UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

DON RUPPEL, individually and on behalf of all others similarly situated, Plaintiff, v. CONSUMERS UNION OF UNITED STATES, INC., Defendant.	Civil Action No. 16-cv-02444-KMK

PLAINTIFF'S OPPOSITION TO DEFENDANT
CONSUMERS UNION OF THE UNITED STATES, INC.'S MOTION TO DISMISS

Dated: September 8, 2016

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INTRODUCTION

Defendant Consumers Union of United States, Inc.'s ("Defendant's") Motion to Dismiss is a near carbon copy of another magazine publisher's Motion to Dismiss in a nearly identical case under the Michigan Preservation of Personal Privacy Act, M.C.L. §§ 445.1711, *et seq.* (the "PPPA")[1] pending before Judge Analisa Torres in the Southern District of New York. *See Boelter v. Hearst Commc'ns, Inc.*, 2016 WL 3369541 (S.D.N.Y. June 17, 2016). In *Hearst*, Judge Torres rejected every argument Defendant raises here. *See id.* In doing so, Judge Torres joined <u>four</u> other courts that have denied similar motions to dismiss in other PPPA cases. *See Halaburda v. Bauer Pub. Co., LP*, 2013 WL 4012827 (E.D. Mich. Aug. 6, 2013); *Kinder v. Meredith Corp.*, 2014 WL 4209575 (E.D. Mich. Aug. 26, 2014); *Owens v. Rodale, Inc.*, 2015 WL 575004 (E.D. Mich. Feb. 11, 2015); *Cain v. Redbox Automated Retail, LLC*, 981 F. Supp. 2d 674 (E.D. Mich. 2013). Nonetheless, Defendant argues that *Hearst* was wrongly decided. Memorandum Of Law Of Defendant Consumers Union Of United States, Inc. In Support Of Its Motion To Dismiss ("Def.'s Br."), at 10 n.5, 12 n.6, 21.

<u>First</u>, Defendant argues that recent amendments to the PPPA – which did not take effect until July 31, 2016 – apply retroactively and thus deprive Plaintiff of statutory standing. However, under Michigan law, statutory amendments "are presumed to operate prospectively unless the contrary intent <u>is clearly manifested</u>." *Frank W. Lynch & Co. v. Flex Techs., Inc.*, 463 Mich. 578, 583 (2001) (emphasis added). Far from "clearly manifest[ing]" retroactive intent, the Amended PPPA lacks any express retroactive language. That fact is fatal to Defendant's argument that the Amended PPPA applies retroactively. *See Hearst*, 2016 WL 3369541, at *5

[1] Defendant and other courts refer to the PPPA as the "Video Rental Privacy Act" or "VRPA." Plaintiff will refer to the statute by its actual name throughout. *See Deacon v. Pandora Media, Inc.*, 2016 WL 3619346, at n.1 (Mich. July 6, 2016).

("Notably absent from the amended [PPPA] is any express language indicating the law's retroactive application."). Further, even if the Michigan Legislature's intent against retroactively was not clear, Michigan law nonetheless prohibits retroactive application where, as here, vested rights would be impaired. *See id.* at *6 (citing cases). Accordingly, the only court to date to consider whether the Amended PPPA applies retroactively held that it does not. *See id.* at *4-6.

Second, Defendant argues that Plaintiff lacks Article III standing for a "bare procedural violation" without concrete harm. But Plaintiff does not allege a "bare procedural violation." Indeed, he does not allege a procedural violation at all, but rather a violation of his substantive rights under the PPPA. Post-*Spokeo*, courts have consistently held that alleged violations of substantive rights granted by statute confer Article III standing. And both common law history and legislative intent clearly indicate that a violation of the PPPA is a concrete injury. Further, even if a violation of the PPPA alone is insufficient to confer Article III standing, Plaintiff alleges actual harm in the well-accepted forms of receipt of unwarranted junk mail and telephone solicitations, enhanced risk of identity theft, and overpayment.

Third, Defendant argues that Plaintiff fails to state a claim under the PPPA for the same reasons that have been rejected in every case since *Halaburda*. Defendant provides no reason for this Court to decline to follow every other court to consider these arguments.

Fourth, Defendant argues that the PPPA violates the First Amendment. Judge Torres rejected that argument – twice – because the First Amendment's protections for commercial speech are considerably lower and as such do not prevent a state from passing reasonable laws to protect its citizen's privacy.

Finally, Defendant argues that Plaintiff fails to state a claim for unjust enrichment, for the same reasons that were rejected by Judge Torres. Again, Defendant provides no reason for this Court to decline to follow Judge Torres' holding.

Plaintiff alleges facts that are simple, clear, and sufficient to state his claims. Defendant unlawfully discloses its subscribers' Personal Reading Information. On similar facts, five other courts denied defendants' motions to dismiss. This Court should deny Defendant's motion.

FACTUAL BACKGROUND

Plaintiff is a Michigan citizen and a subscriber to Defendant's *Consumer Reports* magazine. *See* Class Action Complaint, Dkt. No. 1 ("Compl.") ¶ 10. Plaintiff alleges that Defendant violated the PPPA[2] by disclosing his Personal Reading Information – including, but not limited to, his name, magazine that he subscribed to, and home address – to third parties. *Id.* ¶¶ 7-9. Plaintiff further alleges that Defendant was unjustly enriched by disclosing his information in that Defendant "sells its mailing lists – which include subscribers' Personal Reading Information identifying which individuals purchased which magazines … to data miners, other consumer-facing organizations, non-profit organizations seeking to raise awareness and solicit donations, and to political organizations soliciting donations, votes, and volunteer efforts." *Id.* ¶ 43.

ARGUMENT

I. THE AMENDED PPPA DOES NOT APPLY RETROACTIVELY AND THUS HAS NO IMPACT ON THIS ACTION

Defendant contends that "the unambiguous intent of the legislature … supports the conclusion the Amendment is to be applied retroactively." Def.'s Br. at 9. That is wrong. The

[2] The PPPA was amended, effective July 31, 2016. *See* Declaration of Sean M. Sullivan, Ex. 1 (the "Amended PPPA"); *see also* Declaration of Joseph I. Marchese ("Marchese Decl."), Ex. A (comparison of original versus amended PPPA). For the reasons detailed in Argument § I, the Amended PPPA does not apply retroactively and thus has no impact on this action.

recent amendments to the PPPA do not apply retroactively, and therefore have no impact on this action. *See Hearst*, 2016 WL 3369541, at *4-6 (holding that the Amended PPPA does not apply retroactively and therefore has no impact on actions filed before it took effect on July 31, 2016).

Under Michigan law, statutory amendments "are presumed to operate prospectively unless the contrary intent is clearly manifested." *Frank W. Lynch*, 463 Mich. at 583 (emphasis added). "This is especially true if retroactive application of a statute would impair vested rights, create a new obligation and impose a new duty, or attach a disability with respect to past transactions." *Id.* "The Legislature's expression of an intent to have a statute apply retroactively must be clear, direct, and unequivocal as appears from the context of the statute itself." *Davis v. State Emps. Ret. Bd.*, 272 Mich. App. 151, 155-56 (2006) (citing *Chesapeake & O. R. Co. v. Pub. Service. Comm.*, 382 Mich. 8, 23 (1969)). As the Michigan Supreme Court recently stated, "[r]etroactive application of legislation presents problems of unfairness … because it can deprive citizens of legitimate expectations and upset settled transactions." *LaFontaine Saline, Inc. v. Chrysler Grp., LLC*, 496 Mich. 26, 38 (2014) (internal quotations omitted). Thus, Defendant must overcome this heavy presumption in order to apply the Amended PPPA retroactively.

In determining whether a law has retroactive effect, Michigan courts consider four factors:

> First, we consider whether there is a specific language providing for retroactive application. Second, in some situations [not presented here], a statute is not regarded as operating retroactively merely because it relates to an antecedent event. Third, in determining retroactivity, we must keep in mind that retroactive laws impair vested rights acquired under existing laws or create new obligations or duties with respect to transactions or considerations already past. Finally, a remedial or procedural act not affecting vested rights may be given retroactive effect where the injury or claim is antecedent to the enactment of the statute.

Id. at 38-39. Here, each relevant factors weighs against retroactivity.

A. The Amended PPPA Does Not Have Any Specific Retroactive Language

"Notably absent from the amended [PPPA] is any express language indicating the law's retroactive application." *Hearst*, 2016 WL 3369541, at *5. "The Michigan Supreme Court has repeatedly observed that the Michigan Legislature 'knows how to make clear its intention that a statute apply retroactively,' so the absence of express retroactive language is a strong indication that the Legislature did not intend a statute to apply retroactively." *Kia Motors Am., Inc. v. Glassman Oldsmobile Saab Hyundai, Inc.*, 706 F.3d 733, 739 (6th Cir. 2013) (citing *Brewer v. A.D. Transp. Express, Inc.*, 486 Mich. 50, 56 (2010)); *see also LaFontaine Saline, Inc.*, 496 Mich. at 39-40 (same).

Here, the Amended PPPA does not use any form of the word "retroactive" to describe its application.[3] Additionally, the portions of the Provision at issue are written in the future tense. The Provision reads that the "amendatory act is *curative*." Amended PPPA, Enacting Provision § 2. The word "curative" does not "unequivocally indicate that the amendments apply to pre-existing disputes." *Hearst*, 2016 WL 3369541, at *4. The Michigan Legislature knows this as evidenced by other recent statutory amendments that supplemented the word "curative" with express retroactive language. *See, e.g.*, *Daimler Chrysler Servs. of N. Am, LLC v. Dep't of Treas.*, 2010 WL 199575, at *2 n.1 (Mich. Ct. App. Jan. 21, 2010) ("The amendment to M.C.L. 205.54i also contains the following enacting provision … [t]his amendatory act is curative and <u>shall be retroactively applied</u>.") (emphasis added).

[3] The Michigan Supreme Court's recent holding in *Deacon*, 2016 WL 3619346 (Mich. July 6, 2016) provides further evidence that the Amended PPPA does not apply retroactively. There, the Michigan Supreme Court acknowledged the amendments but nevertheless applied the version of the PPPA "in effect at the time of the events giving rise to [the] case" and stated that the amendments did not affect the analysis "in any respect." *Id.* at n.7. The Court also repeatedly highlighted the amendments' future effective date and did not apply any of the provisions retroactively. *Id.* at nn. 8-9.

Moreover, Enacting Provision § 1 states that "[t]his amendatory act takes effect 90 days after the date it is enacted into law." That gave the Amended PPPA an effective date of July 31, 2016, several months after Mr. Ruppel filed his lawsuit. The Michigan Supreme Court "has recognized that 'providing a specific, future effective date and omitting any reference to retroactivity' supports a conclusion that a statute should be applied prospectively only." *Brewer*, 486 Mich. at 56 (quoting *White v. Gen. Motors Corp.*, 431 Mich. 387, 398-99 (1988)); *see also Hearst*, 2016 WL 3369541, at *5 ("Moreover, the amended law contains text that affirmatively indicates its prospective application.").

Defendant nonetheless argues that, under Michigan law, the amendment's "curative and intended to clarify" language means that the amendment "app[lies] retroactively." Def.'s Br. at 9. That is wrong. Plaintiff's counsel could not find a single instance where the Michigan Legislature relied solely on the phrase "curative and intended to clarify" to denote retroactivity. Indeed, two other recent Michigan statutory amendments supplement that phrase with clear retroactive language. *See* M.C.L. § 324.20140(4) ("Subsection (3) is curative and intended to clarify the original intent of the legislature <u>and applies retroactively</u>.") (emphasis added); M.C.L. § 208.1512, "Retroactive Application" Section ("P.A. 2011, No. 305, § 1 provides the amendatory act is curative and intended to clarify the original intent of P.A. 2007, No. 36, <u>and is retroactive</u> and effective for taxes levied on and after January 1, 2008.") (emphasis added). Defendant fails to explain why the Michigan Legislature did not supplement "curative and intended to clarify" with clear retroactive language, as it has in other recent statutory amendments. Given that the Michigan Legislature knows how to supplement "curative and intended to clarify" with express retroactive language, and has done so in the recent past, Defendant's argument must be rejected.

Defendant cites *In re Oswalt*, 444 F.3d 524 (6th Cir. 2006), *People v. Sheeks*, 244 Mich. App. 584 (2001), and *Seaton v. Wayne Country Prosecutor*, 233 Mich. App. 313 (1998), but each is easily distinguishable. *See* Def.'s Br. at 10. First, the amended statute at issue in *In re Oswalt* contained express retroactive language. *See In re Oswalt*, 444 F.3d at 527-28 ("The Michigan legislature further provided that '[t]his section applies to all transactions, liens, and mortgages within its scope <u>even if</u> the transaction, lien, or mortgage was entered into or created *before* July 14, 2003.'") (emphasis added). Second, *Sheeks* and *Seaton* predate the *Frank W. Lynch* Court's holding that the lack of express retroactive language is the "most instructive" factor because "the Legislature … knows how to make clear its intention that a statute apply retroactively." *Frank W. Lynch*, 463 Mich. at 583. Since *Frank W. Lynch*, Michigan courts have not applied statutory amendments retroactively in the absence of express retroactive language. *See, e.g.*, *Johnson v. Pastoriza*, 491 Mich. 417, 430-32 (2012) (overturning appellate court holding that statutory amendment applied retroactively where "nothing in the statutory amendment suggest[ed] that the Legislature intended *retroactive* effect").[4]

Next, Defendant asserts that Section 3(d) of the Amended PPPA "reflects the fact that the legislature understood and intended its actual damages clarification would operate retroactively." Def.'s Br. at 10-11. That is also wrong. Defendant's reliance on *People v. Peltola*, 489 Mich. 174 (2011), is misplaced as "[t]he qualifying language in § 3(d) does not concern the prospective force of the provision itself, however, but only the information to which the exception applies." *Hearst*, 2016 WL 3369541, at *5. Thus, the "clearest reading of the statutory text is that the legislature intends the amended law to govern the disclosure of consumer data regardless of

[4] *Sheeks* is also distinguishable because there the accompanying legislative analysis stated that the amendments were intended to address a pending case. *See Sheeks*, 244 Mich. App. at 590. Here, neither the text of the statute nor the legislative analyses mention any pending litigation. *See* Marchese Decl., Exs. B & C (House and Senate legislative analyses).

whether the information pre- or post-dates the amendment – except § 3(d), which applies only where information post-dates the amendment." *Id.*

Finally, Defendant argues that where "an amendment is 'enacted soon after controversies arose as to the interpretation of the original act, it is logical to regard the amendment as a legislative interpretation of the original act.'" Def.'s Br. at 11. Even assuming that rule is still good law after *Frank W. Lynch* – which it is not – there is "no evidence … that the statute was crafted to address any legal controversy contemporaneous with the law's passage." *Hearst*, 2016 WL 3369541, at *5. In any event, Defendant's argument is wrong for three additional reasons.

First, there is and never was any "controversy" concerning Article III standing and the PPPA. Every single court to consider whether the PPPA's statutorily-defined damages award confers Article III standing has held that it does. *See Hearst*, 2016 WL 3369541, at *3; *Halaburda*, 2013 WL 4012827, at *4, *6; *Kinder*, 2014 WL 4209575, at *2; *Owens*, 2015 WL 575004, at *4; *Cain*, 981 F. Supp. 2d at 683; *Deacon v. Pandora Media, Inc.*, 901 F. Supp. 2d 1166, 1172 (N.D. Cal. 2012).

Second, while the Michigan Legislature can be presumed to know of these cases, the citation Defendant provides involved a very different scenario. In *Detroit Edison Co. v. Michigan*, 320 Mich. 506 (1948), the Michigan Legislature amended a statute "to clarify the statute because of the differences of opinion existing between the department of revenue, and the board of tax appeals." *Id.* at 521. There is no such difference of opinion here as every court to consider whether the PPPA's statutorily-defined damages award confers Article III standing has held that it does.

Third, the fact that the Michigan Legislature was aware of pending litigation under the PPPA, and still chose not to include express retroactive language, or even mention that pending

litigation, is even more evidence the Legislature did not intend for the amendments to impact pending litigation. *See Duffy v. Grange Ins. Co.*, 2010 WL 3655979, at *2 (Mich. Ct. App. Sept. 21, 2010) ("It can be presumed, then, that the Legislature knew of the Michigan court rulings … and, with such knowledge, intentionally and consciously elected to leave out language in the statutory amendment indicating that the amended statute was to apply retroactively."). Nonetheless, Defendant argues that the Act's "legislative history confirm[s] the legislature's intent to give retroactive effective to the Act's actual damages provision." Def.'s Br. at 11. But Michigan courts "do not resort to legislative history to cloud a statutory text that is clear." *Chmielewski v. Xermac, Inc.*, 457 Mich. 593, 608 (1998). As the text of the Amended PPPA clearly does not denote retroactivity, *see supra*, Michigan law does not permit the Court to consult legislative history.[5]

In sum, the Amended PPPA does not contain "any express language indicating the law's retroactive application." *Hearst*, 2016 WL 3369541, at *5. Thus, the Amended PPPA does not apply retroactively.

B. Retroactive Application Of The Amended PPPA Would Impermissibly Impair Plaintiff's Vested Rights

Even if the Legislature's intent against retroactivity was not clear, the third factor[6] of the *LaFontaine Saline* test weighs against retroactivity as it would impair Plaintiff's vested rights. *See Hearst*, 2016 WL 3369541, at *6 ("These amendments do not merely 'change the mechanics or time frame' by which Plaintiffs can assert their rights. … Rather, they alter the scope of those rights and the recourse available should the rights be violated. … Therefore, the new law is substantive, and should not apply retroactively to Plaintiffs' claims."). Under Michigan law,

[5] This Court rejects appeals to legislative history where "the text … [is] unambiguous." *Henny v. New York State*, 842 F. Supp. 2d 530, 549 n.17 (S.D.N.Y. 2012).
[6] The second *LaFontaine Saline* factor is not applicable to the circumstances of this case.

"[a] statute may not be applied retroactively if it abrogates or impairs vested rights." *Davis*, 272 Mich. App. at 158. The Michigan Supreme Court has long held that "a statutory right of action for damage to person or property, which has accrued, is a vested right and likewise to be protected." *Minty v. Bd. of State Auditors*, 336 Mich. 370, 391 (1953); *see also In re Certified Questions from the U.S. Court of Appeals for the Sixth Circuit*, 416 Mich. 558, 573 (1982) ("The general rule against retrospective application has been applied in cases where a new statute abolishes an existing cause of action. It is clear that once a cause of action accrues, – *i.e.*, all the facts become operative and are known – it becomes a 'vested right.' … A new statute which abolishes an existing cause of action brings the statute within the general proscription of rule three."); *Doe v. Dep't of Corr.*, 249 Mich. App. 49, 61-62 (2001) (same). Thus, retroactive application of these amendments would impermissibly impair Plaintiff's vested rights, which accrued prior to the Amended PPPA's effective date.

As Judge Torres held, the amendments to the PPPA significantly alter the privacy protections afforded by the PPPA. *See Hearst*, 2016 WL 3369541, at *6. For example, the Amended PPPA significantly alters the "exclusively for direct marketing" exception because it removes the word "exclusive," provides for additional forms of acceptable written notice, and even permits Defendant to disclose a customer's name for 30 days after that customer provides written notice to Defendant instructing that it discontinue disclosing his name. *See* Section 3(e). Thus, retroactive application of the Amended PPPA would deprive Plaintiff of legitimate expectations he had under the law when he subscribed to *Consumer Reports* and at the time he commenced this action. *See Neal v. Dep't of Corr.*, 2005 WL 326883, at *8 (Mich. Ct. App. Feb. 10, 2005) ("The record displays that several members of the class had vested claims pending … at the time the statutory amendment became effective. The amendment during the

pendency of the class action has no bearing on those rights because they were fixed by law before the amendment.”).

Defendant counters by arguing that Plaintiff’s statutory cause of action under the PPPA is not a vested right. *See* Def.’s Br. at 12-13. Defendant primarily relies on *Lahti v. Fosterling*, 357 Mich. 578 (1959), but “more recent cases from the Michigan Supreme Court cast doubt on *Lahti*’s broad language.” *Kia Motors Am., Inc. v. Glassman Oldsmobile Saab Hyundai, Inc.*, 2012 WL 175489, at *5 (E.D. Mich. Jan. 23, 2012) (citing *White*, 431 Mich. at 429). Indeed, more recent decisions have rejected Defendant’s argument. *See, e.g.*, *Doe*, 249 Mich. App. 49 at 61-62 (“A cause of action becomes a vested right when it accrues and all the facts become operative and known. Plaintiffs’ cause of action accrued and all the facts became operative and known before the effective date of 1999 PA 201. Retroactive application of the [statute] would impair plaintiffs’ cause of action.”); *Duffy*, 2010 WL 3655979, at *3 (same); *Neal*, 2005 WL 326883, at *8 (same). As in *Doe*,[7] *Duffy*, and *Neal*, Plaintiff’s cause of action accrued, and became a vested right, prior to the effective date of the Amended PPPA. Accordingly, retroactive application of the Amended PPPA would impermissibly impair Plaintiff of his vested rights. This factor therefore also weighs against retroactivity.

C. The Amended PPPA Is Not Merely Remedial Or Procedural

The fourth factor of the *LaFontaine Saline* test also weighs against retroactivity as the amendments to the PPPA are not merely remedial or procedural. In applying this factor, Michigan courts “have rejected the notion that a statute significantly altering a party’s substantive rights should be applied retroactively merely because it can also be characterized in a

[7] *Doe* is particularly instructive because the statutory amendment at issue stated that the “amendatory act is curative and intended to correct any misinterpretation of legislative intent in the court of appeals decision in *Doe v. Dep’t of Corrections*, 236 Mich. App. 801 (1999).” *Doe*, 249 Mich. App. at 57. Despite that language, the Michigan Court of Appeals still refused to apply the statute retroactively because doing so would have impermissibly impaired vested rights. *Id.* at 61-63.

sense as remedial." *Frank W. Lynch*, 463 Mich. at 585. Thus, "the term 'remedial' in this context should only be employed to describe legislation that does not affect substantive rights." *Id.* at 585. As described above, the Amended PPPA significantly alters the privacy protections afforded by the Act. *See supra* at 10. It therefore is not merely remedial or procedural. *See, e.g.*, *Hearst*, 2016 WL 3369541, at *6 (finding Amended PPPA is "substantive"); *Brewer*, 486 Mich. at 58 (amendment was not remedial or procedural where it "imposed a new legal burden on out-of-state employers").

Defendant nonetheless argues that the Amended PPPA is remedial because "it affects only … how a plaintiff may redress a [PPPA] right – and does not impair the right itself." Def.'s Br. at 12. But that argument was rejected by Judge Torres as well. *See Hearst*, 2016 WL 3369541, at *6 (describing broad extent of amendments to PPPA). In the end, the Amended PPPA significantly "alter the scope of [Plaintiff's PPPA] rights and the recourse available should the rights be violated." *Id.* Amendments of that magnitude do not qualify as "remedial" under Michigan law.[8]

According to Defendant, the "Amendment's stated intention is to 'correct[] a perceived flaw or defect,' and cure 'mischiefs' inadvertently created by the original statute, and thus 'remed[ies] defects therein, or mischiefs thereof.'" Def.'s Br. at 12. But Defendant points to no evidence identifying these perceived flaws, defects, or mischiefs, let alone any evidence that the Amendment was intended to correct these perceived issues. That is because there is none. Accordingly, *Seaton* is distinguishable. *See Seaton*, 233 Mich. App. at 321-22 (finding "the statute at issue was clearly enacted to put a halt to the mischief and abuse of public resources

[8] Defendant's citation to *In re Certified Questions*, 416 Mich. 558 (1982) does not compel a different conclusion as amendment at issue there did "not bar any claim, legal or equitable," it merely "mitigate[d] damages in products liability actions." *Id*. at 577. The Amended PPPA, by contrast, requires actual damages for standing, and significantly alters the privacy protections afforded by the PPPA.

caused by Michigan's prisoner population through excessive and largely frivolous FOIA requests" based on the Senate Fiscal Agency Bill Analysis for the statute at issue).

Finally, Defendant argues that a remedy made available by a statute is not a vested right. Def.'s Br. at 13. But Michigan courts reject that argument as well. *See Lenawee Cnty. v. Wagley*, 301 Mich. App. 134, 175-76 (2013) ("Although subsection (5) is distinguishable from a statute conferring a substantive right because it relates to the remedy available … the amendment creates new obligations, which counsels against retroactive application. Irrespective of whether a statute qualifies as procedural or remedial, a court may not retroactively apply the statute if this application would abrogate or impair vested rights."); *see also id.* at 177 (holding rights vested when action was filed because that is when "[t]he potential for damages arose").

II. PLAINTIFF HAS STANDING TO ASSERT CLAIMS UNDER THE PPPA

Defendant contends Plaintiff lacks standing because he "has not alleged that he suffered actual damages as a result of the alleged disclosures." Def.'s Br. at 8. But Defendant's argument is premised on the text of the PPPA as amended. *See id.* ("The VRPA, as amended, expressly requires actual injury to bring a civil suit under the statute.") (emphasis added). As discussed above, the Amendment does not apply retroactively.[9] Moreover, as discussed below, Plaintiff has demonstrated Article III standing.

A. *Spokeo* Confirmed That The Legislature Can Identify Intangible Concrete Harms Redressble In Federal Court

In *Spokeo v. Robins*, 136 S. Ct. 1540 (2016) the Supreme Court reaffirmed its long line of case law holding that Article III standing does not require tangible injury. *See id.* at 1549

[9] In any event, the Second Circuit has held "deducing original legislative intent … on the basis of actions taken by Congress years later is at best a hazardous undertaking." *Home Grp., Inc. v. C.I.R.*, 875 F.2d 377, 381 n.7 (2d Cir. 1989) (citing *Waterman S.S. Corp. v. United States*, 381 U.S. 252, 269 (1965) ("This Court has pointed out on previous occasions that 'the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one.'")).

("'Concrete' is not, however, necessarily synonymous with 'tangible.' … [W]e have confirmed in many of our previous cases that intangible injuries can nevertheless be concrete."). Contrary to Defendant's suggestion, the Supreme Court expressly held that the violation of a statutory right – in and of itself – may be a concrete injury so long as the right protects a legislatively identified interest. Put simply, a plaintiff vindicating a concrete statutory interest "need not allege any *additional* harm beyond the one Congress has identified." *Id*. at 1549-50.

To be sure, a plaintiff does not "automatically satisfy 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." *Spokeo*, 136 S. Ct. at 1549. However, in endorsing Justice Kennedy's *Lujan* concurrence, the *Spokeo* Court held that "'Congress,'" or, here, the Michigan Legislature, "'has the power to define injuries and articulate chains of causation that will give rise to a case or controversy where none existed before.'" *Spokeo*, 136 S. Ct. at 1549 (quoting *Lujan*, 504 U.S. at 580) (Kennedy, J., concurring in part and concurring in the judgment); *see also id*. at 1553 (Thomas, J., concurring) ("Congress can create new private rights and authorize private plaintiffs to sue based simply on the violation of those private rights.").

B. Plaintiff Sufficiently Alleges A Violation Of His Substantive Rights Under The PPPA, And Therefore Has Article III Standing To Pursue His Claims

Defendant argues that Plaintiff fails to sufficiently allege a concrete injury because "[t]he essence of Plaintiff's claim is, at most, a procedural violation based on the alleged failure of 'notice' regarding disclosures by Consumers Union for marketing purposes." Def.'s Br. at 15. Defendant misconstrues Plaintiff's allegations. Plaintiff's claim is not a "procedural violation." Rather, Plaintiff claims that Defendant violated his <u>substantive rights</u> under the PPPA by selling his "personal information … to data miners and other third parties," including "non-profit organizations seeking to raise awareness and solicit donations, and to political organizations

soliciting donations, votes, and volunteer efforts." Compl. ¶¶ 7, 43.[10] The PPPA's prohibition on the disclosure of personal information "do[es] not deal with the procedure or process for enforcing" consumer's privacy rights; it actually defines those rights as a matter of substantive law. *Wysocki v. IBM Corp.*, 607 F.3d 1102, 1106-07 (6th Cir. 2010); *see also Sterk v. Redbox Automated Retail, LLC*, 770 F.3d 618, 623 (7th Cir. 2014) (rejecting argument that "impermissible disclosures of one's sensitive, personal information" was a mere technical violation of a statute designed to protect video viewing history because such disclosures were precisely what the statute was intended to prohibit); *Boelter v. Hearst Commn's Inc.*, 2016 WL 361554, at *3 (S.D.N.Y. Jan. 28, 2016) ("[T]he [PPPA] creates for Plaintiff a specific, enforceable legal right to expect Defendant to keep private her identifying information … its violation constitutes a concrete, particularized deprivation.").

Since *Spokeo*, courts have drawn a distinction between cases alleging procedural violations, and those alleging violations of statutes that specifically proscribe certain conduct, i.e., substantive violations. *Compare Smith v. Ohio State Univ.*, 2016 WL 3182675, at *4 (S.D. Ohio June 8, 2016) (holding that plaintiffs did not have standing in FCRA case where they alleged only that defendants did not follow the correct procedure when retrieving credit reports), *with Church v. Accretive Health, Inc.*, 2016 WL 3611543, at *3 n.2 (11th Cir. July 6, 2016) (finding standing in FDCPA case and holding that "Church has not alleged a procedural violation. Rather, Congress provided Church with a substantive right to receive certain disclosures and Church has alleged that Accretive Health violated that substantive right"). Thus,

[10] Notably, whether Defendant provides adequate notice is only relevant towards whether it meets the PPPA's "exclusively for direct marketing defense." M.C.L. § 445.1713(d). However, that defense only applies to disclosure that are "for the *exclusive* purpose of marketing goods and services directly to the consumer." *Id.* (emphasis added). In other words, disclosures that are not for the *exclusive* purpose of marketing goods and services directly to the consumer, such as those alleged in Paragraph 43 of the Complaint, are prohibited under the PPPA, whether or not adequate notice is provided. Thus, Plaintiff's Complaint necessarily encompasses more than the adequacy of Defendant's purported notice. *See infra* Argument § III.

post-*Spokeo* courts have consistently found that the violation of a substantive right granted by statute is sufficient to confer Article III standing. *See, e.g.*, *Hearst*, 2016 WL 3369541, at *3 (holding that PPPA plaintiff had standing under *Spokeo*); *In re Nickelodeon Consumer Privacy Litig.*, 2016 WL 3513782, at *7 (3d Cir. June 27, 2016) (holding that *Spokeo* did not "call[] into question whether [] plaintiffs'" in a federal Video Privacy Protection Act ("VPPA") case had Article III standing because "the harm is … concrete in the sense that it involves a clear *de facto* injury, *i.e.*, the unlawful disclosure of legally protected information"); *Church*, 2016 WL 3611543, at *3 ("The invasion of Church's right to receive the disclosures is not hypothetical or uncertain; Church did not receive information to which she alleges she was entitled. … Accordingly, Church has sufficiently alleged that she suffered a concrete injury, and thus, satisfies the injury-in-fact requirement."); *Yershov v. Gannet Satellite Info. Network*, 2016 WL 4607868, at *8 (D. Mass. Sept. 2, 2016) (holding that "the invasion of [plaintiff's] privacy interest in his video-viewing history," is an intangible harm sufficient to confer Article III standing).[11]

Simply put, by disclosing Plaintiff's private reading choices, Defendant "deprived Plaintiff[] of [his] right to keep [his] information private." *Hearst*, 2016 WL 3369541, at *3. This is a violation of a substantive – not procedural – right, and Plaintiff therefore "need not allege any *additional* harm." *Spokeo*, 136 S. Ct. at 1549. Indeed, Judge Saylor recently rejected the argument that disclosure of a plaintiff's private video-viewing choices was simply a "bare procedural violation" in *Yershov*. As Judge Saylor explained, the defendant's "alleged disclosure of information to Adobe is not a mere procedural violation. … Rather … it is the precise type of

[11] *Hancock v. Urban Outfitters, Inc.*, 2016 WL 3996710 (D.C. Cir. July 26, 2016), cited by Defendant, does not compel a different conclusion. *See* Def.'s Br. at 17-18. There, the court held that the plaintiffs lacked Article III standing where did they "not allege, for example, any invasion of privacy." *Hancock*, 2016 WL 3996710, at *3. Here, by contrast, the crux of Plaintiff's case is the invasion of his privacy interests under the PPPA.

disclosure for which the VPPA created a substantive right to prevent and remedy." *Yershov*, 2016 WL 4607868, at *8 n.5. Judge Saylor also rejected the argument that plaintiff's complaint did "not allege any 'material risk of harm.'" *Id.* As Judge Saylor explained, the plaintiff had "*already suffered* an injury defined by the VPPA – the non-consensual disclosure of his PII to Adobe." *Id.* Here, as in *Yershov*, the invasion of Plaintiff's privacy interest in his reading choices is an intangible harm sufficient to confer Article III standing. *Id.*

C. Defendant's Disclosure Of Plaintiff's Personal Reading Information Is A Concrete Injury

Under *Spokeo*, "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." *Id*. This is because federal judicial power under Article III applies to "cases and controversies of the sort traditionally amenable to, and resolved by, the judicial process." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 102 (1998). If the interest follows from the common law, it is concrete.

Here, while Defendant necessarily obtains information about their customers' reading choices as part of the subscriber relationship, the PPPA requires it keep that information confidential. "[A]n individual's right to privacy, both as to certain personal information and private locations, has long 'been regarded as providing a basis for a lawsuit in English or American courts.'" *Yershov*, 2016 WL 4607868, at *8 (quoting *Spokeo*, 136 S. Ct. at 1549). That is because "the right to privacy in compilations of personal information is particularly powerful because the power of compilations to affect personal privacy … outstrips the combined power of the bits of information contained within." *Id.* (quoting *Thomas v. FTS USA, LLC*, 2016 WL 3653878, at *10 (E.D. Va. June 30, 2016)). "Thus, 'it is well-settled that Congress may create a statutory right to privacy in certain information that strengthens or replaces the common

law, and citizens whose statutory rights to information privacy has been invaded [have standing] to bring suit under the statute to vindicate that right.'" *Id.* (quoting *Thomas*, 2016 WL 3653878, at *10).

But even if the PPPA does not follow from the common law, which it does, the statute still creates a concrete interest. "The judiciary clause of the Constitution … did not crystallize into changeless form the procedure of 1789 as the only possible means for presenting a case or controversy otherwise cognizable by the federal courts." *Nashville, C. & St. L. Ry. Co. v. Wallace*, 288 U.S. 249, 264 (1933). A legislative body therefore can create "new rights of action that do not have clear analogs in our common law tradition." *Lujan*, 504 U.S. at 580 (Kennedy, J., concurring). To do so, the legislature must "identify the injury it seeks to vindicate and relate the injury to the class of persons entitled to bring suit." *Id*. The Michigan Legislature did so.

The Michigan Legislature recognized that a person's choice in reading materials "is nobody's business but one's own," and passed the statute "to explicitly protect a consumer's privacy in buying and borrowing" such materials. Compl. Ex. A. The Michigan Legislature chose to protect Michiganders' privacy in their reading choices by, among other things, prohibiting exactly what Defendant did here: disclosing to third parties information identifying its customers as purchasers of particular reading materials. *See* M.C.L. § 445.1712. In doing so, the Michigan Legislature created a right that protects the privacy of information consumers share with the companies from which they buy their reading materials.

Under *Spokeo*, a "plaintiff seeking to vindicate a statutorily created private right need not allege actual harm beyond the invasion of that private right." *Spokeo*, 136 S. Ct. at 1553 (Thomas, J., concurring). Accordingly, Plaintiff's alleged invasions of the private right defined by the Michigan Legislature in the PPPA constitutes an injury sufficient to permit federal

jurisdiction. *Cf. In re Nickelodeon*, 2016 WL 3513782, at *7 ("Congress has long provided plaintiffs with the right to seek redress for unauthorized disclosures of information that, in Congress's judgment, ought to remain private.").[12]

D. Plaintiff Has Also Alleged Concrete Injuries In The Forms Of Receipt Of Unwarranted Junk Mail And Telephone Solicitations, Risk Of Identity Theft, And Overpayment

Even if the Court finds that a violation of the PPPA alone is not a concrete injury, Plaintiff alleges three additional concrete injuries: (1) receipt of unwarranted junk mail and telephone solicitations; (2) risk of identity theft; and (3) overpayment.

First, Plaintiff alleges that "[b]ecause Consumers Union sold and disclosed his Personal Reading Information, he now receives junk mail and telephone solicitations offering discounted magazine subscriptions, among other things. These unwarranted offers waste Plaintiff Ruppel's time, money, and resources. These harassing junk mail offerings and phone call solicitations … are attributable to Consumers Union's unauthorized sale and disclosure of his Personal Reading Information." Compl. ¶ 10. Judge Torres held that this form of injury conferred Article III standing for a PPPA plaintiff. *See Hearst*, 2016 WL 3369541, at *3. And following *Spokeo*, at least one district court has found that similar allegations sufficiently allege concrete injury under Article III. *See, e.g.*, *Booth v. Appstack, Inc.*, 2016 WL 3030256, at *5 (W.D. Wash. May 25, 2016) ("[T]he TCPA and WADAD violations alleged here, if proven, required Plaintiffs to waste time answering or otherwise addressing widespread robocalls. … As Congress and Washington State's legislature agreed, such an injury is sufficiently concrete to confer standing.").

[12] Defendant alludes to an argument that a state legislature may not create a a legal interest sufficient to confer Article III standing. *See* Def.'s Br. at 15 n.8. That is wrong. *See Diamond v. Charles*, 476 U.S. 54, 65 n.17 (1986) ("The Illinois Legislature, of course, has the power to create interests, the invasion of which may confer standing. In such a case, the requirements of Art. III may be met."); *Jaffe v. Bank of Am., Inc.*, 2016 WL 3944753, at *4 (S.D.N.Y. July 15, 2016) (Briccetti, J.) ("The Court … holds that a state statute, like a federal statute, may create a legal right, the invasion of which may constitute a concrete injury for Article III purposes.").

Second, Plaintiff alleges that Defendant's unlawful disclosures put his "at risk of serious harm from scammers." Compl. ¶ 44. The *Spokeo* Court specifically stated that "the risk of real harm" can "satisfy the requirement of concreteness." *Spokeo*, 136 S. Ct. at 1549. And Judge Torres held that this form of injury conferred Article III standing for a PPPA plaintiff. *See Hearst*, 2016 WL 3369541, at *3. Moreover, in the similar context of data breaches, courts have held that "the risk that Plaintiffs' personal data will be misused by … hackers … is immediate and very real." *In re Adobe Sys., Inc. Privacy Litig.*, 66 F. Supp. 3d 1197, 1214 (N.D. Cal. 2014). Thus, Plaintiff's allegation that Defendant's unlawful disclosures put his "at risk of serious harm from scammers," satisfies the injury-in-fact requirement of Article III standing.

Third, Plaintiff alleges that he "would not have been willing to pay as much, if at all, for his *Consumer Reports* subscription had he known that Consumers Union would disclose his Personal Reading Information." Compl. ¶¶ 10, 74. Judge Torres held that this form of injury also conferred Article III standing for a PPPA plaintiff. *See Hearst*, 2016 WL 3369541, at *3. And other courts have found that allegations of overpayment, such as these, are sufficient to confer Article III standing. *See, e.g.*, *Carlsen v. GameStop, Inc.*, 2016 WL 4363162, at *3 (8th Cir. Aug. 16, 2016) (allegation that the plaintiff "suffered damages as a result of GameStop's breach in the form of devaluation of his Game Informer subscription in an amount equal to the difference between the value of the subscription that he paid for and the value of the subscription that he received, *i.e.*, a subscription with compromised privacy protection," conferred Article III standing); *In re Adobe Sys., Inc. Privacy Litig.*, 66 F. Supp. 3d at 1223-24 (same).

III. DEFENDANT CANNOT HIDE BEHIND THE PPPA'S "EXCLUSIVELY FOR DIRECT MARKETING" DEFENSE

Defendant argues that its disclosures are excused because under the PPPA's exclusively for direct marketing defense. Def.'s Br. at 18-21. The PPPA allows disclosure where it "is for the exclusive purpose of marketing goods and services directly to the consumer," and if the "person disclosing the information … inform[s] the customer by written notice that the customer may remove his or her name at any time by written notice to the person disclosing the information." M.C.L. § 445.1713(d).

As an initial matter, Defendant's defense is based on a declaration accompanying exhibits. *See* Def.'s Br. at 19-21; Declaration of Sean M. Sullivan, Exs. 3-7. It is inappropriate for the Court to consider these on a motion to dismiss. *See, e.g.*, *Schwartz v. Schwartz*, 2014 WL 6390316, at *3 (E.D.N.Y. Nov. 17, 2014) ("[T]he Court notes that it will not consider matter outside the pleadings, such as the party and non-party declarations … on a motion to dismiss.") (citing *Nakahata v. New York-Presbyterian Healthcare Sys., Inc.*, 723 F.3d 192, 202 (2d. Cir. 2013) ("We do not consider matters outside the pleadings in deciding a motion to dismiss for failure to state a claim.")). Defendant incorrectly argues that the "Court can take judicial notice of the contents of these disclosures … [because they] are 'integral to the Complaint.'" Def.'s Br. at 19. A document is only considered "integral" to the complaint where the complaint "relies heavily upon its terms and effect." *Chambers v. Time Warner, Inc.*, 282 F.3d 147, 153 (2d. Cir. 2002). "[M]ere notice or possession [of a document] is not enough." *Id.* Instead, a plaintiff must have "reli[ed] on the terms and effects" of the document in drafting his complaint in order for the Court to consider it on a motion to dismiss. *Id.* Here, Plaintiff did not at all rely on Defendant's purported notices. In fact, Plaintiff alleges that "[he] and the members of the Class did not receive notice before Consumers Union disclosed their Personal Reading Information to

third parties." Compl. ¶ 67. Accordingly, it is inappropriate for the Court to consider the declaration and accompanying exhibit on this motion to dismiss.[13]

Nonetheless, even if the Court were to consider the declaration and accompanying exhibits, this defense fails at this stage for two reasons.

First, the "exclusively for direct marketing" defense fails because it is premature for a motion to dismiss. "Defendant's claim that its conduct falls within a statutory exception constitutes an affirmative defense to liability … which may only be 'raised by pre-motion answer to dismiss … if the defense appears on the face of the complaint.'" *Hearst*, 2016 WL 3369541, at *15 (citing cases). That is not the case here. Rather, the facts central to Defendant's defense are in dispute, including the purpose of the disclosures and the sufficiency of Hearst's purported notice. *See* M.C.L. § 445.1713(d). Plaintiff's allegations that the disclosures were not for the *exclusive* purpose of marketing goods and services *directly* to him, *see* Compl. ¶¶ 7, 8, 42-44, 61-62, and that Defendant failed to provide notice, *see id.* ¶¶ 10, 46, 67, govern at the pleadings stage. *See Hearst*, 2016 WL 3369541, at *15.

Second, the "exclusively for direct marketing" defense fails because the "pleadings contradict Defendant's assertion that disclosures were made exclusively for marketing purposes." *Id.* Rather, Plaintiff alleges that Defendant disclosed his Personal Reading Information to data mining companies, including Insource and others, *see* Compl. ¶¶ 7, 8, 42-44, 61-62, and that these disclosures were made to allow Defendant to later sell enhanced versions of its mailing lists at higher prices. *See id.* ¶¶ 42-44, 61-63, 70. "Defendant's argument that it is

[13] Defendant's citation to *Wilson v. Kellogg Co.*, 111 F. Supp. 3d 306 (E.D.N.Y. 2015) is readily distinguishable. In *Wilson*, the Court considered the defendant's terms and conditions on its website because the "Plaintiff agreed to the Terms and Conditions. … Plaintiff d[id] not deny that he agreed to the Terms and Conditions; in fact, he acknowledge[d] agreeing to them in his Second Amended Complaint." *Id.* at 311.

not liable because it provided notice to Plaintiff[] fails for the same reasons." *Hearst*, 2016 WL 3369541, at *15.

IV. THE PPPA DOES NOT VIOLATE THE FIRST AMENDMENT

Defendant argues that the PPPA violates the First Amendment. Def.'s Br. at 22-24. This argument was also rejected by Judge Torres in *Hearst*. There, Judge Torres held that "Defendant's speech is commercial in nature," and thus is subject to intermediate scrutiny under *Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557 (1980). *Hearst*, 2016 WL 3369541, at *8. Applying that level of scrutiny, Judge Torres held that the PPPA is not unconstitutional either as applied to Defendant or on its face. *Id.* at *8-14.

Defendant argues that "the Second Circuit and nearly every appellate court to consider cases of commercial or other forms of speech traditionally subject to 'intermediate' scrutiny have applied some form of heightened scrutiny to content-based regulations like the one here." Def.'s Br. at 23. That is wrong. Defendant "cites no decision directly holding that *Reed* [*v. Town of Gilbert*, 135 S. Ct. 2218 (2015) or any other Supreme Court decision] overturns the decades of jurisprudence maintaining that commercial speech merits reduced constitutional protection." *Boelter v. Hearst Commn's Inc.*, 8/2/16 Order, at 2, Marchese Decl. Ex. D. "Conversely, there exist several decisions by courts directly addressing the question and finding that *Reed* does not apply to laws restricting only commercial speech." *Id.* (citing cases). "And the Second Circuit … has reiterated since *Reed* that restrictions on commercial speech must withstand only intermediate scrutiny." *Id.* (citing *Poughkeepsie Supermarket Corp. v. Dutchess Cnty.*, 2016 WL 2782988, at *1 (2d Cir. May 13, 2016)).[14] *See also Kiser v. Kamdar*, 2016 WL 4150918, at *3 (6th Cir. Aug. 5, 2016) ("Kiser's complaint properly alleges a violation of his First Amendment

[14] Defendant cites *United States v. Caronia*, 703 F.3d 149 (2d Cir. 2012) in support, but in *Caronia*, the Second Circuit applied *Central Hudson*. *See id.* at 165-169.

right to commercial speech, and the applicable test for considering his claim is the intermediate-scrutiny analysis set forth in *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557 (1980).").

Defendant also argues that the PPPA is not a regulation on commercial speech. Def.'s Br. at 22. That is wrong. "In determining whether speech is commercial, the Court considers three factors: (1) whether the communication is an advertisement, (2) whether the communication refers to a specific product or service, and (3) whether the speaker has an economic motivation for the speech." *Gorran v. Atkins Nutritionals, Inc.*, 464 F. Supp. 2d 315, 326 (S.D.N.Y. 2006). The PPPA only limits speech "concerning the purchase, lease, rental, or borrowing" of "books or other written materials, sound recordings, or video recordings." M.C.L. § 445.1712. Accordingly, all of the speech limited by the PPPA necessarily "refers to a specific product." And, in nearly all instances, including this case, the speech restricted by the PPPA is economically motivated. As set out in the Complaint, Defendant's speech constitutes the selling of subscribers' "Personal Reading Information," and other personal data. *See* Compl. ¶¶ 7, 42-48. Moreover, as Judge Torres and other courts have held, laws "regulating the dissemination of consumer data," have been held to regulate commercial speech. *Hearst*, 2016 WL 3369541, at *9 (citing cases). Thus, the PPPA regulates commercial speech and is afforded intermediate scrutiny accordingly. It easily passes that test. *Id.* at *8-14.

V. PLAINTIFF SUFFICIENTLY PLEADS A CLAIM FOR UNJUST ENRICHMENT

Defendant argues that Plaintiff fails to state a claim for unjust enrichment for two reasons. Def.'s Br. at 24-25. Both are wrong.

First, Defendant argues that "[b]ecause the [PPPA] … provides the exclusive legal remedy … for Plaintiff's claims, his equitable claim for unjust enrichment must be dismissed." Def.'s Br. at 25. That is wrong. Under Michigan law, a "statutory remedy will only exclude

common law claims if it is granted pursuant to 'comprehensive legislation [that] prescribes in detail a course of conduct to pursue and the parties and things affected, and designates specific limitations and exceptions.'" *Hearst*, 2016 WL 3369541, at *15 (quoting *Kraft v. Detroit Entm't, L.L.C.*, 261 Mich. App. 534, 545 (2004)). The PPPA "does not include express language limiting a plaintiff's other potential remedies and is not part of a comprehensive legislative scheme. Therefore, it does not preclude Plaintiffs' unjust enrichment claim." *Id.*

Second, Defendant argues that "unjust enrichment is an equitable doctrine," which is not available where there is a full and adequate remedy at law, "here, under the [PPPA]." Def.'s Br. at 23. Defendant's argument misses the mark. Plaintiff's unjust enrichment claim is not solely predicated on Defendant's violation of the PPPA. Among other things, "Plaintiff[] allege[s] that because [he] paid for [his] subscription[], and Defendant was obligated to protect [his] identifying information, Defendant's 'unlawful disclosure of [that] information deprived Plaintiff[] … of the full value of [his] paid-for subscription[].'" *Hearst*, 2016 WL 3369541, at *15; *see also* Compl. ¶ 72. Every other court to consider the question has found that these allegations are sufficient to plead a claim for unjust enrichment at this stage. *See Hearst*, 2016 WL 3369541, at *15; *Kinder*, 2014 WL 4209575, at *7; *Halaburda*, 2013 WL 4012827, at *8; *Cain*, 981 F. Supp. 2d at 687.

CONCLUSION

For the foregoing reasons, Plaintiff respectfully requests that the Court deny Defendant's motion to dismiss in its entirety.

Dated: September 8, 2016

Respectfully submitted,

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