IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI SOUTHERN DIVISION

TIMOTHY WOODS, *Individually and as a representative of the class,*	)	
Plaintiffs,	)	
v.	)	Case No. 4:15-cv-00535-SRB
CAREMARK, L.L.C.,	)	
Defendant.	)	

ORDER

Before the Court is Defendant's Motion for Summary Judgment on Standing (Doc. #73) filed by Defendant Caremark, L.L.C. (Caremark). For the reasons stated herein, the motion is GRANTED. Also before the Court is Plaintiff Timothy Woods' (Woods) Motion for Leave to File Second Amended Complaint and Supporting Documents under Seal and to Publicly File a Redacted Version of the Second Amended Complaint. (Doc. #58). The motion is DENIED as futile because the proposed Second Amended Complaint does not cure Woods' lack of standing.

I. BACKGROUND

Caremark moves for summary judgment arguing that Woods lacks standing under Article III because Woods has not suffered a concrete injury. Woods claims to have suffered an informational injury and invasion of privacy, which he argues are concrete injuries, caused by Caremark's violation of the Fair Credit Reporting Act's stand-alone disclosure requirement. Woods also seeks leave to file a Second Amended Complaint. This Court finds that Woods lacks standing and that allowing Woods to file his proposed Second Amended Complaint would be futile.

Considering the parties' factual positions as reflected in the briefing as well as the record made at the in-person hearing on July 9, 2016, in the light most favorable to the non-moving party, the Court finds the relevant facts to be as follows:

On or around June 18, 2013, Woods applied for a customer care representative position with Caremark. (Doc. #74-2, Woods Dep. Tr. 10:16–25, 11:1–2, 18:12–15). Caremark invited Woods to an open house taking place on or around June 20, 2013. (Woods Dep. Tr. 18:15–18). When Woods attended the open house, Caremark provided Woods with an Authorization Form for Consumer Reports that read, in part:

> In connection with your application for employment (including contract for services), understand that consumer reports or investigative consumer reports which may contain public information may be requested or made on you including consumer credit, criminal records, driving record, education, prior employment verification, workers compensation claims and others. These reports will include experience information along with reasons for termination of past employment. Further, understand that information from various Federal, State, local and other agencies which contain your past activities will be requested. A consumer report containing injury and illness records and medical information may be obtained only after a tentative offer of employment has been made.
>
> By signing below, you hereby authorize without reservation, any party or agency contacted by this employer to furnish the above mentioned information. You further authorize ongoing procurement of the above mentioned report at any time during your employment (or contract).

(Doc. #19-1, p. 2; Woods Dep. Tr. 36:17–25, 37:11–13). The Authorization Form for Consumer Reports included an authorization, which read:

> You hereby authorize and request, without any reservation, any present or former employer, school, police department, financial institution, division of motor vehicles, consumer reporting agencies, or other persons or agencies having knowledge about you to furnish First Advantage with any and all background information in their possession regarding you, in order that your employment qualifications may be evaluated.

(Doc. #19-1, p. 2). The Authorization Form for Consumer Reports also included two paragraphs of state-specific notices and spaces for the applicant to fill in personal information, such as name, address, and social security number. (Doc. #19-1, p. 2).

At the bottom of the spaces provided for personal information, the Authorization Form for Consumer Reports included a space for the applicant to sign. (Doc. #19-1, p. 2). Woods signed the Authorization Form for Consumer Reports on June 20, 2013. (Doc. #19-1, p. 2; Woods Dep. Tr. 37:4–10). Woods knew that "there would have been some kind of request for background investigation or employment" because "[e]very job that I've ever applied for has asked something about criminal background check or employment verification or, in this case, something to do with a Fair Credit Reporting Act." (Woods Dep. Tr. 34:18–22, 35:5–13). On July 16, 2013, the background report on Woods was completed. (Doc. #46, p. 4). Woods then assumed that Caremark had retrieved the background report. (Woods Dep. Tr. 48:18-23). This Court finds these admissions central to its decision.

Woods sued Caremark PhC, L.L.C. in the 16th Judicial Circuit Court of Jackson County, Missouri stating one claim on behalf of himself and a class of individuals – failure to provide a stand-alone disclosure in violation of FCRA provision 15 U.S.C. § 1681b(b)(2). Caremark PhC, L.L.C. removed the case to the Western District of Missouri. Woods then filed a first amended complaint against Caremark PhC, L.L.C., which was later amended in order to substitute Caremark, L.L.C. as a defendant in place of Caremark PhC, L.L.C. The operative First Amended Class Action Petition includes the same, single claim on behalf of Woods and a class of individuals he seeks to represent – failure to provide a stand-alone disclosure. On April 29, 2016, Woods sought leave of Court to file a Second Amended Complaint to add a related

defendant, CVS Pharmacy, Inc. Caremark opposes the motion for the same reason Caremark seeks summary judgment on the operative complaint, i.e. Woods lacks standing.

II. LEGAL STANDARD

Defendant Caremark moves for summary judgment on standing. Caremark brings its motion for summary judgment in accordance with Fed. R. Civ. P. 56. Article III extends judicial power to "cases" and "controversies." U.S. Const. art. III, § 2. "'Under Article III of the United States Constitution, federal courts may only adjudicate actual cases or controversies.'" *Constitution Party v. Nelson*, 639 F.3d 417, 420 (8th Cir. 2011) (quoting *Pucket v. Hot Springs Sch. Dist. No. 23-2*, 526 F.3d 1151, 1157 (8th Cir. 2008)). "[I]t is Article III standing that enforces this case-or-controversy requirement." *Id.* (citing *Pucket*, 526 F.3d at1157).

The plaintiff must have standing for the court to have jurisdiction. *Hargis v. Access Capital Funding, LLC*, 674 F.3d 783, 793 (8th Cir. 2012). For a plaintiff to have standing, "[t]he 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." *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016) (citations omitted) (*Spokeo*). Typically, the party invoking federal jurisdiction must show the three elements of standing. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992); *FW/PBS, Inc. v. Dallas*, 493 U.S. 215, 231, 110 S. Ct. 596, 107 L. Ed. 2d 603 (1990). When the defendant challenges standing at the summary judgment stage, the plaintiff must submit affidavits or other evidence that demonstrate through specific facts that he has suffered an injury in fact. *Lujan*, 504 U.S. at 561; *Hargis*, 674 F.3d at 790. The plaintiff "must establish that there exists no genuine issue of material fact as to justiciability or the merits." *DOC v. United States House of Representatives*, 525 U.S. 316, 329, 119 S. Ct. 765 (1999) (citations omitted). *But see City of Clarkson Valley v.*

Mineta, 495 F.3d 567, 569 (8th Cir. 2007) (citation omitted) ("It is well established that standing is a jurisdictional prerequisite that must be resolved before reaching the merits of a suit.").

Federal Rule of Civil Procedure 15(a)(2) provides that leave to amend should be freely given "when justice so requires." "While Rule 15 envisions a liberal amendment policy, justice does not require the filing of a futile amendment." *Employers Mut. Cas. Co., Inc. v. Luke Draily Const. Co., Inc.*, Case No. 10–00361–CV–W–DGK, 2010 WL 4853886 at *2 (W.D. Mo. 2010) (citing *Stricker v. Union Planters Bank, N.A.*, 436 F.3d 875, 878 (8th Cir. 2006)).

III. DISCUSSION

Before an employer may obtain an employee's consumer report to evaluate whether to retain that employee, FCRA requires (1) a "clear and conspicuous disclosure" that a consumer report may be obtained for employment purposes (2) that is provided "in a document that consists solely of the disclosure." 15 U.S.C. §§ 1681a(h), 1681b(b)(2)(A)(i). FCRA also requires the consumer to authorize in writing the procurement of the consumer report before the consumer report may be procured for employment purposes. 15 U.S.C. § 1681b(b)(2)(A)(ii). Woods admits he received a disclosure that informed him Caremark would obtain a consumer report on him. Despite receiving the disclosure and despite admitting he knew based on the disclosure that Caremark would obtain his consumer report, Woods alleges Caremark violated FCRA by including extraneous information in the disclosure, i.e. state-specific information and spaces for personal information.

By its motion for summary judgment, Caremark claims that Woods lacks standing under Article III because Woods has not suffered a concrete injury. Even if Woods could put forth evidence of a FCRA violation at trial, Caremark argues that *Spokeo* changed the law in the

Eighth Circuit and that a statutory violation is now insufficient to confer standing. Caremark contends that Woods has not suffered any concrete injury as a result of Caremark's alleged technical violation of the stand-alone disclosure requirement, 15 U.S.C. § 1681b(b)(2)(A)(i). Woods argues that *Spokeo* "broke no new ground and overruled no precedent." Woods claims to have suffered an informational injury and invasion of privacy, which he argues are concrete injuries, caused by Caremark's violation of the stand-alone disclosure requirement.

a. Standing

This Court finds that FCRA's stand-alone disclosure requirement is a procedural requirement that creates a procedural right. *See Spokeo*, 136 S. Ct. at 1545, 1550. Neither party argues that the stand-alone disclosure requirement creates a substantive right. Woods for the first time in a notice of filing supplemental authority summarily states that the alleged FCRA violation violated his substantive rights based on his reading of *Thomas v. FTS USA, LLC*, No. 3:13-cv-825, 2016 WL 3653878 (E.D. Va. June 30, 2016), which is not binding on this Court and with which this Court disagrees. Since *Spokeo*, the Eighth Circuit has not ruled on whether the stand-alone disclosure requirement creates a substantive or procedural right. Moreover, the stand-alone disclosure requirement is analogous to the FCRA provisions, which are procedural requirements, at issue in *Spokeo*. 15 U.S.C. § 1681e(b), (d); *see Spokeo*, 136 S. Ct. at 1545, 1550. Because the Eighth Circuit has provided no binding authority and the stand-alone disclosure requirement is analogous to the provisions at issue in *Spokeo*, this Court finds that the stand-alone disclosure requirement is a procedural requirement specifying the form and format of the "clear and conspicuous disclosure" required by FCRA. 15 U.S.C. § 1681b(b)(2)(A)(i).

When a statutory violation results in the violation of a procedural right, it must be accompanied by a concrete harm or a material risk of concrete harm to constitute a concrete

injury. *Spokeo*, 136 S. Ct. at 1549–50. A plaintiff cannot "allege a bare procedural violation, divorced from any concrete harm, and satisfy the injury-in-fact requirement of Article III." *Id.* at 1549 (citing *Summers v. Earth Island Inst.*, 555 U.S. 488, 496, 129 S. Ct. 1142, 173 L. Ed. 2d 1 (2009) ("[D]eprivation of a procedural right without some concrete interest that is affected by the deprivation . . . is insufficient to create Article III standing.")). By holding that a bare procedural violation that does not cause concrete harm or that does not lead to a material risk of concrete harm is not a concrete injury in fact, the Supreme Court clarified existing law. *Id.* Previously, the Eighth Circuit held that "the actual-injury requirement may be satisfied *solely* by the invasion of a legal right that Congress *created*." *Hammer v. Sam's E., Inc.*, 754 F.3d 492, 498-99 (8th Cir. 2014) (emphasis in original); *see also Charvat v. Mut. First Fed. Credit Union*, 725 F.3d 819, 821 (8th Cir. 2013) ("Once Charvat alleged a violation of the notice provisions of the EFTA in connection with his ATM transactions, he had standing to claim damages."). For the violation of a statutorily-created procedural right to confer standing, *Spokeo* requires more than just a violation of the statute. *Spokeo*, 136 S. Ct. at 1549 ("Article III standing requires a concrete injury even in the context of a statutory violation."). Thus, concrete harm or the material risk of concrete harm are required for Article III standing when Congress created a procedural right.

Because Woods did not suffer an informational injury or an invasion of privacy, neither is a concrete harm that can support standing. Caremark's failure to provide a stand-alone disclosure did not result in an informational injury because Woods received a disclosure that included all of the information required by FCRA. The Supreme Court has 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." *Fec v. Akins*, 524 U.S. 11, 21 (1998); *see also Charvat v. Mut. First Fed. Credit Union*, 725 F. 3d 819, 821 (2013). In support of his informational injury claim,

Woods cites cases holding that plaintiffs have standing when they claim that a statutorily-required disclosure has not been made. *Pub. Citizen v. United States Dep't of Justice*, 491 U.S. 440, 449, 109 S. Ct. 2558, 2564 (1989); *Akins*, 524 U.S. at 21, 25; *Charvat*, 725 F. 3d at 821; *Church v. Accretive Health, Inc.*, No. 15-15708, 2016 U.S. App. LEXIS 12414, *2, 8–9 (11th Cir. July 6, 2016); *see also Lane v. Bayview Loan Servicing, LLC*, No. 15 C 10446, 2016 U.S. Dist. LEXIS 89258, at *11–12, 16 (N.D. Ill. July 11, 2016). By contrast, Woods was not deprived of any information required to be disclosed under FCRA.

Woods' understanding that Caremark would retrieve a background check does not defeat his informational injury claim. *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 373–74, 102 S. Ct. 1114, 1121 (1982); *Charvat*, 725 F.3d at 821. Instead, Woods' receipt of the disclosure—the only one required by FCRA—that included all of the information required by FCRA defeats Woods' informational injury claim. *See Friends of Animals v. Jewell*, No. 15-5223, 2016 WL 3854010, at *6 (D.C. Cir. July 15, 2016) ("A plaintiff suffers sufficiently concrete and particularized informational injury where the plaintiff alleges that: (1) it has been deprived of information that, on its interpretation, a statute requires the government or a third party to disclose to it, and (2) it suffers, by being denied access to that information, the type of harm Congress sought to prevent by requiring disclosure."). *But see Thomas*, 2016 WL 3653878, at *28–29 (holding that a disclosure that does not satisfy the stand-alone requirement constitutes a concrete informational injury). Thus, Woods has not suffered an informational injury.

Caremark's failure to provide a stand-alone disclosure did not result in an invasion of Woods' privacy because Woods understood that Caremark would obtain a background check and consented to the procurement of the background check. By signing the disclosure, Woods knowingly authorized Caremark to procure his consumer report. (Woods Dep. Tr. 37:4–8, 49:7–

18). As required by FCRA, Woods' authorization was obtained before Caremark accessed Woods' consumer report. 15 U.S.C. § 1681b(b)(2)(A)(ii); Doc. #46, p. 4; Woods Dep. Tr. 37:4–8, 49:7–18. Because Woods understood that Caremark would retrieve a background check and authorized Caremark to do so in writing, Woods has not suffered an invasion of privacy. *But see Thomas*, 2016 WL 3653878, at *32–33. This Court may reach a different conclusion absent these admissions. By violating the stand-alone disclosure requirement, Caremark violated Woods' procedural right, but did not cause Woods to suffer an informational injury or an invasion of privacy. Thus, neither the alleged informational injury nor invasion of privacy is a concrete harm that can support standing.

The present case does not involve a circumstance in which the violation of the procedural requirement alone is a concrete injury in fact. *Spokeo*, 136 S. Ct. at 1549. In *Spokeo*, the Supreme Court held that "the violation of a procedural right granted by statute can be sufficient in some circumstances to constitute injury in fact." *Id.* (citing *Akins*, 524 U.S. 11, 118 S. Ct. 1777, 141 L. Ed. 2d; *Public Citizen*, 491 U.S. 440, 109 S. Ct. 2558, 105 L. Ed. 2d 377). However, the Supreme Court suggested that dissemination of an incorrect zip code would violate the requirement to "follow reasonable procedures to assure maximum accuracy" of consumer reports but would not cause concrete harm. 15 U.S.C. § 1681e(b); *Spokeo*, 135 S. Ct. at 1550. Moreover, although FCRA requires consumer reporting agencies "to notify providers and users of consumer information of their responsibilities under the Act," the information provided by a consumer reporting agency may be accurate "even if a consumer reporting agency fails to provide the required notice." 15 U.S.C. § 1681e(d); *Spokeo*, 135 S. Ct. at 1550. As a result of Caremark's violation of FCRA's procedural stand-alone disclosure requirement in the present case, Woods has not suffered an informational injury or an invasion of privacy. Thus, although a

violation of a procedural right can be sufficient for standing, Caremark's violation of Woods' procedural right did not lead to a concrete injury in fact in the present case. This decision is limited to these facts due to Woods' admissions, and this Court can envision future facts that would warrant reaching an opposite conclusion. Additionally, this decision does not turn on the type of damages sought. *See Hammer*, 754 F.3d at 496, 501 (holding that plaintiffs who sought statutory and punitive damages but not actual damages had standing).

b. Dismissal or Remand

Caremark claims that because Woods lacks standing, the case should be dismissed. Woods argues that if he lacks standing, the case should be remanded to state court. When a plaintiff who originally filed in federal court lacks standing, the case should be dismissed. *E.g.*, *Wallace v. ConAgra Foods, Inc.*, 747 F.3d 1025, 1033 (8th Cir. 2014); *Nelson*, 639 F.3d at 420. Article III standing is "a part of the concept of justiciability." *McCarney v. Ford Motor Co.*, 657 F.2d 230, 233 (8th Cir. 1981) (citation omitted). "[A] decision to dismiss based on any of the doctrines under the justiciability heading should preclude relitigation of the same justiciability issue but not a second suit on the same claim even if arising out of the identical set of facts." *Id.* (citation omitted).

Recent Eighth Circuit decisions conflict regarding whether dismissal or remand is appropriate for cases where a defendant removed the case to federal court and the plaintiff lacks standing. *Wallace*, 747 F.3d at 1033; *Hargis*, 674 F.3d at 793. In *Hargis*, the Eighth Circuit dismissed the case for lack of standing. *Hargis*, 674 F.3d at 787, 793. In *Wallace*, the Eighth Circuit remanded the case to state court in accordance with 28 U.S.C. § 1447(c) after finding that the plaintiffs lacked standing and, thus, that the court "lack[ed] subject-matter jurisdiction." *Wallace*, 747 F.3d at 1027, 1033; *see also Higgins Elec., Inc. v. O'Fallon Fire Prot. Dist.*, 813

F.3d 1124 (8th Cir. 2016) (quoting *Miller v. Redwood Toxicology Lab., Inc.*, 688 F.3d 928, 934 (8th Cir. 2012)) ("[I]f [standing] is lacking, a federal court has no subject-matter jurisdiction over the claim."); *Jones v. Gale*, 470 F.3d 1261, 1265 (8th Cir. 2006) (stating that standing is a "prerequisite" for subject-matter jurisdiction). Because Article III standing is "a part of the concept of justiciability," this Court follows the Eighth Circuit's earlier decision in *Hargis*. *Hargis*, 674 F.3d at 793; *McCarney*, 657 F.2d at 233 (citation omitted). Where the plaintiff lacks standing, dismissal is appropriate. *Hargis*, 674 F.3d at 793. Because Woods has not suffered a concrete injury and lacks standing, the Court dismisses the case.

c. Leave to Amend

Woods' motion seeking leave to file a Second Amended Complaint must be denied as futile for the same reasons Caremark's motion for summary judgment must be granted. In Woods' reply in support his motion for leave to amend, he states:

> First, Plaintiff's proposed claim against CVS Pharmacy arises out of the same transaction or occurrence as his claim against Caremark. . . . Plaintiff alleges the exact same claim under 15 U.S.C. § 1681b(b)(2). . . . Nowhere does Plaintiff allege that there were multiple "pull[s]" of his consumer report. . . . Instead, Plaintiff alleges that CVS Pharmacy and Caremark *acted together* in procuring Plaintiff's report.

(Doc. #71, p. 3). By his motion for leave to file an amended complaint, Woods seeks leave to file the same claim based on the same alleged facts against a separate but related entity. As a result, the same standing analysis applies to Woods' proposed Second Amended Complaint necessitating that leave to amend be denied as futile.

IV. CONCLUSION

Accordingly, it is hereby **ORDERED** that Defendant's Motion for Summary Judgment on Standing (Doc. #73) is GRANTED. Plaintiff's Motion for Leave to File Second Amended

Complaint and Supporting Documents under Seal and to Publicly File a Redacted Version of the Second Amended Complaint (Doc. #58) is DENIED as futile.

IT IS SO ORDERED.

/s/ Stephen R. Bough
STEPHEN R. BOUGH
UNITED STATES DISTRICT JUDGE

Dated: July 28, 2016