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June 15, 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 Response to Sprint's June 8, 2016 Letter Regarding the Court's Subject Matter Jurisdiction in Light of *Spokeo, Inc. v. Robins*

Dear Judge Oetken:

Plaintiff Emilio hereby responds to Sprint's June 8, 2016 letter [Dkt. No. 212] ("June 8 letter") regarding the Court's subject matter jurisdiction in light of *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540 (2016) ("*Spokeo*"). Emilio's claim of price deception in connection with the Sprint's New York Excise Tax billing practices fully satisfies the "injury-in-fact" requirement for Article III standing.[1] Sprint's contentions to the contrary based on *Spokeo* should be summarily rejected by the Court.

The fallacy of Sprint's primary argument—that Emilio has no injury-in-fact because Sprint was entitled to impose the Excise Tax charge in any event (e.g., June 8 letter at 1-2, 5 n.8)—is made clear by the following "hypothetical": Assume that Sprint expressly states the Excise Tax is levied by New York directly on Sprint's customers and collected and remitted to New York by Sprint—and not a discretionary recoupment of Sprint's overhead costs kept by Sprint. Under Sprint's theory, because Sprint nevertheless is allowed to charge for the Excise

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[1] The Court need look no further than Paragraph 2 of Emilio's Amended Complaint [Dkt. No. 141] for his allegations of price deception:

> *Sprint's practices regarding the Excise Taxes* that are the subject of Plaintiff's Amended Complaint *were deceptive, misleading and unconscionable*, *inter alia, because* they caused Sprint's customers to believe that *the Excise Tax* was a tax imposed on customers by New York and required to be collected and remitted to the government by Sprint, when in fact it was a tax imposed by New York solely on Sprint, and thus *was nothing more than a discretionary recoupment of Sprint's overhead costs and a hidden price increase*. (emphasis added)

In its June 8 letter, Sprint totally ignores these allegations, which standing alone satisfy the injury-in-fact requirement—Emilio paid more for his services than "they were worth," *i.e.,* the agreed-upon price—because of Sprint's deceptive and unconscionable Excise Tax practices.

Tax regardless of how it is disclosed and described, its customers suffer no damage or injury-in-fact because they have to pay the same amount out of pocket either way. Sprint's reasoning is fallacious because, as opposed to government taxes levied directly on customers, Sprint's Excise Tax charges fill Sprint's pockets with additional profits—a hidden price increase costing Emilio and the class more than the agreed-upon price for service, and quintessential price deception.[2]

In the wireless industry, tax-related line items are unique in their ability to cause price deception. *Everybody knows what taxes are,* and they know that taxes are a government charge that can be added on top of the agreed price for goods or services. And while certain line items on Sprint's bills really are taxes imposed on customers by the government, other tax-related line items (like the Excise Tax charge) are discretionary recoveries of Sprint's overhead costs bolstering its bottom line. In other words, some tax charges are taxes, and some tax charges are not. And the failure to properly handle this extremely confusing dichotomy misleads customers and causes price deception, because it "do[es] 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." *Truth-In-Billing Second Report* ("TIB"), 20 F.C.C.R. 6448, 6454 at ¶ 13 n.32 (Mar. 18, 2005) (TIB excerpts attached as Exhibit 2 hereto).

Thus, to prevent wireless providers from misleading customers and causing this form of price deception, the prohibition on labeling a discretionary charge as a tax is universal:

(i) The *first paragraph* of the TIB prohibits it: "(3) [We] reiterate that it is misleading to represent discretionary line item charges *in any manner that suggests* such line items are taxes or charges required by the government." *See* Ex. 3, ¶ 1 (emphasis added); *see also* Amended Complaint ¶¶ 3, 22.[3]

(ii) The Assurance of Voluntary Compliance ("AVC") that Sprint entered into with the 32 Attorneys General in July 2004 includes a separate section solely to address "Disclosure of Taxes and Surcharges on Consumer Bills," which in § 36(b) prohibits Sprint's Excise Tax practices complained of by Emilio: "[Sprint will] not represent, expressly *or by implication*, that discretionary

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[2] In fact, the "hypothetical" is not hypothetical, because, from the first time Sprint mentioned "excise taxes" in its customer agreement, as of June 1, 2003, and thereafter through December 31, 2006, the agreement *did* state that excise taxes, like sales and other taxes, were levied by and remitted directly to the government (*see* Exhibit 1 hereto; *see also* Amended Complaint ¶ 29 [Dkt. No. 141]):

> We invoice you for taxes, fees and other charges levied by or remitted directly to federal, state or local authorities, or foreign government[s] on Services including, without limitation, sales, gross receipts, use, and excise taxes. If you claim any tax exemption, you must provide us with a valid tax-exempt document.

[3] The definition of "suggests" includes, *inter alia,* "to bring before a person's mind indirectly or without plain expression," and "to call (something) up in the mind through association or natural connection of ideas." *See* http://www.dictionary.com/browse/suggest. Calling something a tax "suggests" it is a tax, and violates the TIB prohibition.

cost recovery fees are taxes." *See* Dkt. No. 33-1, § 36(b) (emphasis added); *see also, e.g.,* Amended Complaint ¶¶ 4, 20, 30.[4]

(iii) Section 6 of the Consumer Code for Wireless Customers (Exhibit 3 attached hereto), which was first promulgated in 2003 by the Cellular Telecommunications Industries Association ("CTIA") to which Sprint and all other major wireless service providers are signatories, prohibits Sprint's Excise Tax practices: "Carriers *will not label* cost recovery fees or charges as taxes." (emphasis added)[5]

Sprint doggedly refuses to recognize what the regulators and its own industry association have publicly recognized for more than a decade—that labeling discretionary cost recoveries as taxes causes price deception—an injury-in-fact. The issue in this case isn't whether Emilio satisfies the requirements for Article III standing under *Spokeo*—it's whether Sprint should be liable for punitive damages for its flagrant, continuing violation of the AVC and the TIB, as well as its own industry standards in place even before the AVC and TIB (*see* Amended Complaint, Prayer for Relief (D)).

I. *Spokeo* Has No Bearing On The Injury-In-Fact Caused By Sprint's Price Deception

In his May 23, 2016 response [Dkt. No. 209] to Sprint's May 18, 2016 request for a briefing schedule on *Spokeo* and stay [Dkt. No. 207], Emilio fully discussed in detail the facts, holding and application of *Spokeo* to this case, including Emilio's satisfaction of the injury-in-fact requirement based his allegation of the hidden price increase in Amended Complaint ¶ 2 [Dkt. No. 209 at 3]. This allegation, ignored by Sprint, undermines all of its *Spokeo* arguments.

Although price deception can come in many different forms—including hidden overcharges—there has never been any question that price deception causes damages that satisfy the injury-in-fact requirement. This was true before *Spokeo. See, e.g., In re Bayer Corp. Combination Aspirin Products Mktg. & Sales Practices Litig.,* 701 F. Supp. 2d 356, 377-78 (E.D.N.Y.2010) ("[C]ourts have long held that a plaintiff is injured, suffering an ascertainable loss, when he receives less than what he was promised.") (citing *Ramirez v. STi Prepaid LLC,* 644 F. Supp. 2d 496, 501-02 (D.N.J.2009) (plaintiffs alleged ascertainable loss where they claimed calling cards they purchased did not adequately disclose per-minute charges and fees)). *Cf. Ross v. AXA Equitable Life Ins. Co.,* 115 F. Supp. 3d 424, 436 (S.D.N.Y. 2015) ("a product that was … reduced in value because of a corporation's misrepresentations [results] in immediate, concrete, and particularized financial harm) (cited Sprint June 8 letter, at 4, 5). And

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[4] *See also* TIB (Ex. 2), 20 F.C.C.R. at 6460, ¶ 24 (emphasis added): "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." The definition of "imply" includes, *inter alia,* "to indicate or *suggest* without being explicitly stated." *See* http://www.dictionary.com/browse/imply (emphasis added).

[5] The CTIA is now referred to as CTIA—The Wireless Association. *See* http://www.ctia.org/policy-initiatives/voluntary-guidelines/consumer-code-for-wireless-service.

an injury-in-fact from price deception has continued to be found to exist after *Spokeo. See Story v. Attends Healthcare Prods., Inc.,* No. 15-CV-13577, 2016 WL 3125210 at *4 (E.D. Mich. June 3, 2016) (paying price premium based on defendant's misrepresentations causes economic harm and injury-in-fact under *Spokeo*). Emilio's injury-in-fact and damages were caused by his paying more for his services than "they were worth," *i.e.,* the agreed-upon price—because of Sprint's deceptive and unconscionable Excise Tax practices.

Finally, it is important to recognize that—unlike here—*Spokeo* did not involve a claim of price deception or similar conduct causing a readily quantifiable economic loss. In *Spokeo,* Robins, the plaintiff, alleged that Spokeo disseminated inaccurate information about him on the internet, in violation of the Fair Credit Reporting Act of 1970. 136 S. Ct. at 1544. Robins further alleged that because of these inaccuracies, he encountered "[imminent and ongoing] actual harm to [his] employment prospects." *Id.* at 1554 (Ginsburg, J., dissenting). Contrary to the implications of Sprint's letter, the Supreme Court did not find these allegations insufficient to establish an injury-in-fact necessary for Article III standing, but *remanded* to the Ninth Circuit to further examine whether they were sufficiently concrete. *Id.* at 1554. Here, Emilio's claim of price deception and a "hidden price increase" damaging Emilio satisfies the injury-in-fact requirement as a matter of law. *See also* Amended Complaint ¶ 8 ("[Emilio] 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."). Additionally, contrary to Sprint's argument (June 8 letter, at 5 n.8), these allegations also satisfy the "particularity" and "traceability" requirements under *Spokeo,* because they directly link Sprint's deceptive and unconscionable Excise Tax practices to Emilio, and the practices "affect [Emilio] in a personal and individual way." 136 S. Ct. at 1548. And because "the risk of real harm [can] satisfy the requirement of concreteness," *id.* at 1549, Sprint's argument that Emilio's overcharge claim cannot satisfy Article III is also meritless (June 8 letter at 4. n.6)—if the overcharge is established, Emilio's injury-in-fact will "be redressed by a favorable judicial decision," *Spokeo,* 136 S. Ct. at 1547.

II. Sprint's Remaining Arguments Are Irrelevant To This Court's Jurisdiction And *Spokeo*

The remainder of Sprint's June 8 letter is a "kitchen sink" of distortions of Emilio's testimony during the JAMS arbitration, [6] and bald, conclusory denials and/or merits-related arguments that Sprint conflates with standing even where it assumes in the alternative such standing exists:

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[6] Because Sprint has seen fit to cherry-pick and twist portions of the transcript of Emilio's August 12, 2009 deposition in the JAMS arbitration, Emilio attaches as Exhibit 4 hereto relevant pages from that transcript confirming that Emilio is claiming that Sprint is engaging in both actionable price deception and unfair practices. See Ex. 4, Tr. at 88-89, 92-93, 115-16, 119. *But see Warth v. Seldin*, 422 U.S. 490, 501 (1975) ("For purposes of ruling on a motion to dismiss for want of standing, [the] courts must accept as true all material allegations of the complaint, and must construe the complaint in favor of the complaining party."). Suffice to say that Sprint's distortions of Emilio's testimony contradicted by this other testimony in Exhibit 4 cannot be resolved on a motion to dismiss—or on summary judgment, for that matter.

- Emilio's "standing" to assert claims prior to the 2004 AVC or 2005 TIB is irrelevant, because he is not asserting claims based on them (June 8 letter at 2 n.3).

- Emilio's entitlement to damages for Sprint's continuing deceptive Excise Tax practices after he commenced his arbitration in 2005 (June 8 letter at 2 n.3) is merits-related, not a standing issue, and depends, *inter alia,* on the legal consequences of the fact that, as with many state consumer fraud statutes, reliance is not an element of his KCPA claim. *See* KCPA 50-626(b) ("whether or not any consumer has in fact been misled"); *Ray v. Ponca Universal Holdings, Inc.,* 22 Kan. App. 2d 47, 50, 913 P.2d 209, 212 (Kan. Ct. App. 1995) (reliance not an element under KCPA).

- Whether Emilio knew how Sprint described the Excise Tax charge when he signed up in 1998 or 1999 (June 8 letter at 3) is similarly irrelevant because of the lack of a reliance requirement. Furthermore, to date, Sprint has produced no documents or information, and there is nothing in the record, establishing when Sprint began charging it, or whether it was even being charged when Emilio signed up. And, contrary to Sprint's description of Emilio's testimony (*id.*), it is undisputed that he understood the Excise Tax charge to be a tax from the first time he saw it until he commenced his arbitration (Ex. 4, Tr. at 119), and that Emilio *did not* understand before he commenced the arbitration that the Excise Tax was part of the price he was paying for his services (Ex. 4, Tr. at 115-16).

- Finally, it is irrelevant that Emilio has continued his service with Sprint (June 8 letter at 3 and n.5). Again, reliance is not an element of his claim. More importantly, Emilio is no more required to terminate his service than any other parties subject to an ongoing commercial relationship are required to terminate their relationship when a dispute occurs. Furthermore, in addition to the possibility that Emilio would have been subject to hundreds of dollars of early termination fees vastly outweighing the total Excise Tax charges if he had terminated his service between the time he commenced his arbitration and the end of the class period on June 30, 2007 (June 8 letter at 3 n.4), he *also* would have had to incur hundreds of dollars of costs for new phones for his family from a new provider. And Emilio made clear that the large termination fees, standing alone, would have kept him from terminating his service (Ex. 4, Tr. 113-15 at 114).

Only by ignoring Emilio's clear allegations of price deception and injury-in-fact can Sprint argue that he lacks Article III standing under *Spokeo.* Sprint's request that this Court dismiss the action based on *Spokeo* should be summarily denied.

Respectfully submitted,

/s/William R. Weinstein

cc: Sprint Counsel (by ECF Filing)