

standing in this Court. Nevertheless, standing is jurisdictional, and while parties may move for dismissal on the issue of standing pursuant to Rule 12(b)(6), “it is more properly considered an attack on the court’s subject-matter jurisdiction under Rule 12(b)(1).” *Allstate Ins. Co. v. Global Med. Billing, Inc.*, 520 Fed. Appx. 409, 410 (6th Cir. 2013), quoting *Harold H. Huggins Realty, Inc. v. FNC, Inc.*, 634 F.3d 787, 795 n.2 (5th Cir. 2011). “The distinction [between Rule 12(b)(1) and Rule 12(b)(6)] is important because a dismissal for failure to state a claim is considered an adjudication on the merits with full preclusive effect in later litigation, while a dismissal for lack of subject-matter jurisdiction does not operate as a merits adjudication and is presumably granted without prejudice.” *Id.*, citing *Pratt v. Ventas, Inc.*, 365 F.3d 514, 523 (6th Cir. 2004). As the Sixth Circuit has explained:

“The rationale behind this is that merely because one court does not have the jurisdiction over a dispute does not necessarily mean that another court is precluded from properly exercising jurisdiction over the matter. Moreover, if a court does not have jurisdiction over a matter it cannot properly reach the merits of the case.”

Wilkins v. Jakeway, 183 F.3d 528, 533 n.6 (6th Cir. 1999) (citation omitted); C. Wright, A. Miller, & M. Kane, *Federal Practice and Procedure* § 2713, p. 239 (3d ed. 1998) (“If the court has no jurisdiction, it has no power to enter a judgment on the merits and must dismiss the action.”). It follows, then, that if this Court does not have the proper jurisdiction to rule on the merits of the claims before it, it also does not have proper jurisdiction to determine whether those claims may be brought in any other court. Accordingly, while a party may set forth its arguments for dismissal based on Rule 12(b)(6), the jurisdictional nature of a dismissal based on standing should nevertheless be “without prejudice.” *See Mitan v. Int’l Fid. Ins. Co.*, 23 F. App’x 292, 298 (6th Cir. 2001) (“Dismissals of actions that do not reach the merits of a claim, such as dismissals for lack of jurisdiction, ordinarily are without prejudice”).

Defendants have filed their Motion to Dismiss, with the primary argument being that the Plaintiffs never had standing to assert the claims in their Complaint. Since said filing, Plaintiffs have moved for voluntary dismissal of their claims. Both motions before the Court should, ultimately, have the same effect – a dismissal without prejudice. Even if this Court were to consider ruling on Defendants’ Motion, it is abundantly clear that the Sixth Circuit views a dismissal based on standing as a jurisdictional issue. When reviewing the jurisdictional requirements, this Court is only permitted to review whether the Complaint meets the minimum requirements of this Court, and nothing more. If this Court were to determine that it does not have jurisdiction, it cannot thereafter make a determination on an alternative court’s jurisdictional limits. This Court would have no way of knowing whether jurisdiction was proper in another venue. Therefore, there is no basis in law that neither supports Defendants’ proposition that a decision on standing, nor a requested dismissal, should result in a dismissal with prejudice.

B. In spite of resounding case law opposing a dismissal on the merits, the requirements for a prejudicial dismissal under Fed.R.Civ.P. 41(a)(2) have not been fulfilled.

In their Response Memorandum, Defendants argue that this Court should dismiss this action pursuant to Plaintiffs’ request, however, Defendants ask that the dismissal be *with prejudice*, pursuant to Rule 41(a)(2). Rule 41(a)(2) provides, in pertinent part that a civil action may be dismissed “...at plaintiff’s request only by court order, on terms that the court considers proper.” Dismissals pursuant to this section are without prejudice, unless the dismissal entry provides otherwise. *Id.* “[T]he last sentence of Rule 41(a)(2) implicitly permits the district court to dismiss an action with prejudice in response to a plaintiff’s motion to dismiss without prejudice.” *United States v. One Tract of Real Property*, 95 F.3d 422, 425 (6th Cir. 1996) (citation omitted).

However, the conversion of Plaintiffs' motion into a dismissal prejudice cannot be *sua sponte*. First, the court must give a plaintiff notice of its intent to dismiss with prejudice. *Jaramillo v. Burkhardt*, 59 F.3d 78, 79 (8th Cir. 1995). "It is not enough that the plaintiff is aware that dismissal is possible... or even that the defendant has requested that a grant of Rule 41(a)(2) motion be with prejudice." *Mich. Surgery Inv., LLC v. Arman*, 627 F.3d 572, 576 (6th Cir. 2010). The first requirement is such that the court must actually inform the plaintiff that it intends to grant a Rule 41(a)(2) motion with prejudice. *Id.* Second, a plaintiff must be given an opportunity to be heard in opposition to the court's intention. *Id.* at 79. Finally, a plaintiff must have the opportunity to withdraw the request for voluntary dismissal, and proceed with the litigation. *Id.* As the Sixth Circuit noted in its decision, the last requirement is pivotal to the protection of due process of law, since the dismissal would be a rejection of the plaintiff's claim on the merits, being an ultimate bar to further litigation. *Id.* citing *Gravatt v. Columbia University*, 845 F.2d 54, 56 (2d Cir. 1988).

With regard to Defendants' request for a dismissal with prejudice, Defendants have failed to demonstrate the three steps required for said dismissal. This Court has not given Plaintiffs' notice of its intent to dismiss with prejudice, nor have Plaintiffs had the opportunity to be heard or to consider the weighty decision of continuing the litigation. Without fulfillment of these three steps, dismissal with prejudice is entirely inappropriate.

In support of their request, Defendants argue that this Court should consider the arguments articulated in their Motion to Dismiss. Specifically, Defendants state that this Court lacks jurisdiction over Plaintiffs' claims, but also that all courts lack jurisdiction over the claims, and this Court should find jurisdiction is not proper in any forum, dismissing the action with prejudice and prohibiting its refiling in any forum. Dkt. #50, p. 3-4. Not only is this proposition

entirely outside the jurisdictional limits of this Court, but it is completely unwarranted. Simply because a party files a motion to dismiss based on lack of jurisdiction does not make the granting of that motion a foregone conclusion. *Mich. Surgery*, supra, at 576. In *Mich. Surgery*, the Sixth Circuit reversed and remanded a dismissal entry with prejudice based on the trial court's failure to comply with the three steps set forth in *Jaramillo*, supra. *Id.* at 577. The defendants in that matter maintained that the trial court's dismissal with prejudice was proper "because the court was going to dismiss the case anyway under Rule 12(b)(1)." *Id.* at 576. However, the Sixth Circuit found that the assumption(s) made by the trial court and the defendant(s) had several due process issues, preventing the plaintiffs from asserting important procedural and appellate issues. Therefore, the court remanded the matter back to the trial court for compliance with the three step procedure, at which the plaintiffs would be given an opportunity to pursue litigation.

In the instant matter, Plaintiffs implore this Court not to presume the likelihood of success of Defendants' motion on the merits. Thus far, the Court has heard a one-sided telling of a recent, limitedly written Supreme Court decision that does not directly address the issues at hand. Defendants' motion is far from a foregone conclusion. Accordingly, Plaintiffs ask that this Court remove itself from the fray and dismiss this action without prejudice.

C. The long-awaited decision in *Spokeo, Inc. v. Robins* is not conclusive as to the issue of standing, and thus a decision on the issues of standing is premature.

This matter has been stayed for a number of months for the purpose of awaiting the outcome of the Supreme Court decision in *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 194 L. Ed. 2d 635 (2016). As it has been noted by both sides, the issues and decision of *Spokeo* have been the subject of considerable public debate and controversy. In that decision, the Supreme Court re-emphasized, albeit a little more forcefully, the notion that for parties to have "standing", they must also have a "concrete", "de facto" injury. *Spokeo*, at 1548. The Court specifically held that

the Ninth Circuit failed to “fully appreciate the distinction between concreteness and particularization”, resulting in an incomplete analysis. This finding is far from black letter law. This is the Supreme Court asking the Ninth Circuit to try it again.

Plaintiffs recognize that the decision in *Spokeo* did not bring any more clarity to the issue of standing than what already existed in the plethora of “standing” case law. To that point, Plaintiffs also recognize that the appropriate course of action would be to stay this action further, so that *Spokeo* may have a second opportunity with the Ninth District Court of Appeals (and likely, the Supreme Court). However, an additional stay of time would unnecessarily clog this Court’s docket and would not move the parties any closer towards a resolution. Therefore, it is the Plaintiffs’ position that a dismissal without prejudice, pursuant to Rule 41(a)(2) would be in the best interests of all parties and this Court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on July 1, 2016 the foregoing was filed with the Clerk of Court via the CM/ECF system, automatically sending a notification of the filing to all attorneys of record.

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