

**UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF GEORGIA  
ATLANTA DIVISION**

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JILL ALTMAN, individually and on behalf of  
a class,

**CIVIL ACTION FILE NO.**

Plaintiff,

**1:15-CV-02451-SCJ-CMS**

v.

WHITE HOUSE BLACK MARKET, INC.

Defendant.

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**OBJECTION TO MAGISTRATE’S  
FINAL REPORT AND RECOMMENDATION**

Pursuant to 28 U.S.C. § 636 and Federal Rule of Civil Procedure 72, Plaintiff objects to the Magistrate’s Final Report and Recommendation (“R&R”) (Dkt. 23), which opines that Plaintiff’s complaint should be dismissed under Federal Rule 12(b)(1) for lack of standing due to Plaintiff’s alleged inability to assert a concrete injury. Section 636 provides that the Court “shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made.” 28 U.S.C. § 636(b)(1)(C); and *see* Fed. R. Civ. P. 72(b)(3) and *United States v. One Piece of Real Property Located at 5800 SW 74th Ave., Miami, Fla.*, 363 F.3d 1099, 1103, fn.6 (11th Cir. 2004).

**The R&R Is Based on a Misreading and Misapplication of the Supreme Court's Recent Decision in *Spokeo v. Robins***

The R&R principally bases its conclusion on the Supreme Court's recent decision in *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 194 L. Ed. 2d 635 (May 16, 2016), attached as Exhibit 1. However, the R&R misreads and misapplies *Spokeo* in two fundamental ways.

First, the R&R misreads *Spokeo* to hold that a violation of a plaintiff's statutory rights under FACTA is not enough, standing alone, to meet Article III's injury requirement. The R&R reaches this conclusion by mistakenly reading *Spokeo* as "squarely settl[ing]" whether a "violation of a legal right granted to a consumer by statute is sufficient to constitute an injury-in-fact for Article III standing." (See R&R p.6). *Spokeo* does not settle that issue or make any such ruling. To the contrary, it merely reaffirms existing law that when a plaintiff's claim arises from a violation of a *procedural* right, the violation alone *may* or *may not* be enough to meet the injury requirement for Article III standing, depending on the circumstances. Also, *Spokeo* does not address or alter long-standing Supreme Court authority establishing that a violation of one's *substantive* rights is enough, standing alone, to meet Article III's injury requirement.

Second, the R&R fails to recognize that even if Plaintiff must show some form of injury beyond the violation of her FACTA rights, she has done so in

multiple ways consistent with *Spokeo*. *Spokeo* explicitly holds that intangible harms, including a risk of real harm, can satisfy the concrete injury requirement, and that these harms include injuries recognized at common law or by Congressional determination. Plaintiff suffered multiple injuries recognized at common law and by Congressional determination because Defendant's publication of her credit card information breaches her privacy interests, and exposes her to an unacceptably high risk of identity theft. Indeed, both are injuries FACTA was created to prevent. Thus, Plaintiff has standing, and the R&R's recommendation of dismissal for lack of standing under Federal Rule 12(b)(1) should be declined.

## **I. THE *SPOKEO* RULING**

*Spokeo* did not decide whether the "injury" requirement was met in that case. Instead, it concluded the Ninth Circuit's analysis of the issue was incomplete, and remanded the case for further consideration. *Spokeo*, 194 L. Ed. 2d at 640. However, *Spokeo* does reiterate a number of "general principles" concerning that requirement, and specifically regarding the well-established need to "allege an injury that is both concrete *and* particularized." *Spokeo*, 194 L. Ed. 2d at 640, citing *Friends of the Earth, Inc. v. Laidlaw Env'tl. Servs (TOC), Inc.*, 528 U.S. 167, 180–81 (2000) (italics in original).

*Spokeo* discusses these general principles in the context of an alleged violation of *procedural* requirements imposed on credit bureaus by the Fair Credit Reporting Act (“FCRA”). *Spokeo*, 194 L. Ed. 2d at 646 (“Congress plainly sought to curb the dissemination of false information by adopting procedures designed to decrease that risk.”). Within that context, *Spokeo* holds that an asserted statutory violation, standing alone, can suffice to meet the concreteness requirement in some circumstances. *Id.* (“the violation of a *procedural* right granted by statute can be sufficient in some circumstances to constitute injury in fact. In other words, a plaintiff in such a case need not allege any *additional* harm beyond the one Congress has identified.”) (first italics added). In other circumstances, however, the plaintiff may need to allege additional harm beyond the procedural violation to meet the concreteness element. *See Id.* (“A violation of one of the FCRA’s procedural requirements may result in no harm.”)

*Spokeo* goes on to note that in cases for which additional harm must be alleged, the additional harm can be “intangible.” *Id.* at 645. Indeed, a “risk” of real harm can meet the concreteness element. *See Id.* (“This does not mean, however, that the risk of real harm cannot satisfy the requirement of concreteness.”). Furthermore, in deciding whether an asserted intangible harm or risk of harm is concrete, “both history and the judgment of Congress play important roles.” *Id.* For

example, courts should “consider whether an alleged intangible harm has a close relationship to a harm that has traditionally been regarded as providing a basis for a lawsuit in English or American courts.” *Spokeo*, 194 L. Ed. 2d at 645, citing *Vermont Agency of Nat’l Res. v. U.S. ex rel. Stevens*, 529 U.S. 765, 775-77 (2000). Also, “Congress has the power to define injuries and articulate chains of causation that will give rise to a case or controversy where none existed before.” *Id.*, quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 578 (1992) (Kennedy, J., concurring). Thus, if a mere procedural violation is alleged and the circumstances require the plaintiff to allege something more than the violation to assert a concrete injury, an alleged intangible harm or risk of harm that is recognized at common law or identified by Congress is sufficient.

Significantly, the *Spokeo* majority does not discuss the injury requirement in the context of an asserted violation of a plaintiff’s *substantive* rights. Justice Thomas fills this gap, discussing the well-established principle that a violation of an individual’s substantive or “private” rights is sufficient, by itself, to meet the injury in fact requirement:

Common-law courts imposed different limitations on a plaintiff’s right to bring suit depending on the type of right the plaintiff sought to vindicate. Historically, common-law courts possessed broad power to adjudicate suits involving the alleged violation of private rights, even when plaintiffs alleged only the violation of those rights and nothing

more. ‘Private rights’ are rights ‘belonging to individuals, considered as individuals.’ 3 W. Blackstone, Commentaries \*2 (hereinafter Blackstone). .... In a suit for the violation of a private right, courts historically presumed that the plaintiff suffered a *de facto* injury merely from having his personal, legal rights invaded. Thus, when one man placed his foot on another’s property, the property owner needed to show nothing more to establish a traditional case or controversy. See *Entick v. Carrington*, 2 Wils. K. B. 275, 291, 95 Eng. Rep. 807, 817 (1765).

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A plaintiff seeking to vindicate a statutorily created private right need not allege actual harm beyond the invasion of that private right. See *Havens Realty Corp. v. Coleman*, 455 U. S. 363, 373–374, 102 S. Ct. 1114, 71 L. Ed. 2d 214 (1982) (recognizing standing for a violation of the Fair Housing Act); *Tennessee Elec. Power Co. v. TVA*, 306 U. S. 118, 137–138, 59 S. Ct. 366, 83 L. Ed. 543 (1939) (recognizing that standing can exist where ‘the right invaded is a legal right,—one of property, one arising out of contract, one protected against tortious invasion, or one founded on a statute which confers a privilege’).

*Spokeo*, 194 L. Ed. 2d at 647 and 649-50 (Thomas, J., concurring).

As explained below, these general principles demonstrate that Plaintiff meets the injury in fact requirement in multiple ways. Accordingly, the R&R’s recommendation that Plaintiff’s complaint should be dismissed for lack of standing due to an alleged inability to meet the injury requirement should be declined.

## **II. PLAINTIFF MEETS THE “INJURY” REQUIREMENT**

As demonstrated below, Plaintiff asserts a concrete injury because she alleges Defendant violated her substantive rights under the Fair and Accurate

Credit Transactions Act or “FACTA.” Plaintiff also asserts a concrete injury because she alleges Defendant exposed her private credit card information and subjected her to the risk of identity theft, two injuries Congress enacted FACTA to prevent. Thus, in multiple ways, Plaintiff meets the injury requirement.

**A. Plaintiff Alleges an Article III Injury Because Defendant Violated Her Substantive Rights under FACTA.**

Although the R&R acknowledges *Spokeo*’s statement that “an invasion of a legally protected interest” meets the injury requirement when the invasion is concrete, particularized and actual or imminent (R&R, p.7), the R&R nevertheless concludes that Defendant’s willful invasion of Plaintiff’s legally protected interest under FACTA is insufficient. This is incorrect because as Justice Thomas’s concurrence notes, it is well established that a violation of one’s private or substantive rights (as opposed to public procedural rights) is enough, standing alone, to meet the injury requirement. *See Spokeo*, 194 L. Ed. 2d at 649-650 (“A plaintiff seeking to vindicate a statutorily created private right need not allege actual harm beyond the invasion of that private right.”), citing *Havens Realty Corp. v. Coleman*, 455 U. S. 363, 373-374 (1982) and *Tennessee Elec. Power Co. v. TVA*, 306 U. S. 118, 137–138 (1939).

The *Havens Realty* case Justice Thomas cites is particularly instructive. A unanimous Supreme Court ruled that a defendant's violation of a plaintiff's statutory right not to be lied to about available housing met the "injury in fact" requirement even if the plaintiff had no intention of doing business with the defendant and interacted with it *fully expecting* it to violate her rights:

As we have previously recognized, "[the] actual or threatened injury required by Art. III may exist solely by virtue of 'statutes creating legal rights, the invasion of which creates standing . . . .'" *Warth v. Seldin*, *supra*, at 500, quoting *Linda R. S. v. Richard D.*, 410 U.S. 614, 617, n. 3 (1973). Accord, *Sierra Club v. Morton*, 405 U.S. 727, 732 (1972); *Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205, 212 (1972) (WHITE, J., concurring). Section 804(d), which, in terms, establishes an enforceable right to truthful information concerning the availability of housing, is such an enactment. A tester who has been the object of a misrepresentation made unlawful under § 804(d) has suffered injury in precisely the form the statute was intended to guard against, and therefore has standing to maintain a claim for damages under the Act's provisions. That the tester may have approached the real estate agent *fully expecting* that he would receive false information, and *without any intention* of buying or renting a home, does not negate the simple fact of injury within the meaning of § 804(d).

*Havens Realty Corp.*, 455 U.S. at 373-74 (italics added). Needless to say, a person who interacts with a firm having no intention of doing business with it, and expecting the firm to lie, suffers no harm beyond the statutory violation. Nevertheless, in the context of substantive rights, the Court ruled that Article III

does not require the plaintiff to allege anything more. *See Havens Realty Corp.*, 455 U.S. at 373-74.

No subsequent Supreme Court case questions or limits *Havens Realty*. To the contrary, later Supreme Court authority is consistent with it. In *Lujan v. Defenders of Wildlife*, cited by *Spokeo*, the Supreme Court expressly describes the required “injury in fact” as “*an invasion of a legally protected interest* which is (a) concrete and particularized [citations] and (b) “actual or imminent, not ‘conjectural’ or ‘hypothetical.’” *Lujan*, 504 U.S. at 560 (italics added).<sup>1</sup> In other words, when the statutory violation itself is concrete, particularized and actual or imminent, the injury requirement is met.

The Eleventh Circuit recently confirmed the vitality of this rule and *Havens Realty*, citing it to hold that a plaintiff has standing to sue a business for having an architectural barrier that violates his substantive rights under the Americans with Disabilities Act, even if the plaintiff visited the business for the purpose of encountering the barrier so he could sue. *See Houston v. Marod Supermarkets*,

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<sup>1</sup> The Court found no standing in *Lujan* but, unlike here, the plaintiff did not assert a violation of its own rights. Instead, the “plaintiff’s asserted injury ar[ose] from the government’s allegedly unlawful regulation (or lack of regulation) of *someone else*.” *Lujan*, 504 U.S. at 562 (emphasis in original). The Court found this problematic because “the ‘injury in fact’ test .... requires that the party seeking review be himself among the injured.” *Id.* at 562-563, quoting *Sierra Club v. Morton*, 405 U.S. 727, 734 (1972).

*Inc.*, 733 F.3d 1323, 1330 (11th Cir. 2013) (“the actual or threatened injury required by Art. III may exist solely by virtue of statutes creating legal rights, the invasion of which creates standing.”), quoting *Havens Realty*, 455 U.S. at 373. In other words, the *Marod Supermarkets* plaintiff did not identify any harm beyond the violation of his substantive rights, and yet the Court found he still met the injury requirement. *See* 733 U.S. at 1332 (“The substantive right conferred by the statute is to be free from disability discrimination in the enjoyment of the facility.... Houston suffered an injury when he allegedly encountered architectural barriers at the Presidente Supermarket—notwithstanding that he did so while testing for ADA compliance.”)

Significantly, the only appellate case to address Article III standing in the FACTA context confirms that an alleged violation of one’s FACTA rights, standing alone, meets the injury requirement. *See Hammer v. Sam’s East, Inc.*, 754 F.3d 492, 498 and n. 3 (8th Cir. 2014) (“the actual-injury requirement may be satisfied *solely* by the invasion of a legal right that Congress *created*. This is not a novel principle within the law of standing.”) (italics in original) (collecting cases). *Hammer* notes that in FACTA, “Congress gave consumers the legal right to obtain a receipt at the point of sale showing no more than the last five digits of the consumer's credit or debit card number.” *Hammer*, 754 F.3d at 498. Moreover, as

*Spokeo* requires, the Eighth Circuit determined that the defendant's alleged violation of this right was both particularized and concrete, *i.e.*, not abstract. *See Hammer*, 754 F.3d at 499 (“Congress may not, for example, permit individuals to enforce ‘an abstract, self-contained, noninstrumental ‘right’ .... this limitation poses no obstacle here.”); *cf. See Spokeo*, 194 L. Ed. 2d at 645-46 (“When we have used the adjective ‘concrete,’ we have meant to convey the usual meaning of the term — ‘real,’ and not ‘abstract.’”) Accordingly, the Court concluded that the alleged violation of the plaintiffs’ substantive rights under FACTA, standing alone, was sufficient. *Hammer*, 754 F.3d at 499. (“Because appellants allege that they have suffered an actual, individualized invasion of a statutory right, we conclude that they have satisfied the injury-in-fact requirement of Article III standing.”)

The R&R does not address *Havens Realty* or *Marod Supermarkets* and, although it cites *Hammer* (R&R, p.4), it does not reconcile its conclusion with *Hammer*'s reasoning. Instead, the R&R describes Plaintiff's FACTA rights as merely “procedural,” but the R&R does not explain this statement, cite any authority for it, or give any reasoning for it. By contrast, *Hammer* describes the very same FACTA rights at issue here as substantive. *See Hammer*, 754 F.3d at 498 (“Congress created a statutory right to receive receipts that disclose no more than the last five digits of the cardholder's credit card number.”) FACTA does not

prescribe “procedures” for meeting this obligation. By contrast, the principal statutory section at issue in *Spokeo* is titled “Compliance Procedures.” *See Spokeo*, 194 L. Ed. 2d at 641, *citing* 15 U.S.C. §1681e.

*Spokeo*, *Havens Realty*, *Marod Supermarkets* and *Hammer* confirm that Plaintiff meets the injury requirement. Plaintiff alleges “an invasion of a legally protected interest” that is particularized and concrete because she asserts Defendant willfully violated her substantive right to receive a transaction receipt that reveals no more than the last five digits of her credit card. (Dkt. 1 at ¶21, ¶23-¶44, ¶48-¶50). Accordingly, these allegations establish the requisite injury.

**B. Plaintiff Also Alleges an Injury Because Defendant Breached Her Privacy Interests and Because Congress Determined that Defendant Exposed Plaintiff to a Real Risk of Identity Theft.**

Plaintiff also meets the injury requirement because Defendant’s actions caused her harm beyond the violation of her statutory rights. In determining what kinds of injuries beyond a statutory violation are sufficiently “concrete,” *Spokeo* holds the required injury may be tangible or intangible. *See Spokeo*, 194 L. Ed. 2d at 645 (“‘Concrete’ is not, however, necessarily synonymous with ‘tangible.’ Although tangible injuries are perhaps easier to recognize, we have confirmed in many of our previous cases that intangible injuries can nevertheless be concrete.”) Indeed, the mere risk of real harm can be sufficient. *See Spokeo*, 194 L. Ed. 2d at

645 (“This does not mean, however, that the risk of real harm cannot satisfy the requirement of concreteness.”)

*Spokeo* explains that to determine which intangible harms present a “concrete” injury, one may look to the common law or Congress:

In determining whether an intangible harm constitutes injury in fact, both history and the judgment of Congress play important roles. Because the doctrine of standing derives from the case-or-controversy requirement, and because that requirement in turn is grounded in historical practice, it is instructive to consider whether an alleged intangible harm has a close relationship to a harm that has traditionally been regarded as providing a basis for a lawsuit in English or American courts. [citation omitted]. In addition, because Congress is well positioned to identify intangible harms that meet minimum Article III requirements, its judgment is also instructive and important.

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Just as the common law permitted suit in such instances, the violation of a procedural right granted by statute can be sufficient in some circumstances to constitute injury in fact. In other words, a plaintiff in such a case need not allege any *additional* harm beyond the one Congress has identified.

*Spokeo*, 194 L. Ed. 2d at 645-646 (italics in original); *see also Massachusetts v. EPA*, 549 U.S. 497, 516 (2007) (“[Congressional] authorization is of critical importance to the standing inquiry: ‘Congress has the power to define injuries and articulate chains of causation that will give rise to a case or controversy where none existed before.’”), quoting *Lujan*, 504 U.S. at 580.

Beyond Defendant's violation of Plaintiff's substantive FACTA rights, Defendant injured Plaintiff in two ways recognized at common law and by Congress in passing FACTA.

1. Defendant Invaded Plaintiff's Privacy and Secrecy Interests.

FACTA was created in part "to protect the secrecy, and, thus, the privacy of card holders' complete payment card account numbers and information." *Creative Hospitality Ventures, Inc. v. U.S. Liab. Ins. Co.*, 655 F.Supp.2d 1316, 1333-34 (S.D. Fla. 2009). Specifically:

Congress, at the very least, recognized a card holder's right of privacy in the card holder's complete card account number and account information, and a corresponding right of privacy not to have that information exposed on an electronically printed payment card receipt.

*Id.* at 1334. Indeed, when signing FACTA into law, President Bush expressly noted that the government was "act[ing] to protect individual privacy." *Id.* at 1333, quoting 39 Weekly Comp. Pres. Doc. 1746, 1757 (Dec. 4, 2003).

Defendant's disclosure of Plaintiff's credit card information on its transaction receipt invaded Plaintiff's privacy and secrecy interests, both of which are traditionally regarded as providing an independent basis for a lawsuit. Common-law courts recognized claims for misuse of confidential information even in the absence of further proof of a separate injury because *the invasion of privacy*

*itself* was recognized as a distinct injury. *See Parks v. IRS*, 618 F.2d 677, 683 (10th Cir. 1980) (the “common law tort of invasion of privacy” created a remedy for “personal wrongs which result[ed] in injury to plaintiffs’ feelings and [were] actionable even though the plaintiff suffered no pecuniary loss nor physical harm. *It is the invasion of the right that is the essence of the action.*”), citing 62 Am. Jur. 2d Privacy § 45 (emphasis added); *accord Pichler v. UNITE*, 542 F.3d 380, 398–99 (3d Cir. 2008). As Justice Brandeis likewise explained: “[The right] does not turn upon the form or amount of mischief or advantage, loss or gain. The author of manuscripts, whether he is famous or obscure, low or high, has a right to say of them, if innocent, that whether interesting or dull, light or heavy, saleable or unsaleable, they shall not, without his consent, be published.” Warren & Brandeis, 4 Harv. L. Rev. at 199, n.6.

Modern courts are in accord when it comes to invasions of secrecy. “Indeed, courts have recognized as a ‘species of privacy violation . . . violations of a right to secrecy of personal information . . . .’” *Creative Hospitality Ventures*, 655 F.Supp.2d at 1333-34, quoting *Hooters of Augusta, Inc. v. Am Global Ins. Co.*, 157 Fed. Appx. 201, 208 (11th Cir. 2005) (citing *Res. Bankshares Corp. v. St. Paul Mercury Ins. Co.*, 407 F.3d 631, 640-41 (4th Cir. 2005); *Am States Ins. Co. v. Capital Assocs. of Jackson County, Inc.*, 392 F.3d 939, 942-43 (7th Cir. 2004)).

Defendant subjected Plaintiff to both an invasion of privacy and secrecy. It published ten digits of her credit card number on her transaction receipt, exposing and disclosing her private credit information to its employees and anyone else who might find the receipt. As shown, these are harms FACTA was passed to avoid, and they bear “a close relationship to a harm that has traditionally been regarded as providing a basis for a lawsuit in English or American courts.” *Spokeo*, 194 L. Ed. 2d at 645. The R&R does not find otherwise. For these additional reasons, Plaintiff meets the injury requirement. *See, e.g., Id.* at 645-46 (“the law has long permitted recovery by certain tort victims even if their harms may be difficult to prove or measure. *See, e.g.,* Restatement (First) of Torts §§569 (libel), 570 (slander *per se*) (1938). Just as the common law permitted suit in such instances, the violation . . . . can be sufficient in some circumstances to constitute injury in fact. In other words, a plaintiff in such a case need not allege any additional harm beyond the one Congress has identified.”).

2. Defendant put Plaintiff at Risk for Identity Theft.

FACTA’s other main purpose is to help prevent identity theft. *Harris v. Mexican Specialty Foods, Inc.*, 564 F.3d 1301, 1306 (11th Cir. 2009) (noting FACTA “is aimed at protecting consumers from identity theft”); *see also Steinberg v. Stitch & Craft, Inc.*, No. 09-60660-CIV-HUCK, 2009 U.S. Dist. LEXIS 72908 at

\*1 (S.D. Fla. Aug. 18, 2009) (describing FACTA as “a law enacted in 2003 to prevent identity theft and credit/debit card fraud”). Congress determined that including the account holder’s credit card information on transaction receipts creates a real risk of identity theft by enabling potential identity thieves to find the information. *See Redman v. Radioshack Corp.*, 768 F.3d 622, 626 and 639 (7th Cir. 2014) (“the less information the receipt contains the less likely is an identity thief who happens to come upon the receipt to be able to figure out the cardholder’s full account information” and “identity theft is a serious problem, and FACTA is a serious congressional effort to combat it.”); *see also* S. Rep. No. 108-166, at pp. 3 and 13 (2003) (FACTA designed to “protect consumers from identity thieves” and “limit the number of opportunities for identity thieves to ‘pick off’ key card account information.”) The account number is the “single most crucial piece of information that a criminal would need to perpetrate account fraud.” Vol. 154, No. 78 Cong. Rec. H3730 (May 13, 2008) (Rep. Mahoney). The complaint’s allegations echo these findings in detail:

2. One common modus operandi for those seeking to commit fraud or identity theft is to obtain credit card receipts and use the information published on the document.
3. The publication of more than the last five digits of a credit card or debit card number or an expiration date on customer receipts increases the possibility of identity theft or fraud.

4. Any person who obtains a receipt containing more than the last five digits of a credit card or debit card number or the expiration date can use that data in an attempt to dupe the actual cardholder, or other potential information sources, into disclosing additional confidential financial information relating to the cardholder. The more information that is disclosed on the receipt, the easier it is to pilfer additional confidential financial information.

5. In 2014, the Federal Trade Commission's Consumer Sentinel Network reported over 2.5 million complaints, of which 60 percent were related to fraud and 13 percent were related to identity theft. With over 1.5 million fraud-related complaints, the FTC reported customers paying over \$1.7 billion as a result of those fraud complaints. *See* <https://www.ftc.gov/system/files/documents/reports/consumer-sentinel-network-data-book-january-december-2014/sentinel-cy2014-1.pdf>

6. To curb this means of identity theft, Congress passed FACTA and prohibited merchants, such as Defendant, who accept credit cards and debit cards from issuing electronically-generated receipts that display either the expiration date or more than the last five digits of the card number.

39. At the time of the FACTA violations identified in this Complaint and before, Defendant knew of its obligations under FACTA and the importance of the truncation requirements.

43. The cost of truncating credit card or debit card numbers and/or expiration dates is significant, but minimal when compared with the risk posed to thousands of Defendant's customers.

(Dkt. 1 at ¶¶2-¶6, ¶39, ¶43).<sup>2</sup>

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<sup>2</sup> Plaintiff's response to Defendant's motion to dismiss suggests that the risk of identity theft is not a basis for Plaintiff's standing, but Plaintiff only made that suggestion to emphasize that she should not need to rely on that risk of harm because the statutory violation alone is sufficient. (Response to Motion at p.7).

Defendant's willful violation of Plaintiff's FACTA rights exposed Plaintiff to this risk of harm. Again, Defendant published ten digits of her credit card number on its transaction receipt, enabling any potential identity thief who handled or found the receipt access to the information.

The R&R acknowledges this risk of harm, but summarily concludes "allegations of possible future injury" are not sufficient, citing *Clapper v. Amnesty Int'l USA*, 133 S.Ct. 1138, 1147 (2013). (R&R, pp.8-9). This conclusion is erroneous because it contradicts *Spokeo*, which reaffirms the rule that a risk of future harm *can* satisfy the concrete injury requirement. *See Spokeo*, 194 L. Ed. 2d at 645 ("This does not mean, however, that the risk of real harm cannot satisfy the requirement of concreteness."); *see also Massachusetts*, 549 U.S. at 521 ("EPA's steadfast refusal to regulate greenhouse gas emissions presents a risk of harm to Massachusetts that is both 'actual' and 'imminent.'") In fact, *Spokeo* cites *Clapper* for the proposition that a risk of harm can meet the injury requirement. *Spokeo*, 194 L. Ed. 2d at 645, *citing Clapper*, 133 S.Ct. 1138. <sup>3</sup>

The point missed by R&R is not whether a risk of harm can meet the injury requirement, but whether there is a basis for concluding the risk of harm is real.

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Plainly, Congress found and Plaintiff's complaint alleges a risk of identity theft, and thus it provides an additional basis for establishing her standing.

*See Spokeo*, 194 L. Ed. 2d at 645 (“A ‘concrete’ injury must be ‘de facto’; that is, it must actually exist.”) In *Clapper*, the reason the asserted risk of harm was found insufficient was because it was based on nothing more than the plaintiff’s speculation. *See Clapper*, 133 S.Ct. at 1143.<sup>4</sup> By contrast, as shown, here the risk of harm is established by the findings of Congress. *See Redman*, 768 F.3d at 626 and 639; S. Rep. No. 108-166, at pp. 3 and 13 (2003). The R&R’s suggestion that a risk of future harm is not enough effectively means a plaintiff’s information must actually be used by an identity thief. However, as determined by Congress, once private information is exposed, harm has already occurred regardless of whether that injury is compounded by a resulting credit card fraud.

It is also important to note that exposure to identity theft is *itself* a form of injury, even if no actual identity theft occurs. A person so exposed to identity theft may have to pay for an expensive credit-monitoring service; if she opts not to do so, she may have to dedicate numerous hours of her own time to monitoring her

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<sup>4</sup> The *Clapper* plaintiffs sought to invalidate a statute based on the mere possibility – asserted by the plaintiffs, not Congress – that the statute might cause future harm. *See* 133 S.Ct. at 1144 and 1147-48. That involves a special burden because “[a] plaintiff who challenges a statute must demonstrate a realistic danger of sustaining a direct injury as a result of the statute’s operation or enforcement.” *Babbitt v. UFW Nat’l Union*, 442 U.S. 289, 298 (1979). Unlike here, *Clapper* did not address whether or when a statutory violation meets the concreteness requirement, let alone whether it does so when, as here, Congress determined the violation creates a risk of harm the statute was enacted to prevent.

own credit and/or enduring increased stress, anxiety and worry at the possibility that her identity may be compromised. The injury claimed is not just, then, the risk of identity theft in the future; it is also that a person whose credit card information is exposed to identity thieves suffers a series of harms in the present as she deals with the fallout of that exposure by taking steps to prevent or ameliorate the risk of future identity theft and/or by suffering psychic injuries flowing from that increased risk. These harms are real, and they predated FACTA, but they were injuries that were difficult to vindicate at common law and under existing statutes. Congress enacted FACTA, and the truncation requirement in it, in part to give consumers a mechanism to vindicate themselves when exposed to this harm.

Congress “is far better equipped than the judiciary to amass and evaluate the vast amount of data bearing upon” legislative questions. *See Turner Broad. Sys., Inc. v. F.C.C.*, 512 U.S. 622, 665 (1994); *see also Walters v. Nat’l Ass’n of Radiation Survivors*, 473 U.S. 305, 331 n. 12 (1985) (“When Congress makes findings on essentially factual issues such as these, those findings are of course entitled to a great deal of deference.”). Moreover, *Spokeo* confirms “Congress has the power to define injuries and articulate chains of causation that will give rise to a case or controversy where none existed before.” *Spokeo*, 194 L. Ed. 2d at 645, quoting *Lujan*, 504 U.S. at 580 (Kennedy, J., concurring).

Needless to say, Plaintiff is among the persons Congress specifically found to be exposed to a genuine risk of identity theft as a result of the inclusion of too much credit card information on transaction receipts. Accordingly, Congress's determination establishes that Defendant's willful violation of Plaintiff's FACTA rights subjected Plaintiff to an actionable risk of real harm. *See Spokeo*, 194 L. Ed. 2d at 645 ("Congress is well positioned to identify intangible harms that meet minimum Article III requirements."). For this additional reason, Plaintiff meets the injury requirement.

**C. Plaintiff Meets the Injury Requirement Because Defendant's Willful Violation of Plaintiff's FACTA Rights Gives Rise to a Right of Action for Statutory Damages.**

The R&R's analysis of the standing question also fails to consider the purpose of the standing requirement and whether Plaintiff's allegations satisfy that purpose. "Standing" is not an arbitrary limitation, but rather one that ensures the court's resources are brought to bear on a real controversy asserted by a genuinely interested party with something to gain:

'the gist of the question of standing' is whether the petitioners have 'such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination.'

*Massachusetts*, 549 U.S. at 517, quoting, *Baker v. Carr*, 369 U.S. 186, 204 (1962).

In other words, "[t]he basic inquiry is whether the 'conflicting contentions of the

parties . . . present a real, substantial controversy between parties having adverse legal interests, a dispute definite and concrete, not hypothetical or abstract.” *Babbitt*, 442 U.S. at 298 (citations omitted).

Plaintiff’s FACTA claim squarely satisfies these concerns. She alleges a real (not hypothetical or abstract) violation of FACTA that is particularized to her (because it concerns her credit card information). Furthermore, she alleges Defendant’s violation is willful which, if proven, entitles her to recover between \$100 and \$1,000 in statutory damages. *Harris*, 564 F.3d at 1312. Plainly, the actual violation of Plaintiff’s personal rights and resulting ability to recover (and impose on Defendant an obligation to pay) statutory damages demonstrates that this case presents a genuine dispute, and thus that Plaintiff has the requisite “personal stake” in its outcome. Accordingly, for all of the above reasons, Plaintiff has standing, and the R&R’s conclusion to the contrary is incorrect.

### CONCLUSION

Plaintiff has standing, and thus the R&R’s recommendation that Plaintiff’s complaint be dismissed for lack of standing should be declined.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that on June 6, 2016, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which electronically delivered a copy to the parties listed below.

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