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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

GORDON MCMAHON, an
individual;

Plaintiff,

v.

JPMORGAN CHASE BANK, N.A.;
SELECT PORTFOLIO SERVICING,
INC.; and DOES 1 through 20
inclusive,

Defendants.

No. 2:16-cv-1459-JAM-KJN

**ORDER AMENDING APRIL 26, 2017
ORDER ON SELECT PORTFOLIO
SERVICING INC'S MOTION TO
DISMISS**

On April 26, 2017 this Court issued its Order ("4/26/17 Order") granting in part and denying in part Defendant Select Portfolio Servicing's ("SPS") motion to dismiss Plaintiff Gordon McMahon's ("McMahon") First Amendment Complaint. ECF No. 44.

In that Order, the Court dismissed McMahon's second claim for violation of the the Equal Credit Opportunity Act ("ECOA") at 15 U.S.C. § 1691(d)(1) with prejudice on the grounds that the ECOA's notice requirements do not apply when the applicant is delinquent or otherwise in default. 4/26/17 Order at 6. The Court found that McMahon had already defaulted when he submitted

1 his loan modification to SPS. Id. at 7.

2 Upon review of the briefs filed in support of and in
3 opposition to Defendant JPMorgan Chase Bank's motion to dismiss
4 in this case, the Court now recognizes that its ruling on
5 McMahon's ECOA claim against SPS should be reconsidered and
6 vacated. First, SPS' argument upon which the Court relied was
7 first raised in SPS' reply brief in support of its motion to
8 dismiss. ECF No. 41 at 3-4. McMahon therefore had no opportunity
9 to respond to this argument and the Court should not have given
10 it any consideration. Zamani v. Carnes, 491 F.3d 990, 997 (9th
11 Cir. 2007). Second, McMahon did respond to this argument in his
12 opposition to JP Morgan Chase's motion to dismiss, ECF No. 45 at
13 7-9, and based on that response, and for the following reasons,
14 the Court now finds that it should not have dismissed McMahon's
15 ECOA claim against SPS.

16 In MacDonald v. Wells Fargo Bank N.A., 2015 WL 1886000, at *3
17 (N.D. Cal. Apr. 24, 2015), the court stated that "Section
18 1691(d)(1) does not contain the words 'adverse action.'
19 Therefore, on its face, Section 1691(d)(6)'s exclusion for
20 applicants that are 'delinquent or otherwise in default' would
21 appear to impact only the entitlement to a statement of reasons
22 upon denial, not a determination on an application within thirty
23 days." MacDonald, 2015 WL 188600, at *3. MacDonald further
24 stated that few courts have discussed "whether the exceptions to
25 the definition of 'adverse action' in Section 1691(d)(6) apply to
26 the word "action" as used in Section 1691(d)(1) . . . [but] [a]t
27 least two courts have found that applicants are entitled to a
28 determination on their application with[in] thirty days whether

1 or not they defaulted on their existing loan obligations." Id.
2 MacDonald held an allegation that the servicer failed to give the
3 borrower notice of their action within thirty days of receiving
4 the completed application "is sufficient to state a claim under
5 § 1691(d)(1), even though Plaintiffs were in [default] at the
6 time." Id. at *4.

7 Thus, the Court finds that SPS's motion to dismiss McMahon's
8 ECOA claim simply because he had already defaulted before
9 submitting his loan application to SPS must be denied. The Court
10 now turns to SPS's other argument in support of its motion to
11 dismiss McMahon's ECOA claim.

12 SPS' second reason as to why it believes McMahon's ECOA
13 claim should be dismissed is that "Plaintiff has not alleged that
14 he was not [sic] a member of a protected class based on 'race,
15 color, religion, national origin, sex or marital status, or age .
16 . . In other words, Plaintiff fails to state facts demonstrating
17 he was denied pursuant to some discriminatory practice of SPS."
18 Mot. at 7.

19 The Court finds that this argument also lacks merit.
20 District courts in the Ninth Circuit have found "the [ECOA's]
21 notice provisions to give rise to a cause of action even with no
22 accompanying claims of discrimination." Cooksey, 2014 WL
23 4662015, at *4 (citing Errico v. Pac. Capital Bank, N.A., 753 F.
24 Supp. 2d 1034, 1042 (N.D. Cal. 2010); Vasquez, 2013 WL 6001924,
25 at *11). Thus, McMahon need not allege SPS discriminated against
26 him or that he was in a protected class in order to to state an
27 ECOA claim.

28 Having found that both of SPS' arguments in support of its

1 motion to dismiss this claim fail, the Court vacates its prior
2 ruling dismissing this claim with prejudice and instead denies
3 SPS's motion to dismiss McMahon second claim for violation of the
4 ECOA at 15 U.S.C. § 1691(d)(1).

5 The Court strikes lines 21-28 on page 6; lines 1 through 5
6 on page 7; and the word "second" on line 4 on page 13 of the
7 Court's 4/26/17 Order. McMahon may proceed against SPS on his
8 second and fifth through seventh claims. SPS shall file its
9 Amended Answer to the FAC within fifteen days of the date of this
10 Order.

11 IT IS SO ORDERED.

12 Dated: May 25, 2017

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15 JOHN A. MENDEZ,
16 UNITED STATES DISTRICT JUDGE
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