

**KELLEY DRYE & WARREN LLP**

A LIMITED LIABILITY PARTNERSHIP

**101 PARK AVENUE**

**NEW YORK, NEW YORK 10178**

FACSIMILE

(212) 808-7897

www.kelleydrye.com

NEW YORK, NY

WASHINGTON, DC

LOS ANGELES, CA

CHICAGO, IL

STAMFORD, CT

BRUSSELS, BELGIUM

AFFILIATE OFFICES

MUMBAI, INDIA

ELIZABETH D. SILVER

DIRECT LINE: (973) 503-5923

EMAIL: [esilver@kelleydrye.com](mailto:esilver@kelleydrye.com)

May 18, 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:

We represent defendant Sprint Spectrum, L.P. (“Sprint”) in the above-referenced matter. We write to inform the Court that, the Supreme Court issued a 6-2 decision in *Spokeo, Inc. v. Robins*, 578 U.S. —, Case No. 13-1339 (May 16, 2016) that bears directly on the Court’s subject matter jurisdiction over this matter. Sprint respectfully requests for a stay of the proceedings and a briefing schedule for the parties to address the issue.

In *Spokeo*, the Court held that for a plaintiff to establish Article III standing, he must allege an injury-in-fact that is both “concrete and particularized.” *Id.* at 2. A plaintiff cannot “automatically satisfy the injury-in-fact requirement whenever a statute grants a person a statutory right and purports to authorize that person to sue to vindicate that right. *Id.* at 9. Rather, “Article III standing requires a concrete injury even in the context of a statutory violation.” *Id.* Further, “that a suit may be a class action ... adds nothing to the question of standing, for even named plaintiffs who represent a class ‘must allege and show that they personally have been injured, not that injury has been suffered by other, unidentified members of the class to which they belong.’” *Id.* at 6-7, n. 6.

KELLEY DRYE & WARREN LLP

Honorable J. Paul Oetken  
May 18, 2016  
Page Two

Here, Emilio has failed to plead an injury-in-fact as required in *Spokeo*. Emilio claims that Sprint violated the KCPA by not properly describing a line item surcharge for New York Excise Tax. This is a quintessential claim of technical violation of a regulation or statute that purports to require that the charge be described differently. However, Emilio's mere disagreement with the description does not in and of itself produce a concrete injury-in-fact by anyone who paid a Sprint bill containing this charge.

Emilio admits that Sprint's monthly customer bills "purported to explain the difference between taxes and surcharges," but contends these disclosures were not "clear and conspicuous, as defined in the AVC, or readily understandable." (*Id.*, ¶ 31.) Rather, they "were buried in extremely small, difficult-to-read print in the middle on the back of the first page of the bill – where no one was likely to see or read them..." (*Id.*) He further alleges that Sprint's point-of-sale disclosures failed to disclose "the full range of total amounts (or percentage) of ... additional monthly discretionary charges ... including the Excise Taxes..." (Am. Compl., ¶ 32.)

While Sprint disagrees that it failed to adequately disclose the nature of the Excise Tax surcharge to customers (*see* Sprint's Motion to Dismiss, ECF 149), even if Plaintiff's allegations are accepted as true, he fails to allege any particularized and concrete harm that resulted. Emilio never even explains how such disclosures caused him any actual harm. He simply claims an entitlement to relief based solely on the alleged violation of the KCPA\_ (Am. Compl., ¶ 6.) Emilio also does not allege anywhere in the Complaint that he, personally, was "overcharged" by Sprint. Without more, this is insufficient under the Supreme Court's ruling in *Spokeo* to establish any injury-in-fact that is either particularized (i.e. affecting plaintiff in a personal and individual way) or concrete (i.e. real, and not abstract) or "fairly traceable to the challenged conduct" of Sprint.

Emilio's failure to allege a harm traceable to the conduct of Sprint is exacerbated by the record in the arbitration. There, Sprint was found to be legally entitled to recoup the cost of paying the New York Excise Tax from its customers. (Silver Decl. i/s/o Motion to Dismiss, Ex. F, ECF 150). This is not disputed. Indeed, Emilio previously acknowledged that Sprint was not barred "from collecting or recouping the Excise Tax from customers. (*Id.* at 2-3.) Thus, Plaintiff would have continued to be billed for the identical surcharge for Excise Taxes, regardless of whether Sprint called the surcharge "New York State Excise Tax," or "New York State – Telecomm Excise Recovery," the disclosure Sprint used starting in July 2007, and which Plaintiff concedes removed the implication that the charges were taxes. (Am. Compl., ¶ 30.) Nor does Plaintiff allege that he would have stopped paying and/or discontinued his Sprint service (or switched to another carrier) had he known the "true" nature of the charge. Indeed, even after filing his demand for arbitration in January, 2005 alleging that Sprint's disclosures

KELLEY DRYE & WARREN LLP

Honorable J. Paul Oetken  
May 18, 2016  
Page Three

were misleading, Emilio continued paying for Sprint service through the close of the class period, and he continues to be a loyal Sprint customer today.

Thus, Emilio's payment of the excise tax surcharge is not an "injury-in-fact." Indeed, it is not an injury in any sense given that he would have paid the surcharge regardless of the disclosures and, in fact, continued to pay it even after filing his claim in arbitration. Nor is payment of the surcharge "fairly traceable to the challenged conduct of the defendant" – i.e. to the alleged misrepresentations – because Sprint was legally entitled to collect the surcharge from Emilio. Thus, under *Spokeo*, because Emilio lacks standing, this Court lacks subject matter jurisdiction over Emilio's claim.

In light of the foregoing, Sprint respectfully requests that the Court set a briefing schedule to allow Sprint to file a supplemental motion to dismiss this action, based on the Supreme Court's decision in *Spokeo*; and to stay this case, including discovery in the action, pending a decision on whether this Court has subject matter jurisdiction. Such a stay is warranted given "the Court's obligation not to proceed unnecessarily with merits discovery in a case over which the Court may lack subject matter jurisdiction." See *Hong Leong Fin. Ltd. (Sing.) v. Pinnacle Performance Ltd.*, 297 F.R.D. 69, 75 (S.D.N.Y. 2013) (granting defendants' motion for a stay of discovery pending a motion to dismiss based on lack of subject matter jurisdiction).

Thank you for Your Honor's consideration of this matter.

Respectfully submitted,

/s/Elizabeth D. Silver

Elizabeth D. Silver

cc: Jason Zweig, Esq. (via ECF)  
William Weinstein, Esq. (via ECF)