

June 10, 2016

Catherine O'Hagan Wolfe
Clerk, U.S. Court of Appeals for the Second Circuit
Thurgood Marshall U.S. Courthouse
New York, NY 10007

Re: *Cruper-Weinmann v. Paris Baguette America, Inc.*, 14-3709-cv

Dear Ms. Wolfe,

We submit this letter on behalf of plaintiff-appellant pursuant to the Court's Order of May 18, 2016.

Overview

*Spokeo, Inc. v. Robins*¹ did not change the law of the Second Circuit. Because of the bizarre facts and theory of harm² alleged in that case, the *Spokeo* court merely remanded the case back to the Ninth Circuit, requiring it to apply the correct injury-in-fact standard,³ one this Circuit has long applied. *Natural Res. Def. Council, Inc. v. U.S.*

¹ 578 U.S. ___, 2016 U.S. LEXIS 3046 (May 16, 2016).

² Robins bizarrely alleged that he was somehow harmed by Spokeo, because Spokeo published on the Internet “that he is married, has children, is in his 50’s, has a job, is relatively affluent, and holds a graduate degree.” *Spokeo*, 2016 U.S. LEXIS 3046, at *9. The *Spokeo* Court observed that the Fair Credit Reporting Act of 1970, 84 Stat. 1127 (codified as amended at 15 U.S.C. § 1681 *et seq.*), was “[e]nacted long before the advent of the Internet” *Spokeo*, 2016 U.S. LEXIS 3046, at *6.

³ See *Spokeo*, 2016 U.S. LEXIS 3046, at *18 (concluding that because the Ninth Circuit “failed to fully appreciate the distinction between concreteness and particularization, its standing analysis was incomplete. It did not address the question framed by our

Food & Drug Admin., 710 F.3d 71, 80 (2d Cir. 2013) (Pooler, J.) (“*NRDC*”) (discussing concreteness requirement for Article III standing).

Here, plaintiff-appellant Devorah Cruper-Weinmann has sufficiently alleged a concrete injury in fact in the form of risk-based harm caused by Paris Baguette’s printing of her credit card expiration date on her credit card receipt at the point of sale, in violation of the Fair and Accurate Credit Transactions Act of 2003 (“FACTA”), Pub. L. No. 108-59, 117 Stat. 1952, *amending* Fair Credit Reporting Act of 1970 (“FCRA”), 15 U.S.C. § 1681 *et seq.* *Spokeo* assumes that violations of the FCRA may constitute concrete risk-based harms. *See Spokeo*, 2016 U.S. LEXIS 3046, at *16–17 (“[T]he risk of real harm can[] satisfy the requirement of concreteness [T]he violation of a procedural right granted by statute can be sufficient in some circumstances to constitute injury in fact. In other words, a plaintiff in such a case need not allege any additional harm beyond the one Congress has identified.”) (emphasis original); *Baur v. Veneman*, 352 F.3d 625, 632–33 (2d Cir. 2003); *see also NRDC*, 710 F.3d at 80–81.

Secondly, where two private parties engage in a financial relationship, and harms stemming from that relationship are difficult to trace, Congress has always had the ability to assign fiduciary-like duties to the parties as a condition of their voluntary choice to enter into the arrangement. *See Donoghue v. Bulldog Investors Gen. P’ship*, 696 F.3d 170, 177–78, 180 (2d Cir. 2012) (corporation suffered a concrete harm when an investor that had beneficial ownership of more than 10% of the stock violated implied-fiduciary

discussion, namely, whether the particular procedural violations alleged in this case entail a degree of risk sufficient to meet the concreteness requirement.”).

relationship created by the Securities Exchange Act of 1934). The *Spokeo* Court confirmed this principle:

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.

Spokeo, 2016 U.S. LEXIS 3046, at *15 (citing *Vt. Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765, 775–77 (2000)).

The Law of Standing In This Circuit

Spokeo merely reiterates principles of standing that this Circuit has long applied. Compare *Spokeo*, 2016 U.S. LEXIS 3046, at *13 (“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.’” (quoting *Lujan v. Defenders of Wildlife*, 504 U. S. 555, 560 (1992))), with *NRDC*, 710 F.3d at 80 (applying identical standard).⁴ The Court further recognized that “the risk of real harm can[] satisfy the requirement of concreteness.” *Spokeo*, 2016 LEXIS 3046, at *16.

“The injury-in-fact necessary for standing ‘need not be large, an identifiable trifle will suffice.’” *Lafleur v. Whitman*, 300 F.3d 256, 270–71 (2d Cir. 2002) (quoting *Sierra*

⁴ There can be no dispute that Paris Baguette violated Ms. Cruper-Weinmann’s own, particularized, legally protected interest, by printing her credit card expiration date on the credit card receipt at the point of sale on September 19, 2013, *see* Ex. A to Yoon Aff’n in Supp. of Mot. to Dismiss (CA-1); that the Court can redress defendant-appellee’s violation of law; and that the scourge of credit card identity theft through printed receipts presented such an actual threat that it twice merited Congressional legislation in the past 13 years.

Club v. Cedar Point Oil Co., Inc., 73 F.3d 546, 557 (5th Cir. 1996)). “[B]ecause Congress is well positioned to identify intangible harms that meet minimum Article III requirements, its judgment is[] instructive and important. . . . Congress may ‘elevat[e] to the status of legally cognizable injuries concrete, *de facto* injuries that were previously inadequate in law.’” *Spokeo*, 2016 U.S. 3046, at *15–16 (quoting *Lujan*, 504 U.S. at 578).

Risk-Based Injury In The Second Circuit

This Circuit’s leading case on risk-based injury is *Baur v. Veneman*. *Baur* sets forth that “the courts of appeals have generally recognized that threatened harm in the form of an increased risk of future injury may serve as injury[]in[]fact for Article III standing purposes.” 352 F.3d at 633 (citations omitted). *Baur* relied upon decisions finding risk-based harm in a variety of contexts. *Id.* (citing with approval, *inter alia*, *Johnson v. Allsteel, Inc.*, 259 F.3d 885, 888 (7th Cir. 2001) (holding that the “increased risk” that a participant in an Employee Retirement Income Security Act plan faced as a result of plan administrator’s alleged abuse of discretionary authority satisfied Article III injury-in-fact requirements); *Mountain States Legal Found. v. Glickman*, 92 F.3d 1228, 1231, 1234–35 (D.C. Cir. 1996) (confirming that “incremental risk” of wildfire was sufficient to confer Article III standing on public-private alliance challenging federal government’s restrictions on timber-harvesting in national forest)).⁵

⁵ “Most especially, the Supreme Court has ‘consistently stressed that a plaintiff’s complaint must establish that he [or she] has a “personal stake” in the alleged dispute, and that the alleged injury suffered is particularized as to him [or her].” *Baur*, 352 F.3d

This Court affirmed in *Donoghue* that the same risk-based analysis is applicable in the commercial, non-medical context. 696 F.3d at 179–80; *Denney v. Deutsche Bank AG*, 443 F.3d 253, 264 (2d Cir. 2006) (taxpayers who faced increased risk of being audited by the Internal Revenue Service suffered injury in fact, because “[a]n injury[in]fact may simply be the fear or anxiety of future harm.”); see *Engel v. Scully & Scully, Inc.*, 279 F.R.D. 117, 123–24 (S.D.N.Y. 2011) (Article III standing for plaintiff suing merchant for FACTA violation); *Caudle v. Towers, Perrin, Forster & Crosby, Inc.*, 580 F. Supp. 2d 273, 279-80 (S.D.N.Y. 2008) (the risk of future identity theft and fraud arising from the theft of a laptop containing personal information was sufficient to confer Article III standing under the FCRA) (relying on *Pisciotta v. Old Nat’l Bancorp*, 499 F.3d 629, 634 (7th Cir. 2007)); see also *Bell v. Xerox Corp.*, 52 F. Supp. 3d 498, 504–05 (W.D.N.Y. 2014) (standing for participants in Employee Retirement Income Security Act plan who alleged risk of reduction of benefits) (citing *Johnson*, 259 F.3d at 888); *Gov’t Emps. Ins. Co. v. Saco*, No. 12-CV-5633 (NGG) (MDG), 2014 U.S. Dist. LEXIS 20919, at *26 (E.D.N.Y. Feb. 18, 2014) (standing met where there was “sufficient likelihood of future injury—that Defendants will bring suit to expand the scope of Plaintiff’s duty to indemnify its insured[.]”) (citing *Lujan*, 504 U.S. at 560–61); *Adkins v. Morgan Stanley*, No. 12 CV 7667 (HB), 2013 U.S. Dist. LEXIS 104369, at *9–10 (S.D.N.Y. July 25, 2013) (“Plaintiffs have suffered a cognizable injury. As alleged, Morgan Stanley’s policies and practices caused New Century to target Plaintiffs for toxic loans. These

at 645 (Pooler, J., dissenting) (quoting *Raines v. Byrd*, 521 U.S. 811, 819 (1997)). Here, plaintiff-appellant has such a personal stake.

loans placed Plaintiffs at greater risk of default, delinquency, and foreclosure.”) (emphasis added) (internal quotation marks and record citation omitted).

In evaluating the degree of risk sufficient to support standing in this Circuit, a court engages in an analysis that “is qualitative, not quantitative, in nature.” *Baur*, 352 F.3d at 637 (internal quotation marks and citation omitted). Further, “[b]ecause the evaluation of risk is qualitative, the probability of harm which a plaintiff must demonstrate in order to allege a cognizable injury[]in[]fact logically varies with the severity of the probable harm.” *Id.* (citation omitted); *see also NRDC*, 710 F.3d at 81 (“Under *Baur*, whether a plaintiff has established a credible threat of harm sufficient to confer standing based on exposure to a potentially harmful product is a qualitative inquiry in which the court should consider both the probability of harm and the severity of the potential harm.”).

**Congress Found That The Printing Of Expiration Dates
Creates An Unacceptable Risk Of Harm From Identity Theft**

Unlike the risk of harm alleged in *Spokeo*, plaintiff-appellant herein faces an increased risk of identity theft, a problem so pervasive in America that it has topped the Federal Trade Commission’s list of consumer complaints for 15 years.⁶ Congress enacted FACTA in 2003 in response to the rampant growth of credit/debit card fraud and identity theft, facilitated in large part by the increasing number of sophisticated criminal syndicates relying on rapidly expanding technology. FACTA renders it more difficult for

⁶ *See* Press Release, Fed. Trade Comm’n, “FTC Releases Annual Summary of Consumer Complaints” (Mar. 1, 2016), *available at* <https://www.ftc.gov/news-events/press-releases/2016/03/ftc-releases-annual-summary-consumer-complaints>.

identity thieves to obtain consumers' credit card information by reducing the amount of information identity thieves can retrieve from found or stolen credit card receipts. As President Bush declared when signing FACTA into law:

This bill also confronts the problem of identity theft. A growing number of Americans are victimized by criminals who assume their identities and cause havoc in their financial affairs. With this legislation, the federal government is protecting our citizens by taking the offensive against identity theft.

President George W. Bush, Remarks at FACTA Signing Ceremony (Dec. 4, 2003).

The U.S. Department of Justice ("DOJ") has confirmed the causal link between the information protected by FACTA and credit card identity theft. In *Papazian v. Burberry Ltd.*, No. 2:07-cv-01479-GPS-RZ (C.D. Cal.), for example, the DOJ filed a brief that explained the purpose of FACTA and why compliance is so important:

The goal of the provision that became § 1681c(g) was "to limit the opportunities for identity thieves to 'pick off' key card account information." S. Rep. No. 108-166 (2003). FACTA followed enactment of laws in at least 20 states with provisions similar to § 1681c(g) that prohibited printing the full card number as well as the expiration date on receipts. . . .

. . . .

Defendant's argument that a thief would not be able to make fraudulent charges using *only* a truncated card number and the full expiration date misses the point. Thieves might piece together (or 'pick-off,' in the words of Congress) different bits of information from different sources. The expiration date of a customer's credit/debit card, until recently printed on Defendant's receipts, is one of several pieces of information that can make it easier for criminals to rack up fraudulent charges. These dates are worth protecting even when not accompanied by other important financial information. . . . Congress' actions comport with common experience, testimony provided in support of the legislation, and the instructions credit card companies give to merchants. . . .

Brief in Support of Statute by United States of America as Intervenor, *Papazian*

v. Burberry Ltd., No. 2:07-cv-01479-GPS-RZ (C.D. Cal. July 24, 2007) (underlined emphasis added), *filed as* Exhibit A to Ex Parte Application to Intervene, ECF No. 24.

Congress knew that only persons in plaintiff-appellant's position (those who received from a merchant printed credit card receipts bearing the consumer's financial information) would suffer harm, and that they would specifically suffer the harm Congress had contemplated (an increased risk of identity theft). Thus, plaintiff-appellant has alleged that "there is a tight connection between the type of injury which [plaintiff-appellant] alleges and the fundamental goals of the statute[] which [she] sues under—reinforcing [her] claim of cognizable injury." *Baur*, 352 F.3d at 635.

Further, at the time of the passing of the Credit and Debit Card Receipt Clarification Act of 2007 ("Clarification Act"), Pub. L. 110-241, § 3(a), 122 Stat. 1566 (effective June 3, 2008) (codified at 15 U.S.C. § 1681n(d)), four years after FACTA was first passed, Congress had further investigated this problem, including the probability of harm from improperly printing credit card receipts, and still subjected violators to stiff penalties without limitation after June 3, 2008.⁷ In effect, Congress twice required merchants to suppress the printing of credit card numbers and expiration dates, because it had twice found that the risk emanating from such printing was harmful.

Any attempt by Paris Baguette to judicially invalidate Congress's carefully wrought probability determination must be rejected. *Spokeo*, 2016 U.S. LEXIS 3046, at *15 ("[B]ecause Congress is well positioned to identify intangible harms that meet

⁷ The Clarification Act sought to more carefully balance the competing concerns of businesses and consumers. *See* Pub. L. 110-241, § 2(a)(7), 122 Stat. 1566.

minimum Article III requirements, its judgment is also instructive and important.”). Moreover, demands of mathematical probability are inappropriate under the standing analysis. *NRDC*, 710 F.3d at 83 (“The government argues that the uncertainty as to triclosan’s harmfulness bars NRDC from establishing a credible threat under *Baur*. Given *Baur*’s treatment of uncertainty, the government’s argument lacks merit.”). This Court has been judicious when asked to second-guess Congress’s fact finding on the probability of harm on constitutional standing grounds, as demonstrated in the *NRDC* Court’s discussion of *Baur*:

The *Baur* court concluded that Baur had established a credible threat of harm even though the likelihood that Baur would contract vCJD by eating beef from a food supply that included beef from downed cattle was uncertain. Baur did not allege that BSE was [even] present in the United States, nor did he quantify the risk that BSE was present in the United States or allege that there was a particular likelihood that BSE had entered the United States. Moreover, even assuming BSE had entered the United States, Baur made no allegations as to the likelihood that he would consume beef from downed cattle. Instead, Baur alleged only that BSE may be present in the United States and argued that, if it were, the government would be unable to detect it.

NRDC, 710 F.3d at 82 (emphasis original) (internal citations omitted).

Plaintiff-Appellant Has Standing

This Court’s recent decision in *Donoghue* is instructive. *Donoghue* concerned § 16(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78p(b), pursuant to which, “when a stock purchaser chooses to acquire a 10% beneficial ownership stake in an issuer, he becomes a corporate insider and thereby accepts the limitation that attaches to his fiduciary status: not to engage in any short-swing trading in the issuer’s stock. At that point, injury depends not on whether the § 16(b) fiduciary traded on inside information

but on whether he traded at all.” *Donoghue*, 696 F.3d at 177 (internal brackets, quotation marks, and citation omitted). Equally, Congress may assign fiduciary duties to a handler of consumers’ credit card information insofar as to not publish that information. *See Spokeo*, 2016 U.S. LEXIS 3046, at *15 (“[I]t is instructive to consider whether an alleged intangible harm has a close relationship to a [traditional] harm . . .”).

The purpose and effects of § 16(b) and FACTA are analogous. Both were solutions to pervasive problems that harmed both individuals and U.S. markets. Both statutes were required because the actual harms—insider trading and identity theft—were difficult to prove at law, requiring a flat rule to prevent them. Congress “‘elevat[ed] to the status of legally cognizable injuries’” the risk-based harms caused by FACTA’s prohibited conduct. Such harms amount to “‘concrete, *de facto* injuries that were previously inadequate in law.” *Spokeo*, 2016 U.S. LEXIS 3046, at *15 (quoting *Lujan*, 504 U.S. at 578) (emphasis added).

The pervasiveness of harm caused by identity theft and insider trading cannot be questioned. *Donoghue*, 696 F.3d at 174 (Congress recognized a “widespread use of confidential information by corporate insiders to gain an unfair advantage in trading their corporations’ securities.”) (internal quotation marks and citation omitted); *cf.* 149 Cong. Rec. 26,891 (2003) (statement of Sen. Richard Shelby, in support of passage of FACTA) (“As our economy has grown more automated, more electronic transactions occur without the lender and borrower ever meeting face to face. As a result, the transfer of information has become much more pervasive, and a new crime has emerged that takes advantage of this flow of information[:] identity theft . . .”).

Indeed, the Supreme Court’s description of § 16(b) sounds nearly identical to

FACTA:

Those courts have recognized that the only method Congress deemed effective to curb the evils of insider trading was a flat rule taking the profits out of a class of transactions in which the possibility of abuse was believed to be intolerably great. . . .

In order to achieve its goals, Congress chose a relatively arbitrary rule capable of easy administration. The objective standard of Section 16 (b) imposes strict liability upon substantially all transactions occurring within the statutory time period, regardless of the intent of the insider or the existence of actual speculation. This approach maximized the ability of the rule to eradicate speculative abuses by reducing difficulties in proof. Such arbitrary and sweeping coverage was deemed necessary to insure the optimum prophylactic effect.”

Reliance Elec. Co. v. Emerson Elec. Co., 404 U.S. 418, 422 (1972) (emphases added) (internal quotation marks and citation omitted).

Similarly, in both circumstances, Congress recognized that the great risk of harm, coupled with the difficulties of tracing harm, called for a flat rule preventing the conduct that causes that risk. *Compare Donoghue*, 696 F.3d at 176 (“Judge Learned Hand observed that ‘[i]f only those persons were liable, who could be proved to have a bargaining advantage, the execution of the statute would be so encumbered as to defeat its whole purpose.’” (quoting *Gratz v. Cloughton*, 187 F.2d 46, 50 (2d Cir. 1951) (Hand, J.))), *with Bateman v. Am. Multi-Cinema, Inc.*, 623 F.3d 708, 718 (9th Cir. 2010) (“The actual harm that a willful violation of FACTA will inflict on a consumer will often be small or difficult to prove. . . . That actual loss is small and hard to quantify is why statutes such as the [FCRA] provide for modest damages without proof of injury.”) (internal quotation marks and citation omitted).

By choosing to accept plaintiff-appellant’s credit card, Paris Baguette voluntarily took on the fiduciary duty not to harm the integrity of plaintiff-appellant’s financial information. *See Donoghue*, 696 F.3d at 177 (“Drawing an analogy between trust law and the fiduciary duty created by § 16(b), Judge Hand observed that ‘[n]obody is obliged to become a director, an officer, or a ‘beneficial owner’; just as nobody is obliged to become the trustee of a private trust; but, as soon as he does so, he accepts whatever are the limitations, obligations and conditions attached to the position, and any default in fulfilling them is as much a ‘violation’ of law as though it were attended by the sanction of imprisonment.”) (quoting *Gratz*, 187 F.2d at 49) (adding emphasis)).

Plaintiff-Appellant Need Not Allege Pecuniary Harm

Further, *Spokeo* rebukes Paris Baguette’s previous insistence that actual pecuniary harm is required for plaintiff-appellant to allege a cognizable injury. *Spokeo*, 2016 U.S. LEXIS 3046, at *17 (“[A] plaintiff . . . need not allege any additional harm beyond the one Congress has identified.”) (emphasis original). This is because “intangible injuries can nevertheless be concrete.” *Id.* at *15.⁸ When it passed and modified FACTA, Congress identified an unreasonable risk of harm in the form of risk of identity theft, the very harm plaintiff-appellant alleges herein. *See* Compl. ¶¶ 6–11 (A-8–A-9). As Justice Thomas explained, “[a] plaintiff seeking to vindicate a statutorily created private right need not allege actual harm beyond the invasion of that private right.” *Spokeo*, 2016 U.S. LEXIS 3046, at *26 (Thomas, J., concurring) (citing *Havens Realty Corp. v. Coleman*,

⁸ Indeed, FACTA has a two-part test, one for actual damages where identity theft has occurred or another, where there is no immediate loss, with damages of not less than \$100 and not more than \$1,000. *See* 15 U.S.C. § 1681n(a)(1)(A).

455 U.S. 363, 373–74 (1982) (standing for violation of the Fair Housing Act); *Tenn. Elec. Power Co. v. Tenn. Valley Auth.*, 306 U.S. 118, 137–38 (1939) (standing exists when “the right invaded is a legal right, — one of property, one arising out of contract, one protected against tortious invasion, or one founded on a statute which confers a privilege’’)).

Risk-Based Harms

Contrary to any argument by Paris Baguette, *Spokeo* rejected the argument that, for a risk of harm to be concrete, the contemplated chain of causation from the violator’s conduct to actual harm cannot involve the conduct of a third party. The harm alleged by Robins was that the falsities in Spokeo’s reports could influence the decisions of third-party employers. *Spokeo*, 2016 U.S. LEXIS 3046, at *35 (Ginsburg, J., dissenting) (“...Robins’ complaint already conveys concretely [that] Spokeo’s misinformation causes actual harm to his employment prospects.”) (internal brackets, quotation marks, and record citation omitted); *see also Bennett v. Spear*, 520 U.S. 154, 169 (1997) (plaintiff had Article III standing where alleging “injury produced by determinative or coercive effect upon the action of [a third party]”). Similarly here, the publication of a consumer’s credit card data causes actual harm to her financial integrity by increasing the probability that third parties will act to her detriment.

Request For Remand

Should this Court hold either that *Spokeo* changed the law of standing in this Circuit, or that plaintiff-appellant has somehow inadequately pleaded standing, plaintiff-appellant respectfully requests that this Court remand this action back to the District

Court for further proceedings.

Conclusion

Congress is well within its powers to determine that certain conduct between private parties creates an unacceptable increase in the risk of harm. Rather than waiting for that risk to manifest, Congress may elevate the risk of harm itself to a cognizable injury at law. That is exactly what Congress did with FACTA—twice. Congress conducted an extensive and ongoing factual investigation, determined how probable and how injurious credit card identity theft can be, and passed a statute that has always been within Congress’s traditional powers. The harm that plaintiff-appellant alleges falls centrally within Congress’s statutory scheme, and is more than sufficiently concrete to meet constitutional muster.

Dated: New York, New York
June 10, 2016

Respectfully submitted,

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