

May 18, 2016

Honorable Naomi Reice Buchwald
United States District Judge
United States Courthouse
500 Pearl Street
New York, N.Y. 10007

Re: *Boelter v. Advance Magazine Publishers Inc.*, Case No. 15-CV-05671

Dear Judge Buchwald:

This firm represents Defendant Advance Magazine Publishers Inc., d/b/a Condé Nast (“Condé Nast”) in the above-referenced action. We write in response to Plaintiff’s May 16, 2016 letter (Doc. 45) concerning the Supreme Court’s recent decision in *Spokeo, Inc. v. Robins*, 578 U.S. ___, 2016 WL 2842447 (May 16, 2016) as additional authority on Condé Nast’s Motion to Dismiss. Condé Nast agrees that the *Spokeo* decision is “highly relevant to the pending Motion to Dismiss” -- but contrary to what Plaintiff asserts in her letter, *Spokeo*’s relevance is to confirm, once and for all, that Plaintiff cannot establish the injury in fact required for Article III standing.

In *Spokeo*, the Court *reversed* the Ninth Circuit’s conclusion that an alleged violation of the Fair Credit Reporting Act (“FCRA”) was, without more, an Article III “injury in fact,” holding that the Ninth Circuit “elided” the “concreteness” requirement of injury in fact, which requires analysis of the nature of the violation – not the bald assertion that a violation occurred.

Plaintiff points to language in the opinion stating that, for Article III purposes, “intangible injuries” can sometimes be “concrete,” and “the violation of a procedural right granted by statute can be sufficient in some circumstances to constitute injury in fact.” (Doc. 45 at 1.) However, Plaintiff avoids what the Supreme Court actually had to say about those concepts -- and why the opinion lends no support to, but instead forecloses, her attempt to establish injury in fact and Article III standing here.

As the Court stated, “[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.’” Op. at 8. The Court emphasized in this regard that 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. Article III standing requires a concrete injury even in the context of a statutory violation.” Accordingly, the plaintiff “*could not, for example, allege a bare procedural violation, divorced*

from any concrete harm, and satisfy the injury-in-fact requirement of Article III.” Op. at 9-10 (emphasis added).¹

Here, Plaintiff has no “risk of real harm” and does not “satisfy the requirement of concreteness.” *Id.* at 10. Notwithstanding Congress’ desire in the FCRA to “curb the dissemination of false information” (or, in this case, the Michigan legislature’s desire to limit dissemination of certain truthful subscription information), because Plaintiff here alleges no concrete harm whatsoever, she “cannot satisfy the demands of Article III by alleging a bare procedural violation.” *Id.* As the Court made clear:

A violation of one of the FCRA’s procedural requirements may result in no harm. . . . [N]ot all inaccuracies cause harm or present any material risk of harm. An example that comes readily to mind is an incorrect zip code. It is difficult to imagine how the dissemination of an incorrect zip code, without more, could work any concrete harm.

Id. at 10-11.

The same is *a fortiori* true here: it is “difficult to imagine” how the dissemination of truthful subscription information “could work any concrete harm” and Plaintiff has not met her burden of showing why the alleged disclosure of her particular subscription information, even if it violated the statute, presents “any material risk of harm.” *Id.* at 11.

Certainly, the alleged disclosures here do not give rise to “harms” historically recognized by the common law of libel and slander (*id.* at 10); the “harm” Plaintiff alleges here is not just “difficult to prove or measure” (*id.*), it is non-existent. Nothing about the information at issue here is an injurious untruth, nor would its disclosure be actionable as an invasion of privacy under the common law -- otherwise Plaintiff would have asserted such a claim. To the contrary, the fact of her subscription is so patently *not* private that Plaintiff made it a matter of public record by filing this Complaint. And, although the Court’s decision focuses on the “concreteness” element of injury in fact, the other requirements of Article III injury in fact -- including that the alleged harm be “fairly traceable to the challenged conduct,” and not “conjectural or hypothetical” (Op. at 6-7, citing *Lujan v. Defenders of Wildlife*, 504 U. S. 555, 560-61 (1992)) -- are also not met by Plaintiff’s pleading, as Conde Nast showed in its Motion to Dismiss.

¹ This is not a case like those mentioned by the Court where *denial* of a “procedural right” granted by statute -- such as the right to obtain information from the government -- can be “sufficient in some circumstances to constitute injury in fact.” Op. at 10. In addition, to the extent Plaintiff continues to refer to other district court decisions that found standing under the VRPA, those decisions did not have the benefit of the Supreme Court’s purposeful and directed guidance in *Spokeo*, and can no longer be considered to have persuasive value.

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Thus, while the Court in *Spokeo* remanded for determination of whether the falsities alleged in that case “entail a degree of risk” of harm “sufficient to meet the concreteness requirement” (*id.* at 11), here there are no false statements or any other grounds for alleging a concrete “material risk of harm.” *Id.*; *cf.* dissenting op. of Ginsburg, J., at 5 (“Far from an incorrect zip code, Robins complains of misinformation about his education, family situation, and economic status, inaccurate representations that could affect his fortune in the job market”).

Accordingly, dismissal is in order on Article III standing grounds, and for the other reasons indicated in Defendant’s prior briefs and letters. Condé Nast respectfully requests that the Court inform the parties if it wishes additional briefing on this issue, so as to avoid any additional submissions without leave of Court.

Respectfully submitted,

/s/ Sandra D. Hauser

Sandra D. Hauser

cc (via CM/ECF system): All counsel of record