

Nos. 16-3355 and 16-3711 (Consolidated)

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

<p>CORY GROSHEK, Plaintiff-Appellant,</p>	<p>]</p>	<p>Appeal from the United States District Court for the Eastern District of Wisconsin.</p>
<p>No. 16-3355 v.</p>	<p>]</p>	<p>No. 2:15-cv-00157-PP</p>
<p>TIME WARNER CABLE, INC., Defendant-Appellee.</p>	<p>]</p>	<p>Honorable Pamela Pepper</p>
<p>CORY GROSHEK, and all others similarly situated, Plaintiff-Appellant,</p>	<p>]</p>	<p>Appeal from the United States District Court for the Western District of Wisconsin.</p>
<p>No. 16-3711 v.</p>	<p>]</p>	<p>No. 3:15-cv-00143-jdp</p>
<p>GREAT LAKES HIGHER EDUCATION CORPORATION, Defendant-Respondent.</p>	<p>]</p>	<p>Honorable James D. Peterson</p>

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CORPORATE DISCLOSURE STATEMENT

Pursuant to 7th Cir. R. 26.1, and Fed. R. App. P. 26.1 the undersigned counsel of record makes the following disclosures:

1. The full name of every party that the undersigned attorneys represent in this case: **Cory Groshek.**

2. If such party or amicus is a corporation: **N/A**

(i) Its parent corporation, if any: **N/A**

(ii) A list of stockholders that are publicly held companies owning 10% or more of stock in the party: **N/A**

3. The names of all law firms whose partners or associates have appeared for the party in this case or are expected to appear for the party in this Court: **Axley Brynelson, LLP and Gingras, Cates & Luebke, SC.**

Dated this 28th day of November, 2016.

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JURISDICTIONAL STATEMENT

1. Statement Concerning the District Court's Jurisdiction.

These consolidated cases allege violations of rights under the Fair Credit Reporting Act ("FCRA"), 15 U.S.C. § 1681 *et seq.* Therefore, the District Courts had original jurisdiction, based on a federal question, pursuant to 28 U.S.C. § 1331.

2. Statement Concerning Appellate Jurisdiction.

The Court of Appeals has jurisdiction pursuant to 28 U.S.C. § 1291, as this is an appeal of a final decision of a district court of the United States.

i. This appeal is consolidated and is taken from the final Judgment entered in the *Great Lakes* action on October 4, 2016, and from the final Judgment entered in the *Time Warner* action on August 9, 2016, the former by U.S. District Court for the Western District of Wisconsin, and the latter by the U.S. District Court for the Eastern District of Wisconsin. Both decisions dispose of all claims on standing grounds.

ii. No motions have been filed tolling the time within which to appeal.

iii. The Notice of Appeal was filed in the *Time Warner* matter on September 6, 2016, within the time limitations in Rule 4 of the Rules of Appellate Procedure. The Notice of Appeal was filed in the *Great Lakes*

matter on October 19, 2016, within the time limitations in Rule 4 of the Rules of Appellate Procedure.

iv. For purposes of briefing and disposition, the Seventh Circuit Court consolidated the two cases on October 21, 2016.

v. This is not an appeal from a decision of a magistrate judge.

3. Final Judgment.

This appeal is from final judgments which adjudicate all the claims and issues with respect to all parties.

4. Additional Information

There have been no prior appellate proceedings in the above-captioned case. There was no prior litigation before the District Courts. No parties appear in an official capacity. This appeal is not a collateral attack on a criminal conviction. As a result of mediation, the Court changed the briefing schedule so that Plaintiff-Appellant's Brief is due on November 28, 2016.

STATEMENT OF THE ISSUES

The district courts, in the respective proceedings, granted Defendants' motions to dismiss, on standing grounds. The issue common to both cases is whether Groshek, in pursuing his claims for violation of 15 U.S.C. § 1681b(b)(2)(A), suffered a concrete injury to his privacy and/or informational rights and not merely a bare procedural violation and therefore has Article III standing.

STATEMENT OF THE CASE

In 1970, Congress enacted the Fair Credit Reporting Act ("FCRA") to address two primary concerns: widespread inaccuracies in consumer reports and invasions of consumer privacy through unregulated dissemination of highly personal and confidential consumer information. Congress addressed these dual concerns by mandating a variety of disclosures and notices to consumers. In so doing, the mandatory disclosures became the primary vehicle for protecting consumers' substantive right to privacy and to address inaccuracies in their consumer reports which were negatively impacting some of the most critical areas in their lives: employment, credit, insurance, and housing.

Employers, under the original FCRA, routinely acquired consumer reports on job applicants as part of background checks, without providing any notice to the job applicant. While the original FCRA required employers to

notify applicants only if they used the consumer report to take an adverse employment action, Congress and the FTC found that employers were not doing so. This led to the amendment of the FCRA in 1996 which added § 1681b(b)(2)(A). This provision now required employers to provide to all job applicants a very simple disclosure, on a stand-alone document, noting that an employer may obtain a consumer report on the applicant and use it for employment purposes. Applicants also had to sign an authorization to allow an employer to obtain a consumer report.

This new disclosure requirement furthered Congress's two primary purposes for the FCRA and the substantive protections the law was enacted to protect. First, by informing job applicants and employees that the employer intended to obtain a consumer report, the consumer was on notice of the existence of a consumer report and could request to see a copy of the report. In this way, any errors in the report could be identified and the consumer could request a correction of any erroneous information. At the time the law was amended, approximately 50 percent of all consumer reports contained inaccuracies. Second, the consumer could deny the employer's request to obtain and possibly disseminate the consumer's private credit and reputational information, thereby protecting the consumer's privacy.

Congress routinely, in consumer protection and privacy protection legislation, uses disclosures to protect consumer privacy. This is exactly what

Congress did with the FCRA generally and with the disclosure requirement in § 1681b(b)(2)(A) specifically. Congress recognized the significant harm and risk of harm to consumers resulting from widespread inaccuracies in consumer reports as well as the invasion of consumer privacy by dissemination of confidential information in consumer reports. These concerns have continued to increase as organizations use massive databases to retain highly personal consumer information with billions of pieces of additional information being added to these databases monthly. To protect consumers, Congress provided them a private right of action to enforce their rights under the FCRA, including a right to recover statutory and punitive damages for willful violations of the FCRA.

In the present cases, Groshek applied for employment in February 2014 with Great Lakes and with Time Warner on September 22, 2014. In both circumstances, the employer obtained a consumer report using a disclosure and authorization document that clearly violated the FCRA. Not only did the disclosure include extraneous information, but each disclosure stated that Groshek and all members of the putative classes prospectively waived their rights under the FCRA. At the time of the use of the unlawful disclosure, the Supreme Court had made clear for nearly 70 years that such prospective waivers of federal statutory rights were unlawful.

Defendants' violation of § 1681b(b)(2)(A) of the FCRA is completely contrary to the very harm Congress sought to protect against. By telling job applicants that they have prospectively waived their rights, consumers have no reason to look into potential inaccuracies in their consumer reports and to try to get these inaccuracies corrected because they have been told that they have waived their rights. Similarly, consumers would have no reason to take action to protect any privacy rights since they have been informed that they have waived these rights.

The District Courts in the *Great Lakes* and *Time Warner* cases dismissed Groshek's pending FCRA claims on standing grounds based upon the *Spokeo* decision. The Supreme Court's decision in *Spokeo* did not change established standing law. Rather, the Supreme Court remanded the *Spokeo* case to the Ninth Circuit to analyze the issue of concreteness of injury since the Ninth Circuit had failed to do so. The Supreme Court made clear that standing could be premised on intangible harms including informational and privacy injuries. These are the type of injuries present in the instant appeal. Additionally, violations of procedural provisions or even risks of such violations are adequate to confer standing.

In providing guidance to the Ninth Circuit, the Supreme Court drew a line: a bare procedural violation of a statute would not, by itself, be adequate to confer standing. Recognizing the deference to be afforded Congress for its

role in recognizing harms and providing remedies, the Supreme Court drew the standing line so as not to impose a significant burden on litigants who have suffered a violation of a federal statutory right. Many of the laws passed by Congress to protect consumers and individual privacy rights recognize that injuries may be intangible. Consumer protection laws use required disclosures, notices, and authorizations routinely to protect consumers. The Supreme Court, in *Spokeo*, in no way suggested that these laws would be out of reach of consumers based on standing grounds.

Rather, the Supreme Court, in providing guidance to the Ninth Circuit, stated that bare procedural violations such as simply an incorrect zip code, without more, would not work a concrete harm. That is a far cry from the statutory violation in the present cases. The core goals of the FCRA are to protect consumer privacy and protect against inaccuracies in consumer reports negatively impacting an individual in key life areas including employment. The § 1681b(b)(2)(A) disclosure and authorization requirement is critical to furtherance of those goals. Applicants, without knowledge that the employer obtained and used a consumer report in the hiring decision, have no opportunity to review and correct inaccuracies in the consumer report. Additionally, consumers have no ability to protect their confidential information from dissemination to individuals who had no need to see it.

Congress remedied these problems by enacting § 1681b(b)(2)(A). Employers, in the simplest terms, had to tell job applicants that the employer may obtain a consumer report for employment decisions. Applicants could then request to see the report to make certain it contained no inaccuracies. Additionally, the applicant could decide whether to authorize a prospective employer to obtain the consumer's most private financial and reputational information. The disclosure requirement enacted by Congress is simple and critical to consumers. Preventing consumers from obtaining the protections afforded by Congress in the core areas of their lives is not a bare procedural violation. Moreover, Defendants can hardly seriously contend that placing in the simple required disclosure a prospective waiver of FCRA rights is a bare procedural violation.

STATEMENT OF FACTS

I. Groshek v. Great Lakes

Groshek applied for employment at Great Lakes in February 2014 as a Customer Outreach Representative and/or a Borrower Services Representative, working out of Stevens Point, Wisconsin. (Dkt.1 Complaint at ¶ 11.) Groshek interviewed for this position on February 6, 2014. (*Id.* at ¶ 12.) Any potential offer of employment to Groshek was conditioned upon his completion of paperwork prior to and during the interview process. (*Id.* at ¶ 13.) As part of this paperwork, Groshek was required to and did sign a disclosure and release of information authorization. (*Id.* at ¶ 14 and Ex. A to Complaint.)

The disclosure and authorization included a liability release which read, in part: “I release all parties for all liability for any damage that may result from furnishing information, including my providing my birthdate to Verifications, Inc., if requested and this authorization to Great Lakes and Verifications, Inc.” (*Id.* at ¶ 15 and Ex. A to Complaint.) Verifications, Inc. is a consumer reporting agency as defined by the FCRA. (*Id.* at ¶ 17.) Verifications, Inc. provided a consumer report on Groshek to Great Lakes on or about February 11, 2014. (*Id.* at ¶ 18.) Groshek filed a class action complaint alleging violation of 15 U.S.C. § 1681b(b)(2)(A) on March 5, 2014. (*Id.*) Defendant moved to dismiss Groshek’s complaint claiming that it had

not willfully violated the FCRA. (Dkt. 10.) By Order dated November 16, 2015, the District Court denied Great Lakes' motion to dismiss. (Dkt. 37.)

Thereafter, the parties engaged in mediation with Magistrate Judge Peter Oppeneer on January 7, 2016. (See January 11, 2016 Minute Order.) While mediation was not successful, it set the stage for Great Lakes' Rule 68 Offer of Judgment which resulted in the parties reaching a settlement of all claims on a class-wide basis. (Dkts. 43-45.) The parties filed a joint motion for preliminary approval of the settlement and supporting documents on March 14, 2016. (*Id.*)

The District Court issued an order granting the motion for preliminary approval on April 13 and set the final fairness hearing for August 18. On or about July 8, Michael Best and Friedrich, prior counsel for Great Lakes, alerted class counsel for the first time that defense counsel had failed to send out CAFA notices as required by the settlement agreement. (Dkt. 58.) Because of the statutory requirement that applicable federal and state attorneys general be given 90 days to consider a settlement, the final fairness hearing had to be rescheduled and was set for October 14, 2016. (Dkt. 48.) The failure of defense counsel, a sophisticated firm with class action experience, to timely serve CAFA notices appeared to be an intentional act to delay the fairness hearing. (Dkt. 60, Modl Decl.) On September 9, Michael Best and Friedrich withdrew as counsel and, on the same day, new counsel

for Great Lakes filed a motion to dismiss based upon a lack of standing. (Dkts. 49, 53.) On September 30, class counsel filed a motion for final approval of the settlement as well as supporting documents. (Dkts. 61-63.)

On October 4, 2016, the District Court granted Great Lakes' motion to dismiss for lack of subject matter jurisdiction. (Dkt. 65.) The District Court entered judgment on October 4 and Groshek timely appealed on October 19, 2016. (Dkt. 67.)

II. Groshek v. Time Warner

On or about September 22, 2014, Groshek applied for employment with Time Warner and, on the same day, received a conditional offer of employment to work at its Appleton, Wisconsin, facility. (Dkt. 1 at ¶ 11-12.) The conditional offer of employment was dependent upon Groshek's completion of several internet-based application documents. (*Id.* at ¶ 13.) Groshek completed these documents on or about September 24. (*Id.* at ¶ 14.) The application documents included a document called 'Background Check & Drug Screening Authorization' which was the FCRA disclosure and authorization. (*Id.* at ¶ 15 and Ex. B to Complaint.) Groshek completed the disclosure and authorization document on September 24, 2014. (*Id.* at ¶ 16.) The disclosure and authorization document included a release of liability which read "I hereby release from liability all persons and organizations furnishing references or other information." (*Id.* at ¶ 17 and Ex. B to

Complaint.) After Groshek completed the disclosure and authorization document, Time Warner submitted it to General Information Services (“GIS”) and requested a consumer report on Groshek. (*Id.* at ¶ 18.) GIS is a consumer reporting agency as defined by the FCRA. (*Id.* at ¶ 19.) GIS provided the consumer report on Groshek to Time Warner on about October 10, 2014. (*Id.* at ¶ 20.)

On February 6, 2015, Groshek filed his Complaint alleging that Time Warner willfully violated the FCRA. (Dkt. 1.) Time Warner moved to dismiss the Complaint and, by Order dated July 31, 2015, the District Court denied Time Warner’s motion to dismiss, finding that Groshek had stated claims for violation of the FCRA and for willful violations. (Dkt. 28.) Following limited discovery, the District Court, on March 29, 2016, stayed the case pending a decision by the Supreme Court in *Spokeo v. Robins*. (Dkt. 53.) Following the *Spokeo* decision, Great Lakes moved to dismiss on subject matter jurisdiction grounds, claiming Groshek lacked standing because he had not suffered a concrete injury. (Dkt. 55.) On August 9, 2016, the District Court granted Time Warner’s motion to dismiss. (Dkt. 71.) The District Court entered judgment on August 9, 2016, and Groshek timely appealed on November 6, 2016. (Dkt. 76.)

STANDARD OF REVIEW

The Court of Appeals reviews the issue of standing de novo. *Sterk v. Redbox Automated Retail, LLC*, 775 F.3d 618, 622 (7th Cir. 2014); *Sierra Club v. Franklin Cnty. Power of Ill., LLC*, 546 F.3d 918, 925 (7th Cir. 2008).

SUMMARY OF THE ARGUMENT

While the Supreme Court in *Spokeo* broke no new ground in its discussion of when an individual has Article III standing to assert a violation of individual rights under a federal statute, it did provide some guidance to the Ninth Circuit and other lower courts in analyzing the concreteness component of the injury in fact element of standing doctrine. The *Spokeo* Court addressed standing in the context of a violation of a procedural right conferred by federal law. Presumably, when a defendant is alleged to have violated a substantive right conferred by federal law, there is no question that a private plaintiff would have Article III standing to pursue a claim for such violation, provided Congress created a private right of action for such violation.

In the present cases, Congress created a private right of action for violations of the FCRA, including violations of § 1681b(b)(2)(A). Lower courts that have examined whether this provision creates substantive rights have answered the question affirmatively. The mandatory disclosure provision in § 1681b(b)(2)(A) provides a substantive protection to job applicants which

further the two primary goals Congress established for the FCRA: a reduction in inaccuracies in consumer reports which were preventing job applicants from obtaining needed employment, and protection against invasion of applicant privacy. Without the simple disclosure, job applicants have no idea that a prospective employer has obtained a consumer report and is using information in the report to make hiring decisions. The disclosure requirement alerts applicants to this fact, which allows them to educate themselves about their FCRA rights, to request a copy of their consumer report, and to review the report to determine if any inaccuracies exist in the report. The disclosure requirement is the consumer's entry into the other substantive protections in the FCRA, such as the method for obtaining correction of erroneous information in a report and the means by which individuals learn of important rights created by Congress.

The disclosure requirement also was intended to further applicants' substantive privacy interests. The legislative history of the FCRA and the 1996 amendments, including the addition of § 1681b(b)(2)(A), established, without question, that one of Congress's primary purposes in requiring notices, disclosures, and authorizations to job applicants and employees was to protect their privacy. By the mid-1990s, there had been an explosion in employer use of consumer reports in making hiring decisions. There was also an explosion in the amount and type of information available regarding

consumers, given advances in technology. The § 1681b(b)(2)(A) disclosure and authorization requirement allowed job applicants to decline to permit a prospective employer from obtaining highly confidential information about an applicant.

Congress's requirement that employers provide a lawful disclosure and authorization to job applicants before obtaining a consumer report protects substantive rights of individuals. As other courts have recognized, the rights protected by this disclosure requirement are substantive, not procedural. Accordingly, the standing issue in the present cases is not governed by the *Spokeo* decision.

Assuming that the § 1681b(b)(2)(A) disclosure requirement is procedural, the *Spokeo* Court made clear that violations of procedural rights granted by Congress confer standing, unless the violation is a "bare procedural violation" without more. *Spokeo* teaches that Congress's judgment is critical in analyzing the standing issue where federal statutes are involved. Congress is uniquely positioned to recognize harms and to create remedies. In the late-1960s, Congress, in fact, concluded that there were substantial harms befalling consumers based on problems in the credit reporting industry. Specifically, Congress noted the widespread problem with inaccuracies in consumer reports and the impact this was having on consumers in some of the most important areas of their lives including

employment. Congress sought to address these problems through disclosure requirements that would alert consumers to their rights, including their right to obtain a consumer report and to seek corrections of inaccuracies in the reports.

In the early-1990s, Congress learned that employers, who were then obtaining job applicants' consumer reports in record numbers, were disregarding the FCRA requirement to inform applicants that the employer had used a consumer report to make a hiring decision, thereby nullifying the ability of consumers to identify and correct errors in their consumer report that were costing them jobs. To address this problem, Congress amended the FCRA in 1996 to require employers to provide a simple disclosure to applicants and to obtain the applicants' written authorization prior to the employer being able to obtain a consumer report on the applicant. In this way, Congress assured that job applicants would be informed that a prospective employer was obtaining a consumer report for employment purposes and the applicant could educate himself of his FCRA rights, obtain and review a copy of the report, and exercise rights under the FCRA to correct inaccuracies in the report that prevented the applicant from obtaining employment.

In the 1960s and 1970s, Congress routinely mandated disclosures to protect rights of consumers, including privacy rights. If a consumer is not

aware of his rights, he is unable to take action to protect himself, and the harms which Congress identified and passed laws to address would be useless. Given the number of laws that included disclosure requirements, Congress, with the § 1681b(b)(2)(A) disclosure requirement, made clear that the disclosure needed to be clear and conspicuous, needed to be on a stand-alone document (e.g., not part of a job application), and needed to be simple with no distracting extraneous information. In fact, § 1681b(b)(2)(A) informs employers of exactly what the disclosure should say: the employer may obtain a consumer report on the job applicant for employment purposes.

Congress identified serious harms to consumers, including job applicants, resulting from problems in the credit reporting industry, enacted solutions to these problems, including the § 1681b(b)(2)(A) disclosure and authorization requirement, and created a private right of action for job applicants when these important rights were violated. In the present cases, there is no serious contention that Defendants did not violate the § 1681b(b)(2)(A) disclosure requirement. Defendants did not simply include extraneous information in the disclosure document, but each disclosure included a prospective waiver of liability. Defendants, in effect, nullified the primary protections which Congress afforded job applicants – the ability to learn about and correct inaccuracies in consumer reports and the ability to protect their privacy interests – by requiring job applicants to prospectively

waive their FCRA rights as a condition of even being considered for a job. Applicants are less likely to investigate their rights under the FCRA and to exercise their rights if they are told that they have already released any claims under the FCRA against wrongdoers. The law has been clear for over 70 years, since the Supreme Court's decision in *Brooklyn Savings Bank v. O'Neill*, 324 U.S. 697 (1945), that prospective waivers of federal statutory rights are impermissible.

There is no question that a violation of § 1681b(b)(2)(A), even if considered a violation of a procedural right, cannot reasonably be characterized as a “bare procedural violation,” like an inaccurate zip code. The § 1681b(b)(2)(A) disclosure is critical to job applicants' ability to exercise their core rights which Congress sought to protect by enactment and amendment of the FCRA. A disclosure which violates § 1681b(b)(2)(A) removes these key protections. Moreover, where the violation is not simply adding language that may cause confusion or distraction from the disclosure, but additionally informing the job applicant that, by authorizing the employer to obtain a consumer report in order for the applicant to be considered for a job, the applicant is prospectively surrendering his rights under the law, Congress's core purposes of the FCRA are gutted. As the *Spokeo* Court recognized, there are circumstances where violations of a

procedural right granted by Congress is adequate, by itself, to confer standing. This is just such a circumstance.

The Supreme Court in *Spokeo* also recognized that “Congress has the power to define injuries and articulate chains of causation that will give rise to a case for controversy where none existed before.” *Spokeo*, 136 S. Ct. at 1549. That is exactly what Congress did with the FCRA. Congress recognized serious harms resulting to consumers based upon significant problems in the credit reporting industry. Consumers were being denied credit, employment, rental housing, and insurance based upon inaccurate information in consumer reports. Additionally, much of the information in consumer reports was highly confidential financial information, and this was being disseminated with no protections for consumers’ privacy interests. Twenty-five years after Congress passed the FCRA, with changes occurring in technology and abuses of the FCRA, particularly by employers, Congress strengthened the protections of the FCRA, especially in the employment context. These are precisely the congressional powers that the *Spokeo* Court alluded to in its opinion regarding the authority of Congress to define and remedy injuries.

The Supreme Court, in *Spokeo*, in providing guidance as to when violations of a federal statute may be adequate to confer standing, directed lower courts to examine history, namely “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.” *Id.* Two such intangible harms are directly relevant to the present appeals. The first such harm is injury to privacy interests. All or nearly all states have recognized a common law or statutory harm resulting from invasions of privacy. Similarly, the Supreme Court has recognized such privacy interests under the United States Constitution. The legislative history and text of the FCRA and amendments thereto describe specifically and repeatedly that protecting consumer privacy is a primary purpose of the FCRA, as amended. The § 1681b(b)(2)(A) disclosure and authorization requirement gives control to a job applicant to decide, once properly notified, whether to authorize a prospective employer to obtain the most confidential information about the applicant for a job, for which the private information may have no relevance. The harm to an individual’s privacy rights is precisely what Congress addressed with the FCRA disclosure requirements, including § 1681b(b)(2)(A).

Second, courts, including the United States Supreme Court, have recognized informational injuries. For example, the Supreme Court in *Federal Election Comm’n v. Akins*, 524 U.S. 11, 20-25 (1998) and *Public Citizen v. Department of Justice*, 491 U.S. 440, 449 (1989,) recognized this very harm. Where federal law mandates a particular disclosure, such as the

§ 1681b(b)(2)(A) disclosure and authorization, and a defendant fails to provide a compliant disclosure, a plaintiff suffers an informational injury as has been recognized by the courts.

As noted above, the § 1681b(b)(2)(A) disclosure is the notification to a job applicant that the employer may obtain a consumer report and use it for making employment decisions. This is the notification to applicants to obtain and review their consumer report for inaccuracies and, if any are discovered, to exercise their rights to correct these errors. It is the method by which applicants learn of their rights under the FCRA. Failure to provide a compliant notice results in an informational injury. This is especially the case where the information provided is not only non-compliant with federal requirements, but includes a prospective waiver of an applicant's FCRA rights. While the information and the disclosure are intended to assist the consumer in exercising his FCRA rights, information in Defendants' § 1681b(b)(2)(A) disclosures instead informed job applicants that if they wanted to be considered for a position, they needed to surrender their FCRA rights.

Injury to both privacy rights and informational rights has been recognized at common law. As the *Spokeo* Court recognized, such injuries are adequate to establish Article III standing.

The Supreme Court in *Spokeo* also recognized that the **risk** of harm may also be sufficient to confer Article III standing. There is a clear risk of harm resulting from Defendants' violation of § 1681b(b)(2)(A). In both the *Great Lakes* and *Time Warner* cases, Defendants included in the § 1681b(b)(2)(A) disclosure a prospective waiver of FCRA rights, essentially communicating to job applicants that, if they wanted to be considered for a particular job position, they must forfeit their rights. The risks of harm to job applicants with such disclosure are apparent. The purpose of the clear and simple disclosure is to alert applicants that a prospective employer may obtain a consumer report and use the report to make a hiring decision. This allows applicants to request a copy of their report and to learn their rights under the FCRA. Upon reviewing a consumer report, an applicant can exercise rights under the FCRA to correct errors in the report, which remain a problem, and was one of Congress's purposes in enacting the FACT Act. The risk that job applicants will not learn of or exercise their FCRA rights where the § 1681b(b)(2)(A) disclosure informs the applicant that he has prospectively waived his § 1681b(b)(2)(A) rights, is substantial.

The Supreme Court in *Spokeo* attempted to provide some guidance to lower courts where there have been violations of federal procedural statutory rights: if the violation is a "bare procedural violation" without more, then there is not a concrete injury in fact. This standard gives appropriate

deference to: the role of Congress to enact laws to remedy harms identified by Congress; the historical significance of developments of the common law to address injuries; and the role of the federal courts to ultimately make certain that they have subject-matter jurisdiction to decide a dispute as required by the Constitution's Case or Controversy provision. Defendants' violations of § 1681b(b)(2)(A) are clearly on the standing side of the line, which the Court drew in the *Spokeo* case. The § 1681b(b)(2)(A) disclosure and authorization requirement was Congress's effort to address significant harms resulting from problems in the credit reporting industry due to inaccuracies in consumer reports and dissemination of highly confidential information resulting in invasions of consumer privacy.

Defendants' statutory violations were not simply inclusion of extraneous, innocuous information in the disclosure form; rather, it was inclusion of a prospective waiver of rights under the FCRA, thereby rendering meaningless the very procedures Congress put in place to educate consumers of their rights under the FCRA and to exercise these rights. Instead of encouraging job applicants to inform themselves of their rights and to exercise these rights to correct inaccurate information in the reports and protect their privacy rights, Defendants' disclosure discourages applicants from doing so by telling job applicants that they have already waived these rights in order to even be considered for the job. Under *Spokeo*, such a

violation of rights cannot be a “bare procedural violation” by any reasonable understanding of that term.

Because Groshek has Article III standing to pursue his claims, this Court should reverse the decisions of the underlying district courts and remand the cases for further proceedings.

ARGUMENT AND AUTHORITY

I. Groshek Has Established That He Suffered a Concrete Injury.

A. Original FCRA.

In 1969, Wisconsin Senator Proxmire introduced Senate Bill 823: The Fair Credit Reporting Act, in order to correct certain abuses which were occurring within the credit reporting industry and to ensure that the credit information system was responsive to the needs of consumers as well as creditors.¹ Proxmire was concerned that credit reports including biased information and malicious gossip were distributed with a lack of any public standards to ensure that information was kept confidential.² From the creation of the FCRA, there were concerns about how consumer reports were affecting individuals’ employment opportunities.³

The FCRA was introduced to address concerns relating to employment opportunities, to protect consumers and to create high standards of

¹ 115 Cong. Rec. 2410-2411 (1969).

² *Id.* at 2413.

³ *Id.* at 2411.

confidentiality, accuracy, and currency of information within the consumer reporting industries.⁴

Congress transformed Senator Proxmire's standards into the goals of confidentiality, privacy, and accuracy. This is reflected in the FCRA's statement of purpose: "to require that consumer reporting agencies adopt reasonable procedures for meeting the needs of commerce...in a manner which is fair and equitable to the consumer with regard to confidentiality, accuracy, relevancy, and proper utilization of such information." 15 U.S.C. § 1681(b) Disclosures, notices, and authorizations are the primary structural protections of the original FCRA. For example, if a consumer report was procured and used in part to make an adverse employment action, the original FCRA required the employer to provide consumers with notice of this. This is consistent historically with other laws. As consumer protections developed, Congress increased the use of required disclosures as regulatory protections. By the late 1960s, required disclosures had become one of Congress's primary regulatory techniques for consumer protection. In the FCRA, more than half of the sections governing the procurement and use of consumer reports required disclosures. (See, for example, Sections 606, 608, 613, and 615.)

⁴ 114 Cong. Rec. 23,903 (1968).

B. 1996 Amendments to the FCRA.

Technology rapidly advanced in the 1970s and 1980s and the FCRA's protections did not keep pace. By the 1990s, the consumer reporting industry was exchanging around two billion pieces of credit information per month.⁵ Consumers became more concerned about the confidentiality, privacy, and accuracy of their personal information and employers' use of consumer reports for employment decisions increased. As a result, there were calls for FCRA reformation which resulted in the 1996 amendments to the Act, including addition of Section 1681b(b)(2)(A).

In 1988, Congress enacted the Employee Polygraph Protection Act of 1988 which prohibited employers from using polygraph tests for most employment purposes. Consumer reporting agencies began marketing employment consumer reports as an alternative to the banned polygraph tests and this resulted in increased use of consumer reports for employment purposes. In a highly publicized *Business Week* article, a reporter pretended to be an employer and managed to gain access to then Vice-President Dan Quayle's credit report, including mortgage information, shopping preferences, and credit card information.⁶ Additionally, in a 1990 *Wall Street Journal* article, the author observed that employers were obtaining information about

⁵ Michael W. Miller, *Credit: An Open Book – With Typos*, WALL ST. J., Mar. 27, 1991, at B1.

⁶ Jeffrey Rothfeder, et. al., *Is Nothing Private?: Computers Hold Lots of Data on You—And There are Few Limits on Its Use*, BUS. WK., Sept. 4, 1989.

job applicants, using the information, and not disclosing to consumers that employment decisions were based upon the consumer reports.⁷

In 1990 Congressional hearings to amend the FCRA, the FTC's Director of Credit Practices discussed the consequences when employers did not comply with the original FCRA requirements:

If the consumer report plays any part in the employer's decision not to employ the applicant, the employer must provide the applicant with the disclosure required by section 615 of the FCRA. *To the extent employers do not comply with this provision of the FCRA, a very real problem may exist. Without this disclosure, disappointed applicants are unlikely ever to suspect that a consumer report contributed to their loss of an employment opportunity.* In our experience, consumers generally anticipate that their credit histories will be consulted when they apply for credit; they are much less likely to suspect that the same credit report may be considered when they apply for employment. Thus, if rejected job applicants do not receive a section 615 notice, they are unlikely to avail themselves of the opportunity to review their report and have any errors corrected.⁸

By the mid-1990s, the FTC had brought enforcement suits or heard allegations against a number of large companies for denying employment

⁷ Gilbert Fuchsberg, *More Employers Check Credit Histories Of Job Seekers to Judge Their Character*, WALL ST. J., May 30, 1990.

⁸ *Amendments to the Fair Credit Reporting Act: Hearing before the Subcomm. on Consumer Affairs and Coinage of the H.R. Comm. on Banking, Fin. and Urban Affairs*, 101st Cong. 552 (1990).

based, in part, on consumer reports but not disclosing this to job applicants.⁹ In response to the growing concerns regarding violation of employee privacy rights and employers' failure to disclose use of consumer reports in employment decisions which contained inaccurate information, Congress enacted the Consumer Credit Reporting Reform Act of 1995 to strengthen consumer protection, particularly in the employment area.

C. Section 1681b(b)(2)(A) Disclosure Requirement.

The Consumer Credit Reporting Reform Act of 1995 amended § 604 of the FCRA and added § 1681b(b)(2)(A). The disclosure and authorization requirement, which is nearly identical to what was passed in 1996, is as follows:

A person may not procure a consumer report, or cause a consumer report to be procured, for employment purposes with respect to any consumers, unless—

- (A) a clear and conspicuous disclosure has been made in writing to the consumer at any time before the report is procured or caused to be procured, in a document that consists solely of the disclosure, that a consumer report may be obtained for employment purposes; and
- (B) the consumer has authorized in writing the procurement of the report by that person.¹⁰

Section 1681b(b)(2)(A) provides confidentiality, privacy, and accuracy protections to consumers in employment situations. The history of the

⁹ *Consumer Reporting Reform Act of 1993—S. 783: Hearing before the S. Comm. on Banking, Housing, and Urban Affairs*, 103d Cong. 46 (1993).

¹⁰ *Id.* § 2403(b)(2)(A)-(B).

disclosure requirement amplifies the concerns that the disclosure was intended to remedy. Representative Kleczka as well as the Attorneys General of 14 states proposed a disclosure to consumers where an employer may seek a consumer report on a job applicant for employment purposes.¹¹ The states' Attorneys General believed that a required disclosure was necessary because "for the system to work, the consumer must first know and understand what the system is."¹²

The § 1681b(b)(2)(A) disclosure is an integral part of the FCRA's consumer protections. By providing notice to consumers that an employer may procure a consumer report, the disclosure requirement returns control over consumer reports back to consumers, ensures confidentiality of consumer reports, protects consumer privacy, and helps improve the accuracy of consumer reports. The notice prompts consumers to do more research about what a consumer report is and alerts them about the existence of a consumer report so that they can request and review the report for inaccuracies. The required disclosure also increases consumer knowledge about the consumer's legal rights. Many job applicants may not be aware of their legal right to protect their private information. The disclosure provides

¹¹ *Fair Credit Reporting Act: Hearing before the Subcomm. on Consumer Affairs and Coinage of the H.R. Comm. on Banking, Fin. and Urban Affairs*, 102d Cong. 1 (1991); *Hearing before the Subcomm. On Consumer and Regulatory Affairs of the S. Comm. on Banking, Housing and Urban Affairs*, 102d Cong. 24 (1991) at 1, 35.

¹² June 6, 1991 House Hearing at 653.

job applicants with: a warning that an employer may procure their consumer report; a warning that they should figure out what is in their consumer report; the control over who may procure their consumer reports; and the ability to determine if their rights have been violated.

The § 1681b(b)(2)(A) disclosure requirement also strengthened consumers' privacy rights. As Congress noted in discussing the inaccurate consumer reporting information and its devastating consequences:

Equally disturbing is the growing distribution of credit reports without a consumer's knowledge or consent. These reports contain very personal information about a consumer's life. When that information is sent far and wide without consent, then the consumer suffers an invasion of privacy that can be personally embarrassing and financially damaging.¹³

Further, Congress was concerned about invasion of consumer privacy and noted the benefit of the disclosure:

In general, consumers are less likely to be aware that a consumer report may be obtained in connection with employment than they are in connection with a credit extension. *These [disclosures] would alert consumers to the probability that a report would be obtained in connection with a particular job* and would provide an opportunity to withdraw the application or terminate the employment relationship if the consumer deemed this overly intrusive.¹⁴

¹³ H.R. Rep. No. 140-9 at 38.

¹⁴ *Fair Credit Reporting Act: Hearing before the Subcomm. on Consumer Affairs and Coinage of the H.R. Comm. on Banking, Housing, and Urban Affairs*, 102d Cong. 350 (1991) (emphasis added).

The § 1681b(b)(2)(A) disclosure strengthens consumers' privacy rights. After the original FCRA was passed, technology evolved rapidly and began threatening privacy rights.¹⁵ In response, Representative Kennedy called for reform and declared, "The right to privacy is sacred to all Americans, and we should not tolerate its erosion."¹⁶ Before the § 1681b(b)(2)(A) disclosure, consumers did not have a choice about whether an employer could procure their consumer report or not. The original FCRA only mandated that an employer disclose use of a consumer report only if the report resulted in an adverse employment action against the individual.¹⁷ Therefore, reports were often being used without a consumer's awareness.¹⁸ The § 1681b(b)(2)(A) disclosure returns privacy protection to the consumers' control.

Congress also implemented the § 1681b(b)(2)(A) disclosure to prevent the consequences of inaccurate credit reports in the employment setting. Congress was receiving reports that "[w]orkers [were being] denied employment or even blackballed because of erroneous information in their files."¹⁹ Furthermore, reports showed that almost half of all consumer reports contained an error, and twenty percent of those errors were serious enough to

¹⁵ H.R. Rep. No. 102-194, at 11 ("When the [FCRA] was first drafted, no one envisioned the impact computer technology would have on the distribution of information").

¹⁶ H.R. Rep. No. 140-9 at 38.

¹⁷ Fair Credit Report Act, Pub. L. No. 91-508, 84 Stat. 146 (1970) (codified as amended at 15 U.S.C. §§ 1681a-x (2012)).

¹⁸ *Employers Check Credit*, *supra* note 7, at B1.

¹⁹ H.R. Rep. No. 140-9 at 38 (1994).

affect an individual's employment.²⁰ In order to address inaccuracies, Congress implemented the § 1681b(b)(2)(A) disclosure. This disclosure alerts individuals to check their consumer reports for errors. If consumers locate errors in their reports, they can contest and correct any inaccuracies. Accordingly, the § 1681b(b)(2)(A) disclosure is critical information for job applicants to be able to exercise key rights provided under the FCRA.

Congress provided the required disclosure as a “new safeguard[] to protect the privacy of employees and job applicants” by establishing the § 1681b(b)(2)(A) disclosure requirement. The disclosure was “an important step to restore employee privacy rights.”²¹

D. *Spokeo* Decision.

In *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540 (2016), the United States Supreme Court reviewed a decision of the Ninth Circuit that found Robins had standing to pursue his FCRA claims, which were based upon a provision other than that involved in the present case. The *Spokeo* Court confirmed the three elements needed for standing: 1) An injury in fact; 2) that is fairly traceable to the challenged conduct of the defendant; and 3) that is likely to be redressed by a favorable judicial decision. *Spokeo*, 136 S. Ct. at 1547. The *Spokeo* case involved only the injury in fact element which includes

²⁰ *Id.*

²¹ *Id.* at 46.

requirements that the injury be particularized and concrete. The Supreme Court found that, while the Ninth Circuit had examined the particularized injury component, it had failed to analyze whether Robins' injury was concrete. The Supreme Court remanded the case to the Ninth Circuit to review the issue of concreteness. The parties in *Spokeo*, in the remanded action, have completed supplemental briefing, and oral argument in the remanded appeal is scheduled for December 13, 2016.

The Supreme Court in *Spokeo*, in remanding the case to the Ninth Circuit, provided guidance on the issue of when an injury is concrete. First, the Court observed that while tangible injuries are easier to recognize, intangible injuries can nevertheless be concrete. *Id.* at 1549. The Court provided the following analysis for determining whether an intangible harm constitutes an injury in fact:

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, 112 S. Ct. 2130, 119 L. Ed. 2d 351. 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, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (opinion concurring in part and concurring in judgment).

Id. at 1549.

The Court then drew a line where a defendant violates a procedural requirement set forth in a federal statute:

Congress’ role in identifying and elevating intangible harms does not mean that a plaintiff automatically satisfies 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. For that reason, Robins could not, for example, allege a bare procedural violation, divorced from any concrete harm, and satisfy the injury-in-fact requirement of Article III.

Id.

The Court went on to make clear that the **risk** of real harm can satisfy the requirement of concreteness. *Id.*

The *Spokeo* Court specifically recognized and affirmed its previous rulings where informational injuries were adequate to provide standing to sue: *Federal Election Comm’n v. Akins*, 524 U.S. 11, 20-25 (1998) (confirming that a group of voters’ “inability to obtain information” that Congress had decided to make public is a sufficient injury in fact to satisfy Article III); *Public Citizen v. Department of Justice*, 491 U.S. 440, 449 (1989) (holding

that two advocacy organizations' failure to obtain information subject to disclosure under the Federal Advisory Committee Act "constitutes a sufficiently distinct injury to provide standing to sue"). *Id.* at 1549-50.

The *Spokeo* Court gave examples of what may constitute a bare procedural violation: "In addition, not all inaccuracies cause harm or present any material risk of harms. 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 1550.

Significantly, the *Spokeo* Court made no substantive change to established standing doctrine. Rather, it found that the Ninth Circuit had not analyzed established standing doctrine – namely, whether the alleged injury in fact was concrete – necessitating a remand for this purpose. Accordingly, the Supreme Court's standing jurisprudence remains intact.

E. Groshek Has Standing Because He Suffered An Informational Injury.

Federal courts, including the United States Supreme Court, have recognized that informational injuries are intangible harms that can form the basis for Article III standing. In *Public Citizen*, 491 U.S. 440, the defendants challenged plaintiffs' standing to bring suit, claiming they had not alleged any injuries sufficiently concrete to confer standing. The plaintiffs had brought suit to compel the United States Justice Department and the

American Bar Association to comply with the Federal Advisory Committee Act's (FACA) charter and notice requirements. The FACA required covered entities to give certain notices, including notice of meetings. The defendants had failed to do so. The Supreme Court concluded that injuries resulting from a failure to provide required information are adequate to confer Article III standing. *Public Citizen*, 491 U.S. at 448-49.

The Supreme Court reached a similar conclusion in *Akins*, 524 U.S. 11. In *Akins*, political committees were required by the Federal Election Campaign Act of 1971 (FECA) to provide certain disclosures regarding membership, contributions, and expenditures. The American Israel Public Affairs Committee (AIPAC) failed to make such disclosures. The Federal Election Commission determined that AIPAC was not a political committee and certain voters filed suit challenging this determination. The first question the Supreme Court considered was whether the plaintiff voters had standing to challenge the Federal Election Commission's decision to not bring an enforcement action. In first analyzing prudential standing, the Court noted that the injury involved was to the plaintiffs' failure to receive relevant information. *Akins*, 524 U.S. at 20. The Court observed that the lack of disclosures were the type of injury which the FECA sought to address and that this satisfied the standing requirement. *Id.*

Turning next to Article III standing, the Court noted that the injury in fact that the plaintiff voters had suffered “consists of their inability to obtain information....” *Id.* at 21. The Court ruled:

“Respondents’ injury consequently seems concrete and particular. Indeed, this 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. *Public Citizen v. Department of Justice*, 491 U.S. 440, 449, 105 L. Ed. 2d 377, 109 S. Ct. 2558 (1989) (failure to obtain information subject to disclosure under Federal Advisory Committee Act “constitutes a sufficiently distinct injury to provide standing to sue”). See also *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 373-374, 71 L. Ed. 214, 102 S. Ct. 1114 (1982) (deprivation of information about housing availability constitutes “specific injury” permitting standing).

Id.

The Supreme Court, in the *Spokeo* case, specifically affirmed the vitality of the *Public Citizen* and *Akins* decisions.

Courts of appeals, post-*Spokeo*, continued to recognize informational harm as a concrete injury which is adequate to confer Article III standing. In *Church v. Accretive Health Inc.*, 2016 U.S. App. Lexis 12414 (11th Cir. 2016) (*per curiam*),²² the Eleventh Circuit examined the plaintiff’s claim that the defendant violated the Fair Debt Collection Practices Act (FDCPA) by not including in a collection letter certain disclosures required by the FDCPA. The defendant alleged that Church lacked Article III standing because she

²² Suppl. Appendix (“SA”) 1-5.

did not suffer any actual damages. The district court granted the defendant's motion for summary judgment on the merits of the claim.

The Eleventh Circuit first examined whether it had subject-matter jurisdiction, i.e. whether Church had alleged Article III standing. In finding that Church had Article III standing, the Eleventh Circuit analogized the case to the Supreme Court's decision in *Havens Realty* where the only injury alleged by a Fair Housing Act tester was that she was given false information. *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982). The Court noted that the Fair Housing Act established an enforceable right to truthful information concerning available housing. The Eleventh Circuit observed, "thus, through the FDCPA, Congress has created a new right – the right to receive required disclosures and communications governed by the FDCPA – and a new injury – not receiving such disclosures." *Church* at p. 4. The Eleventh Circuit concluded that Church had sufficiently alleged that she sustained a concrete injury because she did not receive the required disclosures and that such a right was not hypothetical or uncertain. *Id.*

Similarly, the Third Circuit in *In re Nickelodeon Consumer Privacy Litigation*, 827 F.3d 262 (3rd Cir. 2016), reviewed the issue of Article III standing under the Video Privacy Protection Act. The case involved unlawful disclosure of legally-protected information: personal information about webpage visits and videos viewed on the internet. The court observed that

courts have found standing in cases arising from allegedly unlawful disclosures, citing to the Seventh Circuit's decision in *Sterk*, 770 F.3d 618. The Third Circuit discussed the *Spokeo* decision and its impact on standing analysis where an injury relates to disclosure of information. Citing *Spokeo* and its references to the Supreme Court's decisions in *Akins* and *Public Citizen*, the Nickelodeon court observed "intangible harms that may give rise to standing also include harms that 'may be difficult to prove or measure,' such as unlawful denial of access to information subject to disclosure." (*Nickelodeon*, 827 F.3d at 273-74). The Third Circuit concluded that informational injury – unlawful disclosure of protected information – was sufficient to confer Article III standing. *Id.* at 274.

District courts have examined standing based upon informational injury, post-*Spokeo*, based on FCRA disclosure requirements, including the § 1681b(b)(2)(A) disclosure requirement. In *Thomas v. FTS USA, LLC*, 13-cv-825 (ED VA)²³, the plaintiff alleged that the defendant's § 1681b(b)(2)(A) disclosure did not comply with the FCRA. The defendant sought dismissal of this claim on standing grounds and the court, in denying the defendant's motion for summary judgment, ruled that the plaintiff had alleged two concrete injuries: an informational injury and invasion of privacy. The

²³ SA 124-163.

Thomas court exhaustively analyzed the FCRA's disclosure requirements and the *Spokeo* court's observations and ruling.

Following analysis of the language and legislative history of the FCRA generally and § 1681b(b)(2)(A) specifically, the *Thomas* court observed, "to that end, it was Congress's judgment, as clearly expressed in §§ 1681b(b)(2) and 1681b(b)(3), to afford consumers' rights to information and privacy." (SA 145). In finding an informational injury sufficient to confer standing, the *Thomas* court observed, "In the wake of *Havens*, *Akins*, and *Public Citizens*, it is well-settled that Congress may create a legally cognizable right to information, the deprivation of which will constitute a concrete injury." (*Id.* at p. 148) The *Thomas* court concluded, "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." (*Id.* at p. 149-50). (See also *Meza v. Verizon Communications*, 16-cv-739 (ED CA)²⁴; *Prindle v. Carrington Mortgage Services, LLC*, 13-cv-1349 (MD FL)²⁵; *Graham v. Pyramid Healthcare Solutions, Inc.*, 16-cv1324 (MD FL)²⁶; *Witt v. Corelogic Saferent, LLC*, 15-cv-386 (ED VA)²⁷.

²⁴ SA 51-57.

²⁵ SA 73-112.

²⁶ SA 17-20.

²⁷ SA 164-204.

Congress mandated that, before an employer can obtain a consumer report on a job applicant, it had to provide a simple one-sentence disclosure and obtain the written authorization of the job applicant. As noted above, this disclosure was critical for alerting applicants of the existence of the FCRA so they could investigate their rights. The disclosure was critical because it alerted applicants to the possible use of a consumer report in the hiring decision so they could obtain a copy of their consumer report and review it for inaccuracies. In the event of any errors, the FCRA provided specific procedures for correcting such errors so that they would not prevent the consumer from being denied future employment, credit, housing, or insurance. The § 1681b(b)(2)(A) disclosure was also critical in that it protected the applicant's highly private information. The applicant could decline to sign an authorization if he did not want his confidential personal information disseminated to prospective employers.

Consumers, namely job applicants, have a statutory right to a lawful disclosure, as mandated by Congress, particularly given the significant consequences resulting from a failure by employers to comply with this requirement. The simple disclosure is not to include any extraneous distracting information. The Time Warner and Great Lakes' disclosures clearly did not comply with the FCRA disclosure law. Not only did they include extraneous information, the release of liability language in the

disclosures completely nullified the very purpose of the disclosure. Rather than providing information to allow applicants to educate themselves regarding their FCRA rights, and if necessary, exercise these rights (e.g. by obtaining correction of inaccurate information in the consumer report), Defendants' disclosures, by informing applicants that they had prospectively waived their rights, discouraged applicants from learning of and exercising their rights, contrary to Congress's key goals of the FCRA.

Groshek and putative class members suffered a concrete injury in fact as a result of Defendants' failure to provide a lawful disclosure. This informational injury is sufficient to confer Article III standing.

F. Groshek Has Standing Because He Suffered An Injury To His Established Privacy Interests.

As the language and legislative history of the FCRA demonstrate, protection of consumer privacy was one of Congress's key purposes in enacting the FCRA. By the late-1960s, consumer reporting agencies, which were unregulated, were disseminating highly confidential information about Americans to third parties. This included financial information, credit information, medical information, arrest record information, employment information, and information gathered from interviews of consumers' neighbors and coworkers. Congress recognized the invasion of consumer privacy by the uncontrolled dissemination of such information and, to protect

privacy interests, enacted the FCRA in 1970 with its various disclosure, notice, and authorization requirements.

With advances in technology, the amount of information available on consumers exploded in the 1970s and 1980s, causing Congress to revisit the FCRA in the 1990s. In addition to the massive amounts of highly personal information available on individuals, employers were not compliant with the FCRA and were improperly accessing consumers' private information. The scope of the problem became clear when the media were able to obtain personal information on former Vice President Dan Quayle. Congress, specifically noting concerns with employee privacy interests, amended the FCRA in 1996 to add § 1681b(b)(2)(A), a provision requiring any prospective employer to first provide a simple disclosure and obtain a written authorization before obtaining a consumer report for employment purposes. This protects employee privacy because it allows the applicant to decline to allow a prospective employer access to highly personal information.

Most states have recognized a common law right to privacy and a number of states, including Wisconsin, have codified this right. See Wis. Stat. § 995.50. Courts, including the Seventh Circuit, have recognized that injuries to privacy interests are adequate to confer Article III standing. *Sterk*, 770 F.3d 618. The *Sterk* case involved claims that defendant Redbox disclosed the plaintiffs' personal identifying information to a third party. Redbox alleged

that such disclosure did not constitute an injury in fact, and, accordingly, that plaintiffs lacked standing to pursue their claims. In response to the defendant's allegation that this disclosure was a "mere technical violation," the Seventh Circuit stated "but 'technical' violations of the statute (i.e., impermissible disclosures of one's sensitive personal information) are precisely what Congress sought to illegalize by enacting the VPPA." *Sterk*, 770 F.3d at 623. The *Sterk* court concluded, "by alleging that Redbox disclosed their personal information in violation of the VPPA, Sterk and Chung have met their burden of demonstrating that they suffered an injury in fact that success in this suit would redress." *Id.*

Other courts, post-*Spokeo*, have examined challenges to standing where privacy interests were involved, including claims under the FCRA. In *Thomas v. FTS USA, LLC*, 13-cv-825 (ED VA), a case involving an alleged violation of § 1681b(b)(2)(A), the court denied the defendants' motion for summary judgment based on an alleged lack of Article III standing. The court found that the plaintiff had alleged a violation of his statutorily-created right to privacy and confidentiality of his personal information. (SA 153.) The *Thomas* court specifically noted that as to compilations of personal information, the United States Supreme Court had recognized specific concerns: "moreover, as the Supreme Court has observed, the right to privacy in compilations of personal information is particularly powerful because of

the ‘power of compilations to affect personal privacy that outstrips the combined power of the bits of information contained within.’” *Id.* (quoting *United States Department of Justice v. Reporters Comm. For Freedom of Press*, 489 U.S. 749, 765 (1989)).

The *Thomas* court concluded that the plaintiff’s privacy interest in his personal information was adequate to confer Article III standing. Other courts, in the FCRA context, have reached the same conclusion. *Dougherty v. Barrett Services Inc.*, 15-cv-501 (WD WA)²⁸; *Hawkins v. S2Verify*, 15-cv-3502 (ND CA);²⁹ *Burke v. Federal National Mortgage Association*, 16-cv-153 (ED VA);³⁰ *Perrill v. Equifax Information Services, LLC*, 14-cv-612(WD TX);³¹ *Mey v. Got Warranty, Inc.*, 15-cv-101 (ND WV).³²

In the present cases, Groshek had a privacy interest in the personal information contained in his consumer report. Congress prohibited employers from obtaining this confidential information unless the employer had first provided a lawful disclosure and obtained a written authorization. Here there is no question that Defendants did not use a lawful disclosure document to obtain Groshek’s consumer report. The inclusion of extraneous distracting information in the required simple disclosure form violated § 1681b(b)(2)(A).

²⁸ SA 15-16.

²⁹ SA 21-22.

³⁰ SA 6-14.

³¹ SA 58-72.

³² SA 23-50.

As discussed above, the extraneous information was a requirement that, in order to be considered for a position, Groshek had to prospectively waive rights which Congress provided to him under the FCRA. The disclosure and authorization which allowed Defendants to unlawfully obtain Groshek's—and tens of thousands of other putative class members'—consumer reports violated Groshek's privacy rights since Defendants could only obtain a consumer report with a lawful disclosure and authorization. Accordingly, Defendants accessed Groshek's highly personal information in violation of the FCRA.

Additionally, § 1681b(b)(2)(A) was enacted to provide notice that the employer may obtain a consumer report for employment purposes. This allows a prospective applicant such as Groshek to educate himself as to what is in his consumer report and to make a reasoned decision whether to agree to allow a prospective employer access to such information. Job applicants may not want their highly personal information disseminated to a prospective employer when the personal information has nothing to do with the job. Unfortunately, in this day and age, hackers are able to breach security of major corporations, dating websites and even political parties, resulting in the public disclosure of highly private information. The § 1681b(b)(2)(A) disclosure allows consumers to decide whether to put their personal information in the hands of a prospective employer.

Federal and state courts, as well as Congress and state legislatures, have recognized the importance of privacy interests. Today consumer reporting agencies receive literally billions of pieces of information about consumers every month. Section 1681b(b)(2)(A) recognizes these privacy interests and prohibits employers from obtaining consumer reports containing this private information unless they comply with disclosure and authorization requirements, which are not onerous. Additionally, § 1681b(b)(2)(A) puts protection of privacy interests into the hands of consumers. If an applicant does not want a prospective employer to obtain a consumer report containing private information, he can refuse to sign an authorization. A disclosure which tells applicants that they have prospectively released their rights takes control away from consumers, contrary to Congress's directives.

Because Defendants' violation of § 1681b(b)(2)(A) invades Groshek's privacy interests, he has standing to proceed with the present actions.

G. Risk of Injury.

The Supreme Court in *Spokeo* specifically recognized that the **risk** of injury caused by violation of a federal statute which confers procedural rights may be a concrete injury sufficient to confer standing. This is precisely the situation in the present case. Section 1681b(b)(2)(A) was enacted to protect

against two real risks: 1) Employers would use inaccurate information in consumer reports to make employment decisions with no notification to the job applicant of such use and therefore no ability to correct inaccuracies; and 2) invasions of applicants' privacy rights. Congress and the FTC were aware, in the early 1990s, that employers were obtaining consumer reports, using information in the reports to make hiring decisions and never informing consumers of this fact, even though the original FCRA required such notification to applicants in these circumstances.

Section 1681b(b)(2)(A) was enacted to address the risk that consumers were losing jobs without ever knowing that this was resulting from inaccurate information in their consumer reports. An employer is now prohibited from even obtaining a consumer report for employment purposes without providing a simple disclosure to job applicants that the employer intends to obtain a consumer report and, further, obtaining written authorization from the job applicant. Upon receiving this simple disclosure, job applicants can request a copy of their consumer report to make certain it is accurate. This alleviates the risk of employment decisions being based on erroneous information in the report. As noted above, addressing inaccuracies in consumer reports is one of the primary purposes for enacting the FCRA and its 1996 amendment. Recall that in the mid-1990s, 50 percent of all

consumer reports contained errors and in 20 percent of the reports, the errors were significant enough to result in loss of employment,.

The new § 1681b(b)(2)(A) disclosure was also enacted to address the substantial risks of invasions into job applicants' privacy. By the early 1990s, databases at consumer reporting agencies had become massive with two billion pieces of information being added monthly. These databases included highly confidential information in all areas of an individual's personal life such as credit limits, timeliness of paying bills, specific purchases on credit, medical information, employment information, and gossip from interviews with neighbors and coworkers. A person applying for a job as a helper in a store or a phone answerer in a call center may not want all of his personal information released to such prospective employers, who would have no need for such information.

Today, the risk to individuals' privacy is even greater due to widespread hacking and security breaches. Under § 1681b(b)(2)(A), a job applicant can eliminate a risk to invasion of his privacy by declining to authorize an employer, in the first instance, from obtaining a copy of his consumer report.

The risks of employment decisions being made based on inaccurate information in a consumer report and invasions of a job applicant's privacy substantially increase by inclusion of prospective waivers of FCRA rights in

§ 1681b(b)(2)(A) disclosures. A prospective release of claims is a clear message to the job applicant that, by signing the disclosure/authorization document, he is forfeiting his ability to exercise his rights under the FCRA. If an applicant refuses to prospectively surrender his FCRA rights, he will not be considered for a much-needed employment position.

The primary risks which Congress attempted to address with the FCRA and its 1996 amendments -- correction of inaccurate information in consumer reports and prevention of invasions of consumer privacy -- are increased by unlawful disclosures, particularly where the disclosure requires the job applicant to prospectively waive his FCRA rights.

The District Court in *Rodriguez v. El Toro Medical Investors Limited Partnership et al.*, 16-cv-59 (CD CA)³³ considered the defendants' inclusion of waiver language in a § 1681b(b)(2)(A) disclosure in its standing analysis. In concluding that the use of exculpatory language in the FCRA disclosure created a substantial risk of harm to job applicants, the Court reasoned:

An exculpatory clause embedded within the FCRA-mandated disclosure form may detract from the warnings that Congress found so vital or, likelier still, leave consumers with the false impression that they have no recourse against third party providers of information, no matter how inaccurate, incomplete, or misleading the information they submit. Indeed, a frequently-cited empirical study found that consumers were less likely to seek redress for their injuries if they signed a contract that included an exculpatory clause, even though the clause would likely be found unenforceable. *See* Dennis P. Stolle & Andrew J. Slain,

³³ SA 113-123.

Standard Form Contracts and Contract Schemas: A Preliminary Investigation of the Effects of Exculpatory Clauses on Consumers' Propensity to Sue, 15 Behav. Sci. & L. 83, 90 (1997). This finding is consistent with a growing body of research that indicates that most consumers resolve disputes informally based on their intuition about what their legal rights are. Because consumers generally believe that exculpatory provisions are enforceable, even if they are clearly not, they are likely to seek less—if any—recompense for their injuries when businesses include these terms in contracts of adhesion. *See, e.g.*, Eyal Zamir, *Contract Law and Theory: Three Views of the Cathedral*, 81 U. Chi. L. Rev. 2077, 2101 n.70 (2014). Separately, because third party providers of information would also likely believe that an exculpatory clause is enforceable, such a provision may induce these sources to be less careful in their provision of information, thereby magnifying the danger that an employer will make decisions based on incomplete or inaccurate information. These substantial risks—which are antithetical to the aims of the Fair Credit Reporting Act—are sufficiently concrete to establish Article III standing. *See Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334, 2341 (2014) (holding that a “substantial risk that the harm will occur” is a sufficient injury-in-fact.)

SA 120-21.

II. Groshek Has Suffered More Than a “Bare Procedural Violation” of His FCRA Rights.

The United States Supreme Court has drawn a relatively clear line as to when an individual who is alleging an injury to himself (not to the public generally) has standing to assert a violation of a federal statute: Is the violation a bare procedural violation of the law? The Court did not intend this to be an onerous burden. The *Spokeo* Court specifically recognized the important role the judgment of Congress plays where intangible harms, such as injuries to privacy and the right to information, are involved. The Court noted that Congress is well-positioned to identify intangible harms that meet

minimum Article III requirements. Congress is also well-suited to define injuries and articulate chains of causation.

In enacting the FCRA, Congress concluded that there was a significant need to regulate the credit industry. Consumer credit had exploded after World War II. Consumer reporting agencies were assembling information on individuals and, as often as not, much of the information was inaccurate. Consumers were being denied the most basic of opportunities based on inaccuracies in the reports including denial of employment, credit, housing, and insurance. Additionally, the information gathered on individuals was extremely sensitive and confidential such as credit information and personal, financial, medical, and reputational information.

Congress, in enacting the FCRA, created a set of protections for consumers. The FCRA protected consumer privacy and, through disclosure requirements, allowed consumers to learn about and exercise their rights. The protections provided by the FCRA to consumers were largely in the form of required disclosures and notices. Such disclosures are critical to alert consumers of their rights so that they can exercise such rights. This is especially the case in the credit reporting area where consumers had little or no information about the industry.

Disclosures also provide the avenue for consumers to protect substantive rights under the law. For example, Congress recognized the

widespread inaccuracies in consumer reports and, with the FCRA, provided substantive mechanisms for individuals to correct these errors. In order for consumers to know and appreciate their right to request corrections to their consumer report, Congress required that consumer reporting agencies and users of consumer reports, such as the Defendants, provide certain disclosures to consumers so that they know when a user of a consumer report may take action based on the report. This allows consumers to know their rights and to request and review a consumer report. If the consumer discovers an inaccuracy, he can then seek correction of the error.

The disclosure requirement in the original FCRA was inadequate to protect rights of job applicants and employees. Although employers were required to inform applicants when taking an adverse action based upon a consumer report, Congress and the FTC concluded that employers were failing to do so. As a result, job applicants had no idea that inaccurate information in their consumer reports was the reason for the failure to hire and had no opportunity to correct any such inaccuracies. Also, by the mid-1990s, employers were routinely obtaining consumer reports on job applicants as a standard part of background checks, thereby multiplying the problem.

Congress amended the FCRA by adding § 1681b(b)(2)(A) to remedy these problems. This new section required the employer to provide to the job

applicant on a stand-alone document a very simple disclosure – the employer may obtain a consumer report on the applicant for employment purposes – and to obtain the applicant’s written authorization to obtain the report. The simple, unencumbered disclosure notified the job applicant of the potential existence of a consumer report so he could request a copy from the employer and review it for any inaccuracies that might result in his being denied employment. Moreover, correction of the inaccuracies would assist in other critical life areas such as credit and housing.

The required simple disclosure was also intended by Congress to protect privacy interests. This was not just limited to an individual’s confidential financial information but also included medical and employment information. Depending on the particular job, this confidential information may be wholly irrelevant to the position. By alerting job applicants in a simple disclosure document that a prospective employer intended to obtain this sensitive confidential information, the applicant had the option to protect his privacy and refuse to permit the employer to obtain the consumer report.

Congress decided that violations of this critical disclosure requirement can lead to liability for actual damages and, in the case of a willful violation, for statutory damages, in the absence of actual damages, as well as punitive damages. In both the *Great Lakes* and *Time Warner* cases, there can be little doubt that both defendants willfully violated § 1681b(b)(2)(A). Both are large

companies that annually have tens of thousands to millions of FCRA-covered transactions. For example, Time Warner has in excess of 10 million cable/phone/internet customers on whom it obtains consumer reports, in addition to tens of thousands of prospective employees on whom Time Warner obtained consumer reports. Additionally, Time Warner is a furnisher of information to consumer reporting agencies, which is covered by the FCRA. For each of its 10 million customers, Time Warner provides monthly information to consumer reporting agencies, or in excess of 100 million FCRA transactions annually.

Time Warner's and Great Lakes' violations of the FCRA were not minor or technical. Rather, both required job applicants to sign a disclosure/authorization which contained a waiver of FCRA rights. Since 1945, the Supreme Court has invalidated prospective waivers of federal statutory rights. *O'Neill*, 324 U.S. 697 (1945). In *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 51-2 (1974), the Supreme Court again made clear, in the context of Title VII, that prospective waivers of statutory rights are impermissible. The FTC early on had announced its position that prospective waivers of FCRA rights were prohibited, and shortly after the effective date of the 1996 amendment, the FTC in a publicized opinion letter specifically

opined that prospective waivers of FCRA rights in § 1681b(b)(2)(A) disclosures were prohibited. (*Hauxwell Opinion Letter*).³⁴

Defendants' requirement that applicants waive their rights under the FCRA in order to be considered for employment was not a bare procedural violation of the FCRA. Defendants' waiver language required applicants to prospectively forfeit the protections which the FCRA afforded job applicants: the right to protect their privacy interest by declining to authorize a prospective employer to see their confidential, financial, and personal information, and the protection to correct inaccurate information in their consumer report. Applicants would have no reason to pursue their FCRA rights when they are told, as part of the job application process, that they are waiving all such rights.

Inclusion of a prospective waiver of substantive and key procedural FCRA rights is not a "bare procedural violation" of the FCRA. It is in no way comparable to including an incorrect zip code, which, without more, can rarely or ever cause injury, tangible or intangible, to an individual. Groshek has established a concrete injury and the decisions of the District Courts should be reversed.

³⁴ SA 205-207.

CONCLUSION

Because Groshek has Article III standing to pursue his claims, this Court should reverse the decisions of the underlying district courts and remand the cases for further proceedings.

Dated this 28th day of November, 2016.

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CERTIFICATE OF COMPLIANCE WITH FED. R. APP. P. 32(a)(7)

I hereby certify that pursuant to Fed. R. App P. 32(a)(7), the foregoing Brief is proportionally spaced, has a type fact of 13 points Century, and contains 12,410 words, excluding those sections identified in Fed. R. App. P. 32(a)(7)(B)(iii).

/s/ Michael J. Modl
Michael J. Modl

CERTIFICATE OF SERVICE

I hereby certify that on November 28, 2016, I electronically filed the foregoing with the Clerk of Court for the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system.

/s/ Michael J. Modl
Michael J. Modl

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CIRCUIT RULE 30(d) STATEMENT

Pursuant to Circuit Rule 30(d), counsel certifies that all material required by Circuit Rule 30(a) and (b) are included in the Short Appendix of Plaintiff-Appellant and the Supplemental Appendix of Plaintiff-Appellant filed contemporaneously herewith.

Dated this 28th day of November, 2016.

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**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN**

**CORY GROSHEK, and all others
similarly situated,**

Plaintiff,

-vs-

Case No. 15-C-157

TIME WARNER CABLE, Inc.

Defendant.

DECISION AND ORDER GRANTING MOTION TO LIFT THE STAY, *NUNC PRO TUNC* TO MAY 25 (DKT. NO. 54); GRANTING DEFENDANT'S MOTION TO DISMISS (DKT. NO. 55); DENYING PLAINTIFF'S MOTION TO SEAL (DKT. NO. 61); AND DENYING DEFENDANT'S MOTION FOR LEAVE TO FILE SUR-REPLY AS MOOT (DKT. NO. 66)

On March 29, 2016, the Honorable Rudolph T. Randa stayed the proceedings in this case pending a ruling from the Supreme Court in Spokeo, Inc. v. Robins (Dkt. No. 53); the Supreme Court issued its decision just short of two months later, on May 16. Spokeo, Inc. v. Robins, 134 S. Ct. 1540 (2016). Days later, the plaintiffs moved to lift the stay. Dkt. No. 54. At around the same time, the defendant moved to dismiss the complaint for lack of standing in light of Spokeo. Dkt. No. 55.

The named plaintiff also has asked the court to seal certain documents. Dkt. No. 61. The defendant opposed that motion, Dkt. No. 62, the plaintiff filed a reply, Dkt. No. 65, and on July 19, 2016, the defendant filed a motion requesting leave to file a sur-reply, Dkt. No. 66.

On August 2, the case was reassigned to this court.

A. **Plaintiff's Motion to Lift Stay (Dkt. No. 54)**

The plaintiffs' May 24, 2016 motion to lift the stay simply noted that the Supreme Court had decided Spokeo, and thus that there was no longer any reason to delay moving forward. Dkt. No. 54. The defendant objected, arguing that the court ought to keep the stay in place until it could decide the defendant's May 27, 2016 motion to dismiss. Dkt. No. 58. The defendant argued that the motion to dismiss was based on the argument that the court does not have subject matter jurisdiction; if that turned out to be true, the court would not have jurisdiction to allow the parties to proceed with discovery or anything else. Id. at 58.

The court notes with interest that, despite the fact there was—and arguably until this order, continued to be—a stay in place, the defendant filed a motion to dismiss; the plaintiff filed a motion to seal; the defendant filed a motion to file a sur-reply; and the parties briefed all of these motions. A “stay” generally means that the parties should file nothing further in the litigation as long as the stay is in effect. The fact that a stay was in place does not appear to have prevented the parties from filing numerous documents while the stay was in place.

Bowing to the inevitable, the court will grant the motion to lift the stay, *nunc pro tunc* to May 25, 2016. Dkt. No. 54.

B. **Defendant's Motion to Dismiss (Dkt. No. 55)**

Federal Rule of Civil Procedure 12(b)(1) provides for a party to bring a

motion to dismiss for lack of standing. In considering such a motion, the court must “accept as true all material allegations of the complaint, drawing all reasonable inferences therefrom in the plaintiff’s favor.” Lee v. City of Chi., 330 F.3d 456, 468 (7th Cir. 2003). The plaintiff, however, “as the party invoking federal jurisdiction, bears the burden of establishing the required elements of standing,” including (i) injury in fact, (ii) causation, and (iii) redressability. Id. On a factual challenge to subject matter jurisdiction, district courts “may properly look beyond the jurisdictional allegations of the complaint and view whatever evidence has been submitted on the issue to determine whether in fact subject matter jurisdiction exists.” Evers v. Astrue, 536 F.3d 651, 656-57 (7th Cir. 2008).

To establish injury in fact, a plaintiff must show that he or she suffered an “invasion of a legally protected interest” that is “concrete and particularized” and “actual or imminent, not conjectural or hypothetical.” Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992). In Spokeo, the Court emphasized the distinction between concreteness and particularization. The latter is “necessary to establish injury in fact, but it is not sufficient. . . . We have made it clear time and again that an injury in fact must be both concrete *and* particularized.” Spokeo, 136 S. Ct. at 1548 (emphasis in original). 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.’

Concreteness, therefore, is quite different from particularization.” Id.

The Spokeo Court went on to clarify that concrete is not “necessarily synonymous with ‘tangible.’ Although tangible injuries are perhaps easier to recognize, we have confirmed in many of our previous cases that intangible injuries can nevertheless be concrete.” Id. at 1549. In this context, the judgment of Congress is “important,” but “Congress’ role in identifying and elevating intangible harms does not mean that a plaintiff automatically satisfies 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.” Id. A “bare procedural violation, divorced from any concrete harm, [cannot] satisfy the injury-in-fact requirement of Article III.” Id.

The named plaintiff alleges that he applied for employment with the defendant, and that in the course of considering his application, the defendant obtained a consumer report on him “without first providing [him] a clear and conspicuous written disclosure, in a document consisting solely of the disclosure, that a consumer report may be obtained for employment purposes.” Dkt. No. 1 at 4. He alleges that this failure to disclose violated §1681(b)(2)(A)(i) of the Fair Credit Reporting Act. Id. While the complaint alleges, in several places, that the defendant’s action violated the Fair Credit Reporting Act, it makes no mention of any concrete harm the plaintiff (or any putative class members) suffered as a result of the alleged violation.

In his response to the defendant’s motion to dismiss, the plaintiff

argues that the defendant's alleged violation of the FDCPA—obtaining consumer information about him without giving him a separate document warning him that it was going to do so—“invaded [the plaintiff's] privacy—a clear form of concrete harm that [the defendant] simply ignores in its motion.” Dkt. No. 60 at 10. He also argued that the defendant unlawfully “sought to obtain *his* private information, and then it obtained *his* personal information as a result of the unlawful permission it received.” Id. at 13. The named plaintiff argues that these two assertions constitute the kind of concrete, particularized injury Spokeo mandated as necessary to confer standing. Id.

This court, and others, have rejected this argument. In Gubala v. Time Warner Cable, Inc., Case No. 15-cv-1078, 2016 WL 3390415 at *4 (E.D. Wis. June 17, 2016), this court held that while alleging a statutory violation satisfies the *particularized injury* prong of the injury-in-fact requirement discussed in Spokeo and other cases, it did not, in and of itself, demonstrate a concrete harm. In Gubala, the plaintiff alleged that the defendant had failed to abide by the Cable Communications Policy Act's requirement that cable companies destroy personally identifiable information after a customer has terminated service. Id. at *1. The court found that the fact that the defendant had failed to destroy the information did not constitute concrete harm.

[The plaintiff] does not allege that the defendant has disclosed his information to a third party. Even if he had

alleged such a disclosure, he does not allege that the disclosure caused him any harm. He does not allege that he has been contacted by marketers who obtained his information from the defendant, or that he has been the victim of fraud or identity theft. He alleges only that the CCPA requires cable providers to destroy personal information at a certain point, and that the defendant hasn't destroyed his.

Id. at 4.

The same is true in this case. The plaintiff has not alleged that he did not get the job he applied for as a result of the consumer report the defendant obtained. He has not alleged that the defendant released the information in the report to other people, causing him embarrassment or damaging his credit. He has not alleged that the defendant used the consumer report against him in any way. In fact, in his October 7, 2015 deposition, when defense counsel asked him if he was aware of anything in that might entitle him to actual damages, the plaintiff responded, "I do not know of any actual damages that I am claiming nor do I believe I've ever actually claimed actual damages against [the defendant] nor do I intend to." Dkt. No. 59-2 at 18 (deposition page 115), lines 9-11. In short, he has not alleged a concrete harm. See also, Smith v. The Ohio State Univ., Case No. 15-cv-3030, 2016 WL 3182675 (S.D. Ohio June 8, 2016) (no concrete injury based on allegation that defendant violated the FCRA by including extraneous information, such as a liability release, in the disclosure and authorization).

Because the plaintiff has not alleged a concrete harm resulting from

the defendant's alleged violation of the FDCPA, the plaintiff does not have standing, and the court must dismiss the case.

C. **Plaintiff's Motion to Seal (Dkt. No. 61)**

The court has established that it does not have subject matter jurisdiction in this case. The court notes, however, that prior to the court reaching this decision, the plaintiff filed a motion asking the court to seal various portions of his deposition transcripts, supplemental answers to discovery, and any other document that might make mention of any settlement agreement between him and "another party." Dkt. No. 61.

On May 27, 2016, the defendant filed a "Notice of Filing." Dkt. No. 59. The notice indicated that the defendant was provisionally filing, under seal, Exhibits 1 and 2 to the declaration of Anthony E. Giardino. Id. at 1. Exhibit 1 was the plaintiff's entire deposition transcript. Exhibit 2 was the plaintiff's supplemental answers to the defendant's first interrogatories. Dkt. Nos. 59-2 and 59-3. The defendant explained that it did not believe that the documents contained confidential information. It was filing the documents under seal, it explained, because the plaintiff had attempted, unilaterally and in the absence of an agreed protective order, to deem the documents "confidential" and "attorneys' eyes only (by means of an e-mail, citing Civil Local Rule 26(e) of the Eastern District. Dkt. No. 59 at 1; Dkt. No. 59-1 at 3. In the notice, the defendant pointed out that pursuant to Civil Local Rule 79(d)(7), the plaintiff had twenty-one days from the date the notice was filed to file a motion to

seal, if he wanted to keep the documents under seal. Dkt. No. 59 at 1.

The plaintiff filed the instant motion to seal on June 17, 2016. Dkt. No. 61. The motion identifies specific pages in the deposition and the supplemental answers which the plaintiff wishes to keep under seal. Id. at 1. The plaintiff also attached to the motion a draft protective order.¹

As grounds for sealing, the plaintiff states that the pages he seeks to keep sealed “concern confidential settlement agreements reached between [the plaintiff] and various third-parties.” Id. at 2. He indicates that if the confidentiality of these documents were violated, the result would be a “serious financial burden” on the plaintiff. Id. He states that “[o]f principal concern, these agreements require that [the plaintiff] keep confidential the terms of the settlement, the fact of settlement, negotiations related to settlement, and documents related to those settlement negotiations.” Id. at 1-2. He indicates that “the disclosure” of the documents would subject the plaintiff to legal action for breach of contract. Id. at 3. He also argues that the documents relate to private agreements between the plaintiff and other parties, outside of the context this case. Id.

As an initial matter, the court looked at some of the pages that the

¹ Attaching a protective order to a motion to seal is putting the cart before the horse, pursuant to this court’s local rules. Civil Local Rule 26(e) does not allow a party to “deem” a document confidential by saying so in an e-mail to opposing counsel. Rather, it explains the process for obtaining a protective order—the proper method, in this district, for protecting confidential documents in the discovery process. Rule 26(f) provides for filing documents under seal, including “the filing of information covered by a protective order.”

plaintiff alleges made reference to settlement negotiations and settlement agreements. The court was hard-pressed, on some pages, to find reference to anything related to settlements—the plaintiff's or anyone else's. Other pages do refer to the plaintiff making settlement demands on some companies, and to settling with some companies.

The plaintiff's argument in support of maintaining any of these documents under seal, however, is not persuasive. First, assuming that the plaintiff has entered into settlement agreements that prohibit him from disclosing the existence or terms of those agreements, it is not clear how the plaintiff has violated those agreements. It is the *defendant* who filed the documents, not the plaintiff. The plaintiff told the defendant in the e-mail at Dkt. No. 59-1 that he intended anything he said in his deposition or supplemental responses to be confidential, and he's filed the instant motion with this court. He has not publicly disclosed the information; he has *opposed* the disclosure of the information. So it is not clear how someone else's disclosure of information that he sought to keep private would constitute a violation of any agreements to which the plaintiff may be a party with entities not involved in this suit.

Further, the plaintiff's argument ignores the fact that he came to the court—a public forum—and instituted this lawsuit. He sued the defendant on a cause of action for which he has sued a number of other companies, and yet he argues that those other suits are irrelevant to this one. In

essence, he indicates that while he wants to be able to file suit against the defendant in federal court, he wants to prevent the defendant from enquiring into similar suits that he has filed against other companies for the same alleged conduct. That is not an appropriate basis for the court to seal documents from public view.

The court will deny the plaintiff's motion to seal.

D. **Defendant's Motion for Leave to File Sur-Reply (Dkt. No. 66)**

Finally, after the parties had fully briefed the motion plaintiff's motion to seal, the defendant filed a motion asking the court for leave to file a sur-reply. Dkt. No. 66. This court grants such leave only rarely; the local rules provide for a motion, a response and a reply, and in the vast majority of cases, this is sufficient.

Given the court's decision on the motion to dismiss, and on the motion to seal, the court will deny the motion for leave to file a sur-reply as moot.

E. **Conclusion**

The court **GRANTS** the plaintiff's motion to lift the stay, *nunc pro tunc* to May 25, 2016. Dkt. No. 54.

The court **GRANTS** the defendant's motion to dismiss. Dkt. No. 55. The court **ORDERS** that the complaint is dismissed for lack of subject matter jurisdiction, effective immediately. The clerk will enter judgment accordingly.

The court **DENIES** the plaintiff's motion to seal. Dkt. No. 61.

The court **DENIES AS** MOOT the defendant's motion for leave to file a sur-reply. Dkt. No. 66.

Dated in Milwaukee, Wisconsin this 9th day of August, 2016.

BY THE COURT:



HON. PAMELA PEPPER
United States District Judge

AO 450 (Rev. 01/09) Judgment in a Civil Action

UNITED STATES DISTRICT COURT
for the
Eastern District of Wisconsin

Cory Groshek,
Plaintiff
v.
Time Warner Cable, Inc.
Defendant

Civil Action No. 15-cv-157-PP

JUDGMENT IN A CIVIL ACTION

The court has ordered that (check one):

[] the plaintiff (name) _____ recover from the
defendant (name) _____ the amount of
_____ dollars (\$) , which includes prejudgment
interest at the rate of _____%, plus post judgment interest at the rate of _____% per annum,
along with costs.

[] the plaintiff recover nothing, the action be dismissed on the merits, and the defendant (name)
_____ recover costs from the plaintiff (name) _____
_____.

X other: the complaint is dismissed for lack of subject matter jurisdiction, effective immediately.

This action was (check one):

[] tried by a jury with Judge _____ presiding, and the jury has rendered a verdict.

[] tried by Judge _____ without a jury and the above decision
was reached.

X decided by Judge Pamela Pepper on the defendant's motion to dismiss filed on May 27, 2016.

Date: August 9, 2016

CLERK OF COURT

/s/ Kristine G. Wrobel _____

Signature of Clerk or Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

CORY GROSHEK,
And all others, similarly situated,

Plaintiff,

v.

GREAT LAKES HIGHER EDUCATION
CORPORATION,

Defendant.

OPINION & ORDER

15-cv-143-jdp

Plaintiff Cory Groshek brings this class action lawsuit against defendant Great Lakes Higher Education Corporation alleging violations of the Fair Credit Reporting Act (FCRA). In March, 2016, the parties reached a settlement agreement, Dkt. 43, which the court preliminarily approved in April, Dkt. 46. But in May, the Supreme Court decided *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1548 (2016), which held that a bare statutory violation of the FCRA may not be sufficient in itself to establish a “concrete” injury, which is one of the requirements of Article III standing, without which this court would not have jurisdiction to decide this case.

Great Lakes now moves to dismiss the complaint for lack of standing, contending that Groshek has not alleged a concrete injury. Dkt. 53. Groshek opposes Great Lake’s motion and he moves for final approval of class action settlement and final certification. Dkt. 61. Great Lakes’ motion comes awfully late in the case, but because it goes to the court’s jurisdiction, the court must decide it on the merits. For reasons given below, the court concludes that Groshek has not alleged a concrete injury. The court will grant Great Lakes’ motion and dismiss the case for lack of subject matter jurisdiction.

ALLEGATIONS OF FACT

According to Groshek's complaint, Dkt. 1, Groshek applied for a job with Great Lakes in 2014. During an interview for the position, Great Lakes asked him to sign a two-sided document: one side was titled "Disclosure and Release of Information Authorization," and the other side was titled "Great Lakes Higher Education Corporation and Affiliates (Great Lakes) Applicant Disclosure of Criminal Conviction History." Great Lakes then acquired a consumer report on Groshek from Verifications, Inc., a consumer reporting agency.

Groshek filed suit against Great Lakes, contending that it willfully violated the FCRA by procuring a consumer report on Groshek without providing Groshek a clear and conspicuous written disclosure that a consumer report may be obtained for employment purposes in a document consisting solely of the disclosure, as required by 15 U.S.C. § 1681b(b)(2)(A)(i). Specifically, the disclosure "included a liability release/waiver and other extraneous information." Dkt. 1, ¶ 28. It was also "included . . . with a plethora of other information and documents provided at the same time." *Id.* ¶ 46. Because of this procedural violation, Groshek argues that he is entitled to statutory and punitive damages.

In March 2016, Groshek and Great Lakes jointly moved for preliminary approval of a class action settlement and conditional class certification, Dkt. 43, which the court granted, Dkt. 46. The final fairness hearing concerning the settlement is scheduled for October 14.

ANALYSIS

On Great Lakes' motion to dismiss, the court accepts Groshek's well-pleaded factual allegations as true and draws all reasonable inferences from those facts in his favor. *Lee v. City of Chicago*, 330 F.3d 456, 468 (7th Cir. 2003). But Groshek "bears the burden of

establishing” the three elements of Article III standing: injury in fact, causation, and redressability. *Id.* At the pleading stage, “the plaintiff must ‘clearly . . . allege facts demonstrating’ each element.” *Spokeo*, 136 S. Ct. at 1547 (quoting *Warth v. Seldin*, 422 U.S. 490, 518 (1975)).

The only standing element at issue is injury in fact. “To establish injury in fact, [Groshek] must show that he . . . suffered ‘an invasion of a legally protected interest’ that is ‘concrete and particularized’ and ‘actual or imminent, not conjectural or hypothetical.’” *Id.* at 1548 (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)). The *Spokeo* decision focused most particularly on the “concreteness” requirement, which the Court distinguished from the requirement of “particularization.” A concrete injury is one that is real. And a concrete injury does not automatically flow from every statutory violation, because sometimes there might be some procedural violation which causes no real harm to the plaintiff. *Id.* at 1549. However, in some circumstances, when a risk of specific harm flows more or less directly from the statutory violation, then the plaintiff need not show any harm beyond the violation of the statute.

The statute at issue in *Spokeo* was the FCRA, the same statute at issue here. The *Spokeo* court remanded the case because the lower courts had not adequately considered whether the plaintiff in that case had suffered a concrete harm when Spokeo, as a consumer reporting agency under the FCRA, disclosed certain false information about the plaintiff. The *Spokeo* decision thus rules out the idea that the FCRA is a statute so directly tied to a risk of real harm that a plaintiff need only show the statutory violation without pleading any other concrete injury. So the question for this court is whether Groshek has pleaded concrete injury

beyond the bare statutory violation. Based on the court's review of the complaint, the court concludes that he has not.

Groshek alleges that Great Lakes failed to provide the statutorily prescribed notice about its intent to obtain a consumer report under the FCRA. That is all. Groshek contends that Great Lakes' acquisition of his consumer report implicates his privacy interest. But Groshek does not allege that he did not know that Great Lakes was seeking to acquire a consumer report. He does not allege that would not have granted permission for Great Lakes to acquire a consumer report. He does not allege that Great Lakes disclosed the report to anyone else. *See also Groshek v. Time Warner Cable, Inc.*, No. 15-cv-157, 2016 WL 4203506, at *2-3 (E.D. Wis. Aug. 9, 2016) (rejecting Groshek's privacy-interest argument in a nearly identical lawsuit and noting that "[h]e has not alleged that the defendant released the information in the report to other people, causing him embarrassment or damaging his credit [or] that the defendant used the consumer report against him in any way"). The deficiencies in the notice did not cause any injury to Groshek's privacy interests.

Groshek also argues that he suffered an "informational injury." In its prototypical form, an informational injury is caused by the violation of a statute that requires the disclosure of information, such as the Freedom of Information Act. *See, e.g., Pub. Citizen v. U.S. Dep't of Justice*, 491 U.S. 440, 449 (1989) ("Our decisions interpreting the Freedom of Information Act have never suggested that those requesting information under it need show more than that they sought and were denied specific agency records."). Groshek cites cases in which the informational injury concept has been applied to claims under the FCRA, *see, e.g., Manuel v. Wells Fargo Bank, Nat'l Ass'n*, 123 F. Supp. 3d 810, 817 (E.D. Va. 2015), but those cases pre-date *Spokeo*. Such an expansive view of "informational injury" is hard to square with

Spokeo's reasoning. If the statutorily defective notice given to Groshek counts as a concrete informational injury, then it is hard to imagine a statutory violation that would not cause some form of informational injury. The court concludes that receiving a statutorily defective notice is not, in itself, a concrete injury. And Groshek has alleged no other harm.

Groshek suggests that the court is bound to follow *Sterk v. Redbox Automated Retail, LLC*, 770 F.3d 618 (7th Cir. 2014), which requires the court to deny Great Lakes' motion. Sterk's personal information had been disclosed by the defendant to a third party, and the Seventh Circuit concluded that that disclosure constituted an injury in fact sufficient to confer standing. *Id.* at 623. The *Sterk* court recognized that Congress could not lower the threshold for standing below that required by the Constitution, even though Congress has the power to enact statutes that create legal rights, without which standing could not exist. *Id.* In other words, some legal violation is a necessary prerequisite to standing, but it is not alone sufficient. There is nothing in *Sterk* that requires the court to conclude that Groshek has suffered concrete injury sufficient to confer standing.

The court understands Groshek's frustration, but his timing-related arguments are futile. A motion to challenge subject-matter jurisdiction under Rule 12(h)(3) may be made at any time and requires the court to dismiss the action if it finds it lacks jurisdiction. *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 506 (2006). "[W]hen [jurisdiction] ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause." *Ex Parte McCardle*, 74 U.S. 506, 514 (1868). This court lacks jurisdiction and thus "cannot proceed at all." *Id.*

ORDER

IT IS ORDERED that:

1. Defendant Great Lakes Higher Education Corporation's motion to dismiss for lack of subject matter jurisdiction, Dkt. 53, is GRANTED.
2. Plaintiff Cory Groshek's motion for final approval of class action settlement and final certification of Rule 23 settlement class, Dkt. 61, is DENIED.
3. The clerk of court is directed to close this case.

Entered October 4, 2016.

BY THE COURT:

/s/

JAMES D. PETERSON
District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

CORY GROSHEK,
And all others, similarly situated,

Plaintiff,

v.

GREAT LAKES HIGHER EDUCATION
CORPORATION,

Defendant.

JUDGMENT IN A CIVIL CASE

Case No. 15-cv-143-jdp

This action came before the court for consideration with District Judge James D. Peterson presiding. The issues have been considered and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that judgment is entered in favor of defendant Great Lakes Higher Education Corporation against plaintiff Cory Groshek and all others similarly situated dismissing this case for lack of subject matter jurisdiction.

s/ J. Smith, Deputy Clerk
Peter Oppeneer, Clerk of Court

10/04/2016
Date

**United States District Court
Eastern District of Wisconsin (Milwaukee)
CIVIL DOCKET FOR CASE #: 2:15-cv-00157-PP**

Groshek v. Time Warner Cable Inc
Assigned to: Judge Pamela Pepper
Case in other court: 16-03355
Cause: 15:1681 Fair Credit Reporting Act

Date Filed: 02/06/2015
Date Terminated: 08/09/2016
Jury Demand: Plaintiff
Nature of Suit: 480 Consumer Credit
Jurisdiction: Federal Question

Plaintiff

Cory Groshek

represented by **Heath P Straka**
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V.

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TERMINATED: 03/09/2016

Date Filed	#	Docket Text
02/06/2015	1	COMPLAINT with Jury Demand; against Time Warner Cable Inc. by Cory Groshek. (Filing Fee PAID \$400 receipt number 0757-2044192) (Attachments: # 1 Civil Cover Sheet, # 2 Summons, # 3 Exhibit A - Application documents, # 4 Exhibit B - Background Check & Drug Screening Authorization, # 5 Exhibit C - Advisory Opinion to Hauxwell) (Modl, Michael)
02/06/2015	2	MOTION to Certify Class by Cory Groshek. (Modl, Michael)
02/06/2015	3	BRIEF in Support filed by Cory Groshek re 2 MOTION to Certify Class . (Modl, Michael)
02/06/2015		NOTICE Regarding assignment of this matter to Magistrate Judge William E Callahan, Jr ;Consent/refusal forms for Magistrate Judge Callahan to be filed within 21 days;the consent/refusal form is available on our web site ;pursuant to Civil Local Rule 7.1 a disclosure statement is to be filed upon the first filing of any paper and should be filed now if not already filed (jcl)
02/09/2015		Summons Issued as to Time Warner Cable Inc. (kah)
02/10/2015	4	NOTICE of Appearance by John C Mitby on behalf of All Plaintiffs. Attorney(s) appearing: John C. Mitby (Mitby, John)
02/16/2015	5	DISCLOSURE Statement by Cory Groshek. (Gingras, Robert)
02/27/2015	6	Consent to Jurisdiction by US Magistrate Judge by Cory Groshek. (Attachments: # 1 Certificate of Service)(Modl, Michael)
03/25/2015		Case Reassigned to Magistrate Judge William E Duffin. Magistrate Judge William E Callahan, Jr no longer assigned to the case. (kah)
03/25/2015		NOTICE from the clerk to ALL PARTIES requesting that the Consent/Refusal form to Magistrate Judge William E Duffin be filed within 21 days; the form is available at the court's web site: www.wied.uscourts.gov (kah)
04/07/2015	7	Unopposed MOTION for Extension of Time to File Answer <i>or Otherwise Respond to Complaint and Motion for Class Certification</i> by All Defendants. (Lueder, Michael)
04/08/2015	8	ORDER signed by Magistrate Judge William E Duffin. IT IS THEREFORE ORDERED that Defendants 7 Motion for an Extension of Time is granted. Defendant shall file an answer, motion, or otherwise respond to the complaint and respond to the motion for class certification on or before May 8, 2015. (cc: all counsel) (asc)
04/15/2015	9	Refusal to Jurisdiction by US Magistrate Judge by Cory Groshek. (Modl, Michael)
04/15/2015		Due to the non-consent of the parties this case has been randomly reassigned to Judge Rudolph T Randa. Magistrate Judge William E Duffin no longer assigned to the case. (asc)

04/27/2015	10	NOTICE of Appearance by Michael Mishlove on behalf of Time Warner Cable Inc. Attorney(s) appearing: Emery K. Harlan, Michael Mishlove (Mishlove, Michael)
05/01/2015	11	NOTICE by Time Warner Cable Inc of <i>Withdrawal of Appearance</i> (Lueder, Michael)
05/08/2015	12	DISCLOSURE Statement by Time Warner Cable Inc. (Mishlove, Michael)
05/08/2015	13	MOTION to Dismiss by Time Warner Cable Inc. (Mishlove, Michael)
05/08/2015	14	BRIEF in Support filed by Time Warner Cable Inc re 13 MOTION to Dismiss . (Attachments: # 1 Exhibit A - Background Form, # 2 Exhibit B - Background Acknowledgement, # 3 Exhibit C - Submitted Background, # 4 Exhibit D - Authorization Summary, # 5 Exhibit E - Willner Letter, # 6 Exhibit F - Hawkey Letter, # 7 Exhibit G - Peikoff, # 8 Exhibit H - Gardner, # 9 Exhibit I - Uber, # 10 Exhibit J - Smith, # 11 Exhibit K - Syed I, # 12 Exhibit L - Syed II, # 13 Exhibit M - Westlaw Form)(Mishlove, Michael)
05/08/2015	15	BRIEF in Opposition filed by Time Warner Cable Inc re 2 MOTION to Certify Class . (Attachments: # 1 Exhibit A - Dzujna Declaration, # 2 Exhibit 1 - to Exhibit A, # 3 Exhibit B - Forrest, # 4 Exhibit C - Howard, # 5 Exhibit D - Bernegger, # 6 Exhibit E - Ball, # 7 Exhibit F - Audio-Video World, # 8 Exhibit G - Bohn, # 9 Exhibit H - Raytheon) (Mishlove, Michael)
05/22/2015	16	REPLY BRIEF in Support filed by Cory Groshek re 2 MOTION to Certify Class . (Straka, Heath)
05/22/2015	17	DECLARATION of Heath P. Straka <i>In Support of Brief in Reply to Defendant's Brief in Opposition to Plaintiff's Motion for Class Certification</i> (Attachments: # 1 Exhibit A: Atlantic Recording Corp. Decision, # 2 Exhibit B: LaRocque Decision, # 3 Exhibit C: Pope Decision, # 4 Exhibit D: Bernegger Decision, # 5 Exhibit E: Spizzirri Decision, # 6 Exhibit F: Coffey Decision)(Straka, Heath)
05/29/2015	18	BRIEF in Opposition filed by Cory Groshek re 13 MOTION to Dismiss . (Modl, Michael)
05/29/2015	19	DECLARATION of Michael J. Modl (Attachments: # 1 Exhibit 1 Avila v. NOW Order, # 2 Exhibit 2 Dunford v. American Databank Order, # 3 Exhibit 3 Milbourne v. JRK Memorandum Opinion, # 4 Exhibit 4 Reardon v. ClosetMaid, # 5 Exhibit 5 Singleton v. Domino's Memorandum Opinion, # 6 Exhibit 6 Speer v. Whole Food Order, # 7 Exhibit 7 Massey v. On-site Manager Memorandum Decision and Order, # 8 Exhibit 8 Miller v. Quest Diagnostics Order, # 9 Exhibit 9 Jones v. Halstead Order, # 10 Exhibit 10 Emerald Lengel v. Homeadvisor Memorandum and Order, # 11 Exhibit 11 1990 FTC Comprehensive Order, # 12 Exhibit 12 Hauxwell Advisory Opinion, # 13 Exhibit 13 FTC 2011 Staff Summary, # 14 Exhibit 14 Part 1, # 15 Exhibit 14 Part 2, # 16 Exhibit 15 Prepared Stmt 5/15/03, # 17 Exhibit 16 Prepared Stmt 10/20/93)(Modl, Michael)
06/03/2015	20	SUPPLEMENT by Cory Groshek <i>Notice of Supplemental Authority</i> . (Attachments: # 1 Exhibit A - Memorandum dated May 29, 2015 in Moore v. Rite Aid Hdqtrs. Corp.)(Modl, Michael)
06/15/2015	21	MOTION for Leave to File <i>Sur-Reply In Opposition to Plaintiff's Motion for Class Certification</i> by Time Warner Cable Inc. (Attachments: # 1 Exhibit A, # 2 Exhibit B) (Mishlove, Michael)
06/15/2015	22	PROPOSED SUR-REPLY BRIEF in Opposition filed by Time Warner Cable Inc re 2 MOTION to Certify Class , 21 MOTION for Leave to File <i>Sur-Reply In Opposition to Plaintiff's Motion for Class Certification</i> . (Attachments: # 1 Exhibit A, # 2 Exhibit B) (Mishlove, Michael) Modified on 6/16/2015 (blr).
06/15/2015	23	REPLY BRIEF in Support filed by Time Warner Cable Inc re 13 MOTION to Dismiss . (Attachments: # 1 Exhibit A, # 2 Exhibit B)(Mishlove, Michael)

06/16/2015		NOTICE of Electronic Filing Error re 21 Brief in Opposition to Motion, filed by Time Warner Cable Inc ; This document should have been filed as an attachment to the Motion for Leave to File as a Proposed Sur-Reply. This document does not need to be re-filed. Please refer to the policies and procedures for electronic case filing and the user manual found at www.wied.uscourts.gov. (blr)
06/26/2015	24	SUPPLEMENT by Cory Groshek <i>Notice of Supplemental Authority</i> . (Attachments: # 1 Exhibit A - Order in Rawlings v. ADS Alliance Data Systems)(Modl, Michael)
07/06/2015	25	BRIEF in Opposition filed by Cory Groshek re 21 MOTION for Leave to File <i>Sur-Reply In Opposition to Plaintiff's Motion for Class Certification</i> . (Gingras, Robert)
07/06/2015	26	SUPPLEMENT by Cory Groshek <i>Notice of Supplemental Authority</i> . (Attachments: # 1 Exhibit A - copy of Memorandum Opinion in Martin v. Fair Collections & Outsourcing, Inc., # 2 Exhibit B - copy of Order Denying Motion to Dismiss in Harris v. Home Depot USA, Inc.)(Modl, Michael)
07/23/2015	27	REPLY BRIEF in Support filed by Time Warner Cable Inc re 21 MOTION for Leave to File <i>Sur-Reply In Opposition to Plaintiff's Motion for Class Certification</i> . (Attachments: # 1 Exhibit 1)(Mishlove, Michael)
07/31/2015	28	ORDER signed by Judge Rudolph T. Randa on 7/31/2015. 21 Defendant's MOTION for Leave to File Sur-Reply GRANTED. 13 Defendant's MOTION to Dismiss DENIED. Scheduling Conference set for 9/16/2015 at 9:30 AM (Central Time) before Judge Rudolph T. Randa, the Court will initiate the call. (Attachments: # 1 Attachment A, # 2 Attachment B, # 3 Attachment C) (cc: all counsel)(cb)
07/31/2015	29	SUR-REPLY to Motion filed by Time Warner Cable Inc re 2 MOTION to Certify Class . (Attachments: # 1 Exhibit A, # 2 Exhibit B)(blr) (Entered: 08/03/2015)
08/14/2015	30	ANSWER to 1 Complaint, by Time Warner Cable Inc.(Mishlove, Michael)
09/10/2015	31	<i>Joint</i> REPORT of Rule 26(f) Plan by Cory Groshek. (Modl, Michael)
09/16/2015	32	Minute Entry for proceedings held before Judge Rudolph T Randa: Telephonic Scheduling Conference held on 9/16/2015. Amended Pleadings due by 11/1/2015. Motion for Rule 23 Class Certification due by 1/31/2016. Plaintiffs Expert Witness List due by 5/4/2016. Defendants Expert Witness List due by 6/18/2016. Discovery due by 7/20/2016. Dispositive Motions due by 9/1/2016. Telephonic Final Pretrial Conference set for 2/13/2017 02:00 PM before Judge Rudolph T Randa. 2-week Jury Trial set for 2/27/2017 09:00 AM in Courtroom 320, 517 E Wisconsin Ave., Milwaukee, WI 53202 before Judge Rudolph T Randa. The number of interrogatories per party is 25. The number of depositions per party, excluding expert depositions, is 10. (Zik, Linda) (Entered: 09/18/2015)
09/21/2015	33	SCHEDULING ORDER: signed by Judge Rudolph T Randa on 9/21/2015. (cc: all counsel)(Zik, Linda)
09/21/2015	34	STANDING ORDER RELATING TO THE DISCOVERY OF ELECTRONICALLY STORED INFORMATION signed by Judge Rudolph T Randa on 9/21/2015. (cc: all counsel)(Zik, Linda)
09/28/2015	35	NOTICE by Cory Groshek <i>Notice Regarding Plaintiff's Pending Class Certification Motion</i> (Modl, Michael)
09/29/2015	36	NOTICE of Appearance by Joseph W Ozmer, II on behalf of Time Warner Cable Inc. Attorney(s) appearing: Joseph W. Ozmer II, David M. Pernini, and Anthony E. Giardino (Ozmer, Joseph)

09/29/2015	37	DISCLOSURE Statement by Time Warner Cable Inc re 2016-02-06 (Ozmer, Joseph) 107
12/07/2015	38	Joint MOTION to Stay <i>Discovery and Case Deadlines</i> by Time Warner Cable Inc. (Attachments: # 1 Text of Proposed Order)(Giardino, Anthony)
12/09/2015	39	ORDER signed by Judge Rudolph T. Randa on 12/9/2015 GRANTING 38 Joint Motion to Stay. All discovery and case deadlines stayed pending mediation/settlement negotiations. If mediation/settlement unsuccessful parties will propose amended scheduling order to the Court within 5 days. (cc: all counsel) (cb)
01/13/2016	40	NOTICE by Time Warner Cable Inc <i>Notice of Withdrawal of Counsel</i> (Pernini, David)
01/14/2016	41	NOTICE of Change of Address by Joseph W Ozmer, II and Anthony E. Giardino (Ozmer, Joseph)
02/10/2016	42	LETTER from the Court to Counsel requesting the status of settlement negotiations within 21 days of the date of this Letter. (cc: All Counsel) (lz)
02/19/2016	43	MOTION to Stay by Time Warner Cable Inc. (Giardino, Anthony)
02/19/2016	44	BRIEF in Support filed by Time Warner Cable Inc re 43 MOTION to Stay . (Attachments: # 1 Exhibit A - Hannahan, # 2 Exhibit B - Asset Recovery, # 3 Exhibit C - Tyson Foods Question Presented, # 4 Exhibit D - Larson, # 5 Exhibit E - Hilti, # 6 Exhibit F - Ramirez, # 7 Exhibit G - Davis, # 8 Exhibit H - Schartel, # 9 Exhibit I - Lennartson, # 10 Exhibit J - Gensel, # 11 Exhibit K - Gottschalk, # 12 Exhibit L - Scheffler, # 13 Exhibit M - Compressor, # 14 Exhibit N - Ernst, # 15 Exhibit O - Acton, # 16 Exhibit P - Luster, # 17 Exhibit Q - Kolloukian, # 18 Exhibit R - Hilton Grand, # 19 Exhibit S - Fromer, # 20 Exhibit T - Duchene, # 21 Exhibit U - Salvatore, # 22 Exhibit V - Stone, # 23 Exhibit W - Provo, # 24 Exhibit X - Boise, # 25 Exhibit Y - Syed, # 26 Exhibit Z - Williams)(Giardino, Anthony)
02/19/2016	45	DECLARATION of Anthony E. Giardino <i>In Support of Motion to Stay</i> (Giardino, Anthony)
02/19/2016	46	NOTICE by Cory Groshek <i>Plaintiff's Proposed Schedule Following Mediation</i> (Modl, Michael)
02/19/2016	47	NOTICE by Time Warner Cable Inc <i>Defendant's Proposed Schedule Following Mediation</i> (Attachments: # 1 Exhibit A - Email Correspondence)(Giardino, Anthony)
02/23/2016	48	ORDER signed by Judge Rudolph T. Randa on 2/23/2016. If necessary parties to re-submit proposed amended schedules within 5 business days of the Court's ruling on 43 defendant's motion to stay. (cc: all counsel)(cb) (Entered: 02/25/2016)
02/26/2016	49	BRIEF in Opposition filed by Cory Groshek re 43 MOTION to Stay . (Attachments: # 1 Exhibit 1 - copy of Order in Robrinzine v. Big Lots Stores, Inc.)(Modl, Michael)
03/07/2016	50	SUPPLEMENT by Cory Groshek <i>Notice of Supplemental Authority</i> . (Attachments: # 1 Exhibit 1 - copy of Order in Rodriguez, Jr. v. Sprint/United Mgmt)(Modl, Michael)
03/09/2016	51	NOTICE of Appearance by Emery K Harlan on behalf of All Defendants. Attorney(s) appearing: Emery K. Harlan (Harlan, Emery)
03/11/2016	52	REPLY BRIEF in Support filed by Time Warner Cable Inc re 43 MOTION to Stay . (Giardino, Anthony)
03/29/2016	53	ORDER signed by Judge Rudolph T. Randa on 3/29/2016 GRANTING 43 Defendant's MOTION to Stay. Case STAYED pending U.S. Supreme Court's decision in <i>Spokeo v. Robins</i> . (cc: all counsel)(cb) (Entered: 03/30/2016)

05/24/2016	Case MOTION to Lift Stay by Cory Groshek (Gingras, Robert) Pages: 107
05/27/2016	55 MOTION to Dismiss for Lack of Jurisdiction by Time Warner Cable Inc. (Giardino, Anthony)
05/27/2016	56 BRIEF in Support filed by Time Warner Cable Inc re 55 MOTION to Dismiss for Lack of Jurisdiction . (Attachments: # 1 Exhibit A - Declaration of Anthony E. Giardino, # 2 Exhibit 1 to Exhibit A - Declaration of Anthony E. Giardino, # 3 Exhibit 2 to Exhibit A - Declaration of Anthony E. Giardino, # 4 Exhibit B - Wiesmueller v. Nettesheim, # 5 Exhibit C - Disability Rights Wisconsin, Inc. v. Walworth County Board of Supervisors, # 6 Exhibit D - Assn of Am. Physicians v. Koskinen)(Giardino, Anthony)
05/27/2016	57 NOTICE by Time Warner Cable Inc <i>Notice of Filing</i> (Attachments: # 1 Exhibit A - Correspondence, # 2 Exhibit 1, # 3 Exhibit 2)(Giardino, Anthony)
05/27/2016	58 BRIEF in Opposition filed by Time Warner Cable Inc re 54 MOTION to Lift Stay . (Attachments: # 1 Exhibit A - Omegbu v. State of Wisconsin Elections Board, # 2 Exhibit B - Enoch v. Tienor, # 3 Exhibit C - Lo v. Endicott, # 4 Exhibit D - Thompson v. Retirement Plan for Employees of S.C. Johnson & Sons, Inc., # 5 Exhibit E - Orlando Residence, Ltd. v. GP Credit Co., LLC)(Giardino, Anthony)
05/27/2016	59 NOTICE by Time Warner Cable Inc <i>Corrected Notice of Filing</i> (Attachments: # 1 Exhibit A - Correspondence, # 2 Exhibit 1 - Deposition Transcript Excerpts, # 3 Exhibit 2 - Plaintiff's Supplemental Answers to Defendant's First Interrogatories) Documents unrestricted pursuant to 71 Order. This document and/or certain attachments are restricted to case participants and attorneys of record should use their e-filing login and password to view this document (Giardino, Anthony) Modified on 8/9/2016 (amb).
06/17/2016	60 BRIEF in Opposition filed by Cory Groshek re 55 MOTION to Dismiss for Lack of Jurisdiction . (Gingras, Robert)
06/17/2016	61 MOTION to Seal Document by Cory Groshek. (Attachments: # 1 Exhibit 1: Protective Order)(Gingras, Robert)
07/01/2016	62 REPLY BRIEF in Support filed by Time Warner Cable Inc re 55 MOTION to Dismiss for Lack of Jurisdiction . (Attachments: # 1 Exhibit A - Stoops Order, # 2 Exhibit B - Wall Order, # 3 Exhibit C - Gubala Order, # 4 Exhibit D - Smith Order, # 5 Exhibit E - Gunther Brief, # 6 Exhibit F - Disability Rights Order, # 7 Exhibit G - Wiesmueller Order, # 8 Exhibit H - Gunther Order, # 9 Exhibit I - Matson Order, # 10 Exhibit J - Koskinen Order, # 11 Exhibit K - Spivey-Johnson Order)(Giardino, Anthony)
07/01/2016	63 BRIEF in Opposition filed by Time Warner Cable Inc re 61 MOTION to Seal Document . (Attachments: # 1 Exhibit 1 - Decl. of Anthony E. Giardino in Supp. of Def.'s Br. in Opp'n to Pl.'s Mot. to Seal, # 2 Exhibit 2 - S.C. Johnson Order, # 3 Exhibit 3 - Nordock Order, # 4 Exhibit 4 - Gronik Order)(Giardino, Anthony)
07/05/2016	64 SUPPLEMENTAL AUTHORITY by Cory Groshek . (Attachments: # 1 Exhibit 1 - Opinion In Re Nickelodeon Consumer Privacy Litigation)(Modl, Michael) Modified on 7/6/2016 (blr).
07/15/2016	65 REPLY BRIEF in Support filed by Cory Groshek re 61 MOTION to Seal Document . (Modl, Michael)
07/19/2016	66 MOTION for Leave to File <i>Sur-Reply In Opposition to Plaintiff's Motion to Seal</i> by Time Warner Cable Inc. (Attachments: # 1 Exhibit A - Matthews Order, # 2 Exhibit B - Sawyer Order)(Giardino, Anthony)
07/19/2016	67 PROPOSED SUR-REPLY BRIEF in Opposition filed by Time Warner Cable Inc re 61 MOTION to Seal Document <i>PROPOSED Sur-Reply Brief</i> . (Attachments: # 1 Exhibit A -

07/19/2016		NOTICE of Electronic Filing Error re 67 Brief in Opposition to Motion, filed by Time Warner Cable Inc; This document should have been filed as an attachment to the motion for leave to file. This document does not need to be re-filed; Please refer to the policies and procedures for electronic case filing and the user manual found at www.wied.uscourts.gov (blr)
07/27/2016	68	SUPPLEMENTAL AUTHORITY by Cory Groshek . (Attachments: # 1 Exhibit A - copy of Church v. Accretive Health, Inc. case, # 2 Exhibit B - copy of Thomas v. FTS USA, LLC case)(Modl, Michael)
07/28/2016	69	SUPPLEMENTAL AUTHORITY by Time Warner Cable Inc <i>Notice of Supplemental Authority in Support of Motion to Dismiss for Lack of Subject Matter Jurisdiction.</i> (Attachments: # 1 Exhibit A - Hancock Opinion, # 2 Exhibit B - Sartin Order, # 3 Exhibit C - Jamison Order)(Giardino, Anthony)
08/02/2016		Due to the unavailability of Judge Rudolph T. Randa, this case has been reassigned to Judge Pamela Pepper. Consent/refusal forms for Magistrate Judge Nancy Joseph to be filed within 21 days. The consent/refusal form is available at the court's web site: www.wied.uscourts.gov. (blr)
08/03/2016	70	Refusal to Jurisdiction by US Magistrate Judge by Time Warner Cable Inc. (Giardino, Anthony)
08/09/2016	71	ORDER signed by Judge Pamela Pepper on 8/9/2016 GRANTING 54 Motion to Lift the Stay, nunc pro tunc to 5/25/2016; GRANTING 55 Defendant's Motion to Dismiss for Lack of Jurisdiction, effective immediately; DENYING 61 Plaintiff's Motion to Seal Document; and DENYING AS MOOT 66 Defendant's Motion for Leave to File a Sur-reply. (cc: all counsel) (pwm)
08/09/2016	72	JUDGMENT approved by Judge Pamela Pepper and signed by Deputy Clerk on 8/9/2016. (cc: all counsel)(kgw)
08/11/2016	73	BILL OF COSTS Proposed by Time Warner Cable Inc (Attachments: # 1 Exhibit A - Itemization and Documentation for Requested Costs)(Giardino, Anthony) (Additional attachment(s) added on 8/12/2016: # 2 Bill of Costs (Correct format)) (amb).
08/11/2016	74	BRIEFING LETTER re 73 Bill of Costs Electronically Transmitted to Parties. (amb)
08/11/2016		NOTICE of Electronic Filing Error re 73 Bill of Costs filed by Time Warner Cable Inc ; To ensure proper processing of the Bill of Costs this document must be submitted as a fillable form. Please save it in the correct format and email it (do not re-file it) to wied_clerks_milw@wied.uscourts.gov; Please refer to the policies and procedures for electronic case filing and the user manual found at www.wied.uscourts.gov (amb)
08/30/2016	75	COSTS TAXED for Time Warner Cable Inc by Chief Deputy Clerk in amount of \$3,621.06 against Cory Groshek. (cc: all counsel) (amb) (Entered: 08/31/2016)
09/06/2016	76	NOTICE OF APPEAL by Cory Groshek. Filing Fee PAID \$505, receipt number 0757-2417053 (cc: all counsel) (Modl, Michael)
09/06/2016	77	Docketing Statement by Cory Groshek re 76 Notice of Appeal (cc: all counsel) (Modl, Michael)
09/06/2016	78	Attorney Cover Letter re: 76 Notice of Appeal (Attachments: # 1 docket sheet)(dl)
09/06/2016	79	Transmission of Notice of Appeal and Docket Sheet to US Court of Appeals re 76 Notice of Appeal (dl)

09/07/2016	Case 1:16-cv-00001-UNA Document 81-1 Filed 10/08/16 Page 1 of 1	USCA Case Number 16-3351 re: 76 Notice of Appeal filed by Cory Groshek . (dl)
09/20/2016	81	MOTION to Stay <i>Execution of Judgment for Costs</i> by Cory Groshek. (Modl, Michael)
10/11/2016	82	BRIEF in Opposition filed by Time Warner Cable Inc re 81 MOTION to Stay <i>Execution of Judgment for Costs</i> . (Ozmer, Joseph)
10/12/2016	83	ORDER signed by Judge Pamela Pepper on 10/12/2016 DENYING WITHOUT PREJUDICE 81 Motion to Stay Execution of Judgment for Costs Without Posting a Bond. (cc: all counsel) (kgw)

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V.

Defendant

**Great Lakes Higher Education
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represented by **Albert Bianchi, Jr.**
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A-030

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ATTORNEY TO BE NOTICED

Date Filed	#	Docket Text
03/05/2015	1	COMPLAINT against Great Lakes Higher Education Corporation. (Filing fee \$ 400 receipt number 0758-1513156.), filed by Cory Groshek. (Attachments: # 1 JS-44 Civil Cover Sheet, # 2 Summons, # 3 Exhibit A: Disclosure and Release of Information Authorization, # 4 Exhibit B: Verifications' consumer report, # 5 Exhibit C: FTC Advisory Opinion to Hauxwell) (Gingras, Robert) (Entered: 03/05/2015)
03/05/2015	2	Motion to Certify Class under Rule 23 by Plaintiff Cory Groshek. Brief in Opposition due 3/26/2015. Brief in Reply due 4/6/2015. (Gingras, Robert) (Entered: 03/05/2015)
03/05/2015	3	Brief in Support of 2 Motion to Certify Class under Rule 23 by Plaintiff Cory Groshek. (Gingras, Robert) (Entered: 03/05/2015)
03/06/2015		Case randomly assigned to Magistrate Judge Stephen L. Crocker. (voc) (Entered: 03/06/2015)
03/06/2015		Standard attachments for Magistrate Judge Stephen L. Crocker required to be served on all parties with summons or waiver of service: Corporate Disclosure Statement , Order Regarding Assignment of Civil Cases , Notice of Assignment to a Magistrate Judge and Consent/Request for Reassignment , Order on Dispositive Motions . (voc) (Entered: 03/06/2015)
03/06/2015	4	Summons Issued as to Great Lakes Higher Education Corporation. (voc) (Entered: 03/06/2015)
03/06/2015	5	** TEXT ONLY ORDER ** Briefing on plaintiffs' motion 2 to certify a Rule 23 class is stayed pending entry of a

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		full schedule at the not-yet scheduled telephonic preliminary pretrial conference. Signed by Magistrate Judge Stephen L. Crocker on 3/6/2015. (voc) (Entered: 03/06/2015)
03/10/2015	6	Notice of Appearance filed by John C. Mitby for Plaintiff Cory Groshek. (Mitby, John) Modified on 3/11/2015: Removed reference re: representing Defendant. (lak) (Entered: 03/10/2015)
04/09/2015	7	Notice of Appearance of <i>Michelle L. Dama</i> filed by Michelle L. Dama for Defendant Great Lakes Higher Education Corporation. (Dama, Michelle) (Entered: 04/09/2015)
04/09/2015	8	Notice of Appearance of <i>Farrah N. W. Rifelj</i> filed by Farrah N.W. Rifelj for Defendant Great Lakes Higher Education Corporation. (Rifelj, Farrah) (Entered: 04/09/2015)
04/09/2015	9	Notice of Appearance of <i>Albert Bianchi, Jr.</i> filed by Albert Bianchi, Jr for Defendant Great Lakes Higher Education Corporation. (Bianchi, Albert) (Entered: 04/09/2015)
04/09/2015		Case randomly reassigned to District Judge James D. Peterson and Magistrate Judge Stephen L. Crocker. (cak) (Entered: 04/09/2015)
04/13/2015	10	MOTION TO DISMISS and Combined Memorandum in Support Thereof by Defendant Great Lakes Higher Education Corporation. Brief in Opposition due 5/4/2015. Brief in Reply due 5/14/2015. (Dama, Michelle) Modified on 4/14/2015. (lak) (Entered: 04/13/2015)
05/04/2015	11	Brief in Opposition by Plaintiff Cory Groshek re: 10 Motion to Dismiss filed by Great Lakes Higher Education Corporation. (Gingras, Robert) (Entered: 05/04/2015)
05/04/2015	12	Declaration of Michael J. Modl filed by Plaintiff Cory Groshek re: 10 Motion to Dismiss (Attachments: # 1 Exhibit 1: Avila Order, # 2 Exhibit 2: Dunford Order, # 3 Exhibit 3: Milbourne Opinion, # 4 Exhibit 4: Reardon Opinion, # 5 Exhibit 5: Singleton Opinion, # 6 Exhibit 6: Speer Order, # 7 Exhibit 7: Massey Decision and Order, # 8 Exhibit 8: Miller Order, # 9 Exhibit 9: 1990 FTC Comprehensive Commentary, # 10 Exhibit 10: Hauxwell Advisory Opinion, # 11 Exhibit 11: FTC 2011 Staff Summary, # 12 Exhibit 12: Part 1 - Compliance Manuals, # 13 Exhibit 12: Part 2 - Compliance Manuals) (Gingras, Robert) (Entered: 05/04/2015)
05/07/2015	13	Notice of Supplemental Authority by Plaintiff Cory Groshek re: 10 Motion to Dismiss, (Attachments: # 1 Exhibit 1 - Copy of Order in Jones v. Halstead Management Company, # 2 Exhibit 2 - Copy of Memorandum and Order in Lengel v. Homeadvisor, Inc.) (Modl, Michael) Modified on 5/8/2015 to link to the pending motion instead of the brief. (lak) (Entered: 05/07/2015)

05/12/2015		Set Telephone Pretrial or Status Conference: Telephone Pretrial Conference set for 6/10/2015 at 12:30 PM before Magistrate Judge Stephen L. Crocker. Counsel for Plaintiff responsible for setting up the call to chambers at (608) 264-5153. [Standing Order Governing Preliminary Pretrial Conference attached] (jls) (Entered: 05/12/2015)
05/14/2015	14	Brief in Reply by Defendant Great Lakes Higher Education Corporation in Support of 10 Motion to Dismiss. (Dama, Michelle) (Entered: 05/14/2015)
05/27/2015	15	Corporate Disclosure Statement by Defendant Great Lakes Higher Education Corporation. (Bianchi, Albert) (Entered: 05/27/2015)
05/27/2015		Set Telephone Pretrial or Status Conference: Telephone Pretrial Conference set for 6/10/2015 at 12:30 PM rescheduled to 02:30 PM the same date to accommodate the court's calendar. Counsel for Plaintiff remains responsible for setting up the call to chambers at (608) 264-5153. (cak) (Entered: 05/27/2015)
06/03/2015	16	Joint Preliminary Pretrial Conference Report by Plaintiff Cory Groshek. (Gingras, Robert) (Entered: 06/03/2015)
06/03/2015	17	Notice of Supplemental Authority by Plaintiff Cory Groshek re: 10 Motion to Dismiss filed by Great Lakes Higher Education Corporation, (Attachments: # 1 Exhibit A - Memorandum dated May 29, 2015 in Moore v. Rite Aid Hdqtrs. Corp.) (Modl, Michael) Modified on 6/4/2015 to link to the pending motion. (lak) (Entered: 06/03/2015)
06/10/2015		Minute Entry for proceedings held before Magistrate Judge Stephen L. Crocker: Telephone Preliminary Pretrial Conference held on 6/10/2015 [:15] (cak) (Entered: 06/10/2015)
06/12/2015	18	Standing Order Relating to the Discovery of Electronically Stored Information in a Complex Civil Lawsuit. Signed by Magistrate Judge Stephen L. Crocker on 6/12/15. (jls) (Entered: 06/12/2015)
06/15/2015	19	Pretrial Conference Order - Amendments to Pleadings due 7/24/2015. Motion to Certify Class under Rule 23 due 12/18/2015. Dispositive Motions due 6/3/2016. Settlement Letters due 9/30/2016. Motions in Limine due 10/21/2016. Response to Motion due 11/4/2016. Final Pretrial Conference set for 11/16/2016 at 03:00 PM. Jury Selection and Trial set for 12/5/2016 at 09:00 AM. Signed by Magistrate Judge Stephen L. Crocker on 6/12/15. (jls) (Entered: 06/15/2015)
06/26/2015	20	Notice of Supplemental Authority filed by Plaintiff Cory Groshek re: 10 Motion to Dismiss filed by Great Lakes Higher Education Corporation, (Attachments: # 1 Exhibit A - Order in Rawlings v. ADS Alliance Data Systems) (Modl, Michael) Modified on 6/29/2015. (lak) (Entered: 06/26/2015)
07/06/2015	21	Notice of Supplemental Authority by Plaintiff Cory Groshek re: 10 Motion to Dismiss filed by Great Lakes Higher Education Corporation, (Attachments: # 1 Exhibit A - Copy of Memorandum Opinion in Martin v. Fair Collections & Outsourcing, Inc., # 2 Exhibit B - Copy of Order Denying Motion to Dismiss in Harris v. Home Depot USA, Inc.) (Modl, Michael) Modified on 7/7/2015. (lak) (Entered: 07/06/2015)

07/22/2015	22	Stipulated Motion for Protective Order by Defendant Great Lakes Higher Education Corporation. (Bianchi, Albert) (Entered: 07/22/2015)
07/23/2015	23	** TEXT ONLY ORDER ** The parties' stipulated protective order (dkt. 22) is accepted and entered by the court. Signed by Magistrate Judge Stephen L. Crocker on 7/23/2015. (jls) (Entered: 07/23/2015)
08/03/2015	24	Notice of Supplemental Authority by Plaintiff Cory Groshek, (Attachments: # 1 Exhibit A - Decision and Order dated July 31, 2015 in Groshek v. Time Warner Cable) (Modl, Michael) (Entered: 08/03/2015)
08/13/2015	25	Notice of Supplemental Authority by Defendant Great Lakes Higher Education Corporation re: 14 Brief in Reply, 10 MOTION TO DISMISS <i>and Memorandum in Support Thereof</i> , (Attachments: # 1 Exhibit A - Landrum v. Harris County Emergency Corps, No. 4:14CV-1811, 2015 U.S. Dist. LEXIS 92361 (S.D. Tex. July 16, 2015)) (Bianchi, Albert) (Entered: 08/13/2015)
08/20/2015	26	Motion to Compel <i>a Complete Answer to Interrogatory No. 2 of Plaintiff's First Set of Interrogatories and Requests for Production of Documents and Supporting Argument and Authority</i> by Plaintiff Cory Groshek. Motions referred to Magistrate Judge Stephen L. Crocker. Response due 8/27/2015. (Modl, Michael) (Entered: 08/20/2015)
08/20/2015	27	Declaration of Michael J. Modl filed by Plaintiff Cory Groshek re: 26 Motion to Compel, (Attachments: # 1 Exhibit 1 - Plaintiff's First Set of Interrogatories and Requests for Production of Documents, # 2 Exhibit 2 - Defendant's Response to Plaintiff's First Set of Discovery, # 3 Exhibit 3 - Correspondence dated 8/7/15 from Atty Modl to Atty Dama, # 4 Exhibit 4 - Correspondence dated 8/12/15 from Atty Dama to Atty Modl, # 5 Exhibit 5 - 8/12/15 e-mail from Atty Modl to Atty Dama, # 6 Exhibit 6 - Order in Harris v. Home Depot, # 7 Exhibit 7 - Memorandum in Moore v. Rite Aid HDQTRS) (Modl, Michael) (Entered: 08/20/2015)
08/27/2015	28	Disregard, wrong document attached. Refiled as 30 Brief in Opposition. Modified on 8/27/2015. (arw) (Entered: 08/27/2015)
08/27/2015	29	Declaration of Michelle L. Dama filed by Defendant Great Lakes Higher Education Corporation re: 26 Motion to Compel, (Attachments: # 1 Exhibit A - Email String) (Dama, Michelle) (Entered: 08/27/2015)
08/27/2015	30	Brief in Opposition by Defendant Great Lakes Higher Education Corporation re: 26 Motion to Compel, filed by Cory Groshek. (Dama, Michelle) (Entered: 08/27/2015)
09/25/2015		Set Hearing as to 26 Motion to Compel <i>a Complete Answer to Interrogatory No. 2 of Plaintiff's First Set of Interrogatories and Requests for Production of Documents and Supporting Argument and Authority</i> . Telephonic Motion Hearing set for 9/30/2015 at 03:00 PM before Magistrate Judge Stephen L. Crocker. Counsel for Plaintiff responsible for setting up the call to chambers at (608) 264-5153. (jls) (Entered: 09/25/2015)

09/30/2015		Minute Entry for proceedings held before Magistrate Judge Stephen L. Crocker: Telephone Motion Hearing held on 9/30/2015 re 26 Motion to Compel a Complete Answer to Interrogatory No. 2 of Plaintiff's First Set of Interrogatories and Requests for Production of Documents and Supporting Argument and Authority filed by Cory Groshek [:30] (skv) (Entered: 09/30/2015)
09/30/2015	31	** TEXT ONLY ORDER ** At a September 30, 2015 telephonic hearing, the court granted plaintiff's motion to compel discovery (dkt. 26) for the reasons stated. Defendant must provide the requested information not later than October 7, 2015. Each side will bear its own costs on this motion. Signed by Magistrate Judge Stephen L. Crocker on 9/30/2015. (jls) (Entered: 09/30/2015)
10/07/2015	32	Appeal of Magistrate Judge Decision to District Court by Defendant Great Lakes Higher Education Corporation by Defendant Great Lakes Higher Education Corporation. (Dama, Michelle) (Entered: 10/07/2015)
10/07/2015	33	Brief in Support of 32 Appeal of Magistrate Judge Decision to District Court by Defendant Great Lakes Higher Education Corporation. (Dama, Michelle) (Entered: 10/07/2015)
10/07/2015	34	Declaration of Michelle L. Dama filed by Defendant Great Lakes Higher Education Corporation re: 32 Appeal of Magistrate Judge Decision to District Court, (Attachments: # 1 Exhibit 1 - Hearing Transcription) (Dama, Michelle) (Entered: 10/07/2015)
10/20/2015	35	** TEXT ONLY ORDER ** The magistrate judge granted plaintiff's motion to compel discovery, ordering defendant to disclose the names and contact information of additional potential class members. Dkt. 31. Defendant has appealed that order. Dkt. 32 . The court will address the merits of defendant's appeal with the merits of defendant's motion to dismiss, Dkt. 10 . Enforcement of the order, Dkt. 31, is STAYED pending resolution of the appeal and the motion to dismiss. Signed by District Judge James D. Peterson on 10/20/2015. (jls) (Entered: 10/20/2015)
11/04/2015	36	Notice of Supplemental Authority by Plaintiff Cory Groshek, (Attachments: # 1 Exhibit A - Copy of Woods v. Caremark PHC) (Modl, Michael) Modified on 11/5/2015. (lak) (Entered: 11/04/2015)
11/16/2015	37	ORDER denying 10 Motion to Dismiss; overruling 32 Appeal of Magistrate Judge Decision to District Court; and ordering defendant to supplement its response to Interrogatory No. 2 to provide the names and contact information of job applicants for whom it has requested a credit report on or after March 5, 2010. Signed by District Judge James D. Peterson on 11/16/2015. (jls) (Entered: 11/16/2015)
11/30/2015	38	Stipulated Motion for Extension of Time <i>Regarding Class Certification Deadlines</i> by Defendant Great Lakes Higher Education Corporation. Motions referred to Magistrate Judge Stephen L. Crocker. (Bianchi, Albert) (Entered: 11/30/2015)

12/03/2015		Set Hearings: Settlement Conference before Peter Oppeneer set for 1/7/2015 at 9:30 AM in conference room 410. Any submissions of the parties are due by 1/5/2015 at clerkofcourt@wiwd.uscourts.gov. (jaf) (Entered: 12/03/2015)
12/03/2015		Reset Hearings: Settlement Conference reset for 1/7/2016 at 9:30 AM before Peter Oppeneer in conference room 410. Any submissions of the parties are due by 1/5/2016 at clerkofcourt@wiwd.uscourts.gov. (jaf) (Entered: 12/03/2015)
12/07/2015	39	** TEXT ONLY ORDER ** The parties jointly have requested a 60-day extension of the class certification motion and briefing deadlines in order to conserve resources while they engage in settlement discussions. The motion is GRANTED, with this observation: the parties did not address the ripple effect these extensions might have on other deadlines in the event they do not settle this case. So that there is no misunderstanding later, the December 5, 2016 trial date is not moving, and there is at most one or two weeks' slack in the June 3, 2016 deadline to file dispositive motions. Signed by Magistrate Judge Stephen L. Crocker on 12/3/2015. (jls) (Entered: 12/07/2015)
12/16/2015	40	ANSWER by Defendant Great Lakes Higher Education Corporation. (Dama, Michelle) (Entered: 12/16/2015)
01/11/2016		Minute Entry for proceedings held before Magistrate Judge Peter A. Oppeneer: Settlement Conference held on 1/7/2016 [5:00] during which the parties did not reach a final settlement. (Court Reporter FTR.) (jaf) (Entered: 01/11/2016)
02/15/2016	41	Joint Motion to Stay <i>Proceedings</i> by Plaintiff Cory Groshek. Response due 2/22/2016. (Gingras, Robert) (Entered: 02/15/2016)
02/17/2016	42	** TEXT ONLY ORDER ** Re: 41 Motion to Stay. Discovery is stayed for 21 days. All other dates remain on the calendar. Signed by District Judge James D. Peterson on 2/17/2016. (voc) (Entered: 02/17/2016)
03/14/2016	43	Joint Motion for Settlement (<i>Preliminary Approval of Class Action Settlement and Joint Stipulation for Class Certification</i>) by Plaintiff Cory Groshek. (Straka, Heath) (Entered: 03/14/2016)
03/14/2016	44	Brief in Support of 43 Motion for Settlement by Plaintiff Cory Groshek. (Straka, Heath) (Entered: 03/14/2016)
03/14/2016	45	Declaration of Heath P. Straka filed by Plaintiff Cory Groshek re: 43 Motion for Settlement, (Attachments: # 1 Exhibit A: Settlement Agreement, # 2 Exhibit B: Class Notice of Settlement, # 3 Exhibit C: Order, # 4 Exhibit D: CAFA Notices) (Straka, Heath) (Entered: 03/14/2016)
04/13/2016	46	ORDER granting 43 Joint Motion for Preliminary Approval of Class Action Settlement and Joint Stipulation for Class Certification; Appointing Cory Groshek as class representative and Heath P. Straka of Gringras, Cates & Luebke and Michael Modl of Axley Brynelson, LLP as class counsel. Counsel is to send notice to the class withing 14 days of this order. All papers in support of settlement are due by

		8/4/2016. The Final Fairness Hearing is set for 8/18/2016 at 09:00 AM. Signed by District Judge James D. Peterson on 4/13/2016. (jls) (Entered: 04/13/2016)
07/08/2016	47	Joint Motion to Reschedule Final Fairness Hearing by Defendant Great Lakes Higher Education Corporation. (Dama, Michelle) (Entered: 07/08/2016)
07/11/2016	48	** TEXT ONLY ORDER ** The parties' joint motion to reschedule the final fairness hearing, Dkt. 47 , is GRANTED. The hearing is moved to October 14, 2016, at 9:00 a.m. All papers in support of settlement are due September 30, 2016. Settlement Conference set for 10/14/2016 at 09:00 AM in courtroom 360. Signed by District Judge James D. Peterson on 7/11/2016. (voc) (Entered: 07/11/2016)
09/09/2016	49	Stipulation for Withdrawal and Substitution of Counsel by Defendant Great Lakes Higher Education Corporation. (Dama, Michelle) (Entered: 09/09/2016)
09/09/2016	50	Notice of Appearance filed by John Noble Giftos for Defendant Great Lakes Higher Education Corporation. (Giftos, John) (Entered: 09/09/2016)
09/09/2016	51	Notice of Appearance filed by Roisin Heather Bell for Defendant Great Lakes Higher Education Corporation. (Bell, Roisin) (Entered: 09/09/2016)
09/09/2016	52	Notice of Appearance filed by Kevin Michael St. John for Defendant Great Lakes Higher Education Corporation. (St. John, Kevin) (Entered: 09/09/2016)
09/09/2016	53	MOTION TO DISMISS for Lack of Jurisdiction by Defendant Great Lakes Higher Education Corporation. Brief in Opposition due 9/30/2016. Brief in Reply due 10/11/2016. (Bell, Roisin) (Entered: 09/09/2016)
09/09/2016	54	Brief in Support of 53 Motion to Dismiss/Lack of Jurisdiction by Defendant Great Lakes Higher Education Corporation (Attachments: # 1 Exhibit A - First Amended Class Action Complaint, Case No.: 15-cv-65, # 2 Exhibit B - Class Action Complaint, Eastern District of Wisconsin, # 3 Exhibit C - Index to Exhibit C and Cases) (Bell, Roisin) Modified on 9/11/2016: Added exhibit descriptions; e-mail to counsel. (lak) (Entered: 09/09/2016)
09/09/2016	55	** TEXT ONLY ORDER ** The parties' stipulation for withdrawal and substitution of counsel for defendant Great Lakes Higher Education Corporation, Dkt. 49 , is GRANTED. The briefing deadlines for defendant's motion to dismiss for lack of jurisdiction, Dkt. 53 , are rescheduled. The brief in opposition is due 9/12/2016. If the court decides a reply brief is needed, it will issue further instructions. Signed by District Judge James D. Peterson on 9/9/2016. (cew) Modified on 9/12/2016. (lak) (Entered: 09/09/2016)
09/12/2016	56	Motion for Extension of Time to Respond to Defendant's Motion to Dismiss for Lack of Subject Matter Jurisdiction by Plaintiff Cory Groshek. Motions referred to Magistrate Judge Stephen L. Crocker. Response due 9/19/2016. (Modl, Michael) (Entered: 09/12/2016)
09/12/2016	57	** TEXT ONLY ORDER ** Plaintiff Cory Groshek's motion for extension of time to respond to defendant's motion to dismiss for lack of subject matter jurisdiction, Dkt. 56 , is GRANTED. The plaintiff's brief in opposition to defendant's motion to dismiss for lack of jurisdiction,

		Dkt. 53 , is due 9/13/16. Signed by District Judge James D. Peterson on 9/12/2016. (jls) (Entered: 09/12/2016)
09/13/2016	58	Brief in Opposition by Plaintiff Cory Groshek re: 53 Motion to Dismiss/Lack of Jurisdiction filed by Great Lakes Higher Education Corporation. (Modl, Michael) (Entered: 09/13/2016)
09/13/2016	59	Disregard. See 60 . Modified on 9/14/2016. (lak) (Entered: 09/13/2016)
09/14/2016	60	Declaration of Michael J. Modl filed by Plaintiff Cory Groshek re: 53 Motion to Dismiss/Lack of Jurisdiction, (Attachments: # 1 Exhibit 1 - Copy of Memorandum Opinion in Witt v. Corelogic, # 2 Exhibit 2 - Copy of Order in Perrill v. Equifax, # 3 Exhibit 3 - Copy of Memorandum Opinion in Thomas v. FTS USA, # 4 Exhibit 4 - Copy of Memorandum Opinion in Burke v. Federal National Mortgage Association, # 5 Exhibit 5 - Copy of Order in Meza v. Verizon, # 6 Exhibit 6 - Copy of Memorandum and Order in Yershov v. Gannet Satellite, # 7 Exhibit 7 - Copy of Memorandum Opinion and Order in Lane v. Bayview Loan, # 8 Exhibit 8 - Copy of Order in Mey v. Got Warranty Inc., # 9 Exhibit 9 - Copy of Order in Altman v. White House Black Market, # 10 Exhibit 10 - Copy of Order in Hawkins v. S2verify, # 11 Exhibit 11 - Copy of Decision in Church v. Accretive Health Inc., # 12 Exhibit 12 - Copy of Decision in In re: Nickelodeon Consumer Privacy Litigation) (Modl, Michael) Modified on 9/14/2016. (lak) (Entered: 09/14/2016)
09/30/2016	61	Motion for Settlement (<i>Final Approval of Class Action Settlement and Final Certification of Rule 23 Settlement Class</i>) by Plaintiff Cory Groshek. Response due 10/7/2016. (Modl, Michael) (Entered: 09/30/2016)
09/30/2016	62	Brief in Support of 61 Motion for Settlement (<i>Final Approval of Class Action Settlement and Final Certification of Rule 23 Settlement Class</i>) by Plaintiff Cory Groshek. (Modl, Michael) (Entered: 09/30/2016)
09/30/2016	63	Declaration of Heath P. Straka filed by Plaintiff Cory Groshek re: 61 Motion for Settlement. (Modl, Michael) (Entered: 09/30/2016)
09/30/2016	64	Brief in Opposition by Defendant Great Lakes Higher Education Corporation re: 61 Motion for Settlement filed by Cory Groshek. (Giftos, John) (Entered: 09/30/2016)
10/04/2016	65	ORDER granting 53 Motion to Dismiss for Lack of Jurisdiction; denying 61 Motion for final certification of Rule 23 settlement class; and directing the clerk to close the case. Signed by District Judge James D. Peterson on 10/4/2016. (jls) (Entered: 10/04/2016)
10/04/2016	66	JUDGMENT entered in favor of Defendant Great Lakes Higher Education Corporation dismissing the case. (jls) (Entered: 10/04/2016)
10/19/2016	67	NOTICE OF APPEAL by Plaintiff Cory Groshek as to 66 Judgment. Filing fee of \$ 505, receipt number 0758-1901755 paid. Docketing Statement filed. (Attachments: # 1 Docketing Statement) (Modl, Michael) (Entered: 10/19/2016)
10/19/2016	68	Appeal Information Packet. (lak) (Entered: 10/19/2016)

