Disbursement or Change Date plus or minus the percentage  
13 as identified on my Disclosure Statement, which is hereby incorporated  
14 into this Note, per annum (the “Margin”) and rounded to the nearest  
15 one-eighth (0.125) of one percent. (For example, the Variable Rate for  
16 each quarter beginning January 1<sup>st</sup> will be determined by the applicable  
17 Prime Rate published on the preceding December 14<sup>th</sup>.) The Margin is  
based on my School, credit history and co-borrower-s credit history.  
Once set, the Margin does not change. The actual interest rate during  
the quarter in which my loan is disbursed will be on my Disclosure  
Statement.”

18 Exh.1 ¶ C.2. Thus, in any given quarter, Sallie Mae charges interest on the Private  
19 Education Loans at a Variable Rate equal to the (variable) Prime Rate plus the (fixed)  
20 Margin set by Sallie Mae and identified in the borrower’s disclosure statement.

21 48. During the Class Period, the federal Prime Rate fluctuated between  
22 3.25% and 9.5%. *See* historical data for Federal Prime Rate available at  
23 <http://www.federalreserve.gov/releases/h15/data.htm>. The Prime Rate published in  
24 the Wall Street Journal reflects the federal Prime Rate, and, accordingly, also ranged  
25 between 3.25% and 9.5% during the Class Period.

26 49. The fixed Margin added to the Prime Rate and charged to student  
27 borrowers was set between 1.5% and 9.85% based upon Sallie Mae’s estimation of  
28

1 borrower's creditworthiness, as indicated in a Chart ("Table 1") provided by Sallie Mae  
 2 to Career Education Services in 2002:

3 **CEC SIGNATURE LOANS**

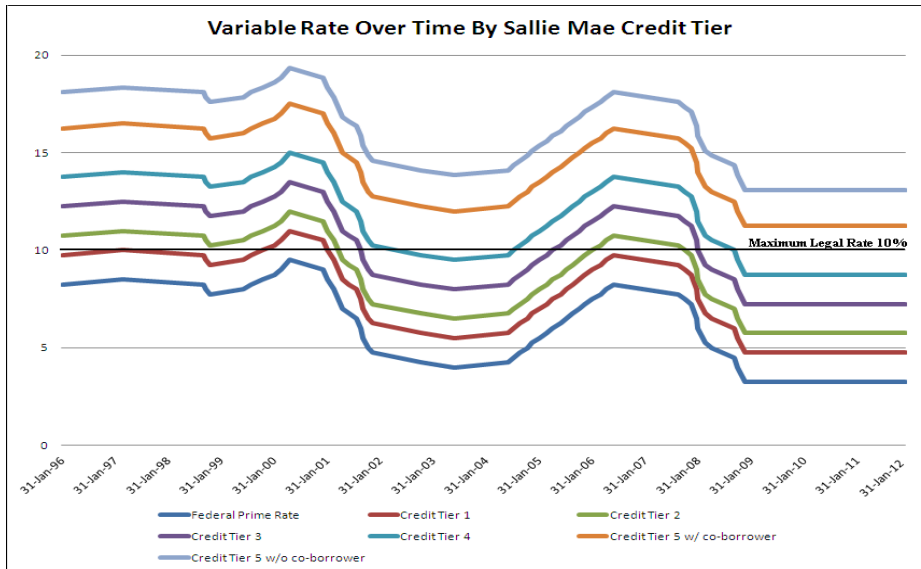
4

Credit Tier	Interest Rate	Disbursement Fee	Repayment Fee
1	Prime + 1.5%	4%	0%
2	Prime + 2.5%	4%	0%
3	Prime + 4.0%	4%	0%
4	Prime + 5.5%	6%	0%
5 with a co-borrower	Prime + 8.0%	6%	0%
5 w/o a co-borrower	Prime + 9.85%	6%	0%

5  
6  
7  
8  
9  
10

11 (Exh.7, 08/20/02 Letter from Sallie Mae to CEC, at SNB00070).

12 50. As reflected in the chart below ("Table 2"), the Variable Interest Rate  
 13 charged borrowers who Sallie Mae placed in Credit Tiers 5 and 5 (w/o co-borrower)  
 14 always exceeded the 10% annual limit during the class period, and has been as much  
 15 as 19.35 percent per annum (nearly double the legal limit).





1           51. In addition, the effective rate of interest charged by Sallie Mae on the  
2 Private Education Loans was in some cases even higher than the Variable Rate,  
3 because Sallie Mae assesses a variety of loan fees, including late fees, supplemental  
4 fees upon disbursement and repayment of the loan, and forbearance fees.

5           52. Sallie Mae charges a “Late Charge” whenever a student borrower fails to  
6 make any part of an installment payment within 15 days after it becomes due. *See*  
7 Exh. 1, ¶ E. Sallie Mae’s Disclosure Statement identifies the Late Charge as follows:  
8 “If any part of an installment is more than 15 days late, you may have to pay a late  
9 charge of \$5.00 or 5% of the installment, whichever is greater.”

10          53. Sallie Mae also charges a “Supplemental Fee” on the Private Education  
11 Loans upon disbursement of the loan proceeds, and/or when the loan entered  
12 repayment status (and after unpaid interest accrued while the student borrower was  
13 in school had been capitalized). Exh. 1, ¶F(1,2). The amount of the Supplemental  
14 Fees was set based upon “a percentage of the principal balance” of the loan and may  
15 include any capitalized interest. *See id.*

16          54. Sallie Mae’s Late Charges and Supplemental Fees constitute additional  
17 forms of interest charged by Sallie Mae on the Private Education Loans. Cal. Const.,  
18 art. XV, § 1. These fees are devices by which Sallie Mae earns additional profit on the  
19 Private Education Loans rather than remuneration for any expense.

20          55. Because Sallie Mae charged additional interest to student borrowers  
21 through its fees, including Late Charges and Supplemental Fees, even if the Variable  
22 Rate itself did not exceed the legal limit of 10 percent per annum, the overall interest  
23 charged by Sallie Mae on a student borrower’s Private Education Loan could, and,  
24 upon information and belief, in many cases did, still exceed the legal limit.

25          56. Thus, Sallie Mae has charged a large number of student borrowers  
26 usurious interest rates on the Private Education Loans, either directly through the  
27 assessment of the Variable Rate, or indirectly through the assessment of interest at  
28

1 the Variable Rate in combination with the assessment of interest through fees such as  
2 Late Charges and/or Supplemental Fees that together create an effective rate of  
3 interest in excess of the 10 percent annual limit.

4 57. Sallie Mae earned billions of dollars of interest on its Private Education  
5 Loans throughout the class period, both directly through the assessment of interest at  
6 the Variable Rate and indirectly through the assessment of fees, including millions of  
7 dollars in interest to which it was not entitled and which it was not permitted to  
8 charge under California law.

9 58. In 2007, Sallie Mae earned approximately \$2,582 million (\$2.582 billion)  
10 in net interest income on its Private Education Loans, which constituted 36% of Sallie  
11 Mae's overall "Core Interest Income" prior to provision for loan losses. (2009 10-K, pp.  
12 15, 60) Net interest income earned on the Private Education Loans was \$1,551  
13 million (\$1.551 billion) in 2008 and \$1,546 million (\$1.546 billion) in 2009. (2010 10-  
14 K, p.47)

15 59. Sallie Mae cannot justify the usurious interest rate it charges borrowers  
16 on the Private Education Loans in violation of California law, and the interest it  
17 received unlawfully represents a windfall to Sallie Mae. This is particularly true  
18 given that private education loans are not dischargeable in bankruptcy, *see*  
19 Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (P.L. 109-8,  
20 10/17/2005), codified at 11 U.S.C § 523(a)(8), thereby ensuring that Sallie Mae will be  
21 repaid its principal and any amounts of interest that it charged on the Private  
22 Education Loans.

23 **C. SALLIE MAE USES NOMINEE BANKS AS PURPORTED LENDERS TO**  
24 **MANUFACTURE A PREEMPTION DEFENSE TO EVADE STATE LAW**

25 60. Sallie Mae attempts to evade California law and the protections it  
26 provides student loan borrowers against punitive, non-compensatory late fees and  
27 usurious interest rates by making it appear as if the loans are made by a National  
28

1 Bank or state chartered bank located in a different state, and subject to the laws of the  
2 bank's home state, pursuant to the National Bank Act, 12 U.S.C. sections 85, 86, the  
3 Federal Deposit Insurance Act, or other similar laws. Sallie Mae does so by selecting a  
4 National Bank or state chartered bank and including its name in its preprinted loan  
5 application and referring to it as the lender. According to the terms of the promissory  
6 note, the loan contract is with the purported lender.

7 61. Further, Sallie Mae includes a one-sided assignment clause in its  
8 copyrighted promissory notes, and by advance agreement and understanding, the  
9 nominee lender assigns the loan contract to Sallie Mae. Sallie Mae maintains the  
10 assignment includes a National Bank Act, Federal Deposit Insurance Act or similar  
11 preemption defense, which allows it to charge late fees and interest according to  
12 nominee bank's home state laws. In effect, the nominee bank monetizes its National  
13 Bank or state bank charter by allowing its name to be used by Sallie Mae, and Sallie  
14 Mae pays to use the name of the bank so that it may evade and violate California law.  
15 The assignment, however, does not include a National Bank Act preemption defense  
16 because the nominee bank did not make the loan and thus has no National Bank Act,  
17 Federal Deposit Insurance Act or similar preemption defense to assign in the first  
18 instance, as the loan is made by Sallie Mae, which is the *de facto* actual lender.

19 62. Sallie Mae has financial relationships with banks which it refers to as  
20 "lender-partners." Sallie Mae enters into what it has called and what in substance are  
21 "forward purchase commitment agreements" with these "lender-partner" banks.  
22 Under these agreements, the "lender-partner" bank purportedly acts as the lender of  
23 record, but in reality Sallie Mae makes the Private Education Loans by funding them  
24 through a standing credit arrangement with the "lender-partner" and/or by a standing  
25 obligation to purchase - immediately or shortly after complete disbursement of the  
26 loan is made - the Private Education Loans from the banks at rates set by the forward  
27 purchase commitment agreements. Moreover, the Private Education Loans also use  
28

1 Sallie Mae's own underwriting, copyrighted forms, promissory notes, brands and/or  
2 proprietary platforms to initiate the loans and Sallie Mae services the Private  
3 Education Loans.

4 63. For instance, Sallie Mae has cultivated such a financial relationship with  
5 "lender-partner" Stillwater National Bank ("Stillwater"), a national bank located in  
6 Oklahoma that Sallie Mae identified as the lender on Plaintiffs' application forms. As  
7 reflected in the 10-K filed by Southwest Bancorp Inc. (Stillwater's parent company) for  
8 2010:

9 student lending ... is substantially dependent on Student Loan  
10 Marketing Administration ("Sallie Mae"), which provides substantially  
11 all of the servicing for government guaranteed and private student  
12 loans and provides liquidity through its purchases of student loans and  
13 lines of credit. Southwest makes government guaranteed student  
14 loans and private student loans. At December 31, 2010, all private  
15 student loans were self-insured by Sallie Mae.

16 64. Upon information and belief, national or state-chartered banks such as  
17 Stillwater have no true role or relationship to the loans that are made by Sallie Mae in  
18 their names, and merely maintain bank accounts from which Sallie Mae can issue  
19 disbursements and/or be reimbursed for the money it disperses directly to students.  
20 Sallie Mae also makes lines of credit available to its "lender-partners" with lines of  
21 credit that they can draw upon for the purpose of funding such loans as directed by  
22 Sallie Mae. Moreover, because the third-party banks transfer the Private Education  
23 Loans to Sallie Mae after origination under a pre-arranged agreement as described  
24 herein, the third-party banks never truly undertake the risk of loss.

25 65. Sallie Mae exerts control and ownership over all Private Education Loans  
26 in other ways as well. Sallie Mae carries out all interactions with the borrowers  
27 applying for the Private Education Loans, establishes and controls the terms and  
28 conditions under which the Private Education Loans are offered. It approves or denies  
29 borrowers' Private Education Loan applications in accordance with its own  
30 underwriting policies, uses its own copyrighted forms, promissory notes, brands and

1 platforms, and disburses the payments to those borrowers who it approves for Private  
2 Education Loans.

3 66. Sallie Mae collects and keeps the vast majority of fees and interest on the  
4 loans. This arrangement is effectuated pursuant to materially-similar assignment  
5 clauses that Sallie Mae includes in its copyrighted promissory notes for the Private  
6 Education Loans. The assignment provisions are one-sided, stating that the lender  
7 (but not borrower) “may assign this loan at any time” and “if... assigned, the Assignee  
8 will become the owner of this Note and will have all your rights to enforce this Note  
9 against me.”

10 67. Sallie Mae bears the credit risk on all the Private Education Loans.  
11 Sallie Mae insures and/or guarantees the Private Education Loans so that Sallie Mae  
12 bears the risk of loss on the loans even prior to purchasing them. Sallie Mae then  
13 assumes the risk of loss directly when it executes the assignments of the Private  
14 Education Loans pursuant to the forward purchase commitment agreements.

15 68. In reality, Sallie Mae is the *de facto* actual lender for its Private  
16 Education Loans. Sallie Mae owns and markets the Private Education Loans brands,  
17 and underwrites the loans, directs the terms of the loans, funds the loans directly or  
18 indirectly, does all of the work to service the loans, bears the credit risk, and reaps  
19 most or all of the fees and profits from the Private Education Loans.

20 69. None of the Private Education Loans are made by national banks, within  
21 the meaning or application of NBA §§ 85 and 86, nor are they made by qualifying bank  
22 entities under parallel state charters as provided by the Federal Deposit Insurance  
23 Act or other similar laws.

24 **D. THE UNITED STATES DEPARTMENT OF THE TREASURY FOUND THAT**  
25 **THE PRIVATE EDUCATION LOANS WERE MADE BY SALLIE MAE**

26 70. In 2002, the Department of the Treasury determined that Sallie Mae  
27 predecessor in interest Student Loan Marking Association (SLMA) was originating  
28

1 loans (and incorrectly attributing these loans to its banking partners) even though it  
2 was a Government Sponsored Entity and forbidden to engage in loan origination  
3 activities.

4 71. In correspondence dated August 30, 2002 to the Department of the  
5 Treasury Office of Sallie Mae Oversight (OSMO), Sallie Mae disputed the Treasury's  
6 draft findings, *see* Exhibit 4 at UST-Ubaldi 011, and explained its activities as follows:

7 SLMF does not make Career Training Loans. Rather, the  
8 GSE has entered into loan purchase agreements with various  
9 lenders under which the GSE provides loan origination services  
10 and loan servicing to the lenders and purchases loans from the  
11 lenders. Copies of the various loan purchase agreements are  
12 available upon request. The GSE in turn subcontracts the loan  
13 origination servicing and the loan servicing functions to SLMF.  
14 The loan purchase agreements between the GSE and its lender  
15 partners governing Career Training Loans are very similar to  
16 the ExportSS agreements that the GSE enters into with its  
17 FFELP lender clients. In all cases, the Career Training Loans  
18 are actually made by federally chartered or state chartered  
19 lenders. The lenders make these loans with their own funds.  
20 Further, each lender in the Career Training Loan program  
21 represents and warrants in the loan purchase agreements that  
22 it is the sole owner of the loans free and clear of any liens,  
23 claims or encumbrances of any nature, and is free to transfer  
24 title to the loans to the GSE. Furthermore, the lenders have the  
25 right to retain 20 percent of the original principal balance of all  
26 Loans that they make under the Career Training Loan Program.  
27 This is consistent with the terms of the GSE's loan purchase  
28 agreements in the Signature Loan Program.

21 72. Notwithstanding Sallie Mae's objections, in its final September 2002  
22 Report of Examination of the Student Loan Marketing Association<sup>2</sup>, the OSMO  
23 reiterated its initial determination that this activity as structured constituted loan  
24 origination by Sallie Mae, stating:

25 \_\_\_\_\_  
26 <sup>2</sup> Neither Sallie Mae's Aug. 2002 letter nor the OSMO's Sept. 2002 Report of  
27 Examination is publicly available. These documents were obtained by Plaintiff Ubaldi  
28 through a subpoena served on the Department of Treasury in connection with this  
action.

1                   **Origination versus Secondary Market Activity.** The  
2 GSE purchases loans in the secondary student loan market; it  
3 generally does not originate student loans for its own account.  
4 In 1998, SLM Corporation had extensive discussions with  
5 Treasury about its plans to originate federally insured student  
6 loans for its own account (the Origination Program). Treasury  
7 stressed the ban on direct and indirect funding of non-GSE  
8 affiliate loan origination activity by the GSE. In 1998, SLM  
9 Corporation's Management represented to Treasury that the  
10 Origination Program would be conducted separately from the  
11 GSE. In a legal memorandum dated March 31, 1998,  
12 Management represented to OSMO that the Origination  
13 Program would "not be funded with proceeds from debt issued  
14 by the GSE and ... loans made under the program [would] not be  
15 sold to the GSE." Thus, all apparently understood and  
16 acknowledged it would undermine the statutory restriction on  
17 loan origination by the GSE, if a non-GSE affiliate originated  
18 loans and the GSE then purchased the loans. This point was  
19 again acknowledged in the Nellie Mae acquisition in 1999, when  
20 Management represented in a letter to Treasury dated May 21,  
21 1999, that "no loans originated by [Nellie Mae] will be  
22 transferred to the GSE." Based on SLMF's relationship with its  
23 banking partners, OSMO concluded that SLMF, in substance  
24 originates loans. Further, the Holding Company has  
25 consistently represented, via its filings with the Securities and  
26 Exchange Commission, that SLMF originates its loans.

18 Exhibit 5, September 2002 OSMO Report of Examination at 5.

19           73. Subsequently, in a 2006 draft report first published on its website in  
20 2011, the federal Office of Sallie Mae Oversight (OSMO) also stated:

21           Based on its examination of SLMA's relationship with its  
22 funding bank partners, OSMO concluded that SLMA, in  
23 substance, was originating certain private loans. The funding  
24 banks did not take long-term possession of the notes signed by  
25 the student borrowers, nor did they assume the credit risk  
26 associated with the notes. The GSE [SLMA] unconditionally  
27 purchased the notes, generally within a month, even in case of  
28 the borrower's death. Further, the economic substance of the  
payments by SLMA to the funding banks reflected loan  
origination via a "storefront" rather than second market activity.

27 Exhibit 6, Excerpts of OSMO 2006 Draft Report, at p.142.

1           74. The OSMO Report further explained, “[i]n a true secondary market, a  
2 bank would sell its asset into the secondary market (i.e., to Sallie Mae) at its fair  
3 value. However, in practice that was not how these loans ‘sold’ to Sallie Mae were  
4 priced.” *Id.* at 142 n. 199. Instead, “[t]he loans were sold to Sallie Mae by its  
5 “storefront banks” at cost plus interest during the holding period rather than at fair  
6 value. This was, in effect, origination by SLMA.” *Id.*

7           **E. DISCOVERY PRODUCED IN THIS ACTION CONFIRMS THAT**  
8           **SALLIE MAE MADE PLAINTIFFS’ LOANS AND WAS THE *DE FACTO***  
9           **ACTUAL LENDER FOR PLAINTIFFS’ LOANS**

10          75. Consistent with the OSMO’s conclusion based upon its 2002 examination  
11 of Sallie Mae, discovery in this action to date, specifically including the ExportSS®  
12 form agreement between Sallie Mae and its lender partner Stillwater Bank, confirms  
13 Sallie Mae was the *de facto* actual lender for its Private Education Loans, including  
14 those loans made to Plaintiffs.

15          76. On July 1, 2002, SLMA and Stillwater entered into an ExportSS®  
16 Agreement. The ExportSS® is a form agreement that Sallie Mae used with multiple  
17 of its “lender-partners” in connection with the origination of the Private Education  
18 Loans. A copy of the ExportSS® Agreement between Sallie Mae and Stillwater and  
19 amendments thereto is attached as Exhibit 7.

20          77. The ExportSS® Agreement refers to Sallie Mae as the entity originating  
21 the Private Education Loans. *See* Exh. 7 at SNB000003 (“You and we agree that only  
22 we [Sallie Mae] and our affiliates will originate and process” the Private Education  
23 Loans).

24          78. The ExportSS® Agreement establishes that Stillwater did not assume  
25 any risk of loss on the Private Education Loans. Instead, Sallie Mae assumed the risk  
26 of loss on the Private Education Loans, since it required Stillwater to assign and sell  
27 the loans to Sallie Mae within a matter of months, and it required Sallie Mae to buy  
28



1 the entire interest in those Private Education Loans. *See* Exh. 7 at SNB000018 (“you  
2 agree to offer to us on the sales schedule set forth below... all Eligible Private Loans  
3 originated by us or our affiliate”); *id.* at SNB000019 (“we **will** purchase all Eligible  
4 Private Loans that we originate on your behalf”) (emph. added).

5 79. The ExportSS® Agreement demonstrates that Sallie Mae controlled the  
6 terms and conditions of the loans. In particular, under the Agreement, Sallie Mae  
7 could, but was not “obligated” to use its own underwriting standards and would  
8 approve or deny borrowers without consulting Stillwater. Exh. 7 at SNB00004-5,  
9 00079-81. Sallie Mae would supply the “design template” for the promissory note,  
10 loan application forms, and related marketing materials, *id.* at SNB000011, and Sallie  
11 Mae reserved final rights of approval on the forms. *Id.* (“You further agree that you  
12 will not alter the content or description of Application Materials without our express  
13 written consent. Sallie Mae shall have final approval of Application Materials prior to  
14 distribution.”).

15 80. The ExportSS® Agreement establishes that the purported “lender”  
16 identified on the loan application forms never actually paid any money to the schools  
17 attended by the student borrowers. Instead, the ExportSS® Agreement specifies that  
18 loan monies are to be disbursed by Sallie Mae from its own accounts to the schools  
19 attended by the students. *See* Exh. 7 at SNB000005 (“We will disburse Loan  
20 proceeds... Funds for these Loans will be drawn from a bank account maintained by  
21 us”).

22 81. At the time that Sallie Mae predecessor in interest SLMA entered into  
23 the ExportSS® Agreement with Stillwater Bank any loans it made would not be  
24 protected by federal preemption as SLMA was not a bank. Thus, as the ExportSS®  
25 Agreement demonstrates, Sallie Mae and its lender partners engaged in a subterfuge  
26 in which Stillwater was named as the lender of record, even though Sallie Mae made  
27 the loan and was the *de facto* actual lender.

1           82. Nominee lenders such as Stillwater made short-term business loans to  
2 Sallie Mae; nominee lenders such as Stillwater did **not** make loans to student  
3 borrowers. Beginning in or about 2005, Sallie Mae in some instances paid the  
4 nominee lender a lower interest rate on the funds than it charged the borrowers  
5 (during the 90 to 180 day period between disbursement and assignment and sale of  
6 the loan to Sallie Mae), further demonstrating that the banks were effectively  
7 providing Sallie Mae with a short-term credit facility rather than making loans to  
8 student borrowers. (Stillwater Form 10-K, 2005, p. 26)

9           83. In sum, as reflected in the ExportSS® form agreement between Sallie  
10 Mae and Stillwater Bank, national or state-chartered banks such as Stillwater have  
11 no true role or relationship to the loans that are made by Sallie Mae in their names.

12           **F. SALLIE MAE INCLUDES AN UNENFORCEABLE CHOICE OF LAW**  
13           **PROVISION DESIGNED TO EVADE CONSUMER PROTECTION LAWS**

14           84. Sallie Mae includes a self-serving choice-of-law provision in its  
15 copyrighted promissory notes, selecting the law of the nominee lender's home state.  
16 The promissory note states: "I understand that you are located in the State listed on  
17 the front of the attached application and this Note will be entered into in the same  
18 State. Consequently, the provisions of this Note will be governed by federal laws and  
19 the laws of that State, without regard to conflict of law rules." Exh. 1, ¶L.3.

20           85. The law selected by Sallie Mae's choice-of-law provision bears no  
21 substantial or reasonable relationship to the parties or the Private Education Loan  
22 transactions because the nominee banks have no involvement in the making of the  
23 Private Education Loans and are not the actual lenders for the Private Education  
24 Loans. The provision is therefore unenforceable.

25           86. For instance, although Sallie Mae's promissory note would make  
26 Plaintiffs' loans subject to Oklahoma law, Sallie Mae does not maintain its principal  
27 place of business in Oklahoma. Conversely, while nominee lender Stillwater Bank is  
28

1 located in Oklahoma, it has no involvement in making or servicing the loans, and has  
2 no relationship whatsoever with the Plaintiffs. In fact, under the arrangement  
3 between Sallie Mae and Stillwater, the identity of individual borrowers only becomes  
4 known to Stillwater (if ever) after the loan is made by Sallie Mae and after the funds  
5 have been disbursed by Sallie Mae. See Exh. 7, SNB 000005 (“we will send two  
6 master checks to each school...together with a disbursement roster... and we will send  
7 you a copy of the portion of the disbursement roster that lists information for your  
8 borrowers”).

9 87. Under these circumstances, there is no nexus between the student  
10 borrowers who took out the Private Education Loans in California and the foreign  
11 state law chosen by Sallie Mae, and it would be contrary to law and equity for law  
12 other than the law of California to apply.

## 13 **V. REPRESENTATIVE PLAINTIFFS AND THE CLASSES**

### 14 **A. PLAINTIFF TINA UBALDI**

15 88. On June 24, 2003, Plaintiff Tina M. Ubaldi took out a Private Education  
16 Loan in California referred to as a CEC Signature Education Loan in the total amount  
17 of \$22,765.00, which was disbursed to her as follows: \$17,756.96 on June 24, 2003 and  
18 \$5,918.64 on October 13, 2003. (Exh. 8). This loan was co-signed by Lamoyne L.  
19 Porter, II, who was at the time and has since then been a California resident. (Exh.  
20 9). This loan was used to help Ms. Ubaldi pay for her education at the California  
21 Culinary Academy in San Francisco, California. This loan was made by Sallie Mae, or  
22 its predecessor in interest, the Student Loan Marketing Association, pursuant to a  
23 forward purchase commitment agreement with Stillwater National Bank intended to  
24 disguise Sallie Mae’s role as the *de facto* actual lender.

25 89. On or before December 18, 2003, this loan was assigned to Sallie Mae or  
26 its predecessor in interest, the Student Loan Marketing Association.

27  
28

1           90. On March 25, 2004, SLM PC Student Loan Trust 2004-A purchased  
2 Plaintiff Ubaldi's loan and remains the owner of her loan.

3           91. Sallie Mae, operating as Sallie Mae Servicing LLP and later as Sallie  
4 Mae, Inc. has serviced Plaintiff Ubaldi's Private Education Loan since its inception.  
5 (Exh. 8).

6           92. Plaintiff Ubaldi applied for her CEC Signature Education Loan using a  
7 loan application form copyrighted and written by Sallie Mae in May 2003. The "CEC  
8 Loan Application" listed Sallie Mae's name and telephone number prominently on the  
9 top of the form, and directed Plaintiff to "Mail application to: Sallie Mae Servicing" in  
10 Panama City, Florida. (Exh. 10).

11           93. On May 30, 2003, Plaintiff Ubaldi received a letter from Sallie Mae's  
12 "Loan Origination Department" located in Panama City, Florida, that her application  
13 was approved and that Sallie Mae would disperse her loan funds in accordance with  
14 the schedule set by her school. (Exh. 11). This was some six (6) months before the  
15 loan was assigned to Sallie Mae.

16           **B. PLAINTIFF CHANEE THURSTON**

17           94. On October 10, 2001 and October 16, 2002, Plaintiff Chanee Thurston  
18 took out Private Education Loans in California referred to as CEC Signature  
19 Education Loans in the total amounts of \$10,600.00 and \$6,240, which included  
20 charges for supplemental disbursement fees in the amounts of 6% and 4% of the loans  
21 respectively. (Exhs. 12, 13, and 14). These loans were used to help Ms. Thurston pay  
22 for her education at Brooks College in Long Beach, California. These loans were made  
23 by Sallie Mae, or its predecessor in interest, the Student Loan Marketing Association,  
24 pursuant to a forward purchase commitment agreement with Stillwater National  
25 Bank intended to disguise Sallie Mae's role as the *de facto* actual lender.

26           95. Upon information and belief, Ms. Thurston's October 10, 2001 and  
27 October 16, 2002 Private Education Loans were assigned to Sallie Mae or its  
28

1 predecessor in interest, the Student Loan Marketing Association, shortly after  
2 disbursement.

3 96. Sallie Mae, operating as Sallie Mae Servicing LLP and later as Sallie  
4 Mae, Inc. has serviced Plaintiff's October 10, 2001 and October 16, 2002 Private  
5 Education Loans since their inception. (Exh. 12 and Exh. 14).

6 97. On June 30, 2001 and October 16, 2002, Plaintiff Thurston received a  
7 letters from Sallie Mae's "Loan Origination Department" located in Panama City,  
8 Florida, stating that her applications were approved and that Sallie Mae would  
9 disperse her loan funds in accordance with the schedule set by her school. (Exhs. 12  
10 and 14). As reflected in the letters and/or enclosed Truth in Lending disclosure forms,  
11 the marginal interest added to the prime rate on Plaintiff Thurston's October 10, 2001  
12 and October 16, 2002 Private Education Loans was 8% and 1.5%, respectively. (Exhs.  
13 12, 13, and 14)

14 98. Plaintiff Thurston was charged a Supplemental Fee at the time of  
15 disbursement on both the June 30, 2001 and October 16, 2002 Private Education  
16 Loans. (Exhs. 12, 14 at 2)

17 **C. PLAINTIFFS' PRIVATE EDUCATION LOANS**

18 99. Like all other Private Education Loans made by Sallie Mae, Plaintiffs  
19 Ubaldi and Thurston received a standard form promissory note copyrighted and  
20 written by Sallie Mae for their CEC Signature Education Loans.<sup>3</sup> (See, e.g., Exh. 1).  
21 This promissory note could not be modified or otherwise negotiated by Plaintiffs or  
22 other borrowers since it was offered to them solely on a take it or leave it basis, and  
23 included statements such as "THIS IS A NON-NEGOTIABLE CONSUMER NOTE."  
24 (*Id.* at 3).

25  
26  
27 <sup>3</sup> The "Signature Student Loan" name is a registered trademark of SLM Corporation  
(Sallie Mae).

1           100. Like all other Private Education Loans made by Sallie Mae, Plaintiffs’  
2 promissory notes included a *one-sided* assignment clause providing “If this Note is  
3 assigned, the Assignee will become the owner of this Note and will have all your rights  
4 to enforce this Note against me” and “I may not assign this Note or any of its benefits  
5 or obligations. You may assign this Note at any time.” (*See, e.g.*, Exh. 1 at ¶L.2 and  
6 ¶L.10)

7           101. Like all other Private Education Loans made by Sallie Mae, Plaintiffs’  
8 promissory notes included a choice-of-law clause providing “I understand that you are  
9 located in the State listed on the front of the attached application and this Note will be  
10 entered into in the same State. Consequently, the provisions of this Note will be  
11 governed by federal laws and the laws of that State, without regard to conflict of law  
12 rules.” (*See, e.g.*, Exh. 1 at ¶L.3)

13           102. Like all other Private Education Loans made by Sallie Mae, Plaintiffs’  
14 promissory notes for their Private Education Loans include a promise to pay such as “I  
15 will make consecutive monthly payments during the Repayment Period in the  
16 amounts and on or before the payment due dates shown on my statements until I have  
17 paid all of the principal and interest and any other charges I may owe on this Note.”  
18 (*See, e.g., Id.* at ¶D.2).<sup>4</sup> In the event Plaintiffs or other borrowers fail to make the full  
19 monthly payment when due, the standard form promissory note permits Sallie Mae to  
20 declare the loan in default and demand immediate payment of the entire loan balance,  
21 including all Late Charges (*see, e.g., Id.* at ¶I.1), or continue the loan and assess a Late  
22 Charge. (*See, e.g., Id.* at ¶E). The standard form promissory note provides for a Late  
23 Charge, and makes it clear that the Late Charge will be paid first from any future  
24 payments from the borrower. (*See, e.g., Id.* at ¶¶D.7; E).

25 \_\_\_\_\_  
26 <sup>4</sup> Plaintiffs’ promissory notes, like the promissory notes for all other Private  
27 Education Loans, includes provisions for the deferment of payments during the  
28 borrower’s schooling and otherwise of which Plaintiff Ubaldi received several from  
Sallie Mae since the loan was initiated. (*See, e.g., Id.* at ¶¶B.1;D.1).

1           103. Like all other Private Education Loans made by Sallie Mae, the Late  
2 Charge provided for under Plaintiffs' promissory notes was the greater of 5% of the  
3 installment or \$5.00 for any payment not made within 15 days after the due date.  
4 While all promissory notes for the Private Education Loans require the materially  
5 same Late Charge, some promissory notes specifically state the greater of \$5.00 or 5%  
6 language directly in the standard form promissory note, while other standard form  
7 promissory notes state that a Late Charge will be assessed if a payment was more  
8 than 15 days late, and that the terms of this Late Charge would be disclosed in a  
9 subsequent Disclosure Statement.

10           104. Plaintiffs' promissory notes, like all other promissory notes of all other  
11 Sallie Mae Private Education Loans, provided that the interest would be determined,  
12 as follows:

13                   the annual rate equal to the sum of the highest Prime  
14 Rate published in The Wall Street Journal Credit Markets'  
15 section, "Money Rates" table on the fifteenth day of the last  
16 month of the quarter prior to a borrower's Disbursement or  
17 Change Date plus or minus the percentage as identified on my  
18 Disclosure Statement, which is hereby incorporated into this  
19 Note, per annum (the "Margin") and rounded to the nearest one-  
20 eighth (0.125) of one percent. (For example, the Variable Rate  
21 for each quarter beginning January 1<sup>st</sup> will be determined by the  
applicable Prime Rate published on the preceding December  
14<sup>th</sup>.) The Margin is based on my School, credit history and co-  
borrower-s credit history. Once set, the Margin does not change.  
The actual interest rate during the quarter in which my loan is  
disbursed will be on my Disclosure Statement."

22 Exh. 1 ¶C.2.

23           105. Plaintiffs' promissory notes, like the promissory notes of all other Sallie  
24 Mae Private Education Loan borrowers, provided for the collection of Supplemental  
25 Fees, specifically including a disbursement fee based upon a "percentage of the  
26 principal balance of my loan" which Sallie Mae could either "deduct from the  
27 disbursement or add to the principal loan balance" of the loan, and a repayment fee  
28

1 that would be “a percentage of the principal balance of my loan after unpaid interest  
2 accrued during the Interim Period is capitalized.” (*See, e.g.*, Exh. 1, ¶F.1,2)

3 106. Plaintiffs received several standard form Disclosure Statements from  
4 Sallie Mae for their Private Education Loans, each providing that a Late Charge of the  
5 greater of 5% of the installment or \$5.00 may be charged for any payment not made  
6 within 15 days after the due date. (Exhs. 2, 4, 14). Whether specifically stated in the  
7 standard form promissory note or in a separate Disclosure Statement incorporated  
8 and made part of the promissory note by reference, all promissory notes for the  
9 Private Education Loans serviced by Sallie Mae require materially the same Late  
10 Charge. These Late Charges are collected and retained by Sallie Mae, whether it  
11 owns and services or just services the Private Education Loans.

12 107. Plaintiffs, like all other borrowers of Private Education Loans made by  
13 Sallie Mae, did not know what costs Sallie Mae (and the named lender if purportedly  
14 different than Sallie Mae) incurred as a result of borrowers’ late payments. Neither  
15 Sallie Mae nor the named lender (if purportedly different than Sallie Mae) disclosed to  
16 Plaintiffs, borrowers or the public at large the costs associated with each late payment  
17 for Private Education Loans. Nor did Plaintiffs or other borrowers of Private  
18 Education Loans have any reason to suspect that the Late Charge assessed by Sallie  
19 Mae exceeded the true costs associated with the late payment, or that the Late Charge  
20 violated applicable law. Indeed, Sallie Mae is one of the largest educational loan  
21 providers and servicers in the United States, providing and servicing millions of  
22 education loans. Plaintiffs and other borrower class members’ promissory notes and  
23 related documents were replete with disclosures and other provisions touted therein  
24 as being required by law. As such, Plaintiffs and other borrower class members’ had  
25 no reason to believe that Sallie Mae would fail to comply with applicable law with  
26 respect to the Late Charges, and they reasonably trusted and relied on Sallie Mae to  
27 assess any Late Charges on their Private Education Loans in accordance with  
28



1 applicable law. As described throughout this Complaint, unbeknownst to Plaintiffs  
2 and other borrower class members, Sallie Mae violated applicable California law by  
3 assessing them an unlawful Late Charge in excess of its true costs of the late  
4 payments.

5 108. Sallie Mae charged Plaintiff Ubaldi 5% of the amount of the installment  
6 each time Plaintiff Ubaldi was more than 15 days late in making a payment as a Late  
7 Charge, as 5% of the payment was greater than the \$5.00 minimum. For example, on  
8 August 12, 2007, Plaintiff had a "Past Due Amount" of \$329.43 on her Private  
9 Education Loan and was charged a "Late Fee" of \$16.47 by Sallie Mae, which is 5% of  
10 the late payment. (Exhs. 15, 16). Plaintiff incurred additional Late Charges for her  
11 Private Education Loan that were assessed by Sallie Mae on the same basis on at  
12 least the following occasions: December 16, 2007, November 30, 2008, June 25, 2009  
13 and September 25, 2009. (Exhs. 17-21).

14 109. Plaintiff Ubaldi paid Sallie Mae for each of the Late Charges set forth in  
15 the preceding paragraph since she made subsequent payments on her Private  
16 Education Loan. (Exhs. 15-21). Indeed, pursuant to her promissory note, Plaintiff  
17 Ubaldi's subsequent payments made after being assessed a Late Charge were applied  
18 first to pay the Late Charge before being applied to the interest and principal owed on  
19 her loan. (Exh. 1, ¶D.7)

20 110. Plaintiff Thurston has been charged Late Charges in the amount of \$5.00  
21 or 5%, whichever was greater, on repeated occasions throughout the duration of her  
22 Private Education Loans up to the present day, and including in 2012. Thurston paid  
23 Late Charges on the Private Education Loans, including in 2012.

24 111. The Late Charges Plaintiffs and other borrower class members incurred  
25 had no reasonable relationship to the actual damages Sallie Mae suffered as a result  
26 of Plaintiffs and other borrower class members making a payment late, and do not  
27 represent an amount Sallie Mae estimated to be fair compensation for any losses it  
28

1 sustained as a result of the late payment. Instead, the Late Charges Plaintiffs and  
2 other borrower class members incurred were punitive, liquidated damages assessed  
3 for the sole purposes of encouraging Plaintiffs and other borrower class members to  
4 pay on time and to generate profit for Sallie Mae, which violates applicable California  
5 law.

6 112. Sallie Mae also charged and received, and continues to charge and  
7 receive, interest from Plaintiff Thurston in excess of 10% per annum on her 2001 and  
8 2002 Sallie Mae Private Education Loans. (Exhs 13, 14 at 2) Plaintiff Thurston was  
9 placed in credit tier 5 (with a co-borrower) and charged a Margin of 8% above the  
10 Prime Rate on her 2001 Private Education Loan. (Exh. 3; Exh. 12) Since 2001, the  
11 Prime Rate has never fallen below 3.25%. *See* Table 2 at ¶50, *supra*. Accordingly, the  
12 Variable Rate (i.e., the Prime Rate plus the Margin) charged by Sallie Mae on Plaintiff  
13 Thurston's 2001 Private Education Loan has exceeded 10% per annum throughout its  
14 entire lifetime. *See id.* (reflecting Variable Rate over time charged to Tier 5  
15 borrowers). Notably, the Variable Rate assessed by Sallie Mae and paid by Plaintiff  
16 Thurston on her 2001 Private Education Loan reached nearly 18% during those times  
17 when the Prime Rate was highest (Prime Rate of 9.5% plus Margin of 8% equals a  
18 Variable Rate of 17.5%), even before calculation of any additional interest in the form  
19 of fees. Sallie Mae also charged interest in excess of 10% on Plaintiff Thurston's 2002  
20 Private Education Loan, as a result of the charging of a Supplemental Fee. (Exh. 14  
21 at 2)

22 113. Plaintiffs, like all other borrowers of Private Education Loans made by  
23 Sallie Mae, did not know, nor did they have reason to know, that Sallie Mae was not  
24 entitled to charge interest as such high rates. Neither Sallie Mae nor the named  
25 lender (if purportedly different than Sallie Mae) disclosed to Plaintiffs, borrowers or  
26 the general public that the Private Education Loans had in fact been made by Sallie  
27 Mae and that, therefore, the interest rates on the loans were subject to California law.

28

1 Nor did Plaintiffs or other borrowers of Private Education Loans have any reason to  
 2 suspect that the Variable Rate assessed by Sallie Mae, either standing alone or in  
 3 conjunction with Late Charges and/or Supplemental Fees, exceeded the maximum  
 4 legal interest limit allowed by law.

5 114. Plaintiffs and the other student borrowers' promissory notes and related  
 6 documents were replete with disclosures and other provisions touted therein as being  
 7 required by law. As such, Plaintiffs and the other class members' had no reason to  
 8 believe that Sallie Mae would fail to comply with applicable law with respect to the  
 9 interest rate, and they reasonably trusted and relied on Sallie Mae to assess interest  
 10 on their Private Education Loans in accordance with applicable law. As described  
 11 throughout this Complaint, unbeknownst to Plaintiffs and the other class members,  
 12 Sallie Mae violated applicable California law by assessing interest at usurious rates in  
 13 excess of the legal limit.

14 ~~**D. PLAINTIFFS' AND THE CLASSES' CLAIMS ARE TOLLED BY**~~  
 15 ~~**OPERATION OF THE DISCOVERY RULE AND DOCTRINE OF**~~  
 16 ~~**CONCEALMENT**~~

17 ~~115. Plaintiffs and class members did not know, and had no reason to suspect,~~  
 18 ~~until at least early March 2011, after the publication of the OSMO's draft report on its~~  
 19 ~~website, that Sallie Mae and not a national and/or state chartered bank was the *de*~~  
 20 ~~*facto* actual lender for the Private Education Loans.~~

21 ~~116. As explained above, Sallie Mae misrepresented in the loan application~~  
 22 ~~forms that it provided to Plaintiffs and all other Private Education Loan student~~  
 23 ~~borrowers that a national and/or state chartered bank was the "lender" for the Private~~  
 24 ~~Education Loans. See Exh. 10. Since federal law provides that national and/or state-~~  
 25 ~~chartered banks are entitled to charge interest (including in the form of fees) at the~~  
 26 ~~highest rate permitted by their home states, and since federal law preempts~~  
 27 ~~conflicting state consumer protection laws, the factual misrepresentation as to the~~  
 28 ~~identity of the "lender" operated to conceal from Plaintiffs and other class members~~

1 ~~that the terms of the Private Education Loans were subject to California state law and~~  
2 ~~that the fees and interest charged by Sallie Mae were unlawful.~~

3 ~~117. Moreover, prior to early March 2011, there was no publicly available~~  
4 ~~information explaining that Sallie Mae and not its nominee banking partners was~~  
5 ~~actually making the Private Education Loans, from which Plaintiffs or class members~~  
6 ~~could have determined that their rights were being violated. While the OSMO~~  
7 ~~concluded in 2002 that Sallie Mae was in substance making the Private Education~~  
8 ~~Loans that Sallie Mae attributed to its banking partners, (see Exs. 4 and 5) the~~  
9 ~~OSMO's conclusion and the documents related to OSMO's examination of Sallie Mae~~  
10 ~~were never made publicly available. (These documents were obtained through a~~  
11 ~~subpoena to the Department of Treasury in this action after their existence was~~  
12 ~~disclosed by the OSMO's report published on its website.)~~

13 ~~118. The first public disclosure of Sallie Mae's true role as the *de facto* actual~~  
14 ~~lender did not come until the OSMO published the draft 2006 report on its website,~~  
15 ~~which upon information and belief occurred on or around March 8, 2011. However,~~  
16 ~~even then, the disclosure was buried on the 142nd page of a 300 plus page draft report~~  
17 ~~that did not receive any media attention or publicity that was buried on a sub page of~~  
18 ~~the Department of Treasury's website. Given these circumstances, this draft report~~  
19 ~~did not provide adequate notice to borrowers of the need to investigate potential~~  
20 ~~claims against Sallie Mae. Indeed, Plaintiffs only learned of the existence of the draft~~  
21 ~~report and that Sallie Mae was the *de facto* actual lender for the Private Education~~  
22 ~~Loans through this litigation, after the identity of the lender for the Private Education~~  
23 ~~Loans was raised by SLM Corporation in its motion to dismiss filed on May 27, 2011.~~

24 ~~119. Until at least March 2011, as a result of Sallie Mae's concealment and~~  
25 ~~the lack of publicly available information, Plaintiffs and class members did not know~~  
26 ~~and had no reason to suspect that Sallie Mae was the *de facto* actual lender and~~  
27 ~~improperly charging fees and interest in violation of law. Indeed, Sallie Mae assured~~

28

1 ~~its student loan borrowers otherwise. See, e.g., Exh. 3 at 1 (“In no event will the~~  
 2 ~~interest rate exceed the maximum rate allowed by law.”).~~

3 ~~120. Accordingly, any otherwise applicable statutes of limitation for Plaintiffs~~  
 4 ~~and class members are tolled from the first unlawful charging of fees and/or interest~~  
 5 ~~by the Discovery Rule and/or concealment doctrine.~~

## 6 VI. CLASS ACTION ALLEGATIONS

7 ~~121,115.~~ This action asserts claims on behalf of a class and two subclasses  
 8 pursuant to Federal Rules of Civil Procedure 23(a), and (b)(1), 23(b)(2) and 23(b)(3).

9 ~~122,116.~~ Plaintiffs Ubaldi and Thurston bring claims on behalf of  
 10 themselves and the Choice-of-Law Class, defined as:

11 All persons who on or after ~~March 17, 2007~~January 1, 1996  
 12 obtained a Sallie Mae Private Education Loan for which Sallie Mae  
 13 was the *de facto* actual lender as described in this Third Amended  
 14 Complaint which included a choice-of-law provision, based upon a loan  
 15 application that listed California as the permanent residence of the  
 16 borrower if no temporary residence was identified, or based upon a  
 17 loan application that listed California as the temporary residence of  
 18 the borrower (the “**Choice of Law Class**”).

19 ~~123,117.~~ Plaintiffs Ubaldi and Thurston bring claims on behalf of  
 20 themselves and the Late Charge Subclass, defined as:

21 All persons who at any time obtained a Sallie Mae Private  
 22 Education Loan for which Sallie Mae was the *de facto* actual lender as  
 23 described in this Third Amended Complaint, based upon a loan  
 24 application that listed California as the permanent residence of the  
 25 borrower if no temporary residence was identified, or based upon a  
 26 loan application that listed California as the temporary residence of  
 27  
 28

1 the borrower, and who on or after ~~March 17, 2007~~~~January 1, 1996~~ March 17,  
 2 2007, incurred a Late Charge from Sallie Mae (the “**Late Charge**  
 3 **Subclass**”);

4 ~~124,118.~~ Plaintiffs Thurston bring claims on behalf of herself and the Usury  
 5 Subclass, defined as:

6 All persons who at any time obtained a Sallie Mae Private  
 7 Education Loan for which Sallie Mae was the *de facto* actual lender as  
 8 described in this Third Amended Complaint, based upon a loan  
 9 application that listed California as the permanent residence of the  
 10 borrower if no temporary residence was identified, or based upon a  
 11 loan application that listed California as the temporary residence of  
 12 the borrower, and who on or after March 26, 2009~~January 1, 1996~~,  
 13 were charged interest at an annual rate of more than 10% (the “**Usury**  
 14 **Subclass**”).

15 ~~125,119.~~ The Choice-of-Law Class, Late Charge Subclass, and Usury  
 16 Subclass are each subject to the following exclusions:

17 Excluded are Sallie Mae’s officers, directors, managerial  
 18 employees and their immediate families, and any of the judges of the  
 19 Court before which this case is pending and their immediate families.

20 Excluded are Sallie Mae Private Education Loans made by  
 21 Sallie Mae Bank, since its inception in 2005.

22 Excluded are all Sallie Mae Private Education Loans with a  
 23 promissory note for the loan at issue that includes an arbitration  
 24 clause or class action waiver.<sup>5</sup>

25 \_\_\_\_\_  
 26 <sup>5</sup> By deleting tolling allegations (¶¶ 115-120) and modifying the class periods  
 27 (¶¶ 121-125) alleged in the original TAC [Dkt. No. 126, Ex. A-1], Plaintiffs are  
 28 conforming the TAC to the Court’s November 15, 2013 Order [Dkt. No. 169].  
By so doing, and not re-alleging those portions in the Modified TAC.

1           **A. THE CHOICE OF LAW CLASS**

2           ~~126,120.~~ Upon information and belief, there are thousands of members in  
3 the Choice of Law Class who are geographically dispersed throughout California, as  
4 well as those who have re-located to other states. Therefore, individual joinder of all  
5 members in the Choice of Law Class would be impracticable.

6           ~~127,121.~~ Common questions of law or fact exist as to all members of the  
7 Choice of Law Class. These questions predominate over the questions affecting only  
8 individual class members. For the Choice of Law Class, these common legal or factual  
9 questions include:

- 10           a. Whether Sallie Mae was the *de facto* actual lender for the Private  
11 Education Loans;
- 12           b. Whether the Private Education Loans included among their terms  
13 a choice of law provision;
- 14           c. Whether the law selected by the choice of law provision in the  
15 Private Education Loans had a substantial relationship to the parties or  
16 transactions; and

17  
18  
19 Plaintiffs are not waiving their rights to subsequently appeal the Court's  
20 decision. *Lacey v. Maricopa County*, 693 F.3d 896, 928 (9th Cir. Ariz. 2012) (“  
21 We see no benefit in requiring plaintiffs to re-allege claims that the district  
22 courts have already dealt with on the merits and dismissed with prejudice.  
23 Even where the district court recognizes that plaintiffs are just following the  
24 *Forsyth* rule and preserving their options on appeal, the court will still be  
25 wasting resources in parsing old claims and reiterating its prior rulings, and  
26 there is no reason to make the court dismiss them a second time. Our  
27 stewardship requires better use of our limited judicial resources.... We  
28 therefore join our sister circuits and overrule in part the rule found in  
*Forsyth* and other cases “that a plaintiff waives all claims alleged in a  
dismissed complaint which are not re-alleged in an amended complaint.” For  
claims dismissed with prejudice and without leave to amend, we will not  
require that they be re-pled in a subsequent amended complaint to preserve  
them for appeal” (citations omitted)

Formatted: Font: Italic

Formatted: Font: Italic

Formatted: Font: Italic

1           d.       Whether Plaintiffs and the Choice of Law Class are entitled to  
2       Declaratory Relief that California law governs the rights and remedies of the  
3       parties with respect to their Private Education Loans.

4       ~~128,122.~~ Plaintiffs' claims are typical of the claims of the Choice of Law  
5       Class, in that Plaintiffs took out Sallie Mae Private Education Loans, the promissory  
6       notes for their loans included a choice of law provision, and their loans were made in  
7       California. Plaintiffs, therefore, are no different in any relevant respect from any  
8       other Choice of Law Class member, and the relief sought is common to the Choice of  
9       Law Class.

10       ~~129,123.~~ Plaintiffs are adequate representatives of the Choice of Law Class  
11       because their interests do not conflict with the interests of Choice of Law Class  
12       members they seek to represent, and they have retained counsel competent and  
13       experienced in conducting complex lending and class action litigation. Plaintiffs and  
14       their counsel will adequately protect the interests of the Choice of Law Class.

15       ~~130,124.~~ A class action is superior to other available means for the fair and  
16       efficient adjudication of this dispute. The damages suffered by each individual Choice  
17       of Law Class member with respect to the declaratory relief claim are non-monetary,  
18       while the burden and monetary expense needed to individually prosecute the choice-  
19       of-law issue against Sallie Mae is substantial. Thus, it would be virtually impossible  
20       for Choice of Law Class members individually to redress effectively the wrongs done to  
21       them. Moreover, even if Choice of Law Class members could afford individual actions,  
22       it would still not be preferable to class wide litigation. Individualized actions present  
23       the potential for inconsistent or contradictory judgments.

24       ~~131,125.~~ By contrast, a class action presents far fewer management  
25       difficulties and provides the benefits of single adjudication, economies of scale, and  
26       comprehensive supervision by a single court. In the alternative, the Choice of Law  
27       Class may be certified because Sallie Mae has acted or refused to act on grounds  
28



1 generally applicable to the Choice of Law Class thereby making appropriate  
2 preliminary and final declaratory relief with respect to the Choice of Law Class.

3 ~~132.126.~~ Upon information and belief, all records concerning each of the  
4 Sallie Mae Private Education Loans entered into by members of the Choice of Law  
5 Class are in the possession and control of Defendants and their agents and available  
6 through discovery.

7 **B. THE LATE CHARGE SUBCLASS**

8 ~~133.127.~~ Upon information and belief, there are thousands of members in  
9 the Late Charge Subclass who are geographically dispersed throughout California, as  
10 well as those who have re-located to other states. Therefore, individual joinder of all  
11 members in the Late Charge Subclass would be impracticable.

12 ~~134.128.~~ Common questions of law or fact exist as to all members of the  
13 Late Charge Subclass. These questions predominate over the questions affecting only  
14 individual class members. For the Late Charge Subclass, these common legal or  
15 factual questions include:

- 16 a. What the purpose is for the Late Charge assessed to Private  
17 Education Loan borrowers whose payments are not received by Sallie Mae  
18 within 15 days of the scheduled payment date;
- 19 b. What costs Sallie Mae actually incurs when it does not receive a  
20 payment within 15 days of the scheduled date for its Private Education Loans;
- 21 c. Whether Sallie Mae calculated the actual cost incurred when a  
22 borrower is more than 15 days late in making a payment at the time when the  
23 Private Education Loans were entered into;
- 24 d. Whether Sallie Mae charged Plaintiffs and the other Subclass  
25 member borrowers a Late Charge exceeding the costs Sallie Mae actually  
26 incurs when it does not receive a payment within 15 days of the scheduled date  
27 for its Private Education Loans;
- 28

Field Code Changed

1 e. Whether and how much Sallie Mae profited by charging Late  
2 Charges to borrowers with Private Education Loans;

3 f. Whether Sallie Mae violated California Civil Code §§1671(b) or (d)  
4 when it charged borrowers a Late Charge;

5 g. Whether Sallie Mae's conduct violated California's Unfair  
6 Competition Law, California Business and Practices Code § 17200, *et seq.*; and

7 h. The appropriate measure of restitution and/or restitutionary  
8 disgorgement.

9 ~~135,129.~~ Plaintiffs' claims are typical of the claims of the Late Charge  
10 Subclass, in that Plaintiffs Ubaldi and Thurston were more than 15 days late in  
11 making a payment on their Sallie Mae Private Education Loans on one or more  
12 occasions, the loans were made in California, and they were charged a Late Charge  
13 each time their payments were late. Plaintiffs, therefore, are no different in any  
14 relevant respect from any other Late Charge Subclass member, and the relief sought  
15 is common to the Late Charge Subclass.

16 ~~136,130.~~ Plaintiffs are adequate representatives of the Late Charge  
17 Subclass because their interests do not conflict with the interests of Late Charge  
18 Subclass members they seek to represent, and they have retained counsel competent  
19 and experienced in conducting complex lending and class action litigation. Plaintiffs  
20 and their counsel will adequately protect the interests of the Late Charge Subclass.

21 ~~137,131.~~ A class action is superior to other available means for the fair and  
22 efficient adjudication of this dispute. The damages suffered by each individual  
23 Subclass member likely will be comparatively small, especially given the burden and  
24 expense of individual prosecution of the complex litigation necessitated by Sallie Mae's  
25 conduct. Thus, it would be virtually impossible for Late Charge Subclass members  
26 individually to redress effectively the wrongs done to them. Moreover, even if Late  
27 Charge Subclass members could afford individual actions, it would still not be

1 preferable to class wide litigation. Individualized actions present the potential for  
2 inconsistent or contradictory judgments.

3 ~~138,132.~~ By contrast, a class action presents far fewer management  
4 difficulties and provides the benefits of single adjudication, economies of scale, and  
5 comprehensive supervision by a single court. In the alternative, the Late Charge  
6 Subclass may be certified because Sallie Mae has acted or refused to act on grounds  
7 generally applicable to the Late Charge Subclass, thereby making appropriate  
8 preliminary and final equitable relief with respect to the Subclass.

9 ~~139,133.~~ Upon information and belief, all records concerning each of the  
10 Sallie Mae Private Education Loans entered into by members of the Late Charge  
11 Subclass are in the possession and control of Defendants and their agents and  
12 available through discovery.

13 **C. THE USURY SUBCLASS**

14 ~~140,134.~~ Upon information and belief, there are thousands of members in  
15 the Usury Subclass who are geographically dispersed throughout California, as well as  
16 those who have re-located to other states. Therefore, individual joinder of all members  
17 in the Usury Subclass would be impracticable.

18 ~~141,135.~~ Common questions of law or fact exist as to all members of the  
19 Usury Subclass. These questions predominate over the questions affecting only  
20 individual class members. For the Usury Subclass, these common legal or factual  
21 questions include:

22 a. Whether Sallie Mae charged interest of its Private Education  
23 Loans at rates in excess of 10 percent annually;

24 b. Whether the Late Fees and Supplemental Fees Sallie Mae charged  
25 to borrowers constitute forms of interest subject to California's Constitutional  
26 prohibition on usury;

27  
28

1           c.       Whether Sallie Mae's conduct violated California's Unfair  
2       Competition Law, California Business and Practices Code § 17200, *et seq.*; and

3           d.       The appropriate measure of restitution and/or restitutionary  
4       disgorgement.

5       ~~142,136.~~ Plaintiff Thurston's claims are typical of the claims of the Usury  
6       Subclass, in that Plaintiff Thurston was charged and paid interest at a rate of more  
7       than 10% annually on one or more of her Sallie Mae Private Education Loan and paid  
8       additional usurious interest in the form of Late Charges and Supplemental Fees, and  
9       her loans were made in California. Plaintiff Thurston, therefore, is no different in any  
10      relevant respect from any other Usury Subclass member, and the relief sought is  
11      common to the Usury Subclass.

12      ~~143,137.~~ Plaintiff Thurston is an adequate representative of the Usury  
13      Subclass because her interests do not conflict with the interests of Usury Subclass  
14      members she seeks to represent, and she has retained counsel competent and  
15      experienced in conducting complex lending and class action litigation. Plaintiff  
16      Thurston and her counsel will adequately protect the interests of the Usury Subclass.

17      ~~144,138.~~ A class action is superior to other available means for the fair and  
18      efficient adjudication of this dispute. The damages suffered by each individual Usury  
19      Subclass member likely will be comparatively small, especially given the burden and  
20      expense of individual prosecution of the complex litigation necessitated by Sallie Mae's  
21      conduct. Thus, it would be virtually impossible for Usury Subclass members  
22      individually to redress effectively the wrongs done to them. Moreover, even if Usury  
23      Subclass members could afford individual actions, it would still not be preferable to  
24      class wide litigation. Individualized actions present the potential for inconsistent or  
25      contradictory judgments.

26      ~~145,139.~~ By contrast, a class action presents far fewer management  
27      difficulties and provides the benefits of single adjudication, economies of scale, and

1 comprehensive supervision by a single court. In the alternative, the Usury Subclass  
 2 may be certified because Sallie Mae has acted or refused to act on grounds generally  
 3 applicable to the Usury Subclass, thereby making appropriate preliminary and final  
 4 equitable relief with respect to the Usury Subclass.

5 ~~146,140.~~ Upon information and belief, all records concerning each of the  
 6 Sallie Mae Private Education Loans entered into by members of the Usury Subclass  
 7 are in the possession and control of Defendants and their agents and available  
 8 through discovery.

## 9 VII. CLAIMS FOR RELIEF

### 10 A. FIRST CLAIM FOR RELIEF - "UNLAWFUL" BUSINESS PRACTICES 11 IN VIOLATION OF THE UNFAIR COMPETITION LAW, BUS. & 12 PROF. CODE § 17200, ET SEQ. FOR PLAINTIFFS AND THE LATE CHARGE SUBCLASS

13 ~~147,141.~~ Plaintiffs hereby incorporate the foregoing paragraphs of this  
 14 Complaint and restate them as if they were fully written herein.

15 ~~148,142.~~ This claim is brought on behalf of Plaintiffs and the Late Charge  
 16 Subclass.

17 ~~149,143.~~ The Unfair Competition Law ("UCL"), California Business and  
 18 Professions Code § 17200, *et seq.*, defines unfair business competition to include any  
 19 "unlawful, unfair or fraudulent" act or practice.

20 ~~150,144.~~ A business act or practice is "unlawful" if it violates any  
 21 established state or federal law.

22 ~~151,145.~~ California Civil Code Section 1671 establishes the standards for  
 23 determining if a liquidated damages clause in a contract is legitimate. It states:

24 (a) This section does not apply in any case where another statute  
 25 expressly applicable to the contract prescribes the rules or  
 26 standard for determining the validity of a provision in the  
 contract liquidating the damages for the breach of the contract.

1 (b) Except as provided in subdivision (c), a provision in a  
2 contract liquidating the damages for the breach of the contract  
3 is valid unless the party seeking to invalidate the provision  
4 establishes that the provision was unreasonable under the  
5 circumstances existing at the time the contract was made.

6 (c) The validity of a liquidated damages provision shall be  
7 determined under subdivision (d) and not under subdivision (b)  
8 where the liquidated damages are sought to be recovered from  
9 either:

10 (1) A party to a contract for the retail purchase, or rental, by  
11 such party of personal property or services, primarily for the  
12 party's personal, family, or household purposes; or

13 (2) A party to a lease of real property for use as a dwelling by the  
14 party or those dependent upon the party for support.

15 (d) In the cases described in subdivision (c), a provision in a  
16 contract liquidating damages for the breach of the contract is  
17 void except that the parties to such a contract may agree therein  
18 upon an amount which shall be presumed to be the amount of  
19 damage sustained by a breach thereof, when, from the nature of  
20 the case, it would be impracticable or extremely difficult to fix  
21 the actual damage.

22 ~~152,146.~~ A liquidated damages clause under § 1671(b) is unlawful if it bears  
23 no reasonable relationship to the actual damages that the parties could have  
24 anticipated would flow from a breach, or if the amount does not represent the result of  
25 a reasonable endeavor to estimate a fair average compensation for any loss that may  
26 be sustained.

27 ~~153,147.~~ Likewise, under § 1671(d), a liquidated damages clause is unlawful  
28 in a consumer contract unless it is impracticable or extremely difficult to fix the actual  
29 damage, and the amount represents the result of a reasonable endeavor to estimate a  
30 fair average compensation for any loss that may be sustained.

31 ~~154,148.~~ The Private Education Loans at issue in this action are either  
32 contracts for property or services primarily for the person's personal, family or  
33

1 household purposes subject to § 1671(d), or, in the alternative, are subject to the  
2 general prohibition against unlawful liquidated damages under § 1671(b).

3 ~~155,149.~~ The limitations set forth in § 1671(d), or in the alternative, §  
4 1671(b), apply to the Private Education Loans, as these loans were not made by a  
5 national bank within the meaning of the National Bank Act §§ 85 and 86, nor are they  
6 made by qualifying bank entities under parallel state charters as provided by the  
7 Federal Deposit Insurance Act or other similar laws. These limitations apply to Sallie  
8 Mae, which is not a national or state-chartered bank.

9 ~~156,150.~~ Sallie Mae's Late Charge is an unlawful liquidated damages  
10 provision under §1671(b) because it bears no reasonable relationship to the amount of  
11 money Sallie Mae could have anticipated would flow from a borrower failing to make a  
12 payment within 15 days after the payment due date. Given the manner in which  
13 borrowers are penalized for not making a payment on time (*i.e.*, being charged daily  
14 interest on the entire principal owed), Sallie Mae is more than compensated for any  
15 actual damage it could have anticipated or actually suffers when a borrower does not  
16 make a payment within 15 days after the payment due date. To the extent Sallie Mae  
17 incurs any additional administrative costs when a borrower does not make a payment  
18 within 15 days after the payment due date, the Late Charge of the greater of \$5.00 or  
19 5% that Sallie Mae imposes on Private Education Loan borrowers exceeds the total  
20 costs actually incurred as a result of the late payment.

21 ~~157,151.~~ Alternatively, Sallie Mae's Late Charge is an unlawful liquidated  
22 damages provision under § 1671(d) because it was not impossible or extremely difficult  
23 for Sallie Mae to fix the actual damage it might suffer as a result of a borrower not  
24 making an installment payment within 15 days after the payment due date. Given  
25 that the accounting of borrowers' accounts and the calculation of interest and principal  
26 are automated and performed by computers, Sallie Mae sustains little, if any, actual  
27 loss when a payment is made more than 15 days after its due date. Any actual loss  
28

1 Sallie Mae might sustain could have been calculated when the Private Education  
 2 Loans were entered into, and the Late Charge of the greater of \$5.00 or 5% that Sallie  
 3 Mae imposes on Private Education Loan borrowers exceeds the total costs actually  
 4 incurred as a result of the late payment.

5 ~~158,152.~~ Sallie Mae has and continues to violate the “unlawful” prong of the  
 6 UCL by charging borrowers liquidated damages in violation of § 1671. By committing  
 7 the acts and practices alleged above, Sallie Mae has engaged, and continues to be  
 8 engaged, in unlawful business practices within the meaning of California Business  
 9 and Professions Code 17200, *et seq.*

10 ~~159,153.~~ Through its unlawful acts and practices Sallie Mae has obtained,  
 11 and continues to unfairly obtain, money from Plaintiffs and members of the Late  
 12 Charge Subclass. As such, Plaintiffs requests for themselves and all Late Charge  
 13 Subclass members the relief set forth in the Prayer, including that this Court enjoin  
 14 Sallie Mae from continuing to violate the Unfair Competition Law as discussed herein.  
 15 Otherwise, the Late Charge Subclass may be irreparably harmed and/or denied an  
 16 effective and complete remedy if such an order is not granted.

17 **B. SECOND CLAIM FOR RELIEF - “UNLAWFUL” BUSINESS PRACTICES IN**  
 18 **VIOLATION OF THE UNFAIR COMPETITION LAW, BUS. & PROF. CODE**  
 19 **§ 17200, ET SEQ. FOR PLAINTIFF THURSTON AND THE USURY**  
 20 **SUBCLASS**

21 ~~160,154.~~ Plaintiffs hereby incorporate the foregoing paragraphs of this  
 22 Complaint and restate them as if they were fully written herein.

23 ~~161,155.~~ This claim is brought on behalf of Plaintiff Thurston and the Usury  
 24 Subclass.

25 ~~162,156.~~ The Unfair Competition Law (“UCL”), California Business and  
 26 Professions Code § 17200, *et seq.*, defines unfair business competition to include any  
 27 “unlawful, unfair or fraudulent” act or practice.  
 28



1           ~~163,157.~~ A business act or practice is “unlawful” if it violates any  
2 established state or federal law.

3           ~~164,158.~~ California Constitution, Article XV sets a maximum legal rate for  
4 interest charged on loans such as the Private Education Loans of 10 percent per  
5 annum, including through the charging of fees. In pertinent part, it states:

6           Section 1. The rate of interest upon the loan or forbearance of  
7 any money, goods, or things in action, or on accounts after  
8 demand, shall be 7 percent per annum but it shall be competent  
9 for the parties to any loan or forbearance of any money, goods or  
10 things in action to contract in writing for a rate of interest:

11           (1) For any loan or forbearance of any money, goods, or  
12 things in action, if the money, goods, or things in action are  
13 for use primarily for personal, family, or household  
14 purposes, at a rate not exceeding 10 percent per annum;  
15 provided, however, that any loan or forbearance of any  
16 money, goods or things in action the proceeds of which are  
17 used primarily for the purchase, construction or  
18 improvement of real property shall not be deemed to be a  
19 use primarily for personal, family or household purposes.

20           ...

21           No person, association, copartnership or corporation shall by  
22 charging any fee, bonus, commission, discount or other  
23 compensation receive from a borrower more than the  
24 interest authorized by this section upon any loan or  
25 forbearance of any money, goods or things in action.

26           ~~165,159.~~ California's usury proscription is also set forth in a statute, an  
27 initiative measure that has not been codified. Stats.1919, p. lxxxiii, Deering's Uncod.  
28 Initiative Measures & Stats. (1973 ed.) 1919–1, p. 35]) (the “Usury Law”).

~~166,160.~~ The Private Education Loans at issue in this action are loans of  
money primarily for personal, family, or household purposes subject to Cal. Const.,  
art. XV, § 1(1).

~~167,161.~~ The Private Education Loans at issue in this action are loans of  
money expressed “in writing” within the meaning of the Usury Law. Cal. Civ. Code §  
1916-1.

1           ~~168,162.~~ The limitations set forth in Cal. Const., art. XV, § 1(1) and the  
2 Usury Law apply to the Private Education Loans, as these loans were not made by a  
3 national bank within the meaning of the National Bank Act §§ 85 and 86, nor were  
4 they made by qualifying bank entities under parallel state charters as provided by the  
5 Federal Deposit Insurance Act or other similar laws. These limitations apply to Sallie  
6 Mae, which is not a national or state-chartered bank, or subject to any other  
7 exception.

8           ~~169,163.~~ Sallie Mae charges interest on the Private Education Loans at a  
9 Variable Rate that often exceeds 10 percent per annum, and also charges interest in  
10 the form of fees, including Late Charges and Supplemental Fees, such that even when  
11 the Variable Rate does not exceed 10 percent per annum, Sallie Mae charges an  
12 effective interest rate on the Private Education Loans that is in excess of the legal  
13 limit.

14           ~~170,164.~~ Sallie Mae has and continues to violate the “unlawful” prong of the  
15 UCL by charging borrowers interest in violation of California’s Constitution, art. XV, §  
16 1(1) and the Usury Law. By committing the acts and practices alleged above, Sallie  
17 Mae has engaged, and continues to be engaged, in unlawful business practices within  
18 the meaning of California Business and Professions Code 17200, *et seq.*

19           ~~171,165.~~ Through its unlawful acts and practices Sallie Mae has obtained,  
20 and continues to unfairly obtain, money from Plaintiff Thurston and members of the  
21 Usury Subclass. As such, Plaintiff Thurston requests on behalf of herself and all  
22 Usury Subclass members the relief set forth in the Prayer, including that this Court  
23 enjoin Sallie Mae from continuing to violate the Unfair Competition Law as discussed  
24 herein. Otherwise, the Usury Subclass may be irreparably harmed and/or denied an  
25 effective and complete remedy if such an order is not granted.

26  
27  
28

1           **C.    THIRD CLAIM FOR RELIEF - “UNFAIR” BUSINESS PRACTICE IN**  
2           **VIOLATION OF THE UNFAIR COMPETITION LAW, BUS. & PROF. CODE**  
3           **§17200, ET SEQ. FOR PLAINTIFFS AND THE LATE CHARGE SUBCLASS**

4           ~~172.166.~~ Plaintiffs hereby incorporate the foregoing paragraphs of this  
5           Complaint and restate them as if they were fully written herein.

6           ~~173.167.~~ This claim is brought on behalf of Plaintiffs and the Late Charge  
7           Subclass.

8           ~~174.168.~~ A business act or practice is “unfair” under the UCL if the reasons,  
9           justifications and motives of the alleged wrongdoer are outweighed by the gravity of  
10           the harm to the alleged victims.

11           ~~175.169.~~ Sallie Mae, a non-national and non-state-chartered bank, has and  
12           continues to violate the “unfair” prong of the UCL through its imposition of the Late  
13           Charge for Private Loans because Sallie Mae both penalizes borrowers by assessing a  
14           \$5.00 or 5% fee when a payment has not been received, and also charges borrowers  
15           daily interest for use of the funds.

16           ~~176.170.~~ Sallie Mae’s imposition of its Late Charge violates the “unfair”  
17           prong of the UCL because the amount of the Late Charge, the greater of \$5.00 or 5% of  
18           the amount of the installment owed, is disproportionate to the transaction cost to  
19           Sallie Mae due to a borrower not making a payment within 15 days after the payment  
20           is due. The actual transaction cost to Sallie Mae resulting from a late payment is  
21           nominal because the application of the Late Charge, such as in re-calculating the  
22           principal and interest, are all computer functions requiring little, if any, human  
23           involvement. In any event, such transaction costs are less than the greater of \$5.00 or  
24           5% of a missed payment that Sallie Mae charges.

25           ~~177.171.~~ The gravity of the harm to Plaintiffs and members of Late Charge  
26           Subclass resulting from such unfair acts and practices outweighs any conceivable  
27           reasons, justifications and/or motives of Sallie Mae’s conduct. By committing the acts  
28           and practices alleged above, Sallie Mae has engaged, and continues to be engaged, in

1 unfair business practices within the meaning of California Business and Professions  
2 Code 17200, *et seq.*

3 ~~178,172.~~ Through its unfair acts and practices Sallie Mae has obtained, and  
4 continues to unfairly obtain, money from Plaintiffs and members of the Late Charge  
5 Subclass. As such, Plaintiffs requests for themselves and all Late Charge Subclass  
6 members the relief set forth in the Prayer, including that this Court enjoin Sallie Mae  
7 from continuing to violate the Unfair Competition Law as discussed herein.  
8 Otherwise, the Late Charge Subclass may be irreparably harmed and/or denied an  
9 effective and complete remedy if such an order is not granted.

10 **D. FOURTH CLAIM FOR RELIEF - "UNFAIR" BUSINESS PRACTICE IN**  
11 **VIOLATION OF THE UNFAIR COMPETITION LAW, BUS. & PROF.**  
12 **CODE §17200, ET SEQ. FOR PLAINTIFF THURSTON AND THE**  
13 **USURY SUBCLASS**

14 ~~179,173.~~ Plaintiffs hereby incorporate the foregoing paragraphs of this  
15 Complaint and restate them as if they were fully written herein.

16 ~~180,174.~~ This claim is brought on behalf of Plaintiff Thurston and the Usury  
17 Subclass.

18 ~~181,175.~~ A business act or practice is "unfair" under the UCL if the reasons,  
19 justifications and motives of the alleged wrongdoer are outweighed by the gravity of  
20 the harm to the alleged victims.

21 ~~182,176.~~ Sallie Mae, a non-national and non-state-chartered bank, has and  
22 continues to violate the "unfair" prong of the UCL through its assessment of usurious  
23 interest on the Private Education Loans of more than 10% annually.

24 ~~183,177.~~ Sallie Mae's assessment of the interest at effective rates of greater  
25 than 10% annually violates the "unfair" prong of the UCL, because Sallie Mae is not  
26 entitled to charge these amounts of interest, which are excessive and not justified by  
27 any business need, and which create an onerous burden on Usury Subclass members.

28 ~~184,178.~~ The gravity of the harm to Plaintiffs and members of Usury  
Subclass resulting from such unfair acts and practices outweighs any conceivable

1 reasons, justifications and/or motives of Sallie Mae's conduct. By committing the acts  
 2 and practices alleged above, Sallie Mae has engaged, and continues to be engaged, in  
 3 unfair business practices within the meaning of California Business and Professions  
 4 Code 17200, *et seq.*

5 ~~185,179.~~ Through its unfair acts and practices Sallie Mae has obtained, and  
 6 continues unfairly to obtain, money from Plaintiff Thurston and members of the Usury  
 7 Subclass. As such, Plaintiff Thurston requests on behalf of herself and all Usury  
 8 Subclass members the relief set forth in the Prayer, including that this Court enjoin  
 9 Sallie Mae from continuing to violate the Unfair Competition Law as discussed herein.  
 10 Otherwise, the Usury Subclass may be irreparably harmed and/or denied an effective  
 11 and complete remedy if such an order is not granted.

12  
 13 **E. FIFTH CLAIM FOR RELIEF - USURY IN VIOLATION OF ARTICLE XV**  
 14 **SECTION 1 OF THE CALIFORNIA CONSTITUTION FOR PLAINTIFF**  
 15 **THURSTON AND THE USURY SUBCLASS**

16 ~~186,180.~~ Plaintiffs hereby incorporate the foregoing paragraphs of this  
 17 Complaint and restate them as if they were fully written herein.

18 ~~187,181.~~ This claim is brought on behalf of Plaintiff Thurston and the Usury  
 19 Subclass.

20 ~~188,182.~~ The California Constitution, art. XV, sec. 1, states "No person,  
 21 association, co-partnership or corporation shall by charging any fee, bonus,  
 22 commission, discount or other compensation receive from a borrower more than the  
 23 interest authorized by this section upon any loan or forbearance of any money, goods  
 24 or things in action."

25 ~~189,183.~~ For any loan, if the money, goods, or things in action are for use  
 26 primarily for personal, family, or household purposes, the authorized interest rate is  
 27 10 percent per annum or less. Cal. Const., art. XV, § 1(1).  
 28



1 ~~196,190.~~ Plaintiffs hereby incorporate the foregoing paragraphs of this  
2 Complaint and restate them as if they were fully written herein.

3 ~~197,191.~~ This claim is brought on behalf of Plaintiff Thurston and the Usury  
4 Subclass.

5 ~~198,192.~~ California's usury proscription is set forth in the Usury Law, an  
6 uncodified Initiative Measure adopted nearly 100 years ago. *See* Cal. Civ. Code § 1916-  
7 1 through 1916-3.

8 ~~199,193.~~ The Usury Law provides:

9  
10 The rate of interest upon the loan or forbearance of any  
11 money, goods or things in action or on accounts after demand or  
12 judgments rendered in any court of this state, shall be seven  
13 dollars upon the one hundred dollars for one year and at that  
14 rate for a greater or less sum or for a longer or a shorter time;  
15 but it shall be competent for parties to contract for the payment  
16 and receipt of a rate of interest not exceeding twelve dollars on  
17 the one hundred dollars for one year and not exceeding that rate  
18 for a greater or less sum or for a longer or shorter time, in which  
19 case such rate exceeding seven dollars on one hundred dollars  
20 shall be clearly expressed in writing.

21 Cal. Civ. Code § 1916-1.

22 ~~200,194.~~ As recognized in *Penziner v. West American Finance Co.*, 10 Cal. 2d  
23 160, 174, 74 P.2d 252 (Cal. 1937), the 12 percent interest rate established by the  
24 Usury Law for contracts in writing was amended to 10 percent by adoption of the  
25 usury provisions of the California Constitution.

26 ~~201,195.~~ Sallie Mae's Private Education Loans are "loans" for "money"  
27 expressed "in writing" within the meaning of the Usury Law. Sallie Mae is not  
28 excluded or otherwise exempt from the Usury Law.

~~202,196.~~ Sallie Mae charged Plaintiff Thurston and all members of the  
Usury Subclass interest in excess of the statutory maximum rate of 10 percent per  
annum, either directly through the assessment of interest at the Variable Rate, or

1 indirectly through the assessment of interest at the Variable Rate and through the  
2 payment of additional fees.

3 ~~203~~.197. Sallie Mae established the terms of the Private Education Loans,  
4 including the rates of interest to be charged to its student borrowers, and willfully  
5 intended to enter these transactions and to collect amounts in excess of the legal limit  
6 of 10 percent per annum.

7 ~~204~~.198. Through its usurious charges Sallie Mae has received, and  
8 continues to receive, money from Plaintiff Thurston and all members of the Usury  
9 Subclass in violation of the Usury Law, as amended. As such, Plaintiff Thurston  
10 requests on behalf of herself and all Usury Subclass members the relief set forth in the  
11 Prayer, including awarding three times the interest paid on the Private Education  
12 Loans as provided by the Usury Law, and that this Court enter an order canceling all  
13 future interest on the Private Education Loans. Cal. Civ. Code § 1916-3(a).

14 **G. SEVENTH CLAIM FOR RELIEF - CLAIM FOR DECLARATORY RELIEF**  
15 **FOR THE CHOICE OF LAW CLASS**

16 ~~205~~.199. Plaintiffs hereby incorporate the foregoing paragraphs of this  
17 Complaint and restate them as if they were fully written herein.

18 ~~206~~.200. This claim is brought on behalf of Plaintiffs and the Choice of Law  
19 Class.

20 ~~207~~.201. Sallie Mae included in the Private Education Loans a choice of law  
21 provision selecting the law of the home states of its banking partners.

22 ~~208~~.202. The law selected by operation of the choice of law provision has no  
23 substantial relationship to the parties or the Private Education Loan transactions.

24 ~~209~~.203. Plaintiffs and all members of the Choice-of-Law Class are entitled  
25 to declaratory relief holding that the choice of law provision in the Private Education  
26 Loans for which Sallie Mae was the *de facto* actual lender is unenforceable, and, that  
27 California law governs the rights of the parties.



1 **VIII. PRAYER**

2 WHEREFORE, Plaintiffs, on behalf of themselves and all class members,  
3 request award and relief as follows:

4 **A.** An order certifying that this action is properly brought and may be  
5 maintained as a class action, that Plaintiffs Ubaldi and Thurston be appointed Class  
6 Representatives for the Choice of Law Class and Late Charge Subclass, that Plaintiff  
7 Thurston be appointed Class Representative for the Usury Subclass, and that  
8 Plaintiffs' counsel be appointed Class Counsel.

9 **B.** Restitution in such amount that Plaintiffs and all Late Charge Subclass  
10 members were charged for Late Charges by Sallie Mae on Private Education Loans,  
11 and the interest charged thereon.

12 **C.** Restitution in such amount that Plaintiff Thurston and all Usury  
13 Subclass members paid directly or indirectly as interest on Private Education Loans  
14 or, alternatively, the amount of interest paid on Private Education Loans in excess of  
15 the 10% legal limit.

16 **D.** Restitutionary disgorgement of the profits Sallie Mae made on the Late  
17 Charges it assessed to Plaintiffs and all Late Charge Subclass members on their  
18 Private Education Loans.

19 **E.** Restitutionary disgorgement of the profits Sallie Mae made on the  
20 interest it assessed to Plaintiff Thurston and all Usury Subclass members on their  
21 Private Education Loans or, alternatively, the amount of interest assessed on Private  
22 Education Loans in excess of the 10% legal limit.

23 **F.** An order awarding three times the interest paid on the Private Education  
24 Loans by Plaintiff Thurston and the Usury Subclass members as permitted by the  
25 Usury Law or, alternatively, three times the amount of interest paid on Private  
26 Education Loans in excess of the 10% legal limit as permitted by the Usury Law.

27  
28



1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

~~Allegheny Building, 17th Floor  
429 Forbes Avenue  
Pittsburgh, Pennsylvania 15219  
Telephone: (412) 281 8400  
Facsimile: (412) 281 1007~~

~~Michael D. Braun (SBN 167416)  
**BRAUN LAW GROUP, P.C.**  
10680 West Pico Boulevard  
Suite 280  
Los Angeles, California 90064  
Telephone: (310) 836 6000  
Facsimile: (310) 836 6010~~

Janet Lindner Spielberg (SBN 221926)  
**LAW OFFICES OF JANET  
LINDNER SPIELBERG**  
12400 Wilshire Boulevard, #400  
Los Angeles, California 90025  
Telephone: (310) 392-8801  
Facsimile: (310) 278-5938

William J. Genego (SBN 103224)  
**LAW OFFICE OF WILLIAM GENEGO**  
2115 Main Street  
Santa Monica, California 90405  
Telephone: 310-399-3259

*Attorneys for Plaintiffs Tina M.  
Ubaldi and Chanee Thurston*

← --- Formatted: Justified  
← --- Formatted: Justified, Indent: Left: 0"  
← --- Formatted: Justified, Indent: Left: 0", Right: -0.19", Line spacing: Exactly 12 pt