

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

RACHEL A. WHITAKER and RICHARD
L. DUNKIN, individually and on behalf of
all others similarly situated,

Plaintiffs,

v.

APPRISS, INC.,

Defendant.

Case No. 3:13-cv-00826-RLM-CAN

**PLAINTIFFS' MEMORANDUM IN OPPOSITION TO DEFENDANT
APPRISS, INC.'S RULE 12(b)(1) MOTION TO DISMISS**

Dated: August 4, 2016

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Plaintiffs Rachel A. Whitaker (“Whitaker”) and Richard L. Dunkin (“Dunkin”) (collectively “Plaintiffs”), by counsel, respectfully submit this Memorandum in Opposition to Defendant Appriss, Inc.’s (“Appriss”) Rule 12(b)(1) Motion to Dismiss.

INTRODUCTION

Eleven months ago, Appriss moved to stay all proceedings in this case pending the outcome of the Supreme Court’s decision in *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540 (2016), in the hope that *Spokeo* would change the law so as to strip the named Plaintiffs of Article III standing and this Court of subject-matter jurisdiction. ECF Nos. 135-136. It did not. Indeed, in *Spokeo*, the Supreme Court merely reaffirmed the existing law of standing, rejecting the argument that the injury-in-fact element cannot be satisfied by an alleged violation of statutory protections. Applying that law to the case at bar yields only one conclusion: the named Plaintiffs each suffered an injury-in-fact that is both concrete and particularized when Appriss sold their Driver’s Privacy Protection Act (“DPPA”)-protected personal information to third parties for impermissible purposes. Thus, this Court enjoys subject-matter jurisdiction and Appriss’s motion should be denied.

BACKGROUND

The DPPA prohibits a State department of motor vehicles, its agents, and any individuals, organizations, and business entities, from knowingly disclosing “personal information” obtained by the department in connection with a motor vehicle record. 18 U.S.C. §§ 2721-22; *see also Dahlstrom v. Sun-Times Media, LLC*, 777 F.3d 937, 939 (7th Cir. 2015). The DPPA was enacted in response to public concerns regarding the ease with which criminals, solicitors, and other third parties could obtain personal details about licensed drivers. *See Dahlstrom*, 777 F.3d. at 939, 944-45. Indeed, as the Supreme Court recognized, the DPPA addressed the need to protect drivers against the “common practice of selling personal information to businesses

engaged in direct marketing and solicitation” without the express consent of the individual to whom the information pertains. *Maracich v. Spears*, 133 S. Ct. 2191, 2198 (2013). Shaped by these objectives, the intent of the DPPA is simple: “protect the personal privacy and safety of all American licensed drivers.” 140 Cong. Rec. H2518-01, H2526 (daily ed. Apr. 20, 1994) (statement of Rep. Goss), *available at* 1994 WL 140035.

To that end, Congress provided a private right of action to any individual whose “personal information” contained in a “motor vehicle record” is disclosed without his or her “express consent.”¹ 18 U.S.C. § 2724(a). The DPPA provides specific examples of the types of personal information subject to statutory protection, which include name, address, and driver identification number. 18 U.S.C. § 2725(3).² Recognizing that the unauthorized disclosure of such information constitutes a serious invasion of privacy for which monetary damages are difficult, if not impossible to quantify, the DPPA provides for recovery of “liquidated damages in the amount of \$2,500” for each violation. 18 U.S.C. § 2724(b)(1).

Notwithstanding that Plaintiffs allege Appriss knowingly disclosed their protected personal information without their express consent and for an impermissible purpose – the precise harm against which the DPPA protects – Appriss contends that Plaintiffs lack Article III standing because they seek only the statutory damages Congress authorized, rather than out-of-pocket losses. Relying exclusively, but mistakenly, on *Spokeo*, Appriss characterizes its unfettered sale and disclosure of Plaintiffs’ protected personal information as a “bare procedural violation” of the Act and contends that Plaintiffs have not suffered any concrete harm. Appriss’s

¹ The DPPA defines “express consent” as “consent in writing, including consent conveyed electronically that bears an electronic signature.” 18 U.S.C. § 2725(5). “Personal information” includes any “information that identifies an individual.” 18 U.S.C. § 2725(3); *see also Dahlstrom*, 777 F.3d. at 944.

² Plaintiffs allege that each of these pieces of information was improperly disclosed to commercial solicitors by Appriss. *See* ECF No. 1 at ¶¶24, 30-31.

argument, however, is based on a gross misreading of *Spokeo*, is contrary to the post-*Spokeo* Article III standing jurisprudence, and is inconsistent with the well-established principles of standing and binding Seventh Circuit authority. Accordingly, Appriss’s motion fails.

ARGUMENT

Appriss claims that, following *Spokeo*, “concrete” injuries, for Article III purposes, are limited to physical or monetary injuries, or a “risk of harm” that is “certainly impending.” ECF No. 151 at 8 (citing *Clapper v. Amnesty Int’l USA*, 133 S. Ct. 1138 (2013)). This overreaching and legally incorrect argument has no foundation in the Supreme Court’s opinion and distorts the Article III jurisprudence. Indeed, Plaintiffs here have suffered *precisely* the type of harm the DPPA was enacted to prohibit and remedy: invasions of their interests in the privacy of discrete categories of their personal information specified by Congress as meriting heightened protection. That this injury is neither physical nor monetary (in the sense of an out-of-pocket loss) does not render it insufficiently concrete under *Spokeo*.

In addition to misconstruing *Spokeo*, Appriss’s argument is grounded upon several other mistaken premises. *First*, Appriss incorrectly identifies the alleged injury here, offering the Court a straw-man caricature of Plaintiffs’ actual harms. According to Appriss, the alleged injury at issue is Plaintiffs’ receipt of solicitation letters. *See, e.g.*, Dkt. No. 151 at 1. That is incorrect. Rather, Plaintiffs’ injury is the invasion of their privacy interests resulting from Appriss’s unauthorized disclosure to third parties of personal information specifically granted heightened protections by the DPPA. These injuries bear “a close relationship” to harms traditionally recognized in the common law tradition, including the common law privacy torts.

Second, these injuries do not arise from technical violations of *procedural* rights (such as failure to maintain re-disclosure records as set forth in 18 U.S.C. § 2721(c)) but from Appriss’s actual violations of the *substantive* privacy protections furnished by the Driver’s Privacy

Protection Act (“DPPA”). Congress’ judgment that certain categories of personal information merit heightened protection is entitled to deference. Accordingly, here, both “history and the judgment of Congress” strongly support Article III standing. *Spokeo*, 136 S. Ct. at 1549.

Third, even if Plaintiffs’ invasion-of-privacy injuries under the DPPA could be described as “procedural injuries” – and they cannot – this would not, as Appriss’s motion suggests, mandate dismissal. Indeed, the injuries are sufficiently similar to the procedural injuries recognized by the Supreme Court in prior cases as bearing the requisite concreteness. *Id.* (citing *Fed. Election Comm’n. v. Akins*, 524 U.S. 11, 20-25 (1998); *Public Citizen v. Dept. of Justice*, 491 U.S. 440, 449 (1989)). In addition to invading Plaintiffs’ substantive privacy rights, Appriss’s conduct has deprived Plaintiffs of important procedural rights furnished by the DPPA, including the right to receive advance notice of any disclosure of their protected personal information. Such informational injuries are sufficient to confer standing on Plaintiffs even independent of their substantive privacy injuries, as decades of Article III jurisprudence plainly shows.

Finally, Appriss incorrectly maintains that the remedy Plaintiffs pursue (statutory damages) bears on the issue of Article III standing. Appriss cherry-picks from Plaintiffs’ deposition transcripts and interrogatory responses to argue that neither of them suffered a concrete injury, conflating out-of-pocket monetary losses and physical injuries (which Plaintiffs do not claim and which are not required for Article III standing) with actually-existing harms (which Plaintiffs have suffered and which are required for standing). *See, e.g.*, ECF No. 151 at 3. In addition to erroneously relying on lay witness evidence for the establishment of a legal conclusion (and distorting that evidence), Appriss’s argument fails because the fact that Plaintiffs seek only liquidated statutory damages under the DPPA simply has no bearing on the legal

question before the Court, *i.e.*, whether Plaintiffs have Article III standing. Appriss's misguided attempt to transform Plaintiffs' requested remedy into an admission that they suffered no concrete harm broadly misses the mark.

I. SPOKEO DID NOT ALTER ARTICLE III'S "CONCRETENESS" REQUIREMENT.

In *Spokeo*, the Supreme Court explained that the "concreteness" requirement for an Article III injury in fact is distinct from the "particularity" requirement. *Spokeo*, 136 S. Ct. at 1548. "Concreteness" is satisfied if the alleged injury is "real," that is, "actually exist[s]." *Id.* Both "tangible" and "intangible" injuries may actually exist, and, thus, either may satisfy the requirement. *Id.* at 1549. Of course, tangible injuries, such as monetary loss and physical harm, are "perhaps easier to recognize," but *Spokeo* makes clear that intangible injuries are no less concrete. *Id.*

In analyzing whether an intangible injury satisfies Article III "concreteness," *Spokeo* instructs courts to look to "both history and the judgment of Congress." *Id.* Intangible harms with "a close relationship to a harm that has traditionally been regarded as providing a basis for a lawsuit in English or American courts" satisfy the concreteness requirement. *Id.* (citing *Vermont Agency of Natural Resources v. U.S. ex rel. Stevens*, 529 U.S. 765, 775-77 (2000)). The same is true of intangible injuries that "were previously inadequate in law" but later "elevat[ed] to the status of legally cognizable injuries" by Congress. *Id.* (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 578 (1992)). The latter may include substantive statutory protections as well as violations of rights that are procedural in nature, such as a defendant's failure to provide

statutorily mandated disclosures of information. *Id.* (citing *Akins*, 524 U.S. at 20-25; *Public Citizen*, 491 U.S. at 449).³

This is no change in the law. Indeed, other courts have observed that *Spokeo* “broke[] no new ground” and “created no new law.” *Mey v. Got Warranty, Inc.*, No. 5:15-CV-101, 2016 WL 3645195, at *2-3 (N.D. W. Va. June 30, 2016); *Thomas v. FTS USA, LLC*, No. 3:13-cv-825, 2016 WL 3653878, at *4 (E.D. Va. June 30, 2016) (“Contrary to Defendants’ position, *Spokeo* did not change the basic requirements of standing.”). Appriss simply misconstrues *Spokeo*.

II. THE ALLEGED INJURY HAS “A CLOSE RELATIONSHIP” TO HARMS TRADITIONALLY RECOGNIZED IN THE COMMON LAW.

Plaintiffs are Indiana-registered drivers alleging that Appriss’s unauthorized sale and disclosure to third parties of their legally-protected personal information for an impermissible purpose constitutes a violation of the DPPA. *See, e.g.*, ECF No. 1 at ¶¶1-3. In *Spokeo*, the Supreme Court held that intangible harms (such as invasions of privacy interests) are concrete if they bear “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. Because the injury to Plaintiffs’ privacy interests is closely related to harms so recognized in the common law tradition, Plaintiffs enjoy Article III standing.

The United States Court of Appeals for the Third Circuit recently examined a substantially identical issue under the VPPA. *In re Nickelodeon Cons. Priv. Litig.*, --- F.3d ---,

³ In addition to “history and the judgment of Congress,” courts may consider the nature of the rights being asserted in analyzing “concreteness.” *See id.* at 1550-1554 (Thomas, J. concurring). Throughout the history of Article III jurisprudence, “[c]ommon-law courts more readily entertained suits from private plaintiffs who alleged a violation of their own rights, in contrast to private plaintiffs who asserted claims vindicating public rights.” *Id.* at 1550. The differences between “private rights,” which traditionally included rights of personal security and privacy, and “public rights,” which involve duties owed to the whole community in its social aggregate, continue to underlie modern Article III standing. *Id.* at 1552. Importantly, in the context of claims asserting private rights, the concreteness requirement “does not apply as rigorously,” and contemporary decisions do not require a plaintiff to assert any actual injury beyond the violation of his personal legal rights. *Id.*

2016 WL 3513782 (3d Cir. June 27, 2016). The VPPA “prohibits the disclosure of personally identifying information relating to viewers’ consumption of video-related services.” *Id.* at *1. In *Nickelodeon*, the court considered the argument that plaintiffs lack standing “because the disclosure of information about the plaintiffs’ online activities does not qualify as an injury-in-fact.” *Id.* at *6. After analyzing *Spokeo*, the court ruled that the alleged injury to plaintiffs’ privacy interests is “concrete in the sense that it involves a clear *de facto* injury, *i.e.*, the unlawful disclosure of legally protected information.” *Id.* at *7. In so holding, the court noted that, “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.” *Id.* (citing *In re Google Inc. Cookie Placement Cons. Priv. Litig.*, 806 F.3d 125, 134 (3d Cir. 2015)).

A district court interpreting the DPPA came to the same conclusion. In *Potocnik v. Carlson*, No. 13-cv-2093 (PJS/HB), 2016 WL 3919950, at *2 (D. Minn. July 15, 2016), the court rejected the very arguments Appriss now advances. There, the plaintiff brought a DPPA claim, alleging that the defendant accessed her DPPA-protected personal information for impermissible purposes. *Id.* at *1. The defendant argued the plaintiff “lacks standing because she has alleged only a violation of a statutory right, and not a concrete injury.” *Id.* at *2. The court “disagree[d],” ruling that “the type of harm at issue [here] – the viewing of private information without lawful authority – has a close relationship to invasion of the right to privacy, a harm that has long provided a basis for tort actions in the English and American courts.” *Id.* (citing RESTATEMENT (SECOND) OF TORTS § 652A cmt. A (Am. Law Inst. 1977)).

As these courts acknowledged, invasion of privacy is a harm that has traditionally been regarded as providing a basis for a lawsuit in American courts. *First*, nearly all states and the Restatement recognize invasion of privacy as an actionable tort. *See* ELI A. MELTZ, *No Harm*,

No Foul? Attempted Invasion of Privacy and the Tort of Intrusion upon Seclusion, 83 FORDHAM L. REV. 3431, 3440 (May 2015) (providing state-by-state survey); *see also* RESTATEMENT (SECOND) OF TORTS § 652A.⁴ Indeed, “it has long been the case that an unauthorized dissemination of one’s personal information, even without a showing of actual damages, is an invasion of one’s privacy that constitutes a concrete injury sufficient to confer standing to sue.” *Thomas*, 2016 WL 3653878, at *10 (citing SAMUEL D. WARREN & LOUIS D. BRANDEIS, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890)). *Second*, the right to privacy is protected by the U.S. Constitution and its alleged deprivation is regularly a subject of litigation in federal courts. *See, e.g., Lawrence v. Texas*, 539 U.S. 558 (2003); *Eisenstadt v. Baird*, 405 U.S. 438 (1972).

Importantly, the common law also regards invasions of privacy as sufficiently concrete in themselves, even where no other injury, such as pecuniary loss or physical harm, is alleged. *See, e.g., Parks v. U.S. Internal Revenue Serv.*, 618 F.2d 677, 683 (10th Cir. 1980) (privacy claims “actionable even though the plaintiffs suffered no pecuniary loss nor physical harm.”); *Nolley v. County of Erie*, 802 F.Supp. 2d 898, 904 (W.D.N.Y. 1992); *Bolduc v. Bailey*, 586 F.Supp. 896, 902 (D. Colo. 1984); *Fairfield v. Am. Photocopy Equip. Co.*, 291 P.2d 194, 198 (Cal. App. 1955). That is because it is *the invasion of the right to privacy itself* that is the very essence of the common law cause of action. *Parks*, 618 F.2d at 683 (citing 62 AM. JUR. 2D PRIVACY § 45

⁴ The privacy torts to which the DPPA’s cause of action are most similar are reflected in Restatement (Second) of Torts §§ 652B (“One who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of his privacy, if the intrusion would be highly offensive to a reasonable person.”); and 652D (“One who gives publicity to a matter concerning the private life of another is subject to liability to the other for invasion of his privacy, if the matter publicized is of a kind that (a) would be highly offensive to a reasonable person, and (b) is not of legitimate concern to the public.”). While these common-law torts require different elements than a DPPA violation, “the Supreme Court’s focus in *Spokeo* was not on the elements of the cause of action but rather on whether the harm was of a type that traditionally provides a basis for a common law claim.” *Mey*, 2016 WL 3645195, at *3. Were this not the case, legislatures would be incapable of doing anything but codifying existing common law claims with no variance in the elements of such claims.

(1972)).⁵ The fact that the DPPA is, like the common law, devoid of any requirement that a plaintiff establish an injury *in addition to* the invasion of privacy and/or misuse of personal information simply demonstrates that Congress was informed by the common law in its enactment of the DPPA.

Plaintiffs' DPPA claims also have historical common-law antecedents other than invasion of privacy, including trespass and conversion. Courts have long recognized property rights in personal information. *See, e.g., Acme Circus Operating Co., Inc. v. Kuperstock*, 711 F.2d 1538, 1541 (11th Cir. 1983) (describing privacy interest in name and likeness as "an intangible personal property right"); *Motschenbacher v. R.J. Reynolds Tobacco Co.*, 498 F.2d 821, 825 (9th Cir. 1974) (recognizing a "proprietary interest in [a person's] own identity" that is entitled to "legal protection"); *Lavery v. Automation Mgmt. Consultants, Inc.*, 360 S.E.2d 336, 342 (Va. 1987) (privacy law "creates in an individual a species of property right in their name and likeness."); *Canessa v. J.I. Kislak, Inc.*, 235 A.2d 62, 76 (N.J. Super. 1967) ("[P]laintiffs' names and likenesses belong to them. As such they are property. They are things of value."); *see also PROSSER AND KEETON ON THE LAW OF TORTS* (5th ed. 1984) at 854 (interest protected by privacy torts is "clearly proprietary in its nature"). The common law trespass-to-chattels and conversion torts, which remedy unwanted interference with property rights, are historical analogues of the modern privacy torts that underlie the DPPA.

⁵ As an extension of this logic, courts interpreting the damages provisions of the DPPA have observed that "a person need not prove actual damages to receive liquidated damages" under the DPPA. *See e.g. Pichler v. UNITE*, 542 F.3d 380, 398-399 (3d Cir. 2008); *Kehoe v. Fidelity Fed. Bank & Trust*, 421 F.3d 1209, 1216 (11th Cir. 2005) ("[A] plaintiff need not prove actual damages to recover liquidated damages [under the DPPA].").

Plaintiffs' injuries are, therefore, closely related to harms recognized in the common law tradition as providing a basis for a lawsuit. Accordingly, Plaintiffs enjoy Article III standing and Appriss's motion should be denied.⁶

III. THE JUDGMENT OF CONGRESS DEMONSTRATES THAT PLAINTIFFS' INJURIES ARE CONCRETE.

In addition to "history," the Court should examine "the judgment of Congress" in determining whether Plaintiffs' injuries are concrete. *Spokeo*, 136 S. Ct. at 1549. Even if invasion of privacy was not recognized as a basis on which a lawsuit could be maintained – although, as shown above, it clearly is – Congress unmistakably identified it as a legally cognizable harm here. This judgment is entitled to great deference "because Congress is well positioned to identify intangible harms that meet minimum Article III requirements[.]" *Id.* This Court should decline Appriss's invitation to encroach upon the legislative branch's authority by overruling Congress.

Protection of driver privacy was foremost in Congress's mind when it enacted the DPPA. The public record clearly reflects the judgment of Congress that protection of driver privacy is the primary impetus behind the DPPA. 140 Cong. Rec. at H2526 (purpose of DPPA is to "protect the personal privacy and safety of all American licensed drivers"); *see also id.* at H2522-23 (statement of Rep. Moran) (DPPA protects "an individual's fundamental right to privacy and safety," and "protect[s] the privacy of all Americans"); *id.* at H2527 (statement of Rep. Morella) (DPPA provides "all individuals ... an opportunity to protect their privacy"). Indeed, the very name of the statute (Driver's Privacy Protection Act) reflects this judgment.

⁶ Throughout its brief, Appriss incorrectly maintains that Plaintiffs' claimed injuries are reducible to their receipt of solicitation letters from third parties to whom Appriss sold their personal information. It bears noting that, even if Appriss were correct (which it is not), the post-*Spokeo* jurisprudence would support such a theory of injury. *See Gubala v. Time Warner Cable, Inc.*, 2016 WL 3390415, at *4 (E.D. Wis. June 17, 2016) (observing that plaintiff could satisfy "concreteness" requirement by alleging "he has been contacted by marketers who obtained his information from the defendant").

Because Congress repeatedly identified the intangible harm of invasion of driver privacy as the key concern in enacting the DPPA, as *Spokeo* counsels, its judgment should be afforded great deference. *Spokeo*, 136 S. Ct. at 1549; *see also Mey*, 2016 WL 3645195, at *4-5 (discussing judgment of Congress in TCPA context and noting, “[Congress’s] judgment that this harm [*i.e.*, invasion of privacy] is legally cognizable should be given great weight.”); *Thomas*, 2016 WL 3653878, at *11 (declining to “override clear Congressional intent” where “Congress explicitly provided for actual damages as an *alternative* to, not a prerequisite for, the recovery of statutory damages”) (emphasis in original).

This conclusion is fully consistent with Seventh Circuit authority on the injury-in-fact analysis. Appriss brazenly asserts that *Spokeo* “overrules” Seventh Circuit law that clearly holds that disclosure of personal information, in the presence of a federal statute prohibiting such disclosure, suffices to furnish Article III standing. *See* ECF No. 151 at 9 (citing *Sterk v. Redbox Automated Retail, LLC*, 770 F.3d 618 (7th Cir. 2014); *Graczyk v. West Publ’g. Co.*, 660 F.3d 275 (7th Cir. 2011)). Contrary to Appriss’s aspirational and overly aggressive contention, however, both of those authorities remain alive and well.

The *Sterk* court’s standing analysis recognizes, as did *Spokeo*, that while Congress cannot diminish the requirements for standing below the Constitution’s threshold, Congress may “enact statutes creating legal rights, the invasion of which creates standing, even though no injury would exist without the statute.” *Sterk*, 770 F.3d at 623 (quoting *Kyles v. J.K. Guardian Sec. Servs., Inc.*, 222 F.3d 289, 294 (7th Cir. 2000)). The Seventh Circuit’s conclusion that the VPPA is just such a statute is in no way affected by *Spokeo*. Indeed, the Seventh Circuit’s *Sterk* analysis is in perfect alignment with the Third Circuit’s post-*Spokeo* opinion in *In re Nickelodeon*, which also found that plaintiffs alleging unauthorized disclosure of personal

information protected by the VPPA enjoy Article III standing. *In re Nickelodeon*, 2016 WL 3513782, at *7.

Neither does *Spokeo* negatively impact the Seventh Circuit's standing analysis in *Graczyk*. There, the court rejected West Publishing's argument that plaintiffs could not assert DPPA claims where they alleged West engaged in bulk compilation and distribution of drivers' personal information. *Graczyk*, 660 F.3d at 278. The Seventh Circuit found that, by enacting the DPPA, Congress exercised its "power to define injuries and articulate chains of causation that will give rise to a case or controversy where none existed before," by prohibiting and providing a private remedy to redress the obtainment, disclosure, or use of certain categories of personal information. *Id.* (quoting *Mass. v. EPA*, 549 U.S. 497, 516 (2007)). In *Spokeo*, the Supreme Court relied on this identical line of reasoning to explain that new causes of action can be created by Congress to redress intangible but concrete injuries not otherwise recognized in the common law. *Spokeo*, 136 S. Ct. at 1549 (citing *Lujan*, 504 U.S. at 580 (Kennedy, J., concurring)).

Appriss's arguments amount to a request that this Court rewrite the *Spokeo* opinion and override Congress's lawful exercise of its constitutional power. This Court should reject those arguments, recognize the continued validity of binding Seventh Circuit precedent, and deny Appriss's motion.

IV. PLAINTIFFS' INVASION-OF-PRIVACY INJURIES ARE "SUBSTANTIVE," NOT "PROCEDURAL."

Appriss's refrain that Plaintiffs complain of "bare procedural violations" rests on the erroneous assumption that *any* statutory violation is "bare" and "procedural." The portion of the DPPA under which Plaintiffs' claims are proceeding, 18 U.S.C. § 2724(a), creates substantive rights, including the right of registered drivers to have certain specific categories of information protected from unauthorized disclosure. While other provisions, such as 18 U.S.C. §§ 2721(c),

create procedural rights,⁷ Plaintiffs allege that Appriss violated the DPPA's substantive prohibition against disclosure of specific categories of information pertaining to them. In other words, Plaintiffs complain that their substantive rights to the privacy of their DPPA-protected personal information were invaded when Appriss sold that information to third parties for impermissible purposes – the very type of harm the DPPA was enacted to prohibit and remedy. Thus, the Supreme Court's discussion of "bare procedural violations," *Spokeo*, 136 S. Ct. at 1549-50, which concerns only statutory requirements like "required notice," *id.* at 1550, has no bearing on this case.⁸

Other courts have analyzed the difference between procedural and substantive rights following *Spokeo*. For example, in *Thomas*, the court held that the Fair Credit Reporting Act ("FCRA") provision under which the plaintiffs' claim was brought creates "substantive rights," and held that defendants' "breach of the statute is not a 'bare procedural violation' of a technical requirement." *Thomas*, 2016 WL 3653878, at *11. Importantly, the FCRA provision at issue in that case was a prohibition of the unauthorized disclosure of personal information in credit

⁷ 18 U.S.C. § 2721(c) provides a process according to which authorized recipients of protected information must maintain records of re-disclosure of such information.

⁸ Appriss may maintain that the *Spokeo* opinion's use, in *dicta*, of the inaccurate zip code example to demonstrate that certain statutory violations do not "cause harm or present any material risk of harm," 136 S. Ct. at 1550, belies this understanding of "bare procedural violations." That argument would fail on two grounds. First, it would miss the point entirely: Plaintiffs' alleged injuries do not resemble the inaccurate zip code example, which entails no invasion of privacy. Second, it would fail because, as a careful reading of the opinion clearly shows, the Supreme Court did not include the zip code example in the category of "bare procedural violations." The sole example of a "bare procedural violation" given by the Supreme Court is that wherein "a consumer reporting agency fails to provide the required notice to a user of the agency's consumer information," an example that is illustrative of a "bare procedural violation" because the purpose of the FCRA is to ensure credit reports are accurate. *Id.* Indeed, the Supreme Court expressly noted that failure to provide the statutorily required notice may not cause concrete harm because the information reported "may [nevertheless] be entirely accurate." *Id.* The zip code example illustrates not a "bare procedural violation" but a peripheral FCRA violation that, in the Court's view, is "difficult to imagine" causing concrete harm. *Id.* There is no difficulty imagining the concrete harm Plaintiffs suffered here, however, because the sale and disclosure of their protected information is a violation of the core substantive prohibition of the DPPA.

reports. *Id.* at *8. The court explained that the plaintiffs “have alleged a violation of their statutorily created right to privacy and confidentiality of their personal information,” and that “[t]he common law has long recognized a right to personal privacy, and ‘both the common law and the literal understandings of privacy encompass the individual’s control of information concerning his or her person.’” *Id.* at *10 (quoting *Dept. of Justice v. Reporters Comm. for Freedom of Press*, 489 U.S. 749, 763 (1989)). Additionally, the court recognized that “it is well-settled that Congress may create a statutory right to privacy in certain information that strengthens or replaces the common law,” such that “where a defendant fails to comply with statutory prerequisites protecting the plaintiff’s privacy, the plaintiff’s privacy has been unlawfully invaded and he has suffered concrete injury, regardless of actual damages.” *Id.*

Similarly, in *Mey*, the court explained that the TCPA provides “substantive prohibitions of actions directed toward specific consumers” rather than mere procedural rights such as notice requirements. *Mey*, 2016 WL 3645195, at *2. That court also found that “[i]nvasion of privacy is just such an intangible harm recognized by the common law,” *id.* at *3, and that “[e]ven if invasion of privacy were not a harm” so recognized, “it would meet the requirement of concreteness as interpreted by *Spokeo* because Congress so clearly identified it as a legally cognizable harm.” *Id.* at *4. The same is true with respect to the DPPA, which furnishes substantive prohibitions of actions (namely, those resulting in the obtainment, disclosure, or use of protected categories of personal information) directed toward a particular population (licensed drivers).⁹

⁹ See also *Guarisma v. Microsoft Corp.*, No. 15-24326-CIV, 2016 WL 4017196, at *3 (S.D. Fla. July 26, 2016) (holding that “Congress created a substantive right for consumers to have their personal credit card information truncated on printed receipts [in enacting the Fair and Accurate Credit Transactions Act (“FACTA”)],” rather than “merely creat[ing] a procedural requirement for credit card-using companies to follow.”).

The *Spokeo* defendant requested a ruling that would have eliminated statutory causes of action (and/or actions seeking only statutory damages), but the Supreme Court declined to issue that ruling. Appriss’s argument is mere counter-factual aspiration grounded in an imaginary world in which the Supreme Court outlawed statutory claims. But this case is being litigated in the real world. Appriss’s argument should be rejected.

V. EVEN IF PLAINTIFFS’ INVASION-OF-PRIVACY INJURIES QUALIFIED AS MERELY “PROCEDURAL,” THOSE INJURIES ARE SUFFICIENTLY CONCRETE.

Contrary to Appriss’s repeated assertion that “bare procedural violations” of statutes are, following *Spokeo*, no longer actionable, the Supreme Court unequivocally held that “the violation of a procedural right granted by statute *can be sufficient* in some circumstances to constitute injury in fact.” 136 S. Ct. at 1549 (emphasis added). Those circumstances include cases involving harms that “were previously inadequate in law” which were “elevat[ed]” by Congress “to the status of legally cognizable injuries,” *id.* (quoting *Lujan*, 504 U.S. at 578), and harms that are “difficult to prove or measure” (such as libel or slander *per se*). *Id.* (citing Restatement (First) of Torts §§ 569-70). By enacting the DPPA, Congress elected to enlarge the protection of certain specified categories of personal information – namely, “information that identifies an individual, including an individual’s photograph, social security number, driver identification number, name, address (but not the 5-digit zip code), telephone number, and medical or disability information,” 18 U.S.C. § 2725(3) – in motor vehicle records. Even if Plaintiffs’ invasion-of-privacy injuries are deemed “procedural” in nature – although they are not – those injuries would nevertheless satisfy Article III’s concreteness requirement.

The harm associated with violation of 18 U.S.C. § 2724(a) is sufficiently similar to the harms considered in *Akins* and *Public Citizen*, upon which the Supreme Court relied in *Spokeo*. In *Akins*, the Supreme Court held that plaintiffs’ “inability to obtain information” about a group’s

political contributions and expenditures, which a federal statute allegedly required the Federal Election Commission to make public, satisfied the injury-in-fact requirement. *Akins*, 524 U.S. at 21. The Court reasoned that, since such “information would help them [and others] to evaluate candidates for public office ..., and to evaluate the role that [the group’s] financial assistance might play in a specific election,” their injury is “concrete and particular.” *Id.* Although this theory of injury – a deprivation of information – arguably lacks a historic root in common law practice and entails no monetary or physical injuries, Congress saw fit to “elevate” it to the status of a legally cognizable harm. “[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) (citing *Akins*, 524 U.S. at 20-25; *Public Citizen*, 491 U.S. at 449).

In *Public Citizen*, advocacy groups sought and were refused access to records that, under the Federal Advisory Committee Act (“FOIA”), allegedly should have been disclosed. *Public Citizen*, 491 U.S. at 449. The Supreme Court found the groups’ inability to obtain the requested information “constitutes a sufficiently distinct injury to provide standing to sue.” *Id.* As in *Akins*, although this theory of injury arguably lacks a historic root in the common law and entails no monetary or physical injuries, Congress “elevated” it to the status of a legally cognizable claim, and so no “additional” harm must be asserted.¹⁰

Even if Plaintiffs’ invasion-of-privacy injuries are erroneously considered “procedural” in nature, this precedent strongly supports Plaintiffs. The injuries resulting from the conduct alleged in *Akins* and *Public Citizen* are procedural in that the defendants’ refusals to provide the

¹⁰ The Supreme Court has found Article III standing in other cases involving non-pecuniary, intangible injuries lacking a historic root in the common law and which appear to be “procedural” in nature. *See, e.g., Dept. of Justice v. Reporters Comm. for Freedom of Press*, 489 U.S. 749 (1989) (Article III standing present where party requesting information under Freedom of Information Act (“FOIA”) was denied information allegedly subject to disclosure); *Dept. of Justice v. Julian*, 486 U.S. 1 (1988) (same); *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 373-74 (1982) (deprivation of information about housing availability constitutes “specific injury” permitting Article III standing).

requested information were allegedly made in violation of a statute's procedural requirements. Similarly, here, Appriss's impermissible disclosure to third parties of Plaintiffs' protected personal information was made in violation of certain of the DPPA's express requirements, including the requirement of providing notice and obtaining express consent prior to disclosing such information absent a statutorily permissible use. *See* 18 U.S.C. § 2721(b)(13).

Moreover, like *Akins* and *Public Citizen*, the injuries Plaintiffs complain of here are precisely the types of injuries the relevant statutory framework was meant to prohibit and remedy. Any damages incurred in these circumstances would be "difficult to prove or measure." *Spokeo*, 136 S. Ct. at 1549; *see also Kehoe*, 421 F.3d at 1213 ("Damages for a violation of an individual's privacy are a quintessential example of damages that are uncertain and possibly unmeasurable. Since liquidated damages are an appropriate substitute for the potentially uncertain and unmeasurable actual damages of a privacy violation, it follows that proof of actual damages is not necessary for an award of liquidated damages."). Thus, here, even allegedly procedural violations of the DPPA suffice to confer Article III standing. *Spokeo*, 136 S. Ct. at 1549 ("[A] plaintiff in such a case need not allege any *additional* harm beyond the one Congress has identified.") (emphasis in original).

Accordingly, even if this Court finds Plaintiffs' invasion-of-privacy injuries to be "procedural" in nature, those injuries are sufficiently concrete to confer Article III standing. Appriss's motion should be denied.

VI. PLAINTIFFS ALSO SUFFERED INFORMATIONAL INJURIES SUFFICIENT TO CONFER STANDING.

Appriss sold Plaintiffs' protected personal information solely for its own financial gain, which is not a "permissible use." *See generally*, 18 U.S.C. § 2721(b) (setting forth permissible use exceptions); *Maracich*, 133 S. Ct. at 2198. Absent the application of a specific exception,

Appriss could only have lawfully engaged in such conduct if Plaintiffs provided their “express consent,” as defined by the Act (18 U.S.C. § 2725(5)), to the disclosure of their protected information. Thus, by enacting the DPPA, Congress created a right for the benefit of registered drivers, like Plaintiffs, to be informed of Appriss’s intent to sell their information *prior to* any such transaction, and upon obtaining such notice, to either grant or refuse consent to such disclosure. Appriss deprived Plaintiffs of this statutory protection, and that deprivation constitutes a separate injury that satisfies Article III’s concreteness requirement. *Spokeo*, 136 S. Ct. at 1549-1550 (citations omitted).

As discussed in Section V, *supra*, two authorities upon which the Supreme Court relied in *Spokeo – Akins* and *Public Citizen* – demonstrate that deprivation of information subject to disclosure under federal statutes constitutes a concrete injury. In neither case were the plaintiffs’ deprivation-of-information injuries accompanied by additional harms of any kind. Instead, those injuries were solely comprised of the fact that certain information allegedly required to be disclosed under the provisions of federal statutes was withheld. *Akins*, 524 U.S. at 20-25; *Public Citizen*, 491 U.S. at 449. Similarly, by failing to seek Plaintiffs’ express consent to the disclosure of their protected information, Appriss denied Plaintiffs their DPPA-protected right to information about the potential disclosure of that information, thus causing them concrete harm.

For decades, the Supreme Court has recognized that the infringement of a statutory right to receive information is sufficient to establish an Article III injury-in-fact, and *Spokeo* reaffirms this point. *Spokeo*, 136 S. Ct. at 1549; *see also Havens Realty*, 455 U.S. at 374. Circuit courts have also regularly endorsed this principle – including after *Spokeo*. *See, e.g., Church v. Accretive Health, Inc.*, No. 15-15708, 2016 WL 3611543, at *3 (11th Cir. Jul. 6, 2016) (finding Article III standing where plaintiff alleged debt collector failed to make informational

disclosures mandated by the Fair Debt Collection Practices Act) (citing *Spokeo*); *Heartwood v. U.S. Forest Serv.*, 230 F.3d 947, 952 n.5 (7th Cir. 2000) (recognizing that “cognizable injury-in-fact” exists “for plaintiffs who are deprived of” information required to be disclosed under the National Environmental Policy Act) (citing *Akins*).

The same conclusion follows here. Appriss’s motion should be denied.

VII. OTHER COURTS HAVE REJECTED THE VERY ARGUMENTS RAISED BY APPRISS IN THE WAKE OF SPOKEO.

Since the Supreme Court’s decision in *Spokeo*, courts across the country have been flooded with dismissal motions filed by defendants breathlessly making the same arguments Appriss raises here. In virtually all of those cases, those arguments have been roundly rejected. *See, e.g., In re Nickelodeon*, 2016 WL 3513782; *Church*, 2016 WL 3611543; *McCamis v. Servis One, Inc.*, No. 8:16-CV-1130-T-30AEP, 2016 WL 4063403, at *2 (M.D. Fla. July 29, 2016); *Cour v. Life360, Inc.*, No. 16-cv-805-TEH, 2016 WL 4039279, at *2 (N.D. Cal. July 28, 2016); *Guarisma*, 2016 WL 4017196, at *3; *Dickens v. GC Servs. L.P.*, No. 8:16-cv-803-T-30TGW, 2016 WL 3917530 (M.D. Fla. July 20, 2016); *Jaffe v. Bank of Am., N.A.*, No. 13 CV 4866 (VB), 2016 WL 3944753, at *3-4 (S.D.N.Y. July 15, 2016); *Altman v. White House Black Market, Inc.*, No. 1:15-cv-2451-SCJ, 2016 WL 3946780, at *5 (N.D. Ga. July 13, 2016) (rejecting erroneous *Spokeo* analysis in magistrate judge’s report); *Lane v. Bayview Loan Servicing, LLC*, No. 15 C 10446, 2016 WL 3671467, at *3-5 (N.D. Ill. July 11, 2016); *Caudill v. Wells Fargo Home Mortg., Inc.*, No. 5:16-cv-066-DCR, 2016 WL 3820195, at *1-2 (E.D. Ky. July 11, 2016); *Thomas*, 2016 WL 3653878; *Mey*, 2016 WL 3645195; *Boelter v. Hearst Comm’ns., Inc.*, No. 15 Civ. 3934 (AT), 2016 WL 3369541, at *3 (S.D.N.Y. June 17, 2016); *see also Chapman v. Dowman, Heintz, Boscia & Vician, P.C.*, No. 2:15-cv-120 JD, 2016 WL 3247872, at *1 n.1

(N.D. Ind. June 13, 2016) (acknowledging that *Spokeo* “largely reiterated long-standing principles of Article III standing, and did not clearly disrupt appellate precedent”).

Appriss strives vainly to move this mountain of authority by appealing to two cases in which, according to it, courts “followed the Supreme Court’s direction” in *Spokeo* by dismissing claims for lack of standing. ECF No. 151 at 13 (citing *Khan v. Children’s Nat’l Health Sys.*, 2016 WL 2946165 (D. Md. May 19, 2016); *Smith v. The Ohio State Univ.*, No. 2:15-CV-3030, 2016 WL 3182675 (S.D. Ohio June 8, 2016)). These cases are readily distinguishable.

In *Smith*, the district court considered plaintiff’s standing to pursue claims under the FCRA, the same statute at issue in *Spokeo*. *Smith*, 2016 WL 3182675, at *1. The *Smith* plaintiffs were applicants for employment to whom the defendant provided disclosure and authorization forms, which allegedly contained “extraneous information such as a liability release, in violation of the FCRA.” *Id.* Relying upon the Supreme Court’s observation that “[a] violation of one of the FCRA’s procedural requirements may result in no harm,” the *Smith* court found that this plaintiff’s claim indeed resulted in no harm and dismissed the complaint. *Id.* at *4 (quoting *Spokeo*, 136 S. Ct. at 1540). The *Smith* plaintiffs were unable to credibly claim that their privacy was invaded, or that they were otherwise injured, by the inclusion of “extraneous information such as a liability release” in an employment form.

Here, by contrast, Plaintiffs’ claims arise under a completely different statute specifically designed to protect driver privacy, and do not assert that merely procedural rights flowing from a company’s technical statutory responsibilities have been violated. Instead, Plaintiffs assert that Appriss knowingly violated the substantive privacy protections afforded to them under the DPPA and that their protected privacy interests were invaded. Additionally, to the extent the *Smith* court impliedly rejected the concreteness of privacy injuries in general – and it did not – it would

have committed clear error in doing so, as demonstrated by the arguments presented *supra* and the multitude of other courts, including circuit courts, flatly rejecting that conclusion. *See, e.g., In re Nickelodeon*, 2016 WL 3513782; *Church*, 2016 WL 3611543.

Khan is also distinguishable. There, the plaintiff asserted various claims relating to a data breach engineered by hackers. *Khan*, 2016 WL 2946165, at *1. The email accounts of certain employees “had been *potentially* exposed in a way that *may* have allowed hackers to access” certain personal information of patients, including plaintiff. *Id.* (emphasis added). The plaintiff did not establish that her own, or any other patient’s, personal information had *actually* been obtained, let alone misused. *Id.* After examining data breach case law from across the country, the court concluded that the alleged injuries sustained by the plaintiff were not “certainly impending” because there was no allegation or evidence that the data breach resulted in any fraudulent financial transactions or other instances of identity theft. *Id.* at *5.

Appriss’s reliance on *Khan* is utterly misplaced. Unlike here, the *Khan* plaintiff’s alleged injury was a “future injury” that was marred by the uncertainty as to whether anyone actually obtained the plaintiff’s information, and which the court analyzed under the Supreme Court’s *Clapper* opinion, not *Spokeo*. *Khan*, 2016 WL 2946165, at *2-5. Indeed, the *Khan* court’s brief mention of *Spokeo* occurs only *after* the standing question had been resolved under the *Clapper* analysis. *See id.* at *7. The sole point for which the *Khan* court cites *Spokeo* is the uncontroversial one that a procedural violation *for which concrete harm is lacking* does not give rise to standing. *Id.* Moreover, unlike here, the plaintiff in *Khan* was unable to point to any legally cognizable interest expressly recognized by Congress through the enactment of a statutory scheme that seeks to protect her from the specific type of harm she alleged.

And indeed, unlike *Khan*, this case is not a data breach suit concerning a speculative, uncertain future injury. Rather, Plaintiffs' claims here are proceeding under a federal statute that specifically enlarges the protections afforded to particular categories of personal information associated with drivers and motor vehicle records. Plaintiffs' protected personal information has definitely, certainly, and admittedly already been sold and disclosed to third parties by Appriss, and Plaintiffs will prove at trial that this was done in contravention of the DPPA's prohibitions. As such, Plaintiffs do not merely speculate that their privacy may one day in the future be invaded or that their information may possibly have been disclosed; their privacy interests have *already* been substantially invaded. Of course, Plaintiffs also suffer an increased risk of harm flowing from Appriss's unlawful sale and disclosure of their DPPA-protected personal information, including the risk that their information will be misused by persons that have obtained it thanks only to Appriss's misconduct. But the concreteness analysis ends with the analysis of "history and the judgment of Congress," as set forth in Sections II and III, *supra*.

This Court should not be the first to endorse the specious arguments Appriss now advances. Its motion should be denied.

VIII. PLAINTIFFS' REQUESTED REMEDY HAS NO BEARING ON THE ISSUE OF ARTICLE III STANDING.

Appriss attempts to bolster its incorrect reading of *Spokeo* and its distortion of the principles of Article III standing in general by cherry-picking from the record in this case. Appriss insists that, because Plaintiffs do not claim to have suffered harms like stalking or physical injuries, they could not have suffered a concrete injury. As demonstrated in the preceding sections, however, this argument is legally incorrect. But it also fails for three further reasons. In addition to mischaracterizing the record and relying erroneously on lay witness testimony for the establishment of a legal conclusion, the argument falters because the fact that

Plaintiffs seek only liquidated statutory damages under the DPPA simply has no bearing on the legal question before the Court, *i.e.*, whether Plaintiffs have Article III standing.

Appriss relies principally on Plaintiffs' interrogatory responses for this argument. Appriss's interrogatory number 5 asks for a description of the "damages" Plaintiffs "claim" in this litigation. Plaintiffs accurately responded that they "seek statutory damages" under the DPPA. *See* ECF No. 152-1 at 7 (Dunkin); ECF No. 152-2 at 6-7 (Whitaker). The interrogatory simply does not seek information regarding the *injuries or harms* Plaintiffs suffered. It uses legal terminology (*i.e.*, damages claimed) that calls for a legal response, and Plaintiffs explained in response that the damages they seek are those allowed by the DPPA. The interrogatory cannot fairly be read to inquire into the factual bases for Article III standing to sue, that is, the *de facto* injuries sustained by Plaintiffs. Appriss mischaracterizes this portion of the record.

Appriss's attempts to use Plaintiffs' deposition testimony against them also fail. It is well settled that lay witnesses may not supply legal conclusions (such as whether they enjoy standing or are entitled to particular categories of damages). Any attempt to do so is both inadmissible under Federal Rule of Evidence 701 and an impermissible usurpation of this Court's control over legal issues. *See* Fed. R. Evid. 701 (prohibiting lay opinion testimony that is not rationally based on the witness's perception, not helpful to determining a fact in issue, and/or which must be based on specialized knowledge, such as law); *Larsen v. Barrientes*, No. 1:09-cv-55, 2010 WL 2772325, at *3 (N.D. Ind. July 12, 2010) (noting that "lay testimony offering a legal conclusion is inadmissible. . . .") (quoting *U.S. v. Noel*, 581 F.3d 490, 496 (7th Cir. 2009)). Neither Plaintiff testified that they do or do not enjoy standing, or that they are or are not legally entitled to seek any particular category of damages. To the extent Appriss mischaracterizes Plaintiffs'

depositions to argue that they testified that they “suffered no actual injury” (ECF No. 151 at 3, 5), this argument must fail.

Finally, the fact that Plaintiffs seek only liquidated statutory damages under the DPPA is irrelevant to the question whether Plaintiffs have Article III standing. No court has held otherwise – including the Supreme Court in *Spokeo*. Appriss, in its motion, has systematically conflated the standing inquiry with the damages inquiry, and has further conflated the concept of damages with the concepts of out-of-pocket monetary loss and physical injury, in a futile attempt to show that Plaintiffs lack standing *because* they do not complain of such harms. This does not, and as a matter of law could not, follow. The key lesson of *Spokeo* is, indeed, that the injury-in-fact requirement can be satisfied by non-pecuniary, non-physical, intangible injuries that have traditionally been recognized as grounds for a lawsuit in the common law, or that have been elevated to the status of legally cognizable harms based on the judgment of Congress. *Spokeo*, 136 S. Ct. at 1549. *Spokeo* did not hold, as Appriss wishes, that plaintiffs cannot assert claims seeking solely statutory liquidated damages. *See Mey*, 2016 WL 3645195 at *3 (noting that “[i]n *Spokeo*, the defendant sought a ruling that would have eviscerated causes of action seeking statutory damages” but observing that “the Supreme Court did no such thing”). Indeed, *Spokeo* did not even touch on the relationship between *standing* and *remedies*. The Court should not make the errors Appriss invites it to make.

CONCLUSION

Spokeo did not create new law in recognizing that Article III standing requires a concrete injury-in-fact. Instead, *Spokeo* reaffirms well-established principles of standing, including the notion that Congress has the ability to create or expand upon substantive rights and define injuries and chains of causation that will give rise to standing, even where none existed in historical common-law practice. Plaintiffs’ injuries have historical antecedents in the common

law tradition, and the judgment of Congress in enlarging the protection of certain categories of personal information by enacting the DPPA must be respected. Accordingly, Plaintiffs have standing to pursue their claims for statutory damages based on the invasion of their DPPA-protected privacy interests, and Appriss's motion must be denied.

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CERTIFICATE OF SERVICE

I hereby certify that on August 4, 2016, I electronically filed the foregoing with the Clerk of the Court using the CM/CM/ECF system which sent notification of such filing to the following:

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