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13 UNITED STATES DISTRICT COURT  
14 NORTHERN DISTRICT OF CALIFORNIA  
15

16 ANGELO BOTTONI; PAUL ROBERTS; and  
17 TRACIE SERRANO and SHAWNEE SILVA  
18 and all others similarly situated,

19 Plaintiffs,

20 v.

21 SALLIE MAE, INC.; and DOES 1 through  
22 1,000 inclusive,

23 Defendants.

CASE NO. 4:10-cv-03602-LB

**DEFENDANT SALLIE MAE, INC.'S  
NOTICE OF MOTION TO DISMISS  
UNDER RULES 12(b)(1) and 12(b)(6) FOR  
FAILURE TO STATE A CLAIM;  
MEMORANDUM OF POINTS AND  
AUTHORITIES IN SUPPORT OF  
MOTION TO DISMISS THE  
COMPLAINT**

Date: February 3, 2011  
Time: 11:00 a.m.  
Courtroom: 4, 3<sup>rd</sup> Floor

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1 PLEASE TAKE NOTICE that on February 3, 2011, at 11:00 a.m., or as soon thereafter as  
2 this matter may be heard, in Courtroom 4 of the United States District Courthouse in Oakland,  
3 California, before the Honorable Magistrate Judge Laurel Beeler, Defendant Sallie Mae, Inc. will  
4 and hereby does move to dismiss the First Amended Complaint filed against it by Plaintiffs.

5 This motion is filed pursuant to F.R.C.P. 12(b)(1) and 12(b)(6) and is based upon the  
6 Memorandum of Points and Authorities, all pleadings and papers on file in this action, and on  
7 such other matters as may be presented to the Court at the hearing.

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1 **I. INTRODUCTION**

2 This is a purported class action brought by four individuals who have defaulted on one or  
3 more student loans which were originated by Sallie Mae, Inc. (“Sallie Mae”). The plaintiffs, who  
4 owe collectively more than \$150,000 in connection with those loans, failed to make the principal  
5 payment when due, and as a result, the loans went into default and were ultimately turned over for  
6 collection in accordance with the terms of the promissory notes which govern the loans. Having  
7 not made the required payments in connection with their loans, the plaintiffs now object to the  
8 imposition of certain collection charges by third party collectors, and have brought this lawsuit as  
9 a result. However, and as will be demonstrated herein, the Plaintiffs lack standing to assert the  
10 claims set forth in the First Amended Complaint (“FAC”), or the claims as pled otherwise fail to  
11 state a claim upon which relief can be granted.

12 **II. FACTS AS ALLEGED IN THE COMPLAINT**

13 Plaintiffs Angelo Bottoni (“Bottoni”), Paul Roberts (“Roberts”), Tracie Serrano  
14 (“Serrano”) and Shawnee Silva (“Silva”), obtained student loans through Defendant Sallie Mae's  
15 Signature Student Loan program. (FAC, ¶¶ 19, 22, 24 and 26.) As alleged in the First Amended  
16 Complaint, each of the plaintiffs has defaulted on their obligations. (FAC at ¶ 20, 23, 25 and 27)  
17 They now bring suit, individually and as a purported class, against Sallie Mae for (1) violations of  
18 California *Civil Code* Section 1671; (2) violations of the Consumer Legal Remedies Act as set  
19 forth in California *Civil Code* § 1750 (“CLRA”); (3) violation of the Unfair Competition Law as  
20 set forth in California *Business & Professions Code* § 17200 (“UCL”); (4) breach of contract; (5)  
21 declaratory relief; (6) violation of the Rosenthal Fair Debt Collections Practices Act as set forth in  
22 California *Civil Code* § 1788 et seq.; and (7) violations of the Consumer Credit Reporting  
23 Agencies Act as set forth in California *Civil Code* § 1785.1 et seq. (See FAC ¶¶ 27-52.)  
24 Specifically, Plaintiffs claim that after they defaulted on their loans, Sallie Mae assessed a  
25 collection penalty of approximately 25% regardless of the actual collection costs which were  
26 incurred in connection with those collection efforts. (FAC ¶ 14.)

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1 **III. LEGAL ARGUMENT**

2 **A. Plaintiffs Claims Should Be Dismissed for Lack of Standing and for Failure to**  
 3 **State a Claim Pursuant to Federal Rules Of Civil Procedure 12(b)(1) and**  
 4 **12(b)(6)**

5 Standing is a threshold issue in every federal case and a party must have standing at the  
 6 time the suit is brought. *See Sicom Systems Ltd. v. Agilent Technologies, Inc.*, 427 F.3d 971, 975-  
 7 976 (Fed. Cir. 2005). The requirement of standing is based on Article III of the Constitution which  
 8 confines the federal courts to adjudicating actual cases or controversies. *See Allen v. Wright*, 468  
 9 U.S. 737, 750, 104 S.Ct. 3315, 3317, 3324 82 L.Ed.2d 556 (1984); *see also Warth v. Seldin*, 422  
 10 U.S. 490, 498, 95 S.Ct. 2197, 2205 (1975) (standing imports justiciability). Standing also has  
 11 prudential elements. *See Valley Forge Christian College v. Americans United for Separation of*  
 12 *Church and State, Inc.*, 454 U.S. 464, 472, 474-75, 102 S.Ct. 752, 70 L.Ed.2d 700, 759-760  
 13 (1982). To that end, standing bears on:

14 whether the litigant is entitled to have the court decide the merits of the dispute or  
 15 of particular issues. This inquiry involves both constitutional limitations on federal  
 16 court jurisdiction and prudential limitations on its exercise.

17 *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 99, 99 S.Ct. 1601, 1607, 60 L.Ed.2d 66  
 18 (1970) (quoting *Warth*, 422 U.S. at 498).

19 In addition, under *Federal Rule of Civil Procedure* 12(b)(6), a party may move to dismiss  
 20 based on the failure to state a claim upon which relief may be granted. *See Fed. R. Civ. P.*  
 21 12(b)(6). A motion to dismiss based on Rule 12(b)(6) challenges the legal sufficiency of the  
 22 claims alleged in the complaint. *See Parks Sch. of Business v. Symington*, 51 F.3d 1480, 1484 (9th  
 23 Cir. 1995). In considering such a motion, a court must take all allegations of material fact as true  
 24 and construe them in the light most favorable to the nonmoving party, although “conclusory  
 25 allegations of law and unwarranted inferences are insufficient to avoid a Rule 12(b)(6) dismissal.”  
 26 *Cousins v. Lockyer*, 568 F.3d 1063, 1067 (9th Cir. 2009). To survive a Rule 12(b)(6) motion to  
 27 dismiss, the plaintiff must allege “enough facts to state a claim to relief that is plausible on its  
 28 face.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 127 S. Ct. 1955, 1974, 167 L. Ed. 2d 929 (2007).

1 While courts do not require “heightened fact pleading of specifics,” a plaintiff must provide “more  
2 than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not  
3 do.” *Id.* at 1965. Plaintiff must allege facts sufficient to “raise a right to relief above the  
4 speculative level.” *Id.* As set forth in greater detail herein, the Complaint should be dismissed  
5 because plaintiffs have failed to set forth the necessary factual allegations to sustain recovery.

6 **B. Plaintiffs Have Not Adequately Alleged That They Have Standing to Maintain**  
7 **the Claims as Alleged in the Action**

8 In the instant action, plaintiffs Bottoni, Roberts and Serrano have not alleged that they  
9 have made any payment in connection with the collection costs assessed with respect to their  
10 student loan accounts, and all have affirmed their intent not to make any such payment with  
11 respect to the loans (FAC ¶ 18). The doctrine of standing embraces, *inter alia*, the general  
12 prohibition that a litigant may not raise another person's legal rights. *See Valley Forge*, 454 U.S.  
13 at 474-75. Thus, even if a plaintiff has alleged injury sufficient to meet the case or controversy  
14 requirement, the plaintiff must assert his or her own legal rights, and cannot rest a claim for relief  
15 on the legal rights or interests of a third party. *See Simon v. Eastern K.Y. Welfare Rights, Org.*,  
16 426 U.S. 26, 37-38, 96 S.Ct. 1917, 1924, 48 L.Ed.2d 450 (1917). A class action does not avoid  
17 the basic requirement of Plaintiffs to establish their standing to sue by alleging and showing that  
18 they personally have been injured. It is not enough, therefore, for class representatives to show  
19 injuries to other unidentified members of a class that they purport to represent. *Lewis v. Casey*  
20 (1996) 518 U.S. 343, 349 (“It is the role of courts to provide relief to claimants, in individual or  
21 class actions, who have suffered, or will imminently suffer, actual harm”). The foregoing  
22 individuals do not have standing as it relates to the first five causes of action.

23 Only one of the named plaintiffs (Shawnee Silva) is alleged to have made *any* payment  
24 with respect to the collection costs assessed with regard to the defaulted loans. However, there  
25 are no allegations in the FAC that Ms. Silva has made any payment in excess of what would be a  
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1 reasonable collection cost.<sup>1</sup> Absent a contention (missing from the claims as alleged) that she has  
2 paid more than the reasonable collection costs, she lacks standing as addressed herein.

3 **C. The First Cause of Action for Alleged Violations of Civil Code § 1671 Is Not**  
4 **Cognizable as Pled as the Loans At Issue Are Not Goods or Services Within**  
5 **Civil Code § 1671(d)**

6 Plaintiffs purport to assert a claim under *Civil Code* §1671(d), which relates to the validity  
7 of a liquidated damages provision where the liquidated damages are sought to be recovered from  
8 either:

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

12 However, the transactions at issue in this case do not involve either the retail purchase or  
13 rental of property or services, and the educational loan evidenced by the promissory note which  
14 contains the collection costs to which Plaintiffs object is not a service which would implicate *Civil*  
15 *Code* §1671(d)(1).

16 The only case which has addressed an issue similar to the instant action, specifically in the  
17 context of *Civil Code* §1671(d)(1), is *Hitz v. First Interstate Bank* (1995) 38 Cal.App.4th 274. In  
18 *Hitz*, the Court held that the fees imposed against breaching credit card customers who failed to  
19 make minimum monthly payments when due or exceeded their credit limits implicated *Civil Code*  
20 §1671 because a credit card agreement is much more than that, encompassing *convenience*  
21 *services* in addition to extension of credit. The Court, however, also stated that "We need not  
22 decide whether an extension of credit is a consumer contract within the meaning of *Civil Code*  
23 section 1671, subdivision (c)(1)."

24  
25 \_\_\_\_\_  
26 <sup>1</sup> While allegations alleged in the pleadings must be accepted as true, the inability of  
27 Plaintiff Silva to identify the collection fees imposed or the amounts paid is curious given the level  
28 of detail provided as to the other named plaintiffs who admittedly have made no payments.

1 The extension of credit for the purpose of obtaining an educational loan is not a *service*  
 2 that would implicate *Civil Code* §1671(d), for the same reason that the meaning of “service” under  
 3 the Consumer Legal Remedies Act has repeatedly been held not to include the extension of credit  
 4 as discussed hereinbelow. *Berry v. American Express Publishing, Inc.*, 147 Cal.App.4th 224  
 5 (2007); *Van Slyke v. Capital One Bank*, 503 F. Supp. 2d 1353 (N.D. Cal. 2007); *In re Late Fee &*  
 6 *Over-limit Fee* ., 528 F. Supp. 2d 953 (N.D. Cal. 2007); *Fairbanks v. Superior Court*, 46 Cal.4th  
 7 56 (2009); *Rand v. American Nat’l Ins. Co.*, No. 09-0639 SI, 2009 U.S. Dist. LEXIS 64781, 2009  
 8 WL 2252115, at \*3 (N.D. Cal. July 28, 2009); *Consumer Solutions REO, LLC v. Hillery*, 658 F.  
 9 Supp. 2d 1002 (N.D. Cal. Aug. 26, 2009).

10 **D. The Second Cause of Action for Alleged Violations of the Consumer Legal**  
 11 **Remedies Act Fails Because an Educational Loan Is Not A Service Within the**  
 12 **Act**

13 Plaintiffs’ second claim pursuant to the California Consumer Legal Remedies Act  
 14 (“CLRA”) fails as a matter of law and should be dismissed. The CLRA makes unlawful certain  
 15 “unfair methods of competition and unfair or deceptive acts or practices undertaken by any person  
 16 in a transaction intended to result or which results in *the sale or lease of goods or services* to any  
 17 consumer.” *Civil Code* § 1770(a)(emphasis added). “Goods” are defined as “tangible chattels  
 18 bought or leased for use primarily for personal, family, or household purposes.” *Civil Code* §  
 19 1761(a). “Services” are defined as “work, labor, and services for other than a commercial or  
 20 business use, including services furnished in connection with the sale or repair of goods.” *Civil*  
 21 *Code* § 1761(b). In connection with the second claim, the Plaintiffs contend that Defendant  
 22 engaged in “deceptive practices, unlawful modes of competition and/or unfair acts” in connection  
 23 with their assessment and collection of Collection Penalties with respect to the Notes. (FAC, ¶ 38)

24 While Plaintiffs allege that “The Notes all represent loans that were incurred as part of a  
 25 transaction resulting in the sale of educational services, thus the CLRA applies (See FAC at page  
 26 3, footnote 1),” this is not the law. Indeed, the CLRA is inapplicable to the instant case, because a  
 27 provider of educational loans implicates neither “goods” nor “services” within the meaning of the  
 28 statute.

1           In *Berry v. American Express Publishing, Inc.*, 147 Cal.App.4th 224 (2007), the plaintiff  
2 alleged that the terms of the credit cardholder agreement with his credit card company violated the  
3 CLRA. The Court held that the extension of credit **did not** qualify as either a good or service  
4 under the CLRA. *Id.* at 229-30. In so ruling, the court noted that the statute as originally drafted  
5 expressly included the extension of “money” and “credit” as within the scope of the Act. *Id.* at  
6 230-33. The version passed by the legislature, however, omitted these terms. *Id.* at 230-31.  
7 Relying on this change, the court held that the “extension of credit, such as issuing a credit card,  
8 separate and apart from the sale or lease of any specific goods or services, does not fall within the  
9 scope of the [CLRA].” *Id.* at 233; see also *Van Slyke v. Capital One Bank*, 503 F. Supp. 2d 1353  
10 (N.D. Cal. 2007); *In re Late Fee & Over-limit Fee Litig.*, 528 F. Supp. 2d 953 (N.D. Cal. 2007).

11           The California Supreme Court’s decision in *Fairbanks v. Superior Court*, 46 Cal.4th 56  
12 (2009), further confirms that the CLRA does not apply to the student loan transaction here. In  
13 *Fairbanks*, the California Supreme Court held that life insurance is not covered by the CLRA  
14 because it is not a good or service as defined by the Act. See *Id.* at 61. The court rejected the  
15 plaintiff’s argument that “the work or labor of insurance agents and other insurance company  
16 employees [(1)] in helping consumers select policies that meet their needs, [(2)] in assisting  
17 policyholders to keep their policies in force, and [(3)] in processing claims are services that are  
18 sufficient to bring life insurance within the reach of the CLRA.” *Id.* at 65.

19           As [defendant] points out, ancillary services are provided by the sellers of virtually  
20 all intangible goods -- investment securities, bank deposit accounts and loans, and  
21 so forth. The sellers of virtually all these intangible items assist prospective  
22 customers in selecting products that suit their needs, and they often provide  
23 additional customer services related to the maintenance, value, use redemption,  
24 resale, or repayment of the intangible item. Using the existence of these ancillary  
25 services to bring intangible goods within the coverage of the CLRA would defeat  
26 the apparent legislative intent in limiting the definition of “goods” to include only  
27 “tangible chattels.”

28           *Id.* *Fairbanks* indicates that loans are intangible goods and that ancillary services provided in the  
sale of intangible goods do not bring these goods within the coverage of the CLRA. See also  
*Rand v. American Nat’l Ins. Co.*, No. 09-0639 SI, 2009 U.S. Dist. LEXIS 64781, 2009 WL  
2252115, at \*3 (N.D. Cal. July 28, 2009) (discussing *Fairbanks* and emphasizing that ancillary

1 services are insufficient to bring insurance policy within coverage of CLRA); *Consumer Solutions*  
 2 *REO, LLC v. Hillery*, 658 F. Supp. 2d 1002 (N.D. Cal. Aug. 26, 2009).

3 In light of the holdings of the foregoing cases, there simply is no legal precedent to support  
 4 the conclusion that the loans at issue in this action would implicate the CLRA, and indeed, the  
 5 applicable law supports a contrary determination. In light of the foregoing, the CLRA claim  
 6 asserted by Plaintiffs cannot be maintained, and Sallie Mae respectfully requests that it be  
 7 dismissed.

8 **E. The Third Cause of Action for Alleged Violations of the Business &**  
 9 **Professions Code Fails As Pled**

10 **1. Plaintiffs Have Not Alleged A Loss of Money or Property that Would**  
 11 **Give Rise to Any Relief Under the UCL**

12 Plaintiffs' third cause of action is for violations of *Business & Professions Code* §17200, et  
 13 seq. (also known as the Unfair Competition Law). The Plaintiffs allege that the Defendants'  
 14 conduct was "unfair", "unlawful" and "fraudulent." However, while Plaintiffs contend that they  
 15 have "suffered harm as a proximate result of the violations of law and wrongful conduct of the  
 16 defendants alleged herein" (FAC, ¶ 47), those allegations are not sufficient to maintain this cause  
 17 of action under the *Business & Professions Code*.

18 Standing is a jurisdictional prerequisite which involves justiciability; it cannot be waived  
 19 and must be established before the court makes any determination on the merits of an action.  
 20 *Buckland v. Threshold Enterprises, Ltd.*, 155 Cal.App 4th 798, 812 (2007); *Blumhorst v. Jewish*  
 21 *Family Services of Los Angeles*, 126 Cal.App.4th 993, 1000 (2005); *Carsten v. Psychology*  
 22 *Examining Com*, 27 Cal.3d 793, 796-797 (1980); *Cetacean Cmty. v. Bush*, 386 F.3d 1169, 1175  
 23 (9th Cir. 2004). Proposition 64 ("Prop. 64") was passed by the electorate in order to limit abuses  
 24 by attorneys who used the UCL and FAL as a means to advance "shakedown" schemes and  
 25 frivolous lawsuits. *Peterson v. Cellco Partnership*, 164 Cal. App. 4th 1583, 1590 (2008);  
 26 *Buckland*, 155 Cal. App. 4th at 812. Pursuant to Prop. 64, a private party may not sue under the  
 27 UCL or FAL unless he or she can satisfy elements of a two-pronged test for standing including  
 28 that the plaintiff must be able to prove an "injury in fact" – i.e., the loss of money or property that

1 is eligible for restitution. *Kwikset Corporation v. Superior Court*, 171 Cal.App.4th 645, 653-55  
 2 (2009); *Peterson*, 164 Cal.App.4th at 1590; *Hall v. Time, Inc.*, 158 Cal.App.4th 847, 852 (2008);  
 3 *Buckland*, 155 Cal.App.4th at 817.

4 In this case, the FAC is devoid of any allegations that Plaintiffs suffered *injury in fact and*  
 5 *have lost money or property* as a result of the wrongful conduct. As to Plaintiffs Bottoni, Roberts  
 6 or Serrano, such a contention would be inconsistent with the allegations made in the FAC at ¶¶ 20,  
 7 21, 23, and 25, where those individuals merely assert that Defendants had attempted to impose the  
 8 collection costs which Plaintiffs contend are improper, not that any had been paid. Further,  
 9 restitution, which is the only monetary recovery possible under § 17200, involves the payment or  
 10 return of money or property that belongs to the plaintiff, and there are no allegations that Bottoni,  
 11 Roberts or Serrano paid any money paid to Defendant. See, e.g., *Montecino v. Spherion Corp.*,  
 12 427 F. Supp. 2d 965, 967 (C.D. Cal. 2006).

13 Insofar as Plaintiff Silva is concerned, her claim fares no better as currently pled as she has  
 14 not alleged that she has made any payments of collection costs which otherwise would not be  
 15 permitted by law (FAC at ¶ 29). Indeed, there is no allegation that the payments she made related  
 16 to the collection of her account were not reasonable, or that she paid collection costs in excess of  
 17 those incurred regarding the efforts to secure payments with respect to her defaulted loans.

18 **2. The Claims in the Third Cause of Action Based Upon “Borrowing”**  
 19 **Other Statutes Fail**

20 In addition to the fact that none of the Plaintiffs has properly alleged standing as set forth  
 21 in Section E.1 above, Plaintiffs’ claims based upon the borrowing of violations of other  
 22 (California) laws also fail. Because Plaintiffs have not properly asserted claims under any of the  
 23 theories asserted in the first, second, and sixth causes of action, the borrowing of such statutes for  
 24 the purpose of a claimed violation of the UCL also necessarily fails.

25 **3. The Claims in the Third Cause of Action Related to the California**  
 26 **Consumer Credit Reporting Act Are Preempted**

27 Finally, the contention that an alleged violation of the California Consumer Credit  
 28 Reporting Act (“CCRRA”) could provide the predicate for a UCL violation (FAC, ¶48 (e)) is

1 erroneous as a matter of law. See *Wang v. Asset Acceptance*, 681 F. Supp. 2d 1143 (2010). In  
 2 discussing the UCL, and specifically as it relates to the CCRRA, the *Wang* Court determined that  
 3 a claimed UCL violation based upon the CCRRA was preempted by the FCRA. See also *Howard*  
 4 *v. Blue Ridge Bank*, 371 F. Supp. 2d 1139, 1143-44 (N.D. Cal. 2005) (granting motion to dismiss  
 5 section 17200 claim because preempted by FCRA); *Roybal v. Equifax*, 405 F. Supp. 2d 1177,  
 6 1181 (E.D. Cal. 2005) (finding state claims, including UCL claim, preempted).

7 **F. Plaintiffs' Fourth Cause of Action for Breach of Contract Fails Because**  
 8 **Plaintiffs Are In Breach of the Contract at Issue**

9 Plaintiffs' breaches of the loan agreements at issue bar their claim for breach of contract.  
 10 In order to state a cause of action for breach of contract under California law, a plaintiff must  
 11 plead and prove as follows: (1) the existence of a contract; (2) plaintiff's performance or excuse  
 12 for nonperformance; (3) defendant's breach; and (4) damage to plaintiff proximately caused from  
 13 defendant's breach. *Acoustics, Inc. v. Trepte Construction Co.*, 14 Cal.App.3d 887, 913 (1971)  
 14 (citing 2 Witkin, Cal. Proc., Pleading, § 251); *Jacobsen v. Katzer*, 609 F. Supp. 2d 925, 932 (N.D.  
 15 Cal. 2009). In this case, there is no dispute that the parties have entered into a contract in the form  
 16 of a student loan, as evidenced by the promissory note.

17 However, and critically, the Plaintiffs concede (at ¶ 20, 23, 25 and 27 of the FAC), that  
 18 they have each breached the contract by defaulting under the Note and failing to make the  
 19 payments. There is no allegation anywhere in the cause of action for breach of contract that there  
 20 has been performance under the contract, or that there was an excuse for such non-performance.  
 21 Such an allegation (and ultimate proof of the same) is a condition precedent for the maintenance of  
 22 this action. *Civil Code* §§ 1436, 1439; *Realmuto v. Gagnard* (2003) 110 Cal.App.4th 193. Absent  
 23 the inclusion of such an allegation, this cause of action is wholly deficient under California law  
 24 and cannot be maintained.

25 **G. Plaintiffs' Fifth Cause of Action Fails Because the Claims Identified In the**  
 26 **Prior Causes of Action Fail**

27 The fundamental basis of declaratory relief is the existence of an actual, present  
 28 controversy over a proper subject. In *Maguire v. Hibernia Savings & Loan Soc.* (1944) 23 Cal.2d

1 719, the court found, “A complaint for declaratory relief is legally sufficient if it sets forth facts  
 2 showing the existence of an actual controversy relating to the legal rights and duties of the  
 3 respective parties under a written instrument and requests that these rights and duties be adjudged  
 4 by the court.” Declaratory relief must be granted when the facts justifying that course are  
 5 sufficiently alleged. *Columbia Pictures Corp. v. De Toth* (1945) 26 Cal.2d 753, 762. As set forth  
 6 above, each of the first four causes of action asserted by Plaintiffs fail because Plaintiffs either  
 7 have not properly pled that they have standing to assert the claims, or the legal theories asserted  
 8 lack merit. Declaratory relief is unnecessary as the declarations sought in the fifth cause of action  
 9 are wholly derivative of the claims asserted above. *Ochs v. PacifiCare of California* (2004) 115  
 10 Cal.App.4th 782, 794.

11 **H. The Cause of Action for Alleged Violations of the Fair Rosenthal Debt**

12 **Collections Practices Act Fails as Pled**

13 **1. There Is No Allegation That Sallie Mae Engaged In any Debt Collection**  
 14 **Activities**

15 While ordinarily the allegations in the Complaint must be accepted as true for the purpose  
 16 of a Motion to Dismiss, conclusory allegations of law and unwarranted inferences are insufficient  
 17 to avoid a Rule 12(b)(6) dismissal.” *Cousins v. Lockyer*, 568 F.3d 1063, 1067 (9th Cir. 2009). In  
 18 this regard, while Plaintiffs assert violations of the Rosenthal Fair Debt Collections Practices Act  
 19 (FAC, ¶ 48) there are **no** allegations the Complaint that Sallie Mae engaged in any debt collection  
 20 activities. Indeed, the allegations in the Complaint are to the contrary – that Sallie Mae refers the  
 21 loan to a third party for collection (FAC, ¶ 14). Absent any allegation that Sallie Mae actually  
 22 operated as a debt collector in attempting to collect a debt from any of the Plaintiffs, Plaintiffs’  
 23 allegations that Sallie Mae violated the Rosenthal Fair Debt Collections Practices Act should be  
 24 disregarded under the holding set forth in *Cousins*.

25 **2. The Claims Arising Out of the Alleged Violations of 15 U.S.C. §**  
 26 **1692(e)(8) are Preempted**

27 In their fifth claim, Plaintiffs contend that Defendant violated 15 U.S.C. § 1692(e)(8) by,  
 28 among other things, communicating or threatening to communicate false information to credit

1 reporting agencies. That claim, however, is preempted by the Fair Credit Reporting Act. In  
 2 *Pirouszian v. SLM Corp.* (S.D. Cal. 2005) 396 F.Supp.2d 1124, 1130, the debtor alleged that the  
 3 debt collector failed to report the debt, a student loan, as “disputed” in violation of the FDCPA.  
 4 (See 15 U.S.C. § 1692(e)(8).) Relying upon section 1788.17 of the Rosenthal FDCPA, the debtor  
 5 alleged that this also constituted a violation of the Rosenthal FDCPA because of the Rosenthal’s  
 6 “incorporation provision.” However, the District Court noted that the federal Fair Credit  
 7 Reporting Act preempts all state causes of action related to furnishers of credit information. See  
 8 FCRA, 15 U.S.C. § 1681t(b)(1)(F).) The *Pirouszian* Court explained:

9           The plain language of section 1681t(b)(1)(F) clearly eliminated all state  
 10 causes of action against furnishers of information, not just ones that stem from  
 11 statutes that relate specifically to credit reporting. To allow causes of action under  
 12 state statutes that do not specifically refer to credit reporting, but to bar those that  
 13 do, would defy the Congressional rationale for the elimination of state causes of  
 14 action.

15 (*Id.* (quoting *Jaramillo v. Experian Information Solutions, Inc.* (E.D. Penn. 2001) 155 F.Supp.2d  
 16 356, 362).) Based on the foregoing analysis, the *Pirouszian* Court concluded that the Rosenthal  
 17 FDCPA claim arising out of on credit reporting is also preempted by the Fair Credit Reporting  
 18 Act. (*Pirouszian*, supra, 396 F.Supp.2d at 1130.) For the same reason, the claims by Plaintiffs in  
 19 the FAC for alleged violations of the Rosenthal FDCPA based upon the FDCPA are similarly  
 20 preempted.

#### 21 **IV. CONCLUSION**

22 For the foregoing reasons, defendant Sallie Mae respectfully request that this Motion to  
 23 Dismiss be granted.

24 DATED: December 3, 2010

McGuireWoods LLP

26 By: /s/ Susan L. Germaise

Susan L. Germaise

Attorneys for Defendant Sallie Mae, Inc.