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United States District Court
Northern District of California

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

JULIA GREENFIELD,
Plaintiff,
v.
CROSS RIVER BANK,
Defendant.

Case No. 21-cv-09296-MMC

ORDER GRANTING IN PART AND DENYING IN PART DEFENDANT'S MOTION TO DISMISS AND STRIKE; GRANTING DEFENDANT'S MOTION TO STRIKE CLASS ALLEGATIONS; AFFORDING PLAINTIFF LEAVE TO AMEND; CONTINUING CASE MANAGEMENT CONFERENCE

Before the Court are two motions filed September 28, 2022, by defendant Cross River Bank ("CRB"): (1) "Motion to Dismiss Second Cause of Action and to Strike Under Fed. R. Civ. P. 12(f)"; and (2) "Motion to Strike Class Allegations Under Fed. R. Civ. P. 23(d)(1)(D)." The motions have been fully briefed. Having read and considered the papers filed in support of and in opposition to the motions, the Court rules as follows.¹

A. Motion to Dismiss/Strike

In the first of the two above-referenced motions, CRB seeks an order dismissing for failure to state a claim the Second Cause of Action alleged in plaintiff Julia Greenfield's ("Greenfield") First Amended Class Action Complaint ("FAC"), and, in addition, an order striking from the FAC a paragraph that, CRB asserts, contradicts allegations in Greenfield's initial Complaint.

1. Dismissal: Second Cause of Action

In her initial Complaint, Greenfield asserted against CRB a single Cause of Action,

¹ By order filed December 6, 2022, the Court took the matters under submission.

1 titled "Violation of the Equal Credit Opportunities Act ["ECOA"] (15 U.S.C. § 1691) and
2 Regulation B (12 C.F.R. § 1002.9)." In support thereof, Greenfield alleged that CRB had
3 denied an application she submitted in 2021 for a loan under the Paycheck Protection
4 Program ("PPP"), and, in so doing, failed, in violation of 15 U.S.C. § 1691(d) and 12
5 C.F.R. § 1002.9, to provide her with a statement containing "specific reasons for the
6 denial" that were "accurate[]." (See Complaint ¶¶ 3-7, 44.) In response to the
7 Complaint, CRB filed an "Answer . . . [and] Counter-Complaint," wherein CRB asserts
8 three Counterclaims, all based on CRB's allegations that Greenfield, prior to having
9 submitted the PPP loan application referenced in her initial Complaint, had submitted in
10 2020 an application that "contained a false net profit figure for her business," on which
11 CRB "reasonabl[y] rel[ied]." (See Answer and Counter-Complaint ¶¶ 1, 28, 45.)
12 Greenfield thereafter filed her FAC, in which she realleged as the First Cause of Action
13 the claim alleged in her initial Complaint and added a Second Cause of Action, which
14 latter claim CRB challenges by the instant motion.

15 In her Second Cause of Action, titled "Violation of [ECOA] (15 U.S.C. § 1691(a)(3))
16 and Regulation B (12 C.F.R. § 1002.4(a))," Greenfield alleges that CRB's Counterclaims
17 were, in violation of 15 U.S.C. § 1691(a) and 12 C.F.R. § 1002.4(a), "filed with [a]
18 retaliatory motive," specifically, to "dissuade Greenfield . . . from exercising [her] rights
19 under ECOA." (See FAC ¶ 81.)

20 Pursuant to ECOA, it is "unlawful for any creditor to discriminate against any
21 applicant, with respect to any aspect of a credit transaction," based on the applicant's
22 "ha[ving] in good faith exercised any right under [ECOA]." See 15 U.S.C. § 1691(a).
23 Regulation B provides that "a creditor shall not discriminate against an application on a
24 prohibited basis regarding any aspect of a credit transaction." See 12 C.F.R.
25 § 1002.4(a).

26 CRB argues Greenfield's Second Cause of Action fails to state a cognizable claim,
27 for the asserted reason that Greenfield has not alleged facts to support a finding that
28 CRB's filing of its Counterclaims constituted an "aspect of a credit transaction," there

1 being, according to CRB, no credit relationship between Greenfield and CRB at the time
2 the Counterclaims were filed. As set forth below, the Court agrees.

3 In a regulation promulgated by the Bureau of Consumer Financial Protection ("the
4 Bureau"),² the term "credit transaction" is defined as "every aspect of an applicant's
5 dealings with a creditor regarding an application for credit or an existing extension of
6 credit." See 12 C.F.R. § 1002.2(m). Greenfield does not allege that, at the time CRB
7 filed its Counterclaims, she had a pending application for credit or any existing extension
8 of credit. Although Greenfield argues a claim under §1691(a) and § 1002.4(a) can be
9 predicated on conduct taken by a lender after the applicant's relationship with the creditor
10 has ended, Greenfield cites no authority in support of the position she takes. Rather, the
11 claims found actionable by the two authorities cited by Greenfield were brought by
12 borrowers who, unlike Greenfield, had existing accounts at the time the creditor allegedly
13 engaged in discriminatory conduct. See, e.g., Wilson v. Toussie, 260 F. Supp. 2d 530,
14 540 (E.D. N.Y. 2003) (finding "the grant of loans in a predatory manner is actionable
15 under [§ 1691(a)]"); Sharp v. Chartwell Financial Services Ltd., 2000 WL 283095, at *4
16 (N.D. Ill. March 6, 2000) (finding "existing customer" stated claim under §1691(a) based
17 on allegation creditor's employee, in attempting to collect repayment, "invoked both racial
18 and gender-based epithets"); see also Federal Deposit Ins. Corp. v. Allen, 1988 WL
19 361044, at *2 (W.D. Okla. November 3, 1988) (noting "[a] consumer is protected by
20 ECOA throughout the life of the credit account").

21 Lastly, the Court finds unpersuasive Greenfield's reliance on a recent "advisory
22 opinion" written by the Bureau, in which the Bureau states that the term "credit
23 transaction" includes "transaction[s] that take place after credit has been extended," see
24 87 Fed. Reg. 30,097 at 30,099 (May 18, 2022), such as "a revocation of credit or an
25 unfavorable change in the terms of a credit arrangement," see id. at 30,098. Nothing in
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27 ² The Bureau has been directed by Congress to "prescribe regulations to carry out
28 the purposes of [ECOA]." See 15 U.S.C. § 1691b(a).

1 the Bureau's opinion, however, suggests § 1691(a) applies to transactions after the
2 applicant's relationship with the lender has ended. Rather, the cited opinion explains that
3 § 1691(a) applies to "applicants who have received credit and are existing account
4 holders, not just those in the process of applying for credit." See id. (emphasis added).

5 Accordingly, to the extent CRB seeks dismissal of the Second Cause of Action,
6 the motion will be granted, and said Cause of Action will be dismissed without leave to
7 amend.

8 **B. Striking: Paragraph 37 of FAC**

9 In the FAC, Greenfield alleges that her 2021 PPP loan application was submitted
10 to CRB by an individual who acted as her "proxy" (see FAC ¶ 19) and whom she further
11 describes as one of CRB's "actual and ostensible agents, conspirators, partners, and/or
12 joint venturers" (see FAC ¶ 37). In support of such description, Greenfield alleges "CRB
13 used a variety of marketing channels operated by . . . [t]hird [p]arties to locate PPP
14 borrowers and facilitate their PPP loan applications with CRB," and that "Greenfield's
15 proxy was and/or is such a [t]hird [p]arty." (See id.)

16 CRB seeks an order striking from the FAC paragraph 37, the paragraph containing
17 the description of the above-referenced proxy as an agent of CRB. CRB argues an order
18 to such effect is warranted, on the asserted ground that such description contradicts
19 allegations made in Greenfield's initial Complaint, wherein Greenfield described the
20 individual as an "independent loan agent" (see Compl. ¶ 20) and as "[p]laintiffs' "loan
21 agent" (see Compl. ¶¶ 22, 28).³

22 At the outset, the Court notes that the allegations in the two pleadings are not
23 necessarily inconsistent, in that, "[u]nder long-accepted agency principles, a person may
24 be the servant of two masters, not joint employers, at one time as to one act, if the
25 service to one does not involve abandonment of the service to the other." See Dazo v.
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28 ³ The initial Complaint was filed by Greenfield and two other individuals. The two
additional plaintiffs subsequently dismissed their claims.

1 Globe Airport Security Services, 295 F.3d 934, 939 (9th Cir. 2002) (internal quotation,
2 alteration, and citation omitted). Even assuming, however, paragraph 37 can only be
3 read as inconsistent with or in contradiction of the initial Complaint's allegation as to
4 agency, the Ninth Circuit has held "there is nothing in the Federal Rules of Civil
5 Procedure to prevent a party from filing successive pleadings that make inconsistent or
6 even contradictory allegations," and, consequently, "[a] district court has no free-standing
7 authority to strike pleadings simply because it believes that a party has taken inconsistent
8 positions in the litigation." See PAE Government Services, Inc. v. MPRI, Inc., 514 F.3d
9 856, 858-860 (9th Cir. 2007).⁴

10 Accordingly, to the extent CRB seeks an order striking paragraph 37 from the
11 FAC, the motion will be denied.

12 **B. Motion to Strike Class Allegations**

13 Greenfield's First Cause of Action, by which, as noted, she asserts violations of
14 § 1691(d) and of § 1002.9(a)(2), is brought both on behalf of herself individually and on
15 behalf of a class. CRB seeks an order striking the class allegations.

16 ECOA provides that, when a "creditor" takes "adverse action" against an
17 "applicant," it must provide a "statement[] of reasons in writing" that "contains the specific
18 reasons for the adverse action taken." See 15 U.S.C. § 1691(d)(2). Regulation B
19 similarly provides that, "when adverse action is taken," the creditor must provide a written
20 notification that contains a "statement of specific reasons for the action taken." See 12
21 C.F.R. § 1002.9(a)(2). The Bureau, in its "official interpretation," states "[t]he specific
22 reasons disclosed under [Regulation B] must relate to and accurately describe the factors
23 actually considered or scored by a creditor." See 12 C.F.R. pt. 1002, Supp. I,
24 § 1002.9(b)(2)-2.

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27 ⁴ Although a court, at least where the plaintiff "is given an opportunity to respond
28 under the procedures of Rule 11," may strike "inconsistent allegations" made in "bad
faith," see id. at 860, in this instance CRB has not argued Greenfield, by including
paragraph 37 in the FAC, has acted in bad faith.

1 Here, Greenfield alleges, her proxy submitted her 2021 application by
2 "upload[ing]" her "supporting documentation" into CRB's "online portal" and thereafter
3 received a "message" stating "Application Complete!" (see FAC ¶ 45), and that CRB, in
4 later denying her application, sent her proxy an email in which CRB stated,
5 "[u]nfortunately, the application(s) referenced below was (were) not successful in this
6 attempt for approval through [CRB's] automated system," after which CRB "listed roughly
7 fifty loan applicants" and then further stated, "[r]eason for [d]enial: [i]nsufficient
8 information or documentation to make a PPP credit decision." (See FAC ¶ 20.)
9 According to Greenfield, the applications referenced in the above-quoted email
10 contained, contrary to CRB's email, "sufficient information for CRB to make a credit
11 decision" (see FAC ¶ 3) and, consequently, that the above-quoted reason for denial was
12 "not true, accurate, or specific" (see FAC ¶ 4).

13 Based on the above allegations, Greenfield, in addition to bringing an individual
14 claim, seeks to certify the following two classes:

15 All PPP loan applicants located in the United States (1) who, in 2021, completed a
16 loan application to Cross River Bank and received a "Application Complete!"
17 message from Cross River Bank's portal(s); (2) who were given the following
18 reason for denial: "Reason for Denial: Insufficient information or documentation to
19 make a PPP credit decision" and/or "Unfortunately, the application(s) referenced
20 below was (were) not successful in this attempt for approval through our
automated system," and (3) who did not receive any other statement of reasons
for Cross River Bank's denial of their PPP loan application from Cross River Bank
within 30 days of such denial.

21 All PPP loan applicants located in the United States (1) who, in 2020, received a
22 PPP loan from Cross River Bank and (2) who, in 2021, completed a loan
23 application to Cross River Bank using data consistent with their 2020 PPP loan
24 application; (3) who were given the following reason for denial: "Reason for Denial:
25 Insufficient information or documentation to make a PPP credit decision" and/or
26 "Unfortunately, the application(s) referenced below was (were) not successful in
this attempt for approval through our automated system," and (4) who did not
receive any other statement of reasons for Cross River Bank's denial of their PPP
loan application from Cross River Bank within 30 days of such denial.

27 (See FAC ¶ 53.)

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1 In moving for an order striking the class allegations, CRB argues the proposed
2 classes are fail-safe and, in addition, would require individualized determinations.

3 **1. Fail-Safe Classes**

4 A fail-safe class is one "defined so narrowly as to preclude membership unless the
5 liability of the defendant is established." See Ruiz Torres v. Mercer Canyons, Inc., 835
6 F.3d 1125, 1138 n.7 (9th Cir. 2016) (internal quotation, citation, and alteration omitted).

7 Here, CRB relies on Greenfield's allegation that both putative classes consist of
8 persons "who, in 2021, completed a loan application" (see FAC ¶ 53), which phrase,
9 CRB argues, is a statement that the class members submitted applications that were
10 complete, i.e., applications that provided CRB with "sufficient data for a credit decision,"
11 see 12 C.F.R. Pt. 1002, Supp. I, ¶ 9(a)(1)-3 (defining "incomplete application" as
12 application that "lacks sufficient data for a credit decision"); see also 12 C.F.R. § 1002.2(f)
13 (defining "completed application" as "an application in connection with which the creditor
14 has received all the information that the creditor regularly obtains and considers in
15 evaluating applications for the amount and type of credit requested").

16 In so alleging, Greenfield uses "completed" as a conclusion that CRB received all
17 material necessary to make a credit decision, i.e., her use of the word defines the class in
18 a manner that limits membership to those who will prevail (see FAC ¶ 3) (alleging
19 Greenfield and putative class members "completed PPP loan applications in 2021 with
20 sufficient information for CRB to make a credit decision")), and, consequently, the class
21 definitions are deficient. Greenfield, however, states, as to the first of the two class
22 definitions, she is prepared to remove the words "completed an application to Cross River
23 Bank and," or to substitute "submitted" for "completed" (see Pl.'s Opp. at 10:5-15), and,
24 as to the second of the two class definitions, to substitute "submitted" for "completed"
25 (see id.).

26 Accordingly, the class allegations are subject to dismissal, with leave to amend as
27 proposed.

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2. Need for Individualized Determinations

By order filed July 26, 2022, the Court granted CRB's motion to strike the class allegations contained in the initial Complaint, finding Greenfield had failed to show a determination as to whether class members' applications were complete could be conducted without engaging in an individualized review of each application. Greenfield was, however, afforded leave to amend.

In amending, Greenfield has added allegations pertaining to the manner in which CRB processed the applications she and the putative class members submitted, which allegations the Court, as set forth below, finds sufficient at the pleading stage to allege circumstances that, if established by Greenfield, would not appear to require individualized determinations.

In particular, Greenfield, as noted, now alleges that, after she submitted her application, she received from CRB a message stating, "Application Complete!" (see FAC ¶ 45), a statement that could be understood as an admission as to the adequacy of the material both submitted by Greenfield and by all putative class members who received the same message.⁵ Additionally, Greenfield now alleges that CRB's review "processes" were "completely automated" and "without human intervention" (see FAC ¶ 43), that "the automated systems used by CRB . . . did not indicate why the systems had not approved particular PPP loans" (see FAC ¶ 41), and that CRB knew "the automated system flagged or rejected batches of applications but not why the system was unable to approve an individual loan" (see id.), allegations that, if established, could support a class-wide finding that the reason for denial given, i.e., incompleteness of the class members'

⁵ As set forth above, the first of the two proposed classes is limited to persons who received the same message. The second of the two proposed classes, while not expressly limited in the same manner, is defined by what would appear to be a similar, but implicit, acknowledgement of completeness, given CRB's acceptance of those class members' earlier applications, which acceptance, as with the first class, was followed by an allegedly inconsistent rejection. Although, as to the second, such allegation is based on the submission of applications containing "data consistent with" the class members' earlier applications, thereby, arguably, requiring an individualized comparison, that issue has not been raised in the parties' papers presently before the Court.

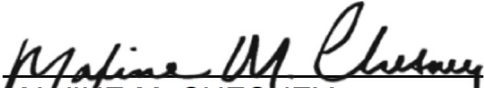
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2. CRB's Motion to Strike Class Allegations is hereby GRANTED and the class allegations are hereby STRICKEN with leave to file, no later than January 27, 2023, 2023, a Second Amended Complaint for purposes of amending the class definitions.

Lastly, in light of the above, the Case Management Conference is hereby CONTINUED from January 27, 2023, to March 17, 2023, at 10:30 a.m. A Joint Case Management Statement shall be filed no later than March 10, 2023.

IT IS SO ORDERED.

Dated: January 13, 2023


MAXINE M. CHESNEY
United States District Judge