

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

DENISE GRAHAM, on her own behalf
and all similarly situated individuals,

Plaintiff,

v.

CASE NO.: 8:16-cv-1324-T-30UAM

PYRAMID HEALTHCARE SOLUTIONS,
INC.,

Defendant.

_____ /

**PLAINTIFF'S RESPONSE IN OPPOSITION
TO DEFENDANT'S MOTION TO DISMISS**

COMES NOW, Plaintiff DENISE GRAHAM, on her own behalf and all similarly situated individuals, and responds in opposition to Defendant's Motion to Dismiss.

INTRODUCTION

Consumer reports contain a wealth of private information and can have life-changing consequences for applicants and employees. Recognizing the dangers these impersonal commercial reports can pose, Congress passed the Fair Credit Reporting Act ("FCRA") and sharply limited the circumstances in which an employer may obtain a background report. Congress made it illegal for employers to obtain background reports unless certain procedural safeguards were followed. Before obtaining a consumer report, an employer must provide a conspicuous, stand-alone disclosure that a report will be procured if authorized by the applicant or employee, and then obtain the applicant or employee's written authorization. The FCRA's requirements are clear and unambiguous.

Plaintiff has alleged Defendant deviated from the requirements of the FCRA by obtaining reports on Plaintiff without providing Plaintiff, or the class, with the information Congress

deemed important for them to receive, in the manner and format directed by Congress. Plaintiff alleges Defendant illegally obtained the reports, thereby invading Plaintiff's and the class members' privacy. Similarly, by failing to make the required disclosures, Defendant deprived Plaintiff of information Congress deemed important for them to receive, causing informational injury.

Defendant argues Plaintiff lacks standing and the case should be dismissed on the basis of the Supreme Court's decision in *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540 (2016). Defendant's reliance upon *Spokeo* is misplaced. *Spokeo* did not create new law giving Defendant and others carte blanche to violate rights created by Congress without consequence. The *Spokeo* decision simply reiterated that, to have standing, a plaintiff must show an injury that is *both* particularized *and* concrete. The Court reaffirmed well-established Article III standing principles — that “intangible injuries can nevertheless be concrete,” and that “[i]n determining whether an intangible harm constitutes injury in fact, both history and the judgment of Congress play important roles.” *Spokeo*, at 1549. *Spokeo* changes nothing with respect to this case. *Spokeo* explicitly affirmed that intangible injuries are sufficiently concrete to confer standing. Invasion of privacy and the deprivation of information to which a plaintiff has a congressionally-established right are examples of such concrete injuries. *Id.* Additional harm, economic or otherwise, is not required. *Id.*

Plaintiff and the putative class have alleged Defendant invaded their privacy and caused them informational injury, actionable as a violation of §§ 1681b(b)(2)(A)(i) and 1681b(b)(2)(A)(ii) of the FCRA. Plaintiff and the putative class had standing pre-*Spokeo* and still have standing post-*Spokeo*. Post-*Spokeo* the Eleventh Circuit Court of Appeals has held violation of a right created by Congress gives rise to a “concrete” injury even if no economic or

physical harm ensued. *Church v. Accretive Health*, No. 15-15708, 2016 WL 3611543 (11th Cir. July 6, 2016). The *Moody* court in the Southern District of Florida reached the same conclusion in a case with facts nearly identical to this case. *Moody v. Ascenda USA, Inc.*, Case No. 0:16-cv-60364-WPD (S.D. Fl. Oct. 5, 2016)(rejecting Defendant’s motion to dismiss, finding plaintiffs alleging failure to make proper disclosures in the format required by §§ 1681b(b)(2)(A)(i) and 1681b(b)(2)(A)(ii) had Art. III standing).

Moreover, even if Plaintiff lacked standing, Defendant’s request that the case be dismissed is completely unwarranted. Plaintiff originally filed this case in state court. Defendant removed the action to this Court. If this Court finds Article III standing is lacking, the case should be remanded, not dismissed. *See* 28 U.S.C.A Sec 1147(c).

For all these reasons, Defendant’s motion should be denied.

STATUTORY BACKGROUND

Congress Enacted the FCRA to Protect Consumers’ Right to Privacy and Information

Congress enacted the Fair Credit Reporting Act in 1970 to protect the “consumer’s right to privacy” by ensuring “the confidentiality, accuracy, relevancy, and proper utilization” of consumer credit information. 15 U.S.C. § 1681(b). And, recognizing the “vital role” that consumer reports play in the modern economy, Congress sought to encourage those handling the sensitive information in those reports to “exercise their grave responsibilities” in a way that “ensure[s] fair and accurate credit reporting.” 15 U.S.C. § 1681(a); *Robinson v. Equifax Info. Servs., LLC*, 560 F.3d 235, 239 (4th Cir. 2009). The FCRA fosters these purposes through a set of interlocking requirements—including strict restrictions on the use of reports for various purposes and detailed requirements about how consumers must be informed of their rights.

The FCRA was created in response to the impact of third-party data collection on the employment market and particularly on individual job seekers. When it passed the FCRA, Congress voiced a strong “concern[]” that “permit[ting] employers to obtain consumer reports pertaining to current and prospective employees . . . may create an improper invasion of privacy.” S. Rep. No. 104-185, at 35 (1995). As one legislator explained, the FCRA’s protections represented “new safeguards to protect the privacy of employees and job applicants”; the Act as a whole, he continued, was “an important step to restore employee privacy rights.” 140 Cong. Rec. H9797-05 (1994) (Statement of Congressman Vento); *see also* 138 Cong. Rec. H9370-03 (1992) (Statement of Congressman Wylie) (stating that the FCRA “would limit the use of credit reports for employment purposes, while providing current and prospective employees additional rights and privacy protections”).

As a result, under the FCRA, an employer must disclose to a job seeker that “a consumer report may be obtained for employment purposes” and must obtain authorization from a consumer before procuring his or her consumer report. *See* 15 U.S.C. § 1681b(b)(2). And, to ensure that prospective employees are adequately informed about their rights concerning these consumer reports, the FCRA requires that this information be provided “in a document that consists solely of the disclosure.” *Id.* § 1681b(b)(2)(A). This is commonly known as the “stand alone disclosure requirement.” Absent the job seeker’s informed consent or strict compliance with the statute’s disclosure requirements, it is flatly illegal for a company to obtain a job applicant’s consumer report for employment purposes - a point Congress hammered home by criminalizing the acquisition of a consumer report under false pretenses. 15 U.S.C. § 1681q.

FACTUAL BACKGROUND

Plaintiff, Denise Graham, applied for employment with Defendant in October, 2015. (Amended Complaint, DKT. 18, ¶ 12). Defendant offered Plaintiff employment, subject to Plaintiff's successful completion of a background check. Thereafter, Defendant obtained Plaintiff's background check from a consumer reporting agency. *Id.* ¶ 12-16. Based upon the results of the background check, Defendant rescinded its job offer. Defendant never provided Plaintiff the pre-adverse action notice required by the FCRA and Plaintiff was never given the opportunity to address the inaccuracies contained within the background report. *Id.* ¶ 17.

Defendant failed to comply with 15 U.S.C. § 1681b(b)(2)(A)(i)'s requirement of a stand-alone disclosure. In particular, Defendant provided Plaintiff with a form titled Background Check Disclosure and Authorization (Disclosure Form – attached hereto as Exhibit A) (“Disclosure Form”). The Disclosure Form violated the FCRA by containing extraneous information. Defendant's Disclosure Form included numerous items of information and authorizations that are unrelated to the disclosure, including the business logo of BIS, the consumer reporting agency; blank lines for “Organization Name” and “Account”; a reference to an unidentified “Organization”; the name and address and phone number of the consumer reporting agency; a false statement that a copy of “A Summary of Your Rights Under the FCRA” was attached; various disclosures relating to state law that are irrelevant and unrelated to the disclosure required under federal law; several purported authorizations that are directed to various agencies, such as law enforcement agencies, state and federal agencies, the military, schools, and other entities to release private records. *Id.* These authorizations purport to waive important rights that the job applicants would otherwise enjoy under state and federal law. *Id.* These authorizations operate as a functional waiver of rights, which numerous courts, and the

Fair Trade Commission (“FTC”), have concluded that including them with the FCRA disclosure violates the stand-alone disclosure requirement.¹

Based on these violations, Plaintiff asserts claims for statutory damages under the FCRA. Plaintiff alleges she and the putative class suffered a concrete harm because they were deprived of a disclosure in a document consisting “solely” of the disclosure to which they have a statutory entitlement. Defendant inflicted an informational injury on Plaintiff, and invaded her privacy. *Id.* Consumer reports contain private information about an individual (which frequently is inaccurate or incomplete), and Congress has set specific conditions to be satisfied before employers access that information. As Defendant failed to satisfy those conditions, Defendant had no legal right to access or use Plaintiff’s report, and, in doing so, obtained personal information to which it had no legal right.

Plaintiff initially filed this action in the Circuit Court of Pinellas County, Florida. Defendant removed the action to the United States District Court of the Middle District of Florida. Defendant then moved to stay this matter pending *Spokeo*, a motion this Court granted. (ECF No. 22.) Defendant now brings this motion, which should be denied.

ARGUMENT

Spokeo and Art. III Standing

To have standing to bring a claim in federal court, the plaintiff must first have suffered an injury in fact. This requirement has two components: the injury must be both (1) particularized, and (2) concrete. Defendant does not contest that the injury suffered by Plaintiff is

¹ *Moore v. Rite Aid Hdqtrs Corp.*, No. CIV.A. 13-1515, 2015 WL 3444227, at *12 (E.D. Pa. May 29, 2015) (“the inclusion of information on the form apart from the disclosure and related authorization violates § 1681b(b)(2)(A).”); *Speer v. Whole Food Mkt. Grp., Inc.*, No. 8:14-CV-3035-T-26TBM, 2015 WL 1456981, at *3 (M.D. Fla. Mar. 30, 2015) (plaintiff had stated a claim when he alleged that “the inclusion of the waiver along with the disclosure violated the FCRA”); *Milbourne v. JRK Residential Am., LLC*, F. Supp. 3d, No. 3:12-cv-861, 2015 WL 1120284, at *6 (E.D. Va. Mar. 10, 2015) (“inclusion of a waiver within the document containing the disclosure would violate [the FCRA].”); *Jones v. Halstead Mgmt. Co., LLC*, F. Supp. 3d, No. 14-CV-3125 VEC, 2015 WL 366244, at *5 (S.D.N.Y. Jan. 27, 2015); *Miller v. Quest Diagnostics*, No. 2:14-cv-4278, F. Supp. 3d, 2015 WL 545506, at *3 (W.D. Mo. Jan. 28, 2015).

sufficiently “particularized.” Defendant does not contend that Plaintiff has failed to satisfy the other tests required for standing. Instead, Defendant argues that Plaintiff has not suffered a “concrete” injury.

Alleging a concrete injury is not a daunting task. The Court in *Spokeo* distilled several “general principles” from its prior cases, without either going beyond or disavowing them. *Spokeo*, at 1549. First, it acknowledged that, although tangible injuries (like physical or economic harm) are “perhaps easier to recognize” as concrete injuries, “intangible injuries can nevertheless be concrete,” as can injuries based on a “risk of harm.” *Id.* Second, “[i]n determining whether an intangible harm constitutes injury in fact, both history and the judgment of Congress play important roles.” *Id.* So if the “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”— or, in fewer words, if “the common law permitted suit” in analogous circumstances — the plaintiff has suffered a concrete injury. *Id.*; *see also Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83, 102 (1998). Third, Congress can elevate a violation of procedural rights to a concrete injury if the rights at issue protect against an identified harm. As a result, Plaintiff is not required to present a common-law analogue to establish a concrete injury because the Court reaffirmed that Congress has the power (and is “well positioned”) “to identify intangible harms that meet minimum Article III requirements,” even if those harms “were previously inadequate in law.” *Spokeo*, at 1549. A “person who has been accorded a procedural right to protect his concrete interests” has standing to assert that right “without meeting all the normal standards for redressability and immediacy.” *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 572 n.7 (1992). However, “a bare procedural violation, divorced from any concrete harm” identified by Congress, will not give rise to an Article III injury. *Id.* at 1549.

Importantly, none of these principles are new.² The Court in *Spokeo* did not even apply these principles to the facts before it, remanding the case to the Ninth Circuit as the previous analysis was “incomplete” because it had “overlooked” concreteness. The Court offered no assessment of the Ninth Circuit’s analysis, aside from noting that the Ninth Circuit had not analyzed concreteness as a separate step in the standing inquiry.

In this case, Defendant cannot argue *Spokeo* made any meaningful new law because it hasn’t. A “bare procedural violation, divorced from any concrete harm” is not enough to confer standing. It never has been. *Id.* at 1549 (quoting *Summers v. Earth Island Institute*, 555 U.S. 488, 496 (2009)). The fact that *Spokeo* broke no new ground is fatal to Defendant’s motion.

Violating A Statute That Establishes Substantive Rights Still Confers Art. III Standing

Congress has determined failure to comply with the FCRA causes a material risk of harm to consumers, which is sufficient by itself to confer standing. The Eleventh Circuit’s post-*Spokeo* holding in *Church* illustrated in the context of the FDCPA, holding an injury-in-fact for Article III purposes occurs when a congressionally created right is violated. The court noted:

In *Spokeo*, the Court stated that a plaintiff cannot satisfy the demands of Article III by alleging a bare procedural violation. *Spokeo*, 136 S.Ct. at 1550. This statement is inapplicable to the allegations at hand, because Church has not alleged a bare procedural violation. Rather Congress provided Church with a substantive right to receive certain disclosures and Church has alleged Accretive Health violated that substantive right.

² Indeed, many commentators have noted that *Spokeo* did nothing other than reiterate already established principles. See, e.g., *Thomas*, slip op. at 11 (“*Spokeo* did not change the basic requirements of standing”); Arthur Bryant, No New Law in ‘*Spokeo*’—And That’s Big News, National Law Journal (July 25, 2016), <http://www.nationallawjournal.com/id=1202763447043>; Amy Howe, Opinion analysis: Case on standing and concrete harm returns to the Ninth Circuit, at least for now, SCOTUSblog (May 16, 2016), <http://bit.ly/1TB3vdl> (describing *Spokeo* as a “narrow” decision); Daniel J. Solove, *Spokeo, Inc. v. Robins: When Is a Person Harmed by a Privacy Violation?*, Geo. Wash. L. Rev. On the Docket (May 19, 2016), <http://bit.ly/20fyAmS>.

Church, 21 WL 3611543, *4, N.2.; See also *Dickens v. GC Services Limited Partnership*, 2016 WL 3917530, *2 (M.D. Fla., July 20, 2016, Judge Moody)(Denying motion to dismiss FDCPA claim for lack standing for failure to show injury in fact, citing *Spokeo* and *Church* for proposition that violation of a right bestowed by congress is a concrete injury). The *Church* holding aligns with the Eleventh Circuit's pre-*Spokeo* holding in *Palm Beach Golf Center-Boca, Inc. v. Sarris*, 781 F.3d 1245 (11th Cir. 2015). In *Palm Beach Golf Center-Boca, Inc.*, plaintiff alleged she received a junk fax in violation of the TCPA. The Court held Article III standing existed solely based upon Plaintiff's allegations Defendant had violated his rights pursuant to the TCPA by sending a junk fax to his office. *Palm Beach Golf Center-Boca, Inc.*, 781 F.3d at 1251 ("Thus, where a statute confers new legal rights on a person, that person will have Article III standing to sue where the facts establish a concrete, particularized, and personal injury to that person as a result of the violation of newly created rights.")

Violations of 15 USC 1681(b)(b)(2) Are Violations of Substantive Rights

Before and after *Spokeo*, courts have found Article III standing exists in cases alleging violations of §1681(b)(b)(2). The *Moody* court in the Southern District of Florida issued a recent order conferring Article III standing to plaintiffs alleging violations of 15 U.S.C. § 1681b(b)(2). In *Moody*, the court held violations of 5 U.S.C. § 1681b(b)(2) violate substantive rights based upon the concepts of informational injury and invasion of privacy:

§ 1681b(b)(2) establishes two rights. First, it establishes a right to specific information in the form of a clear and conspicuous disclosure. The statutory requirement that the disclosure be made in "a document that consists solely of the disclosure" helps to implement the textual command that the disclosure be clear and conspicuous. Second, § 1681b(b)(2) establishes a right to privacy in one's consumer report that employers may invade only under stringently defined circumstances. *Those protections are clearly substantive, and neither technical nor procedural.*

Citing *Thomas v. FTS USA*, 2016 WL 3653878 at *7 (E.D. Va. June 30, 2016).

Because the FCRA's disclosure requirement is substantive in nature, a plaintiff alleging his rights have been violated need not allege more consequential harm. In *Thomas v. FTS USA*, 2016 WL 3653878 (E.D. Va., June 30, 2016), the court characterized the stand-alone disclosure requirement as "clearly substantive":

In these situations, legal rights reflect social judgments about where harm has and has not occurred. Often, these kinds of injuries exist where we think the harm is in the act itself. The public disclosure of private information or defamatory falsehoods does not need downstream consequences to be hurtful; neither does differential treatment on the basis of race. Procedural wrongs are an oft-seen category where the distinction between the legal violation and the injury may be so thin as to be essentially nonexistent. Proving the injury in many of these cases just entails proving the violation itself. ... As a result, requiring some sort of additional indicia of harm beyond the violation itself ignores the nature of the injury and the reason for the remedy.

Thomas, at *6 (quoting *Who Should Define Injuries For Article III Standing?*, 68 STAN L. REV. ONLINE 76, 80-81 (2015)). See *Thomas*, at *10 ("Therefore, where a consumer alleges, as Thomas has here, that he or she has received a disclosure that does not satisfy those requirements, the consumer has alleged a concrete informational injury"); *Meza v. Verizon Communications, Inc.*, slip copy, 2016 WL 4721475, *3 (Sep. 9, 2016 E.D. California)(allegations of violations of 1681b(b)(2)(a) are sufficient to allege invasion of privacy and informational injury, both of which are "concrete" injuries); *Manuel v. Wells Fargo Bank, Nat. Ass'n*, 123 F. Supp. 3d 810, 817-18 (E.D. Va. 2015) (holding plaintiffs had Article III standing in a case alleging a violation of § 1681b(b)(2), because defendant failed to provide plaintiff with the "kind of disclosure" that the FCRA "guarantees" before "procur[ing] a consumer report containing his information."); *Panzer v. Swiftships, LLC*, No. 2:15-cv-2257, ECF No. 27 at 11-12 (E.D. La. Oct. 23, 2015) (finding plaintiff had standing based upon informational injury when defendant failed to comply with § 1681b(b)(2)); *Ryals v. Strategic*

Screening Solutions, Inc., 117 F. Supp. 3d. 746, 753 (E.D. Va. 2015) (finding standing where, like here, the plaintiff alleged “that he did not receive the required information at the required time, as required by the FCRA”).

Violations of 15 U.S.C. § 1681b(b)(2) Are Invasions of Privacy Causing Concrete Injury

By failing to comply with 15 U.S.C. § 1681b(b)(2), Defendant obtained a report when it had no legal right to do so, thereby invading Plaintiff’s privacy. “[A] person may not procure a consumer report, or cause a consumer report to be procured, for employment purposes with respect to any consumer, unless” it complies with the disclosure and authorization requirements. 15 U.S.C. § 1681b(b)(2)(A). “Defendant’s procurement and subsequent use of Plaintiff’s consumer report, which contained personal information, was “unlawful.” Defendant may argue Plaintiff suffered “no harm” but that is simply not accurate. Defendant invaded Plaintiff’s privacy, an established concrete harm. Specifically, invasion of privacy is a “harm that has traditionally been regarded as providing a basis for a lawsuit in English or American courts,” and thus is a cognizable injury for standing purposes. *Spokeo*, slip op. at 1549. For more than a century, American courts have recognized that “[o]ne who invades the right of privacy of another is subject to liability for the resulting harm to the interests of the other.” Restatement (Second) of Torts § 652A (1977); *see id.* cmt. a (noting that “the existence of a right of privacy is now recognized in the great majority of the American jurisdictions”). In his seminal 1890 article, Justice Brandeis explained that “what is ordinarily termed the common-law right to intellectual and artistic property are...but instances and applications of a general right to privacy.” Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 Harv. L. Rev. 193, 198 (1890). American courts at the turn of the century identified the right of privacy as “derived from natural

law.” *Pavesich v. New England Life Ins. Co.*, 50 S.E. 68, 70 (Ga. 1905). Harm to an individual’s privacy has been regarded as a basis for suit.

The provisions of the FCRA relevant to this case were enacted to safeguard the privacy rights of applicants and employees. When it passed the FCRA, Congress voiced a strong “concern[s]” that “permit[ting] employers to obtain consumer reports pertaining to current and prospective employees ... may create an improper invasion of privacy.” S. Rep. No. 104-185, at 35 (1995). The FCRA “sought to protect the privacy interests of... potential employees by narrowly defining the proper usage of these reports and placing strict disclosure requirements on employers.” *Kelchner v. Sycamore Manor Health Ctr.*, 305 F. Supp. 2d 429, 435 (M.D. Pa. 2004), *aff’d*, 135 F. App’x 499 (3d Cir. 2005). The FCRA’s employment-specific provisions go beyond the general privacy protections of the Act—requiring employers to demonstrate a permissible purpose, provide a stand-alone disclosure form, and gain written authorization from the consumer. These provisions demonstrate that Congress intended to allow consumers to make an informed choice over whether employers could view their reports. The FCRA’s protections represented “new safeguards to protect the privacy of employees and job applicants;” the Act as a whole, was “an important step to restore employee privacy rights.” 140 Cong. Rec. H9797-05 (1994).

The disclosure requirement at issue here is contained in § 1681b, titled “Permissible Purposes of Consumer Reports.” Section 1681b(b)(2) requires employers to disclose to job seekers that “a consumer report may be obtained for employment purposes.” After providing such a disclosure, employers must also obtain written authorization from the consumer before procuring his or her consumer report. To ensure that prospective employees are informed about their rights, the FCRA requires that the disclosure be “clear and conspicuous” and provided “in a

document that consists *solely of the disclosure.*” *Id.* § 1681b(b)(2)(A), *i.e.* the “stand alone disclosure” requirement. Absent the job seeker’s informed consent, it is illegal for a company to obtain a job applicant’s consumer report for employment purposes—a point Congress hammered home by criminalizing the acquisition of a consumer report under false pretenses. 15 U.S.C. § 1681q.

In common law terms, an employer that buys a background report without a legal basis to do so has invaded the individual’s privacy. “[A] person may not procure a consumer report, or cause a consumer report to be procured, for employment purposes with respect to any consumer, unless” it complies with the disclosure and authorization requirements. 15 U.S.C. § 1681b(b)(2)(A). “The FCRA makes it unlawful to ‘procure’ a report without first providing the proper disclosure and receiving the consumer’s written authorization.” *Harris v. Home Depot U.S.A., Inc.*, 114 F. Supp. 3d 868, 869 (N.D. Cal. 2015).

Even if Plaintiff’s claims were not precisely cognizable at common law, the Supreme Court explained in *Spokeo* that “Congress may ‘elevat[e] to the status of legally cognizable injuries concrete, de facto injuries that were previously inadequate in law.’” *Spokeo*, at 154 9 (quoting *Lujan*, 504 U.S., at 578). Here, Congress recognized that employers’ procurement of consumer reports without adequate disclosure violated the privacy rights of applicants and employees. Therefore, Congress enacted the FCRA to address the common-law right to privacy in the context of the modern world, including the prevalence of CRAs whose sole function is to sell reports about job applicants to prospective employers. Just as Plaintiff would have had certain privacy rights at common law, through the enactment of the FCRA, Congress codified rights in the specific context of CRAs selling reports for employment purposes. Plaintiff has pled that Defendant unlawfully obtained reports on them in a manner that disregarded the bounds of

privacy established by Congress. Plaintiff has therefore pled a privacy injury that is sufficiently concrete “to constitute injury in fact.” *Spokeo*, at 1549; *Moody*, case No. 0:16-cv-60364-WPD (S.D. Fla. Oct. 5, 2016); *Thomas*, 2016 WL 3653878 (E.D. Va.).

Post-*Spokeo*, numerous district courts and one circuit court have found Article III standing post- *Spokeo* in analogous circumstances. *Boelter v. Hearst Commc'ns, Inc.*, F. Supp. 3d, 2016 WL 3369541, at *3 (S.D.N.Y. June 17, 2016) (plaintiffs suffered a concrete injury in fact when defendant sold plaintiffs’ information to third parties in violation of the Video Privacy Protection Act); *Potocnikv. Carlson*, 0:13-cv-02093, ECF No. 198 (D. Minn. July 15, 2016) (standing existed in case regarding unauthorized access to plaintiff’s driver’s license record). The Third Circuit stated in its first post-*Spokeo* opinion that “when it comes to laws that protect privacy, a focus on economic loss is misplaced.” *In re: Nickelodeon Consumer Privacy Litigation*, No. 15-1441, slip op. at 21 (June 27, 2016). The court found that plaintiffs who alleged that a third party had disclosed information Congress deemed private had standing under Article III, despite lack of consequential harm:

While perhaps “intangible,” the harm is also concrete in the sense that it involves a clear de facto injury, i.e., the unlawful disclosure of legally protected information. Insofar as *Spokeo* directs us to consider whether an alleged injury-in-fact “has traditionally been regarded as providing a basis for a lawsuit,” *Google* noted that Congress has long provided plaintiffs with the right to seek redress for unauthorized disclosures of information that, in Congress’s judgment, ought to remain private. Accordingly, we conclude that the plaintiffs have alleged facts which, if true, are sufficient to establish Article III standing.

Id. at 25 (citing *In re Google Inc. Cookie Placement Consumer Privacy Litig.*, 806 F.3d 125 (3d Cir. 2015)).

The legislative history of § 1681b(b)(2) of the FCRA clearly demonstrates that Congress sought to protect consumer privacy by requiring consumers to be clearly informed that an employer would procure a consumer report on them, and to provide written consent thereto.

Defendant's violation FCRA's requirements invaded Plaintiff's privacy, concretely injured her, and conferred Article III jurisdiction on this Court.

Violations of 15 U.S.C. § 1681b(b)(2) Are Concrete Informational Injuries

There is no question Plaintiff has suffered a concrete privacy injury and therefore has established standing. However, Plaintiff has also suffered informational injury. Plaintiff has alleged that Defendant deprived Plaintiff of information she was entitled to receive. *Spokeo* explicitly embraced informational injuries as the kinds of injuries which are sufficient to confer standing "without more." Noting that the "plaintiff need not allege any additional harm beyond the one which Congress has identified," the Court cited two cases which held that statutory violations, without more, constituted injury in fact: *Fed. Election Comm'n v. Akins*, 524 U.S. 11 (1998) and *Pub. Citizen v. U.S. Dep't of Justice*, 491 U.S. 440 (1989). *Spokeo*, at 1549. In both cases, the Court rejected the idea that plaintiffs who were deprived of information they were entitled to receive had to demonstrate an additional injury. Instead, the deprivation of information sufficed.

In *Public Citizen*, non-profit groups sued for access to records related to the American Bar Association's ("ABA") participation in the federal judicial nomination process, arguing that the ABA's involvement in that process brought it under the ambit of the disclosure requirements of the Federal Advisory Committee Act ("FACA"), 5 U.S.C. § APP. 2 § 1, *et seq.* In addition to disputing the merits, the ABA challenged the groups' standing. The ABA argued that the plaintiffs had not "alleged injury sufficiently concrete and specific to confer standing." 491 U.S. at 448. The Supreme Court soundly rejected that argument, holding that "refusal to permit appellants to scrutinize the ABA Committee's activities to the extent FACA allows constitutes a sufficiently distinct injury to provide standing to sue." *Id.* at 449. Importantly, the Court did not

require the plaintiffs to demonstrate some additional injury beyond not being able to access the information to which they had a right. Plaintiffs were not required to show they lost money, or faced the risk of any other consequence as a result of not having the information to which they were entitled. Instead, the injury was coterminous with the violation of the statutory right. The injury the Court identified was not being able to access the information “to the extent the [law] allows.” *Id. Akins* entailed the same analysis. In that case, the Court 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.” 524 U.S. at 11, 21 (citing *Public Citizen*).

Also instructive is *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982), which involved “testers” applying for housing they had no intention of ever living in for the purpose of determining whether the defendant-realtor would provide legally required disclosures. The Court described the tester as having no “intention of buying or renting a home” and said that he “fully expect[ed] that he would receive false information,” *id.* at 373-374. In other words, the tester suffered no tangible injury. Nonetheless, the Court held that “[a] tester who has been the object of a misrepresentation made unlawful under [the statute] has suffered injury in precisely the form the statute was intended to guard against, and therefore has standing.” *Id.*

In *Akins*, *Public Citizen*, and *Havens*, plaintiffs had standing despite the fact that they (1) had suffered no monetary damages or other consequential harm, and (2) would not have had any entitlement to the information at issue absent Congress creating that entitlement by statute. The same is true in this case. Post-*Spokeo*, the Seventh Circuit recently determined Art. III standing existed where Plaintiff alleged a “colorable claim” he was deprived information to which he was legally entitled. *Carlson v. United States of America*, 2016 WL 4926180 (7th Cir. Sept. 15, 2016). In the instant case, Plaintiff has certainly pled more than a “colorable” claim and Defendant has

conceded it did not provide Plaintiff with a “stand alone” disclosure form. *See also, Charvat v. Mut. First Fed. Credit Union*, 725 F.3d 819, 823 (8th Cir. 2013) (finding informational injury created standing to pursue statutory damages claim under Electronic Funds Transfer Act, where ATM was missing required disclosure sticker, noting that “[decisions by this Court and the Supreme Court indicate that an informational injury alone is sufficient to confer standing, even without an additional economic or other injury.”); *Heartwood, Inc. v. U.S. Forest Serv.*, 230 F.3d 947, 952 n. 5 (7th Cir. 2000); *Doe v. Pub. Citizen*, 749 F.3d 246, 263 (4th Cir. 2014) (observing that “[t]he Supreme Court consistently has held that a plaintiff suffers an Article III injury when he is denied information that must be disclosed pursuant to a statute”); *Alvarez v. Longboy*, 697 F.2d 1333, 1338 (9th Cir. 1983) (migrant workers demonstrated Article III standing by alleging they had been deprived of a written disclosure they were entitled to receive pursuant to the Farm Labor Contractor Registration Act); *Grant ex rel. Family Elder care v. Gilbert*, 324 F.3d 383, 387 (5th Cir. 2003); *Ctr. for Biological Diversity, Inc. v. BP Am. Prod. Co.*, 704 F.3d 413, 429 (5th Cir. 2013); *Byrd v. U.S. E.P.A.*, 174 F.3d 239, 243 (D.C. Cir. 1999); *Earth Island Inst. v. Ruthenbeck*, 490 F.3d 687, 693 (9th Cir. 2007), *aff’d in part, rev’d in part sub nom. Summers*, 555 U.S. at 488. *Spokeo* does nothing to undermine the conclusions of these circuits. By citing *Public Citizen* and *Akins* with approval, and for the explicit proposition that statutory injuries can, without more, confer Article III standing, the Supreme Court in *Spokeo* merely reinforced existing law.

Defendant’s disclosure violations also correspond with longstanding claims at common law. For instance, the common law often recognizes heightened disclosure requirements in the case of transactions between parties in a confidential or fiduciary relationship; transactions concerning the acquisition of insurance, surety, or a release from liability; transactions in which

the parties have unequal access to information; and transactions concerning the transfer of real property, among others. *See* Kathryn Zeiler & Kimberly D. Krawiec, *Common-law Disclosure Duties and the Sin of Omission*, 91 Va. L. Rev. 1795-1882 (2005). Congress's decision to expand the circumstances in which heightened disclosures are required, or to allow the recovery of statutory damages in lieu of proving actual damages to the certainty required in litigation, does not negate the fact that courts have historically recognized disclosure violations as conferring cognizable injuries which can be remedied in federal courts.

Defendant's failure to provide Plaintiff the information it was required to provide her, in the format it was required to provide it, caused informational injury, concretely injured her, and conferred Article III jurisdiction on this Court.

Defendant's Arguments Have Already Been Rejected by the Eleventh Circuit

Defendant argues its FCRA violation is only a "bare procedural violation." In essence, Defendant is moving the Court to disregard the plain language of a federal statute and the precedent set forth by the Supreme Court, the Eleventh Circuit and countless district courts. Congress created rights to receive certain information, namely FCRA disclosures, in a *stand-alone form*, unburdened by extraneous information. Concomitantly, Congress also created a new injury - not receiving the FCRA disclosure in a stand-alone form. Regardless of what Defendant argues, Defendant has violated the FCRA and Plaintiff has alleged injury for purposes of Article III standing. Defendant argues *Church* is distinguishable because the issue in *Church* was whether Defendant provided enough information, as opposed to the instant case, where too much information was provided. Defendant fatally ignores the principals reaffirmed in *Spokeo*, previously articulated in *Palm Beach Golf Centers-Boca*, followed in *Church* and reiterated in *Moody*. Specifically, Congress has authority to bestow a substantive right upon consumers and a

violation thereof creates a concrete injury that satisfies the injury-in-fact requirement. Whether too little or too much information was provided is irrelevant. The issue is whether a right Congress bestowed upon consumers was violated. In this case, it clearly was, as Defendant does not dispute the Disclosure Form contained extraneous information. Similarly, Defendant's assertion that Plaintiff failed to allege confusion, misunderstanding or that she would have made different decisions if presented with a lawful disclosure is also without merit. Specifically, a similar argument was rejected in *Palm Beach Golf Center-Boca, Inc.*, when the Court held standing was established by the simple allegation the junk fax had been transmitted – Plaintiff was not required to allege the fax was actually printed or monetary loss was suffered. *Palm Beach Golf Center-Boca, Inc.*, 781 F. 3d at 1253. In this case, standing was established when Plaintiff alleged Defendant procured a consumer report on her but failed to follow the disclosure and authorization requirements of the FCRA, much like standing was established in *Palm Beach Golf Center-Boca*, by the allegation a junk fax was transmitted. Defendant's effort to create a new "enhanced" standing requirement is misguided and contrary to the holdings in *Spokeo*, *supra*; *Palm Beach Golf Centers-Boca*, *supra*; *Church*, *supra*; and *Moody*, *supra*.

Defendant relies heavily upon an unreported out-of-circuit district court opinion, *Smith v. Ohio State Univ.*, No. 2:15-CV-3030, 2016 WL 3182675, at *1 (S.D. Ohio June 8, 2016). *Smith* should not be given deference by the Court. First, and most importantly, it is an out of circuit district court opinion. Second, the *Smith* court issued its opinion without full briefing. A motion to dismiss was pending. The court issued the opinion after receiving *Spokeo* in a notice of supplemental authority to which plaintiff was not given an opportunity to respond. Third, *Smith* is simply unpersuasive. Its discussion of invasion of privacy is limited to a single sentence, and it does not discuss informational injury at all. When the sparse analysis in *Smith* is compared to the

rich analysis of cases like *Palm Beach Golf Center-Boca, Inc., Church, Moody, Thomas, In Re Nickelodeon, Manuel, and Panzer*, it is clear *Smith* is only a bare conclusion without supporting analysis. In this case, the Court has benefit of both Supreme Court and Eleventh Circuit precedent for guidance.

If the Court Finds No Standing, Remand to State Court Is Required

If the Court does decide that there is no jurisdiction in this case, this matter must be remanded to state court, not dismissed. 28 U.S.C.A. § 1447(c). Section 1447(c) states that “[i]f at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded.”

CONCLUSION

Plaintiff has Article III standing to pursue their claims. For the foregoing reasons, Defendant’s motion to dismiss for lack of subject matter jurisdiction should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY that on this 21st day of October, 2016, a copy of the foregoing was filed electronically. Notice of this filing will be sent by operation of the Court’s electronic filing system to: Grant D. Peterson, Esq., of Ogletree, Deakins, Nash Smoak & Stewart, P.C. 100 N. Tampa Street, Suite 3600, Tampa, FL 33602. Grant.peterson@ogletreedeakins.com

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