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11
12 UNITED STATES DISTRICT COURT

13 NORTHERN DISTRICT OF CALIFORNIA - SAN FRANCISCO DIVISION

14
15 LATASHA McLAUGHLIN, on behalf of
herself and all others similarly situated,

16
17 Plaintiff,

18 vs.

19 WELLS FARGO BANK, N.A., d/b/a WELLS
20 FARGO HOME MORTGAGE,

21 Defendant.
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23
24
25
26
27
28

Case No.: 3:15-cv-02904-WHA

**WELLS FARGO BANK, N.A.’S BRIEF RE
IMPACT OF SPOKEO DECISION**

Honorable William H. Alsup

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1 Pursuant to the Court’s order on Wells Fargo Bank, N.A.’s (“Wells Fargo”) motion to stay,
 2 Wells Fargo submits this brief discussing the impact of the U.S. Supreme Court’s decision in *Robins*
 3 *v. Spokeo, Inc.* on class certification in this matter. Dkt. 89 at 2. In short, *Spokeo* confirms that
 4 Plaintiff did not suffer any actual injury traceable to the payoff statement at issue, and thus lacks
 5 standing to bring her TILA claim. Nor can Plaintiff overcome the individual inquiries required to
 6 establish concrete injury and standing for the putative class. For the reasons stated in Wells Fargo’s
 7 opposition, and herein, Wells Fargo therefore respectfully requests the Court deny Plaintiff’s motion
 8 for class certification.

9 **I. FACTUAL BACKGROUND AND PROCEDURAL HISTORY**

10 The factual background and procedural history through early February 2016 is detailed in
 11 Wells Fargo’s opposition to class certification. Dkt. 95, at Section II. Wells Fargo incorporates that
 12 Section by reference here. *See also* Dkt. 93 (Wells Fargo’s Motion for Summary Judgment), at
 13 Section II.

14 Together with its opposition to class certification, Wells Fargo filed a motion for stay based
 15 on the Supreme Court’s then-pending decision in *Spokeo*. *See* Dkt. 73. Ruling on Wells Fargo’s
 16 motion, the Court found that “it is likely ... that the Supreme Court’s decision in *Spokeo* will affect
 17 the construction of a potential class at the Rule 23 stage.” Dkt. 89 at 2. The Court declined to issue a
 18 full stay of the litigation, but vacated the February 25 hearing on Plaintiff’s motion for class
 19 certification and held the motion in abeyance pending the Supreme Court’s decision in *Spokeo*. *Id.*

20 **II. THE SUPREME COURT HOLDS IN *SPOKEO* THAT ACTUAL CONCRETE**
 21 **INJURY IS REQUIRED FOR INJURY IN FACT AND ARTICLE III STANDING**

22 **A. The District Court Dismissed Robins’ FCRA Suit For Lack Of Standing, But**
 23 **The Ninth Circuit Reversed.**

24 Plaintiff Thomas Robins filed suit against Spokeo alleging violations of the Fair Credit
 25 Reporting Act, 15 U.S.C. § 1681, et seq. (“FCRA”). *Spokeo, Inc. v. Robins*, No. 13-1339, 578 U.S.
 26 ____ (May 16, 2016) (“*Spokeo*”).¹ Robins claimed that Spokeo, an internet “people search engine,”
 27 _____

28 ¹ A copy of the Supreme Court’s decision is attached hereto as Exhibit A, and available at:
<http://www.supremecourt.gov/opinions/slipopinions.aspx> (last visited May 20, 2016).

1 maintained a profile for him that erroneously portrayed him as being married with children, in his
 2 50s, with a job and an advanced degree. *Id.*, Ginsburg, J. dissenting. In reality, Robins was not
 3 married, had no children, was not in his 50s, and was not employed. *Id.* Robins claimed that the
 4 inaccurate profile violated FCRA’s mandate that consumer reporting agencies follow reasonable
 5 procedures to assure maximum possible accuracy in consumer reports. *Id.*

6 Spokeo moved to dismiss the complaint, claiming among other things, that Robins could not
 7 show he was actually harmed by the online profile. The district court agreed, finding that Robins’
 8 alleged injury — harm to his employment prospects — was “speculative, attenuated and
 9 implausible.” *Robins v. Spokeo, Inc.*, No. 10-cv-05306-ODW, 2011 WL 11562151 at *1 (C.D. Cal.
 10 Sept. 19, 2011). The district court dismissed the complaint for failing to plead injury in fact as an
 11 element of Article III standing. *Id.* On appeal, the Ninth Circuit reversed. The Circuit Court found
 12 that Robins had adequately established standing because he had alleged that Spokeo violated his
 13 statutory rights, not just the rights of others in the putative class, and that his “personal interests in
 14 the handling of his credit information [were] individualized rather than collective.” *Robins v.*
 15 *Spokeo, Inc.*, 742 F. 3d 409, 413 (9th Cir. 2014).

16 **B. The Supreme Court Holds That Injury In Fact Is A Two-Part Test And That**
 17 **Concreteness Requires Actual Or Imminent Harm.**

18 To have standing under Article III’s “case or controversy” requirement, “[t]he plaintiff must
 19 have (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the
 20 defendant, and (3) that is likely to be redressed by a favorable judicial decision.” *Spokeo, supra*, at
 21 *6. The Supreme Court accepted *Spokeo* to consider a question on the first element — whether
 22 Congress “may confer Article III standing upon a plaintiff who suffers no concrete harm, and who
 23 therefore could not otherwise invoke the jurisdiction of a federal court, by authorizing a private right
 24 of action based on a bare violation of the federal statute.” 575 U.S. ____ (2015).

25 As detailed in the Supreme Court’s May 16, 2016 decision, injury in fact is a two part test. A
 26 plaintiff must establish that she “suffered ‘an invasion of a legally protected interest’ that is
 27 ‘concrete and particularized’ and ‘actual or imminent, not conjectural or hypothetical.’ ” *Spokeo,*
 28 *supra*, at *7 (emph. added) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)). An

1 injury is “particularized” if it affects the plaintiff in a “personal and individual way.” *Id.* (quoting
 2 *Lujan*, 504 U.S., at 560 n.1); *Id.* (collecting cases). For an injury to be concrete, “it must actually
 3 exist,” in other words, the injury must be “real” and not “abstract”. *Id.*, at *8 (citing Black’s Law
 4 Dictionary, 479 (9th ed. 2009). “Concreteness, therefore, is quite different from particularization.”
 5 *Id.*

6 The Supreme Court cautioned that “Congress’ role in identifying and elevating intangible
 7 harms does not mean that a plaintiff automatically satisfies the injury-in-fact requirement whenever
 8 a statute grants a person a statutory right that purports to authorize that person to sue to vindicate that
 9 right. Article III standing requires a concrete injury even in the context of a statutory violation.” *Id.*
 10 (emph. added). That is because injury in fact is a Constitutional requirement. “Congress cannot
 11 erase Article III’s standing requirement by statutorily granting the right to sue to a plaintiff who
 12 would not otherwise have standing.” *Id.*, at *8 (quoting *Raines v. Byrd*, 52 U.S. 811, 820 n.3 (1997)).
 13 Therefore, the Supreme Court ruled, a plaintiff who alleges “a bare procedural violation, divorced
 14 from any concrete harm” fails to satisfy the injury in fact requirement of Article III. *Id.*, at *9-10
 15 (citing *Summers v. Earth Island Institute*, 555 U.S. 488, 496 (2009) (“[D]eprivation of a procedural
 16 right without some concrete interest that is affected by the deprivation . . . is insufficient to create
 17 Article III standing”)).

18 III. LEGAL ARGUMENT

19 A. **Plaintiff Suffered No Concrete Injury Traceable To The Challenged Payoff** 20 **Statement And Therefore Lacks Standing To Bring A TILA Claim.**

21 A plaintiff “bears the burden of showing that he has standing” *Summers v. Earth Island*
 22 *Inst.*, 555 U.S. 488, 493 (2009). That a suit is brought by a representative plaintiff on behalf of a
 23 class of similarly situated individuals “adds nothing to the question of standing, [] even named
 24 plaintiffs who represent a class ‘must allege and show that they personally have been injured, not
 25 that injury has been suffered by other, unidentified members of the class to which they belong.’”
 26 *Spokeo, supra*, at *6 n.1 (quoting *Simon v. Eastern Ky. Welfare Rights Organization*, 426 U.S. 26,
 27 40 n.20 (1976)).
 28

1 Plaintiff here purports to identify two particularized and concrete harms resulting from the
 2 absence of insurance funds in the April 2015 payoff statement at issue. However, neither harm
 3 actually exists. First, Plaintiff contends that Wells Fargo’s “failure to account” for the insurance
 4 monies prevented her from modifying her mortgage loan. *See* Compl. ¶ 44. Plaintiff’s loan
 5 modification application, however, was denied in 2014 due to Plaintiff’s insufficient income. Avery
 6 Decl. (Dkt. 52), Ex. A (“McLaughlin Depo.”) at 137:16-138:1; Shively Decl. (Dkt. 97), Ex. 6 (Letter
 7 from Wells Fargo to Plaintiff dated February 27, 2015 noting her loan modification application was
 8 denied because bank was “unable to approve payment assistance options”). Second, Plaintiff claims
 9 that Wells Fargo relied on incomplete figures reflected in the payoff statement in a collection action
 10 to enforce Plaintiff’s mortgage debt. *See* Compl. ¶ 45. But Wells Fargo has not filed a lawsuit
 11 against Plaintiff to foreclose on the property or to collect the outstanding debt. Shively Decl. (Dkt.
 12 97), Ex. 6 (Letter from Wells Fargo to Plaintiff dated February 27, 2015 noting no foreclosure sale
 13 date set).

14 In any event, moreover, no actual harm suffered by Plaintiff is traceable to the alleged
 15 procedural violation of TILA — to provide a payoff statement which details property insurance
 16 funds available to be applied to the borrower’s loan balance.² There is no evidence in the record to
 17 suggest that Plaintiff requested a payoff statement as part of her loan modification application.
 18 Indeed the evidence confirms that Plaintiff did not request the payoff statement at issue for any
 19 particular reason in late March 2015, and that Wells Fargo had already denied her loan modification
 20 application by that time. *See* Shively Decl. (Dkt. 97), Ex. 6 (“we previously reviewed the account
 21 and were unable to approve payment assistance options.”).

22 Likewise, to the extent routine default servicing communications may have stated Plaintiff’s
 23 outstanding balance without listing or deducting the insurance funds in restricted escrow from
 24 Plaintiff’s arrears, it is unclear how that allegation implicates TILA’s formal payoff requirements.

25 _____
 26 ² As detailed in its motion to dismiss and motion for summary judgment, Wells Fargo
 27 disputes that TILA requires payoff statements to uniformly detail property insurance funds,
 28 particularly where it is uncertain whether such funds will be applied to the loan. Dkt. 20 (motion to
 dismiss); Dkt. 93 (motion for summary judgment). However, for purposes of this brief, Wells Fargo
 assumes *arguendo* the construction of TILA articulated by this Court in its order on Wells Fargo’s
 motion to dismiss. *See* Dkt. 36 (order on motion to dismiss).

1 See 15 U.S.C. § 1639g (“A creditor or servicer of a home loan shall send an accurate payoff balance
2 within a reasonable time, but in no case more than 7 business days, after the receipt of a written
3 request for such balance from or on behalf of the borrower”).

4 More importantly, Plaintiff cannot show that the amount Wells Fargo sought to collect was
5 inaccurate. Plaintiff’s contractor claimed the large majority of the insurance funds then-held by
6 Wells Fargo. Shively Decl. (Dkt. 92), Ex. 2 (correspondence between Plaintiff and her contractor
7 detailing dispute over payment); *see also id.*, Ex. 3-5.³ The insurance funds, therefore, were not
8 available to be applied to her arrears or loan balance at the time she requested the payoff statement.

9 **B. Plaintiff Cannot Satisfy The Requirements of Rule 23 After *Spokeo*.**

10 Even if Plaintiff could establish Article III standing herself, the *Spokeo* decision makes clear
11 that Plaintiff could not possibly establish concrete harm as to the putative class.

12 **1. Actual Harm Is An Individualized Inquiry Not Susceptible To Class-
13 Wide Proof.**

14 The key consideration in assessing commonality is “the capacity of a classwide proceeding to
15 generate common answers apt to drive the resolution of the litigation.” *Wal-Mart Stores, Inc. v.*
16 *Dukes*, 131 S.Ct. 2541, 2551 (2011) (internal citations and quotations omitted); *see also* Dkt. 95, at
17 15-16 (discussing commonality standard). Here, however, the burden that each class member bears
18 to establish injury in fact, and specifically concrete harm, cannot be answered by class-wide proof.

19 **2. Individualized Questions Will Overwhelm The Harm Analysis And
20 Preclude A Finding Of Predominance.⁴**

21 Concrete injury is a requirement that must be established for each member of the class. And
22 because the question of harm cannot be resolved without resorting to individualized proof, Plaintiff
23 cannot satisfy the predominance requirement of Rule 23(b)(3).⁵

25 ³ Indeed, Plaintiff’s October 2015 settlement with her contractor provided that he be paid
26 with insurance funds held by Wells Fargo. *See* Brecke Decl. (Dkt. 66), ¶¶ 4-5.

27 ⁴ Plaintiff has been less than forthcoming on whether she continues to seek actual damages,
28 or intends to dismiss that claim and only pursue statutory damages under TILA. *See* Dkt. 95 at 17-
18. Wells Fargo assumes for purposes of this brief, however, that Plaintiff seeks to recover only
statutory damages.

1 **a. Plaintiff Cannot Prove Tangible Concrete Injury As To The Class.**

2 Plaintiff contends that the failure to detail insurance monies in payoff statements “imposes
3 drastic consequences” on the putative class. Compl. ¶ 58. Specifically, Plaintiff alleges that in
4 “many” jurisdictions “payoff statements often serve as prima facie evidence in foreclosure
5 proceedings of the amount due.” Compl. ¶ 59; *see also id.* ¶ 61 (“defendant’s deceptive payoff
6 statements enables it to commence foreclosure proceedings . . . in which it exaggerates the amounts
7 owed.”). Plaintiff also contends that the failure to detail insurance funds in payoff statements “has
8 the effect of ‘impeding consumers from refinancing existing loans.’” *Id.* ¶ 60 (quoting 73 Fed. Reg.
9 at 1702). “Lenders rely upon payoff statements when determining whether to offer refinancing on a
10 mortgage.” *Id.*; *see also id.* ¶ 61 (“failure to appraise Plaintiff and the members of the Class of
11 insurance payments frustrates their ability to refinance their mortgage and weakens their negotiating
12 leverage should they wish to settle a foreclosure claim.”).⁶

13 There is no evidence in the record here that supports Plaintiff’s contentions, but even taking
14 Plaintiff’s allegations as true, the members of Plaintiff’s proposed damages class would need to
15 present individual evidence that they, or someone authorized to act on their behalf, requested a
16 payoff statement and that the statement failed to detail property insurance funds available to be
17 applied to the loan. *See* Dkt. 95 at 17-18 (discussing individual issues that arise in that context).
18 Further, because a bare procedural violation of TILA’s payoff provision does not result in actual
19 harm unless and until the statement is used for some purpose, class members would additionally
20 have to present individualized evidence that non-compliant payoff statements caused concrete harm.
21 For example, class members would have to show that a lender denied their refinance mortgage
22 application, or that the borrower received less favorable terms, in reliance on a payoff statement that
23 did not detail available property insurance funds. It would be impossible to make such a showing
24 with the same evidence for all members of the putative class.

25 ⁵ Rule 23(b)(3)’s predominance standard is detailed in Wells Fargo’s opposition to class
26 certification, and incorporated by reference here. Dkt. 95 at 17-18.

27 ⁶ Plaintiff also contends that the “exaggerated debt” may adversely impact the credit ratings
28 of borrowers. *Id.* ¶ 60. However, there is no allegation or evidence to suggest payoff statements sent
in response to borrowers’ requests (i.e. and thus covered by TILA) are somehow simultaneously
reported to the credit bureaus.

1 In the alternative, Wells Fargo anticipates that Plaintiff will argue that the putative class is at
 2 risk of getting the “run-around” while trying to pay off their mortgage loan using payoff statements
 3 that do not detail insurance funds. *See* Dkt. 36 (Court’s order on motion to dismiss). But there is no
 4 feasible way by which the Court could make such a “run around” determination across the class. As
 5 Plaintiff’s own case demonstrates, borrowers request payoff statements for a variety of reasons.
 6 Plaintiff herself concedes she had no intention of paying off her mortgage loan at the time she
 7 requested the payoff statement at issue. McLaughlin Depo. at 113:6-10; 114:1:8.⁷

8 **b. Plaintiff Cannot Establish A Class-Wide Intangible Injury.**

9 Wells Fargo anticipates that Plaintiff will also argue that the harm to the class is intangible
 10 and sufficiently evidenced by virtue of the fact payoff statements did not comply with TILA.
 11 “Violation of a procedural right granted by statute can be sufficient in some circumstances to
 12 constitute injury in fact.” *Spokeo, supra*, at *10. In determining whether an intangible harm amounts
 13 to concrete injury in fact, the Supreme Court instructs that both history and the judgment of
 14 Congress play important roles. *Id.*, at *9 (Congress is well positioned to identify intangible harms
 15 that satisfy Article III’s injury in fact requirements).

16 In this case, Congress enacted TILA in 1968 to improve consumers’ awareness as to the cost
 17 of credit, and enhance economic stability and competition among credit providers. *See generally* 78
 18 Fed. Reg. 10902, 10908 (Feb. 14, 2013) (detailing history of TILA). The stated Congressional
 19 purpose behind TILA was “to assure a meaningful disclosure of credit terms so that the consumer
 20 will be able to compare more readily the various credit terms available to him and avoid the
 21 uninformed use of credit, and to protect the consumer against inaccurate and unfair credit billing and
 22 credit card practices.” 15 U.S.C. § 1601(a); 12 C.F.R. § 226.1(b) (2006).

23 Effective October 1, 2009, the Federal Reserve Board⁸ exercised its rulemaking authority to
 24 amend TILA’s implementing Regulation Z, 12 C.F.R. § 1026, to require loan servicers provide

25 _____
 26 ⁷ Q: Did you apply to any other lenders to refinance or “take over your loan,” as you say?
 27 A: No. Because there was still a dispute as far as the insurance proceeds for the work that had
 28 already been completed.
 29 McLaughlin Depo. 113:6-10.

⁸ The Dodd-Frank Act transferred TILA’s rulemaking power from the Federal Reserve Board
 to the Consumer Financial Protection Bureau. 12 U.S.C. § 5512(b)(1). The Act also codified

1 “accurate” payoff statements within a reasonable time. *See* 73 Fed. Reg. 44522, 44604 (July 30,
 2 2008) (codified at 12 C.F.R. § 226.36(c) (renumbered to 12 C.F.R. § 1026.36(c)(3))); *see also* 78
 3 Fed. Reg. 10902, 10908 (Feb. 14, 2013) (detailing history). The Board explained that the payoff
 4 requirement was necessary in light of concerns that failure to promptly respond to a payoff request
 5 may impede consumers from refinancing existing loans. 73 Fed. Reg. 1672, 1702 (Jan. 9, 2008)
 6 (proposed rule); *see* 73 Fed. Reg. 44522, 44604 (July 30, 2008) (final rule).

7 Here, however, the harm stemming from an alleged procedural violation of TILA’s payoff
 8 provision — as construed by this Court to require payoff statements to include insurance funds — is
 9 akin to the no-harm procedural violations of FCRA detailed by the Supreme Court in *Spokeo*. There,
 10 the Supreme Court recognized that a violation of FCRA’s procedural requirement that consumer
 11 reporting agencies provide notice to the consumer may result in no concrete harm. *Id.*, at *10-11.
 12 Similarly, a violation of FCRA’s procedural requirement against disseminating inaccurate
 13 information would not rise to the level of a concrete injury in instances where the inaccurate
 14 information disseminated did not “cause harm or present any material risk of harm.” *Id.*, at *11. The
 15 Supreme Court used the example of an incorrect zip code: “[i]t is difficult to imagine how the
 16 dissemination of an incorrect ZIP code, without more, could work any concrete harm.” *Id.*

17 The same is true here. A violation of TILA’s procedural requirement that payoff statements
 18 list insurance funds results in no actual harm unless and until the statement is used for some
 19 foreseeable purpose. Even assuming, for example, that a borrower obtained a refinance loan in the
 20 amount of the total outstanding loan balance, without deducting insurance funds available to be
 21 applied to the loan, class members would still have to present individualized proof of a resulting
 22 harm. Where insurance funds are available to be applied to the loan — typically meaning that repair
 23 work has been completed and paid for — at the time of a refinance, insurance funds would generally
 24 be issued directly to the borrower when the loan is paid off by the new lender. Thus it is hard, if not
 25 impossible, to see how a borrower would be harmed in such an instance.

26
 27 Regulation Z’s payoff requirement at 15 U.S.C. Section 1639g and extended the obligation to
 28 provide a payoff statement to both loan servicers and creditors. 15 U.S.C. § 1639g; *see generally* 78
 Fed. Reg. 10902, 10956-57 (Feb. 14, 2013) (detailing revisions).

1 For these reasons, and those discussed in Wells Fargo’s opposition to class certification, the
2 Court should deny certification of Plaintiff’s damages class.

3 **3. Because *Spokeo* Creates Additional Individual Inquiries, The Proposed**
4 **Class Is Unmanageable.**

5 Given the number of individual inquiries that would need to be conducted by the Court on
6 both legal and factual issues — who requested the payoff statement at issue; whether insurance
7 proceeds were available to be applied to the loan balance; whether available insurance proceeds were
8 listed in the payoff statement; if not, whether the putative class member suffered any concrete harm
9 as a result, etc. — a class trial would be wholly unmanageable. *See also* Dkt. 95 at 18.

10 **IV. CONCLUSION**

11 As discussed in Wells Fargo’s opposition to class certification, Plaintiff’s proposed classes
12 do not satisfy the requirements of Rule 23. The Supreme Court’s recent ruling in *Spokeo* only
13 emphasizes that conclusion. Wells Fargo therefore respectfully requests the Court deny Plaintiff’s
14 motion for class certification.

15 DATED: May 23, 2016

REED SMITH LLP

17 By: /s/ Ashley L. Shively
18 Ashley L. Shively
19 Attorneys for Defendant
20 Wells Fargo Bank, N.A.

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