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14
 15 **UNITED STATES DISTRICT COURT**
 16 **NORTHERN DISTRICT OF CALIFORNIA**
 17 **SAN FRANCISCO DIVISION**

18
 19 LATASHA McLAUGHLIN, on behalf of
 20 herself and all others similarly situated,

21 Plaintiff,

22 vs.

23
 24 WELLS FARGO BANK, N.A., d/b/a WELLS
 FARGO HOME MORTGAGE,

25 Defendant.
 26

27 **CLASS ACTION**

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

**PLAINTIFF’S REPLY MEMORANDUM
 DISCUSSING SPOKEO, INC. V. ROBINS**

Date: June 16, 2016
 Time: 8:00 a.m.
 Place: Courtroom 8 – 19th Floor
 Judge: Honorable William Alsup

INTRODUCTION

1
2 Defendant argues that Plaintiff has not suffered actual harm, even though this Court has
3 already found that she has. Additionally, the arguments that Defendant raises are refuted by the
4 record.

5 Defendant argues that the class should not be certified because Plaintiff would have to prove
6 standing for every absent class member, even though this is not the law. Defendant already
7 conceded this point in prior briefing.

8 Finally, Defendant argues that the omission of insurance claim funds (which, in Plaintiff's
9 case, was \$16,490.35) is no worse than a misstated zip code. In the process, Defendant invents a
10 new requirement that the payoff statement actually "be used for some purpose," which is entirely
11 unsupported in the *Spokeo* opinion. The purpose of requiring a payoff statement is to disclose
12 information about the fees and balances related to a homeowner's account. The irony is that
13 Plaintiff's payoff statement did contain a seemingly innocuous error—it shows an incorrect address
14 for Plaintiff's property. Plaintiff is not suing on the basis of this address error because it does not go
15 to the heart of TILA's focus on disclosing the terms of a homeowner's debt.

ARGUMENT

I. Defendant's Arguments Do Not Alter the Court's Order That Plaintiff Has Pled Harm Beyond the Violation of the Statute

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19 This Court has already found that "named plaintiff Latasha McLaughlin has alleged harm
20 going well beyond the bare violation of a federal statute." ECF No. 89 at 1. Defendant entirely
21 ignores this holding. Defendant's Brief re Impact of *Spokeo* Decision, ECF 110 ("Defendant's
22 Impact Brief"). Any further discussion should be unnecessary.

23 However, Defendant repeats incorrect arguments in an effort to minimize the problems that
24 Plaintiff experienced. For example, Defendant argues that the payoff statement had no impact on
25 her efforts to refinance or modify her loan. As explained in Plaintiff's motion for class certification,
26 she requested a payoff statement because she was investigating refinancing her loan or conducting a
27
28

1 short sale, and she had been unable to gather all of the relevant information on her loan from Bank
2 representatives. ECF No. 61 at 10.¹

3 Defendant also argues that Plaintiff was not harmed when the Bank’s law firm threatened to
4 foreclose on her home because it “has not filed a lawsuit against Plaintiff to foreclose on the
5 property” Def. Impact Br at 4. Plaintiff lives in Tennessee, which is a non-judicial foreclosure
6 state. The Bank does not need to file a lawsuit to foreclose on her home. Tenn. C. Ann. § 35-5-101,
7 et seq.; *see also* Tennessee Foreclosure Laws, https://www.foreclosure.com/statelaw_TN.html
8 (discussing Tennessee non-judicial foreclosure procedures). Instead, the Bank’s lawyers threatened
9 her with foreclosure and refused to listen to her when she told them that the Bank held insurance
10 claim funds that should be applied to the outstanding balance. *See* Plaintiff’s Memo. in Opp. To
11 Def. Motion to Stay Proceedings, ECF 80, at 3-4. This harassment should be harm enough for any
12 regular person. *See also* Op. at 10 (“risk of harm” may establish concreteness).

13 As it did in its opposition to class certification, Defendant alleges that Plaintiff had no
14 intention of paying her mortgage. Def. Impact Br. at 7. Plaintiff already explained how she
15 repeatedly attempted to apply the insurance claim funds to her past due amounts, but she was given
16 the run around by Bank employees. ECF No. 79, at 4 n.3; ECF No. 51 at 8-11. Defendant also
17 argues that the funds could not have been applied to the balance because “the large majority” of the

18 ¹ Defendant’s statement that “the evidence confirms that Plaintiff did not request the payoff
19 statement at issue for any particular reason in late March 2015” does not contain a citation to the
20 record. Def. Impact Br. at 4. *Contra* Patricia I. Avery Declaration in Support of Plaintiff’s Motion
21 for Class Certification and Appointment of Class Representative and Class Counsel, Ex. A
22 (Transcript of Deposition of Latasha McLaughlin, Dec. 8, 2015) (“McLaughlin Deposition
23 Transcript”) 114:1-19 (“Q: So what was the purpose, in your mind, of requesting a payoff
24 statement? A: I wanted all of my documents in regards to my account to review, including the
25 payoff statement of what they said that I owed. Because to me, they should have supported—I
26 wanted to see proof of all the documents they had, including what they were saying about the money
27 that was being held in escrow. Since I couldn’t get a clear answer from anybody over the phone, I
28 wanted to see the documents myself.”); *id.* at 136:17-:24 (“A: [M]y assumption was that they
were going to provide me all the information on that payoff statement so that I could make a clear
decision, yes. Q: And when you say ‘a clear decision,’ you mean a decision about what? A: I
mean anything. I requested the information regarding a short sale, which is on one of your
documents. Like I said, I’d gone on the Internet to inquire about possible refinancing or looking for
a different lender.”). The fact that Ms. McLaughlin was unable to complete efforts at refinancing or
a short sale or finding a different lender as a result of not having the complete information in the
payoff statement does not mean she lacked a reason for requesting the payoff statement.

1 funds were claimed by the contractor and “not available to be applied to her arrears or loan balance
 2 at the time she requested the payoff statement.” Def. Impact Br. at 5. However, shortly before
 3 Plaintiff requested a modification, she asked Wells Fargo to apply the funds to her loan that were not
 4 claimed by the contractor. McLaughlin Depo. Tr. at 120:7-:14, 120:17-:19; *see also id.* at 111:10-
 5 :11 (“I requested the funds that [exceeded] the amount that was in dispute”); *id.* at 142:22-143:14
 6 (“When was the first time [you explicitly requested the insurance funds be used towards the
 7 delinquency]? A. I believe right before I asked for the modification. Q. In 2014? A. In 2014,
 8 yes...It was a phone call. And that’s when I talked to Maria, and Maria [switched her to the escrow
 9 department, which in turn switched her to the property loss department]...my question was, again,
 10 that the \$5,000 did not have anything to do with the [contractor] dispute, and why they wouldn’t
 11 release those.”) The Bank’s argument that some funds were claimed by the contractor means that *no*
 12 funds could be applied to the arrears or loan balance at the time Plaintiff requested the payoff
 13 statement has no merit whatsoever. The Bank has never explained why these funds were never
 14 applied or released.

15 The Court’s prior order should have been sufficient to show that Plaintiff has standing due to
 16 her harm beyond the violation of the statute, but Defendant has not shown any reason to overturn
 17 that decision.

18 **II. Plaintiff’s Standing Is Sufficient for the Absent Class Members**

19 Defendant previously admitted that “[i]n a class action, standing is satisfied if at least one
 20 named plaintiff meets the requirements.” Def. Motion to Stay Proceedings, ECF No. 73, at 2
 21 (quoting *Bates v. United Parcel Serv., Inc.*, 511 F.3d 974, 985 (9th Cir. 2007) (en banc)); *see also*
 22 *Ollier v. Sweetwater Union High Sch. Dist.*, 768 F.3d 843, 865 (9th Cir. 2014) (same); *Gutierrez v.*
 23 *Wells Fargo Bank, NA*, 704 F.3d 712, 728 (9th Cir. 2012) (same); *Stearns v. Ticketmaster Corp.*, 655
 24 F.3d 1013, 1020–21 (9th Cir.2011) (same); *Fleming v. Pickard*, 581 F.3d 922, 924 (9th Cir. 2009)
 25 (same). This is the position of apparently every circuit court to have confronted this issue.²

26 ² *See Neale v. Volvo Cars of N. Am., LLC*, 794 F.3d 353, 362 (3d Cir. 2015) (“unnamed,
 27 putative class members need not establish Article III standing. Instead, the ‘cases or controversies’
 28 requirement is satisfied so long as a class representative has standing.”); *In re Deepwater Horizon*,
 739 F.3d 790, 805-06 (5th Cir. 2014) (“BP has cited no authority—and we are aware of none—that

1 Recently, the Supreme Court underscored this point when it refused to entertain reversal of a class
 2 certification order, stating that challenges to absent class members' standing was not proper prior to
 3 disbursal of a damages award. *Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036, 1050 (2016); *see*
 4 *also Lewis v. Casey*, 518 U.S. 343, 395 (1996) (Souter, J., concurring in part, dissenting in part, and
 5 concurring in the judgment) ("Unnamed plaintiffs need not make any individual showing of standing
 6 in order to obtain relief, because the standing issue focuses on whether the plaintiff is properly
 7 before the court, not whether represented parties or absent class members are properly before the
 8 court.").

9 Defendant now claims that standing "is a requirement that must be established for each
 10 member of the class," without providing any legal authority. Def. Impact Br. at 5. This is incorrect.
 11 Perhaps this mistake is due to Defendant's requirement, made out of whole cloth, that the statement
 12 must be "used for some foreseeable purpose." Def. Impact Br. at 8; *also id.* at 6. There is no
 13 requirement in *Spokeo* for a plaintiff to have used the allegedly violative statement. This appears to
 14 be an attempt to import a reliance element to any standing analysis, which is obviously incorrect
 15 given the Supreme Court's acknowledgement that violations of the Freedom of Information Act
 16 ("FOIA") or Federal Advisory Committee Act are sufficiently pled without further harm. Op. at 10.
 17 Defendant may also be confusing damages (which are measured at trial), with injury (which is pled,
 18 and which either exists, or doesn't). *See Kohen*, 571 F.3d at 677 ("[W]hen a plaintiff loses a
 19 [damages] case [at trial] because he cannot prove injury the suit is not dismissed for lack of
 20

21 would permit an evidentiary inquiry into the Article III standing of absent class members during
 class certification"); *Parko v. Shell Oil Co.*, 739 F.3d 1083, 1085 (7th Cir. 2014) ("How many (if
 22 any) of the class members have a valid claim is the issue to be determined *after* the class is
 certified.") (emphasis in original); *Kohen v. Pac. Inv. Mgmt. Co. LLC*, 571 F.3d 672, 676 (7th Cir.
 23 2009) (determining which class members suffered damages would be "putting the cart before the
 24 horse . . . [and] would vitiate the economies of class action procedure; in effect the trial would
 precede the certification"); *id.* at 677 (certifying class with uninjured class members "almost
 25 inevitable" as facts bearing on members' claims "at the outset of the case . . . may be unknown.");
Denney v. Deutsche Bank AG, 443 F.3d 253, 263 (2d Cir. 2006) ("We do not require that each
 26 member of a class submit evidence of personal standing"); *cf.* NEWBERG ON CLASS ACTIONS § 2.3
 27 (5th ed. Supp. 2015) ("[I]f class members other than the named plaintiffs were required to submit
 28 evidence of their standing, then the core function of class actions, wherein named plaintiffs represent
 a passive group of class members, would be significantly compromised.").

jurisdiction”). Each class member experiences different actual losses as a result of the inaccurate payoff statements, but the statutory damages sought by Plaintiff provide a common method of calculation on a classwide basis.³

Plaintiff’s standing is sufficient for all of the absent class members.

III. Failing to Disclose Insurance Claim Funds Is Not a “Zip Code” Error

The *Spokeo* opinion discussed whether or not allegations of intangible harm from violations of FCRA are sufficiently concrete to constitute injury in fact. The only potential issue before this Court is whether Defendant’s inaccurate payoff statement, in violation of TILA, is more like a failure to provide required FOIA disclosures or if it resembles mixing up the numbers in a zip code.

Defendant provides no real justification for its claim that this is a zip code error, except for a fictional “used for some foreseeable purpose” test.⁴ In contrast, Plaintiff previously explained that TILA’s requirement for an accurate payoff statement is intended to assist consumers in receiving all of the information that they need about their loan, and challenge any inappropriate fees or inflated payoff claims. Plaintiff’s Memo. Discussing *Spokeo, Inc. v. Robins*, ECF No. 111, at 2-3. This is just the sort of disclosure TILA addresses.

Ironically, the Bank’s payoff statement shows what might count as a zip code error. As can be seen on the April Payoff Statement, Plaintiff’s mailing address is correctly listed as “4382 Dongourney Cv,” while the property address is incorrectly listed as “4382 Dongounery Cv.” Plaintiff’s Request for Judicial Notice, ECF No. 28-2, Ex. 2 (emphasis added). This spelling error does not go to the outstanding balance on the loan. This spelling error is unlikely to be the result of

³ See, e.g., ECF No. 51, at 2 (“Plaintiff now moves to certify a Rule 23(b)(3) class of borrowers who received payoff statements that did not reflect property insurance claim funds [] in order for the class members to recover statutory damages.”); *id.* at 14 (“She is only seeking statutory damages and injunctive relief, and is not seeking compensatory damages.”).

⁴ Such a test would contravene TILA’s purpose. See *Smith v. Chapman*, 614 F.2d 968, 971 (5th Cir. 1980) (as TILA uses an “objective standard ... [i]t is not necessary that the plaintiff-consumer actually have been deceived....In fact, consumers who are aware of the true terms of a contract are more able to see that these terms are not clearly and conspicuously disclosed.”); *Hamm v. Ameriquest Mortg. Co.*, 506 F.3d 525, 529, 531 (7th Cir. 2007) (“It is immaterial if the borrower in a particular transaction made the right assumptions about the terms and documents presented to her, if the form otherwise does not comply with the statute and regulations. . . . The key point is that the borrower should not have to make any assumptions; she should be told [about the required but missing information] in explicit terms.”).

1 a consistent system-wide effort to prevent the disclosure of information. It is difficult to imagine a
2 harm in this spelling error circumstance. However, this is a far cry from the TILA claim that
3 Plaintiff is advancing.

4 **CONCLUSION**

5 As Plaintiff previously stated, *Spokeo* does not impact Plaintiff's class certification motion
6 and Plaintiff's motion should be granted under Fed. R. Civ. P. 23(b)(2) and 23(b)(3).

7
8 DATED: May 31, 2016

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/s/ Kristin J. Moody
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