

LAW OFFICES OF WILLIAM R. WEINSTEIN

199 Main Street, 4th Floor
White Plains, New York 10601
Tel: (914) 997-2205
Fax: (877) 428-8388
E-Mail: wrw@wweinsteinlaw.com

May 23, 2016

BY ECF

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

**Re: *Emilio v. Sprint Spectrum L.P.*, No. 11-cv-3041 (JPO) (KNF) – Emilio’s
Opposition to Sprint’s May 18, 2016 Letter Requesting that the Court Set a
Briefing Schedule and Stay the Proceedings in Light of *Spokeo, Inc. v. Robins***

Dear Judge Oetken:

On behalf of Plaintiff Emilio, we respond to Sprint’s May 18, 2016 letter [Dkt. No. 207] requesting that the Court set a briefing schedule and stay the proceedings pending the motion to dismiss for lack of subject-matter jurisdiction Sprint intends to file based on the Supreme Court’s recently-issued decision in *Spokeo, Inc. v. Robins*, 578 U.S. ___, No. 13-1339 (May 16, 2016) (*Spokeo*).¹ Although the Court can always examine its subject matter jurisdiction, Sprint’s letter, in reality, seeks to make yet another motion to dismiss directed towards the sufficiency of Emilio’s allegations, this time under the guise of “jurisdiction.” However, *Spokeo* changed nothing insofar as this case is concerned. Emilio alleges that Sprint deceptively and unconscionably labeled a charge as a tax when it was not, Emilio paid the charge, and therefore, was damaged. Nothing more is required.

The purported deficiencies in Emilio’s Amended Complaint identified by Sprint are the result of Sprint’s misreading and misapplication of *Spokeo*. The deceptive practice and overcharge injuries alleged in Emilio’s Amended Complaint fully satisfy the “particularity” and “concreteness” requirements for the existence Article III jurisdiction addressed in *Spokeo*. Furthermore, the parties are deep into discovery—including four already-scheduled depositions and more to be scheduled and completed before the current August 1, 2016 deadline [Docket No. 195, Revised Scheduling Order No. 4, ¶ 6(d)]—with the class certification proceedings to commence immediately after. Any further delay in these eleven year old proceedings would substantially prejudice Emilio and the class he seeks to represent. Thus, the Court should deny Sprint’s request for a stay.

¹ A copy of the *Spokeo* Slip Opinion is attached as Exhibit 1 for the Court’s convenience.

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I. *Spokeo*

Spokeo addressed the issue whether a violation of the Fair Credit Reporting Act of 1970 (“FCRA”), standing alone, is sufficient to satisfy the “injury-in-fact” requirement for standing under Article III. Slip. Op. at 4-5. In *Spokeo*, the statutory rights granted by Congress for violations of the FCRA included the right to recover, *inter alia*, either “actual damages” or statutory damages of \$100 to \$1,000 per violation. *Id.* at 1, 3. Robins, the plaintiff, alleged that Spokeo, an online search engine and putative consumer reporting agency, disseminated inaccurate information about him on the internet, in violation of the FCRA. *Id.* at 1. Robins further alleged that because of these inaccuracies, he encountered “[imminent and ongoing] actual harm to [his] employment prospects.” *Id.*, Ginsburg, J., dissenting, at 2.

Spokeo reiterated that standing consists of three elements: “The 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.” *Id.* at 6. As further elaborated by the Court. “[t]o establish injury in fact, a plaintiff must show that he or she suffered ‘an invasion of a legally protected interest’ that is ‘concrete and particularized.’” *Id.* at 7 (citation omitted). A “particularized” injury is one that “affect[s] the plaintiff in a personal and individual way.” *Id.* To be “concrete,” an “injury must be “*de facto*,” and “real.” *Id.* at 8.

Importantly, and completely overlooked by Sprint, the Supreme Court added significant qualifications to its discussion of “concreteness.” For one thing, the Court emphasized that a concrete injury need not be “tangible.” *Id.* at 8-9. Furthermore, even “the risk of real harm [can] satisfy the requirement of concreteness.” *Id.* at 10. With reference to the type of “harm that has traditionally been regarded as providing a basis for a lawsuit in English or American courts.” *id.* at 9, the Court further observed that “the law has long permitted recovery by certain tort victims even if their harms may be difficult to prove or measure.” *Id.* at 10. Perhaps most instructive are the following observations by Justice Thomas in his concurrence (at 2-3):

[C]ourts 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. ... Many traditional remedies for private-rights causes of action—such as for trespass [and] unjust enrichment—are not contingent on a plaintiff’s allegation of damages beyond the violation of his private legal right.

Sprint tends to lump the “particularity” and “concreteness” requirements together in its letter, but there can be no dispute that Emilio has alleged an injury that is individualized and “particular” to him. Emilio, individually, as well as the class he seeks to represent, have personally been billed by Sprint for the Excise Tax deceptively and unconscionably imposed, and have personally paid the charges deceptively imposed. Furthermore, Sprint’s minimization of its willful violations of the KCPA as mere “technical violation[s] of a regulation or statute”

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(May 18th Letter, at 2) is bald denial. Not only have its Excise Tax practices been universally condemned as deceptive by the Attorney Generals of 32 states in the 2004 Assurance of Voluntary Compliance (“AVC”) and by the FCC in the Truth-In-Billing Second Report (“TIB”), but Sprint continued the same practices *after it agreed in the AVC it would not*, and even though it agreed with the propriety of FCC’s “tax” nomenclature prohibition for discretionary recoveries in connection with the FCC TIB proceedings (Dkt. No. 141, Amended Complaint, *e.g.*, ¶¶ 3-5). The reason Sprint was prohibited from using the tax nomenclature is because it precluded its customers from knowing what they were really paying for their services, even though the Excise Tax surcharge had nothing to do with those services. That is precisely what Emilio alleges: “[I]n fact [the Excise Tax] was a tax imposed by New York solely on Sprint, and thus was nothing more than a ... hidden price increase” (Amended Complaint, ¶ 2).²

Emilio’s allegations that he and Sprint’s other New York customers were misleadingly and unconscionably deceived into believing that the Excise Tax was a charge imposed on them by New York State and merely collected and remitted by Sprint on behalf of the government, rather than a discretionary charge Sprint was using to recover its own overhead in excess of the agreed-upon price, permeate the Amended Complaint (*see* ¶¶ 2, 5, 22, 27, 29, 32). Sprint misstates and misapplies the teachings of *Spokeo*, and Sprint’s contention that Emilio does not allege an injury-in-fact that is both particular *and concrete* based on Sprint’s deceptive and unconscionable practices is wholly meritless.

Sprint’s attempt to avoid the concreteness of the injury it inflicted on Emilio and the class by arguing that the money it collected deceptively could have been collected non-deceptively (May 18th Letter, at 2) is specious. As confirmed by the TIB, Sprint’s Excise Tax billing practices complained of by Emilio “do not allow customers to accurately assess what they are being billed for or permit customers to determine whether the amounts charged conform to the price charged for service.” TIB, 20 F.C.C.R. at 6454, ¶ 13 n. 32. Furthermore, Sprint’s meritless contention does not go to the issue of whether Emilio and the class were damaged, which is clearly alleged, but rather whether they are entitled to recover the damages they claim. That merits-related argument is the essence of an Article III “case or controversy,” and confirms Emilio’s Article III standing.

Finally, Sprint entirely glosses over Emilio’s overcharge claim, by asserting that “Emilio also does not allege anywhere in the Complaint that he, personally, was ‘overcharged’ by Sprint.” May 18th Letter, at 2. This is just another variation on the same arguments that Sprint raised with Magistrate Fox during the November 4, 2015 conference [Dkt. No. 164-1, Transcript, *e.g.*, at 17-18.], and it was rejected by the Court in its January 5, 2016 Order finding “that the overcharge claim is fairly included within the claims asserted in Emilio’s Amended Complaint” [Dkt. No. 168]. Emilio specifically seeks relief “requiring Sprint to establish that the amounts of Excise Taxes it collected *from Plaintiff* and the Class did not exceed the amount of Excise Taxes

² *Accord* TIB, 20 F.C.C.R. 6448, at 6460, ¶ 24: “In particular, we are concerned that some carriers may be disguising rate increases in the form of separate line item charges *and implying* that such charges are necessitated by governmental action” (emphasis added).

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it actually was required to pay and/or remitted to the State of New York (Amended Complaint, ¶¶ 6, 45, Prayer for Relief (E)) (emphasis added).

II. Sprint's Request for a Stay Pending Resolution of its *Spokeo* Motion Should Be Denied

Even if the Court sets a briefing schedule (and it should be the parties who work that out among themselves by stipulation and proposed order), these proceedings should not be stayed. The Court knows that this case has been prosecuted for more than eleven years since the arbitration was first commenced in January 2005. Furthermore, the parties have already engaged in extensive discovery, and are soon to commence depositions—including four already-scheduled and more to be scheduled and completed before the current August 1, 2016 deadline [Dkt. No. 195, Revised Scheduling Order No. 4, ¶ 6(d)]. The class certification proceedings are scheduled to commence immediately thereafter [Dkt. No. 195, ¶ 16]. Indeed, as this letter is being drafted, the parties are exchanging emails to adjust the agreed schedules and locations for the depositions already scheduled, and addressing other discovery-related deficiencies raised by Emilio.

Because any further delay in these already protracted proceedings would prejudice Emilio and the class he seeks to represent, the Court should deny Sprint's request for a stay.

Respectfully submitted,

/s/William R. Weinstein

cc: Sprint Counsel (by ECF Filing)