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June 8, 2016

The Honorable Patrick J. Schiltz
Judge of District Court
United States District Court
14E U.S. Courthouse
300 South Fourth Street
Minneapolis, MN 55415

RE: Sheila Potocnik v. Walter Anton Carlson, et al.
Court File No. 13-CV-2093 (PJS/HB)

Your Honor:

Thank you for the opportunity to submit this letter brief concerning the Supreme Court's recent decision in *Spokeo, Inc. v. Robins*, 136 S.Ct. 1540 (2016). Under *Spokeo*, the Eighth Circuit's standing analysis in *Hammer v. Sam's East, Inc.*, 754 F.3d 492 (8th Cir. 2014), is no longer good law. Congress may not confer standing on a party who has not suffered an injury in fact. Any civil action under 18 U.S.C. § 2724 must be predicated on proof of concrete, real injury.

Injury in fact is the "first and foremost" of the three elements that comprise the "irreducible constitutional minimum" of standing. *Spokeo,* 136 S.Ct. at 1547. To establish injury in fact, a plaintiff must show that she suffered an injury that is "concrete and particularized" and "actual or imminent, not conjectural or hypothetical." *Id.* at 1548. The plaintiff bears the burden of establishing all three elements of standing. *Id.* at 1547.

"A 'concrete' injury must be '*de facto*'; that is, it must actually exist. When we have used the adjective 'concrete,' we have meant to convey the usual meaning of the term—'real,' and not 'abstract.'" *Id.* at 1548 (cites omitted). The fact that an alleged injury is particularized does not satisfy the requirement that it be concrete. *See id.* ("Particularization is necessary to establish injury in fact, but it is not sufficient. An injury in fact must also be 'concrete.'"). "Concrete" is not necessarily synonymous with "tangible"; intangible injuries may nevertheless be concrete. *Id.* at 1549.

"Injury in fact is a constitutional requirement, and it is settled that 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 (quotes omitted). "Article III standing requires a

concrete injury even in the context of a statutory violation." *Id.* at 1549; *see also Wallace v. ConAgra Foods, Inc.*, 747 F.3d 1025, 1032 (8th Cir. 2014) ("[T]he requirement of injury in fact is *a hard floor* of Article III jurisdiction that *cannot be removed by statute*." (quoting *Summers v. Earth Island Inst.*, 555 U.S. 488, 497, (2009) (emphasis supplied by court)). A plaintiff does not "automatically satisf[y] 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." *Spokeo,* 136 S.Ct. at 1548.

Because the Ninth Circuit focused exclusively on the particularized nature of Robin's alleged injury, in *Spokeo* the Supreme Court reversed and remanded for a proper analysis of whether Robin had alleged a concrete injury. *Id.* at 1458, 1550. Making the same error, the Eighth Circuit in *Hammer* elided the concrete injury requirement, holding that: "the actual-injury requirement may be satisfied *solely* by the invasion of a legal right that Congress *created*." *Hammer*, 754 F.3d at 499 (emphasis in original). *Hammer* cannot be reconciled with *Spokeo* and is no longer good law.

Under 18 U.S.C. § 2724(a), a defendant who has unlawfully obtained personal information from a motor vehicle record "shall be liable" to a person who is the subject of that information. To avoid a constitutional defect, the Court must construe Section 2724(a) to incorporate the injury in fact requirement. *See Jones v. United States,* 526 U.S. 227, 239-40 (1999) (reciting the constitutional avoidance canon); *Wallace*, 747 F.3d at 1031-32 ("In drafting the Act, Congress was not required to restate existing standing law, nor to specify that Article III limited CAFA's reach, because 'Congress legislates against the background of ... standing.'") (quoting *Bennett v. Spear*, 520 U.S. 154, 163 (1997))).[1]

Ms. Potocnik may argue that concrete injury can be presumed because she alleges a substantive violation of the statute, and the judgment of Congress was to treat such an invasion as actionable. Not so. First, Congress did not permit the recovery of damages under the Privacy Act without proof of actual damages, *Doe v. Chao,* 540 U.S. 614, 622-23 (2004), and as previously briefed, Congress consciously adopted the intent of the Privacy Act when enacting the DPPA. Second, alleging a substantive violation of the statute does not satisfy *Spokeo*. In *Spokeo* the alleged violation was not a merely procedural. *See* 136 S.Ct. at 1545-46. Spokeo had published false information about virtually every aspect of Robin's profile. *Id.* The Supreme Court recognized that "Congress plainly sought to curb the dissemination of false information by adopting procedures designed to decrease that risk." *Id.* at 1550. Yet the Court highlighted two ways in which a violation may not "satisfy the demands of Article III." *Id.* First, a violation of one of the FCRA's procedural requirements may result in no harm. *Id.* Second, "*not all inaccuracies cause harm* or present any material risk of harm." *Id.* (emphasis added). Therefore, the Court remanded the case for an analysis of whether the alleged violations "entail a degree of risk sufficient to meet the concreteness requirement." *Id.* The Court remanded the case even though Robins had

[1] Applying this rule, the *Spokeo* standing requirements bolster Defendant Carlson's textual arguments that liquidated and punitive damages are not available if Ms. Potocnik fails to prove actual damages.

alleged the misinformation caused "imminent and ongoing actual harm to his employment prospects." *Id.* at 1554 (Ginsburg, J., dissenting). Thus, in this case, the bare fact that Defendant Carlson violated the statute does not prove a concrete injury.

Given the many permissible uses of driver's license data under the DPPA, and the routine dissemination of the data in daily life, the Supreme Court's point in *Spokeo* is particularly apt: not every unauthorized viewing of a driver's license "cause[s] harm or presents any material risk of harm." To be clear, Defendant Carlson does not argue that concrete injury can never arise from the obtainment of driver's license data. Ms. Potocnik has alleged that she suffered injury in the form of emotional distress. Defendant Carlson disputes that allegation. The point is simply that Ms. Potocnik must prove the existence of her alleged injury in fact. Since the standing requirements are "an indispensable part of the plaintiff's case, each element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, *i.e.*, with the manner and degree of evidence required at the successive stages of the litigation." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992). "And at the final stage, those facts (if controverted) must be supported adequately by the evidence adduced at trial." *Id.* (quotes omitted). It remains open to defendants to contest the factual basis for standing at trial. *Gladstone Realtors v. Vill. Of Bellwood*, 441 U.S. 91, 115(1979).

"If a threshold issue of Article III standing raises material fact disputes, including credibility issues, the district court may conduct an evidentiary hearing and resolve them." *U.S. v. One Lincoln Navigator 1998*, 328 F.3d 1011, 1014 (8th Cir. 2003); *see also U.S. v. 1998 BMW "I" Convertible*, 235 F.3d 397, 400 (8th Cir. 2000) ("As no statute or rule prescribes a format for evidentiary hearings on jurisdiction, any rational mode of inquiry will do. However, judges simply cannot decide whether a witness is telling the truth on the basis of a paper record[.]" (quotes and cites omitted)). "[I]n a case in which considerations of standing can be severed from a resolution of the merits, a preliminary hearing—to resolve disputed factual issues determining standing—is an appropriate course." *Barrett Computer Servs. Inc. v. PDA, Inc.*, 884 F.2d 214, 220 (5th Cir. 1989).

In this case, the court may (or may not) conclude that the concrete injury and "actual damages" queries are the same[2] and, if so, elect to proceed on the merits to resolve both issues. If the court determines that considerations of standing can be severed from the merits, a preliminary hearing would be appropriate. In no event, however, should trial proceed on the issues of liquidated or punitive damages unless Ms. Potocnik first satisfies her burden of proving concrete injury. If Ms. Potocnik fails to satisfy the court that she has suffered a concrete injury, her case must be dismissed for want of standing. She may not seek any of the statutory remedies including liquidated damages, punitive damages, or attorney fees.

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[2] Three possible thresholds for "actual damages" under the statute are before the court on this summary judgment motion: (1) pecuniary damages only; (2) emotional distress that satisfies the "genuine injury" standard; and (3) "garden variety" emotional distress.

Very truly yours,

Peter G. Mikhail
PGM/cr

cc: All Counsel of Record
Walter Anton Carlson