

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

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION**

JASON PECHA,
Plaintiff,

v.

EXPERIAN INFORMATION SOLUTIONS,
INC., et al.,
Defendants.

Case No. 15-cv-05132-BLF

**ORDER (1) SUBMITTING DEFENDANT
TD BANK USA, N.A.'S MOTION TO
DISMISS FOR INSUFFICIENT
SERVICE OF PROCESS WITHOUT
ORAL ARGUMENT AND VACATING
HEARING; (2) GRANTING MOTION
TO DISMISS; AND (3) TERMINATING
AS MOOT DEFENDANT TD BANK
USA, N.A.'S MOTION FOR
PROTECTIVE ORDER**

[Re: ECF 51, 54]

On May 23, 2016, Defendant TD Bank USA, N.A. filed a Motion to Dismiss for Insufficient Service of Process pursuant to Federal Rule of Civil Procedure 12(b)(5). *See* Motion to Dismiss, ECF 51. The motion is supported by declarations and correspondence establishing that Plaintiff failed to respond to an offer extended by TD Bank USA N.A.'s counsel to return a waiver of service under Federal Rule of Civil Procedure 4(d), and failed to effect service of process on TD Bank USA, N.A. within the time provided under Federal Rule of Civil Procedure 4(m).

Plaintiff's response to the motion to dismiss was due on June 6, 2016. *See* Civ. L.R. 7-3(a) (opposition due within fourteen days). Plaintiff did not file a response. On June 10, 2016, TD Bank USA, N.A. filed a Notice of No Response to Motion for Dismissal for Insufficient Service of Process. *See* Notice of No Response, ECF 53. Plaintiff did not file a response to the Notice of No Response. The Court hereby SUBMITS the Motion to Dismiss for disposition without oral argument and VACATES the hearing date noticed for September 29, 2016. *See* Civ. L.R. 7-1(b).


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

At the time Plaintiff’s complaint was filed on November 9, 2015, Federal Rule of Civil Procedure 4(m) provided that “[i]f a defendant is not served within 120 days after the complaint is filed, the court – on motion or on its own after notice to the plaintiff – must dismiss the action without prejudice against that defendant or order that service be made within a specified time.” Fed. R. Civ. P. 4(m); *see also Malibu Media, LLC v. Doe*, No. C 15-04443 WHA, 2016 WL 3383759, at *1 (N.D. Cal. June 20, 2016) (discussing prior version of Rule 4(m)).¹ TD Bank USA, N.A. has shown by its motion that Plaintiff did not serve it within 120 days after filing the complaint and still has not served it with the summons and complaint. Plaintiff has not rebutted that showing or responded in any way to TD Bank USA, N.A.’s Motion to Dismiss or Notice of No Response. Under these circumstances, the Court concludes that dismissal, rather than an extension of time to effect service, is appropriate. The Motion to Dismiss is GRANTED and the action is DISMISSED WITHOUT PREJUDICE as to TD Bank USA, N.A.

In light of TD Bank USA, N.A.’s dismissal from the action, TD Bank USA, N.A.’s Motion for Protective Order filed June 10, 2016, ECF 54, is TERMINATED AS MOOT.

IT IS SO ORDERED.

Dated: June 23, 2016


BETH LABSON FREEMAN
United States District Judge

¹ Rule 4(m) was amended, effective December 1, 2015, to shorten the time for service from 120 days to 90 days. This Court applies the 120-day rule that was in effect when Plaintiff filed his complaint. *See Malibu Media*, 2016 WL 3383759, at *1 n.*.