

**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF FLORIDA**

**CASE NO. 1:15-CV-24326-CMA**

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CARLOS GUARISMA, individually and  
on behalf of others similarly situated,

Plaintiff,

v.

MICROSOFT CORPORATION,

Defendant.

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**DEFENDANT MICROSOFT CORPORATION'S MOTION TO DISMISS PLAINTIFF'S  
CLASS ACTION COMPLAINT FOR LACK OF SUBJECT MATTER JURISDICTION  
OR, ALTERNATIVELY, TO COMPEL ARBITRATION ON AN INDIVIDUAL BASIS**

Pursuant to Rule 12(b)(1), Defendant Microsoft Corporation (“Microsoft”) respectfully moves for an Order dismissing Plaintiff’s Complaint for lack of subject matter jurisdiction. In the alternative, pursuant to the Federal Arbitration Act, 9 U.S.C. §§ 1-16, (“FAA”) and Rule 12(b), Microsoft respectfully moves for an Order compelling Plaintiff to arbitrate his claim on an individual basis and staying this case pending that arbitration.

## **I. INTRODUCTION**

Plaintiff Carlos Guarisma (“Guarisma”) walked into a Microsoft retail store, spent \$10 on a Microsoft Surface Pen Tip Kit (an accessory for a Microsoft Surface computer tablet), and then immediately took the receipt to his lawyers.<sup>1</sup> He filed this putative class action two days later. Guarisma complains the printed receipt for his purchase contained ten digits of his credit card number, rather than five, in violation of the Fair and Accurate Credit Transactions Act (“FACTA”). Guarisma alleges no facts to show he suffered any actual harm, he had his identity stolen, or he ever was at risk for fraud or identity theft. Instead, Guarisma seeks statutory damages (along with punitive damages and attorneys’ fees) for an alleged “willful” violation of FACTA. Guarisma’s lone claim should be dismissed, or, in the alternative, sent to arbitration.

As an initial matter, the Complaint should be dismissed for lack of subject matter jurisdiction because Guarisma does not—and cannot—allege he suffered a “concrete,” “particularized,” and “actual or imminent” injury. The Court stayed this action pending the Supreme Court’s decision in *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540 (2016) *as revised* (May 24, 2016) (“*Spokeo*”), which held “Article III standing requires a concrete [and particularized] injury even in the context of a statutory violation.” *Id.* at 1549. The Supreme Court made clear that

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<sup>1</sup> Guarisma has regularly served as the lead class representative for his counsel here. *See, e.g., Guarisma v. Adcahb Med. Coverages Inc.*, No. 13–cv–21016 (S.D. Fla. filed Mar. 21, 2013); *Guarisma v. Adt Sec. Servs. Inc.*, No. 12–cv–61782 (S.D. Fla. filed Sept. 11, 2012).

“Congress cannot erase Article III’s standing requirements by statutorily granting the right to sue to a plaintiff who would not otherwise have standing.” *Id.* at 1547-48 (quotations omitted).

Here, Guarisma alleges nothing more than a technical violation of FACTA, without any resulting harm. Guarisma does not allege his entire credit card number was printed on the receipt; the receipt was shown to anyone other than his lawyers; or he was the victim of identity theft because of the receipt. Nor was Guarisma ever “at risk” of identity theft, because he took his receipt immediately to his lawyers and there are no allegations the receipt ever left his possession or control. Because the alleged *conduct* at issue here—printing ten digits of a credit card number instead of five—did not cause Guarisma any harm, he lacks Article III standing, regardless of whether the conduct technically violates FACTA (which Microsoft disputes).

Alternatively, should the Court find Plaintiff has sufficiently pled a cognizable Article III injury (and he has not), the Court should compel individual arbitration. The Microsoft Surface Pen Tip Kit is subject to a Limited Warranty (the “Warranty”) that *requires* arbitration of any “disputes” concerning the product on an *individual* basis. The packaging for the product informed Guarisma that a “Limited Warranty applies,” and is available at [surface.com/warranty](http://surface.com/warranty). Guarisma decided to purchase it. Moreover, the very receipt forming the basis for Guarisma’s lawsuit also provided him with notice of the terms of the Warranty governing his purchase. Yet, Guarisma chose not to return the product for a refund within the 30-day return window. By not doing so, Guarisma assented to the Warranty and agreed to arbitrate this dispute on an individual basis. He therefore cannot bring his FACTA claim as a class action, and he must pursue it in arbitration (or small claims court).

In short, because Guarisma has not alleged—and cannot show—he suffered any Article III injury, the Complaint should be dismissed for lack of subject matter jurisdiction under the

Supreme Court’s ruling in *Spokeo*. In the alternative, because Guarisma agreed to arbitrate this dispute on an individual basis, the Court should compel individual arbitration and stay the action pending the outcome of that arbitration.

## II. FACTUAL BACKGROUND

### A. Guarisma Purchased The Microsoft Surface Pen Tip Kit On November 18, 2015.

Guarisma alleges that on November 18, 2015, he purchased unidentified “goods” at a Microsoft store in Aventura, Florida (“Aventura Store”) and paid for those “goods” through his personal Visa credit card. (Compl. ¶¶ 28–29, ECF No. 1.) At the time of purchase, Guarisma received a receipt bearing “the first six digits of his credit card account, along with the last four digits.” (*Id.* ¶ 29.) Guarisma then immediately took this receipt to his attorneys, who filed this putative class action two days later.<sup>2</sup>

As explained in the declaration of Julio Gustavo Gonzalez, the manager of the Aventura Store, the product Guarisma purchased was a Microsoft Surface Pen Tip Kit (“Pen Tip Kit”)—an accessory for a Microsoft Surface computer tablet (the “Surface”). (Gonzalez Declaration, attached hereto as Ex. A, at ¶¶ 2, 7.) The Surface is Microsoft’s tablet computer. (*Id.*) It comes with a pen that allows users to write on the Surface’s screen. (*Id.*) The pen has a tip that touches the Surface screen, allowing the user to write, draw, and edit. (*Id.*) Because tips can wear out or break, Microsoft sells replacement tips in a package for approximately \$10.00. (*Id.*) The Pen Tip Kit is one of the least expensive products in the Aventura Store. (*Id.*)

### B. Guarisma’s Purchase Was Subject To A Warranty.

The box for the Pen Tip Kit, which Guarisma purchased, conspicuously states: “Limited Warranty applies: [surface.com/warranty](http://surface.com/warranty).” (*Id.* at ¶ 9; *see also* Pen Tip Kit Packaging, Ex. A2

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<sup>2</sup> Guarisma attached a copy of the receipt to his discovery requests served in this case.

(emphasis in original).) This notice is printed in three different languages. (Bass Declaration, attached hereto as Exhibit B, at ¶ 4.) On the purchase date, Microsoft had computers, tablets, and phones in the Aventura Store that Guarisma could have used to visit this website and read the Warranty before buying the product. (Gonzalez Declaration Ex. A, at ¶ 9.)

**C. The Warranty Contains An Arbitration Clause With A Class Waiver.**

As described in the declaration of Karen Bass, who manages the content of surface.com, the Warranty is easily available upon visiting the website. The website “surface.com/warranty” provides a link stating “Surface warranty documents” in bold type. (Bass Declaration, Ex. B, at ¶¶ 3-6.) This link lists the available Surface warranties, including the “Surface Standard Warranty.” (*Id.* ¶¶ 7-8; *see also* Warranty, Ex. B1.) By clicking on the link, the user can open and read, or download and save, the U.S. English version of the Warranty. (*Id.* ¶ 9.)

In bold and capitalized font, the top of the Warranty states:

**BY USING YOUR . . . MICROSOFT BRANDED ACCESSORY PURCHASED FROM AN AUTHORIZED RETAILER (“ACCESSORY”), YOU AGREE TO THIS WARRANTY. BEFORE USING IT, PLEASE READ THIS WARRANTY CAREFULLY. IF YOU DO NOT ACCEPT THIS WARRANTY, DO NOT USE YOUR MICROSOFT HARDWARE OR ACCESSORY. RETURN IT UNUSED TO YOUR RETAILER OR MICROSOFT FOR A REFUND.**

(Warranty, Ex. B1, at page 1 (emphasis in original).) The very next statement on the

Warranty, also in bold font, provides:

**If You live in the United States, Section 8 contains a binding arbitration clause and class action waiver. It affects Your rights about how to resolve a dispute with Microsoft. Please read it.**

(*Id.* (emphasis in original).)

Section 8 of the Warranty is captioned “**Binding Arbitration and Class Action Waiver for U.S. Residents.**” It provides:

(a) Application. This section applies to any dispute . . . . Dispute means any dispute, action, or other controversy between You and Microsoft concerning the Microsoft Hardware or Accessory (including its price) or this warranty, whether in contract, warranty, tort, statute, regulation, ordinance, or any other legal or equitable basis. “Dispute” will be given the broadest possible meaning allowable under law.

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(d) Binding Arbitration. **If You and Microsoft do not resolve any dispute by informal negotiation or in small claims court, any other effort to resolve the dispute will be conducted exclusively by binding arbitration. You are giving up the right to litigate (or participate in as a party or class member) all disputes in court before a judge or jury.** Instead, all disputes will be resolved before a neutral arbitrator, whose decision will be final except for a limited right of appeal under the Federal Arbitration Act. Any court with jurisdiction over the parties may enforce the arbitrator’s award.

(Warranty, Ex. B1, at § 8(a) and (d) (emphasis in original).)

The arbitration agreement also contains a class action waiver, in bold font, stating:

(e) Class Action Waiver. **Any proceedings to resolve or litigate any dispute in any forum will be conducted solely on an individual basis. Neither You nor Microsoft will seek to have any dispute heard as a class action, private attorney general action, or in any other proceeding in which either party acts or proposes to act in a representative capacity. No arbitration or proceeding will be combined with another without the prior written consent of all parties to all affected arbitrations or proceedings.**

(*Id.* § 8(e) (emphasis in original).)

Finally, the arbitration agreement says “[a]ny arbitration will be conducted by the American Arbitration Association (the ‘AAA’) under its Commercial Arbitration Rules,” expressly incorporating the rules into the agreement. (*Id.* § 8(f).)

**D. The Receipt For Guarisma’s Purchase Also Notified Him Of The Warranty.**

The receipt for Guarisma’s purchase also provided notice of the Warranty accompanying the Pen Tip Kit, including the binding arbitration provision. The front of the receipt says, “All other terms and conditions set forth on the back of your receipt will continue to apply.”

(Gonzalez Declaration, Ex. A, at ¶ 5.) The back of the receipt, in turn, states: “Your use of

products must be in accordance with any end user license agreements and product use terms accompanying your purchase.” (Receipt, Ex. A1, at EULAS & PRODUCT USE TERMS.)

There is also a heading titled “WARRANTIES,” which instructs the consumer to *Please see the warranty terms and conditions accompanying the product.* (*Id.* (emphasis added).)

The receipt gave Guarisma 30 days to return the Pen Tip Kit for a full refund, if he did not wish to be bound by the Warranty’s terms, including the binding arbitration provision and class action waiver. (Receipt, Ex. A1, at RETURNS; Gonzalez Declaration, Ex. A, at ¶ 10.) This 30-day refund policy is applicable to all purchases at the Aventura Store, and is also posted on the Microsoft website. (*Id.*) Guarisma did not return the Pen Tip Kit. (Gonzalez Declaration, Ex. A, at ¶ 10.)<sup>3</sup>

**E. Despite Having Suffered No Harm And Ignoring The Arbitration Agreement, Guarisma Filed This Putative Class Action.**

On November 20, 2015, two days after he purchased the Pen Tip Kit, Guarisma filed a one-count putative class action (the “Complaint”) against Microsoft, based upon an alleged violation of FACTA. Guarisma alleges no facts to show he suffered any actual harm, but makes the conclusory allegation that he suffered an “elevated risk of identity theft.” (Compl. ¶ 1.) Guarisma contends he is entitled to statutory damages, punitive damages, and attorneys’ fees because the alleged violation was done “willful[ly]” under 15 U.S.C. § 1681n. (*Id.* ¶ 62.) He seeks to represent a nationwide class of all persons who purchased a product at a Microsoft store and received a receipt which displayed more than the last five digits of the credit or debit card account number. (*Id.* ¶ 40.)

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<sup>3</sup> As noted above, the Pen Tip Kit is an accessory for, and is only compatible with, the Surface. (Gonzalez Declaration, Ex. A, at ¶ 7.) It is Microsoft’s practice to include inside the box for the Surface the Warranty containing the arbitration provision and class action waiver referenced on the box for the Pen Tip Kit. Thus, if Guarisma owns a Surface (rather than purchasing a \$10 product merely to bring this putative class action), he also received a hard copy of the Warranty with the arbitration agreement.

On December 28, 2015, the Court *sua sponte* stayed this action pending a ruling in *Spokeo*, recognizing this case is “analogous” to *Spokeo* and its outcome could have a controlling effect on whether the Court has subject matter jurisdiction to proceed. (ECF No. 17.) On May 16, 2016, the Supreme Court issued its 6-2 opinion, holding “Article III standing requires a concrete injury even in the context of a statutory violation.” *Spokeo*, 136 S.Ct. at 1549. As described below, this case should be dismissed for lack of subject matter jurisdiction under *Spokeo*, or, in the alternative, stayed pending the outcome of individual arbitration.<sup>4</sup>

### III. ARGUMENT

#### A. The Court Lacks Subject Matter Jurisdiction Because Guarisma Does Not And Cannot Show He Suffered an Injury-In-Fact.

Under Rule 12(b)(1), this Court must grant a motion to dismiss if it lacks subject matter jurisdiction. Fed. R. Civ. P. 12(b)(1). For subject matter jurisdiction to exist, Guarisma bears the burden of showing he has Article III standing, and, thus, there is an actual “case or controversy” between the parties. *See Spokeo*, 136 S.Ct. at 1547 (“plaintiff, as the party invoking federal jurisdiction, bears the burden” of establishing the “irreducible constitutional minimum” of standing); *Steel Co. v. Citizens for a Better Env’t.*, 523 U.S. 83, 101 (1998). To demonstrate standing, Guarisma must show he suffered a cognizable “injury in fact.” *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992).

Guarisma fails to allege—and certainly cannot show—he suffered an injury-in-fact sufficient to confer standing. To establish an injury-in-fact, “a plaintiff must show that he or she suffered ‘an invasion of a legally protected interest’ that is ‘concrete and particularized’ and ‘actual or imminent, not conjectural or hypothetical.’” *Spokeo*, 136 S.Ct. at 1548 (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992)). While the

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<sup>4</sup> To date, despite requests by Microsoft’s counsel, Guarisma has refused to dismiss this putative class action and comply with his agreement to arbitrate.

injury may be “intangible,” such as when someone’s free speech or free exercise rights are violated, the injury must still be “particularized” to the plaintiff and “concrete”—that is, it must “actually exist,” be “real,” and “not [be] ‘abstract.’” *Spokeo*, 136 S.Ct. at 1548.

In *Spokeo*, the Supreme Court made clear that the alleged violation of a federal statute, on its own, is insufficient to show a “concrete” injury. Instead, “Article III standing requires a concrete injury *even in the context of a statutory violation.*” *Spokeo*, 136 S.Ct. at 1549 (emphasis added). While Congress can “identify intangible harms that meet minimum Article III requirements,” *id.*,<sup>5</sup> it “cannot erase Article III’s standing requirements by statutorily granting the right to sue to a plaintiff who would not otherwise have standing.” *Id.* at 1548. In other words, because Congress cannot erase Article III’s injury requirement, the proper test is whether the alleged conduct, standing alone, is sufficient to establish an injury-in-fact had the statute not existed. *Id.* For this reason, “it is instructive to consider whether an alleged intangible harm has a close relationship to a harm that has traditionally been regarded as providing a basis for a lawsuit in English or American courts.” *Id.* at 1549.

The Supreme Court provided an example of how to apply this test. Under the Fair Credit Reporting Act (“FCRA”), Congress intended to prevent the dissemination of false information by adopting procedures designed to decrease that risk. *Spokeo*, 136 S.Ct. at 1550. While the dissemination of an incorrect zip code violates the FCRA, the Supreme Court acknowledged that it is “difficult to imagine how the dissemination of an incorrect zip code, without more, could

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<sup>5</sup> Although the Supreme Court explained that “Congress’ role in identifying and elevating intangible harms” is instructive to the standing inquiry, *Spokeo*, 136 S.Ct. 1540, 1549, an injury must still exist independent from a statutory violation. An example of when Congress would be “identifying and elevating a tangible harm” would be if Congress enacted a statute providing for a \$500 private right of action for trespassing. A plaintiff suffers an injury if someone trespasses on his or her property even if the statute had not existed. While damages may be nominal, the injury is there, irrespective of the statute’s existence. Here, by contrast to that hypothetical, Plaintiff has suffered no concrete injury as a result of printing ten digits instead of five on his credit card receipt.

work any concrete harm.” *Id.* In other words, putting aside the existence of the FCRA, the alleged conduct—dissemination of an incorrect zip code—would be insufficient to establish an Article III injury, absent allegations of actual and concrete harm resulting from such a disclosure.

In *Khan v. Children’s Nat’l Health Sys.*, No. CV TDC-15-2125, 2016 WL 2946165 (D. Md. May 19, 2016), Judge Chuang applied this principle to dismiss a complaint for lack of subject matter jurisdiction. There, a patient sued a hospital because of a data breach where hackers obtained his personal information. *Id.* at \*1. The plaintiff did not allege he suffered any identity theft or other harm as a result of the alleged misappropriation. *Id.* The court applied well-settled precedent holding that an “increased risk” of identity theft is insufficient to establish an Article III injury, which requires a threatened future injury “be *certainly impending* to constitute an injury in fact.” *Id.* at \*2 (citing *Clapper v. Amnesty International USA*, 133 S. Ct. 1138 (2013) (emphasis in original)).

Relying on *Spokeo*, Judge Chuang rejected the plaintiff’s argument that, because the hospital violated a statute providing for a private right of action, the court had subject matter jurisdiction. *Khan*, 2016 WL 2946165, at \*7. The court made clear Article III standing and statutory standing are two distinct concepts that must not be conflated. *Id.* The court then explained that, under *Spokeo*, Article III “requires a concrete injury even in the context of a statutory violation.” *Id.* Because the plaintiff failed to allege any actual harm as a result of the data breach, he failed to meet his burden of establishing an Article III injury. *See also Smith v. Ohio State Univ.*, No. 2:15-CV-3030, 2016 WL 3182675, at \*4 (S.D. Ohio June 8, 2016) (applying *Spokeo* to dismiss FCRA action because while plaintiffs alleged harm from the purported invasion of their privacy, they “did not suffer a concrete consequential damage”).

Here, as in *Kahn* and *Smith*, and like the zip code example in *Spokeo*, Guarisma does not and cannot allege he suffered a concrete, particularized, and actual injury. Guarisma alleges only that Microsoft printed ten digits of a credit card number on a receipt, rather than five. Guarisma does not allege the entire credit card number was printed. He does not allege anyone other than himself and his lawyers was given the receipt or even saw it. Guarisma does not allege he was the victim of credit card fraud or identity theft as a result of five extra digits on his receipt.<sup>6</sup> In fact, Guarisma's assertion of Article III injury here is even weaker than that held insufficient in *Kahn* and *Smith* because he does not allege any third party even accessed his credit card information. Because Guarisma alleges nothing more than a technical violation of FACTA, without any resulting harm, his claim should be dismissed.

Tellingly, Plaintiff's Complaint makes clear his entire theory of Article III standing is predicated upon an alleged "elevated risk of identity theft." (Compl. ¶ 1.) But there are no facts to support this wholly conclusory allegation. *See, e.g., Ashcroft v. Iqbal*, 556 U.S. 662, 677–679 (2009) ("conclusory statements" are not entitled to be presumed true); *Michel v. NYP Holdings, Inc.*, 816 F.3d 686, 704 (11th Cir. 2016) ("conclusory assertion[s]" must be disregarded). Nor can Guarisma plead such facts for the simple reason there was no such risk. Guarisma did not lose or throw out his receipt. Instead, he took it immediately to his lawyers, who then filed this putative class action two days after his purchase. Either Guarisma or his lawyers have the receipt. There was no actual "risk" of identity theft, much less an "elevated" one.

Moreover, even if Plaintiff had alleged facts to show an "elevated risk" of identity theft (and he has not and cannot), this is insufficient *as a matter of law* to create Article III standing. As the Supreme Court has made clear (and Judge Chuang recognized), these are the very

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<sup>6</sup> Guarisma certainly does not allege that printing an extra five digits of a credit card on a receipt is a harm that has traditionally provided a basis for a common law claim.

“allegations of *possible* future injury” that fail to establish a “threatened injury [that is] *certainly impending*,” as required “to constitute an injury in fact.” *Clapper*, 133 S. Ct. at 1147 (emphasis added) (quotation marks and citation omitted). Indeed, numerous courts in the Eleventh Circuit and elsewhere have held the *possibility* of future identity theft, on its own, is not sufficiently concrete, particularized, and imminent to confer Article III standing. *See, e.g., Kahn*, 2016 WL 2946165, at \*3-6; *Case v. Miami Beach Healthcare Grp., Ltd.*, 14-24583-CIV, 2016 WL 1622289, at \*3 (S.D. Fla. Feb. 26, 2016) (because plaintiff “did not allege that any of her sensitive information was misused, or that she suffered any negative consequences from the data breach[,] . . . . [the] identified injury . . . is not sufficiently concrete or particularized to meet this Court’s jurisdictional requirements.”); *In re Zappos.com, Inc.*, 108 F. Supp. 3d 949, 955 (D. Nev. 2015) (applying principle and collecting cases); *accord In re SuperValu, Inc.*, No. 14-2586, 2016 WL 81792, \*5 (D. Minn. Jan. 7, 2016); *Whalen v. Michael Stores Inc.*, No. 14-7006, 2015 WL 9462108, at \*4 (E.D.N.Y. Dec. 28, 2015); *Green v. eBay, Inc.*, No. CIV.A. 14-1688, 2015 WL 2066531, at \*5 (E.D. La. May 4, 2015); *Storm v. Paytime, Inc.*, 90 F. Supp. 3d 359, 366 (M.D. Pa. Mar. 13, 2015); *Peters v. St. Joseph Serv. Corp.*, 74 F. Supp. 3d 847, 854 (S.D. Tex. 2015); *In re Sci. Applications Intl. Corp. Backup Tape Lit.*, 45 F. Supp. 3d 14, 25 (D.D.C. 2014).<sup>7</sup>

Consistent with the principles in *Spokeo*, *Clapper*, and the many decisions cited above, Guarisma has not suffered an Article III injury. At most, Guarisma alleges Microsoft committed a technical violation of FACTA by printing 10 credit card digits on a receipt instead of 5. Under

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<sup>7</sup> To the extent the Court finds Guarisma has sufficiently pled facts to support an “elevated risk of identity theft” and such allegations, if true, are legally sufficient to establish Article III standing, Microsoft asks the Court to treat this motion as a factual attack on subject matter jurisdiction. *See, e.g., Lawrence v. Dunbar*, 919 F.2d 1525, 1528–29 (11th Cir. 1990) (challenge to subject matter jurisdiction may be facial or factual). Given the facts of this case, Guarisma simply cannot show he personally was or is subject to any increased risk of identity theft from the receipt. At a minimum, Microsoft should be entitled to limited discovery on this issue. *See, e.g., Makro Capital of Am., Inc. v. UBS AG*, 436 F. Supp. 2d 1342, 1345 (S.D. Fla. 2006) (Altonaga, J.) (granting factual challenge to subject matter jurisdiction).

*Spokeo*, this is insufficient. Guarisma did not have his identity stolen; there are no allegations that his receipt ever left his possession or control; and he filed this lawsuit two days after the purchase. Because Guarisma has not met and cannot meet his burden of showing a concrete, particularized, and actual injury, the Complaint should be dismissed under Rule 12(b)(1).<sup>8</sup>

**B. In The Alternative, Guarisma Should Be Compelled To Arbitrate His Claim On An Individual Basis.**

To the extent the Court finds it has subject matter jurisdiction, it should compel arbitration of Guarisma’s claim. The FAA instructs that written agreements to arbitrate “shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.” 9 U.S.C. § 2. The FAA reflects an “emphatic federal policy in favor of arbitral dispute resolution.” *KPMG LLP v. Cocchi*, 132 S. Ct. 23, 25 (2011). It requires courts to “rigorously enforce arbitration agreements according to their terms.” *Am. Exp. Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2309 (2013); *see also AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1748 (2011). Thus, the FAA authorizes the Court to enter an order “directing that such arbitration proceed in the manner provided for in such agreement.” 9 U.S.C. § 4.

Here, Guarisma should be compelled to arbitrate on an individual basis because: (1) the FAA applies to the arbitration agreement; (2) Guarisma assented to it; (3) the arbitrator is responsible for determining whether the dispute falls within the scope of the arbitration agreement; and (4) that agreement contains a class waiver.

**1. The Federal Arbitration Act Applies.**

The FAA applies to any arbitration agreement evidencing a transaction involving interstate commerce. *Caley v. Gulfstream Aerospace Corp.*, 428 F.3d 1359, 1370 (11th Cir.

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<sup>8</sup> This individualized standing inquiry—which must be conducted for each putative class member—also precludes class certification. *See, e.g., Sandoval v. Pharmicare US, Inc.*, No. 15-cv-120-H-JLB, slip op., at 14 (S.D. Cal. June 10, 2016) (ECF No. 73) (relying upon *Spokeo* to deny certification in part because proposed class “includes consumers who have no cognizable injury”).

2005); *Sims v. Clarendon Nat. Ins. Co.*, 336 F. Supp. 2d 1311, 1316 (S.D. Fla. 2004) (Altonaga, J.). Guarisma is a citizen of Florida, while Microsoft is a Washington corporation with its principal place of business in Washington. (Compl. ¶ 4-5.) Moreover, the arbitration clause concerns the purchase of a product shipped through interstate commerce. Thus, the FAA applies. *See e.g., Walsh v. Microsoft Corp.*, C14-424-MJP, 2014 WL 4168479, at \*2 (W.D. Wash. 2014) (applying the FAA in compelling arbitration in favor of Microsoft).

## 2. Guarisma Entered Into An Agreement To Arbitrate.

Under Florida law, as this Court has recognized, an agreement to arbitrate does *not* require a signed writing; instead, a consumer can enter into an agreement to arbitrate through conduct showing assent. *See Williams v. MetroPCS Wireless, Inc.*, 09-22890-CIVALTONAGA, 2010 WL 62605, at \*7 (S.D. Fla. Jan. 5, 2010) (Altonaga, J.) (citing *Caley*, 428 F.3d at 1369). This rule applies even when the consumer fails to read the agreement containing an arbitration provision. *See Williams v. Metropcs Wireless, Inc.*, 09-22890-CIV, 2010 WL 1645099, at \*6 (S.D. Fla. 2010) (Altonaga, J.).

Applying this principle, Florida courts (and courts across the country) have consistently recognized a consumer such as Guarisma agrees to arbitrate a dispute where: (1) he has reasonable notice—actual or constructive—of the existence of terms and conditions containing an arbitration clause; and (2) his conduct reasonably manifests assent to those terms. *See, e.g., Rivera v. AT&T Corp.*, 420 F. Supp. 2d 1312, 1320 (S.D. Fla. 2006) (plaintiff agreed to arbitrate by continuing with transaction where she had notice that terms existed); *Rampersad v. Primeco Pers. Communications, L.P.*, No. 01-6640-CIV, 2001 WL 34872572, at \*2 (S.D. Fla. Oct. 16, 2001) (plaintiff agreed to arbitrate by activating phone service where “[d]efendant’s brochures put Plaintiff on notice that rates and services were subject to terms and conditions.”); *Briceno v. Sprint Spectrum, L.P.*, 911 So. 2d 176, 178 (Fla. 3d DCA 2005) (plaintiff agreed to arbitrate by

using service after notice that terms were available on website); *see also Hill v. Gateway 2000, Inc.*, 105 F.3d 1147, 1151 (7th Cir. 1997) (plaintiff agreed to arbitrate by not returning product that contained terms inside of packaging); *Schwartz v. Comcast Corp.*, 256 Fed. Appx. 515, 520 (3d Cir. 2007) (plaintiff agreed to arbitrate by continuing to use service after being notified that terms were available on website); *Vernon v. Qwest Communications Int'l, Inc.*, 857 F. Supp. 2d 1135, 1150 (D. Colo. 2012) *aff'd*, 925 F. Supp. 2d 1185 (D. Colo. 2013) (plaintiff agreed to arbitrate after having notice of terms referenced on website); *Schafer v. AT&T Wireless Services, Inc.*, CIV. 04-4149-JLF, 2005 WL 850459, at \*4 (S.D. Ill. Apr. 1 2005) (where outside of box said that terms applied, plaintiff agreed to arbitrate by using product); *Pentecostal Temple Church v. Streaming Faith, LLC*, CIV .A. 08-554, 2008 WL 4279842, at \*5 (W.D. Pa. Sept. 16, 2008) (same).

Both of these requirements are met. First, Guarisma clearly had notice of the terms of the Warranty, including the arbitration provision. It is well-settled that a physical hard copy of the terms need not be provided to the consumer, so long as the consumer is notified the terms exist and has a reasonable opportunity to procure them. *See e.g. Schafer*, 2005 WL 850459, at \*5 (plaintiff bound by arbitration provision where outside of product box stated terms applied, even if a hard copy of the terms was not included in box); *Rampersad*, 2001 WL 34872572, at \*2 (plaintiff was bound by arbitration provision where product's brochure provided notice that terms applied, despite plaintiff's claim that she did not receive a hard copy); *Briceno*, 911 So. 2d at 178 (plaintiff was bound where the front of a monthly bill informed plaintiff that amendments to the original terms were posted on defendant's website, even if plaintiff was not provided a hard copy); *see also Schwartz*, 256 Fed. Appx. at 520 (plaintiff was bound where work order referenced terms available on website, even if a hard copy was not provided); *Vernon*, 857 F.

Supp. 2d at 1150 (plaintiff was bound where a letter explained that service would “be governed by a Subscriber Agreement that could be found” on the company’s website, even if a hard copy of the terms were not provided); *Pentecostal Temple Church*, 2008 WL 4279842, at \*5 (“a customer [that is] on notice of contract terms available on [an] internet website is bound by those terms,” even if the terms are “not provided in hard-copy to the Plaintiff”); *see also Williams*, 2010 WL 62605, at \*10 (Altonaga, J.) (plaintiff is bound when “informed in some manner of the arbitration agreement” or is “made aware of it”).

Here, Guarisma received notice that terms—in the form of the Warranty—applied to his purchase. The outside of the box for the Pen Tip Kit that Guarisma purchased expressly stated “Limited Warranty applies,” and identified where it is available: “[surface.com/warranty](http://surface.com/warranty).” (Package, Ex. A2 (emphasis in original).) Guarisma had the opportunity to visit the website and view the terms of the Warranty, including the arbitration provision, before purchasing the product. More fundamentally, Guarisma could have decided *not* to purchase the product if he was unwilling to agree to be bound by additional terms. *See Hill*, 105 F.3d at 1150 (“Consumers browsing the aisles of a store can look at the box, and if they are unwilling to deal with the prospect of additional terms can leave the box alone”). The fact that the box referenced the Warranty, and told Guarisma how to access it (*i.e.*, on the website), put Guarisma on sufficient notice of the terms applicable to his purchase, including the arbitration provision.

In addition, Microsoft gave Guarisma a receipt providing further notice that the Warranty referenced on the Pen Tip Kit box applied to his purchase. The receipt explains on the front that “All other terms and conditions set forth on the back of your receipt will continue to apply.” (Receipt, Ex. A1.) Those terms, in turn, include a section captioned “WARRANTIES,” which instructed Guarisma that the product is governed by the Warranty and to “please *see the*

*warranty terms and conditions* accompanying the product.” (*Id.* at WARRANTIES (emphasis added).) Thus, the very receipt forming the basis for Guarisma’s lawsuit provided him with *independent* notice that terms containing an arbitration clause applied.

Second, having had notice of the existence of the applicable contractual terms, including an arbitration provision, Guarisma manifested assent to those terms in multiple ways. To start, Guarisma’s purchase of the Pen Tip Kit—with actual or constructive knowledge of the printed notice on the box—constitutes assent to the arbitration provision. If Guarisma did not like those terms, he did not have to buy the product. Additionally, the receipt (and store policy) makes clear that Guarisma could have returned the Pen Tip Kit within 30 days for a refund. Guarisma did not do so, thereby further manifesting his assent to the Warranty and its arbitration agreement. Instead, Guarisma filed this lawsuit based upon the very receipt giving him notice of the Warranty and its arbitration provision.

Put simply, Guarisma received sufficient notice of the terms applicable to his purchase—before making the purchase, at the time of the purchase, and through the receipt he received. Had he disagreed with those terms, he could have decided not to purchase the product or to return it within 30 days for a refund. He did neither, choosing instead to file this lawsuit. He is therefore bound by the Warranty and its arbitration provision, regardless of whether he read its terms. *See Williams*, 2010 WL 1645099, at \*6.<sup>9</sup>

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<sup>9</sup> At a minimum, even if Plaintiff could present evidence to challenge the existence of the agreement (and he cannot), Microsoft is entitled to limited discovery and a trial on whether Plaintiff entered into an agreement to arbitrate. 9. U.S.C. § 4 (“If the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue, the court shall proceed summarily to the trial thereof.”); *Williams*, 2010 WL 62605, at \*10 (if consumer provides sufficient evidence to substantiate denial of agreement, “proper procedure” is to proceed to jury trial on the limited question of whether an agreement exists). Of course, this arbitration issue—which exists in *different* forms in Microsoft’s contracts with its customers for nearly all the products and purchases at issue—shows a fundamental reason why this action is unsuitable for class certification. *Id.* at \*10 n.3 (“As the parties may already

**3. The Arbitrator Must Determine Whether Guarisma’s Dispute Falls Within The Scope Of The Arbitration Provision.**

The Eleventh Circuit has made clear that when parties incorporate the AAA rules, which empower an arbitrator to decide issues of bilateral arbitrability, this incorporation serves as “clear and unmistakable” evidence of the parties’ intent to delegate issues of bilateral arbitrability to an arbitrator. *Terminix Int’l. Co., LP v. Palmer Ranch Ltd. P’ship*, 432 F.3d 1327, 1332 (11th Cir. 2005) (collecting cases); *accord Norfolk S. Ry. Co. v. Florida E. Coast Ry., LLC*, 3:13-CV-576-J-34JRK, 2014 WL 757942, at \*10 (M.D. Fla. Feb. 26, 2014); *Shea v. BBVA Compass Bancshares, Inc.*, 1:12-CV-23324-KMM, 2013 WL 869526, at \*4 (S.D. Fla. March 7, 2013); *see also Crook v. Wyndham Vacation Ownership, Inc.*, 13-CV-03669-WHO, 2013 WL 6039399, at \*6 (N.D. Cal. Nov. 8, 2013) (granting motion to compel arbitration of named plaintiffs’ claims and delegating questions of arbitrability to the arbitrator).

Here, the arbitration agreement provides that “[a]ny arbitration will be conducted by the American Arbitration Association [] under its Commercial Arbitration Rules.” (Warranty. Ex. B2, at § 8(f).) In turn, Rule 7(a) of the AAA Rules explains that “[t]he arbitrator shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope, or validity of the arbitration agreement or to the arbitrability of any claim or counterclaim.”<sup>10</sup> Therefore, under *Terminix* and controlling Eleventh Circuit law, whether the dispute falls within the scope of the arbitration provision must be submitted to arbitration.

Nonetheless, even if this Court were to conclude it must decide whether Guarisma’s claim falls within the scope of the arbitration provision (and, again, this decision should be made

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recognize, if Williams prevails in a trial on this [arbitrability] issue and then seeks to certify a class, it is apparent that to determine membership in the class, detailed individual inquiry will be required.”).

<sup>10</sup> *See* AAA Commercial Arbitration Rules And Mediation Procedures at R-7(a) (available at [https://www.adr.org/aaa/ShowProperty?nodeId=/UCM/ADRSTG\\_004103](https://www.adr.org/aaa/ShowProperty?nodeId=/UCM/ADRSTG_004103)) (attached as Exhibit C).

by the arbitrator), it clearly does. It is axiomatic that “any doubts concerning the scope of arbitral issues should be resolved in favor of arbitration.” *Solymar Inv., Ltd. v. Banco Santander S.A.*, 672 F.3d 981, 988 (11th Cir. 2012) (quoting *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938 (1995)). So long as the dispute “touch[es]” on a matter covered by the arbitration clause, it must be arbitrated. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 625 n. 13 (1985) (“insofar as the allegations underlying the statutory claims touch matters covered by the enumerated articles, the Court of Appeals properly resolved any doubts in favor of arbitrability”); *see also In re Managed Care Litig.*, No. 00-MD-1334, 2003 WL 22410373, at \*3 (S.D. Fla. Sept. 15, 2003) (same). In other words, a dispute must be arbitrated unless there is “positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute.” *AT&T Tech., Inc. v. Comm’n’s Workers of Am.*, 475 U.S. 643, 650 (1986).

Here, the arbitration provision applies to any “dispute,” which is defined broadly as “any dispute, action, or other controversy between You and Microsoft concerning the Microsoft Hardware or Accessory (including its price) or this warranty, whether in contract, warranty, tort, statute, regulation, ordinance, or any other legal or equitable basis.” (Warranty, Ex. B1, at § 8(a).) Indeed, the arbitration provision provides the term “dispute” will be given “the broadest possible meaning allowable under law.” (*Id.*). Guarisma’s FACTA claim against Microsoft “concern[s]” the purchase of—and receipt for—a Pen Tip Kit, which is an “Accessory” to a Surface. (Gonzalez Declaration, Ex. A1, at ¶ 7.) As such, Guarisma’s claim falls squarely within the broad arbitration provision. Though it is not for the Court to decide whether Guarisma’s FACTA claim is arbitrable, it most certainly is.

#### **4. Guarisma Must Arbitrate His Claim On An Individual Basis.**

This Court must enforce the parties’ arbitration agreement as written, including its clear mandate that arbitration proceed on an individual, non-class basis. *See, e.g., Concepcion*, 131 S.

Ct. at 1748; accord *Stolt-Nielsen S.A. v. Animalfeeds Int'l Corp.*, 599 U.S. 662, 683 (2010).<sup>11</sup> In *Concepcion*, the Supreme Court held the FAA preempted a state rule precluding enforcement of class action waivers in arbitration agreements. *Id.* The Supreme Court reasoned such a rule “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress” in establishing the FAA, including respecting the parties’ expectations and their contractual right to agree to the terms under which arbitration will take place. *Id.* at 1753–54. Indeed, requiring “the availability of classwide arbitration,” contrary to the parties’ agreement, “interferes with fundamental attributes of arbitration”. *Id.* at 1748.

More recently, the Supreme Court in *Italian Colors* overturned a rule allowing courts to reject class action waivers in arbitration agreements for federal statutory claims if the plaintiff would incur prohibitive costs to arbitrate an individual claim. *Italian Colors*, 133 S. Ct. at 2312 n.5. Because the “principal purpose” of the FAA “is the enforcement of arbitration agreements according to their terms,” the Supreme Court held that the “FAA does not sanction” the refusal to enforce a class action waiver. *Id.* at 2312. Indeed, doing so would improperly “destroy” the parties’ agreement for the “speedy resolution that . . . bilateral arbitration in particular was meant to secure.” *Id.*; see also *DIRECTV, Inc. v. Imburgia*, 136 S. Ct. 463 (2015) (applying rule).

Consistent with *Concepcion*, *Italian Colors*, and *DirectTv*, the Eleventh Circuit has consistently enforced class action waivers in arbitration agreements. See *Kaspers v. Comcast Corp.*, 631 F. App’x 779 (11th Cir. 2015) (affirming order dismissing in favor of individual arbitration and holding that a class action waiver was valid under *Concepcion*); *Pendergast v.*

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<sup>11</sup> The Court must make this determination because there is no clear and unmistakable intent to delegate the classwide arbitrability question to the arbitrator. See, e.g., *Chesapeake Appalachia, LLC v. Scout Petroleum, LLC*, 809 F.3d 746, 758 (3d Cir. 2016) (affirming vacatur of arbitration award because district court must resolve question of classwide arbitrability, which was improperly delegated to arbitrators).

*Sprint Nextel Corp.*, 691 F.3d 1224, 1236 (11th Cir. 2012) (same); *Cruz v. Cingular Wireless, LLC*, 648 F.3d 1205, 1212-16 (11th Cir. 2011) (affirming order compelling arbitration on an individual basis and rejecting the argument that a class action waiver is unenforceable as contrary to public policy); *Caley*, 428 F.3d at 1378-79 (same).

Here, the arbitration provision provides for a “Class Action Waiver” in bold font, explaining that “[a]ny proceedings to resolve or litigate any dispute in any forum will be conducted solely on an individual basis,” and “[n]either You nor Microsoft will seek to have any dispute heard as a class action . . . .” (Warranty, Ex. B2, at § 8(e).) Yet, ignoring this provision, Guarisma filed a putative class action, and did so in this forum. Despite the agreement between Microsoft and Guarisma to proceed with arbitration on an individual basis, he has refused to do so. Because the arbitration provision requires arbitration of Guarisma’s FACTA claim, but prohibits arbitration on a class basis, this Court should compel individual arbitration of Guarisma’s claim and stay this action pending that outcome.<sup>12</sup>

#### IV. CONCLUSION

For the foregoing reasons, Microsoft respectfully requests that the Court enter an Order dismissing this action for lack of subject matter jurisdiction. In the alternative, Microsoft requests that the Court enter an Order compelling Guarisma to arbitrate his claim on an individual basis and staying the action pending that outcome.

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<sup>12</sup> Under the arbitration agreement, Guarisma also has the option of pursuing his claim in small claims court. (Warranty, Ex. B1, at § 8(c).) Notably, where the customer elects to arbitrate (rather than go to small claims court) on a dispute of less than \$75,000, the arbitration clause obligates Microsoft to “reimburse . . . filing fees” and to “pay the AAA’s and arbitrator’s fees and expenses.” (*Id.* § 8(g)(1).)

Dated: June 15, 2016

Respectfully Submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that on June 15, 2016, Defendant Microsoft Corporation's Motion To Dismiss Plaintiff's Class Action Complaint For Lack Of Subject Matter Jurisdiction, Or, Alternatively, To Compel Arbitration On An Individual Basis was electronically filed with the Clerk of Court by using the CM/ECF system, which will send a notice of electronic filing to all counsel of record.

/s/ Brian M. Ercole  
Brian M. Ercole

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