

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION**

_____)	
Steven Bivens, on behalf of himself)	
and all persons similarly situated,)	
)	
Plaintiff,)	
)	CIVIL ACTION FILE
v.)	
)	NO. 1:15-cv-4325-ELR-JKL
Select Portfolio Servicing,)	
Inc.,)	
)	
Defendant.)	
_____)	

PLAINTIFF’S REPLY TO DEFENDANT’S OBJECTIONS TO REPORT

COMES NOW, Plaintiff Steven Bivens, by and through his attorney of record, and files this Reply To Defendant’s Objections To Report.

INTRODUCTION

SPS’s Objections serve simply to obfuscate the issues and misrepresent the law. SPS seems to address the issues in the Report, but each time fails to actually do so.

ARGUMENT AND CITATION OF AUTHORITIES

a. A Supplemental Pleading Can Correct A Defective Original Pleading.

The only new issue in SPS's Objections is its claim that FRCP **15(d)** does not actually allow supplemental pleadings to correct a defect in the original pleading – in spite of the Rule's plain language:

Supplemental Pleadings. On motion and reasonable notice, the court may, on just terms, permit a party to serve a supplemental pleading setting out any transaction, occurrence, or event that happened after the date of the pleading to be supplemented. The court may permit supplementation even though the original pleading is defective in stating a claim or defense.

Instead, Defendant cites a decision based on FRCP **15(c)**, "Relation Back of Amendments," writing: "'Federal Rule of Civil Procedure 15(c) does not treat events that post-date the original pleading as if they had occurred at an earlier time,' so a supplemental pleading cannot be used to cure a deficiency as to Plaintiff's Article III standing." See Objections at pp. 6,7 (citing Innovative Therapies, Inc. v. Kinetic Concepts, Inc., 599 F.3d 1377, 1384–85 (Fed. Cir. 2010)). The obfuscation here is that this holding dealt with FRCP 15(c) instead of 15(d), and the misrepresentation is the second half of the statement – the holding that SPS added after the actual quote (after the period that it changed to a comma), but that the Court never held.

This decision was about whether a supplemental pleading related back as if

the events had occurred at an earlier time in a case when other litigation on the same issues had been filed in other jurisdictions after the original filing, but before the supplemental pleading had been filed. Here is the more complete quote in context:

Federal Rule of Civil Procedure 15(c) does not treat events that post-date the original pleading as if they had occurred at an earlier time. The district court so recognized when it treated the Amended Complaint as a supplemental, rather than amended, pleading. We discern no error in the district court's conclusion that ITI's supplemental complaint did not establish an actual controversy at the time of the original pleading, and that jurisdiction based on subsequent events did not relate back to the filing date of the initial complaint. KCI points out that its suits in the Middle District of North Carolina and in state court in Texas were filed before the supplemental complaint. *See, e.g., Electronics for Imaging, Inc. v. Coyle*, 394 F.3d 1341, 1347 (Fed.Cir.2005) (“We apply the general rule favoring the forum of the first-filed case, unless considerations of judicial and litigant economy, and the just and effective disposition of disputes, requires otherwise.”); *Genentech, Inc. v. Eli Lilly & Co.*, 998 F.2d 931, 937 (Fed.Cir.1993) (“The general rule favors the forum of the first-filed action, whether or not it is a declaratory action.”).

...

The district court also observed that all of the issues raised by ITI were subject to resolution in the cases pending in Texas and North Carolina.

Innovative Therapies, Inc. v. Kinetic Concepts, Inc., 599 F.3d 1377, 1384–85 (Fed. Cir. 2010). This decision only held that the supplemental pleading did not relate back to supersede the subsequently filed cases; it did not hold that the supplemental pleading could not have cured the jurisdictional defect.

In a case **not quoted** by SPS, the U.S. Supreme Court held definitively that supplemental pleadings can fix jurisdictional issues where the later event was necessary for standing in the case:

We have little difficulty with Espinosa's failure to file an application with the Secretary until after he was joined in the action. Although 42 U.S.C. s 405(g) establishes filing of an application as a nonwaivable condition of jurisdiction, *Mathews v. Eldridge*, 424 U.S. 319, 328, 96 S.Ct. 893, 899, 47 L.Ed.2d 1829 (1976); *Weinberger v. Salfi*, 422 U.S., at 764, 95 S.Ct., at 2466, 45 L.Ed.2d, at 538, Espinosa satisfied this condition while the case was pending in the District Court. A supplemental complaint in the District Court would have eliminated this jurisdictional issue;⁸ since the record discloses, both by affidavit and stipulation, that the jurisdictional condition was satisfied, it is not too late, even now, to supplement the complaint to allege this fact.⁹ Under these circumstances, we treat the pleadings as properly supplemented by the Secretary's stipulation that Espinosa had filed an application.

Mathews v. Diaz, 96 S. Ct. 1883, 1889 (1976). And the Supreme Court further elaborated in a footnote:

“Defective allegations of jurisdiction may be amended, upon terms, in the trial or appellate courts.” 28 U.S.C. s 1653. Although the defect in Espinosa's allegations must be cured by supplemental pleading, instead of amended pleading, the statutory purpose of avoiding needless sacrifice to defective pleading applies equally to this case. See *Schlesinger v. Councilman*, 420 U.S. 738, 744 n. 9, 95 S.Ct. 1300, 1306, 43 L.Ed.2d 591, 600; *Willingham v. Morgan*, 395 U.S. 402, 407-408, and n. 3, 89 S.Ct. 1813, 1816-1817, 23 L.Ed.2d 396, 401-402. Despite Espinosa's failure to supplement the complaint, the District Court was aware that he had filed his application; since the Secretary stipulated that the application had been filed, the defect in the pleadings surely did not prejudice him.

Mathews v. Diaz, 96 S. Ct. 1883, 1889, Ftnt. No. 9 (1976). This decision shows how permissive supplemental pleading is, and how it cures a jurisdictional defect.

B. The Amended Complaint States A Claim Upon Which Relief May Be Granted.

SPS simply cannot escape the fact that when Mr. Bivens asked for a complete history of payments and charges for his loan, it did not provide a **complete** account history, and it did not provide a **key** to the codes it used in the partial account history it did provide. The first question SPS does not, and cannot, answer is: How can a servicer know if the bottom line of a spreadsheet is accurate when it is missing the top half of that spreadsheet? And the second question is: How can a borrower understand whether charges are valid when they are written with codes, but without a key to the codes?

SPS also cannot escape the fact that the cost of sending follow-up requests for the missing information is actual damages, and that those damages are directly related to SPS's failure to send the required information the first time. This direct relationship is especially obvious when SPS did send a more complete account history and a code key in its responses to these follow-up requests. See Plaintiff's Reply to Defendant's Response To Plaintiff's Motion For Leave To Amend Complaint at pp. 2,3.

SPS's objections on the issue of futility are nothing more than a confused hash of irrelevant statements and inapposite citations. The objections add heat, but they do not add light. Because the Report has already addressed these issues so thoroughly and so accurately, Plaintiff has no need to further address them. This Court should adopt the Report as it is written.

Submitted this 3rd day of August, 2016.

BY: Wayne Charles, P.C.

s/Wayne Charles
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CERTIFICATE OF COMPLIANCE WITH LOCAL RULE 5.1

I hereby certify that I prepared the foregoing in Times New Roman, 14-point font, as approved by Local Rule 5.1.

s/Wayne Charles
Wayne Charles

CERTIFICATE OF SERVICE

I hereby certify that on August 3, 2016, I presented the foregoing to the Clerk of Court for filing and uploading to the CM/ECF system, which will send a notice to the counsel of record listed below:

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DATED this 3rd day of August, 2016.

s/Wayne Charles
Wayne Charles