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 OPENING BRIEF

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APPEARANCE & CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 16-2613

Short Caption: Gubala v. Time Warner Cable, Inc.

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party or amicus curiae, or a private attorney representing a government party, must furnish a disclosure statement providing the following information in compliance with Circuit Rule 26.1 and Fed. R. App. P. 26.1.

The Court prefers that the disclosure statement be filed immediately following docketing; but, the disclosure statement must be filed within 21 days of docketing or upon the filing of a motion, response, petition, or answer in this court, whichever occurs first. Attorneys are required to file an amended statement to reflect any material changes in the required information. The text of the statement must also be included in front of the table of contents of the party's main brief. **Counsel is required to complete the entire statement and to use N/A for any information that is not applicable if this form is used.**

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(1) The full name of every party that the attorney represents in the case (if the party is a corporation, you must provide the corporate disclosure information required by Fed. R. App. P 26.1 by completing item #3):

Derek Gubala

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

Siprut PC

Miota Law LLC

(3) If the party or amicus is a corporation:

i) Identify all its parent corporations, if any; and

N/A

ii) list any publicly held company that owns 10% or more of the party's or amicus' stock:

N/A

Attorney's Signature: s/ Joseph J. Siprut Date: 10/4/2016

Attorney's Printed Name: Joseph J. Siprut

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** X **No** ____

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Attorney's Signature: s/ Richard L. Miller II Date: 10/4/2016

Attorney's Printed Name: Richard L. Miller II

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ____ **No** X

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N/A

Attorney's Signature: s/ Jacob E. Miota Date: 10/4/2016

Attorney's Printed Name: Jacob E. Miota

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ____ **No** X

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I. JURISDICTIONAL STATEMENT.

The District Court has jurisdiction under 28 U.S.C. § 1331 because the Second Amended Class Action Complaint (the "Complaint") filed by Plaintiff Derek Gubala ("Plaintiff") alleges a claim arising under the laws of the United States. (Dkt No. 12.)[1] Specifically, Plaintiff asserts a claim under the Cable Communications Policy Act (the "Cable Act"), 47 U.S.C. § 551.

On December 23, 2015, Defendant Time Warner Cable, Inc. ("Defendant") filed a Motion To Dismiss Second Amended Complaint and supporting Memorandum under Fed. R. Civ. P. 12(b)(6). (Dkt No. 17.) Thereafter, on June 17, 2016, the District Court issued a Decision and Order (the "Order") granting Defendant's Motion to Dismiss and dismissing the case. (App. 2, Dkt. No. 38.) The clerk entered a Judgment on June 23, 2016. (App. 1, Dkt No. 43.) Plaintiff's Notice of Appeal was timely filed on June 22, 2016. (Dkt No. 39.)

Because the Order constitutes a final judgment, jurisdiction in the Court of Appeals for the Seventh Circuit exists pursuant to 28 U.S.C. § 1291, which provides jurisdiction over appeals from all final decisions of District Courts. *See also Kaplan v. Shure Bros.*, 153 F.3d 413, 417 (7th Cir. 1998) ("The fact that no judgment document appears in the record . . . does not deprive us of jurisdiction"); *Rothner v. City of Chi.*, 929 F.2d 297, 300 (7th Cir. 1991) (recognizing that "dismissal of the entire case" can support appellate jurisdiction).

[1] Citations to "Dkt No." refer to the District Court's docket entries in the *Gubala* case below, all of which are included in the record on appeal. Citations to "App." refer to the Appendix concurrently filed herewith.

II. STATEMENT OF THE ISSUES.

This appeal raises the following issues:

A. Does the violation of a statute that establishes a substantive right, as opposed to merely procedural requirements, constitute a "concrete" injury-in-fact sufficient to support Article III standing?

B. Does a plaintiff who has his personally identifiable information unlawfully retained without his authorization suffer a "concrete injury" sufficient to support Article III standing?

C. Does a plaintiff whose personally identifiable information is continuing to be unlawfully retained lack an adequate remedy at law, such that injunctive relief is proper, even where monetary damages are available?

III. STATEMENT OF THE CASE.

A. Defendant's Violation Of The Cable Act.

The Cable Act provides that "[a] cable operator shall destroy personally identifiable information if the information is no longer necessary for the purpose for which it was collected and there are no pending requests or orders for access to such information . . . or pursuant to a court order." 47 U.S.C. § 551(e). As a cable operator, Defendant requires subscribers to provide personally identifiable information in order to receive cable service. (Dkt No. 12 ¶19.) Upon obtaining such information, Defendant maintains it in a digital system containing every subscriber's personal information and adds to each subscriber's file as more information is acquired. (Dkt No. 12 ¶20.) Defendant's uniform policy has been to retain subscribers' personal information indefinitely, even after subscribers' accounts have been terminated. (Dkt No. 12 ¶22.)

On December 27, 2004, Plaintiff subscribed for Defendant's cable service and provided Defendant with personally identifiable information in order to activate that service. (Dkt. No. 12

¶33.) On September 28, 2006, Plaintiff cancelled his service. (Dkt No. 12 ¶34.) On December 4, 2014—*over eight years later*—Plaintiff contacted Defendant and confirmed that Defendant continues to retain all of the personal information that Plaintiff provided. (Dkt No. 12 ¶¶35-36.) Accordingly, Defendant has violated, and continues to violate, Plaintiff's substantive right under the Cable Act to have his personally identifiable information destroyed when it is "no longer necessary for the purpose for which it was collected[.]" 47 U.S.C. § 551(e).

B. Procedural History And Relevant Rulings.

On September 3, 2015, Plaintiff filed his original complaint, seeking monetary damages and injunctive relief. (Dkt No. 1.) On October 6, 2015, after Defendant moved to compel arbitration of Plaintiff's claim for damages (Dkt No. 6), Plaintiff filed his Amended Class Action Complaint seeking injunctive relief (Dkt No. 9). On November 20, 2015, Plaintiff filed the operative Second Amended Class Action Complaint. (Dkt No. 12.)

Defendant filed a motion to dismiss and supporting memorandum under Rule 12(b)(6), arguing that Plaintiff failed to state a claim for relief. (Dkt No. 17.) On May 16, 2016, the District Court heard oral argument on Defendant's motion dismiss. (Dkt No. 34.) That same day, the Supreme Court issued its opinion in *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540 (2016), wherein the Supreme Court addressed the "injury-in-fact" requirement of Article III standing. The District Court allowed the parties to file additional briefs on whether Plaintiff has standing in light of the *Spokeo* decision, which the parties did. (Dkt Nos. 34, 35, 36.)

Subsequently, the District Court granted Defendant's motion to dismiss on the bases that: (a) Plaintiff lacked Article III standing because he had not alleged an injury-in-fact that was "concrete" according to *Spokeo*; and (b) Plaintiff did not sufficiently state his claim for injunctive relief because the Cable Act provides for actual monetary damages, which the District Court believed provides an adequate remedy at law. (App. 14, 18.) The District Court did not address the

parties' remaining arguments on injunctive relief. (App. 18.) On June 22, 2016, Plaintiff timely filed his notice of appeal. (Dkt No. 39.)

IV. SUMMARY OF THE ARGUMENT.

The District Court erred in applying *Spokeo* to Plaintiff's Cable Act claim to find that Plaintiff failed to identify a "concrete harm" resulting from Defendant's unlawful retention of Plaintiff's personal information. (App. 7-12.) In *Spokeo*, the Supreme Court examined the violation of a statute that established merely *procedural* requirements. Where a statute provides merely procedural requirements, it is possible for a party to violate those procedural requirements but not ultimately cause any harm to any substantive right of the victim. In that context, a "bare procedural violation, divorced from concrete harm," does not satisfy the injury-in-fact requirement of Article III. *Spokeo*, 136 S. Ct. at 1549.

Here, by contrast, the Cable Act creates a *substantive* right: a cable subscriber has the right to have his or her personally identifiable information destroyed. Accordingly, violation of that substantive right results in a concrete injury *in and of itself*. On that basis, *Spokeo* does not lead to the conclusion that Plaintiff lacked Article III standing and, therefore, the District Court erred in holding otherwise.

Moreover, even if one assumes *arguendo* that *Spokeo* does apply here, the District Court erred by finding that Plaintiff failed to identify a concrete injury. To the contrary, Plaintiff's Complaint demonstrates concrete injuries to his intangible privacy interests and his economic interests in his personal information. When determining whether an intangible injury is "concrete" for purposes of Article III standing, courts should examine both history and the judgment of Congress. The District Court failed to do so.

The intangible injury to Plaintiff's privacy interests caused by Defendant's unauthorized retention of his personal information is well-grounded in common-law, which has recognized a

right of privacy for over a century. Moreover, Congress enacted the Cable Act to protect subscribers' privacy and, accordingly, adjudged that the failure to destroy personal information is an injury to that privacy. Also, district courts in this Circuit have identified unauthorized retention of personal information as a concrete injury. Hence, the District Court should have found that Plaintiff's Complaint demonstrates a concrete injury-in-fact to his privacy interests.

Plaintiff has also suffered a concrete injury to his economic interests in his personal information and his transaction with Defendant. Plaintiff's personal information has economic value of its own, and that value necessarily played a role in Plaintiff's transaction with Defendant involving that information. By unlawfully retaining Plaintiff's personal information, Defendant has deprived Plaintiff of the full economic value of both that information and Plaintiff's transaction with Defendant, resulting in a concrete injury.

Finally, Plaintiff sufficiently stated his claim for injunctive relief. The District Court ruled that because the Cable Act provides for actual monetary damages, Plaintiff had an adequate remedy at law such that injunctive relief would be improper. (App. 18.) An award of monetary damages on its own, however, would not force Defendant to destroy Plaintiff's personal information which Defendant continues to retain. This is the *precise* injury Plaintiff seeks to redress. Thus, monetary damages would be inadequate to make Plaintiff whole. Because Plaintiff has no adequate remedy at law, he sufficiently stated his claim for injunctive relief.

V. STANDARD OF REVIEW.

The District Court ruled that Plaintiff lacked Article III standing, which deprived the District Court of subject matter jurisdiction. This Court "review[s] *de novo* a District Court's dismissal for lack of subject matter jurisdiction." *Apex Digital, Inc. v. Sears, Roebuck & Co.*, 572 F.3d 440, 443 (7th Cir. 2009).

In determining whether subject matter jurisdiction exists on the face of a complaint, this Court accepts all well-pleaded facts alleged in the complaint and draws all reasonable inferences from those facts in the plaintiff's favor. *CCC Info. Servs. v. Am. Salvage Pool Ass'n*, 230 F.3d 342, 346 (7th Cir. 2000); *Sapperstein v. Hager*, 188 F.3d 852, 855 (7th Cir. 1999). Here, Defendant did not factually challenge Plaintiffs' standing and the Court must accept as true all of Plaintiff's well-pled allegations and accord them all reasonable inferences.

The District Court also dismissed Plaintiff's Complaint for failure to state a claim under Rule 12(b)(6). This Court "review[s] *de novo* a district court's decision to grant a motion to dismiss under Rule 12(b)(6), accepting the well-pleaded allegations in the complaint as true and drawing all reasonable inferences in favor of the plaintiff." *Marshall-Mosby v. Corp. Receivable, Inc.*, 205 F.3d 323, 326 (7th Cir. 2000). A complaint need only provide a short and plain statement of the claim showing that the pleader is entitled to relief. *Wigod v. Wells Fargo Bank, N.A.*, 673 F.3d 547, 555 (7th Cir. 2012); *Tamayo v. Blagojevich*, 526 F.3d 1074, 1081 (7th Cir. 2008). "The complaint will survive dismissal if it contains sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face.'" *Wigod*, 673 F.3d at 555 (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2007)).

VI. ARGUMENT.

A. Plaintiff's Complaint Establishes Article III Standing.

The District Court dismissed Plaintiff's Complaint on the ground that Plaintiff lacked Article III standing to bring his suit. (App. 14.) To have standing, a plaintiff must show:

> (i) an injury in fact, which is an invasion of a legally protected interest that is concrete and particularized, not conjectural or hypothetical; (ii) a causal relationship between the injury and the challenged conduct, such that the injury can be fairly traced to the challenged action of the defendant; and (iii) a likelihood that the injury will be redressed by a favorable decision.

Scanlan v. Eisenberg, 669 F.3d 838, 842 (7th Cir. 2012); *Lee v. City of Chi.*, 330 F.3d 456, 468 (7th Cir. 2003).

The District Court held that Plaintiff's Complaint did not allege a "concrete harm" under the Supreme Court's decision in *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540 (2016). (App. 14.) The District Court erred, however, because dismissal under *Spokeo* is mandated only in cases involving violations of statutes setting merely *procedural* requirements, as opposed to statutes granting *substantive* rights. Even if *Spokeo* did apply, the District Court erred by: (1) misunderstanding the Supreme Court's analysis in *Spokeo* and, as a result, misapplying it; (2) failing to undertake the proper analysis for determining whether Plaintiff suffered a concrete injury; and (3) disregarding decisions within this Circuit that recognize the unauthorized retention of personal information as being a concrete injury. Accordingly, the District Court should have found that Plaintiff suffered a concrete injury to his privacy interests and his economic interests in his personal information. The District Court's decision should be reversed.

1. The *Spokeo* Opinion Clarifies—But Does Not Alter—The Injury-In-Fact Requirement Of Article III Standing.

The District Court's opinion is based on *Spokeo*. In that case, the plaintiff alleged that the defendant violated the Fair Credit Reporting Act ("FCRA") by failing to follow reasonable procedures mandated by that Act and, as a result, disseminated false information about the plaintiff. *Spokeo*, 136 S. Ct. at 1544-45. The Ninth Circuit held that the plaintiff had adequately alleged an injury-in-fact by showing that he had suffered a "particularized" injury. *Id.* at 1544-45. The Supreme Court vacated and remanded—but did *not* reverse—the Ninth Circuit's decision because the Ninth Circuit did not analyze whether the plaintiff's injury was "concrete." *Id.* at 1545.

The Supreme Court noted that an injury-in-fact must be both "particularized" and "concrete"—two distinct characteristics. *Id.* at 1548. A "particularized" injury is one which affects

a plaintiff in a "personal and individual way." *Id.* (internal quotations omitted). A "concrete" injury, meanwhile, "must be real, and not abstract." *Id.* (internal quotations omitted). The Supreme Court emphasized that a plaintiff must demonstrate both particularity and concreteness to establish an injury-in-fact. *Id.*

The Supreme Court explained that a "concrete" injury is not synonymous with a "tangible" injury and, accordingly, "intangible" injuries "can nevertheless be concrete." *Id.* at 1549. Outlining the proper analysis in determining whether an "intangible" injury constitutes and injury in fact, the Supreme Court looked to: (a) history—*i.e.*, whether the intangible injury "has a close relationship to a harm that has traditionally . . . provided a basis for a lawsuit in English or American courts"; and (b) the judgment of Congress, which "is well positioned to identify intangible harms that meet Article III requirements[.]" *Id.*

Discussing Congress's role in "identifying and elevating" intangible injuries, the Supreme Court held that, "Article III standing requires a concrete injury even in the context of a statutory violation." *Id.* The Supreme Court stated that a plaintiff "could not, for example, allege a bare procedural violation, divorced from concrete harm, and satisfy the injury-in-fact requirement." *Id.* In the very next paragraph of the *Spokeo* opinion, however, the Supreme Court set forth a less burdensome standard, stating that "the violation of a procedural right granted by statute can be sufficient in some circumstances to constitute injury in fact." *Id.* The Supreme Court did not elaborate on—or even acknowledge—the tension raised by its seemingly contradictory statements on whether a mere procedural violation of a statute constitutes a concrete injury-in-fact.

Turning to the facts of *Spokeo*, the Supreme Court found that while Congress "plainly sought to curb" the type of harm the plaintiff allegedly suffered, the plaintiff "cannot satisfy the demands of Article III by alleging a bare procedural violation." *Id.* at 1550. Because the Ninth

Circuit had not addressed whether the plaintiff met the concreteness requirement of an Article III injury-in-fact, the Supreme Court vacated the Ninth Circuit's decision and remanded. Importantly, the Supreme Court did ***not*** find that the plaintiff's alleged injury was not concrete. *Id.* ("We take no position as to whether the Ninth Circuit's ultimate conclusion—that [plaintiff] adequately alleged an injury in fact—was correct").

2. *Spokeo* Does Not Apply Here Because The Cable Act Creates *Substantive*, As Opposed To Merely *Procedural*, Requirements.

In the case at bar, the District Court mistakenly concluded that *Spokeo* "addresses directly the circumstances of [Plaintiff's] case." (App. 8.) In *Spokeo*, the FCRA provisions at issue created only *procedural* requirements for the defendant. 136 S. Ct. at 1545 (noting that FCRA requires consumer reporting agencies to "*follow reasonable procedures*" to, *inter alia*, assure maximum possible accuracy of consumer reports) (emphasis added). *Spokeo* does not apply here because the Cable Act creates the *substantive* right that Defendant destroy Plaintiff's personal information. 47 U.S.C. § 551(e); *Church v. Accretive Health, Inc.*, --- Fed. Appx. ---, No. 15-15708, 2016 WL 3611543, at *3 (11th Cir. July 6, 2016) (violation of substantive right, rather than merely procedural requirement, constituted an injury-in-fact sufficient to confer standing); *Matera v. Google Inc.*, Case No. 15-CV-04062-LHK, 2016 WL 5339806, at *12 (N.D. Cal. Sept. 23, 2016) ("If the right created by statute is substantive, courts have generally found that . . . a plaintiff alleging violation of a substantive statutory right has Article III standing"); *Guarisma v. Microsoft Corp.*, CASE NO. 15-24326-CIV-ALTONAGO/O'Sullivan, 2016 WL 4017196, at *3 (S.D. Fla. July 26, 2016) (violation of a substantive right created by Congress constitutes a concrete injury "in and of itself").

a. *Spokeo* Only Addresses Statutes That Create Merely *Procedural* Requirements.

The procedural nature of the FCRA provisions addressed by *Spokeo* is critical to that case's holding. The FCRA does not demand, for example, that a consumer credit report ultimately *have* "maximum possible accuracy"—it demands that consumer reporting agencies "*follow reasonable procedures* to assure maximum possible accuracy[.]" 15 U.S.C. § 1681e(b) (emphasis added). The FCRA governs the *conduct* of a consumer reporting agency in *attempting to achieve* the particular goal of "maximum possible accuracy." It does not govern the achievement of the *goal itself*. In other words, the FCRA does not create a substantive right to maximum accuracy of a consumer report—it merely creates procedural requirements designed to decrease the risk of inaccurate information. *Spokeo*, 136 S. Ct. 1550 ("Congress plainly sought to curb the dissemination of false information by adopting procedures designed to decrease that risk").

Because FCRA requires only that a consumer reporting agency follow reasonable procedures, rather than actually achieve maximum possible accuracy, it is possible that "[a] violation of one of the FCRA's procedural requirements may result in no harm." *Id.* Hence, if a consumer reporting agency fails to follow proper procedures regarding a consumer's information, "that information regardless may be entirely accurate." *Id.* That is why the plaintiff in *Spokeo* "could not . . . allege a bare procedural violation, divorced from concrete harm, and satisfy the injury-in-fact requirement of Article III." *Id.* at 1549.

In stating the proposition that a "bare procedural violation" of a statute is inadequate for Article III standing, the Supreme Court cited *Summers. v. Earth Island Inst.*, 555 U.S. 488, 496 (2009). *Spokeo*, 136 S. Ct. at 1549. This reliance on *Summers* further illustrates the narrow *procedural* context of the Supreme Court's decision in *Spokeo*. In *Summers*, the plaintiffs challenged regulations that excluded certain land management projects from an administrative

agency's notice, comment, and appeal process. 555 U.S. at 491. As the Supreme Court noted, the challenged regulations "neither require nor forbid any *action*[.]" *Id.* at 493 (emphasis added). Rather, the challenged regulations "govern only the *conduct*" of administrative officials. *Id.* (emphasis added).

Importantly, the dispute over the specific land management project at issue in *Summers* settled before the district court. *Id.* at 494. Thus, the plaintiffs argued only that they had "suffered *procedural* injury, namely that they have been denied the ability to file comments on some [administrative agency] actions and will continue to be so denied." *Id.* at 496 (emphasis added). Because the "concrete interest that [was] affected by the deprivation" of their *procedural* rights had been resolved by the settlement, the plaintiffs did not have Article III standing. *Id.* at 496-97. By relying on *Summers*, the Supreme Court in *Spokeo* grounded its analysis in the context of purely *procedural*, rather than substantive, rights.

In sum, *Spokeo* narrowly holds that where a statute merely establishes procedures to be followed—as opposed to mandating actions or results—a bare violation of the procedures required by the statute is not enough on its own to confer Article III standing.

b. Violating A Statute That Establishes *Substantive* Rights Confers Article III Standing, Even After *Spokeo*.

In contrast to *Spokeo* and *Summers*, here, Plaintiff asserts a claim for violation of his *substantive* right to have his personal information destroyed by Defendant. In the wake of *Spokeo*, courts recognize that where a statute creates a *substantive* legal right (as opposed to creating merely procedural requirements), the invasion of that right *on its own* is a concrete injury that supports Article III standing. *Church*, 2016 WL 3611543, at *3 n.2 (distinguishing the "bare procedural violation" of *Spokeo*, which was "inapplicable to the allegations at hand" because "Congress provided [plaintiff] with a substantive right . . . and [plaintiff] has alleged that [defendant] violated

that substantive right"); *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) ("Congress created a substantive legal right for [plaintiff] . . . to receive receipts truncating [her] personal credit card number[ ]" such that plaintiff "suffered a concrete harm as soon as [defendant] printed the offending receipt"); *Guarisma*, 2016 WL 4017196, at *3 (violation of the Fair and Accurate Credit Transactions Act "constitutes a concrete injury in and of itself because Congress created a substantive right for individuals to receive printed receipts that truncate their personal credit card information"); *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) ("The alleged invasion of Plaintiff's substantive right to a truncated receipts means that Plaintiff 'has sufficiently alleged that she has sustained a concrete—*i.e.*, "real"—injury'") (quoting *Church*); *see also Saenz v. Buckeye Check Cashing of Ill.*, No. 16 CV 6052, 2016 WL 5080747, at *2 (N.D. Ill. Sept. 20, 2016) ("nothing in *Spokeo* overruled the Seventh Circuit's decision that emphasized and affirmed the power of Congress to pass legislation creating new rights, which if violated, would confer standing under Article III"); *Quinn v. Specialized Loan Servicing*, Case No. 16 C 2021, 2016 WL 4264967, at *4-5 (N.D. Ill. Aug. 11, 2016) (following *Church*'s reasoning that where Congress provides a substantive right, alleging violation of that substantive right is a sufficiently concrete harm for purposes of Article III standing).

In enacting the Cable Act, Congress created a substantive right in the destruction of personal information, the invasion of which constitutes a concrete injury. Unlike FCRA in *Spokeo*, the Cable Act does not require only that Defendant maintain "reasonable procedures" to destroy personal information—it requires that Defendant *actually destroy* Plaintiff's information. 47 U.S.C. § 551(e). As such, the Cable Act does not "govern only the conduct" of Defendant, it

requires the "action" by Defendant to destroy Plaintiff's personal information. *Cf. Summers*, 555 U.S. at 494. By not destroying Plaintiff's personal information after it was no longer necessary for the purpose for which it was collected, Defendant caused Plaintiff *precisely* the concrete injury that Congress identified—namely, unlawful retention of personal information. 47 U.S.C. § 551(e). Thus, Plaintiff has Article III standing, and the District Court should be reversed.

3. The District Court Misapplied *Spokeo.*

Even assuming *arguendo* that *Spokeo* applies here—it does not—the District Court misapplied it. (*See* App. 7-12.) The District Court's conclusion that Plaintiff failed to demonstrate a "concrete harm" under *Spokeo* is in error because this conclusion rests on a flawed understanding of that case. (App. 11-12.) In reviewing Plaintiff's Complaint, the District Court noted that "[t]hese allegations are almost identical to the allegations the plaintiff made in [*Spokeo*]." (App. 12.) The District Court's comparison of Plaintiff's allegations to the allegations of the plaintiff in *Spokeo*—and using that comparison as a basis for finding that Plaintiff does not allege a concrete harm—assumes that the plaintiff in *Spokeo* failed to demonstrate a concrete harm.

That is not what happened in *Spokeo*. Rather, the Supreme Court remanded to the Ninth Circuit for *further analysis* of whether the plaintiff alleged a concrete harm, and *explicitly declined to rule on whether the plaintiff had alleged an adequate injury-in-fact*. *Spokeo*, 136 S. Ct. at 1550. Accordingly, the Supreme Court did ***not*** hold that the plaintiff failed to allege a concrete harm. The District Court misunderstood this critical aspect of *Spokeo*, and applied a logic that relied on the *Spokeo* plaintiff's supposed failure to demonstrate a concrete injury. Because this logic rests on a flawed understanding of *Spokeo*, the District Court erred by concluding that Plaintiff does not have a concrete injury, and should be reversed.

4. Plaintiff's Complaint Describes A Concrete Injury Under *Spokeo*.

To apply *Spokeo* correctly, the District Court should have: (a) analyzed whether Plaintiff suffered an intangible harm to his privacy interests under *Spokeo*'s dual-pronged framework; and (b) acknowledged the concrete injury to Plaintiff's economic interests in his personal information.[2] Following this proper course of analysis reveals that Plaintiff suffered well-defined concrete injuries as a result of Defendant's actions and, hence, has Article III standing to pursue his claim.

a. Plaintiff Has Suffered A Concrete Injury To His Intangible Privacy Interests.

In misapplying *Spokeo*, the District Court failed to consider whether Plaintiff suffered a concrete harm to his intangible privacy interests. (App. 7-12.) "In determining whether an intangible harm constitutes injury in fact, both history and the judgment of Congress play important roles." *Spokeo*, 136 S. Ct. at 1549. Plaintiff's having suffered a concrete harm to his privacy interests in his personal information is established by both: (i) history; and (ii) the judgment of Congress.

i. Courts' Historical Recognition Of Privacy Violations Demonstrate Plaintiff's Concrete Injury.

An intangible injury is concrete when it "has a close relationship to a harm that has traditionally been regarded as providing a basis for a lawsuit in English or American courts." *See Spokeo*, 136 S. Ct. at 1549. Injury to personal privacy has provided a basis for suit in American courts for over a century, and an individual's right to privacy is grounded in the United States Constitution. *See Pavesich v. New England Life Ins. Co.*, 50 S.E. 68, 70 (Ga. 1905) ("A right of privacy . . . is therefore derived from natural law. This idea is embraced in the Roman's conception

[2] Plaintiff maintains that *Spokeo* does not apply here at all, *see* Section VI(A)(2) *supra*, but engages in this analysis in the interests of thoroughness.

of justice"); Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 198 (1890) (noting that "the common-law right to intellectual and artistic property are . . . but instances and applications of a general right to privacy"); Restatements (Second) of Torts § 652A cmt. a. (1977) (noting that "the existence of a right of privacy is now recognized in the great majority of American jurisdictions"); *see generally Lawrence v. Texas*, 539 U.S. 559 (2003) (recognizing right to privacy grounded in the U.S. Constitution); *Winston v. Lee*, 470 U.S. 753 (1985) (same); *Eisenstadt v. Baird*, 405 U.S. 438 (1972) (same).

Post-*Spokeo*, courts have recognized this historical context in finding that injury to privacy interests is "concrete" enough to confer standing under Article III. *Yershov v. Gannet Satellite Information Network*, Civil Action No. 14-13112-FDS, 2016 WL 4607868, at *8 (D. Mass. Sept. 2, 2016) ("an individual's right to privacy, both as to certain personal information and private locations, has long 'been regarded as providing a basis for a lawsuit in English or American courts'") (quoting *Spokeo*, 136 S. Ct. at 1549)); *Mey v. Got Warranty, Inc.*, CIVIL ACTION NO. 5:15-CV-101, 2016 WL 3645195, at *3 (N.D. W. Va. June 30, 2016) (discussing *Spokeo* and holding, "[i]nvasion of privacy is just such an intangible harm recognized by the common law").

Retention and destruction of personally identifiable information necessarily implicates Plaintiff's interests of privacy, the invasion of which has long provided a common-law right to recovery. Moreover, courts in this Circuit have recognized that unauthorized retention of personal information is *itself* concrete injury. *Sterk v. Redbox Automated Retail, LLC*, No. 11 C 1729, 2012 WL 3006674 (N.D Ill. July 23, 2012) ("*Sterk II*"); *Padilla v. Dish Network L.L.C.*, No. 12-cv-7350, 2013 WL 3791140 (N.D. Ill. July 19, 2013).

In *Sterk II*, the Northern District of Illinois held that plaintiffs suffered an injury in fact under Article III standing when the defendant unlawfully retained their personal information in

violation of the Video Privacy Protection Act ("VPPA") (a statute remarkably similar to the Cable Act). Like the Cable Act, the VPPA requires that persons subject to the statute destroy personally identifiable information after the information is no longer necessary for the purpose for which it was collected. 18 U.S.C. § 2710(e).

The defendant in *Sterk II* argued that plaintiffs lacked standing because they did not show "any injury in fact from [defendant's] alleged mishandling of their personal information[,]" which included unlawful disclosure and retention of their personal information. *Sterk II*, 2012 WL 3006674, at *8. The court rejected this argument and held that *both* of these misdeeds—***including the defendant's mere retention of personal information***—supported the "contention that the plaintiffs were injured, ***in that their personal information was used in a way they did not authorize or contemplate***." *Id.* (emphasis added). By so holding, the court effectively found that the concrete injury that results from unlawful retention of personal information is the use of a plaintiff's personal information "in a way [the plaintiff] did not authorize or contemplate." *Id.*

The defendant also argued that because this Court had previously held that the plaintiffs had no claim for actual damages, the plaintiffs had not suffered an injury-in-fact. *Id.* at *9 (discussing *Sterk v. Redbox Automated Retail, LLC*, 672 F.3d 535, 539 (7th Cir. 2012) ("*Sterk I*")). The district court rejected this argument and held that the plaintiffs had standing for injunctive relief, based on the principle that "[t]he lack of recoverable damages does not eliminate standing." *Id.* (citing *Scanlan v. Eisenberg*, 669 F.3d 838, 845 (7th Cir. 2012)). As the district court concluded, "Plaintiffs still have an injury, even if only a highly attenuated one, if [defendant] retained their personal information without authorization." *Id.*

In *Padilla*, a Northern District of Illinois district court held that a plaintiff had Article III standing to pursue his claim against the defendant for its unauthorized retention of his personal

information in violation of the Satellite Home Viewer Extension and Reauthorization Act ("SHVERA"). *Padilla*, 2013 WL 3791140. Like the Cable Act and the VPPA, SHVERA required that satellite carriers destroy personally identifiable information if the information was no longer necessary for the purpose for which it was collected. *Id.* at *3. The district court held that the plaintiff had standing for injunctive relief, based on the district court's holding in *Sterk II* that plaintiffs have an injury if a defendant retained their personal information without authorization. *Id.* at *5-6.

In the instant case, the District Court failed to consider *Sterk II* and *Padilla*, focusing instead on this Court's decision in *Sterk I*. (App. 12-14.) While the District Court is correct that *Sterk I* does not address Article III standing, the District Court erred by not finding that unauthorized retention of personal information is a concrete injury based on: (a) courts' historical recognition of privacy interests; and (b) *Sterk II* and *Padilla* identifying unauthorized retention of personal information as a concrete injury. Consequently, the District Court should be reversed.

ii. Congress's "Judgment" Establishes Plaintiff's Concrete Injury.

In determining whether an intangible harm is "concrete" for purposes of Article III standing, courts should give credence to Congress's judgment. *Spokeo*, 136 S. Ct. at 1549 ("because Congress is well positioned to identify intangible harms that meet minimum Article III requirements, its judgment is [ ] instructive and important"). Indeed, *Spokeo* reaffirmed that "Congress may elevat[e] to the status of legally cognizable injures concrete, *de facto* injuries that were previously inadequate at law.'" *Id.* (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 578 (1992)) (alteration original). By enacting the Cable Act to protect the privacy interests of consumers' personal information, Congress has elevated Defendant's unlawful retention of Plaintiff's personal information into a concrete, *de facto* injury.

Plaintiff's claim arises under 47 U.S.C. § 551, which is titled, "Protection of subscriber ***privacy***." (Emphasis added.) Congress explicitly included a provision governing the destruction of cable subscribers' personal information—subsection "(e)," which Defendant has violated—within the ambit of a statutory provision meant to protect "subscriber privacy." By doing so, Congress codified its judgment that failing to destroy subscribers' information under subsection "(e)" violates subscriber privacy and, thus, is a concrete injury. Further, as detailed in Plaintiff's Complaint, the Cable Act's legislative history emphasizes the privacy interests the Act seeks to protect:

> Cable systems, particularly those with a 'two-way' capability, have an enormous capability to collect and store personally identifiable information about each cable subscriber. Subscriber records from interactive systems can reveal details about bank transactions, shopping habits, political contributions, viewing habits and other significant personal decisions. ***It is [therefore] important that national cable legislation establish a policy to protect the privacy of cable subscribers. A national policy is needed because***, while some franchise agreements restrict the cable operator's use of such information, ***privacy issues raise a number of federal concerns, including protection of the subscribers' first, fourth, and fifth amendment rights***.

(Dkt. 38 ¶11 (quoting H.R. Re. 98-934 at 4666-67 (1984)) (emphasis added).)

As courts acknowledge post-*Spokeo*, "it is well-settled that Congress may create a statutory right to privacy in certain information that strengthens or replaces the common law, and citizens whose statutory right to informational privacy has been invaded [have standing to] bring suit under the statute to vindicate that right." *Yershov*, 2016 WL 4607868, at *8 (quoting *Thomas v. FTS USA, LLC*, Civil Case No. 3:13-cv-825, 2016 WL 3653878, at *10 (E.D. Va. June 30, 2016)) (alteration original). Here, Congress created a statutory right to privacy in Plaintiff's personal information retained by Defendant—specifically, the right to have his personal information destroyed after it is no longer necessary for the purposes for which it was collected. 47 U.S.C. § 551(e). Defendant violated that right to informational privacy by unlawfully retaining, instead of

destroying, Plaintiff's personal information in violation of 47 U.S.C. § 551(e). Hence, Plaintiff has standing to bring suit under the Cable Act to vindicate his privacy rights, and the District Court should be reversed.

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

Plaintiff has Article III standing because Defendant's unlawful retention of his personal information caused economic injury to the value of his personal information. Courts recognize the economic value of personal information. *See In re Facebook Privacy Litig.*, 572 Fed. Appx. 494, 494 (9th Cir. 2014) (plaintiffs properly pled damages by alleging that they "los[t] the sales value of [their personal] information" after it was stolen by cyber-thieves or hackers); *In re Anthem, Inc. Data Breach Litig.*, 162 F. Supp. 3d 953, 993-95 (N.D. Cal. 2016) (reasoning that loss of value of personal information in the wake of a data breach "would represent a cognizable injury under Article III"); *Svenson v. Google Inc.*, No. 13-cv-04080, 2015 WL 1503429, at *5 (N.D. Cal. Apr. 1, 2015) (holding that plaintiff properly pled breach of contract damages where he alleged that there was a 'robust market' for his personal information and that defendant's deficient cybersecurity, which resulted in the theft of his personal information, 'deprived [plaintiff] of [the] ability to sell [it] on the market"); *Claridge v. RockYou, Inc.*, 785 F. Supp. 2d 855, 866 (N.D. Cal. 2011) (stating that personal information has "some unidentified but ascertainable value").

Plaintiff's Complaint explains in detail the economic value derived from his personal information. (Dkt No. 12 ¶¶25-31.) Further, Plaintiff's Complaint states that Defendant's retention of personal information "in contravention of statutorily guaranteed privacy protections" deprives him of the full value of his transaction with Defendant. (*Id.* ¶32.) These allegations—which must be accepted as true for purposes of ruling on a motion to dismiss—along with the foregoing authority, demonstrate the concrete injuries to Plaintiff's tangible economic interests in his

personal information. *See Carlsen v. GameStop, Inc.*, --- F.3d ---, No. 15-2453, 2016 WL 4363162, at *3 (8th Cir. Aug. 16, 2016) (holding plaintiff alleged cognizable injury-in-fact where he stated he would not have paid as much as he did for a subscription with the defendant had he known the defendant would wrongfully disclose his personal information); *Boelter v. Hearst Commc'ns, Inc.*, --- F. Supp. 3d ---, 15 Civ. 3934 (AT), 15 Civ. 9279 (AT), 2016 WL 3369541, at *3 (S.D.N.Y. June 17, 2016) (holding that plaintiff suffered an "economic harm" that conferred Article III standing where defendant "unjustly retained the economic benefit the value of [plaintiffs'] information" and the plaintiffs would not have paid as much for their subscriptions had they known defendant would wrongfully disclose their information).

The District Court's contention that these allegations are insufficient to demonstrate a concrete injury contradict Plaintiff's well-pled allegations and ignore on-point legal authority. (App. 11.) Therefore, the District Court erred and should be reversed.

5. The Eighth Circuit's Opinion In *Braitberg v. Charter Commc'ns, Inc.* Does Not Apply.

The Eighth Circuit recently ruled that a consumer did not have Article III standing under *Spokeo* for an unlawful retention claim under the Cable Act in *Braitberg v. Charter Commc'ns, Inc.*, --- F.3d ---, No. 14-1737, 2016 WL 4698283 (8th Cir. Sept. 8, 2016). The Eighth Circuit's analysis was flawed in several respects. ***First***, the Eighth Circuit found that the plaintiff asserted a "bare procedural violation, divorced from any concrete harm." *Id.* at *4 (quoting *Spokeo*, 136 S. Ct. at 1549). This finding is incorrect because, as explained in Section VI(A)(2) *supra*, the Cable Act creates a *substantive* right to have a subscriber's personal information destroyed—***not*** merely procedural requirements in furtherance of destroying personal information. Accordingly, Defendant's violation of Plaintiff's substantive right to have his personal information destroyed is, on its own, a concrete injury sufficient for Article III standing.

Second, the Eighth Circuit found that while "there is a common law tradition of lawsuits for invasion of privacy, the retention of information lawfully obtained, without further disclosure, traditionally has not provided the basis for a lawsuit." *Id.* But as this Court has recognized, "[i]njury-in-fact can arise from a *comparable* common-law source." *Carlson v. U.S.*, --- F.3d ---, No. 15-2972, 2016 WL 4926180, at *3 (7th Cir. Sept. 15, 2016) (citing *Spokeo*, 136 S. Ct. at 1549) (emphasis added). *Spokeo* "does not require that the harm created by violation of a statute be *identical* to the type of harm that will give rise to a recovery under the common law of any particular jurisdiction." *Potocnick v. Carlson*, Case No. 13-CV-2093 (PJS/HB), 2016 WL 3919950, at *3 (D. Minn. July 15, 2016) (emphasis added). Here, Congress has enacted the Cable Act to protect consumers' privacy rights, even before a cable company discloses the consumers' personal information or suffers a data breach—because it is nearly impossible for injured consumers to trace disclosures to particular sources. In any event, the Eighth Circuit's demand that plaintiff's claim be identical to a common-law claim is not the law under *Spokeo*.

Third, the Eighth Circuit found that there was no "plausible allegation that [defendant's] mere retention of [ ] information caused any concrete and particularized harm to the value of that information[.]" 2016 WL 4698283, at *5. Here, Plaintiff sets forth numerous facts describing the economic value of his personal information. (Dkt No. 12 ¶¶25-31.) That economic value was necessarily incorporated into Plaintiff's *economic* transaction with Defendant for his subscription services—a transaction that ***provided for the destruction of Plaintiff's personal information***. (*See* Dkt No. 12 ¶¶21-24 (describing how Defendant's privacy policy claims that consumer information is destroyed after it is no longer necessary for business, tax, accounting, or other legal purposes).) Contrary to what the Eighth Circuit believed about the allegations before it in *Charter*, Plaintiff

here has established a plausible basis for his allegation that Defendant's retention of his personal information deprived him of the full value of his transaction. (Dkt No. 12 ¶32.)

These three deficiencies in the *Charter* court's analysis preclude it from having persuasive value here. This Court should hold that Plaintiff has Article III standing based on Defendant's unauthorized retention of his personal information.

B. Plaintiff Sufficiently States A Claim For Injunctive Relief.

The District Court based its finding that Plaintiff failed to state a claim for injunctive relief *entirely* on the fact that the Cable Act provides for actual monetary damages and, hence, the District Court reasoned, Plaintiff possesses an adequate remedy at law. (App. 14-18.) The District Court's assumption that monetary damages *necessarily equals* an adequate remedy law ignores: (1) the well-established legal principle that monetary damages do *not* always provide an adequate remedy at law when the harm is *ongoing*; and (2) the fact that Plaintiff receiving monetary damages ***would not result in the destruction of his personal information***—which is the ***only*** relief that Plaintiff seeks. (Dkt No. 12 ¶51; Request For Relief.)

In his brief before the District Court, Plaintiff cited multiple cases where the court awarded injunctive relief because there was no adequate remedy at law, ***even when monetary damages were available***. *Walgreen Co. v. Sara Creek Prop. Co., B.V.*, 966 F.2d 273 (7th Cir. 1992) (affirming district court's entry of injunctive relief in breach of contract case even though "damages are the norm"); *Lacy v. Dart*, No. 14 C 6259, 2015 WL 5921810, at *13 (N.D. Ill. Oct. 8, 2015) (plaintiffs seeking damages had no adequate remedy at law "because [the damages] are meant to compensate plaintiffs for *past* instances of discrimination, but, if rewarded, will do nothing to protect plaintiffs' rights *going forward*") (emphasis added); *Miller v. LeSea Broadcasting, Inc.*, 896 F. Supp. 889, 894 (E.D. Wis. 1995) (plaintiff had "no adequate remedy at law" even though "he could recover monetary damages").

In addition, Plaintiff cited cases finding that where a harm is *ongoing*—as it is here—there is no adequate remedy at law. *Hess Newmark Owens Wolf, Inc. v. Owens*, 415 F.3d 630, 633 (7th Cir. 2005) (reversing denial of injunctive relief to enforce a restrictive covenant where defendant was "engaged in ongoing competition" against plaintiff); *Duct-O-Wire Co. v. U.S. Crane, Inc.*, 31 F.3d 506, 509-10 (7th Cir. 1994) (affirming grant of preliminary injunction where "[n]o adequate remedy at law exists because the harm without preliminary injunctive relief would be ongoing"); *Eppley v. Mulley*, No. 1:09-cv-386-SEB-MJD, 2011 WL 1258045, at *2-3 (S.D. Ind. Mar. 30, 2011) (enjoining ongoing Lanham Act violations and defamation against plaintiff); *Leitner v. Frank*, No. 06-C-1227, 2006 WL 3857483, at *2 (E.D. Wis. Dec. 26, 2006) (plaintiff could pursue injunction where he alleged that prison official's deliberate indifference to plaintiff's medical needs, in violation of the constitution, "is ongoing and that injunctive relief is needed to alleviate it"). The District Court erred by failing to consider ***any*** of this authority.

Further, the District Court's assertion that Plaintiff "seeks only injunctive relief for one reason: to avoid the arbitration requirement of the subscriber agreement" is incorrect. (App. 18.) Plaintiff seeks injunctive relief because he is suffering an *ongoing* harm—Defendant continues to retain his personal information without authorization. (Dkt No. 12 ¶¶34-36.) An award of damages, by itself, would ***allow Defendant to continue retaining Plaintiff's personal information without authorization***. That is why Plaintiff can be made whole *only* by injunctive relief and, accordingly, why he seeks *only* injunctive relief in his Complaint. (*Id.* ¶51; Request For Relief.) Indeed, the Northern District of Illinois has held that merely alleging that a defendant is keeping personal information for longer than is allowed by a statute is sufficient to state a claim for injunctive relief. *Padilla*, 2013 WL 3791140, at *5 (plaintiff stated claim for injunctive relief where he "alleged that

he is no longer a subscriber and that Defendant has kept and is keeping his personally identifiable information longer than is allowed by [the statutory provision]").

Because Plaintiff has adequately stated his claim for injunctive relief based on the inadequacy of monetary damages, the District Court's ruling to the contrary should be reversed.

VII. CONCLUSION.

For all 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: October 4, 2016

Respectfully submitted,

/s/ Joseph J. Siprut

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STATEMENT REGARDING ORAL ARGUMENT

In accordance with Fed. R. App. P. 34(a)(1) and Circuit Rule 34(f), Plaintiff requests that the Court hear oral argument in this case because it presents significant issues concerning the ability of consumers who have their personally identifiable information retained without their authorization to bring claims against those who unlawfully retain such information.

CERTIFICATE OF COMPLIANCE
WITH TYPE-VOLUME LIMITATIONS, TYPEFACE REQUIREMENTS
AND TYPE STYLE REQUIREMENTS

This brief complies with the length limitations of Fed. R. App. P. 32(a)(7) because it is under 30 pages and with the type-volume limitations of Rule 32(a)(7)(B) because it contains 7,280 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: October 4, 2016

s/ Joseph J. Siprut
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Attorney for Plaintiff-Appellant

CERTIFICATE OF SERVICE

I hereby certify that on October 4, 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

APPENDIX

STATEMENT OF COMPLIANCE
WITH CIRCUIT RULE 30(D)

All materials required by Cir. R. 30(a) & (b) are included in the Appendix of Plaintiff-Appellant Derek Gubala.

s/ Joseph J. Siprut
Joseph J. Siprut

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TO APPENDIX

AO 450 (Rev. 01/09) Judgment in a Civil Action

UNITED STATES DISTRICT COURT

for the
Eastern District of Wisconsin

Derek Gubala,
Plaintiff
v. Civil Action No. 15-cv-1078-PP
Time Warner Cable, Inc.
Defendant

JUDGMENT IN A CIVIL ACTION

The court has ordered that *(check one):*

❒ the plaintiff *(name)*_____ recover from the defendant *(name)*_____ the amount of _____dollars ($), which includes prejudgment interest at the rate of_____%, plus post judgment interest at the rate of_____% per annum, along with costs.

❒ the plaintiff recover nothing, the action be dismissed on the merits, and the defendant *(name)* _____recover costs from the plaintiff *(name)*_____ _____.

X other: the defendant's motion to dismiss the second amended complaint be dismissed. The court further ordered that the second amended complaint be dismissed for lack of standing.

This action was *(check one)*:

❒ tried by a jury with Judge_____presiding, and the jury has rendered a verdict.

❒ tried by Judge_____ without a jury and the above decision was reached.

X decided by Judge Pamela Pepper on the defendant's motion to dismiss the second amended complaint.

Date: June 23, 2016 *CLERK OF COURT*

/s/Kristine G. Wrobel_____

Signature of Clerk or Deputy Clerk

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

DEREK GUBALA,

Plaintiff,

v.

TIME WARNER CABLE, INC.,

Defendant.

Case No. 15-cv-1078-pp

DECISION AND ORDER GRANTING DEFENDANT'S MOTION TO DISMISS THE SECOND AMENDED COMPLAINT (DKT. NO. 17), DENYING AS MOOT PLAINTIFF'S MOTION TO COMPEL (DKT. NO. 25), GRANTING THE PLAINTIFF'S MOTION TO FILE A PORTION OF THE MOTION TO COMPEL UNDER SEAL (DKT. NO. 24), AND DISMISSING CASE

I. FACTUAL BACKGROUND

On September 3, 2015, the plaintiff filed a complaint on his own behalf, and on behalf of putative class members. Dkt. No. 1. The complaint alleged that the defendant, a cable services provider, collected personal information—names, addresses, Social Security numbers, phone numbers, etc.—from "tens of millions of consumers across the country." Id. at 1. The complaint further alleged that when after customers terminate their services with the defendant, the defendant "continues to maintain personally identifiable information on all of its previous customers indefinitely." Id.at 1-2. The complaint alleged that this practice violated 47 U.S.C. §551(e) (subsection e of the Cable Communications Policy Act, or "CCPA"), which requires cable operators to destroy personally identifiable information "[i]f the information is no longer

necessary for the purpose for which it was collected and there are no pending requests or orders for access to such information under subsection (d) of this section or pursuant to a court order." Id.; 47 U.S.C. §551(e).

In the original complaint's prayer for relief, the plaintiff sought class certification; an order enjoining the defendant from "the unlawful practices and statutory violations asserted herein;" actual, liquidated and punitive damages as provided by the CCPA; and attorneys' costs and fees as provided by the CCPA. Id. at 14.

On October 5, 2015, the defendant filed in lieu of an answer a motion asking the court to compel arbitration, and to stay the proceedings. Dkt. No. 6. The motion alleged that the plaintiff had entered into a Residential Services Subscriber Agreement with the defendant, and that by entering into that agreement, the plaintiff had agrees to resolve his claim via arbitration. Id. The brief in support of the motion laid out, verbatim, the arbitration provision in the subscriber agreement. Dkt. No. 6-1 at 7.[1] The pertinent part of the agreement states that, "[e]xcept for claims for injunctive relief . . ., any past, present or future controversy or claim arising out of or related to this agreement shall be resolved by binding arbitration . . . ." Id. In other words, the subscriber agreement provided that claims for money damages had to be resolved through binding arbitration, not litigation.

Three weeks later, rather than filing a response to the motion to stay proceedings and compel arbitration, the plaintiff filed an amended complaint.

[1] The court denied this motion as moot, and without prejudice, after the plaintiff filed his second amended complaint. Dkt. No. 16.

Dkt. No. 9. The only significant change from the original complaint to the amended one appeared in the prayer for relief; in the October 26, 2015 amended complaint, the plaintiff deleted his request for damages, costs and fees. Id. at 13. Despite removing his request for monetary damages, costs and fees, however, the plaintiff left in the amended complaint an extensive discussion regarding the economic value consumers place on the protection of personally identifiable information. Id. at 6-9.

Less than two weeks later, the parties filed a joint motion asking the court to grant the plaintiff leave to file a second amended complaint. Dkt. No. 10. The motion indicated that the defendant believed that the amended complaint, like the original, sought money damages, which meant that the claim had to be submitted to arbitration pursuant to the subscriber agreement. Id. at 1. While the plaintiff "disagree[d]," he sought to file a second amended complaint seeking only injunctive relief. Id. In an attempt to avoid filing another motion to compel arbitration, the defendant joined the motion. Id. The court granted leave to amend on November 10, 2015.

The plaintiff filed the second amended complaint on November 20, 2015. Dkt. No. 12. On December 23, 2015, the defendant filed this motion to dismiss the second amended complaint. Dkt. No. 17. The defendant sought dismissal of this complaint because the plaintiff had failed to plead the elements of a claim for injunctive relief, and because the request for injunctive relief was allegedly vague. Id. at 2. The court heard oral argument on the motion on May 16, 2016, after the parties had fully briefed it. Dkt. No. 34. On the day that the court

heard oral argument, the United States Supreme Court issued its decision in Spokeo v. Robins, ___ U.S. ___, 136 S. Ct. 1540 (May 24, 2016). The parties asked the court to allow them to submit simultaneous briefs regarding whether Spokeo had any impact on the case; the court granted that request, and the parties filed their supplemental briefs on June 6, 2016. Dkt. Nos. 35, 36.

II. GOVERNING LAW

In order to have Article III standing to pursue a claim that a plaintiff has suffered harm under a statute where "Congress plainly sought to curb the dissemination of false information by adopting procedures designed to decrease that risk," the plaintiff "cannot satisfy the demands of Article III by alleging a bare procedural violation." Spokeo,136 S. Ct. at 1550. The plaintiff must demonstrate that the procedural violation resulted in "concrete harm." Id.

Assuming that a plaintiff has standing, that plaintiff must provide a "short and plain statement of the claim showing that [he] is entitled to relief" to survive a motion to dismiss under Fed. R. Civ. P. 12(b)(6). Fed. R. Civ. P. 8(a)(2). A plaintiff does not need to plead specific facts, and his statement need only "give the defendant fair notice of what the . . . claim is and the grounds upon which it rests." Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007) (quoting Conley v. Gibson, 355 U.S. 41, 47 (1957)). However, a complaint that offers "labels and conclusions" or "formulaic recitation of the elements of a cause of action will not do." Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (quoting Twombly, 550 U.S. at 555). To state a claim, a complaint must contain sufficient factual matter, accepted as true, "that is plausible on its face." Id.

(quoting Twombly, 550 U.S. at 570). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* (citing Twombly, 550 U.S. at 556). The complaint allegations "must be enough to raise a right to relief above the speculative level." Twombly, 550 U.S. at 555 (citation omitted).

In considering whether a complaint states a claim, courts follow the principles set forth in Twombly. First, they must "identify[] pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth." Iqbal, 556 U.S. at 679. A plaintiff must support legal conclusions with factual allegations. Id. Second, if there are well-pleaded factual allegations, courts must "assume their veracity and then determine whether they plausibly give rise to an entitlement to relief." Id.

"The basis of injunctive relief in the federal courts has always been irreparable harm and inadequacy of legal remedies." Beacon Theatres, Inc. v. Westover, 359 U.S. 500, 506-507 (1959). Injunctive relief is appropriate, then, when, among other things, the moving party can "demonstrate that (1) no adequate remedy at law exists; [and] (2) it will suffer irreparable harm absent injunctive relief . . . ." U.S. v. Rural Elec. Convenience Co-op. Co., 922 F.2d 429, 432 (7th Cir. 1991) (citations omitted). "It is well settled that the availability of an adequate remedy at law renders injunctive relief inappropriate." Id. (citing, e.g. Northern Cal. Power Agency v. Grace Geothermal Corp., 469 U.S. 1306 (1984) and Beacon Theatres, Inc., 359 U.S. at 509).

III. ANALYSIS

The defendant has asked the court to dismiss the second amended complaint. Dkt. No. 12. The prayer for relief in the second amended complaint asks the court to enter an order "A. [d]eclaring that this action may be maintained as a class action, and certifying the Class as requested herein; B. [e]njoining TWC from the unlawful practices and statutory violations asserted herein; and C. [g]ranting such other and further relief as may be just and proper." Id. at 13. As the defendant has argued, the plaintiff now seeks only an injunction barring the defendant from "the unlawful practices and statutory violations" alleged in the complaint.

A. Standing

As noted above, the court allowed the parties to submit supplemental briefs after the Supreme Court issued its decision in Spokeo. The defendant argues that under Spokeo, the plaintiff does not have Article III standing to bring his claim, because he alleges only that the defendant committed a procedural violation of the CCPA by retaining his personally identifiable information. Dkt. No. 35 at 9-10. The defendant argues that because the plaintiff has not alleged that the defendant distributed or sold or disclosed his personally identifiable information to a third party, and because the plaintiff did not allege that the defendant gained some economic benefit from that retention, he cannot prove the "concrete harm" which the Spokeo court described.

The court agrees that Spokeo addresses directly the circumstances of the plaintiff's case. In Spokeo, the consumer plaintiff alleged that a website operator violated the Fair Credit Reporting Act ("FCRA") when it published inaccurate information about him. Spokeo, 136 S. Ct. at 1544. The Ninth Circuit found that the plaintiff had standing, because he had alleged that the defendant violated his personal statutory rights, not just those of the putative class, and because he had a personal, individualized interest in the handling of his credit information. Id. at 1546.

The Supreme Court found that the Ninth Circuit had not gone far enough in its analysis. The Court began by explaining the three "irreducible constitutional minimum" factors a plaintiff must demonstrate to show Article III standing: "The plaintiff must have (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." Id. at 1547 (citing Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992)). The burden of proving those factors lies with the plaintiff. Id. (citation omitted). And at the pleading stage, the plaintiff must "'clearly . . . allege facts demonstrating' each element." Id. (citation omitted).

The Spokeo Court focused on the first element—the requirement that the plaintiff prove an "injury in fact." Id. For a plaintiff to prove that he has suffered an injury in fact, the plaintiff must "show that he or she suffered 'an invasion of a legally protected interest' that is 'concrete and particularized' and 'actual or imminent, not conjectural or hypothetical.'" Id. at 1548 (citing Lujan,

504 U.S. at 560). The Supreme Court concluded that while the Ninth Circuit had considered whether the plaintiff had proven a *particularlized* injury (one which "affect[s] the plaintiff in a personal and individual way," id. (citation omitted)), it had not considered the other component of an injury-in-fact—the requirement that the injury be concrete. Id. "A 'concrete' injury must be '*de facto*'; that is, it must actually exist." Id. The injury must be "'real,' and not 'abstract.'" Id. This does not mean, the Court clarified, that the injury must be tangible; "intangible injuries can nevertheless be concrete." Id. at 1549.

Acknowledging that intangible harms are somewhat more difficult to identify than tangible ones, the Court advised that looking to history ("whether an alleged intangible harm has a close relationship to a harm that has traditionally been regarded as providing a basis for a lawsuit in English or American courts") and the judgment of Congress (which is "well positioned to identify intangible harms that meet minimum Article III standing requirements") is instructive. Id. But even in cases in which a plaintiff has a statutory right (granted by Congress in its role of "identifying and elevating intangible harms"), the plaintiff must allege a "concrete injury even in the context of a statutory violation." Id. For that reason, the Court stated, the plaintiff could not "allege a bare procedural violation, divorced from any concrete harm, and satisfy the injury-in-fact requirement of Article III." Id. The Court finished its analysis by conceding that the *risk* of concrete harm might, in some circumstances, "constitute an injury in fact." Id.

In the context of the Spokeo plaintiff's allegation that the defendant had committed a violation of the statutory provisions of the FCRA, the Supreme Court found that Congress had identified and elevated an intangible harm—the risk of "the dissemination of false information." Id. at 1550. The Court concluded, however, that the lower courts had not analyzed whether the plaintiff had shown facts demonstrating a real, concrete risk of harm to him. Id. The Court noted that even if the information the defendant had posted about the plaintiff had been inaccurate, for example, "not all inaccuracies cause harm or present any material risk of harm." Id. (The Court used the example of a defendant violating the FCRA by disseminating a false zip code; it wondered what real, concrete injury such a statutory violation could cause. Id.) Accordingly, the Court vacated the judgment of the Ninth Circuit, and remanded the case for further proceedings relating to the concrete harm requirement.

The facts alleged in the second amended complaint in this case present a similar set of circumstances. In the second amended complaint, the plaintiff alleges that Congress has identified and elevated an intangible harm—the risk to subscribers' privacy created by the fact that cable providers have "an enormous capacity to collect and store personally identifiable data about each cable subscriber." Dkt. No. 12 at 3-4 (citing H.R. Rep. 98-934 at 4666-67 (1984)). He has identified the statutory protection Congress has provided—the requirement in the CCPA that cable providers destroy personally identifiable information when it is no longer required for the purpose for which it was

collected. Id. at 2. The plaintiff further alleges that he had provided his personally identifiable information to the defendant when he subscribed in December 2004, that he terminated his service in September 2006, and that when he called the defendant in December 2014 (eight years later), he learned that the defendant still retained his personally identifying information. Id. at 9, ¶¶33-36. These allegations, like the plaintiff's allegations in Spokeo, are sufficient to satisfy the particularized injury prong of the injury-in-fact requirement.

But there are no allegations in the thirteen pages of the second amended complaint showing that the plaintiff has suffered a *concrete* injury as a result of the defendant's retaining his personally identifiable information. The complaint contains a detailed discussion of media articles which support the proposition that consumers value their personally identifiable information—and the privacy of that information—very highly; some researchers even have attempted to quantify in dollars the level of consumers' value. Id. at 6-9. A statement that consumers highly value the privacy of their personally identifiable information, however, does not demonstrate that the plaintiff has suffered a concrete injury. He does not allege that the defendant has disclosed his information to a third party. Even if he had alleged such a disclosure, he does not allege that the disclosure caused him any harm. He does not allege that he has been contacted by marketers who obtained his information from the defendant, or that he has been the victim of fraud or identity theft. He alleges only that the CCPA requires cable providers to destroy personal information at a certain

point, and that the defendant hasn't destroyed his. These allegations are almost identical to the allegations the plaintiff made in Spokeo. In fact, one might argue that the Spokeo plaintiff was a bit closer to alleging a concrete injury, because the defendant wasn't just keeping his information; it was publishing, to anyone who viewed the website, inaccurate information. The plaintiff in this case does not allege that the information the defendant retains is inaccurate, nor does he allege that the defendant has published it, or made it available, to anyone.

The plaintiff argues that Spokeo isn't relevant to the question of whether he has standing, because the Seventh Circuit already has held that a procedural violation such as the one he alleges does demonstrate an injury for the purposes of Article III standing. Dkt. No. 36 at 5. In support of this proposition, the plaintiff cites to the Seventh Circuit's decision in Sterk v. Redbox Automated Retail, LLC, 672 F.3d 535 (7th Cir. 2012). In Sterk, the plaintiff alleged that a video rental company had violated the Video Privacy Protection Act ("VPPA") by failing to destroy personally identifiable information. Id. at 536. The defendant took an interlocutory appeal to the Seventh Circuit, for the sole purpose of asking the court to determine whether the VPPA provided for damages for a plaintiff whose personal information had not been destroyed. Id.

In analyzing this question, the court first looked at the structure of the statute. Id. at 537-538. This court will hold that portion of the analysis until a later point in this decision and order. The court then moved to a practical

consideration of damages for the retention of personally identifiable information, and asked, "How could there be injury, unless the information, not having been destroyed, were disclosed?" Id. at 538. The court observed that "[i]n interpreting a statute even less indicative that an actual injury must be proved to entitle the plaintiff to statutory damages, . . . the Supreme Court held that the plaintiff could not obtain statutory damages without proof of an actual injury." Id. (citing Doe v. Chao, 540 U.S. 614 (2004)). The court stated that the "injury inflicted" by a failure to destroy private information "even if lawfully obtained and not disclosed" "is enormously attenuated," and speculated that Congress may well have decided not to provide for damages for that reason. Id. at 539. The Seventh Circuit thus reversed the district court's decision that the plaintiff could sue for damages for violation of the document destruction provision of the VPPA.

The plaintiff asserts that Sterk stands for the proposition that a "plaintiff had standing to sue to enjoin defendant for wrongfully retaining personal information in violation of Video Privacy Protection Act." Dkt. No. 36 at 5. The court is a bit stymied by this assertion. The Sterk opinion makes no direct reference to Article III standing (although it discusses the absence of any actual injury). As the court framed the question on appeal, it does not appear that the defendant appealed on the basis of standing—rather, the defendant appealed whether the *statute* authorized damages for violation of the information destruction provision. After concluding that the statute did not provide for such damages, the court did observe that the VPPA also authorized "other relief

besides just damages." Sterk, 672 F.3d at 539. But the court did not follow up that observation by stating, "And obviously the plaintiff would have Article III standing to pursue such other relief." Indeed, the court stated that "when all that a plaintiff seeks is to enjoin an unlawful act, there is no need for express statutory authorization; '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.'" Id. (quoting California v. Yamasaki, 442 U.S. 682, 705 (1979)). The Sterk court did *not* hold that the plaintiff had standing to pursue injunctive relief (if, indeed, that plaintiff even sought to pursue such relief). It merely re-stated the fact that if a federal court has jurisdiction over a case, it has the equitable power to issue injunctions in that case.

Given the clear directive in Spokeo, the court finds that while the second amended complaint alleges a particularized injury, it does not allege a concrete harm, and therefore that the plaintiff does not have Article III standing to bring this suit.

B. Failure to State a Claim

Even if the plaintiff had standing to bring the claim alleged in the second amended complaint, the court would be required to dismiss that complaint for failure to state a claim upon which relief may be granted. As noted, the plaintiff seeks only injunctive relief. In order to obtain that relief, he must show that he has no adequate remedy at law, and that he will suffer irreparable harm if the court does not grant the injunctive relief. The defendant has argued, and the

court agrees, that the plaintiff cannot demonstrate that he has no adequate remedy at law.

The statute at issue here, the CCPA, states in subsection (e) that "[a] cable operator shall destroy personally identifiable information if the information is no longer necessary for the purpose for which it was collected and there are no pending requests or orders for access to such information under subsection (d) of this section or pursuant to a court order." 47 U.S.C. §551(e). The next subsection, subsection (f), provides that "[a]ny person aggrieved by any act of a cable operator in violation of this section" can sue in district court, and if successful, may recover actual damages, punitive damages, and attorneys' fees and costs. The subsection provides that those monetary remedies are "in addition to any other lawful remedy available to a cable subscriber." 47 U.S.C. §551(f).

The plaintiff argues that subsection (f) does not afford him an adequate remedy at law, relying on the Sterk decision. The plaintiff's reliance on Sterk is misplaced, because the Sterk court reached its opinion that damages were not available under the VPPA as a result of the way that particular statute was structured.

The VPPA (18 U.S.C. §2710), like the CCPA, is divided into subsections. Subsection (a) lays out the definitions used in the statute. Subsection (b) prohibits video tape service providers from disclosing personally identifiable information except in limited circumstances. Subsection (c) provides that anyone aggrieved by the act of a person acting in violation of the statute can

sue in district court, and can recover actual damages, punitive damages, fees and costs, and "such other preliminary and equitable relief as the court determines to be appropriate." 18 U.S.C. §2710(c)(2)(D). Subsection (d) defines personally identifiable information. And subsection (d) requires video tape provider services to destroy personally identifiable information within a certain time frame.

The Sterk court pointed out that the subsection of the VPPA which provides for civil remedies—subsection (c)—appears *before* the subsection which requires destruction of personally identifiable information—subsection (e). Sterk, 672 F.3d at 538. The court found the "biggest interpretive problem" in what it described as a "not well drafted" statute to be

> . . . created by the statute's failure to specify the scope of subsection (c), which creates the right of action on which this lawsuit is based. If (c) appeared after all the prohibitions, which is to say after (d) and (e) as well as (b), the natural inference would be that any violator of any of the prohibitions could be sued for damages. But instead (c) appears after just the first prohibition, the one in subsection (b), prohibiting disclosure. This placement could be an accident, but we agree with the only reported appellate case to address the issue, *Daniel v. Cantrell*, 375 F.3d 377, 384-85 (6th Cir. 2004), that it is not; that the more plausible interpretation is that it is limited to enforcing the prohibition of disclosure. For one thing, the disclosure provision, but not the others, states that a "video tape service provider who knowingly discloses, to any person, personally identifiable information . . . shall be liable to the aggrieved person for the relief provided in subsection [c]," which includes damages.

Id.

For this reason, as well as because the court wondered how a customer could be harmed by the mere retention of personally identifiable information

absent disclosure, the Sterk court concluded that the plaintiff could not obtain damages for a violation of the information destruction provision of the VPPA.

The plaintiff in this case asserts that Sterk stands for the proposition that one cannot obtain damages for a provider's violation of an information destruction provision. The court does not read Sterk nearly so broadly. The Sterk court based its decision on the order in which the VPPA was laid out—the fact that the civil remedies provision came *before* the information destruction provision. The statute at issue in this case—the CCPA—is not structured that way. Subsection (a) of the CCPA describes the notice cable providers must give subscribers about personally identifiable information; subsection (b) describes when a provider may collect such information; subsection (c) prohibits disclosure of such information with limited exceptions; subsection (d) provides for subscriber access to the information; subsection (e) requires destruction of the information after a period of time; and subsection (f) describes the civil remedies available to "any person aggrieved by an act of a cable operator in violation of this section." The civil remedies provision in the CCPA comes *after* the prohibition on information retention. Unlike it did with the VPPA, Congress provided a damages remedy for violation of the information destruction requirement in the CCPA.

So while the Seventh Circuit held in Sterk that Congress had not provided a damages remedy for a violation of the information destruction provision of the VPPA, Congress has provided a damages remedy for a violation of the information destruction provision of the CCPA. If, therefore, the plaintiff

in this case had alleged facts showing that he had suffered a concrete harm from the defendant's retention of his personally identifying information, the CCPA would have allowed him to seek monetary damages for that harm.

The reason the second amended complaint does not seek money damages is not because no such remedy is available to the plaintiff. The plaintiff seeks only injunctive relief for one reason: to avoid the arbitration requirement of the subscriber agreement. If the plaintiff seeks monetary damages, the subscriber agreement requires that he submit that dispute to binding arbitration. To avoid that requirement, the plaintiff has amended his complaint twice, in an attempt to remove any indication that he seeks monetary damages. Put a different way, it is not that the plaintiff does not have a remedy at law; it is that he does not want to avail himself of that remedy at law, because to do so, he would have to eschew federal court and submit himself to a binding arbitration award.

Because the CCPA provides for money damages for violations of the information destruction provision of the CCPA, therefore, the plaintiff has an adequate remedy at law. That means that he cannot prove one of the two necessary elements for obtaining injunctive relief—even if he did have standing.

III. CONCLUSION

The defendants make other arguments—for example, they argue that the injunctive relief the plaintiff seeks is vague and overly broad, and seeks nothing more than an order requiring the defendant to comply with the law (something the defendant is required to do even without a court order). Because the court

finds that the plaintiff does not have standing to bring the claim asserted in the second amended complaint, and because even if he did have standing, he cannot state a claim upon which the injunctive relief he seeks can be granted, the court need not reach these other arguments.

On February 24, 2016, the plaintiff filed a motion asking the court to compel the defendants to provide certain written discovery responses. Dkt. No. 25. They also filed a motion asking the court to allow them to file under seal the portions of Exhibit F to the motion Bates-stamped TWC 42-340 and 523-28, because the defendant had designated those documents as confidential internal operating policies of the defendant. Dkt. No. 24. The court will deny the motion to compel as moot, given that the court is dismissing the case for lack of standing. The court will grant the motion to seal, however, to avoid unwarranted disclosure of the defendant's private internal policy information.

The court **GRANTS** the defendant's motion to dismiss the second amended complaint, Dkt. No. 17, and **ORDERS** that the second amended complaint is **DISMISSED FOR LACK OF STANDING**.

The court **DENIES** the plaintiff's motion to compel written discovery responses as **MOOT**. Dkt. No. 25.

The court **GRANTS** the plaintiff's motion to seal Dkt. No. 25-3, Exhibit F to the motion to compel, Bates-stamped pages TWC 42-340 and 523-28. The

court **ORDERS** that these documents shall remain under seal until further order of the court.

Dated in Milwaukee, Wisconsin this 17th day of June, 2016.

BY THE COURT:

HON. PAMELA PEPPER
United States District Judge