

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

**MARILY VILLANUEVA, on behalf of herself and
all others similarly situated,**

Plaintiff,

- against -

WELLS FARGO BANK, N.A.,

Defendant.

13CV5429 (CS)(LMS)

ORDER

**REGINALD BOWMAN, on behalf of himself and all
others similarly situated,**

Plaintiff,

- against -

**WELLS FARGO BANK, N.A., and U.S. BANK
NATIONAL ASSOCIATION, as Trustee under the
Trust Agreement for the Structured Asset
Investment Loan Trust, Mortgage Pass Through
Certificates, Series 2005-8,**

Defendants.

14CV648 (CS)(LMS)

ORDER

Lisa Margaret Smith, U.S.M.J.

At the conference held on April 21, 2016, and again in its May 9, 2016, Order, Docket # 84 in 13CV5429 ("Villanueva"); Docket # 94 in 14CV648 ("Bowman"), the Court stayed this action pending the issuance of the Supreme Court's decision in Spokeo, Inc. v. Robins, No. 13-1339, which occurred on May 16, 2016. Spokeo, Inc. v. Robins, 136 S. Ct. 1540 (2016). The Court thereafter ordered counsel for both Plaintiffs and Defendants to address the question of the legal implications of the decision as concerns these actions. Bowman Docket # 95; Docket Sheet, Minute Entry for 5/24/2016 in Villanueva & Bowman. The Court received, and has continued to receive, submissions regarding the legal implications, and the application by other

courts, of the Supreme Court's decision. Bowman Docket ## 99, 100, 101, 102, 104, 105. The Court has undertaken its own review of the Spokeo decision, as well as the parties' submissions and the growing body of case law interpreting Spokeo.

The Supreme Court's Decision in Spokeo

Spokeo is a putative class action involving alleged violations of the federal Fair Credit Reporting Act ("FCRA"). As described by the Supreme Court,

Spokeo operates a "people search engine." If an individual visits Spokeo's Web site and inputs a person's name, a phone number, or an e-mail address, Spokeo conducts a computerized search in a wide variety of databases and provides information about the subject of the search. Spokeo performed such a search for information about Robins, and some of the information it gathered and then disseminated was incorrect. When Robins learned of these inaccuracies, he filed a complaint on his own behalf and on behalf of a class of similarly situated individuals.

136 S. Ct. at 1544. The Supreme Court then went on to explain that the FCRA is intended to guarantee "fair and accurate credit reporting," 15 U.S.C. § 1681(a)(1), and, in that regard, the Court set forth the "requirements concerning the creation and use of consumer reports" relevant to Robins' case:

As relevant here, the Act requires consumer reporting agencies to "follow reasonable procedures to assure maximum possible accuracy of" consumer reports, § 1681e(b); to notify providers and users of consumer information of their responsibilities under the Act, § 1681e(d); to limit the circumstances in which such agencies provide consumer reports "for employment purposes," § 1681b(b)(1); and to post toll-free numbers for consumers to request reports, § 1681j(a).

136 S. Ct. at 1545. For willful failure to comply with the FCRA's requirements, an individual may recover, among other things, either actual damages or statutory damages of \$100 to \$1,000 per violation. Id. (citing 15 U.S.C. § 1681n(a)).

As regards Robins' complaint, the allegations were that

[a]t some point in time, someone (Robins' complaint does not specify who) made a Spokeo search request for information about Robins, and Spokeo trawled its sources and generated a profile. By some means not detailed in Robins' complaint, he became aware of the contents of that profile and discovered that it contained inaccurate information. His profile, he asserts, states that he is married, has children, is in his 50's, has a job, is relatively affluent, and holds a graduate degree. . . . According to Robins' complaint, all of this information is incorrect.

Id. at 1546. Thus, Robins filed a class-action complaint, alleging that Spokeo willfully failed to comply with the FCRA requirements set forth above. Id.

The district court had dismissed the complaint for lack of standing, but was reversed by the Ninth Circuit, which found that Robins had adequately alleged an injury in fact sufficient for Article III standing. Id. at 1544-45. The Supreme Court vacated the Ninth Circuit's decision, because an injury in fact must be both "concrete and particularized," and the Ninth Circuit's analysis "focused on the second characteristic (particularity), but it overlooked the first (concreteness)." Id. at 1545. Thus, the Supreme Court remanded the case "for the Ninth Circuit to consider both aspects of the injury-in-fact requirement." Id. (emphasis in original).

As the Supreme Court explained,

Our cases have established that the "irreducible constitutional minimum" of standing consists of three elements. The plaintiff must have (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision. The plaintiff, as the party invoking federal jurisdiction, bears the burden of establishing these elements.

Id. at 1547 (citations omitted). With respect to an injury in fact, "a plaintiff must show that he or she suffered 'an invasion of a legally protected interest' that is 'concrete and particularized' and 'actual or imminent, not conjectural or hypothetical.'" Id. at 1548 (citation omitted).

The Supreme Court noted that "concrete" is not "necessarily synonymous" with "tangible," and that "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," and that "because Congress is well positioned to identify intangible harms that meet minimum Article III requirements, its judgment is also instructive and important." *Id.* at 1549 (citation omitted). Nonetheless, as the Supreme Court pointed out,

Congress' role in identifying and elevating intangible harms does not mean that a plaintiff automatically satisfies 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. Article III standing requires a concrete injury even in the context of a statutory violation. For that reason, Robins could not, for example, allege a bare procedural violation, divorced from any concrete harm, and satisfy the injury-in-fact requirement of Article III.

Id. (citing Summers v. Earth Island Inst., 555 U.S. 488, 496 (2009) ("[D]eprivation of a procedural right without some concrete interest that is affected by the deprivation . . . is insufficient to create Article III standing")). "This does not mean, however, that the risk of real harm cannot satisfy the requirement of concreteness." *Id.* (citation omitted). Just as "the law has long permitted recovery by certain tort victims even if their harms may be difficult to prove or measure," *id.* (citation omitted), "the violation of a procedural right granted by statute can be sufficient in some circumstances to constitute injury in fact," and "a plaintiff in such a case need not allege any additional harm beyond the one Congress has identified." *Id.* (emphasis in original) (citations omitted).

Following its discussion of the legal principles governing what constitutes a concrete injury sufficient to satisfy Article III standing, the Supreme Court concluded,

In the context of this particular case, these general principles tell us two things: On the one hand, Congress plainly sought to curb the dissemination of false information by adopting procedures designed to decrease that risk. On the other hand, Robins cannot satisfy the demands of Article III by alleging a bare procedural violation. A violation of one of the FCRA's procedural requirements may result in no harm. For

example, even if a consumer reporting agency fails to provide the required notice to a user of the agency's consumer information, that information regardless may be entirely accurate. In addition, not all inaccuracies cause harm or present any material risk of harm. An example that comes readily to mind is an incorrect zip code. It is difficult to imagine how the dissemination of an incorrect zip code, without more, could work any concrete harm.

Id. at 1550 (footnote omitted).

The Legal Implications of Spokeo in the Context of the Instant Actions

In light of the Supreme Court's decision in Spokeo, this Court now must determine whether Plaintiffs Villanueva and Bowman have Article III standing such that the Court has subject matter jurisdiction over these actions. Contrary to Plaintiffs' assertion that Spokeo did not change Second Circuit or Supreme Court standing law, the Second Circuit recently noted "the change Spokeo effected in the standing doctrine." Cruper-Weinmann v. Paris Baguette Am., Inc., 14-3709-cv, 2016 WL 3553448 (2d Cir. June 30, 2016) ("Summary Order").¹ Thus, this Court is not barred by the law of the case doctrine from reconsidering the issue of standing previously decided by Judge Seibel at an earlier stage of the litigation.² See Johnson v. Holder, 564 F.3d 95, 99-100 (2d Cir. 2009) ("We may depart from the law of the case for cogent or compelling reasons including an intervening change in law, availability of new evidence, or the need to correct a clear error or prevent manifest injustice.") (internal quotation marks and citation omitted).

To the extent that Spokeo deemed the legislature's judgment to be instructive in the

¹This appeal was decided jointly with the appeal in Katz v. The Donna Karan Co., LLC, 15-464-cv.

²See Bowman Docket # 100-1 (Transcript of Judge Seibel's decision dated July 31, 2014) at 7-17.

analysis of whether a statutory provision creates Article III standing through its recognition of a concrete harm, the Court has examined the legislative history of the statutory provisions at issue in these actions, New York Real Property and Proceedings Law Section 1921(1) ("RPAPL § 1921(1)") and Real Property Law Section 275(1) ("RPL § 275(1)"), which has been provided by Plaintiffs. See Mem. of Law in Supp. (Bowman Docket # 100) Exs. 2-4.³ The letter to the Counsel to the Governor from the law's sponsor, State Senator John A. DeFrancisco, states that the justification for these statutory provisions, which impose escalating penalties for a mortgagee's failure to record a certificate of discharge within specified periods after the mortgage has been paid, is that a fee for the certificate of discharge "to be presented to the county clerk is paid at the time of a property's sale, indicating that the property's title is clear of this lien. **When a lending institution fails to carry through on making the filing, it can often fall upon a current seller to again pay for the service to ensure that their present transaction can go forward.**" Id. Ex. 2 (emphasis added). Similarly, the New York State Senate Introducer's Memorandum in Support states that the justification for these statutory provisions is as follows:

JUSTIFICATION: When purchasing and selling a home, the recording of a mortgage and its subsequent discharge occurs. The County Clerk charges a fee to record the certificate of discharge of mortgage, which is paid by the mortgagor of the property. **The mortgagor pays this fee to the mortgagee and expects the mortgage to be promptly discharged.**

³"[S]tate law can create interests that support standing in federal courts. If that were not so, there would not be Article III standing in most diversity cases, including run-of-the-mill contract and property disputes. State statutes constitute state law that can create such interests." Cantrell v. City of Long Beach, 241 F.3d 674, 684 (9th Cir. 2001); but see Ross v. AXA Equitable Life Ins. Co., 115 F. Supp. 3d 424, 434 (S.D.N.Y. 2015) ("[T]he Court is not aware of (and Plaintiffs do not cite) any authority suggesting that a state legislature can confer Article III standing upon a plaintiff who suffers no concrete harm merely by authorizing a private right of action based on a bare violation of a state statute.") (emphasis in original).

However, subsequent title searches are done and it is often discovered that the mortgage is still "open" and a discharge was never provided, even though a filing fee had been paid off in full. As a result, a second filing fee becomes necessary to record the certificate of discharge of mortgage. This bill will provide the mortgagor with a remedy for the mortgagee's failure to timely and properly provide a certificate of discharge of mortgage.

Id. Ex. 4 (emphasis added).

Thus, the New York State Legislature sought to provide a statutory remedy for the harm associated with mortgagors paying fees to mortgagees upon satisfaction of their mortgages for the purpose of having a certificate of discharge recorded with the county clerk, but then subsequently finding out that the mortgagee failed to do so in a timely fashion, causing the mortgagor to pay a second fee in order to ensure that this is, in fact, done. More broadly, this ensures that any impediment to the sale of property resulting from the failure to timely record a certificate of discharge is removed so that such sales can proceed.

In the instant actions, Plaintiffs allege nothing more than bare procedural violations of RPAPL § 1921(1) and RPL § 275(1), rather than alleging that they have suffered the concrete harm that these statutory provisions are intended to address. Thus, the First Amended Complaint in the Bowman action alleges as follows:

22. Defendants systematically fail to timely present certificates of discharge, as required by N.Y. Real Prop. Acts. Law § 1921.

23. By reason of the foregoing, Defendants have violated N.Y. Real Prop. Acts. Law § 1921. Defendants are liable to Plaintiff and the other members of the Class for the statutory damages that are due.

...

26. Defendants systematically fail to timely present certificates of discharge, as required by N.Y. Real Prop. Law § 275.

27. By reason of the foregoing, Defendants have violated N.Y. Real Prop.

Law § 275. Defendants are liable to Plaintiff and the other members of the Class for the statutory damages that are due.

First Am. Compl. (Docket # 19) ¶¶ 22-23, 26-27; see First Am. Compl. (Villanueva Docket # 9) ¶¶ 33, 37, 42, 46 (same). Under the Supreme Court's articulation of the standing doctrine in Spokeo, Plaintiffs' bare-bones pleadings do not sufficiently allege a concrete injury as required to establish Article III standing. 136 S. Ct. at 1549 ("Robins could not, for example, allege a bare procedural violation, divorced from any concrete harm, and satisfy the injury-in-fact requirement of Article III.").

In arriving at this conclusion, the Court notes that it is bound by neither the decision in Zink v. First Niagara Bank, N.A., 13-CV-01076-RJA-JJM, 2016 WL 3950957 (W.D.N.Y. July 1, 2016), nor the decision in Jaffe v. Bank of Am., N.A., 13CV4866 (VB), 2016 WL 3944753 (S.D.N.Y. July 15, 2016), both of which found that the plaintiffs in those cases had Article III standing to pursue claims under RPAPL § 1921(1) and RPL § 275(1) identical to those asserted in the instant actions. The district court in Zink only hesitatingly reached its conclusion, noting that "under the present state of the law the scales tip slightly (but only slightly) in favor of finding that plaintiff has Article III standing to pursue claims on behalf of himself and the class." 2016 WL 3950957, at *6 (emphasis added). Furthermore, the district court noted "the substantial possibility that a higher court might eventually rule otherwise . . ." id. (emphasis added), and that if that were to occur before the final resolution of the action, then the action would have to be dismissed. Id. n.7 (citing Fed. R. Civ. P. 12(h)(3)).

Meanwhile, the district court in Jaffe explained how "the state statutes at issue here create a legal right, the invasion of which constitutes a concrete injury" as follows:

As alleged, when 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. Because to the public, these mortgages appeared not to have been satisfied, plaintiffs could have realized that harm if they had, for example, tried to sell or encumber the subject property, or tried to finance another property and been subjected to a credit check.

2016 WL 3944753, at *4. Although the district court found that violation of these statutory provisions created a "real risk of harm" by clouding the title to one's property, Plaintiffs in the instant actions nowhere allege in their complaints that there was a cloud on the titles to their respective properties as a result of Defendants' failure to timely file their mortgage satisfaction notices which interfered with their ability to sell or encumber their properties or to finance another property. Furthermore, the district court in Jaffe surmised that the State Legislature's passage of these statutory provisions was "possibly in recognition of both the concreteness of this harm and the difficulty in otherwise measuring damages," id., but the State Legislature noted that both the harm sought to be protected against and the measure of damages was the financial loss to the mortgagor in paying a fee to the mortgagee to ensure the timely filing of the certificate of discharge, but then having to pay that fee a second time in order to correct the mortgagee's failure to do so. Indeed, state law already provides mechanisms for lifting a cloud on title where a mortgagee fails to provide a discharge of mortgage altogether. See RPAPL §§ 1921(2), 1921(5)(a).⁴

⁴The statute provides as follows:

2. Upon the failure or refusal of any such mortgagee to comply with the foregoing provisions of this section [RPAPL § 1921(1)] any person having an interest in the mortgage or the debt or obligation secured thereby or in the mortgaged premises may apply to the supreme court or a justice

In sum, the Court finds that, as pled, Plaintiffs' claims in the instant actions fail to allege a concrete harm sufficient to support Article III standing. However, rather than dismissing Plaintiffs' actions for lack of subject matter jurisdiction, under the circumstances, the Court concludes that the better course would be to allow Plaintiffs an opportunity to replead their claims to satisfy the injury-in-fact requirement as set forth in Spokeo. In Cruper-Weinmann and Katz the Second Circuit ordered that the plaintiffs be given "an opportunity to replead their

thereof, or to the county court or a judge thereof, in or of any county in which the mortgaged premises or any part thereof are situated in whole or in part, upon a petition, for an order to show cause why an order should not be made by such court canceling and discharging the mortgage of record, and directing the register or clerk of any county in whose office the same may have been recorded to mark the same upon his records as canceled and discharged, and further ordering and directing that the debt or other obligation secured by the mortgage be canceled, upon condition that in the event such mortgage is not paid, the sums tendered pursuant to the foregoing provisions of this section be paid to the officer specified by law to hold court funds and moneys deposited in court in the county wherein the mortgaged premises are situated in whole or in part. Said petition must be verified in like manner as a verified pleading in an action in the supreme court and it must set forth the grounds of the application.

...

5. (a) In the case of a mortgage secured by property improved by a one-to-six family, owner occupied, residential structure or residential condominium unit, if within ninety days of receipt of payment, and request if required, the mortgagee fails to deliver to the mortgagor or the mortgagor's designee the satisfaction of mortgage, the note and the mortgage and any other documents as required by subdivision one of this section, any attorney-at-law may execute, acknowledge and upon payment of an additional filing fee of fifty dollars cause to be filed with the recording officer of the county where the mortgage is recorded, an affidavit which complies with this section. Unless the mortgagee shall file a verified objection to such affidavit within thirty-five days of being filed, as of the date thirty-five days subsequent to its filing, such affidavit shall be recorded and satisfy the lien of such mortgage on the mortgaged premises.

RPAPL §§ 1921(2), 1921(5)(a).

claims to comport with the pleading standards set forth in Spokeo" and that the district courts should be allowed "to address any standing questions in the first instance." Summary Order at 3 (citing Warth v. Seldin, 422 U.S. 490, 501-02 (1975) ("[I]t is within the trial court's power to allow or to require the plaintiff to supply, by amendment to the complaint or by affidavits, further particularized allegations of fact deemed supportive of plaintiff's standing. If, after this opportunity, the plaintiff's standing does not adequately appear from all materials of record, the complaint must be dismissed.")). Post-Spokeo, other courts have taken this approach as well. See, e.g., Jamison v. Bank of Am., N.A., No. 2:16-cv-00422-KJM-AC, 2016 WL 3653456 (E.D. Cal. July 7, 2016) (in putative class action asserting claim for violation of Truth in Lending Act (TILA), district court held plaintiff's claim should be dismissed for lack of standing as complaint did not allege sufficient facts to establish a concrete injury, but granted leave to amend within 21 days of issuance of district court's order)⁵; Sartin v. EKF Diagnostics, Inc., Civil Action No: 16-

⁵The district court described the inadequacies in the complaint as follows:

[T]he complaint alleges "[f]ailure to account for insurance payments in payoff statements imposes drastic consequences upon [the class members]," Compl. ¶ 72, because the payoff statements would not provide an accurate view of the outstanding balance if the class members "were to apply for a loan modification or refinancing, if they wish[ed] to fully satisfy their loan obligation, or if the Bank attempt[ed] foreclosure," id. ¶ 3; see id. ¶¶ 72–75. However, as defendant notes, the complaint does not allege those circumstances ever arose: it does not, for example, allege plaintiff applied for loan refinancing. Neither does the complaint provide support for finding the risk of such consequences sufficient to establish a concrete injury. In addition, although the complaint generally alleges the existence of disputes between plaintiff and her contractor, id. ¶¶ 32–37, it does not provide factual allegations establishing any harm plaintiff suffered as a result of defendant's actions. The complaint otherwise pleads only conclusory allegations of harm that the court need not accept as true, . . . such as that plaintiff "has been harmed and has suffered an increased cost or burden due to Defendant's actions," Compl. ¶ 80.

1816, 2016 WL 3598297 (E.D. La. July 5, 2016) (in putative class action asserting claims for violation of Telephone Consumer Protection Act (TCPA) based on unlawful transmission of unsolicited fax advertisements, district court held plaintiff failed to satisfy injury-in-fact requirement of Article III standing by failing to adequately allege concrete injury, but dismissed complaint without prejudice and with leave to amend within 21 days of entry of district court's order).⁶

Finally, a procedural violation of the TILA requirements for payoff statements does not inherently establish concrete harm. . . . A procedural violation of the TILA provision may result in no concrete harm if the lender provides the omitted information through other means. Cf. Spokeo, 136 S. Ct. at 1550 (" . . . [N]ot all inaccuracies cause harm or present a material risk of harm."). Here, the complaint does not allege BANA failed or refused to ever disclose information to plaintiff about her proceeds, but only that it failed to disclose such information on the payoff statements. See, e.g., Compl. ¶ 70.

2016 WL 3653456, at *4.

⁶More specifically, the district court described the complaint's deficiencies as follows:

Although Dr. Sartin has plausibly alleged that defendants violated the TCPA by sending unsolicited fax advertisements, he fails to plead facts demonstrating how this statutory violation caused him concrete harm. Dr. Sartin's complaint exhaustively describes the requirements of the TCPA, as well as the nature of defendants' alleged "junk fax campaign." But the complaint's only reference to any kind of injury appears in a single sentence, which states that defendants' failure to comply with the TCPA's requirements "caus[ed] Plaintiff and Plaintiff Class to sustain statutory damages, in addition to actual damages, including but not limited to those contemplated by Congress and the [Federal Communications Commission]."

. . . Dr. Sartin's conclusory allegation lacks even general factual support.

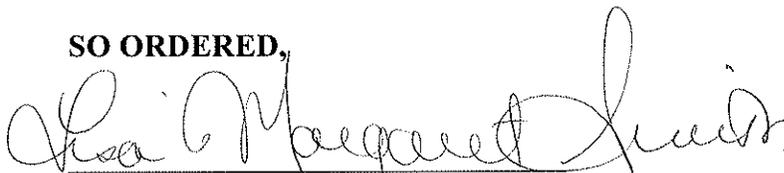
2016 WL 3598297, at *3 (footnote omitted).

CONCLUSION

Accordingly, for the reasons stated above, the Court grants Plaintiffs leave to replead their claims to satisfy the standards set forth in Spokeo and directs them to serve and file their amended complaints within 21 days of the date hereof.

Dated: August 5, 2016
White Plains, New York

SO ORDERED,

A handwritten signature in black ink, appearing to read "Lisa Margaret Smith". The signature is written in a cursive style and is positioned above a horizontal line.

Lisa Margaret Smith
United States Magistrate Judge
Southern District of New York