TYSON M. LIES
Assistant U.S. Attorney
U.S. Attorney's Office
2601 2nd Ave. N., Suite 3200
Billings, MT 59101
Phone: (406) 247-4632
Email: tyson.lies@usdoj.gov

ATTORNEY FOR DEFENDANT
UNITED STATES OF AMERICA

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
GREAT FALLS DIVISION

ROBERT WELLMAN, JOAN WELLMAN, DANIEL B. BARCUS, and ALCINDA BARCUS, Plaintiffs, vs. LACEY ORCUTT, ACTING DIRECTOR OF GLACIER COUNTY FARM SERVICE AGENCY and THOMAS J. VILSACK, ACTING SECRETARY OF UNITED STATES DEPARTMENT OF AGRICULTURE, Defendants.	CV 21-30-GF-BMM-JTJ DEFENDANTS' BRIEF IN SUPPORT OF ITS MOTION TO DISMISS FOR LACK OF JURISDICTION AND FOR FAILURE TO STATE A CLAIM, OR, IN THE ALTERNATIVE, MOTION FOR MORE DEFINITE STATEMENT

INTRODUCTION

Plaintiffs assert claims under the Equal Credit Opportunity Act (ECOA), which prohibits discrimination "against any applicant, with respect to any aspect of a credit transaction" based on the applicant's membership in a protected class. Plaintiffs specifically claim the Farm Service Agency (FSA)—through Defendants Lacey Orcutt, Director of the Glacier County FSA Office, and Thomas J. Vilsack, Acting Secretary of the United States Department of Agriculture—discriminated against them in violation of ECOA based on their Native American ancestry.

Plaintiffs' allegations, however, do not provide specifics as to this purported discrimination. They do not even allege they applied for credit with FSA, nor do they clarify whether they ever had a loan with FSA. Instead, they make a broad assertion that FSA withheld "loans and farm service payments" from them because they are Native Americans, without providing any specifics as to the surrounding facts and circumstances. By means of these unsupported assertions, Plaintiffs seek both general and punitive damages, as well as declaratory and injunctive relief that would effectively prevent FSA from administering its assistance programs.

Plaintiffs' general assertions are not sufficient to make out a claim under ECOA. As an initial matter, their claims for punitive damages must be dismissed because ECOA expressly excepts the United States from any award of punitive damages. Plaintiffs' remaining claims should also be dismissed, or Plaintiffs

should be directed to provide a more definite statement, because (1) they do not clearly allege they were "applicants" entitled to assert a claim under ECOA; (2) they do not allege they engaged in any "credit transaction" with the FSA; and (3) they do not allege facts to show similarly situated individuals received more favorable treatment. For similar reasons, Plaintiffs' claims for declaratory and injunctive relief should also be dismissed.

FACTS

Per the allegations in the Complaint, Plaintiffs Robert and Joan Wellman and Daniel and Alcinda Barcus are residents of Glacier County. Doc. 1, Complaint ¶¶ 1-2.[1] Plaintiffs are farmers/ranchers, and consequently have transacted with the FSA's Glacier County office on multiple occasions. *Id.* ¶¶ 10, 19. FSA administers various financial assistance programs in Glacier County, including program payments made to qualifying farmers and ranchers. *Id.* ¶ 3; U.S. Dep't of Agric., Farm Service Agency Programs (Aug. 2016), https://www.fsa.usda.gov/Assets/USDA-FSA-Public/usdafiles/FactSheets/2016/farm_service_agency_programs.pdf.

Plaintiffs' farms/ranches are located within the exterior boundaries of the Blackfeet Reservation. Doc. 1, ¶¶ 1-2, 9, 18. Plaintiffs own their lands in fee simple and in trust. *Id.* Plaintiffs are also members of the Blackfeet Tribe. *Id.*

[1] As required at this stage of the litigation, all allegations in Plaintiffs' Complaint are assumed to be true for purposes of this motion.

Plaintiffs allege that prior to the spring of 2019, the Wellmans' property was "compr[is]ed" of 36 "farms." *Id.* ¶ 10. In the spring of 2019, however, the land was "dismantled" and "recast" as more than 300 "farms." *Id.* ¶ 11. Plaintiffs allege a similar "recasting" occurred on the Barcuses' farms. *Id.* ¶ 20.

While it is difficult to discern what exactly Plaintiffs are referencing with these allegations, Defendants believe Plaintiffs are alluding to corrective actions FSA took to verify leaseholds within Glacier County beginning in 2018. Ex. A, Rispens Decl. ¶ 7.[2] The FSA discovered in 2018 that lease information in its Glacier County office contained errors. *Id.* ¶ 4. Operators (those who farm or ranch on a property) are required by regulation to provide FSA with records showing they have a valid lease or sublease to operate on a given piece of property. *Id.* ¶ 2; Farm Service Agency, Handbook 10-CM, "Adding or Changing Operator," Par. 21, 2-2 – 2-3 (Sept. 11, 2019), available at https://www.fsa.usda.gov/Internet/FSA_File/10-cm_r01_a04.pdf. If an operator does not provide such documents, then he or she will be deemed ineligible for FSA

[2] Defendants have attached a declaration from Leslie Rispens, FSA's State Executive Director for Montana. *See*, Ex. A. The United States recognizes the Court usually does not consider external evidence on a motion to dismiss, but the attached declaration is not essential for finding that Plaintiffs have failed to state a claim. Rather, it is provided to give context to the Court and to demonstrate the United States' understanding of Plaintiffs' allegations. To the extent the Court determines it must rely on the declaration to rule on this Motion, the United States asks that this motion be deemed a motion for summary judgment, pursuant to Federal Rule of Civil Procedure 12(d).

benefits on that land. *Id.* ¶ 3. Many of the leases in FSA's Glacier County office contained lease and sublease information that did not accurately reflect the current farm operator. *Id.* ¶ 4. FSA therefore initiated a review to update its records. *Id.* ¶ 7. FSA required operators in Glacier County to show lease information and to confirm the amount of acreage under operation. *Id.* The "dismantling" and "recasting" Plaintiffs allege refers to the fact the Wellmans and Barcuses had to produce leases for all of the land under operation, which had multiplied in the years from the time they last reported leases to FSA. *Id.* ¶¶ 8-9.

Plaintiffs maintain the FSA took these corrective actions because of their "race as Native Americans." *Id.* ¶ 20. They claim that "deliberately reconfiguring Plaintiffs' property" made it "impossible, or at the very least unnecessarily difficult, to obtain the needed financial assistance from" FSA. *Id.* ¶ 29. They further claim the FSA did not reconfigure the lands of non-Indian farmers located off the Blackfeet reservation. *Id.* ¶ 30. Plaintiffs maintain that FSA has withheld farm payments and told them they were "to be required to pay back all of the years their farms were deemed to be out of compliance." *Id.* ¶¶ 12, 14, 21, 23. Plaintiffs do not, however, allege they will not receive such payments or have been required to pay back any prior farm assistance payments to FSA.

LEGAL STANDARD

On a motion to dismiss a complaint for lack of subject matter jurisdiction pursuant to Federal Rule of Civil Procedure 12(b)(1), the party asserting the claim has the burden of demonstrating that jurisdiction exists. *Thornhill Pub. Co., Inc. v. General Tel. & Elecs. Corp.*, 594 F.2d 730, 733 (9th Cir. 1979); *Kingman Reef Atoll Investments, L.L.C. v. United States*, 541 F.3d 1189, 1197 (9th Cir. 2008). The court presumes lack of jurisdiction until the plaintiff proves otherwise. *Stock West, Inc. v. Confederated Tribes of the Colville Reservation*, 873 F.2d 1221, 1225 (9th Cir. 1989). In adjudicating a motion to dismiss for lack of jurisdiction, the court is not limited to the pleadings, and may properly consider extrinsic evidence. *Ass'n of Am. Med. Colleges v. United States*, 217 F.3d 770, 778 (9th Cir. 2000). Where the court concludes that it lacks jurisdiction, it must dismiss the action without reaching the merits of the complaint. *High Country Res. v. F.E.R.C.*, 255 F.3d 741, 747 (9th Cir. 2001).

On a motion to dismiss under Rule 12(b)(6), a court must assess whether a complaint "contain[s] sufficient factual matter, accepted as true, 'to state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 547 (2007)). "A claim has facial plausibility when the pleaded factual content allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.*

While a court must accept as true all well-pleaded allegations, "mere conclusory statements in a complaint and formulaic recitations of the elements of a cause of action are not sufficient." *Chavez v. U.S.*, 683 F.3d 1102, 1108 (9th Cir. 2012).

"A pleading that states a claim for relief must contain . . . a short and plain statement of the claim showing that the pleader is entitled to relief . . . ." Fed. R. Civ. P. 8(a)(2). A motion for a more definite statement under Rule 12(e) may challenge a complaint failing to comply with Rule 8's requirements. *McHenry v. Rennie*, 84 F.3d 1172, 1179 (9th Cir. 1996). While no technical form is required for a complaint, a court may order a plaintiff to provide a more definite statement if the complaint "is so vague or ambiguous that the party cannot reasonably prepare a response." Fed. R. Civ. P. 12(e). In response to a motion for a more definite statement, a court may require such detail as may be appropriate in the particular case and may dismiss the complaint if its order is violated. *McHenry*, 84 F.3d at 1179.

ARGUMENT

Plaintiffs' claims must be dismissed on two separate grounds. First, their punitive damages claims should be dismissed under Federal Rule of Civil Procedure 12(b)(1) because there is no relevant waiver of sovereign immunity. In fact, ECOA expressly excepts government agencies from punitive damages. Second, Plaintiffs' remaining claims should be dismissed for failure to state a

claim under Rule 12(b)(6) because Plaintiffs do not make out a prima facie case under ECOA.

I. Plaintiffs' punitive damages claim should be dismissed for lack of jurisdiction because there is no relevant waiver of sovereign immunity.

Plaintiffs seek both actual and punitive damages under ECOA, 15 U.S.C. §1691e(a)-(b). Doc. 1, ¶ 27. 15 U.S.C. § 1691e(b), however, expressly excepts the United States and its agencies from any award of punitive damages:

> Any creditor, *other than a government or governmental subdivision or agency*, who fails to comply with any requirement imposed under this title shall be liable to the aggrieved applicant for punitive damages in an amount not greater than $10,000[.]

This Court has already interpreted this provision to mean the United States has not waived its sovereign immunity as to punitive damages under ECOA. *Thiel v. Veneman*, 859 F. Supp. 2d 1182, 1194 (D. Mont. 2012). Plaintiffs are therefore not entitled to punitive damages, and their claims to such should be dismissed for lack of jurisdiction.

II. Plaintiffs' claims should otherwise be dismissed for failure to state a claim because they do not make out a prima facie case under ECOA.

ECOA prohibits a creditor from "discriminat[ing] against any applicant, with respect to any aspect of a credit transaction" on the basis of race, color, religion, national origin, sex or marital status, or age. 15 U.S.C. § 1691(a). Consequently, a plaintiff alleging an ECOA violation must show (1) she is a member of a protected class; (2) she applied for credit with defendants; (3) she

qualified for credit; (4) she was denied credit despite being qualified; and (5) other similarly situated persons, not members of her protected class or classes were extended credit or given more favorable treatment. *Shiplet v. Veneman*, 620 F. Supp. 2d 1203, 1232 (D. Mont. 2009), *aff'd*, 383 F. App'x 667 (9th Cir. 2010).

Plaintiffs cannot make this showing because (1) they do not allege facts to show they were "applicants" for credit; (2) they do not clearly allege they engaged in a "credit transaction" with the FSA; and (3) they do not plead facts to show similarly situated individuals outside their protected class were given more favorable treatment. For similar reasons, Plaintiffs are not entitled to declaratory and injunctive relief.

a. Plaintiffs do not allege facts to show they were "applicants" for credit.

As noted, ECOA prohibits discrimination against "applicants" on the basis of a protected characteristic. 15 U.S.C. § 1691(a). For purposes of the statute, an "applicant" is "any person who applies to a creditor directly for an extension, renewal, or continuation of credit, or applies to a creditor indirectly by use of an existing credit plan for an amount exceeding a previously established credit limit." 15 U.S.C. § 1691a(b). A "creditor" is "any person"—including a government agency—"who regularly extends, renews, or continues credit; any person who regularly arranges for the extension, renewal, or continuation of credit; or any

assignee of an original creditor who participates in the decision to extend, renew, or continue credit." *Id.* § 1691a(e).

Given the statute expressly defines an applicant as one "who applies," a plaintiff must identify a specific application she made in order to state a claim under ECOA. *Arikat v. JP Morgan Chase & Co.*, 430 F. Supp. 2d 1013, 1026 (N.D. Cal. 2006) ("While plaintiffs contend that defendants collectively denied plaintiffs 'credit, re-financing, equity lines of credit and loans, etc[.], by charging usurious and exorbitant interest rates—all of this done in violation of [the] ECOA,' plaintiffs provide no facts to support this contention."); *Gatpandan v. Wilmington Sav. Fund Soc'y FSB*, No. 17-CV-04001-LB, 2017 WL 5751208, at *3 (N.D. Cal. Nov. 28, 2017) (finding that plaintiff was not an "applicant" because she failed to identify any credit for which she personally applied); *Adhvaryu v. Bank of Am., N.A.*, No. CV181836DOCADSX, 2019 WL 3000611, at *4–5 (C.D. Cal. Apr. 10, 2019) (rejecting ECOA claim because Plaintiff did not "allege that he 'applie[d] for' any relief that would constitute 'credit' within the meaning of the ECOA").

Here, Plaintiffs do not allege they applied for credit with FSA. They claim FSA has "dismantled" and "recast" their farms, but do not clarify how these actions connect to any application for credit. Doc. 1, ¶¶ 11, 20. They similarly assert FSA is withholding "loans and other farm payments from Plaintiffs," but do not clarify the amount of these loans or when the loans were made, if ever. *Id.*

¶¶ 12, 21. The mere fact FSA offers loans, or that Plaintiffs may have applied for loans in the distant past, is irrelevant for ECOA purposes if Plaintiffs do not allege facts to show they suffered discrimination *in applying for* FSA loans. Indeed, Plaintiffs' allegations parallel those of the plaintiff in *Gatpandan*, in which the plaintiff's claims were dismissed because she based her claim solely on her membership in a protected class, even though she had never personally applied for a loan with the defendant. 2017 WL 5751208, at *3. Furthermore, without specific details regarding the loans for which Plaintiffs purportedly applied, Defendants cannot formulate a response to Plaintiffs' claims, much less determine whether Plaintiffs' claims are timely or whether Plaintiffs even have standing to bring claims under ECOA. In short, Plaintiffs' claims lack the "facial plausibility" required to support a reasonable inference that FSA violated ECOA, and should be dismissed.

Plaintiffs may argue FSA's actions discouraged them from pursuing a loan in violation of 12 C.F.R. §1002.4(b), but this misinterprets ECOA's protections. Absent an actual application for credit, a cause of action cannot lie. *Alexander v. AmeriPro Funding, Inc.*, 848 F.3d 698, 707–08 (5th Cir. 2017) (concluding that, even assuming defendants had discouraged plaintiffs from applying for credit, plaintiffs were only "prospective" applicants and therefore not covered by ECOA). Moreover, for the proscriptions of 12 C.F.R. §1002.4(b) to apply, Plaintiffs must

point to an "oral or written statement, in advertising or otherwise, to applicants or prospective applicants that would discourage *on a prohibited basis* a reasonable person from making or pursuing an application." 12 C.F.R. § 1002.4(b) (emphasis added). Plaintiffs point to no such statements. They allege only that their farms were "recast," but omit any allegations as to whether they were actually discouraged or prevented from applying for credit. They similarly do not acknowledge that this "recasting" was pursuant to regulation, and therefore not "on a prohibited basis." Plaintiffs have therefore failed to show they were applicants who were discouraged from seeking credit, and their claims must fail.

b. Plaintiffs do not allege they engaged in a "credit transaction" with the FSA.

Again, to state a claim under ECOA, Plaintiffs must show they suffered discrimination "with respect to any aspect of a credit transaction." *Shiplet*, 620 F. Supp. 2d at 1232. "Credit" is "the right granted by a creditor to a debtor to defer payment of debt or to incur debts and defer its payment or to purchase property or services and defer payment therefor." 15 U.S.C. § 1691a(d).

Plaintiffs do not claim they were ever denied "credit." Instead, they claim FSA withheld "loans and financial assistance" from them as FSA sought to clarify its records regarding Plaintiffs' leaseholds. *Id.* ¶¶ 12, 21. Such allegations cannot support a reasonable inference of an ECOA violation because (1) they do not identify any specific credit transaction in which FSA could have discriminated

against Plaintiffs and (2) they do not show Plaintiffs were ever denied credit. In fact, FSA has no record of Plaintiffs being denied a loan in the past decade. Ex. A, ¶¶ 10-13.

Plaintiffs may argue that FSA withheld loan funds from them because they had not provided updated leases, but, even assuming this was true, merely withholding funds does not constitute a violation of ECOA. 15 U.S.C. § 1691(d)(6) clarifies that an "adverse action" that gives rise to a cause of action under ECOA can only be "a denial or revocation of credit, a change in the terms of an existing credit arrangement, or a refusal to grant credit in substantially the amount or on substantially the terms requested." By contrast, an adverse action "does not include a refusal to extend additional credit under an existing credit arrangement where the applicant is delinquent or otherwise in default." *Id.* To the extent the FSA withheld any loan funds—FSA has no record of doing so—it would not constitute a revocation of credit or a change of terms because Plaintiffs were obligated to ensure their leasehold information was accurate. Ex. A, ¶ 3. Indeed, to the extent FSA withheld loan funds for which Plaintiffs had already applied, it would have been justified because Plaintiffs violated the relevant regulations when they did not update FSA as to their leasehold information. Moreover, if Plaintiffs are claiming they were denied the disbursement of new loans, such facts could not give rise to a claim under ECOA because Plaintiffs were effectively in default on

their FSA loan terms. *Id.*; 15 U.S.C.A. § 1691(d)(6). In other words, there is nothing in Plaintiffs' allegations regarding withholding of "loans and financial assistance" to suggest they suffered any adverse action that would give rise to a claim under ECOA.

Plaintiffs may also claim that farm assistance payments constitute "credit" under ECOA. *See* doc. 1, ¶ 29. This Court has already previously rejected this argument, however, and therefore it cannot form the basis for Plaintiffs' claims under ECOA. *Thiel*, 859 F. Supp. 2d at 1200–01. Thus, unless Plaintiffs can identify some form of credit they sought from FSA, they cannot claim they sought and were denied "credit" by FSA and their claims must be dismissed.

c. Plaintiffs fail to allege sufficient facts to show similarly situated persons were given more favorable treatment.

Plaintiffs specifically fail to allege facts showing they were treated differently from similarly situated individuals based on their membership in a protected class. *Shiplet*, 620 F. Supp. 2d at 1232. Plaintiffs instead make unsupported claims that the "recasting" of their lands was done "based exclusively on their race as Native Americans" because "they own a majority of their property in trust." Doc. 1, ¶¶ 11, 20. They further allege—again, without any factual support—that FSA "discriminated against" Plaintiffs on the basis of their race. *Id.* ¶¶ 16, 25. Plaintiffs do claim that "no such reconfigurations and/or added requirements were put in place for any non-Indian farmers located off the

Blackfeet Reservation (*id.* ¶ 30), but this comparison is not sufficient to support an inference of discrimination because it does not compare two similarly situated groups. Indian lands held in trust are subject to additional requirements and input from the Bureau of Indian Affairs before farmers can obtain farm assistance payments or use those lands as collateral for FSA loans. Ex. A, ¶¶ 5-6; Farm Serv. Agency, Your Guide to FSA Farm Loans 44, 60 (June 2012) https://www.fsa.usda.gov/Internet/FSA_File/fsa_br_01_web_booklet.pdf. Non-Indian farmers located off the Blackfeet Reservation would not own their land in trust, and would, as a matter of course, not be subject to similar restrictions and requirements related to their lands. They are therefore not similarly situated to Plaintiffs, and any allegations regarding them cannot support Plaintiffs' claims. *Shiplet*, 620 F. Supp. 2d at 1206 ("[I]n order to show more favorable treatment, a plaintiff must demonstrate that they are similarly situated *in all material respects*.") (emphasis added).

d. Plaintiffs are not entitled to declaratory or injunctive relief.

Because Plaintiffs have not alleged a cognizable claim under ECOA, they cannot obtain their requested declaratory and injunctive relief. *Adhvaryu*, 2019 WL 3000611, at *9. They additionally cannot obtain the requested injunctive relief because it is impermissibly broad. They seek a permanent injunction to prohibit Defendants "from interfering with the Plaintiffs' right to federal

assistance" and "from placing any future requirements to access federal assistance on the Plaintiffs or the Plaintiffs' property." Doc. 1, ¶¶ 35-36. Such relief could not be granted because it would violate principles of sovereign immunity, effectively prohibiting the FSA from administering its farm assistance programs. *United States v. White Mountain Apache Tribe*, 604 F. Supp. 464, 466 (D. Ariz. 1985) (citing *Larson v. Domestic & Foreign Com. Corp.*, 337 U.S. 682, 687-88 (1949)). Plaintiffs' claims for declaratory and injunctive relief should therefore be dismissed.

CONCLUSION

Plaintiffs' claims should be dismissed for lack of jurisdiction and for failure to state a claim. In the alternative, Plaintiffs should be directed to refile their Complaint and provide a more definite statement pursuant to Federal Rule of Civil Procedure 12(e). Specifically, Plaintiffs should identify the credit for which they applied with FSA and the dates and circumstances in which they applied for that credit. They should also clarify if and when they were denied that credit. As noted above, absent such allegations, it is impossible for Defendants to formulate a response. It is similarly impossible for Defendants to determine the documents and information relevant for purposes of discovery.

DATED this 7th day of June, 2021.

LEIF M. JOHNSON
Acting United States Attorney

/s/ Tyson M. Lies
Assistant U.S. Attorney
Attorney for Defendants

CERTIFICATE OF COMPLIANCE

Pursuant to Local Rule 7.1(d)(2)(E), the attached brief is proportionately spaced, has a typeface of 14 points and contains 3,605 words, excluding the caption, tables, and certificates of service and compliance.

DATED this 7th day of June, 2021.

/s/ Tyson M. Lies
Assistant U.S. Attorney
Attorney for Defendant

CERTIFICATE OF SERVICE

I hereby certify that on the 7th day of June, 2021, a copy of the foregoing document was served on the following person by the following means.

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____ Fax
____ E-Mail

1. Clerk of Court

2. Thane Johnson
Johnson, Berg & Saxby, PLLP
221 First Avenue East
PO Box 3038
Kalispell, Montana 59903-3038
(406) 755-5535 – phone
(406) 756-9436 - fax
Attorney for Plaintiffs

/s/ Tyson M. Lies
Assistant U.S. Attorney
Attorney for Defendant United States