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June 8, 2016

VIA ECF

Honorable J. Paul Oetken
United States District Court Judge
Southern District of New York
United States Courthouse
Room 2101
40 Foley Square
New York, NY 10007

Re: *Emilio v. Sprint Spectrum, L.P.*, 11-3041 (JPO)(KNF)

Dear Judge Oetken:

Pursuant to the Court's order of May 31, 2016 (ECF 210), Sprint Spectrum, L.P. ("Sprint") submits this letter brief on the issue of subject matter jurisdiction in light of *Spokeo v. Robins*, 578 U.S. —, 194 L. Ed. 2d 635 (May 16, 2016). Specifically, Plaintiff has not met his burden of proving by a preponderance of the evidence that jurisdiction exists, nor could he based on the discovery conducted to date. See *Clarex Ltd. v. Natixis Sec. Am LLC*, 12 Civ. 0772(PAE), 2012 U.S. Dist. LEXIS 147485, at *5 (S.D.N.Y. Oct. 12, 2012) (citation omitted).¹ Because there is no "case or controversy" this Court does not possess subject matter jurisdiction, and the action must, therefore, be dismissed pursuant to Fed. R. Civ. P. 12(b)(1) and 12(h)(3).

Relevant Allegations & Facts Regarding Plaintiff's Claim

In 2005, Plaintiff set forth a claim in arbitration that Sprint impermissibly charged him a line-item amount on his monthly bill related to the New York state excise tax. This claim failed in whole prior to the initiation of this federal lawsuit after the arbitrator determined that the charge was properly included on the bill – an issue not now in dispute. Mem. of Law in Support of Def's Motion to Dismiss at 4-5 and accompanying citations (ECF 149). Rather than abandon his

¹ Plaintiff here has failed to plausibly allege facts sufficient to meet his burden based on the face of the pleadings, and on this basis alone the case must be dismissed. However, if the Court determines to look beyond the pleadings, as it may on a Fed. R. Civ. P. 12(b)(1) motion, Plaintiff also fails to meet his burden as explained herein. See *Clarex*, at **12-13.

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claim, more than a decade later, Plaintiff continues to pursue this class action based entirely on his apparent disagreement over the *specific words* Sprint used to describe the line-item surcharge without alleging how he, or anyone, was actually injured by this language or Sprint's related conduct and actions – a classic “no injury” class action. As the Supreme Court recently emphasized in *Spokeo*, the failure of a plaintiff to plausibly allege or demonstrate a concrete injury as opposed to (at most) technical or procedural violations requires dismissal for want of subject matter jurisdiction, even if there were a possible statutory basis for the claim under provisions of the Kansas Consumer Protection Act, K.S.A. §§50-626, 627, 634 (“KCPA”).²

At its core, Paragraph 30 of the Amended Complaint summarizes Plaintiff's claim. (ECF 141.) Plaintiff alleges that his monthly Sprint bill described the charge in question as “New York State Excise Tax.” According to Plaintiff, this language somehow was misleading and deceptive until Sprint amended the line item in 2007 to read “New York State - Telecomm Excise Recovery,” at which point it is not contested that the language was satisfactory.³ What is noticeably absent, however, is any allegation, much less a plausible factual allegation, that Emilio or anyone else suffered injury as a result of the wording on the bill or Sprint's purported conduct. In fact, one is hard pressed to find any allegations at all in the Amended Complaint concerning how Sprint's conduct impacted Emilio beyond wholly conclusory statements or legal tautologies. In sum, Emilio alleges as to himself that “[a]t all relevant times, Claimant has been a Sprint wireless telephone service customer who has been charged by and paid to Sprint the Excise Taxes unlawfully, deceptively and unconscionably charged and collected by Sprint, *and has been injured thereby.*” Am. Compl. ¶7 (ECF 141). The Amended Complaint also alleges “Plaintiff is a Sprint wireless telephone customer who has paid the Excise Taxes, and thus is a member of the

² Sprint also denies that Plaintiff has properly and plausibly alleged facts supporting each of the elements necessary to bring or state a claim under the KCPA, including that Plaintiff is “aggrieved” or has suffered a “loss” pursuant to KCPA § 50-634(a), (c), (d)(1)-(2) or that Plaintiff has otherwise properly pled a claim under KCPA § 50-634(d)(3). In any event, as explained herein, state law cannot override Constitutional standing limits. Moreover, if the Court concludes that it has subject matter jurisdiction, the Court should nonetheless dismiss the Amended Complaint. *See* Sprint's Motion to Dismiss Plaintiff's Amended Class Action Complaint (ECF 148) and accompanying brief and reply brief in support (ECF 149, 150, 166).

³ Even if the Court were to find Plaintiff had standing to pursue a portion of his claim (which Sprint denies), Plaintiff manifestly has no standing to pursue a claim for the period following the filing of his January 4, 2005 lawsuit when he was necessarily aware of the very fact that he claims he was deceived about. Similarly, if the Court were to find that the July 2004 Assurance of Voluntary Compliance (“AVC”) or the FCC's TIB Second Report, somehow provides a basis for standing (which they do not) Plaintiff would not have standing to challenge conduct from prior to the time of the AVC (July 2004) and/or issuance of the Report (March 2005). *See also* Mem. of Law in Support of Def's Motion to Dismiss at 18-20 (ECF 149) (demonstrating that neither provides Plaintiff with a basis for standing).

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Class he seeks to represent.... The *harm suffered by Plaintiff and all other members of the Class* was and is caused by the same conduct, *viz.*, Sprint’s misleading, deceptive and unconscionable Excise Tax practices in violation of the KCPA.” Am. Compl. ¶17 (ECF 141).

It is no surprise that this represents the entirety of Plaintiff’s factual allegations in the Complaint related to his supposed injury. At his deposition, Emilio stated that he had no idea how Sprint described the New York excise tax charge on its bills when he signed up to be a Sprint customer in 1998 or 1999 and, more importantly, it did not matter to him. (Emilio Tr. 55:8-14, attached as Exhibit A.) Emilio described himself as a “loyal customer” both before and after he claims to have discovered Sprint’s supposedly deceptive conduct. (Tr. 28:24-29:3; 29:8-15; 33:7-34:2.)⁴ Moreover, he conceded that regardless of how Sprint described the New York excise tax surcharge on his bill over the years he would have continued to pay it in order to remain a Sprint customer and that his supposed “injury” – the payment of excise tax surcharges – is completely unrelated to the description of the surcharge. (Tr. 94:15-105:2.)⁵ This is the exact type of “no injury” case that the Supreme Court sought to bring to an end with *Spokeo*.

Legal Analysis

The Supreme Court’s *Spokeo* decision did not amend the well-established three-part test to establish Article III standing: a “plaintiff must have (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision.” *Spokeo*, 194 L. Ed. 2d at 643 (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992)). Because Plaintiff here invokes federal jurisdiction, the burden is his to establish each element. *Spokeo*, 194 L. Ed. 2d at 643. Moreover, a plaintiff must do so by “clearly . . . alleg[ing] facts demonstrating’ each element.” *Id.* (quoting *Warth v. Seldin*, 422 U.S. 490, 518 (1975)). Finally, a plaintiff must establish standing based on his own personal injuries and not those of putative class members. *Lewis v. Casey*, 518 U.S. 343, 357 (1996).

The import of the *Spokeo* opinion to the present case arises in two areas related to the “injury in fact” inquiry: First, for a plaintiff to sufficiently allege “injury in fact,” he must “show that he . . .

⁴ Emilio also admitted that he consented to the renewal of his contract over the years and that he would not have to pay an early termination fee if he simply let his contract expire at the end of its term. (Tr. 141:10-22; 142:7-143:20.)

⁵ The evidence also shows that the New York excise tax line item appeared under the Surcharges section of the bill which clearly states that it is a charge Sprint applies to recover its costs and is not government mandated. Emilio admitted that this charge was part of the pricing for services and that he accepted this pricing over the years by renewing his contract with Sprint. (Tr. 46:4-49:11; 53:4-24; 115:11-116:2.)

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. suffered ‘an invasion of a legally protected interest’ that is ‘concrete and particularized’ and ‘actual or imminent, not conjectural or hypothetical.’” *Spokeo*, 194 L. Ed. 2d at 644 (quoting *Lujan*, 504 U.S. at 560). What the *Spokeo* Court made clear is that the requirement that an alleged injury must be “concrete” is *in addition* to the requirement that the claim be particularized (*i.e.*, that it affected the plaintiff in a “personal and individual way”) *Id.* Here, Emilio’s allegations are so scant, that he has failed even to satisfy the bare requirement that the claim be “particularized.” Nonetheless, even if the Court finds Emilio’s claims are particularized, after *Spokeo*, it is manifest his claims do not satisfy the requirement that the alleged injury is also “concrete.” *Spokeo*, 194 L. Ed. 2d at 644; *see also Ross v. AXA Equitable Life Ins. Co.*, 115 F. Supp. 3d. 424, 435 (S.D.N.Y. 2015) (“[A] person’s abstract interest in accurate information from an entity – without any actual or imminent injury arising from the entity’s failure to disclose such information – does not constitute a ‘concrete and particularized’ injury sufficient to confer a right to sue in federal court.”). For Emilio to satisfy, the requirement of a “concrete” injury he must allege a “*de facto*” injury, one that “actually exist[s].” *Spokeo*, 194 L. Ed. 2d at 644. Here the Amended Complaint fails to allege any concrete injury. There is no allegation of economic injury to Emilio or anyone. There is no allegation that Emilio or anyone else changed their conduct as a result of Sprint’s alleged actions. In fact, it is implausible that Emilio would have changed his conduct as he remained a customer of Sprint well after he undeniably became aware of the charge in question. *See* Am. Compl. ¶7. And his deposition testimony confirms that Sprint’s description of the charge did not cause him any harm because he would have paid the charge regardless of how it was described. (Tr. 94:15-105:2.)⁶

Second, the *Spokeo* court also held that an “injury in fact” need not always be “tangible” and that Congress has a role in defining potential “intangible harms” that may satisfy the requirement that an injury be “concrete.” *Spokeo*, 194 L. Ed. 2d at 645. Importantly, however, the Supreme Court did not alter settled law that “Congress cannot erase Article III’s standing requirements by statutorily granting the right to sue to a plaintiff who would not otherwise have standing.” *Raines v. Byrd*, 521 U.S. 811, 820 n.3 (1997). In fact, the Court found that “Article III standing requires a concrete injury even in the context of a statutory violation,” and it is not sufficient, standing alone, to satisfy the injury-in-fact requirement that a statute purports to grant a person the right to bring suit. *Spokeo*, 194 L. Ed. 2d at 645. In particular, a procedural violation of a statute that results in no harm will not satisfy even the “intangible” injury requirement. *Id.* at 645-46. Moreover, the Supreme Court’s analysis of statutory standing is actually inapplicable to Emilio’s claims. He does not assert that Congress has provided him a statutory right to sue, but

⁶ Plaintiff’s “overcharge” claim also does not satisfy the injury-in-fact requirement. Plaintiff does not allege in the Amended Complaint that he (or any other class member) was overcharged. Rather, the Amended Complaint states that the Court should endeavor to figure out whether or not this occurred and/or ensure that it did not. *See* Amended Complaint at ¶¶6, 16(b), 45. These allegations do not allege a concrete, or any, injury and do not satisfy Plaintiff’s burden.

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rather, the State of Kansas has done so. Under well-established law, a state may not define a federal court's subject matter jurisdiction, even in the manner suggested in *Spokeo* that may be available to Congress. *See, e.g., Ross*, 115 F. Supp. 3d. at 434 (finding no standing to pursue claims as "aggrieved" party under state law prohibiting misrepresentations in the absence of concrete injury and noting in anticipation of *Spokeo* that regardless of how the Supreme Court came out in that case, the court was aware of no authority "suggesting that a state legislature can confer Article III standing upon a plaintiff who suffers no concrete harm merely by authorizing a private right of action based on a bare violation of a state statute."); *Robainas v. Metro Life Ins. Co.*, 14cv9926(DLC), 2015 U.S. Dist. Lexis 138354, at *16 (S.D.N.Y. Oct. 9, 2015) ("[S]tates may not bypass constitutional or prudential standing requirements."); *Khan v. Children's Nat'l Health Sys.*, Civ. Action No. TDC-15-2125, 2016 U.S. Dist. Lexis 66404, at **20-22 (D. Md. May 18, 2016) (analyzing *Spokeo* and concluding that it provided no basis for supporting standing under various state consumer protection statutes).⁷ Therefore, even assuming the Court were to conclude that the Kansas legislature intended to define a substantive harm in the KCPA that Emilio seeks to vindicate, his claim still fails to satisfy Article III standing requirements.⁸

The Amended Complaint is devoid of any allegations that satisfy Plaintiff's burden to demonstrate Article III standing, and the discovery of Plaintiff confirms that he has no standing. Plaintiff has not been injured by anything Sprint has done, and this case must be dismissed.

Respectfully submitted,

/s/Damon Suden

Damon Suden

cc: All counsel (via ECF)

⁷ For the same reasons, neither the AVC, nor the TIB Second Report can provide an independent basis for standing.

⁸ Plaintiff also fails to satisfy both the traceability and redressability requirements of Article III standing. *See Spokeo*, 194 L. Ed. 2d at 643. Plaintiff's allegation that he and the class members are entitled to the return of the excise tax (his claimed damages and remedy) is not traceable to Sprint's alleged deceptive conduct since Plaintiff cannot allege that Sprint was not permitted to recover the charge and, to the contrary, conceded at deposition that he would have paid the charge regardless of how it was described. For the same reason, a court order that Sprint return the excise tax would not redress Plaintiff's claim that he and the class members were deceived – rather it would serve as a penalty to Sprint or windfall to Plaintiff. Moreover, Plaintiff admits that Sprint is no longer engaging in the conduct that it complains of, so neither injunctive nor declaratory relief would redress any complaint related to past conduct.