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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, SECRETARY OF UNITED STATES DEPARTMENT OF AGRICULTURE, Defendants.	Cause No. DV 21-30-GF-BMM-JTJ **RESPONSE IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS AND BRIEF IN SUPPORT**

COME NOW Plaintiffs, Robert Wellman, Joan Wellman, Daniel B. Barcus and Alcinda Barcus (collectively "Plaintiffs"), by and through their counsel of record, Thane Johnson of Johnson, Berg & Saxby, PLLP, and file this Response in Opposition to Defendants' 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 filed a Complaint alleging that the actions of the Farm Service Agency ("FSA") and the United States Department of Agriculture ("USDA") have discriminated against them on the basis of their race as Native Americans. At this stage, Plaintiffs have sufficiently pled a claim under the Equal Credit Opportunity Act ("ECOA") which broadly prohibits "discriminat[ion] 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).

FACTS

Plaintiffs are individual residents of Glacier County, Montana and are enrolled members of the Blackfeet Tribe who own property both in fee-simple absolute and in trust within the exterior boundaries of the Blackfeet Indian Reservation. Doc. 1, ¶¶ 1-2 (*Complaint*). The Plaintiffs have historically received assistance from the Glacier County Farm Service Agency. *Id.* ¶¶ 10, 19. Plaintiffs' farms, originally numbered at 36, turned into more than 300 despite the Plaintiffs owning the same exact real property. *Id.* ¶ 11. This process has resulted in utter chaos and confusion for the Plaintiffs and has created obstacles and burdens to receiving assistance to the point that Plaintiffs were unable to

meet the deadline to receive their financial assistance. *Id.* ¶ 13. After years of receiving farm assistance through the Glacier County FSA, the Plaintiffs, through no fault of their own and because they were Native Americans operating on trust land, were told that they would have to pay back assistance payments. Additionally, the FSA is currently withholding approximately $600,000.00 in loans and other farm payments. *Id.* ¶ 12. Only Native Americans who are enrolled members of a Tribe can own trust land. The majority of Plaintiffs' property is owned in trust.

LEGAL STANDARD

Under Fed. R. Civ. P. 8(a)(2), a pleading must contain a "short and plain statement of the claim showing that the pleader is entitled to relief." Fed.R.Civ.P. 8. The court accepts all factual allegations in the complaint as true and construes the pleadings in the light most favorable to the plaintiff. *Knievel v. ESPN*, 393 F.3d 1068, 1072 (9th Cir. 2005). A plaintiff's complaint "must have sufficient facts to state a facially plausible claim to relief." *Bertelsen v. CitiMortgage, Inc.*, No. CV 16-2-BU-JCL, 2016 U.S. Dist. LEXIS 77327, at *5 (D. Mont., June 14, 2016) (citation omitted). Conclusory allegations and unwarranted inferences are insufficient to defeat a motion to dismiss. *Johnson v. Lucent Techs. Inc.*, 653 F.3d 1000, 1010 (9th Cir. 2011).

DISCUSSION

In 1974, Congress enacted ECOA to prevent discrimination in the field of consumer credit. The Act makes it "unlawful for any creditor to discriminate 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). "Creditor" is defined under the statute to include "any person who regularly extends, renews, or continues credit." *Id.* at §1691a(e). "Person" includes a "government or governmental subdivision or agency." *Id.* at §1691(f). ECOA creates a private right of action against creditors who violate its antidiscrimination provisions. *Keepseagle v. Veneman*, No. 99-3119 (EGS), 2005 U.S. Dist. LEXIS 62064, at *24-25 (D.D.C. Mar. 31, 2005).

The USDA administers its farm loan and subsidy programs through the Farm Service Agency. *Love v. Johanns*, 439 F.3d 723, 725 (D.C. Cir. 2006). The FSA provides several different types of loans and benefits intended to assist farmers. *Id.* Farmers apply for loans or benefits from a local county committee. *Id.* The local offices determine eligibility based on criteria promulgated by the USDA. *Id.*

As an initial matter, Plaintiffs wish to clarify that they are not seeking punitive damages, *see*, Doc. 1 at pg. 7-8 (prayer for relief) and therefore do not oppose that aspect of Defendants' Motion.

I. The Court should deny Defendants' Motion to Dismiss because Plaintiffs have sufficiently pled a claim under the ECOA

The Defendants' Motion to Dismiss should be denied for three reasons. First, Defendants supplant the favorable pleading standard of Federal Rule of Civil Procedure 12(b)(6) with the evidentiary standard for establishing a *prima facie* case, thus holding Plaintiffs to a higher burden than required. Second, Defendants' interpretation of the ECOA is overly narrow and has been rejected by various courts. Third, Defendants' moMtion relies on extra-record evidence and asks the Court to prematurely make factual determinations. Each of these reasons are discussed in turn below.

A. Plaintiffs are not required to establish a prima facie case of discrimination at this stage in litigation.

Defendants attempt to hold Plaintiffs to a higher burden than is required at the motion to dismiss stage. Proving a *prima facie* case "is an evidentiary standard and not a pleading requirement." *Taylor v. Accredited Home Lenders*, Inc., 580 F.Supp. 2d 1062 (S.D. Cal. 2008). Therefore, at the 12(b)(6) stage, "a plaintiff is not required to make out a *prima facie* case." *Id.*; *Egbukichi v. Wells Fargo Bank, NA*, 184 F.Supp.3d 971, 980 (D.Or. 2016) ("Allegations sufficient to state a claim are not interchangeable with the evidence sufficient to meet the burden of proof of a *prima facie* case.")

Defendants rely on *Shiplet v. Veneman* for their formulation of the requirements of asserting a claim under ECOA. *Shiplet v. Veneman*, 620

F.Supp.2d 1203, 1232 (D. Mont. 2008). In *Shiplet*, Magistrate Judge Otsby's Findings and Recommendations affirmed an administrative law judge's rejection of Shiplet's claim under ECOA which was made after extensive discovery. In examining Shiplet's disparate treatment claim, the magistrate judge examined the four elements needed to establish a *prima facie* case under the ECOA for purposes of "creat[ing] a rebuttable presumption of discrimination." *Id.* Defendants use *Shiplet* to attempt to argue that Plaintiffs' claims should be dismissed at this early stage of litigation, without the benefit of discovery that had taken place in *Shiplet*.

Defendants conflate establishing a *prima facie* case under the "burden shifting analytical framework" with the pleading requirements of Rule 12(b)(6). *See, Shiplet v. Veneman*, 620 F.Supp. at 1232. Plaintiffs are not required to prove a *prima facie* case at this stage in litigation and have sufficiently pled facts to support their claim under the ECOA. *See, Thiel v. Venemen*, 859 F.Supp.2d 1182, 1200 (D. Mont. 2011) ("Defendants' argument, as presently presented, is not so much that Thiel has failed to state a claim but rather that she cannot prove her claim. Dismissal on this basis as the record now exists would be premature.").

B. This Court should reject Defendants' narrow interpretation of the ECOA.

The requirements for an actionable claim under the ECOA are not as narrow as the Defendants assert, and the ECOA's prohibition against credit discrimination is described as "broad," *Moore v. USDA*, 55 F.3d 991, 993 n.2 (5th Cir. 1995), and "expansive," *Wilson v. Toussie*, 260 F.Supp.2d 530, 541 (E.D.N.Y. 2003). Courts have rejected similar arguments of a narrow interpretation of the broad language of §1691(a). *Haynie v. Venemen*, 272 F.Supp.2d 10, 18 (D.D.C. 2003) ("Rather than prohibiting only the actual denial of a loan application, the statute bars racial discrimination with respect to any aspect of a credit transaction" (citation omitted)).

Defendants proffer a narrow interpretation of "credit transaction," "applicant" and "adverse action." The narrow reading of "adverse action" proposed by Defendants is contrary to the plain language of §1691(a). The Defendants assert that "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." Doc. 5 at 14. Defendants cite to the definition of "adverse action" contained in 15 U.S.C. §1691(d)(6).

In *Wilson v. Toussie*, the court was tasked with determining whether an applicant who was *granted* a loan on the basis of race rather than denied a loan could state a claim under the ECOA. 260 F.Supp.2d 530. The court examined the definition of "adverse action" in §1691(d)(6). The court noted, "viewed in

isolation, this language suggests that only certain narrow transactions may be considered under the ECOA." *Id.* at 541. However, the court noted that this language is interpreted in light of the entire statute and the narrow definition in §1691(d)(6) "does not alter the expansive language contained in §1691(a)[:] '[b]y the plain language of the provision, ECOA protection is not limited to those applicants who were rejected.'" *Id.* (citation and internal alteration omitted). Therefore, even though the plaintiffs had not applied for and been denied credit, the court refused to dismiss that portion of the complaint under Rule 12(b)(6). *Id.*

In *Haynie v. Venemen*, the court rejected a formulaic requirement that plaintiff demonstrate they actually applied and was denied a loan. 272 F.Supp.2d 10. There, the defendant argued that amendment of plaintiff's claims was futile and "characterize[d] [plaintiffs'] allegations as resting on mere 'administrative processing issues that are not even actionable under ECOA.'" *Id.* at 18. The court rejected defendants' argument, noting: "[r]ather than prohibiting only the actual denial of a loan application, the statute bars racial discrimination "with respect to any aspect of a credit transaction." 15 U.S.C. §1691(a)(1) (emphasis added). According to the court, plaintiff's allegations that the FSA deemed "plaintiff's reapplication incomplete and provide[d] misleading advice to induce plaintiff to withdraw her reapplication . . . appear to fall well within the broad language of the statute." *Haynie*, 272 F.Supp.2d at 18. The court in *Haynie* read

the phrase "any aspect of a credit transaction" as meaning "to prohibit discrimination with respect to those acts surrounding an application for credit that materially affect the applicant's ability to obtain the desired credit." *Id.* The court concluded that adopting defendant's narrow interpretation of what is actionable under the ECOA would render the phrase "'any aspect of a credit transaction' . . . meaningless." *Id.*

Similarly, in *Love v. Johanns*, the court examined the certification of a class of litigants alleging ECOA violations. 439 F.3d 723, 729 (2006). The court noted that allegations that "USDA officials told them 'they were too early to apply for a loan, too late to apply for a loan, that they need not bother filling out an application because they were not eligible to receive a loan, or that their husbands should apply'" may give rise to ECOA liability. *Id.*

The term "credit transactions" has been broadly construed as well. The Ninth Circuit has broadly interpreted the term "in view of the overriding national policy against discrimination that underlies the Act." *Brothers v. First Leasing*, 724 F.2d 789, 793 (9th Cir. 1984). The Ninth Circuit concluded it "must construe the literal language of the ECOA in light of the clear, strong purpose evidenced by the Act and adopt an interpretation that will serve to effectuate that purpose." *Id.* Under the ECOA, credit is defined as "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. §1691(a)(d). Because Defendants have notified the Plaintiffs that they owe payments made while their farms were out of compliance, this constitutes a credit within the meaning of the statute.

These cases demonstrate that Defendants' narrow interpretation of liability under the ECOA is not limited to the wrongful denial of an application for credit and that the ECOA's broad prohibition against credit discrimination encompasses Plaintiffs' allegations that they were discriminated against based on their race as Native Americans.

Plaintiffs allege in their complaint that the actions of the FSA and USDA resulted in "unnecessary and unreasonable obstacles in obtaining any financial assistance . . . by systematically and deliberately reconfiguring Plaintiff's property making it impossible, or at the very least unnecessarily difficult, to obtain the needed financial assistance." Doc. 1 ¶29. The Plaintiffs also allege that Defendants failed to provide the required documentation to Plaintiffs in order for them to complete a timely application for assistance. Doc. 1 ¶32. These additional obstacles and burdens imposed by Defendants resulted in Plaintiffs being unable to obtain assistance and the withholding of "approximately $600,000.00 in loans and other farm payments from the Plaintiffs solely because of their race as Native Americans." Doc. 1 ¶12.

As discussed above, ECOA does not simply work to prohibit only the actual denial of a loan application. *See Wilson v. Toussie*, 260 F.Supp.2d 530;

Haynie v. Venemen, 272 F.Supp.2d at 18. If this Court adopted the Defendants' proposed interpretation, the phrase "any aspect of a credit transaction" would be rendered "meaningless." *Haynie*, 272 F.Supp.2d at 18.

Considering the broad and plain prohibition against credit discrimination in §1691(a) and the favorable Rule 12(b)(6) standard, Plaintiffs have sufficiently pled facts to survive a motion to dismiss. Defendants attempt to cast the USDA's and FSA's actions under the guise of administrative and/or regulatory compliance is unavailing. *See, Haynie*, 272 F.Supp.2d at 18.

Defendants also assert that Plaintiffs fail to allege facts showing that they were treated differently from similarly situated individuals based on their membership in a protected class. Doc. 5 at 14. Defendants, seeming to acknowledge that the Plaintiffs are treated differently based on their race as Native Americans, argue that it is not because of their race as Native Americans but rather because they own trust land. Trust land can only be owned by American Indian individuals or federally recognized tribes. Under the ECOA, "an outwardly neutral policy or practice that has a significant adverse or disproportionate impact on members of a protected group" is a cognizable claim under ECOA. *Taylor*, 580 F.Supp.2d at 1068. Therefore, a policy or practice that disproportionately and adversely impacts Native Americans is cognizable under the ECOA.

C. Defendants' Motion relies on evidence outside of the pleadings, not in the record, and requires the Court to make premature factual determinations.

Statements such as "Plaintiffs violated the relevant regulations when they did not update FSA as to their leasehold information" relies on evidence not in front of the Court and requires factual determinations not appropriate for resolution on a Rule 12(b)(6) motion to dismiss. *See, e.g.* Doc. 5 at 13. Questions of whether the Plaintiffs' loans were in default or whether they complied with regulations regarding modifications/updates of their leases are questions not appropriately determined at this stage. Defendants' Motion to Dismiss contains several references to evidence not found within the pleadings and not appropriate for consideration at the motion to dismiss stage.

CONCLUSION

Viewing the Complaint in a light most favorable to Plaintiffs, as the Court must at this stage, Plaintiffs have sufficiently pled a claim under the ECOA, For the foregoing reasons, the Court should deny Defendants' Motion to Dismiss.

DATED this 21st day of June, 2021.

JOHNSON, BERG & SAXBY, PLLP

/s/ Thane Johnson

By: _____

Thane Johnson
Attorneys for Defendant