

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF NEW YORK

JEFFERY ZINK, on behalf of himself and all  
others similarly situated,

Plaintiff,

v.

FIRST NIAGARA BANK, N.A.

Defendant.

Civil Action No. 1:13-cv-01076-RJA-JJM

**MEMORANDUM OF LAW IN SUPPORT OF THIS COURT'S  
SUBJECT MATTER JURISDICTION TO HEAR PLAINTIFF'S CLAIMS**

Plaintiff respectfully submits this memorandum of law in response to this Court's May 17, 2016 Order seeking the parties' respective positions on the impact of *Spokeo, Inc. v. Robins*, No. 13-1339, 2016 WL 2842447 (U.S. May 16, 2016) on the Court's subject matter jurisdiction. Because *Spokeo* did not change Second Circuit or Supreme Court precedent with respect to determining whether a plaintiff seeking statutory penalties has Article III standing, there is no reason to disturb this Court's prior ruling finding that Plaintiff does in fact have standing. Therefore, Plaintiff respectfully requests that the Court enter the proposed Preliminary Approval Order (Dkt. No. 101-3 at 44-52) so that the putative class may receive notice of the excellent settlement Plaintiffs' Counsel has successfully negotiated on their behalf after three years of litigation.

**A. *Spokeo* Did Not Change Second Circuit Or Supreme Court Standing Law.**

The defense bar sought a ruling from the Supreme Court that would have eviscerated causes of action seeking statutory damages. But the Supreme Court in *Spokeo* did no such thing. See *Errington v. Time Warner Cable Inc.*, No. 15-2196, 2016 WL 2930696, at \*3 (C.D. Cal. May 18, 2016) (the Supreme Court "declined to decide the key standing issue."). Instead, it issued a narrow ruling remanding the case to the Ninth Circuit solely on the basis that it failed to address the extent to which Robins' injuries were "concrete" as opposed to merely particularized, notwithstanding prior Supreme Court precedent requiring a finding of both:

The Ninth Circuit noted, first, that Robins had alleged that "Spokeo violated *his* statutory rights, not just the statutory rights of other people," and, second, that "Robins's personal interests in the handling of his credit information are individualized rather than collective." 742 F.3d 409, 413 (2014). Based on these two observations, the Ninth Circuit held that Robins had adequately alleged injury in fact, a requirement for standing under Article III of the Constitution. *Id.*, at 413-414. This analysis was incomplete. As we have explained in our prior opinions, the injury-in-fact requirement requires a plaintiff to allege an injury that is both "concrete *and* particularized." *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167, 180-181, 120 S.Ct. 693, 145 L.Ed.2d 610

(2000) (emphasis added). The Ninth Circuit’s analysis focused on the second characteristic (particularity), but it overlooked the first (concreteness). We therefore vacate the decision below and remand for the Ninth Circuit to consider *both* aspects of the injury-in-fact requirement.

*Spokeo*, 2016 WL 2842447, at \*3 (emphasis in original). The Supreme Court explicitly took no position on whether Robins’ injuries were in fact concrete for standing purposes. *Id.* at \*8.

*Spokeo* thus creates no new law; it merely remanded the case to allow the Ninth Circuit to conduct the proper analysis. As Justice Alito noted, “[w]e have made it clear time and time again that an injury in fact must be both concrete *and* particularized.” *Id.* at \*6 (emphasis in original) (citing *Susan B. Anthony List v. Driehaus*, 573 U.S. —, — (2014) (slip op., at 8); *Summers v. Earth Island Institute*, 555 U.S. 488, 493(2009); *Sprint Communications Co. v. APCC Services, Inc.*, 554 U.S. 269, 274 (2008); *Massachusetts v. EPA*, 549 U.S. 497, 517 (2007)).

Nor does *Spokeo* change the law in the Second Circuit. To the contrary, the Second Circuit’s holding in *Donoghue v. Bulldog Inv’rs Gen. P’ship*, 696 F.3d 170 (2d Cir. 2012) is entirely consistent with *Spokeo*: “The injury in fact required to support constitutional standing is an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical.” *Bulldog Inv’rs*, 696 F.3d at 175. Nor did the Second Circuit fail to analyze the extent to which the plaintiff’s injuries were concrete as opposed to just being particular to that plaintiff, as the *Bulldog Inv’rs* Court found that the statute created a specific and concrete right (to have insiders respect their fiduciary duty by not engaging in certain trades in the issuer’s stock) and a remedy for the invasion of that right:

[Bulldog’s] fiduciary duty was created by § 16(b), and it conferred upon Invesco an enforceable legal right to expect Bulldog to refrain from engaging in any short-swing trading in its stock. The deprivation of this right establishes Article III standing . . . because the issuer’s right to profits under § 16(b) derives from breach of a fiduciary duty created by the statute in favor of the issuer, the issuer is no mere

bounty hunter but, rather, a person with a cognizable claim to compensation for the invasion of a legal right.

*Bulldog Inv'rs*, 696 F.3d at 177-78 (citing *Warth v. Seldin*, 422 U.S. at 500).

Nor did *Spokeo* change existing Second Circuit law recognizing that, “[w]hile the injury-in-fact requirement is a hard floor of Article III jurisdiction that cannot be removed by statute, it has long been recognized that a legally protected interest may exist solely by virtue of statutes creating legal rights, the invasion of which creates standing, even though no injury would exist without the statute.” *Bulldog Inv'rs* at 175. Indeed, the *Spokeo* Court explicitly recognizes that “[t]he violation of a procedural right granted by statute can be sufficient in some circumstances to constitute injury in fact; in such a case, a plaintiff need not allege any *additional* harm beyond the one identified by Congress.” *Spokeo*, 2016 WL 2842447 at \*2 (emphasis in original).

Applying well-worn Second Circuit precedent, unchanged by *Spokeo*, this Court previously held that Plaintiffs had Article III standing. The issue of standing was raised in the briefing on the motion to dismiss. See *Zink v. First Niagara*, No. 13-01076 (W.D.N.Y.) (Dkt. No. 19). As First Niagara states in its submission, “First Niagara has previously addressed standing before this Court.” Dkt. No. 113. In response to Defendant’s questioning of Plaintiff’s standing, Plaintiff responded:

As the Second Circuit recently held, “where, as here, a plaintiffs claim of injury in fact depends on legal rights conferred by statute, it is the particular statute and the rights it conveys that guide the standing determination.” *Donoghue v. Bulldog Investors Gen. P’ship*, 696 F.3d 170, 178 (2d Cir. 2012) (citing *Warth v. Seldin*, 422 u.S. 490,500 (1975)).

In adopting the Report and Recommendation denying the motion to dismiss, the District Court agreed with Plaintiff and held:

The general rule in New York is that statutes which on their face provide penal sanctions also imply a private right of action.” *Diehl & Sons, Inc. v. International*

*Harvester Co.*, 445 F. Supp. 282, 289 (D.C.N.Y. 1978). *See also Franklin v. Gwinnett County Public Schools*, 503 U.S. 60, 69, 112 S. Ct. 1028, 117 L.Ed.2d 208 (1992) (“The existence of a statutory right implies the existence of all necessary and appropriate remedies”); *Alston v. Countrywide Financial Corp.*, 585 F.3d 753, 763 (3rd Cir. 2009) (“the actual or threatened injury required by Art. III may exist solely by virtue of statutes creating legal rights, the invasion of which creates standing”).

*Zink v. First Niagara Bank, N.A.*, 18 F. Supp. 3d 363, 372 (W.D.N.Y. 2014). That decision remains correct today.

In one of the first cases decided post *Spokeo*, the Honorable Ronald S.W. Lew from the Central District of California agreed with Plaintiff’s position stating that “the Supreme Court handed down its decision in *Spokeo* on May 16, 2016, and in doing so, declined to decide the key standing issue.” *Errington*, 2016 WL 2930696, at \*3. The Court therefore declined to stay Plaintiff’s Telephone Consumer Protection Act claim premised on the defendant placing calls to the plaintiff using an automatic telephone dialing system, based on the result in *Spokeo*. This Court should similarly reaffirm Plaintiff’s standing and allow this case to proceed to preliminary approval.

**B. Plaintiff’s Injuries Are Concrete And Particularized.**

Plaintiff, like all mortgagors in every state of the union, have the right to have a timely certificate of discharge of mortgage recorded in the county in which the mortgage itself was recorded. The deprivation of that right by an untimely recorded discharge causes a concrete injury to the mortgagor, against whom an encumbering mortgage is still recorded in the public record. Indeed, the right to have a recorded mortgage timely discharged upon satisfaction has deep roots in American common law and history, and in the New York Legislature’s judgment, a remedy in the form of statutory damages was necessary to compensate mortgagors for the deprivation of their right to have a mortgage discharged.

To the extent that *Spokeo* provides guidance beyond what the Second Circuit relied upon in *Bulldog Inv'rs*, it supports a finding of standing based on the intangible but concrete right to have one's mortgage discharged when it has been satisfied. As Justice Alito held:

In determining whether an intangible harm constitutes injury in fact, both history and the judgment of Congress play important roles. Because the doctrine of standing derives from the case-or-controversy requirement, and because that requirement in turn is grounded in historical practice, 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. See *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765, 775-777, 120 S. Ct. 1858, 146 L.Ed.2d 836 (2000). In addition, because Congress is well positioned to identify intangible harms that meet minimum Article III requirements, its judgment is also instructive and important. Thus, we said in *Lujan* that Congress may “elevat[e] to the status of legally cognizable injuries concrete, *de facto* injuries that were previously inadequate in law.” 504 U.S., at 578. Similarly, Justice Kennedy’s concurrence in that case explained that “Congress has the power to define injuries and articulate chains of causation that will give rise to a case or controversy where none existed before.” *Id.*, at 580 (opinion concurring in part and concurring in judgment).

*Spokeo*, 2016 WL 2842447 at \*7.<sup>1</sup> That the intangible harm Plaintiff suffered (not having his certificate of discharge recorded in a timely manner) confers Article III standing is supported both by history and the judgment of the New York legislature.

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<sup>1</sup> The Supreme Court has recognized a broad range of largely intangible, noneconomic, nonphysical injuries as adequate bases for Article III standing. For example, federal copyright law has long authorized awards of statutory damages to copyright holders in the absence of any proof of harm other than infringement. See 17 U.S.C. 504(a) and (c); *Feltner v. Columbia Pictures Television, Inc.*, 523 U.S. 340, 351 (1998). Other examples abound. See, e.g., *Federal Election Comm’n v. Akins*, 524 U.S. 11, 21 (1998) (“[T]his Court has previously held that a plaintiff suffers an ‘injury in fact’ when the plaintiff fails to obtain information which must be publicly disclosed pursuant to a statute.”) (cited with approval by *Spokeo*, 2016 WL 2842447 at \*8); *Public Citizen v. United States Dep’t of Justice*, 491 U.S. 440, 449 (1989) (“As when an agency denies requests for information under the Freedom of Information Act . . . constitutes a sufficiently distinct injury to provide standing to sue.”) (cited with approval by *Spokeo*, 2016 WL 2842447 at \*8).

First, the harm suffered by a mortgagor whose certificate of discharge is not timely recorded 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.* Indeed, the right to seek a remedy in New York courts for mortgagors who do not timely file mortgage satisfactions has a long and illustrious history. *See Greenberg v. Schwartz*, 73 N.Y.S.2d 458, 459 (Sup. Ct. 1947), *aff’d*, 273 A.D. 814, 76 N.Y.S.2d 95 (App. Div. 1948) (“This is an action to remove that mortgage as a cloud upon plaintiff’s title . . . **this form of action to erase it from the record is an ancient and proper remedy.**”) (emphasis added). *See also Griswold v. Onondaga County Sav. Bank*, 93 NY 301, 302 (1883) (request was made to execute a satisfaction of mortgage on the ground that it was paid in full); *People ex rel. Adams v. Sigel*, 1873 WL 9394 (N.Y. Super. 1873) (“A mandamus should issue directing the register to receive and file the satisfaction-pieces and discharge the mortgages.”). Thus, the right to have a satisfaction of mortgage timely recorded after a mortgage has been satisfied is a long established concrete right held by a mortgagor, the deprivation of which allows a mortgagor to bring a lawsuit in American courts. “A mortgagor has a right of redemption, that is, the right to pay the mortgage debt and clear the legal title to the land from the lien of the mortgage . . . if the mortgage was recorded, the mortgagor is entitled to a satisfaction of the mortgage.” 78 N.Y. Jur. 2d Mortgages § 385 (citing *Application of Fleetwood Acres*, 186 Misc. 299, 62 N.Y.S.2d 669 (Sup 1945), *order aff’d*, 270 A.D. 1050, 63 N.Y.S.2d 238 (2d Dep’t 1946)).

The amendments to RPAPL § 1921 and RPL § 275 merely codified the injury (which existed at common law and which provided a basis for a lawsuit in New York courts) resulting from an untimely recorded satisfaction of mortgage. As the Honorable Judge Vincent Briccetti held in an action arising under the same New York mortgage satisfaction laws against a different

lender: “[T]he penalties provided for in RPAPL § 1921(1) and RPL § 275(1) do not enlarge the common-law cause of action for satisfaction of a mortgage or grant additional remedies for a mortgagee’s failure to satisfy a mortgage.” *Whittenburg v. Bank of Am., N.A.*, No. 14-947, 2015 WL 2330307, at \*3 (S.D.N.Y. Mar. 24, 2015). Thus, the intangible harm of not having a recorded mortgage timely discharged “has a close relationship to a harm that has traditionally been regarded as providing a basis for a lawsuit in English or American courts,” *Spokeo*, 2016 WL 2842447 at \*7, and therefore Plaintiff has suffered a concrete deprivation and has standing.<sup>2</sup>

Second, the judgment of the New York Legislature favors finding that the deprivation of the right to have a mortgage satisfaction timely recorded is a concrete injury for Article III standing purposes.<sup>3</sup> As one Senator noted during the floor debate in explaining the justification for the 2005 amendments, expressing a sentiment that was not opposed: “Let me say that in English. When you pay off your mortgage, you’re entitled to get some kind of receipt,

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<sup>2</sup> *Cf.*, *Piro v. Nat’l City Bank*, No. 82885, 2004 WL 170335, at \*4 (Ohio Ct. App. Jan 29, 2004) (affirming class certification where “Plaintiffs allege that they were mortgagors who paid their mortgages and were entitled to a release, but their release of mortgage was allegedly not filed within 90 days. The record clearly demonstrates that the plaintiffs have the same interest and suffered the **same alleged injury** as the class as a whole.”) (emphasis added).

<sup>3</sup> That the statutory claim at issue arises under state law does not change this analysis. “Properly pleaded violations of state-created legal rights, therefore, must suffice to satisfy Article III’s injury requirement. Thus, even in the absence of a specific finding that FMC was injured by the misappropriation of its confidential business information, FMC sufficiently alleged the violation of a state-law right that in itself would suffice to satisfy Article III’s injury requirement.” *FMC Corp. v. Boesky*, 852 F.2d 981, 993 (7th Cir. 1988). *See also Cantrell v. City of Long Beach*, 241 F.3d 674, 684 (9th Cir. 2001) (“[S]tate law can create interests that support standing in federal courts. If that were not so, there would not be Article III standing in most diversity cases.”); *Utah ex rel. Div. of Forestry, Fire & State Lands v. United States*, 528 F.3d 712, 721 (10th Cir. 2008) (“Although Article III standing is a question of federal law, state law may create the asserted legal interest.”). *See also Diehl & Sons, Inc. v. Int’l Harvester Co.*, 445 F. Supp. 282, 289 (E.D.N.Y. 1978) (“The general rule in New York is that statutes which on their face provide penal sanctions also imply a private right of action.”).

documentation.” Attached hereto as Exhibit 1. In other words, “we’re just trying to give people a remedy for when they don’t get the right documentation that they deserve to get since they’ve paid their mortgage.” *Id.* at 4.

As the bills’ sponsor noted in a letter to the Governor seeking approval of the amendments, “[b]anks and other lender’s have their mortgages recorded with the county clerk to ensure that others are aware of their interest in a property. It is just as important that the document giving notice of the satisfaction of that interest is properly recorded. The legislation provides a remedy to ensure this takes place.” August 5, 2005 letter from Sen. DeFrancisco, attached hereto as Exhibit 2. Similarly, the New York State Senate Introducer’s Memorandum in Support noted that the purpose of the bill is to provide a remedy for the violation of a mortgagors’ right to a timely recorded satisfaction:

When purchasing and selling a home, the recording of a mortgage and its subsequent discharge occurs. The County Clerk charges a fee to record the certificate of discharge of mortgage, which is paid by the mortgagor of the property. The mortgagor pays this fee to the mortgagee and expects the mortgage to be promptly discharged. However, subsequent title searches are done and it is often discovered that the mortgage is still “open” and a discharge was never provided, even though a filing fee had been paid off in full. As a result, a second filing fee becomes necessary to record the certificate of discharge of mortgage. This bill will provide the mortgagor with a remedy for the mortgagee’s failure to timely and properly provide a certificate of discharge of mortgage.

Attached hereto as Exhibit 3. Thus, the statutes create a specific remedy tied to the concrete injury caused by a mortgagee’s failure to timely present a satisfaction of mortgage, and therefore Plaintiff has standing to pursue their claims. *See Massachusetts v. E.P.A.*, 549 U.S. at 516-17 (“Congress[ional] . . . authorization is of critical importance to the standing inquiry: ‘Congress has the power to define injuries and articulate chains of causation that will give rise to a case or controversy where none existed before. In exercising this power, however, Congress must at the very least identify the injury it seeks to vindicate and relate the injury to the class of persons

entitled to bring suit.”) (cited with approval in *Spokeo* and citing *Lujan*, 504 U.S., at 580). The New York Legislature identified the injury (lenders’ failure to clear a mortgage encumbrance after it has been satisfied) and it related that injury directly to the class of persons entitled to bring suit, namely mortgagors whose discharges were not timely presented for recording.<sup>4</sup>

In denying another lender’s motion to dismiss similar claims, Judge Seibel explicitly held that the plaintiffs have standing, notwithstanding an alleged lack of injury beyond that established by RPAPL § 1921 and RPL § 275:

[T]he plain language of RPAPL section 1921 and RPL Section 275 . . . confer on plaintiffs the right to collect damages when a mortgagee violates the statutes. *See Donohue v. Bulldog Investors*, 696 F.3d 170 at 172, where the Court said, “Where a plaintiffs’ claim of injury in fact depends on legal rights conferred by statute, it is the particular statute and the rights it conveys that guide the standing determination.” *See generally Warth v. Seldin*, 422 U.S. 490 at 500, where the Supreme Court said, “Essentially the standing question in such cases is whether the constitutional or statutory provision on which the claim rests properly can be understood as granting persons in the plaintiffs’ position a right to judicial relief.” No additional injury is required. The untimely presentment of the certificate of discharge confers standing on the plaintiffs.

*Villanueva v. Wells Fargo Bank, N.A.*, No. 13-5429 (S.D.N.Y.), July 31, 2014 Transcript of Decision, Docket No. 78-1, at 8-9 (relevant portions of which are attached hereto as Exhibit 4). *See also Adler ex rel. v. Bank of Am., N.A.*, No. 13-4866, 2014 WL 3887224, at \*2, note 3 (S.D.N.Y. July 17, 2014) (finding that “the Court has satisfied itself that plaintiff has Article III standing.”).

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<sup>4</sup> New York is not alone in identifying this injury and passing legislation to address it. Based on Class Counsel’s research, every state except Colorado, Texas, and Nevada has passed a similar mortgage discharge statute. *See, e.g.*, Ohio Rev. Code Ann. § 5301.36; Vt. Stat. Ann. tit. 27, § 464; Cal. Civ. Code § 2941; 765 Ill. Comp. Stat. Ann. §§ 905/2, 905/4; 21 Pa. Stat. Ann. §§ 681, 682; Kan. Stat. Ann. § 58-2309a.

Moreover, *Kendall v. Employees Retirement Plan of Avon Products*, 561 F.3d 112, 121 (2d Cir. 2009) (the case cited in the *Spokeo* petitioners' certiorari petition), is inapposite. Were it not, it would be inconsistent with the subsequent Second Circuit precedent discussed above in *Donoghue* and Supreme Court precedent such as *Warth v. Seldin* cited therein that were previously relief upon by Judge Seibel in this action. *Kendall* involved a claim for a breach of fiduciary duty in a pension plan governed by Employment Retirement Income Security Act ("ERISA"). The Second Circuit found that an ERISA plaintiff seeking relief did not need to allege that she had suffered an injury, "pecuniary or otherwise" to have standing; she only needed to establish that she had been deprived of a specific and personal right under ERISA as the result the breach of fiduciary duty. *Id.* at 120-21. The plaintiff in *Kendall* could not make that showing because she did not allege that any rights which were personal to her had been violated because ERISA "does not confer a right to every plan participant to sue the plan fiduciary for alleged ERISA violations without a showing that they were injured." *Id.* at 120. She therefore had not been deprived of a right granted to her by the ERISA statute, and as a consequence, lacked an injury under Article III. *Id.* In other words, the *Kendall* plaintiff failed to allege that she suffered a particularized harm individual to herself. *Spokeo* at \*3 ("The Ninth Circuit noted . . . that Robins had alleged that 'Spokeo violated *his* statutory rights, not just the statutory rights of other people,' and, second, that 'Robins's personal interests in the handling of his credit information are individualized rather than collective . . . The Ninth Circuit's analysis focused on the second characteristic (particularity), but it overlooked the first (concreteness).").

Here, by contrast, RPAPL § 1921 and RPL § 275 confer upon Plaintiff a concrete and particularized right: to have his satisfaction of mortgage presented in a timely manner. Defendant deprived Plaintiff of that right by presenting his satisfaction of mortgage late. Thus,

even under *Kendall*, Plaintiff has standing. See *Donoghue*, 696 F.3d at 178 (distinguishing *Kendall* and citing *Warth*); *Austin-Spearman*, 98 F. Supp. 3d 662, 667 (S.D.N.Y. 2015) (distinguishing *Kendall* because “the *Kendall* court did not reject the principle that Congress can create a legal right, the violation of which alone confers standing; rather, it held simply that the *Kendall* plaintiff had not alleged an injury sufficient for standing because she had alleged only deprivation of her right to a plan that complied with ERISA, which, it found, was not a right conferred to her under the ERISA statute.”) (citing *Donoghue*).

Plaintiff’s injuries are not based on “a bare procedural violation, divorced from any concrete harm.” *Spokeo*, 2016 WL 2842447, at \*7. The entire purpose of the amendments to RPAPL § 1921 and RPL § 275 was to ensure timely filing of mortgage satisfactions to address the injury identified by the New York legislature. Therefore the failure to comply is plainly an “invasion of a legal right,” not a bare procedural violation. If, for example, the statutes required that the satisfaction of mortgages be presented to county clerks within 30 days in blue envelopes, but First Niagara instead presented them in red envelopes in a timely manner; that would be an example of a bare procedural violation. The case at bar is not akin to the example cited by Justice Alito, where the false information being disseminated is an incorrect ZIP code and thus harmless. *Id.* at \*16. As the Supreme Court held, the “FCRA seeks to ensure “fair and accurate credit reporting.” *Spokeo*, 2016 WL 2842447, at \*3. A simple ZIP code error is not connected to the concrete interest created by the statute and the legal rights it seeks to protect.

On the other hand, the concrete harm here is the violation of the right to have a recorded mortgage timely discharged. Thus, the violation and resulting statutory damages created to remedy that violation are directly tied to the mortgagor’s concrete and well-established right to have a recorded mortgage timely discharged, and Plaintiff therefore has a concrete injury that

establishes standing. *See Lujan*, 504 U.S. at 573 (“There is this much truth to the assertion that ‘procedural rights’ are special: The person who has been accorded a procedural right to protect his concrete interests can assert that right without meeting all the normal standards for redressability and immediacy.”).

That Mr. Zink’s mortgage satisfaction was ultimately filed 135 days after he satisfied his mortgage does not mean he did not suffer a concrete injury. Consistent with the common law action to have a mortgage encumbrance expunged from the public record when it is satisfied, the New York legislature created statutes requiring mortgagors to file certificates of discharge within a specified time. Not surprisingly, lenders, particularly national banks, failed to comply with these statutes, oftentimes for years, because they had little incentive to do so. Accordingly, the New York Legislature amended its statutes in 2005 to provide for a remedy directly tied to the failure of a mortgagor to timely present a certificate of discharge. Just because Plaintiff’s satisfaction was ultimately recorded does not mean that his right to a timely recording of the discharge (a right directly tied to the common law right to have a mortgage discharged from the public record) was not invaded in a direct, particularized, and concrete manner.

As set forth above, *Spokeo*, did not change well-settled law. The Court in *Spokeo* only remanded for the Ninth Circuit to analyze the concreteness of a plaintiff’s injuries for Article III standing and did not disturb the longstanding principle that Congress may statutorily render even an intangible injury “concrete” for purpose of the Article III “case or controversy” requirement. *Spokeo* at \*3, 7-8 (confirming that intangible injuries can be concrete; emphasizing Congress’s important role in deciding that “an intangible harm constitutes injury in fact”; expressly preserving *Lujan*’s holding that Congress may define injuries that will establish Article III standing that would not otherwise exist; and emphasizing that some procedural violations can

suffice for injury in fact without “alleg[ing] any *additional* harm beyond the one Congress has identified” (emphasis in original)).

Where, as here, the New York Legislature has ““identif[ied] the injury it seeks to vindicate and relate[d] the injury to the class of persons entitled to bring suit,”” *Massachusetts*, 549 U.S. at 516 (quoting *Lujan*, 504 U.S., at 580), deference is due to the New York Legislature’s judgment that Plaintiff has suffered a judicially cognizable injury.

### **CONCLUSION**

Because *Spokeo* does not change the law regarding standing, Plaintiff respectfully request that the Court enter the proposed Preliminary Approval Order.

Respectfully submitted,

Dated: May 31, 2016

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