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8 **UNITED STATES DISTRICT COURT**  
9 **EASTERN DISTRICT OF CALIFORNIA**  
10

11 AMY FRASER and PAULA HAUG, on  
behalf of themselves and all others similarly  
12 situated,

13 Plaintiffs,

14 vs.

15 WAL-MART STORES, INC., a Delaware  
corporation; and DOES 1 through 50,  
16 inclusive,

17 Defendants.  
18

CASE NO. 2:13-CV-00520-TLN-CKD (TEMP)

**PLAINTIFFS' RESPONSE AND  
OPPOSITION TO DEFENDANT'S  
MOTION TO DETERMINE WHETHER  
SUBJECT MATTER JURISDICTION  
EXISTS**

Date: July 28, 2016  
Time: 10:00 a.m.  
Place: Courtroom 2

District Court Judge Troy L. Nunley

*Action Filed January 29, 2013*

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I.

**INTRODUCTION**

The purported basis for the present motion is the Supreme Court's recent ruling in *Spokeo, Inc. v. Robins*, 136 S.Ct. 1540 (2016). The *Spokeo* ruling, however, did not address a matter such as the present that was removed to federal court pursuant to the Class Action Fairness Act of 2005, codified in part at 28 U.S.C. Section 1332. Furthermore, the *Spokeo* ruling did not articulate any new legal standard and did not analyze a statute similar to that at issue in the instant action, California's Song-Beverly Credit Card Act. In the end, the *Spokeo* ruling failed to decide the specific action being addressed, and, therefore, it is impossible to conclude that it somehow decided this present, completely unrelated action.

This action was filed in state court and removed by Defendant three and one-half years ago. A class has been certified and a notice motion has been fully briefed. Article III of the United States Constitution has remained the same at all relevant times. There is no authority provided in the moving papers for this court to dismiss an action that is clearly viable under substantive state law and no authority or evidentiary support has been submitted to issue a remand order. The motion amounts to little more than a fairly egregious attempt to forum shop after lengthy litigation proceedings. Therefore, the motion should be denied.

II.

**THIS ACTION WAS REMOVED TO FEDERAL COURT PURSUANT TO THE CLASS ACTION FAIRNESS ACT WHICH WAS NEITHER RULED UNCONSTITUTIONAL NOR DISCUSSED IN SPOKEO**

Unlike *Spokeo*, Plaintiffs in this matter did not invoke federal court jurisdiction. *Spokeo*, 136 S.Ct., *supra*, at 1546. To the contrary, Plaintiffs in this case filed their state law cause of action in state court. Defendant removed the case to federal court pursuant to the Class Action Fairness Act of 2005. Three and one-half years later Defendant argues to this court that Plaintiffs do not have standing under Article III of the United States Constitution even though Article III has not changed and the Class Action Fairness Act remains the law.

The concept of standing is grounded in the separation of powers doctrine. *Allen v. Wright*, 468 U.S. 737, 751, 756 (1984); *Summers v. Earth Island Inst.*, 555 U.S. 488, 492-493

1 (2009). Amorphous lawsuits filed by individuals on behalf of large groups such as taxpayers or  
 2 nature preservationists fail on standing grounds because they are not genuine “cases or  
 3 controversies;” they are matters of only public concern to be left to other branches of  
 4 government. *United States v. Richardson*, 418 U.S. 166 (1974); *Schlesinger v. Reservists*  
 5 *Committee to Stop the War*, 418 U.S. 208 (1974); *Lujan v. Defenders of Wildlife*, 504 U.S. 555  
 6 (1992).

7 In the present action, Defendant cannot and has not argued that Plaintiffs do not have a  
 8 viable case under California law. Nevertheless, Congress decided that cases such as these, class  
 9 actions with an amount in controversy potentially exceeding five million dollars, are removable  
 10 to federal court. Defendant availed itself of the law passed by Congress. Defendant now asks  
 11 this court to utilize a doctrine designed to preserve the separation of powers to, in fact, violate  
 12 the separation of powers. Congress has spoken on the matter and the courts have no authority to  
 13 say otherwise. *Spokeo* did not address this issue and certainly does not command this result.

14 Defendant’s argument is further complicated by the fact that, since Congress’ passage of  
 15 the Class Action Fairness Act, the federal courts in California have handled and decided  
 16 numerous actions regarding California’s Song-Beverly Credit Card Act. A significant body of  
 17 law has been generated as a result. If Defendant’s argument is accepted, this entire body of law  
 18 was created without authority.

### 19 III.

#### 20 **THE SPOKEO RULING DOES NOT SUBSTANTIVELY APPLY TO THE PRESENT** 21 **CASE, IT MADE NO EFFECTIVE DECISION ON THE MERITS AND ARTICULATED** 22 **NO NEW RULE OF LAW**

23 Although the Supreme Court’s recent ruling in *Spokeo* has generated much discussion, it  
 24 is, in reality, nothing more than a classic punt laced with a number of broad statements that both  
 25 plaintiffs and defendants have since been attempting to utilize to turn the tide of their respective  
 26 cases. The Supreme Court did not render any real decision in *Spokeo*. It only discussed  
 27 language of Article III as applied to a federal question case and sent the matter back to the Ninth  
 28 Circuit because it failed to specifically discuss the “concreteness” of the alleged harm in  
 question. In other words, the Supreme Court did not even decide the case it was addressing; it

1 certainly did not decide the present case.

2 In addition to the lack of any substantive decision, the *Spokeo* ruling also fails to contain  
3 any new legal requirements. The Supreme Court’s decision to send the matter back to the Ninth  
4 Circuit for additional analysis centers on whether the alleged injury is concrete enough to satisfy  
5 Article III. First, the relevant language of Article III has existed for more than two hundred  
6 years. Second, the notion that an injury in fact must relate to a “distinct and palpable” injury has  
7 been a part of the law since at least 1975. *Warth v. Seldin*, 422 U.S. 490, 500. If Defendant and  
8 its attorneys have the ethical obligation to ask the jurisdictional question now, it had the same  
9 ethical obligation to ask the question three and one-half years ago when it removed the action in  
10 the first place. Defendant’s current use of *Spokeo* is nothing more than subterfuge for a mulligan  
11 now that a class is certified and notice is imminent.

12 It is equally nebulous whether the Supreme Court intended for its ruling in *Spokeo* to be  
13 applied in any diversity jurisdiction matter pertaining to a state law claim. The plain language of  
14 *Spokeo* analyzes standing requirements when a plaintiff “invokes” federal jurisdiction. *Spokeo*,  
15 *supra*, at 1546. Plaintiffs did not invoke federal jurisdiction in the instant action. Article III  
16 gives federal courts jurisdiction over controversies involving citizens of different states. The  
17 doctrine of standing preserves the separation of powers among the federal branches of  
18 government and may prevent Congress from granting a right to sue in federal courts when such  
19 matter does not rise to the level of a “case or controversy.” In other words, Congress cannot  
20 create a case that does not otherwise exist. *Raines v. Byrd*, 521 U.S. 811, 820 n.3 (1997).  
21 Nevertheless, it can provide for jurisdiction of a case that does exist. Here, a case clearly exists  
22 and it was not created by Congress. It was created by the California Legislature. The case must  
23 be litigated somewhere --- whether in California state court or the federal district court.  
24 Congress has always possessed the authority to allow for a genuine state law controversy to be  
25 adjudicated in the federal courts if such controversy is between citizens of different states.  
26 Congress further refined that authority in class action matters when it passed the Class Action  
27 Fairness Act. *Spokeo* does nothing to challenge these very basic legal concepts.

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IV.

**EVEN IF ARTICLE III STANDING MUST BE MET IN AN ACTION REMOVED UNDER THE CLASS ACTION FAIRNESS ACT, THE HARM ALLEGED BY PLAINTIFFS IN THIS ACTION IS SUFFICIENTLY CONCRETE**

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5 In conclusory fashion, Defendant merely states in its moving papers that Plaintiffs  
6 do not allege that they suffered a concrete injury. (Defendant’s Memorandum of Points and  
7 Authorities 4:25). This is a point with no authority. It is true that Plaintiffs have not alleged that  
8 they suffered financial loss as a result of Defendant’s conduct, but such an allegation is not  
9 required to satisfy the element of concreteness. *Sierra Club v. Morton*, 405 U.S. 727 (1972).  
10 The actual or threatened injury required by Article III may exist solely by virtue of statutes  
11 creating legal rights, the invasion of which creates standing. *Warth, supra*, at 500. Here,  
12 Plaintiffs allege clearly that Defendant violated a California statute by requiring Plaintiffs to  
13 input or otherwise provide their personal identification information that Defendant then recorded  
14 in order to utilize their credit cards at Defendant’s stores. *Spokeo* acknowledges that, to be  
15 concrete, an injury does not have to be measurable or to even have yet occurred. *Spokeo, supra*,  
16 at 1649-1651. The Supreme Court lays out these concepts in *Spokeo* and concludes that a  
17 statutory violation may or may not be enough to rise to the level of a case or controversy for  
18 purposes of standing. In analyzing the Fair Credit Reporting Act, the Supreme Court speculated,  
19 for instance, that, if the reporting agency provided merely an incorrect ZIP Code, it would be  
20 difficult to imagine how any possible harm could result from that particular reporting error and  
21 would be a mere technical violation of that statute. Therefore, the Supreme Court reasoned that  
22 not every statutory violation is concrete. This is not a concept that treads new ground. The  
23 Supreme Court has always maintained that concreteness requires that the plaintiff be exposed to  
24 a “significant risk” of injury. *Monsanto v. Geertson Seed Farms*, 130 S. Ct. 2743 (2010); *Susan*  
25 *B. Anthony List v. Dreihaus*, 134 S. Ct. 2334 (2014).

26 The present case does not involve a mere tangential and, therefore, technical violation of  
27 a statute. Following the typical lengthy and heavily-debated legislative process, the California  
28 Legislature passed California Civil Code section 1747.08 as part of the Song-Beverly Credit

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1 Card Act in 1990. The Act was passed to combat retailers’ improper collection of personal  
2 identification information that leads to undesired marketing contact, credit card fraud, identity  
3 theft and even stalking. California Civil Code 1747.08(e) provides for mandatory civil penalties  
4 to be assessed against those who violate the law because of the imminent danger such a violation  
5 presents to the consumer. The statute does not require proof of any specific additional harm. If a  
6 civil penalty statute is violated, the harm is presumed. *Starving Students, Inc. v. Department of*  
7 *Industrial Relations, Div. of Labor Standards Enforcement*, 125 Cal.App.4<sup>th</sup> 1357, 1368 (2005);  
8 *Murphy v. Kenneth Cole Productions, Inc.*, 40 Cal. 4<sup>th</sup> 1094, 1104 (2007).

9 In any event, Plaintiffs allege that, when they attempted to utilize their credit cards at  
10 Defendant’s stores, they were required to provide their personal identification information in  
11 conjunction with those transactions. Plaintiffs allege that, as a result, Defendant was in  
12 possession of their credit card numbers as well as certain personal identification information.  
13 This, in and of itself, exposed them to the dangers the statute was designed to prevent. When  
14 examining statutory rights and the concreteness necessary to sue, the concurring opinion in  
15 *Defenders of Wildlife* (which was necessary to form a majority on the point addressed) stated that  
16 “Congress must, at the very least, identify the injury it seeks to vindicate and relate the injury to  
17 class of persons entitled to bring suit.” *Lujan v. Defenders of Wildlife, supra*, at 580. California  
18 Civil Code 1747.08 easily meets that standard.

19 There is no evidence presented as part of the motion that Plaintiffs did not engage in the  
20 transactions or that they did not provide the accurate personal identification information they  
21 allege to have provided. Despite several less than candid statements by Defendant in various  
22 pleadings, Defendant has recently acknowledged that it possesses the information Plaintiffs  
23 claim to have provided and can identify individual customers’ credit card numbers, the personal  
24 identification information provided and even track their transaction histories. The allegations in  
25 this case are simply not of a technical nature where no harm is imaginable. The information  
26 collection and storage by Defendant exposes Plaintiffs to hackers as well as Defendant’s own  
27 improper usage of the information illegally collected and aggregated. The legal violation,  
28 significant risk and, therefore, concreteness of a violation of California Civil Code 1747.08 is

1 thoroughly explored by the California Supreme Court in *Pineda v. Williams-Sonoma Stores, Inc.*,  
2 51 Cal. 4<sup>th</sup> 524 (2011).

3  
4 **V.**

5 **IF THE COURT CONCLUDES THAT STANDING DOES NOT EXIST, THE ONLY**  
6 **PROPER ACTION IS TO REMAND THE CASE BACK TO STATE COURT AND**  
7 **REQUIRING DEFENDANT TO PAY COSTS AND ATTORNEY FEES INCURRED AS**  
8 **A RESULT OF ITS REMOVAL**

9 The facts, allegations, evidence and law are the same today in this matter as they were  
10 when Defendant removed the action in March 2013. Defendant attempts to excuse its conduct of  
11 rather obvious forum shopping by referencing ethical obligations and then requests dismissal of  
12 an action it has unsuccessfully litigated for nearly three and one-half years. Any order denying  
13 federal court jurisdiction would come at great cost to Plaintiff s and class counsel. The court, of  
14 course, will decide what it believes is right, but Defendant should bear the considerable costs of  
15 putting in motion a process that would cause the parties to start fresh. Plaintiffs have a viable  
16 state law cause of action. There is no legitimate basis to dismiss the action and Defendant  
17 provides none. “If at any time before final judgment it appears that the district court lacks  
18 subject matter jurisdiction, the case **shall** be remanded (emphasis added). 28 U.S.C. 1447(c).  
19 Furthermore, a remand order may require the payment of costs and attorney fees incurred as a  
20 result of the removal. *Id.* Defendant removed the action, litigated it for years and now  
21 unilaterally moves the court to relieve itself of jurisdiction without any specific directive any  
22 such result is required. Plaintiffs disagree with Defendant’s argument as discussed in previous  
23 sections of this brief; however, if the court believes it does not have jurisdiction, the only correct  
24 result is remand and the only fair result is a remand order that requires Defendant to pay costs  
25 and attorney fees incurred as a result of the removal subject to proof and procedure the court  
26 deems proper.

27 **VI.**

28 **CONCLUSION**

In conclusion, Plaintiffs have asserted a valid cause of action under California law.  
Defendant has not alleged or established otherwise. Congress decided that putative class actions

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1 with an amount in controversy exceeding five million dollars should have original jurisdiction in  
2 the federal courts and, therefore, passed the Class Action Fairness Act. The *Spokeo* ruling does  
3 not address the Class Action Fairness Act much less invalidate it. The doctrine of standing is  
4 designed to promote the separation of powers, not defeat it. The court's refusal to further hear  
5 this matter, which is now a certified class action, would defeat the separation of powers. Even if  
6 the court reviews the substantive standing issues, Plaintiffs have alleged a particularized and  
7 concrete injury. The California Legislature identified a substantial harm, passed a statute  
8 designed to address that specific harm and provided a right to sue for those exposed to the  
9 conduct the legislature desired to eliminate. Plaintiffs were themselves exposed so their injury is  
10 particularized and concrete. If, however, for whatever reason the court declines further  
11 jurisdiction, the only proper order is remand to state court requiring Defendant to pay costs and  
12 Attorney fees subject to proof and procedure set forward by the court.

13 Dated: July 14, 2016

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14  
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