

**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK**

DENISE JAFFE and DANIEL ADLER,  
in their capacity as co-executors of Milton Adler's  
estate, on behalf of themselves and all others  
similarly situated,

Plaintiffs,

v.

BANK OF AMERICA, N.A.,

Defendant.

Civil Action No. 13-cv-4866 (VB)

DERECK WHITTENBURG and JACQUELINE  
WHITTENBURG, on behalf of themselves and  
all others similarly situated,

Plaintiffs,

v.

BANK OF AMERICA, N.A.,

Defendant.

Civil Action No. 14-cv-0947 (VB)

**MEMORANDUM OF LAW IN SUPPORT OF A FINDING BY THIS COURT  
THAT IT HAS SUBJECT MATTER JURISDICTION TO HEAR PLAINTIFFS' CLAIMS**

Plaintiffs respectfully submit this memorandum of law in response to this Court's May 4, 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 Plaintiffs do in fact have standing. Therefore, Plaintiffs respectfully request that the Court enter an Order reaffirming that it has subject matter jurisdiction in this matter.<sup>1</sup>

**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. 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.

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<sup>1</sup> Plaintiff appreciates that this Court's Order limited Plaintiffs' submission to a three page letter. Due to the important of this issue, Plaintiffs respectfully request *nunc pro tunc* permission to exceed the page limit.

*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. *See 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.”). That decision remains correct today.

**B. Plaintiffs’ Injuries Are Concrete And Particularized.**

Plaintiffs, 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>2</sup> That the intangible harm Plaintiffs suffered (not having their 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.

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

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<sup>2</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).

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 this Court has already held, “the 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 mortgagees’ 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 Plaintiffs’ have suffered a concrete deprivation and have standing.<sup>3</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>4</sup> As one Senator noted during the floor debate, expressing a sentiment that was not opposed, in explaining the justification for the 2005 amendments: “Let me say that in English. When you pay off your mortgage, you’re entitled to get some kind of receipt, documentation.” Exhibit 3 to Declaration of Christine B. Cesare, Docket No. 17-3 at 1 (attached hereto as Exhibit 1). In other words, “we’re just trying to give people a remedy for when they

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<sup>3</sup> *C.f.*, *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.”)

<sup>4</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.”).

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 Declaration of Christine B. Cesare, Docket No. 22-3 at 5 (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.

Cesare Dec. Ex. 3, Docket No. 22-3 at 6 (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 Plaintiffs have standing to pursue their claims. *See Massachusetts v. E.P.A.*, 549 U.S. 497, 516-17 (2007) ("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.”) (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>5</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).

Plaintiffs’ injuries are not based on “a bare procedural violation, divorced from any concrete harm.” *Spokeo*, 2016 WL 2842447, at \*7. Nor is the case at bar 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. To the contrary, the concrete harm is the violation of the right to

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<sup>5</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.

have a recorded mortgage timely discharged, and the violation is of the procedure designed to ensure timely presentments. Thus, the procedural 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 Plaintiffs therefore have 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.”).

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 plaintiffs have suffered a judicially cognizable injury.

**C. Because The Preliminary Approval Order And The Settlement Agreement Provides For This Court's Continuing Jurisdiction, It Has Ancillary Jurisdiction To Oversee The Settlement Process And Adjudicate Its Propriety Even If *Spokeo* Is Overturned.**

Even if this Court determines that, as a result of *Spokeo*, its prior determination that Plaintiffs have standing was erroneous (which is not the case), this Court retains ancillary jurisdiction to effectuate and oversee the parties' settlement. It is well settled that a court retains jurisdiction to resolve ancillary matters even when the underlying case was dismissed for want of jurisdiction. As the Second Circuit explains, “[w]henver a district court has federal jurisdiction over a case, it retains ancillary jurisdiction after dismissal to adjudicate collateral matters such as attorney's fees . . . ‘For example, district courts may award costs *after an action is dismissed for want of jurisdiction.*’” *In re Austrian & German Bank Holocaust Litig.*, 317 F.3d 91, 98-99 (2d Cir. 2003) (quoting *Cooter & Gell v. Hartmarx*, 496 U.S. 384, 395 (1990) (emphasis added)).

A court's ancillary jurisdiction extends to supervising and effectuating a settlement, even when the underlying action has been dismissed and the court has no jurisdiction over the dismissed suit, so long as the court's order or the parties agreement provide for the court's continuing jurisdiction over the settlement. As the Second Circuit held in *Cameron Int'l Trading Co. v. Hawk Importers, Inc.*, 501 F. App'x 36 (2d Cir. 2012):

Here, the district court so-ordered not only the Stipulation of Dismissal, but also the Agreement, which expressly provided for continued exclusive federal jurisdiction . . . Hawk asserts that federal courts lack ancillary jurisdiction to grant a motion to enforce unless it is adequately connected to the initial phase of the litigation. This argument, however, misunderstands the law. *Kokkonen* . . . held that ancillary jurisdiction may be asserted . . . “to enable a court to function successfully, that is, to manage its proceedings, vindicate its authority, and effectuate its decrees.” *Kokkonen*, 511 U.S. at 379-80, 114 S. Ct. 1673. In this case, ancillary jurisdiction over Cameron's motion to enforce is appropriate because it is necessary for the district court to effectuate its order, that is, the Agreement that Judge Seybert so-ordered. Accordingly, whether the claims are “factually interdependent” is irrelevant. *Id.*

*Id.* at 37 (quoting *Kokkonen v. Guardian Life Ins. Co. of America*, 511 U.S. 375, 377 (1994)).

*See also Chesley v. Union Carbide Corp.*, 927 F.2d 60, 65 (2d Cir. 1991) (“Ancillary jurisdiction to determine attorney's fees has also been exercised after a party voluntarily discontinued a litigation . . . or took concessionary measures that *mooted the case.*”) (emphasis added; citation omitted).

Here, Paragraph 32 of the Preliminary Approval Order entered by this Court on March 4, 2016 (at a time the Court plainly had jurisdiction), states “[t]he Court retains exclusive jurisdiction over the Actions to consider all further matters arising out of or connected with the Settlement Agreement and the Settlement embodied therein.” Adler, Dkt. No. 92. The Settlement Agreement at Section 12.7 also provides for the Court's continuing jurisdiction. Adler Dkt. No. 89-1 at 45 (“The administration and consummation of the Settlement as

embodied in this Agreement shall be under the authority of the Court, and the Court shall retain jurisdiction for the purpose of entering orders enforcing the terms of this Agreement and the administration of the Settlement.”). *See also* Section 12.21 at 50 (“Although the Court shall enter a judgment, the Court shall retain jurisdiction”).

As this Court has ancillary jurisdiction to effectuate and approve the Settlement, regardless of the significance of *Spokeo*, Plaintiffs respectfully requests that this Court should retain its jurisdiction until this case is complete.

### **CONCLUSION**

Because *Spokeo* does not change the law regarding standing, and because this Court retains ancillary jurisdiction regardless of the effect that *Spokeo* has on Plaintiffs’ standing, Plaintiffs respectfully request that the Court enter an Order reaffirming that it has subject matter jurisdiction in this matter.

Respectfully submitted,

Dated: May 20, 2016

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