

TABLE OF CONTENTS

	Page No.
INTRODUCTION.....	1
I. Background.....	2
II. The Magistrate Erred In Not Drawing Reasonable Inferences In Plaintiffs’ Favor.....	3
III. Under <i>Spokeo</i> And <i>Strubel</i> , Intangible Harms And Procedural Violations Not Accompanied By Actual Damages Can Be Concrete Injuries.....	5
IV. <i>Bellino, Adler</i> and <i>Zink</i> Persuasively Support A Finding That Plaintiffs Have Standing.....	7
V. Plaintiffs Adequately Allege That They Were Subjected To A Material Risk Of Harm From Defendants’ Dilatory Presentment Of Their Certificates Of Discharge.....	13
A. Mortgagors’ Concrete Interest In Having A Certificate Of Discharge Timely Filed Is Protected By The 30 Day Presentment Requirement.....	13
B. Plaintiffs Plausibly Allege That Defendants’ Dilatory Filing Subjected Them To A Material Risk Of Harm.....	15
VI. <i>Nicklaw</i> And <i>Zia</i> Were Wrongly Decided And Contrary To <i>Strubel</i>	18
VII. Because The Preliminary Approval Order Provides For This Court’s Continuing Jurisdiction, It Has Ancillary Jurisdiction To Oversee The Settlement Process.....	22
CONCLUSION.....	24

TABLE OF AUTHORITIES

<u>Cases</u>	Page No.
<i>Bellino v. JPMorgan Chase Bank, N.A.</i> , 2016 WL 5173392 (S.D.N.Y. Sept. 20, 2016).....	<i>passim</i>
<i>Boelter v. Hearst Commc'ns, Inc.</i> , 2016 WL 3369541 (S.D.N.Y. June 17, 2016).....	12
<i>Cameron Int'l Trading Co. v. Hawk Importers, Inc.</i> , 501 F. App'x 36 (2d Cir. 2012).....	22
<i>Carlson v. United States</i> , 2016 WL 4926180 (7th Cir. Sept. 15, 2016).....	18
<i>Chesley v. Union Carbide Corp.</i> , 927 F.2d 60 (2d Cir. 1991).....	23
<i>Church v. Accretive Health, Inc.</i> , 2016 WL 3611543 (11th Cir. July 6, 2016).....	18
<i>Cooter & Gell v. Hartmarx</i> , 496 U.S. 384 (1990).....	22
<i>Deeter v. Crossley</i> , 26 Iowa 180 (1868).....	15
<i>Donohue v. Bulldog Investors</i> , 696 F.3d 170 (2d Cir. 2012).....	11
<i>Fed. Election Comm'n v. Akins</i> , 524 U.S. (1998).....	9, 10
<i>Greenberg v. Schwartz</i> , 73 N.Y.S.2d 458 (Sup. Ct. 1947).....	14
<i>Griswold v. Onondaga County Sav. Bank</i> , 93 NY 301 (1883).....	14
<i>Havens Realty Corp. v. Coleman</i> , 455 U.S. 363 (1982).....	<i>passim</i>
<i>In re Austrian & German Bank Holocaust Litig.</i> , 317 F.3d 91 (2d Cir. 2003).....	22,24

<i>In re Barclays Bank PLC Sec. Litig.</i> , 2016 WL 3235290 (S.D.N.Y. June 9, 2016).....	11,12
<i>In re Nickelodeon Consumer Privacy Litig.</i> , 2016 WL 3513782 (3d Cir. June 27, 2016).....	18
<i>Adler v. Bank of Am., N.A.</i> , 2016 WL 3944753 (S.D.N.Y. July 15, 2016)	2, 7
<i>JWD Auto., Inc. v. DJM Advisory Grp. LLC</i> , 2016 WL 6835986 (M.D. Fla. Nov. 21, 2016).....	8
<i>Kokkonen v. Guardian Life Ins. Co. of America</i> , 511 U.S., 114 S. Ct. 1673 (1994).....	22, 23
<i>Krakauer v. Dish Network L.L.C.</i> , 2016 WL 4272367 (M.D.N.C. Aug. 5, 2016).....	18
<i>Larson v. Trans Union, LLC</i> , 2016 WL 4367253 (N.D. Cal. Aug. 11, 2016).....	18
<i>Livingston v. Cudd</i> , 121 Ala. 316, 25 So. 805 (1899)	16
<i>Lujan v. Defenders of Wildlife</i> , 504 U.S. 555 (1992).....	4, 5, 19, 21
<i>Malarkey v. O’Leary</i> , 34 Or. 493, 56 P. 521 (1899).....	15
<i>Matter of Fleetwood Acres, Inc. v National Life Ins. Co.</i> , 186 Misc. 299, 62 N.Y.S.2d 669 (Sup 1945).....	14
<i>McLaughlin v. Wells Fargo Bank, NA</i> , 2016 WL 3418337 (N.D. Cal. June 22, 2016)	18
<i>Morrison v. Nat’l Australia Bank, Ltd.</i> , 547 F.3d 167 (2d. Cir. 2008).....	3
<i>Nicklaw v. CitiMortgage, Inc.</i> , 2016 WL 5845682 (11th Cir. 2016).....	2, 19
<i>People ex rel. Adams v. Sigel</i> , 1873 WL 9394 (N.Y. Super. 1873).....	14

Pincus v. Nat’l R.R. Passenger Corp.,
581 F. App’x 88 (2d Cir. 2014)..... 4

Prindle v. Carrington Mortgage Services, LLC,
2016 WL 4369424 (M.D. Fla. Aug. 16, 2016)..... 18

Public Citizen v. United States Dep’t of Justice,
491 U.S. 440 (1989)..... 10

Santangelo v. Comcast Corp.,
2016 WL 464223 (N.D. Ill. Feb. 8, 2016)..... 16

Spokeo, Inc. v. Robins,
136 S. Ct. 1540 (2016) *passim*

Strubel v. Comenity Bank,
2016 WL 6892197 (2d Cir. Nov. 23, 2016)..... *passim*

Summers v. Earth Island Institute,
555 U.S., 129 S.Ct. 1142..... 8

Thompson v. City of Franklin,
15 F.3d 245 (2d Cir. 1994)..... 3

Warth v. Seldin,
422 U.S. 490 (1975)..... 11

Whittenburg v. Bank of Am., N.A.,
2015 WL 2330307 (S.D.N.Y. Mar. 24, 2015) 15

Wood v. J Choo USA, Inc.,
2016 WL 4249953 (S.D. Fla. Aug. 11, 2016)..... 18

Zia v. CitiMortgage, Inc.,
2016 WL 5369316 (S.D. Fla. Sept. 26, 2016)..... 2

Zink v. First Niagara Bank, N.A.,
2016 WL 3950957 (W.D.N.Y., 2016)..... 1

Statutes

42 U.S.C. § 3604..... 10

42 U.S.C. § 3612..... 10

42 U.S.C. §§3601..... 10

N.Y. Real Prop. Acts Law § 1921*passim*

N.Y. Real Prop. Law § 275*passim*

Other Authorities

78 N.Y. Jur. 2d Mortgages § 385 14

Restatement (First) of Torts §§ 569 (libel), 570 9

Plaintiffs respectfully file this objection to The Honorable Magistrate Judge Lisa Margaret Smith's November 29, 2016 Report and Recommendation ("Nov. 29 R&R") (which incorporated by reference the Court's November 22, 2016 Report and Recommendation ("Nov. 22 R&R"; combined, the "R&R"). *See* Dkt. Nos. 120-21.

INTRODUCTION

The R&R concludes that Plaintiffs fail to allege that they suffered a concrete injury and therefore lack standing because they did not suffer actual damages as a result of Defendants' failure to timely present certificates of discharge after they satisfied their home loans. But under *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1553 (2016) and the Second Circuit's recent decision in *Strubel v. Comenity Bank*, No. 15-528-cv, --- F. 3d. ---, 2016 WL 6892197 (2d Cir. Nov. 23, 2016), proof of actual harm need not be alleged or proven. Rather, it is sufficient to demonstrate that there is a material risk of harm to the interest that the legislature sought to protect in enacting the statute in question. Plaintiffs here adequately allege such a risk.

Three district courts from within the Second Circuit have addressed this exact issue relating to the identical statutes at issue in this case. All three courts concluded that a mortgagor whose certificate of discharge was untimely presented suffers a concrete injury, notwithstanding a lack of any other alleged injury. *See Bellino v. JPMorgan Chase Bank, N.A.*, No. 14-3139, --- F. Supp. 3d ---, 2016 WL 5173392 (S.D.N.Y. Sept. 20, 2016) (Román, J.); *Adler v. Bank of Am., N.A.*, No. 13-4866, --- F. Supp. 3d ---, 2016 WL 3944753 (S.D.N.Y. July 15, 2016) (Briccetti, J.); *Zink v. First Niagara Bank, N.A.*, No. 13-1076, --- F. Supp. 3d ---, 2016 WL 3950957 (W.D.N.Y., 2016) (W.D.N.Y. July 1, 2016) (McCarthy, m. J.). This is the correct conclusion (one already reached by this Court) because the deprivation of mortgagors' rights to have the public record cleared of encumbering mortgages bearing their names in a timely manner is a tangible and concrete injury.

The R&R bases its conclusion almost exclusively on the analysis of the courts in *Nicklaw v. CitiMortgage, Inc.*, No. 15-14216, 2016 WL 584682 (11th Cir. Oct. 6, 2016), *Zia v. CitiMortgage, Inc.*, No. 15-cv-23026, 2016 WL 5369316 (S.D. Fla. Sept. 26, 2016) and the Second Circuit's *Strubel* decision. Respectfully, *Nicklaw* and *Zia* were wrongly decided and are in direct conflict with *Bellino, Adler* and *Zink*. Moreover, *Strubel* actually supports a finding of standing in this action and is entirely consistent with this Court's prior holding with respect to standing and the courts' analysis in *Bellino, Adler* and *Zink*.

Accordingly, Plaintiffs respectfully submit this Objection with respect the R&R's conclusion that Plaintiffs lack standing to pursue their claims under Section 1921 of the New York Real Property Actions ("RPAPL § 1921") and Section 275 of the New York Real Property Law ("RPL § 275").

I. Background

Plaintiff Villanueva's complaint was filed on August 2, 2013 and Plaintiff Bowman's complaint was filed January 21, 2014. Dkt. No. 1. On July 31, 2014, this Court denied Defendants' motion to dismiss based on, among other arguments, a purported lack of subject matter jurisdiction. Dkt. Nos. 14-15. The parties engaged in a day-long mediation session and subsequently reached a proposed settlement of both cases (the "Settlement"). Dkt. No. 66-1. At the invitation of the Court and the Magistrate, the parties consented to the jurisdiction of the Magistrate solely for purposes of determining whether to preliminarily and finally approve the Settlement. Dkt. No. 63. The Magistrate entered on Order granting preliminary approval on December 3, 2015. Dkt. No. 67.

Pursuant to that Order, notice to 7,855 class members was mailed on January 4, 2016. In reliance on the Magistrate's jurisdiction to hear and resolve their claims, 1,357 class members submitted Proof of Claim forms. Declaration of Lori L. Castenda, Vice President of Operations,

Garden City Group, LLC ¶¶ 8, 16. Dkt. No. 74. There are no objectors or parties opposing the settlement. Declaration of D. Greg Blankinship (“Blankinship Dec.”) ¶ 2. On April 21, 2016, the scheduled date of the final approval hearing, the Magistrate declined to grant final approval and stayed the case pending the Supreme Court’s decision in *Spokeo*. Dkt. No. 84. *Spokeo* was decided on May 16, 2016. On August 5, 2016, the Magistrate denied Plaintiffs’ unopposed motion for final approval and instead issued an opinion holding that Plaintiffs lacked standing (the “August 5 Order”). Dkt. No. 101.¹

As provided for in the August 5, 2016 Order, Plaintiffs filed an Amended Complaint. The Amended Complaint alleged that Defendants’ routine failure to timely present mortgage satisfactions deprives Plaintiffs’ rights to have the public record cleared of an encumbering mortgage, and creates the risk of direct and real world consequences for mortgagors whose liens are not released. *See* Dkt. No. 104 ¶¶ 26-32. On November 22, 2016, the Magistrate issued a second Report and Recommendation recommending dismissal of these actions. Before the time to object to the November 22, 2016 R&R had run, the Magistrate issued a supplement to that R&R incorporating by reference its previous decision, setting forth additional reasoning supporting her conclusion that Plaintiffs lacked standing, and setting a December 16, 2016 deadline to respond to the R&R.

II. The Magistrate Erred In Not Drawing Reasonable Inferences In Plaintiffs’ Favor.

The Magistrate concluded that, because the issue is one of standing, the Court need not draw inferences in Plaintiffs favor. *See* November 22 R&R at 5 (citing *Morrison v. Nat’l Australia Bank, Ltd.*, 547 F.3d 167 (2d. Cir. 2008) and *Thompson v. City of Franklin*, 15 F.3d 245, 249 (2d Cir. 1994)). Recent Second Circuit law is to the contrary. Even when the issue on

¹ Plaintiffs timely objected to the August 5 Order as a Report & Recommendation. *See* Dkt. No. 102. That Objection is incorporated here by reference.

a Rule 12(b)(1) motion is whether a plaintiff has Article III standing, the court must still “assume all well-pleaded factual allegations to be true . . . [and] construe plaintiff’s complaint liberally, accepting all factual allegations in the complaint as true, and drawing all reasonable inferences in the plaintiff’s favor.” *Pincus v. Nat’l R.R. Passenger Corp.*, 581 F. App’x 88, 88-89 (2d Cir. 2014) (summary order) (reversing dismissal for want of standing). *See also Carter v. HealthPort Techs., LLC*, No. 15-1072, 2016 WL 2640989, at *6 (2d Cir. May 10, 2016) (vacating dismissal based on lack of standing and holding that “[a]t each . . . stage [of the litigation], ‘[t]he party invoking federal jurisdiction bears the burden of establishing the[] elements’ of Article III standing; but the stage at which, and the manner in which, the issue is raised affect (a) the obligation of the plaintiff to respond, (b) the manner in which the district court considers the challenge, and (c) the standard of review applicable to the district court’s decision.”) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–65 (1992)).²

This is not a procedural peccadillo. Plaintiffs allege that the public record erroneously reflected (for 136 days in the case of Mr. Bowman and 61 days for Ms. Villanueva) that they owed a significant debt that had in fact been discharged. *See Bowman*, Dkt. No. 114 ¶ 18; *Villanueva*, Dkt. No. 104 ¶ 22. Plaintiffs also allege that there is a real risk that an un-discharged mortgage can deleteriously affect one’s credit, and that allegation is rendered plausible not only by supporting case law but the sworn testimony of a mortgage professional. *See* Dkt. No. 104 ¶¶ 27-32. The only reasonable inference to be drawn from these allegations, particularly when doing so in Plaintiffs’ favor, is that they were at a real risk of harm during the time Defendants’

² The Nov. 22 R&R (at 6 note 3) notes that discovery was had in the litigation. *See* Dkt. No. 110 at 2. However, because this Court held that Plaintiffs had standing in the July 31, 2016 Order, none of that discovery concerned Plaintiffs standing.

failed to present a certificate of discharge to the Westchester County clerk. Allegations of a real risk of harm are sufficient to confer standing, and therefore the R&R should be rejected.

III. Under *Spokeo* And *Strubel*, Intangible Harms And Procedural Violations Not Accompanied By Actual Damages Can Be Concrete Injuries.

The defense bar sought a ruling from the Supreme Court that would have eviscerated causes of action seeking statutory damages. To that end, the *Spokeo* defendant made the unprecedented argument that to establish “injury in fact” standing in statutory cases, the plaintiff must allege “real-world” or “palpable” harm beyond the statutory violation. But the Supreme Court in *Spokeo* held no such thing. Instead, the Supreme Court unanimously reaffirmed a core principle: Legislatures may define the substantive duties members of society owe each other, and the violation of such duties will establish injury in fact. *Spokeo*, 136 S. Ct. at 1549 (citing *Lujan*, 504 U.S. at 578-80).

Spokeo acknowledges that either tangible or intangible injuries can be concrete. *Id.* Where the injury is intangible, courts should 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.* Thus, Congress may “elevat[e] to the status of legally cognizable injuries concrete, de facto injuries that were previously inadequate in law” *Spokeo*, 136 S. Ct. at 1549 (quoting *Lujan*, 504 U.S. at 578). It “has the power to define injuries and articulate chains of causation that will give rise to a case or controversy where none existed before.” *Id.* Congress has the power (and is in fact “well positioned”) “to identify intangible harms that meet minimum Article III requirements,” even if those harms “were previously inadequate in law.” *Id.* The Court held that “the 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.” *Spokeo*, 136 S. Ct. at 1549 (emphasis in original).

Interpreting *Spokeo*, the Second Circuit in *Strubel* held that a procedural violation that is tied to the concrete interest the statute is intended to protect creates a concrete injury, so long as there is a material risk of harm associated with the violation:

Thus, we understand *Spokeo* and the cases therein, to instruct that an alleged procedural violation can by itself manifest concrete injury when Congress conferred the procedural right to protect a plaintiff’s concrete interests and where the procedural violation presents a ‘risk of real harm’ to that concrete interest. *Id.* at 159. But even where Congress has accorded procedural rights to protect a concrete interest, a plaintiff may fail to demonstrate concrete injury where violation of the procedure at issue presents no material risk of harm to that underlying interest. *Id.*

2016 WL 6892197 at *5. The procedural violations that the *Strubel* court found to result in concrete violations (failure to provide certain disclosures regarding the terms of credit offered to the plaintiff) demonstrate that actual injury is not required. The Second Circuit noted that these disclosures serve “to protect a consumer’s concrete interest in ‘avoid[ing] the uniformed use of credit,’ a core objective of the TILA” and that “[a] consumer who is not given notice of his obligations is likely not to satisfy them, and thereby, unwittingly to lose the very credit rights that the law affords him.” *Id.* at *5. The Circuit court also noted that the plaintiff’s suit was intended to “vindicate interests particular to her -- specifically, access to disclosures of her own obligations.” *Id.* at *5. Therefore, the defendant’s failure to give plaintiff notice in connection with her credit card constituted a “real risk of harm” because the plaintiff was deprived of credit rights afforded by law. *See id.* at *5.³

³ *Strubel* found that plaintiff did not have standing for the remaining two claims, each of which failed for unique reasons not at issue here. First, in connection with plaintiff’s allegation that defendant failed to disclose a consumer’s obligation to provide a creditor with timely notice to stop automatic payment of a disputed charge, plaintiff was unable to show that defendant’s failure to provide notice put her at any risk of harm. Defendant did not offer the automatic

IV. *Bellino, Adler and Zink* Persuasively Support A Finding That Plaintiffs Have Standing.

Three other courts in the Second Circuit (including two from the White Plains Division) concluded that a mortgagor whose certificate of discharge was filed late has suffered a concrete injury, and this Court should do the same.

In *Bellino*, the plaintiff alleged that JPMorgan Chase untimely presented a discharge in violation of New York’s Real Property Law § 275 and Real Property Actions and Proceedings Law § 1921. In analyzing whether the plaintiff sustained a concrete injury sufficient to confer Article III standing, Judge Román found “it instructive to look to both the history and the judgment of the New York State legislature to determine whether alleged violations of the statutes constitute injuries.” *Bellino*, 2016 WL 5173392, at *7. Judge Román concluded that “the ‘alleged intangible harm’ – a cloud on title – ‘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.* (quoting *Spokeo*).

The *Bellino* court also concluded that “the New York legislature clearly intended to provide a remedy to homeowners whose satisfaction of mortgages is not timely filed.” *Id.* The court held that “[t]he escalating penalties delineated in the statutes are intended to penalize mortgagees that do not timely file certificates of satisfaction, in recognition of the interest mortgagors have in a public record cleared of encumbering mortgages bearing their names.

payment plan when plaintiff signed-up for the credit card at the center of this dispute. *See Strubel*, 2016 WL 6892197 at *6. Next, the Court concluded that plaintiff lacked standing to sue defendant for “failing to advise her of its obligation not only to acknowledge a reported billing error within 30 days of the consumer communication, but also tell the consumer, at the same time, if the error has been corrected.” *Id.* at *7. This was a bare procedural violation because plaintiff conceded that she did not ever report a billing error in connection with her statements. *See id.* at *7. Accordingly, plaintiff cannot claim that she was deprived of a notice that defendant had no obligation to provide.

Ultimately, both history and the judgment of the New York State legislature indicate an intent to elevate the harm associated with a mortgagee's delayed filing of a satisfaction of mortgage to a concrete injury." *Id.* at *8.

The *Bellino* court also aptly held "there is a single means of violating the statutes— belatedly filing the certificates. Consequently, there is no basis for differentiating between bare procedural violations of the statutes and violations resulting in concrete harms." *Id.* The *Bellino* court determined that "the New York State legislature has created a new right – the right to have a certificate of satisfaction filed within 30 days of paying off a mortgages – and a new injury – not having that certificate timely filed. . . . The statutes create a substantive right for Plaintiff to have the satisfaction of mortgages timely filed, and Defendant violated that right. Nothing more is required, here, to demonstrate injury-in-fact." *Id.* at *9.

This analysis is entirely consistent with *Spokeo* and *Strubel* wherein the Second Circuit stated "an alleged procedural violation can by itself manifest concrete injury when Congress conferred the procedural right to protect a plaintiff's concrete interests." *Strubel*, 2016 WL 6892197 at *5 (quoting *Spokeo*, 136 S. Ct. at 1549). In finding that the lack of certain disclosures resulted in a concrete harm notwithstanding the lack of any actual damages, *Strubel* held that "[t]hese disclosure requirements do not operate in a vacuum, the concern identified in *Summers v. Earth Island Institute*, 555 U.S. at 496, 129 S.Ct. 1142. Rather, each serves to protect a consumer's concrete interest in 'avoid [ing] the uninformed use of credit,' a core object of the TILA." *Strubel*, 2016 WL 6892197 at *5. *See also JWD Auto., Inc. v. DJM Advisory Grp. LLC*, No. 15-793, 2016 WL 6835986, at *3 (M.D. Fla. Nov. 21, 2016) (holding that "the injuries alleged in Plaintiffs' Complaint are not mere 'procedural' statutory violations; rather, they are precisely the kinds of harm the TCPA aims to prevent."). The same is true here. New

York's requirement that mortgage satisfactions must be presented within 30 days does not operate in a vacuum; rather, it serves to protect mortgagors' concrete interest in having a public record cleared of encumbering mortgages bearing their names.

Adler is also directly on point and persuasive. There, Judge Briccetti held that "the state statutes at issue here create a legal right, the invasion of which constitutes a concrete injury," reasoning that:

[W]hen defendant violated plaintiffs' statutory right to a timely filed mortgage satisfaction notice, it created a "real risk of harm" by clouding the titles to their respective properties. *See Spokeo, Inc. v. Robins*, 136 S. Ct. at 1549. The State Legislature has provided a private right of action and a heuristic for quantifying damages, possibly in recognition of both the concreteness of this harm and the difficulty in otherwise measuring damages. The types of harm the statutes protect against are real. . . .

The injury recognized by RPL § 275 and RPAPL § 1921 is no less concrete than the examples of intangible, concrete injuries given by the Supreme Court in *Spokeo, Inc. v. Robins*. "Timely, clear title" is a right just as recognizable as one's good name, *see* Restatement (First) of Torts §§ 569 (libel), 570, or one's ability to be an informed voter, *see Fed. Election Comm'n v. Akins*, 524 U.S. at 20-25.

Adler, 2016 WL 3944753 at *4. This analysis mirrors the analysis of the Second Circuit in *Strubel*, where the Court stated: "Congress conferred the procedural right to protect a plaintiff's concrete interests and where the procedural violation presents a 'risk of real harm' to that concrete interest." *Strubel*, 2016 WL 6892197, at *4.

Zink is also directly on point. Addressing *Spokeo*, the court held that "Congress can create new private rights and authorize private plaintiffs to sue based simply on the violation of those private rights . . . A plaintiff seeking to vindicate a statutorily created private right need not allege actual harm beyond the invasion of that private right." *Zink*, 2016 WL 3950957, at *3 (citing *Spokeo* 136 S. Ct at 1553, and *Havens*, 455 U.S. at 373-74). The court included an in-depth analysis of *Havens*:

Havens involved claims by “testers” alleging violation of the Fair Housing Act of 1968, 42 U.S.C. §§3601 *et seq.* “[T]esters are individuals who, without an intent to rent or purchase a home or apartment, pose as renters or purchasers for the purpose of collecting evidence of unlawful steering practices. Section 804(d) states that it is unlawful for an individual or firm covered by the Act ‘[t]o represent to *any person* because of race, color, religion, sex, or national origin that any dwelling is not available for inspection, sale, or rental when such dwelling is in fact so available,’ 42 U.S.C. § 3604(d) (emphasis added), a prohibition made enforceable through the creation of an explicit cause of action in § 812(a) of the Act, 42 U.S.C. § 3612(a). Congress has thus conferred on all ‘persons’ a legal right to truthful information about available housing A tester who has been the object of a misrepresentation made unlawful under § 804(d) has suffered injury in precisely the form the statute was intended to guard against, and therefore has standing to maintain a claim for damages under the Act’s provisions.” *Id.* at 373-74.

“That the tester may have approached the real estate agent fully expecting that he would receive false information, and without any intention of buying or renting a home, does not negate the simple fact of injury within the meaning of § 804(d).” *Id.* at 374. “[R]espondent Coleman - the black tester - alleged injury to her statutorily created right to truthful housing information. As part of the complaint, she averred that petitioners told her on four different occasions that apartments were not available in the Henrico County complexes while informing white testers that apartments were available. If the facts are as alleged, then respondent has suffered specific injury from the challenged acts of petitioners . . . and the Art. III requirement of injury in fact is satisfied.” *Id.*

Zink, 2016 WL 3950957, at *5. The court concluded that “plaintiff Zink’s injury is no more ephemeral than that of the testers in *Havens*” and therefore “plaintiff has Article III standing to pursue claims on behalf of himself and the class.” *Zink*, 2016 WL 3950957, at *5,*6.

In *Strubel*, the Second Circuit cited *Havens* with approval, lending credence to the court’s analysis in *Zink*.⁴ The R&R does not address or distinguish *Havens*, which is still good law. *See*

⁴ The intangible harm alleged in this case is also closely analogous to the two examples used by the Supreme Court in *Spokeo* that relate to failure to disclose information required by statute. *See, e.g., Federal Election Comm’n v. Akins*, 524 U.S. 11, 21 (1998) (“[T]his Court has previously held that a plaintiff suffers an ‘injury in fact’ when the plaintiff fails to obtain information which must be publicly disclosed pursuant to a statute.”) (cited with approval by *Spokeo*, 136 S. Ct. at 1549); *Public Citizen v. United States Dep’t of Justice*, 491 U.S. 440, 449 (1989) (“As when an agency denies requests for information under the Freedom of Information

Zink, 2016 WL 3950957, at *5 (“Although the majority opinion in *Spokeo* does not mention *Havens*, “[t]he Supreme Court does not normally overturn, or . . . dramatically limit, earlier authority *sub silentio*.” (citation omitted)). Nor can *Havens* be distinguished. There, the Court held that the tester-plaintiffs had standing even though they could have in no way suffered actual or consequential damages because they had no intention of renting the apartments about which they were inquiring. If anything, Plaintiffs injury here is more concrete, as it was their names that continued to be identified in the public records as being the subject of an encumbering mortgage.

This Court’s July 31, 2014 ruling that Plaintiffs have standing was also well reasoned and consistent with *Spokeo* and Second Circuit precedent.

Defendants ignore the plain language of RPAPL Section 1921 and RPL Section 275 which confer on plaintiffs the right to collect damages when a mortgagee violates the statutes. *See Donohue v. Bulldog Investors*, 696 F.3d 170 at 172, where the Court said, “Where a plaintiffs’ claim of injury in fact depends on legal rights conferred by statute, it is the particular statute and the rights it conveys that guide the standing determination.” *See generally* *Warth v. Seldin*, 422 U.S. 490 at 500, where the Supreme Court said, “Essentially the standing question in such cases is whether the constitutional or statutory provision on which the claim rests properly can be understood as granting persons in the plaintiffs’ position a right to judicial relief.” No additional injury is required. The untimely presentment of the certificate of discharge confers standing on the plaintiffs.

July 31, 2014 Transcript of Decision (“July 31, 2014 Decision”) at 8:10-24, attached to the Blankinship Dec. as Exhibit 1.

Importantly, both *Bellino* and *Jaffe* (discussed in detail below) cite *Donoghue v. Bulldog Inv’rs Gen. P’ship*, 696 F.3d 170, 177–78 (2d Cir. 2012), upon which this Court previously relied and which remains good law after *Spokeo*. *See also In re Barclays Bank PLC Sec. Litig.*,

Act . . . constitutes a sufficiently distinct injury to provide standing to sue.”) (cited with approval by *Spokeo*, 136 S. Ct. at 1549).

No. 09-1989, 2016 WL 3235290, at *6 (S.D.N.Y. June 9, 2016) (post-*Spokeo* decision similarly relying on *Donoghue* in finding Article III standing for a statutory violation). In *Barclays*, the court noted that *Spokeo* broke no new ground as it relates to standing in the Second Circuit and that *Donoghue v. Bulldog Inv'rs Gen. P'ship*, 696 F.3d 170, 175 (2d Cir. 2012) remains good law. In rejecting the defendant's argument that the plaintiff lacked standing to assert his claim for statutory damages pursuant to Section 11 of the Securities Act because his shares (which had never been sold) were worth more than when they were purchased, the *Barclay's* court held:

“[I]t has long been recognized that a legally protected interest may exist solely by virtue of statutes creating legal rights, the invasion of which creates standing, even though no injury would exist without the statute.” *Donoghue v. Bulldog Inv'rs Gen. P'ship*, 696 F.3d 170, 175 (2d Cir. 2012) (internal quotation marks omitted); *see also Spokeo*, 136 S. Ct. 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. A plaintiff seeking to vindicate a statutorily created private right need not allege actual harm beyond the invasion of that private right.”) (internal citation omitted). Askelson seeks to vindicate his private right to Section 11 damages based on his purchase of Series 5 shares and the alleged diminution in value of his shares. That satisfies the Article III minima; Askelson has standing.

In re Barclays, 2016 WL 3235290, at *6.

In holding that Plaintiffs must allege either that they suffered a consequential injury from having a cloud on their title or actual damages in the form of having to pay a recording fee twice, the R&R is at odds with *Spokeo*, Second Circuit precedent and every court within this Circuit that has addressed this issue.⁵

⁵ Several other post-*Spokeo* cases within the Second Circuit support a finding *Spokeo* did not change the law on standing to require additional harm beyond the violation of a statutorily created right. *See In re Barclays Bank PLC Sec. Litig.*, No. 09-1989, 2016 WL 3235290 at*6 (S.D.N.Y. June 9, 2016) (holding standing to pursue statutory damages pursuant to Section 11 of the Securities Exchange Act despite the plaintiff “not actually sell[ing] the shares at their depreciated value.”); *Boelter v. Hearst Commc'ns, Inc.*, No. 15-03934, 2016 WL 3369541, at *3 (S.D.N.Y. June 17, 2016) (denying motion to dismiss for alleged violation of the Video and Library Privacy Protection Act, holding that *Spokeo* “does not upset the Court’s conclusion.”).

V. Plaintiffs Adequately Allege That They Were Subjected To A Material Risk Of Harm From Defendants’ Dilatory Presentment Of Their Certificates Of Discharge.

Under *Strubel* and *Spokeo*, a procedural violation that is tied to the concrete interest the statute is intended to protect creates a concrete injury, so long as there is a material risk of harm associated with the violation. The requirement that a certificate of discharge must be timely presented for recording is tied to mortgagors’ concrete interest in having the public record cleared of an encumbering mortgage that has been satisfied, and Plaintiffs adequately allege that dilatory filings create a material and real risk of harm. Therefore, Plaintiffs have Article III standing.

A. Mortgagors’ Concrete Interest In Having A Certificate Of Discharge Timely Filed Is Protected By The 30 Day Presentment Requirement.

As Justice Alito held, “[i]n determining whether an intangible harm constitutes injury in fact, both history and the judgment of Congress play important roles . . . 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*, 136 S. Ct. at 1549. Applying this holding, Judges Román, Briccetti, and McCarthy all concluded that untimely presentments cause concrete injuries, and these holdings are consistent with the judgment of the New York Legislature. Indeed, the right to have a recorded mortgage timely discharged upon satisfaction has deep roots in American common law and history, and in the New York Legislature’s judgment, a remedy in the form of statutory damages was necessary to compensate mortgagors for the deprivation of their right to have a mortgage discharged.⁶

⁶ As Plaintiffs argued in their Objection to the August 5, 2016 R&R, the Magistrate’s conclusion that the only purpose of the statutes is to compensate borrowers who have to pay filing fees twice

The harm suffered by a mortgagor whose certificate of discharge is not timely recorded 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.* Indeed, the right to seek a remedy in New York courts for mortgagors who do not timely file mortgage satisfactions has a long and illustrious history. *See Greenberg v. Schwartz*, 73 N.Y.S.2d 458, 459 (Sup. Ct. 1947), *aff’d*, 273 A.D. 814, 76 N.Y.S.2d 95 (App. Div. 1948) (“This is an action to remove that mortgage as a cloud upon plaintiff’s title . . . ***this form of action to erase it from the record is an ancient and proper remedy.***”) (emphasis added). *See also Griswold v. Onondaga County Sav. Bank*, 93 NY 301, 302 (1883) (request was made to execute a satisfaction of mortgage on the ground that it was paid in full); *People ex rel. Adams v. Sigel*, 1873 WL 9394 (N.Y. Super. 1873) (“A mandamus should issue directing the register to receive and file the satisfaction-pieces and discharge the mortgages.”). “A mortgagor has a right of redemption, that is, the right to pay the mortgage debt and clear the legal title to the land from the lien of the mortgage . . . if the mortgage was recorded, the mortgagor is entitled to a satisfaction of the mortgage.” 78 N.Y. Jur. 2d Mortgages § 385 (citing *Application of Fleetwood Acres*, 186 Misc. 299, 62 N.Y.S.2d 669 (Sup 1945), *order aff’d*, 270 A.D. 1050, 63 N.Y.S.2d 238 (2d Dep’t 1946)).

The amendments to RPAPL § 1921 and RPL § 275 merely codified the injury resulting from an untimely recorded satisfaction of mortgage. Indeed, Judge Briccetti found that the amendments to RPAPL § 1921 and RPL § 275 merely codified the injury (which existed at common law and which provided a basis for a lawsuit in New York courts) resulting from an untimely recorded satisfaction of mortgage: “[T]he penalties provided for in RPAPL § 1921(1) and RPL § 275(1) do not enlarge the common-law cause of action for satisfaction of a mortgage

is contrary to the legislative history, as Your Honor and every other court to address this issue previously held. *See* Dkt. No. 102 at 23-24.

or grant additional remedies for a mortgagees' failure to satisfy a mortgage." *Whittenburg v. Bank of Am., N.A.*, No. 14-947, 2015 WL 2330307, at *3 (S.D.N.Y. Mar. 24, 2015).

Thus, the intangible harm of not having a recorded mortgage timely discharged "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*, 136 S. Ct. at 1549. Plaintiffs have therefore suffered a concrete deprivation of a long-recognized right and they have standing.

B. Plaintiffs Plausibly Allege That Defendants' Dilatory Filing Subjected Them To A Material Risk Of Harm.

Drawing reasonable inferences in Plaintiffs' favor based on the well-plead allegations in the Amended Complaint, this Court should find that Plaintiffs plausibly allege that they were subjected to a material risk of harm during the time their certificates of discharge were not timely recorded.

First, Plaintiffs have a concrete interest in not having the public record reflect that they owe a substantial debt they already satisfied; Defendants' dilatory presentment thus caused a concrete injury and no more is needed. There was thus more than a risk of harm, there was actual injury to a concrete interest.

Second, there was a material risk that Plaintiffs' credit and financial standing would be affected owing to the undischarged mortgage. *See Deeter v. Crossley*, 26 Iowa 180, 182 (1868) ("Unsatisfied mortgages of record tend to affect the pecuniary standing and credit of the mortgagor in business circles."); *Malarkey v. O'Leary*, 34 Or. 493, 499–500, 56 P. 521, 523 (1899) ("An unsatisfied mortgage of record is constructive notice of the existence of a debt, and necessarily tends to injuriously affect the pecuniary standing and credit of the mortgagor. When it is paid, the statute has provided for its satisfaction on the record, so that the fact of payment may be known to the world. The reasonableness of the requirement is apparent. To insure its

observance, the mortgagee is required to acknowledge the satisfaction of a mortgage, when paid, in as public a manner as the mortgagor had acknowledged its existence, or suffer the statutory penalty.”); *Livingston v. Cudd*, 121 Ala. 316, 319, 25 So. 805, 806 (1899) (holding that “a mortgagor though he may have parted with his interest in the mortgaged property, still has a substantial interest in having an entry of satisfaction made upon its record . . .”). Reduced credit and financial standing is a concrete injury. *Santangelo v. Comcast Corp.*, No. 15-0293, 2016 WL 464223, at *4 (N.D. Ill. Feb. 8, 2016) (“[A] depleted credit score is sufficient to constitute an injury-in-fact for the purposes of establishing Article III standing.”).

This allegation is rendered plausible by the well plead allegations in the Amended Complaint. Indeed, Plaintiffs’ cite to the sworn testimony of Ronald Frogatt, a veteran title insurer. Am. Compl. ¶ 31. Mr. Frogatt testified, against the interests of his title company, that un-discharged mortgages can create problems with subsequent refinances, credit checks, and buying a car or another house. *Id.* It is thus reasonable to infer that un-discharged mortgages can have deleterious credit effects, and that during the 61 and 136 days that Plaintiffs’ mortgages were un-discharged, there was a material risk of harm to their credit. The R&R does not address Mr. Frogatt’s testimony, much less draw reasonable inferences in Plaintiffs’ favor regarding their credit claims. Instead, the R&R dismisses these allegations because Plaintiffs did not suffer actual harm to their credit scores (Nov. 22 R&R at 17-18), notwithstanding that under *Spokeo* and *Stubel*, actual consequential damages are not necessary.

Third, Plaintiffs allege that they were at risk for a wrongful foreclosure action during the time their certificates of discharge were not timely presented for recording. Plaintiffs allege that Wells Fargo engaged in notorious “robosigning” and sloppy bookkeeping as it seeks to foreclose on as many homes as possible, and the result is that Wells Fargo often tries to foreclose on

homes whose mortgages were actually paid off. Amend. Compl. ¶¶ 34-36. Having a recorded mortgage satisfaction is an absolute defense to such an action. *See* Dkt. No. 104 at ¶¶ 26-28.

Drawing reasonable inferences in Plaintiffs' favor, it is plausible that Plaintiffs faced a material risk of a wrongful foreclosure action for which they would not have a ready and affordable defense. But the Magistrate rejected these allegations because Plaintiffs had not alleged actual harm because Wells Fargo did not try and foreclose on their homes. *See* Nov. 22 R&R at 18.

The R&R concludes that there was no concrete injury because the satisfactions were recorded before Plaintiffs filed the instant litigation. *See* Nov. 22 R&R at 18. This argument is foreclosed by *Strubel*. There, the Second Circuit held that the plaintiff suffered a concrete harm owing to two disclosures that were not made. Plainly, the plaintiff had gained knowledge of what those disclosures should have contained before filing the action— that was the basis of the lawsuit. Thus, by the time the *Strubel* suit was filed, there was no risk that the plaintiff would take deleterious actions owing to a lack of information relating to the credit agreement because the plaintiff knew that information by the time the suit was filed.⁷ But there was a risk of harm between the time the offending materials were provided to the plaintiff by the defendant and when the plaintiff learned the information that should have been disclosed. So to here; between the 30th day following the satisfactions of their mortgages and when a certificate of discharge was ultimately filed, Plaintiffs were at risk of harm. That this risk was obviated later does not mean that there was not an appreciable risk of harm in the interim, which is sufficient to confer standing.

V. *Nicklaw And Zia Were Wrongly Decided And Contrary To Strubel.*

⁷ Indeed, the same must be true for any case in which standing is based on an appreciable risk of harm when a procedure has been violated. By the time of suit, that violation will have inevitably been addressed.

The R&R bases its conclusion almost exclusively on *Nicklaw* and *Zia*. Respectfully, both cases were wrongly decided and contrary to other circuit's interpretation of *Spokeo*. See e.g. *Carlson v. United States*, No. 15-2972, 2016 WL 4926180 (7th Cir. Sept. 15, 2016) (concluding that denial of a statutorily conferred right constitutes injury in fact); *In re Nickelodeon Consumer Privacy Litig.*, No. 15-1441, 2016 WL 3513782 (3d Cir. June 27, 2016) (holding that unlawful disclosure of information protected under Video Privacy Protection Act was concrete because it involved "a clear *de facto* injury").⁸

Nicklaw is not persuasive, because, among other reasons, it cannot be squared with Supreme Court precedent.

In *Spokeo*, the Supreme Court faced a fundamental question that had divided the lower courts: must a plaintiff suffer tangible harm to meet Article III's "concreteness" requirement?

⁸ Numerous courts have found that risk of harm far more tenuous than those associated with the timely filing of a satisfaction of mortgage were injuries in fact under *Spokeo*. See *Church v. Accretive Health, Inc.*, No. 15-15708, 2016 WL 3611543, at *3 n.2 (11th Cir. July 6, 2016) ("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."). See also *Prindle v. Carrington Mortgage Services, LLC*, No. 13-1349, 2016 WL 4369424 (M.D. Fla. Aug. 16, 2016) (holding that homeowner alleged concrete injury based on certain false statements in debt collection letters, notwithstanding that plaintiff did not allege any subsequent injury); *Larson v. Trans Union, LLC*, No. 12-05726, 2016 WL 4367253 (N.D. Cal. Aug. 11, 2016) (motion for class certification granted where claims under FCRA demonstrated risk of harm sufficient to establish standing); *Wood v. J Choo USA, Inc.*, No. 15-81487, 2016 WL 4249953 (S.D. Fla. Aug. 11, 2016) (court found concrete harm where plaintiff provided with receipt that contained personal credit information and was therefore "burdened with an elevated risk of identity theft" in violation of FACTA); *Krakauer v. Dish Network L.L.C.*, No. 14-333, 2016 WL 4272367 (M.D.N.C. Aug. 5, 2016) (holding that phone calls to class members, even when unanswered, created a risk to one's privacy and is sufficient to meet concrete injury requirement); *Thomas v. FTS USA, LLC, et al.*, No. 13-825, 2016 WL 3653878, *9-10 (E.D. Va. June 30, 2016) (court found two concrete injuries for alleged FCRA violation which included "a concrete information injury" and "violation of a statutorily create right to privacy and confidentiality of their personal information."); *McLaughlin v. Wells Fargo Bank, NA*, No. 15-02904, 2016 WL 3418337 (N.D. Cal. June 22, 2016) (court found Article III standing where plaintiff brought claims under TILA regarding failure of bank to provide an accurate payoff statement).

The Supreme Court answered “no”: an injury can be “concrete” without being “tangible.” *Spokeo*, 136 S. Ct. at 1549. As the Supreme Court explained: “[i]n determining whether an intangible harm constitutes injury in fact, both history and the judgment of Congress play important roles.” *Id.* “Congress is well positioned to identify intangible harms that meet minimum Article III requirements,” *id.*, and it may “define injuries and articulate chains of causation that will give rise to a case or controversy where none existed before,” *id.* (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 580 (1992) (Kennedy, J., concurring in part and concurring in the judgment)). To be sure, a plaintiff cannot “allege a bare procedural violation, divorced from any concrete harm, and satisfy the injury-in-fact requirement of Article III.” *Id.* There must be “risk of real harm” to the interest that the legislature sought to protect in order to “satisfy the requirement of concreteness.” *Id.* But if that requirement is met, a plaintiff “need not allege any additional harm beyond the one Congress has identified.” *Id.*⁹

Despite acknowledging that “intangible injuries may satisfy the Article III requirement of concreteness”, and recognizing that *Spokeo* calls for it to “determine whether the intangible harm caused by the delay in recording the certificate of discharge constitutes a concrete injury in fact”, *see Nicklaw*, 2016 WL 5845682 at *2-3, *Nicklaw* ultimately ignored these directives.

Instead, *Nicklaw* held that “the relevant question is whether Nicklaw was harmed when this statutory right was violated.” *Id.* That is incorrect. Requiring the plaintiff to show that he

⁹ Justice Thomas’s concurrence removed any doubt as to the ruling’s import. Joining the majority in full, he explained that “common-law courts possessed broad power to adjudicate suits involving . . . rights ‘belonging to individuals, considered as individuals’ . . . even when plaintiffs alleged only the violation of those rights and nothing more.” *Id.* at 1551 (Thomas, J., concurring). Thus, Article III does not require a “plaintiff seeking to vindicate a statutorily created private right” to “allege actual harm beyond the invasion of that private right.” *Id.* at 1553 (citing *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 373-74 (1982)) (other citation omitted).

was harmed imposes the very “tangible” injury requirement *Spokeo* squarely rejected. Faulting Nicklaw for not alleging that “he lost money because CitiMortgage failed to file the certificate” or that “his credit suffered” because of the statutory violation confirms the court’s error. *Id.* These are classic “tangible” injuries. But *Spokeo* held that the relevant issue is not whether Nicklaw suffered real-world harm. The issue is whether the statute protects a concrete “intangible” interest--here, Mr. Zink’s interest in having his certificate of discharge timely filed with the county clerk. *Spokeo*, 136 S. Ct. at 1549. If the statute does, then a plaintiff “need not allege any additional harm beyond the one [the legislature] has identified.” *Id.* Put simply, requiring plaintiffs to “allege actual harm beyond the invasion of that private right,” *id.* at 1553 (Thomas, J., concurring), cannot be reconciled with *Spokeo*.¹⁰

Moreover, *Nicklaw* cannot be squared with *Havens*. In *Havens*, the Supreme Court held that a “tester” had Article III standing to bring an action under the Fair Housing Act to enforce the statutory right “to truthful information concerning the availability of housing.” *Havens*, 455 U.S. at 373. It did not matter that the tester could show no risk of harm to himself. The tester “suffered injury in precisely the form the statute was intended to guard against, and therefore ha[d] standing to maintain a claim for damages under the [FHA’s] provisions.” *Id.* at 373-74. Under *Havens*, then, “the actual or threatened injury required by Article III may exist solely by virtue of ‘statutes creating legal rights, the invasion of which creates standing.’” *Id.* at 373 (citation omitted). *Nicklaw* does not address *Havens* at all.

¹⁰ Respectfully, the R&R makes the same mistake as it is apparent the Magistrate found that Plaintiffs lack standing because they failed to allege that they suffered actual consequential damages. See November 22 R&R at 17 (finding that Plaintiffs’ claim for concrete injury “is not supported by any factual allegation that the delay in recording Villanueva’s and Bowman’s certificates of discharge was known to anyone . . . such that it appeared to anyone that Villanueva and Bowman did owe a substantial debt with a resulting deleterious affect on their credit and financial reputations.”).

True, *Strubel* cites *Nicklaw*. But it does so in a footnote simply for the proposition that other circuits agree that there is no standing where there is an insufficient risk of harm. *See Strubel*, 2016 WL 6892197 at *8 n.15. *Nicklaw* may correctly state that general standard, but *Strubel* does not cite *Nicklaw* for the proposition that a violation of New York’s 30 day presentment deadline does not create a material risk of harm. Moreover, the complaint in *Nicklaw* did not contain the allegation regarding the credit and foreclosure risks that are now in the Amended Complaint.

Zia v. CitiMortgage, Inc. also incorrectly applies the holding in *Spokeo*. First, the *Zia* opinion is contrary to the *Spokeo* holding that “the 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.” *Spokeo* 136 S. Ct at 1549 (emphasis in original). Here there is no dispute that a procedural right, at least, has been violated. The *Bellino* court correctly held “there is a single means of violating the statutes—belatedly filing the certificates. Consequently, there is no basis for differentiating between bare procedural violations of the statutes and violations resulting in concrete harms.” *Id.* at 14.

Second, in concluding that the statutory penalty was not historically recognized, the court in *Zia* reads the words “close relationship to a harm” out of *Spokeo* and instead reads *Spokeo* as requiring the exact cause of action to exist at common law. Such a reading is untenable. *See Lujan*, 504 U.S. at 580 (1992) (Congress can create “new rights of action that do not have clear analogs in our common-law tradition.”).

Third, the court in *Zia* incorrectly distinguishes this case from the “information standing” cases that seek “to enforce a statutory disclosure requirement.” The court held that “*Zia* was not

entitled to receive any information from the Defendants.” *Id.* The information standing cases show that an intangible harm, failure to receive information, is sufficient. Here, Plaintiffs were entitled to have accurate information regarding their mortgage recorded in the public record.

VIII. Because The Preliminary Approval Order Provides For This Court’s Continuing Jurisdiction, It Has Ancillary Jurisdiction To Oversee The Settlement Process.

It is well settled that a court retains jurisdiction to resolve ancillary matters even when the underlying case was dismissed for want of jurisdiction. As the Second Circuit explains, “[w]henever a district court has federal jurisdiction over a case, it retains ancillary jurisdiction after dismissal to adjudicate collateral matters such as attorney’s fees . . . ‘For example, district courts may award costs *after an action is dismissed for want of jurisdiction.*’” *In re Austrian & German Bank Holocaust Litig.*, 317 F.3d 91, 98-99 (2d Cir. 2003) (quoting *Cooter & Gell v. Hartmarx*, 496 U.S. 384, 395 (1990) (emphasis added)).

A court’s ancillary jurisdiction extends to supervising and effectuating a settlement, even when the underlying action has been dismissed and the court has no jurisdiction over the dismissed suit, so long as the court’s order or the parties agreement provide for the court’s continuing jurisdiction over the settlement. As the Second Circuit held in *Cameron Int’l Trading Co. v. Hawk Importers, Inc.*, 501 F. App’x 36 (2d Cir. 2012):

Here, the district court so-ordered not only the Stipulation of Dismissal, but also the Agreement, which expressly provided for continued exclusive federal jurisdiction . . . Hawk asserts that federal courts lack ancillary jurisdiction to grant a motion to enforce unless it is adequately connected to the initial phase of the litigation. This argument, however, misunderstands the law. *Kokkonen* . . . held that ancillary jurisdiction may be asserted . . . “to enable a court to function successfully, that is, to manage its proceedings, vindicate its authority, and effectuate its decrees.” *Kokkonen*, 511 U.S. at 379-80, 114 S. Ct. 1673. In this case, ancillary jurisdiction over Cameron’s motion to enforce is appropriate because it is necessary for the district court to effectuate its order, that is, the

Agreement that Judge Seybert so-ordered. Accordingly, whether the claims are “factually interdependent” is irrelevant. *Id.*

Id. at 37 (quoting *Kokkonen v. Guardian Life Ins. Co. of America*, 511 U.S. 375, 377 (1994)).

See also Chesley v. Union Carbide Corp., 927 F.2d 60, 65 (2d Cir. 1991) (“Ancillary jurisdiction to determine attorney’s fees has also been exercised after a party voluntarily discontinued a litigation . . . or took concessionary measures that *mooted the case.*”) (emphasis added; citation omitted). Here, Paragraph 24 of the Preliminary Approval Order entered by this Court on December 3, 2015 (at a time the Court plainly had jurisdiction) states the Court “retains exclusive jurisdiction over the Actions to consider all further matters arising out of or connected with the Settlement Agreement and the Settlement embodied therein.” *Bowman*, Dkt. No. 75 at 12.

The Magistrate dismissed this argument on the basis that no action of the parties can confer subject-matter jurisdiction upon a federal court. That is not what happened here. This Court had jurisdiction at the time it entered the Preliminary Approval Order. The parties did not take any action to confer that jurisdiction. As the Court had jurisdiction at the time this Order was entered:\DATA\FBFG\700032\MEMO\00282198.PDF

, pursuant to Supreme Court and Second Circuit case law, the Court now has Court ancillary jurisdiction to effectuate the Order.

The Magistrate also concluded that the Court lacks ancillary jurisdiction because the Preliminary Approval Order provides for the Court’s jurisdiction for matters “arising out of or connected with the Settlement Agreement and the Settlement embodied therein.” Nov. 22, 2016 R&R at 27, note 13. But this is an issue that is connected with the Settlement, namely, whether the Court has jurisdiction to approve it. Moreover, maintaining ancillary jurisdiction is necessary to effectuate the Court’s Preliminary Approval Order, which provided that the Court

will consider any objections and whether to approve the Settlement at the final fairness hearing. See Dk. No.75 ¶ 12. Ancillary jurisdiction exists precisely to effectuate a court's prior orders. *Cameron Int'l*, 50 F. App'x at 38 (holding that "ancillary jurisdiction over Cameron's motion to enforce is appropriate because it is necessary for the district court to effectuate its order, that is, the Agreement that Judge Seybert so-ordered.").

Moreover, there can be no dispute that ancillary jurisdiction exists to award attorneys fees, and the Settlement includes an agreement that Plaintiffs' counsel should be awarded fees (and the Preliminary Approval Order contemplates the consideration of that award). See *In re Austrian & German Bank Holocaust Litig.*, 317 F.3d at 98-99. Thus, this Court has ancillary jurisdiction to determine whether Plaintiffs' counsel should be awarded fees under the Settlement.

As this Court has ancillary jurisdiction to effectuate and approve the Settlement, given the Parties' desire to effectuate the Settlement and the overwhelmingly positive response from the Class without objection, Plaintiffs respectfully requests that this Court (to the extent necessary) exercise its ancillary jurisdiction and enter Final Approval at this time.

CONCLUSION

RPAPL § 1921 and RPL § 275 confer upon Plaintiffs a concrete and particularized right: to have their satisfaction of mortgage presented for recording in a timely manner. Defendants deprived Plaintiffs of that right by presenting their satisfactions of mortgage late. Plaintiffs' injuries are not based on "a bare procedural violation, *divorced* from any concrete harm." *Spokeo*, 136 S.Ct. at 1549 (emphasis added). To the contrary, the concrete harm is the violation of the right to have a recorded mortgage timely discharged, and the violation is of the statutes designed to ensure timely presentments. The central purpose of the amendments to RPAPL §

1921 and RPL § 275 was to ensure timely filing of mortgage satisfactions to address the injury identified by the New York legislature. Thus, Plaintiffs “suffered injury in precisely the form the statute was intended to guard against, and therefore has standing.” *Havens*, 455 U.S. at 374.

Plaintiffs thus have standing and this Court has jurisdiction to hear their claims.

Dated: December 16, 2016

Respectfully submitted,

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