

1 GALLO & ASSOCIATES
Ray E. Gallo (State Bar No. 158903)
2 rgallo@gallo-law.com
Dominic Valerian (State Bar No. 240001)
3 dvalerian@gallo-law.com
1101 5th Avenue, Suite 205
4 San Rafael, CA 94901
Phone: (415) 397-1205
5 Fax: (310) 338-1199

6 Attorneys for Plaintiffs Angelo Bottoni, Paul
Roberts, Tracie Serrano, and Shawnee Silva, on
7 behalf of themselves and all others similarly situated.

8 **THE UNITED STATES DISTRICT COURT**
9 **NORTHERN DISTRICT OF CALIFORNIA**

10 ANGELO BOTTONI; PAUL ROBERTS;
11 TRACIE SERRANO; and SHAWNEE SILVA
for themselves and all others similarly situated,

12 Plaintiffs,

13 v.

14 SALLIE MAE, INC.; and DOES 1 through
15 1,000, inclusive,

16 Defendants.

Case No. 4:10-cv-03602-LB

**FIRST AMENDED COMPLAINT FOR
DAMAGES, RESTITUTION,
DECLARATORY RELIEF, AND
INJUNCTIVE RELIEF FOR:**

1. **VIOLATION OF CALIFORNIA CIVIL CODE § 1671;**
2. **VIOLATION OF THE CONSUMERS LEGAL REMEDIES ACT;**
3. **VIOLATION OF THE UNFAIR COMPETITION LAW;**
4. **BREACH OF CONTRACT;**
5. **DECLARATORY RELIEF;**
6. **VIOLATION OF THE ROSENTHAL FAIR DEBT COLLECTION PRACTICES ACT; AND**
7. **VIOLATION OF THE CONSUMER CREDIT REPORTING AGENCIES ACT.**

CLASS ACTION

DEMAND FOR JURY TRIAL

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1 Plaintiffs, acting for themselves and for all others similarly situated, allege as follows.
2 The allegations herein that relate to Plaintiffs' personal actions are made based on their personal
3 knowledge. The balance are made on information and belief based on the investigation of
4 counsel.

5 **Nature of Action**

6 1. Plaintiffs bring this action for damages, and other legal and equitable remedies,
7 resulting from the illegal actions of Sallie Mae, Inc. and its third party debt collectors in
8 assessing and collecting illegal liquidated damage penalties and/or unreasonable collections
9 charges from its borrowers in connection with its private student loan programs.

10 **The Parties**

11 2. Sallie Mae, Inc. ("Sallie Mae" or "Defendant") is a Delaware corporation that
12 maintains its headquarters at 12061 Bluemont Way, Reston, Virginia. Sallie Mae does business
13 throughout the country, including in San Francisco County.

14 3. The true identities of Does 1 through 1,000, and all of them, are unknown to
15 Plaintiffs. They will amend this complaint to identify them when their identities are ascertained.
16 On information and belief, each of Does 1 through 1,000 is or at relevant times was the partner,
17 general partner, agent, employee, officer, director, controlling shareholder, principal, corporate
18 parent, corporate subsidiary, affiliate, co-conspirator, joint or co-venturer of one or more of the
19 Defendants or the lender, holder, assignor, assignee, and/or collector of a Plaintiff or Class
20 member's student loan and is responsible for the wrongdoing alleged herein by virtue of having
21 authorized, ratified, consented to, perpetrated, participated in, or aided and abetted that
22 wrongdoing.

23 4. Plaintiff Angelo Bottoni is, and at all times mentioned herein was, an individual
24 citizen of the State of California. He resides in Oakland, California.

25 5. Plaintiff Paul Roberts is, and at all times mentioned herein was, an individual
26 citizen of the State of California. He resides in Sacramento, California.

27 6. Plaintiff Tracie Serrano is, and at all times mentioned herein was, an individual
28 citizen of the State of California. She resides in Newark, California.

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1 the loan goes into default and becomes due and payable in full.

2 14. At some point after a Sallie Mae Private Loan goes into default, Sallie Mae adds
3 to the loan balance a collection charge of 25% of the principal and interest due on the loan (a
4 “Collection Penalty”) and refers the loan to a professional debt collector. The debt collector then
5 demands the entire balance on the loan from the borrower, including the 25% Collection Penalty.

6 15. As set forth in *Bondanza v. Peninsula Hosp. Med. Ctr.*, 23 Cal. 3d 260 (1979),
7 these flat rate Collection Penalties that are imposed by Defendant under the Notes constitute
8 unlawful liquidated damages and violate Cal. Civ. Code § 1671. Defendant’s and its agents’
9 assessment, collection, and reporting of these unlawful Collection Penalties also violates the
10 Consumers Legal Remedies Act (the “CLRA”),¹ Cal. Civ. Code § 1750 et seq.; the Unfair
11 Competition Law (the “UCL”), Cal. Bus. & Prof. Code §17200 et seq.; the terms of the
12 Promissory Notes; the Rosenthal Fair Debt Collection Practices Act (the “Rosenthal Act”), Cal.
13 Civ. Code § 1788 et seq.; and the Consumer Credit Reporting Agencies Act (the “CCRAA”),
14 Cal. Civ. Code § 1785.1 et seq.

15 16. The Collection Penalties are not reasonable. They at no time represented a good
16 faith attempt to estimate Defendant’s likely actual damages arising from a breach of any Note.
17 Moreover, they have not been incurred or paid by Defendant as required by the Notes and
18 applicable law. Indeed, Plaintiffs are informed and believe they are assessed in part for the
19 purpose of obtaining leverage in the collection of the Notes.

20 17. Plaintiffs therefore seek, as alleged with greater particularity below, (1) to
21 permanently enjoin Defendant and its agents from collecting, enforcing, and/or threatening to
22 collect or enforce these Collection Penalties; (2) disgorgement and restitution of all monies by
23 which Defendant has been unjustly enriched as a result of the Collection Penalties from members
24 of the below-defined Payment Subclass; and (3) to recover all such other and further relief,
25 including damages, penalties, and other amounts to which they may be entitled.

26
27
28 ¹ The Notes all represent loans that were incurred as part of a transaction resulting in the sale of educational services, thus the CLRA applies.

1 Sallie Mae Signature Student Loan in the amount of \$2,800 to cover his living expenses while he
2 completed the program.

3 23. Upon graduating from CCA, Mr. Roberts was unable to earn enough to repay his
4 Sallie Mae Private Loans and he defaulted on them. As of February 2, 2010, Sallie Mae held Mr.
5 Roberts's Note, which was in default, and had referred it to NCO Financial Systems, Inc., a third
6 party debt collector for collection. According to a February 2, 2010 statement Mr. Roberts
7 received from NCO Financial Systems, Inc., he owed a total of \$102,791.33, including a
8 principal balance of \$72,293.37, interest of \$10,808.51, and collection costs of \$19,689.45.

9 24. In September 2002, Plaintiff Tracie Serrano enrolled in the Culinary Arts program
10 at CCA. CCA referred Ms. Serrano to Sallie Mae to obtain loans to cover part of the cost of the
11 program. On or about August 20, 2002, Ms. Serrano took out a Sallie Mae Signature Student
12 loan in the amount of \$13,127 to finance part of the cost of a culinary education program. On or
13 about January 7, 2003, Ms. Serrano took out another Sallie Mae Signature Student loan in the
14 amount of \$19,925 to cover her living expenses while she completed the program.

15 25. Upon graduating from CCA, Ms. Serrano was unable to earn enough to repay her
16 Sallie Mae Private Loans and she defaulted on them. As of November 5, 2009, Sallie Mae had
17 referred Ms. Serrano's Note to Windham Professionals, Inc. for collection. According to a
18 November 5, 2009 statement Ms. Serrano received from Windham Professionals, Inc., she owed
19 \$66,258.52 (including principal of \$47,652.76, interest of \$5,576.42, and collection costs of
20 \$13,029.34) on the first loan; and \$46,341.92 (\$33,608.68 principal, \$3,549.30 interest, and
21 \$9,183.94 collection costs) on the second loan.

22 26. In November, 2002, Plaintiff Shawnee Silva, formerly known as Shawnee Morris,
23 enrolled in the Culinary Arts Program at CCA. CCA referred Ms. Silva to Sallie Mae to obtain
24 loans to cover part of the cost of the program. On or about November 22, 2002, Ms. Silva took
25 out a Sallie Mae Signature Student Loan in the amount of \$15,857.00. On or about July 15,
26 2003, Ms. Silva took out a second Sallie Mae Signature Student Loan in the amount of \$7,274.00
27 to cover the remaining cost of the program.
28

1 are unlawful, void, and unenforceable.

2 33. Under Civil Code § 1671(d), a provision in a contract liquidating damages for the
3 breach of the contract is void except that the parties to such a contract may agree therein on an
4 amount which shall be presumed to be the amount of the damage sustained by a breach thereof
5 when, from the nature of the case, it would be impracticable or extremely difficult to fix the
6 actual damage.

7 34. When Civil Code § 1671(b) applies, a provision in a contract liquidating damages
8 is void where the provision was unreasonable under the circumstances existing at the time the
9 contract was made.

10 35. Defendant's Collection Penalties are unlawful liquidated damages under either §
11 1671(d) or (b) because: (a) they were unreasonable under the circumstances existing at the time
12 the contract was made; (b) it would not be impracticable or extremely difficult to fix the actual
13 costs of collection; (c) the amount of the Collection Penalties does not represent the result of a
14 reasonable endeavor by Defendant to estimate a fair compensation for any loss that may be
15 sustained; and (d) the Collection Penalties imposed are designed to substantially exceed the
16 collection costs actually incurred.

17 36. Plaintiffs and Class members have suffered harm as a proximate result of the
18 violations of law and wrongful conduct of Defendant alleged herein.

19 **Second Cause of Action for**
20 **Violation of The Consumer Legal Remedies Act**
21 **[Civil Code Section 1750, et seq.]**

22 37. Plaintiffs incorporate each of the foregoing paragraphs as though repeated here.

23 38. Defendant has engaged in deceptive practices, unlawful methods of competition,
24 and/or unfair acts as defined by Cal. Civ. Code §1750 et seq., to the detriment of Plaintiffs and
25 all Class members. Plaintiffs and the Class members have suffered harm as a proximate result of
26 the violations of law and wrongful conduct of Defendant alleged herein.

27 39. In violation of Civ. Code § 1770(a)(14), Defendant represented that a transaction
28 confers or involves rights, remedies or obligations which it does not have or involve, or which
are prohibited by law by representing that borrowers who defaulted would be assessed only

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1 reasonable collection costs that were permitted by law and actually incurred. In fact, defaulted
2 borrowers were, at all relevant times and as a standard policy and practice, assessed unreasonable
3 and illegal 25% Collection Penalties regardless of the actual collection costs reasonably incurred.

4 40. This violation was committed in transactions intended to result or that did result
5 in the sale of educational services to consumers.

6 41. Defendant's policies and practices with respect to its assessment and collection of
7 Collection Penalties are unlawful, unethical, oppressive, fraudulent, and malicious. The gravity
8 of the harm done by Defendant's practices to consumers far outweighs any purported utility
9 those policies and practices have.

10 42. Plaintiffs and Class members have suffered harm as a proximate result of the
11 violations of law and wrongful conduct of Defendant alleged herein.

12 43. Pursuant to Civil Code § 1782, on or about April 16, 2010, Plaintiffs sent a Notice
13 Letter to Sallie Mae notifying it that its conduct violates the CLRA including, without limitation,
14 Civil Code § 1770(a)(14). In the letter, Plaintiffs demanded, among other things, that Sallie
15 Mae:

- 16 • Immediately cease its assessment and collection of Collection Penalties as
- 17 alleged herein; and
- 18 • Make full restitution and disgorgement of all monies wrongfully obtained.

19 44. Plaintiffs sent said Notice Letter by certified mail, return-receipt requested, to
20 Sallie Mae at its principal places of business and to its registered agent as of the filing of this
21 Complaint.

22 45. Sallie Mae had failed to provide a substantive response to Plaintiffs' demands in
23 the April 16, 2010 letter within 30 days. Plaintiffs are informed and believe that Sallie Mae took
24 no remedial action in response to the letter. Accordingly, Plaintiffs seek damages and all other
25 remedies allowed under the CLRA.

1 53. Pursuant to the terms of the Notes, each borrower agreed to pay reasonable
2 collections costs that are permitted by law and were actually incurred.

3 54. In addition, all applicable laws in existence when an agreement is made, which
4 laws the parties are presumed to know and to have had in mind, necessarily enter into the
5 contract and form a part of it, without any stipulation to that effect, as if they were expressly
6 referred to and incorporated. Accordingly, the Notes required that any collection costs charged
7 by Sallie Mae comport with applicable law.

8 55. Defendant breached these contract provisions by assessing and/or collecting
9 collection costs that were unlawful and not actually incurred against Plaintiffs and Class
10 members. Plaintiffs and each Class member have been damaged by Defendant's breaches in
11 amounts to be proved at trial.

12
13 **Fifth Cause of Action for
Declaratory Relief**

14 56. Plaintiffs incorporate each of the foregoing paragraphs as though repeated here.

15 57. A present and actual controversy, arising from Defendant's and its agents'
16 assessment, collection, and attempted collection of the Collection Penalties, exists between
17 Defendant and the Class.

18 58. A judicial declaration pursuant to Cal. Code Civ. Proc. § 1060 is necessary and
19 appropriate at this time so that the parties' rights and obligations under the SSL Promissory
20 Notes may be determined with certainty.

21 59. Plaintiffs ask that this Court declare all Collection Penalties assessed against
22 members of the Class by Defendant and its agents to be unenforceable, void, and unlawful.

23
24 **Sixth Cause of Action for
Violation of the Rosenthal Act
[Civil Code Section 1788 et seq.]**

25 60. Plaintiffs incorporate each of the foregoing paragraphs as though repeated here.

26 61. Each Plaintiff is a "debtor" as that term is defined by Cal. Civ. Code § 1788.2(h).

27 62. Defendant is a "debt collector" as that term is defined by Cal. Civ. Code §
28 1788.2(c) in that Defendant regularly, on behalf of itself or others, engages in debt collection.

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1 63. Defendant violated Cal. Civ. Code § 1788.13(e) by falsely representing that
2 consumer debts would be increased by the addition of the Collection Penalties when in fact those
3 amounts could not legally be added to the debtor's existing obligation under the circumstances
4 existing when Defendant made these representations.

5 64. Defendant violated Cal. Civ. Code. § 1788.14(b) by collecting or attempting to
6 collect a debt collector's fee or charge that was not permitted by law.

7 65. In addition, Cal. Civ. Code § 1788.17(b) provides that a violation of the Rosenthal
8 Act occurs if a debt collector violates 15 U.S.C. §§ 1692b-1692j. Accordingly, Defendant
9 violated the Rosenthal Act as follows:

- 10 a. Defendant falsely represented the character, amount, or legal status of a
11 debt in violation of 15 U.S.C. § 1692e(2)(A).
- 12 b. Defendant falsely represented the compensation which may be lawfully
13 received by any debt collector for the collection of a debt in violation of
14 15 U.S.C. § 1692e(2)(B).
- 15 c. Defendant communicated and threatened to communicate credit
16 information, which was known or should have been known to be false, to
17 Plaintiffs and consumer reporting agencies in violation of 15 U.S.C. §
18 1692e(8).
- 19 d. Defendant used false representations or deceptive means to collect or
20 attempt to collect or attempt to collect a debt in violation of 15 U.S.C. §
21 1692e(10).
- 22 e. Defendant collected or attempted to collect amounts that were not
23 expressly authorized by the agreement creating the debt or permitted by
24 law in violation of 15 U.S.C. § 1692f(1).

25 **Seventh Cause of Action for**
26 **Violation of the Consumer Credit Reporting Agencies Act**
27 **[Civil Code Section 1785.1 et seq.]**

28 66. Plaintiffs incorporate each of the foregoing paragraphs as though repeated here.

67. Cal Civ. Code § 1785.25 prohibits any person from furnishing to a credit

1 reporting bureau information that such person knows or should know is incomplete or inaccurate.

2 68. Defendant has willfully and intentionally violated Cal. Civ. Code § 1785.25 by
3 informing various credit reporting agencies that Plaintiffs and each of them owe the Collection
4 Penalties even though Defendant knew or should have known at all relevant times that these
5 charges were and are void, illegal, and unenforceable.

6 69. As a result of the foregoing violations, Plaintiffs have incurred damages,
7 including, without limitation, damaged credit, court costs, and attorney's fees.

8 **Class Action Allegations**

9 70. Plaintiffs bring this lawsuit on behalf of themselves and on behalf of all other
10 persons similarly situated pursuant to Fed. R. Civ. P. 23. This action satisfies the numerosity,
11 commonality, typicality, adequacy, predominance, and superiority requirements of Rule 23.

12 71. This Complaint is brought on behalf of the following class (the "Class"):

13 All persons in California who, within the applicable statute of
14 limitations preceding the filing of this action to the date of class
15 certification were assessed a Collection Penalty in connection with
a Sallie Mae Private Loan

16 72. Plaintiff Silva seeks certification of the following subclass (the "Payment
17 Subclass"):

18 All persons in California who, within the applicable statute of
19 limitations preceding the filing of this action to the date of class
20 certification, paid a Collection Penalty, or a portion thereof, in
connection with a Sallie Mae Private Loan

21 73. Plaintiffs reserve the right to modify or amend the definition of the proposed class
22 and/or subclass before the Court determines whether certification is appropriate.

23 74. Excluded from the Class are Sallie Mae, its parents, subsidiaries, affiliates,
24 officers and directors, any entity in which Sallie Mae has a controlling interest, all borrowers
25 who make a timely election to be excluded, and all judges assigned to hear any aspect of this
26 litigation, as well as their immediate family members.

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1 75. The members of the Class and Payment Subclass are so numerous that joinder is
2 impractical. On information and belief, each consists of thousands of members, the identity of
3 whom is within the knowledge of Sallie Mae and can be ascertained from Sallie Mae's records.

4 76. Plaintiffs' claims are typical of the claims of the Class, each having been assessed
5 a Collection Penalty by Defendant. Plaintiffs and all members of the Class have similarly
6 suffered injury arising from Defendant's herein alleged violations of the law.

7 77. Plaintiff Silva's claims are typical of the claims of the Payment Subclass, having
8 paid a Collection Penalty, or a portion thereof. Plaintiff Silva and all members of the Payment
9 Subclass have similarly suffered injury arising from Defendant's herein alleged violations of the
10 law.

11 78. A class action is superior to other available methods for the fair and efficient
12 adjudication of this controversy because joinder of all members is impracticable and the
13 likelihood of individual Class members prosecuting separate claims is remote. Relief concerning
14 Plaintiffs' rights under the laws alleged herein and with respect to the Class as a whole is
15 appropriate. Plaintiffs know of no difficulty to be encountered in the management of this action
16 that would preclude its maintenance as a class action.

17 79. There is a well-defined community of interest among the members of the Class
18 because common questions of law and fact predominate, Plaintiffs' claims are typical of the
19 members of the Class, and Plaintiffs can fairly and adequately represent the interests of the
20 Class.

21 80. The attorneys for Plaintiffs are experienced and capable in the field of class action
22 consumer protection litigation. They have successfully prosecuted claims in other, similar
23 litigation.

24 81. Common questions of law and fact exist as to all members of the Class and
25 predominate over any questions affecting solely individual members of the Class. Among the
26 questions of law and fact common to the Class are:

- 27 a. whether the Collection Penalties are an unlawful penalty in violation of Cal. Civ.
28 Code § 1671(b) or (d).

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- 1 b. whether the assessment and/or collection of the Collection Penalties violates the
- 2 CLRA;
- 3 c. whether the assessment and/or collection of the Collection Penalties violates the
- 4 terms of the Notes;
- 5 d. whether the assessment and/or collection of the Collection Penalties is unlawful,
- 6 unfair, and/or fraudulent in violation of the UCL;
- 7 e. whether the assessment, collection, and/or reporting of the Collection Penalties
- 8 violates the Rosenthal Act;
- 9 f. whether the reporting of the Collection Penalties violates the CCRAA.
- 10 g. whether Plaintiff Silva and the Payment Subclass members are entitled to
- 11 disgorgement of all Collection Penalties Defendant and its agents have collected;
- 12 h. whether Plaintiffs and Class members are entitled to recover compensatory and
- 13 punitive damages and/or statutory penalties as a result of Defendant's assessment,
- 14 collection, and reporting of Collection Penalties;
- 15 i. whether Plaintiffs and Class members are entitled to an award of reasonable
- 16 attorney's fees, pre-judgment interest, and costs of this suit; and
- 17 j. whether Defendant and its agents should be enjoined from assessing, collecting, and
- 18 reporting Collection Penalties.

19 **PRAYER FOR RELIEF**

20 **WHEREFORE** Plaintiffs, individually and on behalf of the Class pray for judgment as
21 follows:

22 **FIRST CAUSE OF ACTION FOR VIOLATION OF CIVIL CODE § 1671:**

- 23 1. For damages according to proof;
- 24 2. For an order enjoining Defendant and its agents from engaging in the methods, acts, or
- 25 practices alleged herein;
- 26 3. For restitution of all monies wrongfully obtained;
- 27 4. For disgorgement of all ill-gotten revenues and/or profits; and
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1 5. For attorney's fees and costs pursuant to statute including, without limitation, Cal. Civ.
2 Code § 1717(a).

3 SECOND CAUSE OF ACTION FOR VIOLATION OF CIVIL CODE §1750 et seq.:

- 4 1. For damages according to proof;
- 5 2. For an order enjoining Defendant and its agents from engaging in the unlawful methods,
6 acts, or practices alleged herein;
- 7 3. For restitution of all monies wrongfully obtained;
- 8 4. For disgorgement of wrongfully obtained profits;
- 9 5. For punitive damages; and
- 10 6. For attorney's fees and expenses pursuant to statute including, without limitation, Cal.
11 Civ. Code § 1780(d).

12 THIRD CAUSE OF ACTION FOR VIOLATION OF BUSINESS AND PROFESSIONS CODE
13 § 17200 et seq.:

- 14 1. For an order enjoining Defendant and its agents from engaging in the unlawful, unfair
15 and fraudulent methods, acts, or practices alleged herein;
- 16 2. For restitution of all monies wrongfully obtained (on behalf of Plaintiff Silva and the
17 Payment Subclass only); and
- 18 3. For attorney's fees and expenses pursuant to all applicable laws including, without
19 limitation, Code of Civil Procedure §1021.5, and the common law private attorney
20 general doctrine.

21 FOURTH CAUSE OF ACTION FOR BREACH OF CONTRACT:

- 22 1. For damages according to proof;
- 23 2. For restitution of all monies wrongfully obtained; and
- 24 3. For attorney's fees pursuant to statute including, without limitation, Cal. Civ. Code §
25 1717(a).

26 FIFTH CAUSE OF ACTION FOR DECLARATORY RELIEF:

- 27 1. For a declaration that all Collection Penalties for all Class members are void and not due
28 or payable; and

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- 1 2. For attorney's fees pursuant to statute including, without limitation, Cal. Civil Code §
2 1717(a).

3 SIXTH CAUSE OF ACTION FOR VIOLATION OF THE ROSENTHAL FAIR DEBT
4 COLLECTION PRACTICES ACT:

- 5 1. For damages according to proof;
6 2. For statutory penalties of at least \$100 and up to \$1,000 for each Class member;
7 3. For attorney's fees and costs pursuant to statute including, without limitation, Cal. Civ.
8 Code § 1788.30(c).

9 SEVENTH CAUSE OF ACTION FOR VIOLATION OF THE CONSUMER CREDIT
10 REPORTING ACT:

- 11 1. For damages according to proof, including, but not limited to, court costs, loss of wages,
12 and attorney's fees;
13 2. For punitive damages of not less than \$100 nor more than \$5,000 for each violation as the
14 court deems proper;
15 3. For an order enjoining Defendant and its agents from the unlawful practices alleged
16 herein; and
17 4. For attorney's fees and court costs pursuant to statute including, without limitation, Cal.
18 Civil Code § 1785.31(e).

19 ON ALL CAUSES OF ACTION:

- 20 1. For attorney's fees and expenses pursuant to all applicable laws including without
21 limitation, Code of Civil Procedure §1021.5, and the common law private attorney
22 general doctrine;
23 2. For costs of suit;
24 3. For both pre- and post-judgment interest on any amounts awarded; and
25 4. For such other and further relief as the Court deems just and proper.
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Respectfully submitted,

DATED: October 18, 2010

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By: /s/ Dominic Valerian

Ray E. Gallo

Dominic Valerian

Attorneys for Plaintiffs ANGELO BOTTONI,
PAUL ROBERTS, TRACIE SERRANO, and
SHAWNEE SILVA, for themselves and all others
similarly situated

DEMAND FOR JURY TRIAL

Plaintiffs hereby demand a jury trial of all causes of action so triable.

Respectfully submitted,

DATED: October 18, 2010

GALLO & ASSOCIATES

By: /s/ Dominic Valerian

Ray E. Gallo

Dominic Valerian

Attorneys for Plaintiffs ANGELO BOTTONI,
PAUL ROBERTS, TRACIE SERRANO, and
SHAWNEE SILVA, for themselves and all others
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