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9 **UNITED STATES DISTRICT COURT**  
10 **NORTHERN DISTRICT OF CALIFORNIA**  
11 **SAN FRANCISCO DIVISION**

13 JUSTIN LEWIS, on behalf of himself and all  
14 others similarly situated,

15 *Plaintiff,*

16 vs.

17 SOUTHWEST AIRLINES CO., a Texas  
18 corporation; and DOES 1 to 100, inclusive,

19 *Defendants.*

Case No. 16-cv-00749-JCS

**NOTICE OF MOTION AND MOTION  
TO REMAND CASE TO STATE  
COURT AND TO VACATE  
TRANSFER ORDER**

**Hearing Information**

Date: August 12, 2016  
Time: 9:30 a.m.  
Courtroom: G (15th Floor)  
Judge: Hon. Joseph C. Spero

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1 TO THE COURT, ALL PARTIES, AND THEIR ATTORNEYS OF RECORD:

2 PLEASE TAKE NOTICE that on August 12, 2016 at 9:30am in Courtroom G of the  
3 U.S. District Court for the Northern District of California, located at 450 Golden Gate Avenue,  
4 San Francisco, CA 94102, Plaintiff Justin Lewis (“Plaintiff”) will and hereby does move this  
5 Court for an order remanding this case to the Alameda County -Superior Court.

6 This Motion is made on the grounds that this Court lacks subject matter jurisdiction over  
7 this action. Pursuant to the decision of the United States Supreme Court in *Spokeo, Inc. v. Robin*  
8 136 S. Ct. 1540 (May 16, 2016) federal court jurisdiction over this matter is lacking because  
9 Plaintiff does not allege a concrete injury as a result of the statutory violations alleged in the  
10 lawsuit. Where, as here, a complaint was removed from state court and subject matter  
11 jurisdiction is lacking, the proper remedy is to remand to state court. *E.g., McGrath v. Home*  
12 *Depot USA, Inc.*, 298 F.R.D. 601 (S.D. Cal. 2014.)

13 Further this Court’s order transferring the case to the Northern District of Texas should  
14 be vacated as void pursuant to Fed. R. Civ. P. 60.

15 This Motion is based on this Notice of Motion and Motion, Memorandum in support  
16 thereof, the Reply brief (if any), all papers and pleadings on file with the Court in this action,  
17 and on any and all further oral and documentary evidence as the Court may consider in  
18 connection with the hearing on this Motion.

19 Respectfully submitted,

20 SETAREH LAW GROUP

21 Dated: June 7, 2016

22 BY: /s/ Shaun Setareh

23 SHAUN SETAREH  
24 Attorneys for Plaintiff,  
25 JUSTIN LEWIS  
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**MEMORANDUM OF POINTS AND AUTHORITIES****I. Introduction.**

By this motion Plaintiff seeks remand to state court. Plaintiff filed an Opposition to Defendant Southwest Airlines' Motion to Transfer Venue on April 1, 2016. Under the existing case law, Plaintiff did not have a basis for seeking remand to state court. On May 16, 2016 the United States Supreme Court issued a decision which called into question whether federal court jurisdiction exists over an action filed pursuant to the Fair Credit Reporting Act where the plaintiff alleges a statutory violation but not a concrete injury. On June 2, 2016 this Court granted the motion to transfer venue. However, if this Court lacked subject matter jurisdiction then the order granting the motion is void.

As explained below, this Court lacks jurisdiction over the action. However, the Fair Credit Reporting Act expressly allows for an FCRA action to be filed in state court. Therefore, this Court should vacate the transfer order and remand this case to state court.

**II. Under *Spokeo* there is no federal subject matter jurisdiction over this action.**

The United States Supreme Court recently issued a seminal decision on the issue of federal court jurisdiction over claims which are based on a violation of a statute. *Spokeo Inc. v. Robins*, 136 S. Ct. 1540 (May 16, 2016.) That decision makes clear that this Court lacks subject matter jurisdiction over this action.

In *Spokeo*, the plaintiff alleged violation of the Fair Credit Reporting Act because the defendant had allegedly published inaccurate information about him on its website. The district court dismissed the case for lack of standing. *Id.* at 1544. The Ninth Circuit reversed holding that the plaintiff had alleged standing, because he had alleged that his individual rights under the statute were violated. *Id.* The United States Supreme Court reversed the Ninth Circuit explaining that in order for federal court jurisdiction to exist, the plaintiff must allege an injury which is both particularized (i.e. their personal rights were violated) and concrete:

“As we have expressed in our prior opinions, the injury-in-fact requirement requires a plaintiff to allege an injury that is both ‘concrete *and* particularized’ . . . The Ninth

1 Circuit’s analysis focused on the second characteristic (particularity) but it overlooked  
2 the first (concreteness.)”

3 *Id.* at 1545.

4 The Supreme Court further explained that a bare statutory violation of the Fair Credit  
5 Reporting Act would be insufficient to establish federal subject matter jurisdiction: “Robins  
6 cannot satisfy the demands of Article III by alleging a bare procedural violation.” *Id.* at 1550.

7 Here, the operative complaint alleges facts demonstrating that the named plaintiff  
8 suffered a particularized injury because Southwest procured credit and background reports on  
9 him while using an authorization form which did not comply with the FCRA. (Complaint ¶¶ 25-  
10 35.) But the complaint does not allege that plaintiff suffered a *concrete* injury i.e. an injury that  
11 exists separate and apart from the violation of the statute.<sup>1</sup> As explained below, given the  
12 procedural posture of this case, the consequence of that is that the case should be remanded to  
13 state court.

14 **III. This action should be remanded to state court.**

15 It is well settled that federal courts are courts of limited jurisdiction and that there is a  
16 presumption that cases are outside that jurisdiction:

17 “Federal courts are courts of limited jurisdiction. They possess only that power  
18 authorized by Constitution or a statute, which is not to be expanded by judicial decree. It  
19 is to be presumed that a cause lies outside this limited jurisdiction and the burden of  
20 establishing the contrary rests upon the party asserting jurisdiction.”

21 *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994.)

22 An injury in fact is a requirement of federal subject matter jurisdiction. *Spokeo supra* at  
23 1547: “No principle is more fundamental to the judiciary’s proper role in our system of  
24 government than the constitutional limitation of federal-court jurisdiction to actual cases or  
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28 <sup>1</sup> Under the well pleaded complaint rule, plaintiff need not plead facts that would create federal jurisdiction. *Franchise Tax Board of California v. Construction Laborers Vacation Trust for Southern California*, 103 S. Ct. 2841, 2846 (1983.)

1 controversies.” *Accord U.S. v. Lopez*, 209 Fed. Appx. 653, 654 (9<sup>th</sup> Cir. 2006): “Since Lopez did  
2 not suffer an injury in fact, this Court lacks subject matter jurisdiction . . . .”

3 Notably, the Fair Credit Reporting Act provides for concurrent jurisdiction in state court.  
4 “An action to enforce any liability created under this subchapter may be brought in any  
5 appropriate United States District Court . . . or in any other court of competent jurisdiction.” 15  
6 U.S.C. § 1681p. Therefore, the FCRA does not create exclusive federal jurisdiction but instead  
7 permits a state forum as well. *Sehl v. Safari Motor Coaches, Inc.*, 2001 WL 940846 \*7 (N.D.  
8 Cal. 2001) (discussing difference between FCRA and federal statutes which confer exclusive  
9 federal jurisdiction.) As such Congress has expressly provided for FCRA cases to be litigated in  
10 state court as well as federal court. Therefore, the case was properly filed in state court, but in  
11 light of *Spokeo* it was removed improperly.

12 Courts have repeatedly concluded that where, as here, a case was filed in state court and  
13 the plaintiff lacks Article III standing, remand is proper. *E.g., McGrath v. Home Depot USA*,  
14 298 F.R.D. 601 (S.D. Cal. 2014); *Boyle v. MTV Networks, Inc.*, 766 F.Supp. 809, 816-817 (N.D.  
15 Cal. 1991); *Maine Ass’n of Independent Neighborhoods v. Commissioner, Maine Department of*  
16 *Human Servs.*, 876 F.2d 1051, 1054 (1<sup>st</sup> Cir. 1989); *Toxic Injuries Corp v. Safety Kleen Corp.*,  
17 57 F.Supp.2d 947, 957 (C.D. Cal. 1999); *Environmental Research Center v. Heartland Prods.*,  
18 29 F.Supp.3d 1281, 1284 (C.D. Cal. 2014); *Brain Policy Institute v. Shewry*, 2006 WL 2237732  
19 \*4 (N.D. Cal. 2006.)

20 As former Chief United States District Court Judge Walker explained:

21 “A practical reason supports remand . . . . If dismissal were the appropriate procedure in  
22 cases like this, plaintiffs would likely refile in state court, only to have their cases  
23 removed and dismissed again. Like Sisyphus, condemned to roll a heavy rock up a hill  
24 only to have it roll back down again just before he reaches the top, these plaintiffs would  
25 never see a resolution on the merits.”

26 *Mirto v. American Intern. Group*, 2005 WL 827903 \*3 (N.D. Cal. 2005.)  
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