No. 16-2613

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

DEREK GUBALA,
Individually and on Behalf of All Others Similarly Situated,
Plaintiff-Appellant,

v.

TIME WARNER CABLE, INC., a Delaware corporation,
Defendant-Appellee.

On Appeal from the United States District Court
Eastern District of Wisconsin – Eastern Division
No. 2:15-cv-01078-PP
The Honorable Pamela Pepper

PLAINTIFF-APPELLANT'S REPLY BRIEF

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Plaintiff-Appellant Derek Gubala ("Plaintiff") hereby replies to the Brief Of Appellee ("Def. App. Br.") filed by Defendant-Appellee Time Warner Cable, Inc. ("Defendant"):

I. INTRODUCTION.

Defendant does not deny that it is breaking the law by retaining millions of people's personal information in violation of the Cable Communications Policy Act (the "Cable Act"), 47 U.S.C. § 551(e). Rather, Defendant argues there is nothing Plaintiff or his fellow class members can do about it. Defendant is incorrect.

Plaintiff has a substantive legal right to have Defendant destroy his personal information. Defendant's violation of a federal statute (and Defendant's own privacy policy) is causing harm to Plaintiff's privacy and economic interests in his personal information. By enacting the Cable Act, Congress expressly adjudged that this type of harm, which is comparable to the harm to privacy interests courts have recognized for over a century, is a concrete injury-in-fact under Article III.

Defendant attempts to contort Plaintiff's amending of his complaint into the meritless argument that Plaintiff has an adequate remedy at law and, hence, is not entitled to injunctive relief. This cannot be true because a legal remedy would allow Defendant to continue to retain Plaintiff's personal information—the destruction of which is the only relief sought in this lawsuit. Accordingly, the only way Plaintiff and his fellow class members can be made whole is by an injunction requiring that Defendant destroy their personal information.

Simply put, Plaintiff has Article III standing to pursue his claim for injunctive relief. The District Court should be reversed.

II. ARGUMENT.

A. Plaintiff Sets Forth An Injury-In-Fact That Establishes Article III Standing.

Defendant argues that Plaintiff fails to set forth an injury-in-fact sufficient to confer Article III standing. (Def. App. Br. 8-18.) To the contrary, Plaintiff has described injuries-in-fact in the form of: (1) having his substantive rights violated; (2) suffering a concrete injury to his intangible privacy interests; (3) having his personal information unlawfully retained, even without disclosure of that information to third parties; and (4) suffering a concrete injury to his economic interests in his personal information. Moreover, Defendant's reliance on *Braitberg v. Charter Commc'ns* is misplaced because flaws in the Eighth Circuit's analysis in that case fatally undermine its persuasive value here. Because Plaintiff has Article III standing, the District Court should be reversed.

1. Defendant's Violation Of Plaintiff's *Substantive* Right Confers Article III Standing.

Relying on *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540 (2016), Defendant contends that Plaintiff cannot establish an injury-in-fact arising from Defendant's statutory violation without alleging some additional injury. (Def. App. Br. 10.) Defendant rests this argument on the incorrect proposition that "*Spokeo* applies to and requires a concrete injury for ***all*** statutory violations." (Def. App. Br. 11 (emphasis added).) *Spokeo* does not apply so broadly. *Spokeo*'s directive that a plaintiff show a separate concrete harm in addition to a statutory violation applies only when the statutory violation is *procedural* in nature. Where, as here, the statutory violation is an invasion of a *substantive* right, then no further showing of concrete harm is necessary.

a. *Spokeo* Applies Only To *Procedural* Violations.

In *Spokeo*, the plaintiff alleged that the defendant violated a provision of the Fair Credit Reporting Act ("FCRA") that required the defendant to *follow reasonable procedures* designed to

assure maximum possible accuracy of consumer reports. 136 S. Ct. at 1545. Critically, the provision that was allegedly violated does ***not*** govern an *actual outcome*—it governs only the *procedures* designed to increase the probability that consumer credit reports will be accurate. This means that it is possible that the FCRA could be violated and yet, nevertheless, a plaintiff's credit report would be accurate.

Hence, where a statutory violation is merely *procedural* in nature, a plaintiff must show *additional* concrete harm because it is possible that the violation nevertheless resulted in achieving the statute's desired outcome. *See Spokeo*, 136 S. Ct. at 1550 ("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"); *LaVigne v. First Cmty. Bancshares, Inc.*, --- F. Supp. 3d --- Civil No. 1:15-cv-00934-WJ-LF, 2016 WL 6305992, at *6 (D.N.M. Oct. 19, 2016) ("*Spokeo* recognized that a procedural violation of the FCRA did not *necessarily* result in a harm which the statute seeks to prevent") (emphasis original).

b. Statutory Violations Of *Substantive* Rights Confer Article III Standing.

As the United States Court of Appeals for the Third Circuit has recognized, *Spokeo* did not change the reality that "in some cases an injury-in-fact may exist *solely* by virtue of statutes creating legal rights, the invasion of which creates standing." *In re Nickelodeon Consumer Privacy Litig.*, 827 F.3d 262, 273 (3d Cir. 2016) (emphasis added, quotation omitted). Post-*Spokeo*, courts consistently recognize that the invasion of a *substantive* legal right created by statute is, *on its own*, an injury-in-fact that gives rise to Article III standing. *LaVigne*, 2016 WL 6305992, at *6 (holding violation of the Telephone Consumer Protection Act ("TCPA") was a concrete injury-in-fact where the statute's "substantive prohibition sets it apart from the few cases which have determined that concrete injuries cannot result from bare statutory violations"); *Bellino v. JPMorgan Chase*

Bank, N.A., --- F. Supp. 3d ---, No. 14-cv-3139 (NSR), 2016 WL 5173392, at *9 (S.D.N.Y. Sept. 20, 2016) ("The statutes create a substantive right for Plaintiff . . . and Defendant violated that right. Nothing more is required, here, to demonstrate an injury-in-fact").

Indeed, Defendant's own authority acknowledges that violation of a substantive right created by statute is a concrete injury-in-fact. (Def. App. Br. 12 (citing *Aranda v. Caribbean Cruise Line, Inc.*, --- F. Supp. 3d ---, No. 12 C 4069, 2016 WL 4439935 (N.D. Ill. Aug. 23, 2016); *A.D. v. Credit One Bank, N.A.*, Case No. 14 C 10106, 2016 WL 4417077 (N.D. Ill. Aug. 19, 2016).) In *Aranda* and *A.D.*, Judge Kennelly held that a violation of the TCPA was a concrete injury-in-fact because the statute "does not require the adoption of procedures to decrease congressionally-identified risks. Rather, [the TCPA] . . . directly forbids activities that by their nature infringe the privacy-related interests that Congress sought to protect[.]" 2016 WL 4439935, at *5; 2016 WL 4417077, at *6. Accordingly, the TCPA "establishes substantive, not procedural, rights" and "violation of this substantive right is sufficient to constitute a concrete, *de facto* injury." 2016 WL 4439935, at *6; 2016 WL 4417077, at *7. This sort of *substantive* right is precisely the kind of right created here by the Cable Act—and violated by Defendant.

c. Defendant's Invasion Of Plaintiff's Substantive Legal Rights, As Created By The Cable Act, Is A Concrete Injury-In-Fact.

Defendant asserts that its millions of violations of the Cable Act are not substantive violations because the Cable Act involves "procedural" means of protecting information through the Cable Act's data retention and destruction provision. (Def. App. Br. 11.) This argument mischaracterizes the Cable Act, which provides a cable subscriber with the *substantive* right to have the subscriber's personal information destroyed. 47 U.S.C. § 551(e). This right is

substantive—***not*** procedural—in nature because the Cable Act governs *the ultimate outcome* of the destruction of cable subscribers' personal information.

Defendant's reliance on *McCollough v. Smarte Cart, Inc.*, Case No. 16 C 03777, 2016 WL 4077108 (N.D. Ill. Aug. 1, 2016) proves this point. (Def. App. Br. 11.) In *McCollough*, the plaintiff asserted a claim for unlawful retention of biometric information in violation of the Illinois Biometric Privacy Act ("BIPA"). 2016 WL 4077108, at *1-2. Unlike the Cable Act, BIPA provides merely that an entity in possession of biometric information "must *develop a written policy*, made available to the public, establishing a retention ***schedule and guidelines*** for permanently destroying" biometric information. 740 ILL. COMP. STAT. 14/15(a) (emphasis added). Thus, BIPA requires the creation of procedures designed to increase the probability of biometric information being destroyed—it does not mandate the ultimate destruction of that information. As a result, the plaintiff in *McCollough* was required to show an additional concrete injury-in-fact because, similar to the FCRA provision at issue in *Spokeo*, failing to follow BIPA's procedural directives may not, *per se*, result in the failure to destroy biometric information.

Defendant's reliance on this Court's decision in *Diedrich v. Ocwen Loan Servicing, LLC*, --- F.3d ---, No. 15-2573, 2016 WL 5852453 (7th Cir. Oct. 5, 2016) (Def. App. Br. 17-18) fares no better. *Diedrich* addressed the Real Estate Settlement Procedures Act ("RESPA"), which "sets forth specific ***procedures***" that a lender must follow in responding to a borrower's request for information. *Id.* at *1 (emphasis added). Like the FCRA provision at issue in *Spokeo* and the BIPA provision at issue in *McCollough*, the RESPA provision in *Diedrich* establishes mere *procedural* directives, as opposed to *substantive* rights.

In stark contrast to the statutes at issue in the cases cited by Defendant, the Cable Act has no "procedural" directives governing the destruction of subscribers' information. The Cable Act

does ***not*** say that a cable operator shall merely adopt procedures and guidelines designed to increase the probability of personal information being destroyed. The Cable Act expressly mandates, "A cable operator ***shall destroy*** personally identifiable information[.]" 47 U.S.C. § 551(e). This means the Cable Act governs the *ultimate outcome* of having cable subscribers' information destroyed. By doing so, the Cable Act creates a *substantive* right, the invasion of which is a concrete injury-in-fact that is sufficient for Article III standing—even after *Spokeo*. *See Nickelodeon*, 827 F.3d at 273; *LaVigne*, 2016 WL 6305992, at *6 (post-*Spokeo*, violation of a substantive right is a concrete injury-in-fact that confers Article III standing); *Matera v. Google Inc.*, Case No. 15-CV-04062-LHK, 2016 WL 5339806, at *12 (N.D. Cal. Sept. 23, 2016) (same); *Bellino*, 2016 WL 5173392, at *9 (same); *Wood v. J Choo USA, Inc.*, --- F. Supp. 3d ---, Case No. 15-cv-81487-BLOOM/Valle, 2016 WL 4249953, at *5-6 (S.D. Fla. Aug. 11, 2016) (same); *Guarisma v. Microsoft Corp.*, CASE NO. 15-24326-CIV-ALTONAGO/O'Sullivan, 2016 WL 4017196, at *3 (S.D. Fla. July 26, 2016) (same); *Altman v. White House Black Market, Inc.*, CIVIL ACTION No. 1:15-cv-2451-SCJ, 2016 WL 3946780, at *5 (N.D. Ga. July 13, 2016) (same). Defendant's argument to the contrary should be rejected, and the District Court should be reversed.

2. Plaintiff Has Suffered Concrete Harm To His Privacy Interests.

Defendant argues that American courts' historical recognition of privacy lawsuits (which demonstrates the injury to Plaintiff's privacy interests here) is not determinative. (Def. App. Br. 13.) This argument brazenly misconstrues the Supreme Court's ruling in *Spokeo*, which directed the Ninth Circuit to consider history and the judgment of Congress *in order to determine whether the plaintiff suffered an intangible harm*. 136 S. Ct. at 1549. Contrary to Defendant's contention, the Supreme Court in *Spokeo* expressly stated, "In determining whether an intangible harm constitutes injury in fact, both history and the judgment of Congress play important roles." *Id.* For

the reasons explained in Plaintiff's Opening Brief ("Pl. App. Br."), both history and the judgment of Congress establish that Defendant's unlawful retention of Plaintiff's personal information results in a concrete harm to Plaintiff's privacy interests. (Pl. App. Br. at 14-19.) In particular, the common-law has recognized the right of privacy for over a century, and Congress enacted the Cable Act to protect that right of privacy. (*Id.*)

Defendant asserts that unlawful retention of information has not provided a basis for lawsuits in American courts, relying on the Eighth Circuit's opinion in *Braitberg v. Charter Commc'ns, Inc.*, 836 F.3d 925 (8th Cir. 2016). (Def. App. Br. 13.) But *Braitberg*'s conclusion that the harm created by statute must be *identical* to a common-law harm stretches *Spokeo* too far. *Spokeo* directs that a statutory harm should be *comparable* to a common-law harm. *Carlson v. U.S.*, 837 F.3d 753, 758 (7th Cir. 2016) ("Injury-in-fact can arise from a comparable common-law source"); *Potocnick v. Carlson*, Case No. 13-CV-2093 (PJS/HB), 2016 WL 3919950, at *3 (D. Minn. July 15, 2016) ("*Spokeo* does not require that the harm created by the violation of a statue be identical to the type of harm that will give rise to a recovery under the common law"). As explained further in Plaintiff's Opening Brief, the harm Plaintiff suffers by having his information unlawfully retained is comparable to the harm to privacy interests American courts have recognized for over a century. (Pl. App. Br. 14-15.)

In sum, Plaintiff has suffered concrete harm to his intangible privacy interests and has Article III standing to pursue his claim. Therefore, District Court should be reversed.

3. Unlawful Retention, Without Disclosure, Is A Concrete Injury-In-Fact.

Defendant argues that Plaintiff fails to allege actual harm because: (a) Defendant has not disclosed his information to third parties; and (b) Plaintiff's information has not been compromised. (Def. App. Br. 14, 15-16.) Defendant's disclosure of Plaintiff's personal

information is not necessary—merely the unlawful retention of his information creates a concrete injury-in-fact. Defendant attempts to rely on this Court's decision in *Sterk v. Redbox Automated Retail, LLC*, 672 F.3d 535 (7th Cir. 2012), for the proposition that unlawful retention does not cause harm or actual injury. (Def. App. Br. 14.) However, that decision does not apply here.

Sterk did not address Article III standing's injury-in-fact requirement. Rather, *Sterk* addressed "injury" in the context of whether *actual damages* existed where a defendant unlawfully retains a plaintiff's personal information. 672 F.3d at 535. While Judge Posner does use the word "injury" in his *Sterk* analysis, he analyzes injury synonymously with actual damages. In other words, *Sterk* did not consider what types of injuries that provide for *Article III standing—i.e.*, violations of a substantive right or intangible injuries. Accordingly, *Sterk* does not provide guidance on Article III injury-in-fact. To the extent *McCollough* relies on *Sterk* to conclude that there is no injury-in-fact from unlawful retention of personal information, that conclusion erroneously rests on a flawed application of *Sterk*. 2016 WL 4077108, at *3-4. Hence, this Court should reject Defendant's invitation to hold that Plaintiff has not suffered an injury-in-fact.

Defendant's argument that Plaintiff does not allege a "material risk of harm" stemming from a risk of identity theft misses the point. (Def. App. Br. 15-16.) It is the unlawful retention of Plaintiff's information itself that constitutes an injury-in-fact—the compromise of that information is not necessary for Plaintiff to have Article III standing to pursue his claim under the Cable Act. *Spokeo*, 136 S. Ct. at 1552 ("Our contemporary decisions have not required a plaintiff to assert an actual injury beyond the violation of his personal legal rights to satisfy the 'injury-in-fact' requirement") (Thomas, J., concurring). Thus, Plaintiff has Article III standing here. Defendant's arguments to the contrary should be rejected, and the District Court should be reversed.

4. Plaintiff Has Suffered Concrete Harm To His Economic Interests In His Personal Information.

Defendant argues that the economic injuries to the value of Plaintiff's personal information are "conclusory" and generalized allegations. (Def. App. Br. 15.) Not so. Plaintiff describes in detail how: (a) his personal information has economic value (Supplemental Appendix 21-23); (b) the economic value of his personal information was incorporated into the value of Plaintiff's transaction with Defendant (Supplemental Appendix 24); and (c) Defendant's unlawful retention of Plaintiff's personal information in violation of both the Cable Act and the Defendant's own policy deprived Plaintiff of the full value of his transaction with Defendant (Supplemental Appendix 21, 24). These facts establish the deprivation of the economic value of Plaintiff's personal information, which is an injury-in-fact that confers Article III standing. *See In re Facebook Privacy Litig.*, 572 Fed. Appx. 494, 494 (9th Cir. 2014) (holding that lost sales value of personal information was sufficient to plead damages); *In re Anthem, Inc. Data Breach Litig.*, 162 F. Supp. 3d 953, 993-95 (N.D. Cal. 2016) (acknowledging that loss of value of personal information would constitute a cognizable injury under Article III); *Svenson v. Google, Inc.*, No. 14-cv-04080, 2015 WL 1503429, at *5 (N.D. Cal. Apr. 1, 2015) (deprivation of sales value of personal information constituted damages for breach of contract claim); *Claridge v. RockYou, Inc.*, 785 F. Supp. 2d 855, 866 (N.D. Cal. 2011) (noting that personal information has ascertainable value).

Defendant's authority on this point is unavailing. (Def. App. Br. 15.) In *Chambliss v. Carefirst, Inc.*, the plaintiffs made no allegations that a data breach that compromised the plaintiffs' personal information diminished the value of their transaction with the defendant. --- F. Supp. 3d ---, Civil Action No. RDB-15-2288, 2016 WL 3055299, at *6 (D. Md. May 27, 2016). Here, by contrast, Plaintiff sets forth detailed facts establishing the diminished value of his transaction with

Defendant. (Supplemental Appendix 21-24.) *Burton v. Time Warner Cable Inc.* does not apply because in that case, the court found that allegations of diminished value were not "particularized" to the plaintiff. No. CV 12-06764 JGB (AJWx), 2013 WL 3337784, at *9 (C.D. Cal. Mar. 20, 2013). Here, the District Court expressly held that Plaintiff satisfies the particularized injury prong of Article III's injury-in-fact requirement. (Appendix to Pl. App. Br. 11.)

5. Defendant's Reliance On *Braitberg v. Charter Commc'ns* Is Misplaced.

Defendant relies heavily on the Eighth Circuit's opinion in *Braitberg v. Charter Commc'ns*. (Def. App. Br. 5-6, 8-9, 11, 15, 17.) *Braitberg* is not binding on this Court and, for the reasons explained in Plaintiff's Opening Brief, *Braitberg* should not apply here. (Pl. App. Br. 20-22.) The Eighth Circuit's analysis in *Braitberg* suffered from several defects. ***First*,** the court failed to address whether the Cable Act conferred a *substantive* right, as opposed to merely procedural rights. ***Second*,** the Eighth Circuit's demand that a plaintiff's claim be *identical* to a common-law claim, rather than merely comparable, is neither the law under *Spokeo* nor the law of the Seventh Circuit. ***Third*,** the Eighth Circuit found that the plaintiff made no plausible allegations regarding the economic value to his information whereas here, Plaintiff sets forth detailed facts establishing the diminution in that economic value. These defects are fatal to *Braitberg*'s persuasive value.

B. Plaintiff Properly Stated His Claim For Injunctive Relief.

Defendant contends that Plaintiff has an adequate remedy at law and, accordingly, may not establish a claim for injunctive relief. (Def. App. Br. 20.) However, as Plaintiff demonstrated in his Opening Brief, an award of monetary damages would not result in Defendant *destroying Plaintiff's information*—which is the ***entire basis*** of Plaintiff's claim and the relief that he seeks. Defendant's arguments to the contrary fail.

1. The Cable Act Provides For Injunctive Relief.

Defendant's argument that the Cable Act precludes injunctive relief because it provides for monetary damages fails on its own terms. (Def. App. Br. 21.) The Cable Act states expressly, "The remedy provided by this section shall be in addition to any other lawful remedy available to a cable subscriber." 47 U.S.C. § 551(f)(3). Defendant admits that "[i]njunctive relief ***is available as a remedy*** for a violation of other sections of the Cable Act[.]" (Def. App. Br. 21.) On the face of the statute, a cable subscriber has a remedy for injunctive relief, including for violation of 47 U.S.C. § 551(e). *See also Sterk*, 672 F.3d at 539 ("absent the ***clearest command to the contrary from Congress***, federal courts retain their equitable power to issue injunctions in suits over which they have jurisdiction") (quoting *Califano v. Yamasaki*, 442 U.S. 682, 705 (1979)) (emphasis added).

2. Plaintiff Has No Adequate Legal Remedy.

Defendant claims that because Plaintiff's first complaint sought monetary damages, Plaintiff has made a "binding admission" that a legal remedy is adequate. (Def. App. Br. 21.) This is wrong both on the facts and on the law. ***First***, Plaintiff has made ***no*** allegation that monetary damages would make Plaintiff whole. ***Second***, Plaintiff's request for injunctive relief *in addition to* monetary damages in his original complaint belies Defendant's assertion that Plaintiff admitted that monetary damages were adequate. ***Third***, Plaintiff is entitled to plead alternative, *inconsistent* forms of relief. FED. R. CIV. P. 8(d)(2); *Tamayo v. Blagojevich*, 526 F.3d 1074, 1087 (7th Cir. 2008) ("Although our pleading rules do not tolerate factual inconsistencies in a complaint, ***they do permit inconsistencies in legal theories***") (emphasis added); *Stucchi USA, Inc. v. Hyquip, Inc.*, No. 09-CV-732, 2011 WL 1527033, at *5 (E.D. Wis. Apr. 20, 2011) ("Federal Rule of Civil Procedure 8(e)(2) permits a party to plead alternative theories of relief under both legal and

equitable grounds, even if the theories are inconsistent"); *J. Diamond Ctr., Inc. v. Leslie's Jewelry Mfg. Corp.*, 562 F. Supp. 2d 1009, 1017 (W.D. Wis. 2008) (same).

Plaintiff has established that a legal remedy would be inadequate to make him whole because it would allow Defendant to continue unlawfully retaining his personal information. This clear showing of ongoing harm bears no resemblance to the bare-bones assertions of the "magic words" of injunctive relief featured in Defendant's cited authority. (Def. App. Br. 20.) Accordingly, Plaintiff has sufficiently stated his claim for injunctive relief, and the District Court should be reversed.

III. CONCLUSION.

For the reasons set forth above, this Court should reverse the District Court's order dismissing this case for lack of subject matter jurisdiction and for failure to state a claim, and remand for further proceedings.

DATED: November 17, 2016

Respectfully submitted,

/s/ Joseph J. Siprut

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CERTIFICATE OF COMPLIANCE
WITH TYPE-VOLUME LIMITATIONS, TYPEFACE REQUIREMENTS
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This brief complies with the length limitations of Fed. R. App. P. 32(a)(7) because it is under 15 pages and with the type-volume limitations of Rule 32(a)(7)(B) because it contains 3,522 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). This brief complies with the typeface requirements of Circuit Rule 32, Fed. R. App. P. 32(a)(5), and Fed. R. App. P. 32(a)(6), because its has been prepared using a proportionally spaced typeface using Microsoft Word 2010 with 12-point Times New Roman font.

DATED: November 17, 2016

s/ Joseph J. Siprut
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CERTIFICATE OF SERVICE

I hereby certify that on November 17, 2016, I electronically filed the foregoing with the Clerk of the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system, thereby effecting service on counsel of record who are registered for electronic filing under Circuit Rule 25(a).

s/ Joseph J. Siprut
Joseph J. Siprut