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
FOR THE EASTERN DISTRICT OF WISCONSIN

THE HONORABLE PAMELA PEPPER
CASE NO. 2:15-CV-01078

BRIEF OF APPELLEE

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CORPORATE DISCLOSURE STATEMENT

1. The full name of every party that the attorney represents in the case: Time Warner Cable Inc.

2. The names of all law firms whose partners or associates have appeared for the party in the case or are expected to appear for the party in this court: White & Case LLP

3. If the party is a corporation, identify all its parent corporations, if any, and list any publicly held company that owns 10% or more of the party's stock:

Derek Gubala ("Plaintiff") filed this action against Time Warner Cable Inc. ("TWC"). When Plaintiff originally filed this action, TWC was an independent, publicly held corporation. In May 2016, TWC merged into Spectrum Management Holding Company, LLC, a limited liability company, owned by Charter Communications Holdings, LLC. Charter Communications Holdings, LLC is a limited liability company owned by CCH II, LLC and Advance/Newhouse Partnership. CCH II, LLC is a limited liability company owned by Charter Communications, Inc., Coaxial Communications of Central Ohio LLC, Insight Communications Company LLC, NaviSite Newco LLC, and TWC Sports Newco LLC. Coaxial Communications of Central Ohio LLC, Insight Communications Company LLC, NaviSite Newco LLC, and TWC Sports Newco LLC are all direct or indirect wholly-owned subsidiaries of Charter Communications, Inc. Charter Communications, Inc. is a publicly held company. Based on publicly available information, TWC is aware that Liberty Broadband Corporation owns 10% or more of Charter Communications, Inc.'s stock. Liberty Broadband Corporation is also a publicly held company.

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I. JURISDICTION

The jurisdictional summary in Plaintiff's brief is not complete and correct. Accordingly, pursuant to Circuit Rule 28(b), TWC provides the following complete jurisdictional statement.

The United States District Court for the Eastern District of Wisconsin had jurisdiction under 28 U.S.C. § 1331. Plaintiff alleges a single cause of action for violation of the Cable Communications Policy Act ("Cable Act"), 47 U.S.C. § 551. Supplemental Appendix ("Supp. App.") at 26-27. Specifically, Plaintiff alleges a violation of 47 U.S.C. § 551(e). *Id.*

This Court has jurisdiction under 28 U.S.C. § 1291. The district court dismissed this action for lack of standing on June 17, 2016, and entered judgment on June 23, 2016. App. at 1, 19. Plaintiff timely filed a notice of appeal on June 22, 2016. Dkt.[1] No. 39; Fed. R. App. Proc. 4(a)(1)(A) (notice of appeal must be filed within 30 days after entry of the judgment or order appealed from); Fed. R. App. Proc. 4(a)(2) ("A notice of appeal filed after the court announces a decision or order—but before the entry of the judgment or order—is treated as filed on the date of and after the entry.").

II. ISSUES PRESENTED

1. Whether the district court correctly held that Plaintiff failed to plead a "concrete" injury in fact and, therefore, failed to establish Article III standing, because he merely and conclusorily alleged a bare violation of the Cable Act's data retention provision.

2. Whether the district court correctly held that Plaintiff failed to state a claim for injunctive relief because he did not and could not plead the mandatory prerequisite elements for injunctive relief: an inadequate legal remedy (*i.e.*, monetary damages) and irreparable harm.

3. Whether injunctive relief is a remedy available for a violation of Cable Act

[1] All citations are to the docket of the underlying district court action, E.D. Wis. No. 2:15-CV-1078, unless otherwise noted.

section 551(e).

III. STATEMENT OF THE CASE

A. Plaintiff Abandons his Claim for Damages to Avoid Arbitration and Amends the Complaint to Seek Only Injunctive Relief

Plaintiff brings this lawsuit against TWC on behalf of himself and a putative nationwide class of former TWC subscribers for violation of the Cable Act's data retention provision, which 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 [by a cable subscriber] under subsection (d) or pursuant to a court order." Supp. App. at 17, 26-27; 47 U.S.C. § 551(e). Specifically, Plaintiff seeks to represent "[a]ll persons in the United States who signed up for cable service with [TWC] and whose personally identifiable information was retained by [TWC] after the termination of services." Supp. App. at 24, ¶ 37.

Plaintiff's initial complaint asserted the same cause of action for violation of the Cable Act, but primarily sought monetary damages. Supp. App. at 12-14. In light of the agreement between Plaintiff and TWC to resolve all disputes through binding arbitration and not participate in a class action, TWC filed a motion to compel arbitration of the claim alleged in Plaintiff's initial complaint. Dkt. No. 6.

Plaintiff and TWC's agreement to arbitrate excludes claims for injunctive relief. Appendix ("App.") at 3; Dkt. No. 6-1 at 3. Rather than pursue an individual claim for monetary damages, costs, and fees in arbitration, Plaintiff abandoned the primary relief he originally sought on behalf of the putative class and amended his complaint twice to remove all references to monetary relief. App. at 3-4; Supp. App. at 16-28. Plaintiff's Second Amended Complaint ("SAC") alleges the same single claim under the Cable Act, but seeks only injunctive relief.

Supp. App. at 27, ¶ 51.

B. Plaintiff Conclusorily Alleges Only a Bare Statutory Violation

Most of the allegations in the SAC are irrelevant to the substance of Plaintiff's Cable Act claim. The SAC sets forth the background and history of the Cable Act, and cites several outdated surveys and academic articles purporting to address the economic value of personal data. Supp. App. at 18-24, ¶¶ 10-17, 25-32.

The SAC dedicates only *four* paragraphs to the "Facts Pertaining to Plaintiff." Supp. App. at 24, ¶¶ 33-36. Those allegations include the following:

- On or about December 27, 2004, Plaintiff subscribed to TWC's residential services and provided TWC with various forms of personally identifiable information, including his date of birth, address, home and work telephone numbers, social security number, and credit card information. Supp. App. at 24, ¶ 33.
- On or about September 28, 2006, Plaintiff cancelled his TWC residential services. Supp. App. at 24, ¶ 34.
- On or about December 4, 2014, Plaintiff contacted TWC and confirmed that all of the personally identifiable information he originally submitted in 2004 remains in TWC's billing records. Supp. App. at 24, ¶ 35.
- TWC retains the personally identifiable information of Plaintiff and other members of the putative class. Supp. App. at 24, ¶ 36.

On this basis alone, Plaintiff conclusorily asserts that TWC's failure to destroy his personally identifiable information violates the Cable Act's data retention provision, 47 U.S.C.§ 551(e), and "constitutes injury in the form of a direct invasion of [his] federally protected privacy rights." Supp. App. at 27, ¶¶ 47-48. That's it.

Entirely absent from the SAC are any allegations asserting a plausible basis for federal court jurisdiction. Plaintiff does not allege actual harm or a material risk of harm stemming from the alleged statutory violation. Nor does he allege the absence of an adequate remedy at law or irreparable harm, both of which are essential elements to state a claim for injunctive relief.

C. The District Court Dismisses Plaintiff's Second Amended Complaint

On December 23, 2015, TWC filed a motion to dismiss the SAC pursuant to Federal Rule of Civil Procedure 12(b)(6). Dkt. No. 17. TWC argued that Plaintiff failed to state a claim because: (1) Plaintiff failed to plead the mandatory prerequisite elements for an injunctive relief claim—namely, an inadequate legal remedy and irreparable harm; (2) injunctive relief was not available as a remedy for a violation of Cable Act section 551(e); and (3) the request for injunctive relief was impermissibly vague. *Id.*

On the day of oral argument, the Supreme Court issued its opinion in *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540 (2016). Acknowledging that *Spokeo* presented a controlling issue in consideration of the court's subject matter jurisdiction, the district court invited the parties to brief the implications of *Spokeo* on this action. Dkt. No. 34 at 3. TWC filed a supplemental brief demonstrating that the court should dismiss the case because Plaintiff did not have Article III standing to pursue his claim. Dkt. No. 35.

The district court dismissed the SAC for lack of standing, but noted that dismissal was proper on two separate grounds. First, the court held that the SAC "does not allege a concrete harm, and therefore that the [P]laintiff does not have Article III standing to bring this suit." App. at 13. After analyzing and applying the Supreme Court's guidance regarding the injury-in-fact requirement, the district court concluded that "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." App. at 11 (emphasis in original).

Second, the district court held that even if Plaintiff had standing to bring his claim, the court must dismiss the SAC for failure to allege one of the two necessary elements for obtaining injunctive relief in federal court. App. at 14-15. Focusing on the inadequacy of monetary damages, the district court correctly found that the statutory text was clear: an award of monetary damages is an adequate remedy for an alleged violation of the Cable Act's data retention provision. App. at 14-18. The district court concluded: "[I]t 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." App. at 18. Consequently, "[P]laintiff cannot demonstrate that he has no adequate remedy at law." *Id.*

The district court entered final judgment on June 23, 2016, dismissing Plaintiff's SAC for lack of standing. App. at 1.

D. The Eighth Circuit Dismissed a Nearly Identical Case Filed by Plaintiff's Counsel for Lack of Standing post-*Spokeo*

Plaintiff's counsel filed nearly identical putative class action complaints across the nation alleging the same bare Cable Act violation against all major cable and satellite providers, including an earlier case against TWC which a California court dismissed.[2] On September 8, 2016, the Eighth Circuit, in counsel for Plaintiff's nearly identical cut and paste case against Charter Communications, Inc. ("Charter"), held that the complaint failed to plead a concrete

[2] *See, e.g.*, *Bayer v. Comcast Cable Commc'ns, LLC*, No. 12-CV-8618 (N.D. Ill.); *Braitberg v. Charter Commc'ns, Inc.*, No. 4:13-CV-498 (E.D. Mo.); *Hodsdon v. Bright House Networks, LLC*, No. 1:12-CV-1580 (E.D. Cal.); *Hodsdon v. DirecTV, LLC*, No. 12-CV-02827 (N.D. Cal.); *Padilla v. DISH Network LLC*, No. 12-CV-7350 (N.D. Ill.). The TWC case was *Burton v. Time Warner Cable Inc.*, No. CV-12-06764, 2013 WL 3337784 (C.D. Cal. Mar. 20, 2013).

injury and therefore did not establish Article III standing necessary for adjudication in federal court. *Braitberg v. Charter Commc'ns, Inc.*, No. 14-1737, 2016 WL 4698283 (8th Cir. Sept. 8, 2016). The decision, discussed below, follows *Spokeo* and requires the plaintiff to plead a concrete harm to establish standing, which, as evident here, helps curb lawyer-driven class actions filed in multiple circuits against the entire cable and satellite industry on behalf of putative classes who have suffered no actual harm and would receive no benefit. Like the Eighth Circuit, this Court should affirm the district court and finally end counsel for Plaintiff's latest lawsuit against TWC, purportedly on behalf of its former customers who have not suffered an injury in fact.

IV. SUMMARY OF ARGUMENT

The district court correctly dismissed this action for lack of Article III standing, and this Court should affirm. The Supreme Court's recent decision in *Spokeo* effectively rejects earlier lower court decisions holding that the allegation of a bare statutory violation was sufficient, without more, to satisfy the requirements of Article III.

In *Spokeo*, the Supreme Court reinforced the fundamental requirement that a plaintiff must allege a concrete injury. The Court explained that a plaintiff establishes a concrete injury by adequately alleging either actual harm or a material risk of harm. *Spokeo*, 136 S. Ct. at 1548-50. This burden applies regardless of whether the alleged injury is "tangible" or "intangible." *Id.* at 1549 ("Congress' role in identifying and elevating intangible harms does not mean that a plaintiff automatically satisfies the injury-in-fact requirement whenever a statute grants a person a statutory right and purports to authorize that person to sue to vindicate that right. Article III standing requires a concrete injury even in the context of a statutory violation.").

Here, Plaintiff fails to satisfy this burden, as he merely alleges that a bare violation of the Cable Act's data retention provision "constitutes injury in the form of a direct invasion of [his] federally protected privacy right[]." Supp. App. at 27, ¶¶ 48-49. Both *Spokeo* and subsequent appellate case law make clear that Plaintiff does not have standing by merely alleging a bare violation of the Cable Act's data retention provision. These scant allegations, which fail to identify actual harm or a material risk of harm, do not establish Article III standing.

Even assuming Plaintiff did have standing, the Court should affirm dismissal of the SAC because it fails to plausibly allege the mandatory prerequisite elements for injunctive relief—namely, an inadequate legal remedy and irreparable harm. *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 381 (1992) (quoting *O'Shea v. Littleton*, 414 U.S. 488, 499 (1974)). The SAC fails to plead, let alone mention, these mandatory elements. The district court correctly concluded that Plaintiff failed to make this showing.

The Cable Act's express statutory language establishes a monetary remedy when a plaintiff proves actual harm from a violation of section 551(e) and does not authorize courts to grant equitable or injunctive relief. In sum, monetary relief can make Plaintiff whole for any past and ongoing harm. Plaintiff amended his complaint twice to remove all requests for monetary relief, but he did so only for the purpose of avoiding his agreement with TWC to arbitrate this dispute. The absence of a prayer for relief for monetary damages in the SAC is not sufficient to plead that the statutory remedy at law is inadequate. As such, Plaintiff cannot pursue his single claim for injunctive relief.

V. ARGUMENT

A. Standard of Review

The district court's order dismissing Plaintiff's SAC for lack of standing is reviewed *de novo*. *Lewert v. P.F. Chang's China Bistro, Inc.*, 819 F.3d 963, 966 (7th Cir. 2016) (citing *Reid L. v. Ill. State Bd. of Educ.*, 358 F.3d 511, 515 (7th Cir. 2004)). This Court must affirm the district court's decision unless—accepting as true all material allegations of the operative complaint and drawing all reasonable inferences in Plaintiff's favor—Plaintiff establishes that he has "suffered a concrete and particularized injury that is fairly traceable to the challenged conduct, and is likely to be redressed by a favorable judicial decision." *Id.* (quoting *Hollingsworth v. Perry*, 133 S. Ct. 2652, 2661 (2013)).

B. Plaintiff Lacks Standing Because He Fails to Allege an Injury in Fact

The district court correctly dismissed this action for lack of standing because the allegations of the SAC fail to establish that Plaintiff suffered an injury in fact. App. at 11-13. *Spokeo* plainly applies here and makes clear that "Article III standing requires a concrete injury even in the context of a statutory violation." *Id.* at 1549. Plaintiff's failure to allege either actual harm or a material risk of harm adequate to satisfy the concreteness requirement deprives him of standing to pursue his claim. *Id.* at 1548-49; *see also Lewert*, 819 F.3d at 966-68.

Indeed, the Eighth Circuit, in a nearly identical case brought by Plaintiff's counsel against Charter, recently rejected the exact argument Plaintiff proffers here with respect to concrete injury—that a mere violation of the Cable Act's data retention provision confers standing without an allegation or showing of actual harm or a material risk of harm arising from the retention of personally identifiable information—and affirmed the dismissal of the action for

lack of Article III standing. *Braitberg*, 2016 WL 4698283, at *4-5 (citing with approval the district court's dismissal of this action for lack of standing).

1. *Spokeo* Applies to the Alleged Statutory Violation and Reinforces the Constitutional Requirement of Injury in Fact

Under Article III of the U.S. Constitution, federal courts may only adjudicate "actual cases or controversies." *Raines v. Byrd*, 521 U.S. 811, 818 (1997) (quoting *Simon* v. *E. Ky. Welfare Rights Org.*, 426 U.S. 26, 37 (1976)). To satisfy the "bedrock" case-or-controversy requirement, Plaintiff must establish, among other elements, that he has standing to sue based on the allegations in the Complaint. *Id.* (quoting *Valley Forge Christian College* v. *Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 471 (1982); citing *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 561 (1992)).

The Supreme Court's recent decision in *Spokeo* further reinforces the fundamental prerequisite of standing. As summarized in *Spokeo*, a plaintiff invoking federal jurisdiction bears the burden of establishing "the 'irreducible constitutional minimum' of standing" by demonstrating: (1) an injury in fact; (2) fairly traceable to the challenged conduct of the defendant; and (3) likely to be redressed by a favorable judicial decision. *Spokeo*, 136 S. Ct. at 1547 (quoting *Lujan*, 504 U.S. at 560-61). This case, as did *Spokeo*, primarily concerns the "'[f]irst and foremost' of standing's three elements": injury in fact. *Id.* (quoting *Steel Co. v. Citizens for Better Env't*, 523 U.S. 83, 103 (1998)).

"Injury in fact is a constitutional requirement, and '[i]t is settled that Congress cannot erase Article III's standing requirements by statutorily granting the right to sue to a plaintiff who would not otherwise have standing." *Id.* at 1547-48 (quoting *Raines*, 521 U.S. at 820 n.3). As the Court in *Spokeo* explained, "an injury in fact must be both concrete *and* particularized," *id*. at

1546, and "actual or imminent, not conjectural or hypothetical, *id*. at 1548 (quoting *Lujan*, 504 U.S. at 560).

With respect to concreteness, the injury must be "'*de facto*'; that is, it must actually exist." *Id.* at 1548. Although the Court recognized the relevance of Congress' role in identifying and elevating intangible harms, this "does not mean that a plaintiff automatically satisfies the injury-in-fact requirement whenever a statute grants a person a statutory right and purports to authorize that person to sue to vindicate that right." *Id*. at 1549. Rather, "Article III standing requires a *concrete injury even in the context of a statutory violation*." *Id*. (emphasis added).

The alleged injury in *Spokeo* was the marketing of inaccurate consumer reporting information about the plaintiff, which purportedly constituted a violation of the Fair Credit Reporting Act's ("FCRA") requirement that consumer reporting agencies "follow reasonable procedures to assure maximum possible accuracy of" consumer reports. *Spokeo*, 136 S. Ct. at 1545-46. Guided by the above principles, the Supreme Court in *Spokeo* vacated and remanded the action because the Ninth Circuit did not consider whether the plaintiff's alleged injury was concrete. *Id.* at 1550. The Court noted that the plaintiff "cannot satisfy the demands of Article III by alleging a bare procedural violation" and ordered the Ninth Circuit to consider whether "the particular procedural violations alleged in this case entail a degree of risk sufficient to meet the concreteness requirement." *Id.* at 1550. Accordingly, *Spokeo* makes clear that Plaintiff cannot establish injury in fact stemming from the alleged statutory violation without alleging an actual injury or material risk of injury. *Id.* at 1549-50.

Instead of acknowledging that *Spokeo* plainly controls here, Plaintiff contorts the Supreme Court's holding in *Spokeo* as applicable only to procedural statutory violations and attempts to characterize the alleged Cable Act violation as "substantive" in order to avoid

Spokeo's application. Appellant's Br. at 9-13. This distinction, however, ignores that *Spokeo* applies to and requires a concrete injury for all statutory violations. *Id.* at 1549 ("Article III standing requires a concrete injury even in the context of a statutory violation."). In any event, the alleged violation of the Cable Act is certainly not a substantive violation.

As the district court found, "*Spokeo* addresses directly the circumstances of [P]laintiff's case," and this case, like *Spokeo*, involves a similar procedural statutory violation. App. at 10; *see also Braitberg*, 2016 WL 4698283, at *4 (finding identical allegations constituted a "bare procedural violation"); *McCollough v. Smarte Carte, Inc.*, No. 16-CV-03777, 2016 WL 4077108, at *4 (N.D. Ill. Aug. 1, 2016) (holding an alleged violation the Illinois Biometric Information Privacy Act for *mere retention* of fingerprint biometric information is "the sort of bare procedural violation that cannot satisfy Article III standing").

Both the FCRA and the Cable Act address the handling of personal information by third parties, and both involve a procedural means of protecting that information: the FCRA through an accuracy assurance provision, and the Cable Act through its data retention and destruction provision. *Spokeo*, 136 S. Ct. at 1545-46; 47 U.S.C. § 551(e). The cases on which Plaintiff relies to create the illusion of a substantive statutory violation here are fundamentally different, involving either an actual intrusion on privacy or a failure to provide information to which the plaintiff was entitled.[3]

[3] *See, e.g.*, *Church v. Accretive Health, Inc.*, No. 15-15708, 2016 WL 3611543, at *3 n.2 (11th Cir. July 6, 2016) (unpublished opinion) (violation of the Fair Debt Collection Practices Act's ("FDCPA") requirement that debt collectors make certain required disclosures); *Matera v. Google Inc.*, No. 15-CV-04062-LHK, 2016 WL 5339806, at *12 (N.D. Cal. Sept. 23, 2016) (violation of the Wiretap Act and California Penal Code § 631's prohibition of actual or attempted interception of communications); *Guarisma v. Microsoft Corp.*, No. 15-24326-CIV, 2016 WL 4017196, at *2-3 (S.D. Fla. July 26, 2016) (violation of FCRA amendment prohibiting point-of-sale disclosure of "more than the last 5 digits of the card number or the expiration date").

No court has disagreed with the district court's analysis in this case, and any court distinguishing this case did so because that plaintiff alleged an actual intrusion or disclosure. *Aranda v. Caribbean Cruise Line, Inc.*, No. 12-C-4069, 2016 WL 4439935, at *4-6 (N.D. Ill. Aug. 23, 2016) (finding TCPA claims were based on violation of substantive right to be free from unsolicited telemarketing calls); *A.D. v. Credit One Bank, N.A.*, No. 14-C-10106, 2016 WL 4417077, at *5-7 (N.D. Ill. Aug. 19, 2016) (same); *Daubert v. NRA Grp., LLC*, No. 3:15-CV-00718, 2016 WL 4245560, at *3-4 (M.D. Pa. Aug. 11, 2016) (noting *Gubala* did not involve the FDCPA and was not binding, and concluding the plaintiff had standing where he alleged his information was disclosed).

Plaintiff contends that *Spokeo*'s citation to *Summers v. Earth Island Institute*, 555 U.S. 488 (2009), lends support to his narrow interpretation of *Spokeo*. Appellant's Br. at 10-11. It does not. *Spokeo* merely cites *Summers* for the unremarkable principle, derived from the general principles set forth *supra*, that "[d]eprivation of a procedural right without some concrete interest that is affected by the deprivation . . . is insufficient to create Article III standing." *Spokeo*, 136 S. Ct. at 1549 (citing *Summers*, 555 U.S. at 496). Indeed, *Summers* returns to the same general principles set forth in *Spokeo* and applicable here. *See Summers*, 555 U.S. at 496 ("[I]t would exceed [Article III's] limitations if, at the behest of Congress and in the absence of any showing of concrete injury, we were to entertain citizen suits to vindicate the public's nonconcrete interest in the proper administration of the laws.") (alterations in original) (quoting *Lujan*, 504 U.S. at 580-81 (Kennedy, J., concurring)).

In addition, Plaintiff argues that, under *Spokeo*, the "historical recognition of privacy violations" demonstrates that the alleged breach of the Cable Act's data retention provision is alone "'concrete' enough to confer standing under Article III." Appellant's Br. at 14-18. *Spokeo*

itself demonstrates this contention is incorrect. *Spokeo* concerned an alleged violation of the FCRA—a statute meant to safeguard the *privacy* of personal information. The history behind privacy lawsuits was not determinative and did not confer Article III standing to the plaintiff in *Spokeo*, and certainly is not determinative here. Nonetheless, to the extent historical recognition has any bearing on the standing analysis, "[a]lthough there is a common law tradition of lawsuits for invasion of privacy [(*i.e.*, intrusion upon seclusion, public disclosure, or false light)], the retention of information lawfully obtained, without further disclosure, traditionally has not provided the basis for a lawsuit in American courts." *Braitberg*, 2016 WL 4698283, at *4 (citing Restatement (Second) of Torts § 652A (Am. Law Inst. 1977)).

Padilla and *Sterk II*, on which Plaintiff relies in this context, do not recognize, let alone discuss, the historical nature of unauthorized retention claims, and are no longer good law for the proposition that a mere violation of a data retention provision confers standing. *See* Appellant's Br. at 15-17 (citing *Padilla v. Dish Network LLC*, No. 12-CV-7350, 2013 WL 3791140 (N.D. Ill. July 19, 2013); *Sterk v. Redbox Automated Retail, LLC* ("*Sterk II*"), No. 11-C-1729, 2012 WL 3006674 (N.D. Ill. July 23, 2012)). In both *Padilla* and *Sterk II*, the plaintiffs only had Article III standing to pursue injunctive relief under the now-incorrect premise that "the injury required by Article III may exist solely by virtue of statutes creating legal rights, the invasion of which create standing." *Padilla*, 2013 WL 3791140, at *5 (quoting *Scanlan v. Eisenberg*, 669 F.3d 838, 845 (7th Cir. 2012)); *accord Sterk II*, 2012 WL 3006674, at *9. In contrast, *Spokeo* explicitly holds that a plaintiff must allege a concrete injury, not only a statutory violation, to establish standing. *Spokeo*, 136 S. Ct. at 1549-50. Plaintiff fails to do so.

2. Plaintiff's Failure to Allege Either Actual Harm or a Material Risk of Harm Precludes a Finding of Injury in Fact

To establish Article III standing, Plaintiff must allege (1) he has suffered actual harm as a result of the alleged statutory violation, or (2) the alleged violation "entail[s] a degree of risk sufficient to meet the concreteness requirement." *Spokeo*, 136 S. Ct. at 1549-50. Plaintiff does not allege such facts. The SAC merely alleges: "Plaintiff and the Class have suffered injuries *as a result of TWC's violation of 47 U.S.C. § 551*. TWC's failure to destroy their PII, as required [by] 47 U.S.C. § 551, *constitutes injury in the form of a direct invasion of their federally protected privacy rights*." Supp. App. at 27, ¶ 48 (emphases added). *Spokeo* makes it clear that such a bare statutory violation is insufficient for the purpose of Article III standing.

Plaintiff could not, in any event, plead actual harm absent TWC's disclosure of his personally identifiable information, which he does not allege. Indeed, this Court has already held, albeit in a different context, that the mere retention of personal information does not cause actual harm or injury. *Sterk v. Redbox Automated Retail, LLC* ("*Sterk I*"), 672 F.3d 535, 538 (7th Cir. 2012) ("How could there be injury, unless the information, not having been destroyed, were disclosed? If though not timely destroyed, it remained secreted in the . . . service provider's files until it was destroyed, there would be no injury."); *see also McCollough*, 2016 WL 4077108, at *3 (citing Judge Posner's injury discussion from *Sterk I* to find no Article III standing for an unlawful retention claim absent disclosure or risk of disclosure). Plaintiff does not allege TWC distributed or disclosed his personally identifiable information to a third party, or even that TWC gained some economic benefit from its alleged retention. Following the guidance of Judge Posner in *Sterk I*, the district court correctly concluded that, in light of *Spokeo*, Plaintiff's sole allegation of ongoing retention is insufficient to establish actual harm for the purpose of Article III standing.

Although Plaintiff has abandoned his claim for monetary damages, in his brief, he directs this Court to generalized allegations in the SAC that allege the statutory violation "deprived [him] of the full value of the services that [he] bargained and paid for [b]ecause Plaintiff . . . ascribe[s] monetary value to the[] ability to control" his personal information.[4] Supp. App. at 27, ¶ 49. But such allegations conclusively do not rise to the level of actual harm. *See, e.g.*, *Braitberg*, 2016 WL 4698283, at *5; *Chambliss v. Carefirst, Inc.*, No. CV RDB-15-2288, 2016 WL 3055299, at *6 (D. Md. May 27, 2016) (noting allegations of decreased value of personal information are insufficient for standing); *Burton v. Time Warner Cable Inc.*, No. CV 12-06764 JGB-AJWX, 2013 WL 3337784, at *9 (C.D. Cal. Mar. 20, 2013) ("Numerous district courts have found that generalized allegations that personal information has independent economic value are insufficient . . . for purposes of Article III standing."). Moreover, the allegations to this effect are conclusory and deficient. Plaintiff does not allege that he could utilize his personally identifiable information for his own financial gain, or that TWC's alleged retention of his information prevented him from doing so. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (holding only "well-pleaded, nonconclusory factual allegation[s]" can plausibly support a claim for relief).

Nor does Plaintiff adequately allege a material risk of harm from the mere retention of his personally identifiable information. In noting that a "material risk of harm" may constitute a concrete injury in fact, the Supreme Court in *Spokeo* cited to its earlier decision in *Clapper v. Amnesty International USA*, 133 S. Ct. 1138 (2013), which articulated the standard for determining whether a risk of harm is sufficient for Article III standing. *Id.* at 1549-50. In

[4] To the extent Plaintiff argues he suffered an "economic injury to the value of his personal information," *see* Appellant's Br. at 19-20, he concedes that a remedy at law (*i.e.*, monetary damages) is adequate, thereby foreclosing his right to injunctive relief. *See* Section C, below.

Clapper, the Court held a risk of harm must be "certainly impending," rather than merely "hypothetical." 133 S. Ct. at 1143, 1151.

The SAC alleges once, in passing, the "risk of identity theft and conversion of personal financial accounts" as a result of the alleged Cable Act violation. Supp. App. at 19, ¶ 13. That sole allegation, does not amount to a material risk of harm sufficient to confer Article III standing, because Plaintiff does not allege a single fact that makes the risk of identity theft real, let alone "certainly impending." *Lewert v. P.F. Chang's China Bistro, Inc.*, 819 F.3d 963 (7th Cir. 2016), which involved a consumer credit and debit card data breach, provides helpful guidance. In *Lewert*, allegations of harm pertaining to future injuries (including an increased risk of fraudulent charges or identity theft) were sufficiently concrete because a data breach had occurred and it was "plausible to infer a substantial risk of harm from the data breach, because a primary incentive for hackers is 'sooner or later[] to make fraudulent charges or assume those consumers' identities[.]" *Id.* at 967 (quoting *Remijas v. Neiman Marcus Grp., LLC*, 794 F.3d 688, 693 (7th Cir. 2015)) (alterations in original). Indeed, one plaintiff had already experienced fraudulent charges. *Id.*

Here, the SAC is entirely devoid of an allegation that Plaintiff's personal information was compromised. Absent such an allegation, the purported risk of identity theft is not credible, but merely conjectural, hypothetical, and insufficient to confer standing. *Id.* at 966-68; *see also Clapper*, 133 S. Ct. at 1143, 1151; *Remijas*, 794 F.3d at 694 (finding the risk of identity theft was sufficient to confer standing, but only because the plaintiffs alleged data servers had already been breached).

3. Subsequent Case Law Applying *Spokeo* Forecloses Plaintiff's Action

The Eighth Circuit's opinion in *Braitberg* is directly on point. *Braitberg*, like this action, was filed by Plaintiff's counsel and involved the alleged violation of the Cable Act's data retention provision. *Braitberg*, 2016 WL 4698283, at *1. The alleged harm in *Braitberg* is identical to the harm alleged here: the "direct invasion of . . . federally protected privacy rights." *Id.* Indeed, the complaint is almost identical to the one here. Guided by *Spokeo*, the Eighth Circuit concluded that the plaintiff alleged only "a bare procedural violation, divorced from any concrete harm." *Id.* at *4 (quoting *Spokeo*, 136 S. Ct. at 1549). Expanding upon why the alleged harm did not constitute an injury in fact, the court explained:

> [The plaintiff] does not allege that [the defendant] has disclosed the information to a third party, that any outside party has accessed the data, or that [the defendant] has used the information in any way during the disputed period. He identifies no material risk of harm from the retention; a speculative or hypothetical risk is insufficient.

Id. Here, Plaintiff's allegations suffer from the same deficiencies. Supp. App. at 27, ¶¶ 48, 49.

This Court's opinion in *Diedrich v. Ocwen Loan Servicing, LLC*, No. 15-2573, 2016 WL 5852453 (7th Cir. Oct. 6, 2016), is in accord with *Braitberg* and illustrates why Plaintiff's allegations do not establish standing. *Diedrich* involved the violation of a provision of the federal Real Estate Settlement Procedures Act setting forth how a mortgage servicer must respond to a borrower's qualified written request for information. *Id.* at *1-2. After requesting that the parties file supplemental briefing on the issue of standing in light of *Spokeo*, the Court concluded that the plaintiffs adequately alleged a concrete harm. *Id.* at *2-4. Specifically, the plaintiffs alleged that, as a direct result of the alleged statutory violation, they "suffered damage to their credit" and were "forced to pay [the defendant] more money and higher interest rates

than they were required by law or by the terms of their loan modification agreement to pay." *Id.* at *4.

In contrast, here, Plaintiff alleges only a bare statutory violation divorced from any actual harm—and not a single effect causally related to TWC's alleged retention of his personally identifiable information. Supp. App. at 27, ¶¶ 48, 49. Moreover, to the extent Plaintiff claims that a bare statutory violation is sufficient to establish standing without a showing of a concrete injury, this Court held in *Diedrich* that "[a]fter *Spokeo*, this is clearly no longer the case." *Diedrich*, 2016 WL 5852453, at *4.

Plaintiff cites a number of cases involving the unauthorized use or disclosure of personal information, which instead of supporting Plaintiff's position, further illustrate why Plaintiff's allegations—premised on mere retention—are insufficient to confer standing.[5] *See, e.g.*, *Carlsen v. GameStop, Inc.*, No. 15-2453, 2016 WL 4363162, at *3 (8th Cir. Aug. 16, 2016) (finding injury in fact where the defendant disclosed the plaintiff's personal information to a third party in violation of an express agreement not to do so); *Boelter v. Hearst Commc'ns, Inc.*, Nos. 15-CIV-3934-AT & 15-CIV-9279-AT, 2016 WL 3369541, at *3 (S.D.N.Y. June 17, 2016) (concluding the pleadings established standing where the defendant disclosed the plaintiffs' information by

[5] Although other of Plaintiff's citations on this point do not directly pertain to Article III standing, they too involve the unauthorized disclosure of information and further highlight how Plaintiff's allegations are deficient. *See, e.g.*, *In re Facebook Privacy Litig.*, 572 Fed. Appx. 494, 494 (9th Cir. 2014) (unpublished opinion) (finding the plaintiffs properly pled damages for their breach of contract and fraud claims because they were harmed "both by the dissemination of their personal information and by losing the sales value of that information"); *Svenson v. Google Inc.*, No. 13-CV-04080-BLF, 2015 WL 1503429, at *5 (N.D. Cal. Apr. 1, 2015) (finding contract damages adequately alleged where the defendant breached the contract by sharing the plaintiff's personal information with a third party); *Claridge v. RockYou, Inc.*, 785 F. Supp. 2d 855, 866 (N.D. Cal. 2011) (finding, with respect to the plaintiff's negligence claim, the "defendant's actions in permitting the unauthorized and public disclosure of his [personally identifiable information], which had some unidentified but ascertainable value, are sufficient to allege an actual injury").

selling it to third parties and providing it to data mining companies); *In re Anthem, Inc. Data Breach Litig.*, 162 F. Supp. 3d 953, 993-95 (N.D. Cal. 2016) (finding loss of value of personal information following a data breach and the misuse of the extracted information "would represent a cognizable injury under Article III").

For the foregoing reasons, Plaintiff has failed to allege either actual harm or a material risk of harm sufficient to establish a concrete injury. Accordingly, Plaintiff does not have standing to pursue his claim for violation of the Cable Act's data retention provision, and the district court's dismissal for lack of standing should be affirmed.

C. Plaintiff's Request for Injunctive Relief Fails

The district court correctly held that, even if he were to have standing, Plaintiff cannot advance his claim for injunctive relief because he did not and cannot adequately plead the mandatory prerequisite elements necessary to invoke the court's equitable powers. App. at 14-15, 18.

A party seeking injunctive relief in federal court must adequately plead that he or she: (1) does not have an adequate remedy at law; and (2) will suffer irreparable harm absent permanent injunctive relief. *Morales*, 504 U.S. at 381 (quoting *O'Shea*, 414 U.S. at 499 ("It is a 'basic doctrine of equity jurisprudence that courts of equity should not act . . . when the moving party has an adequate remedy at law and will not suffer irreparable injury if denied equitable relief.'")); *Beacon Theaters, Inc. v. Westover*, 359 U.S. 500, 506-07 (1959) ("The basis of injunctive relief in the federal courts has always been irreparable harm and inadequacy of legal remedies.").

Where, as here, a plaintiff does not allege facts plausibly establishing the mandatory elements for injunctive relief, a complaint should be dismissed pursuant to Rule 12(b)(6) for

failure to state a claim. *See, e.g.*, *Randle v. City of Chi.*, No. 00-C-299, 2000 WL 1536070, at *4 (N.D. Ill. Oct. 17, 2000) (dismissing injunctive relief claim for failure to plead no more than the "conclusory assertion that [plaintiff] will suffer irreparable harm"); *Robinson v. Maentanis*, No. 95-C-6982, 1997 WL 391830, at *3 (N.D. Ill. June 9, 1997) (dismissing injunctive relief complaint because plaintiff failed to plead sufficient facts suggesting the potential for irreparable harm); *Goodson v. Commissioner of Internal Revenue*, No. 81-CIV-1021, 1982 WL 1698, at *2 (E.D.N.Y Oct. 27, 1982) ("Since the plaintiffs have made no attempt to show such irreparable harm, the complaint is dismissed for failure to state a claim upon which relief can be granted.").

Plaintiff entirely disregarded and failed to plead any facts to plausibly establish either of the prerequisite elements for injunctive relief. Nor could Plaintiff do so. The adequacy of a legal remedy is readily apparent—both from the remedy expressly provided in the statutory text and the actual allegations in Plaintiff's initial complaint and SAC.

1. Plaintiff Has an Adequate Remedy at Law

Section 551 of the Cable Act provides that an aggrieved person may seek: "(a) actual damages but not less than liquidated damages computed at the rate of $100 a day for each day of violation or $1,000 whichever is higher; (b) punitive damages; and (c) reasonable attorneys' fees and other litigation costs reasonably incurred." 47 U.S.C. § 551(f). Congress has, therefore, expressly established that if there is a violation and injury, damages (actual, liquidated, and punitive) are sufficient to make Plaintiff whole—both for past harm and for ongoing harm—and equitable or injunctive relief is not available. Indeed, liquidated and punitive damages are routinely utilized, as opposed to injunctive relief, to deter ongoing or future violations. *See State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 416 (2003) ("[P]unitive damages serve a broader function; they are aimed at deterrence.").

a. Section 551 Precludes Injunctive Relief

Congress clearly enumerated the remedies available for a violation of section 551 of the Cable Act, providing that a court may award only damages, fees, and costs. 47 U.S.C. § 551(f). In contrast, other statutes either (1) expressly include injunctive relief as an available remedy, or (2) do not enumerate available remedies, such that a court has authority to fashion appropriate relief. *See, e.g.*, 17 U.S.C. § 502(a) (injunctive relief is available for a violation of the Copyright Act); 15 U.S.C. § 1116 (same, with respect to the Lanham Act); *Sterk I*, 672 F.3d at 539 (concluding injunctive relief was available where a statute provided for both damages and injunctive relief and the violation was not a suitable predicate for a damages award). Because section 551 plainly omits injunctive relief as an available remedy, Plaintiff's request for injunctive relief fails on its face.

Similarly, Plaintiff is not entitled to injunctive relief under section 551(f)(3), which provides that the remedies available under section 551 are "in addition to any other lawful remedy available to a cable subscriber." 47 U.S.C. § 551(f)(3). Injunctive relief is available as a remedy for a violation of other sections of the Cable Act, including section 553. 47 U.S.C. § 553(c)(2)(A). Section 551(f)(3) merely provides that section 551's damages provision neither supersedes the remedies available under section 553 or other Cable Act provisions, nor incorporates them. If Congress intended to authorize courts to award injunctive relief for a violation of section 551, it would have done so.

b. Plaintiff's Allegations Acknowledge the Adequacy of a Legal Remedy

Consistent with the Cable Act's remedial provision, Plaintiff first filed this case seeking money damages on behalf of himself and the putative class. Plaintiff cannot walk away from that binding admission in his initial pleading to allege that a legal remedy (*i.e.*, monetary damages) is now inadequate under the circumstances. In fact, the SAC continues to include

allegations purporting to value the alleged injury. *See, e.g.*, Supp. App. at 21-24, 27 ("TWC's failure to destroy their PII deprives them of the full *value* of the services they bargained and paid for. Because Plaintiff and the Class ascribe *monetary value* to their ability to control their PII, Plaintiff and the Class have sustained and continue to sustain, injuries . . .") (emphases added). These allegations cannot be reconciled with the tactical shift in Plaintiff's requested relief, resulting in the argument that the legal remedy specifically allowed by the Cable Act is inadequate. *Tamayo v. Blagojevich*, 526 F.3d 1074, 1086 (7th Cir. 2008) ("[O]ur pleading rules do not tolerate factual inconsistencies in a complaint.").

As the district court found, Plaintiff clearly made the strategic choice to abandon his request for money damages only in an attempt to moot TWC's motion to compel arbitration and avoid the parties' arbitration agreement. App. at 3-4. Plaintiff's tactical choice to forego money damages does not change the fact that, if he can allege a sufficient injury and prove the injury, a legal remedy is readily available to him in binding arbitration—the forum in which he agreed to resolve disputes with TWC.

2. Plaintiff Mischaracterizes the Legal Standard and Case Law

Plaintiff does not deny that the SAC fails to include the necessary facts to plausibly establish the mandatory prerequisites for injunctive relief. Instead, Plaintiff argues that he need not expressly plead facts demonstrating an inadequate remedy at law or irreparable harm because he alleges an "ongoing" violation of federal law and is, therefore, automatically entitled to injunctive relief. Appellant's Br. at 23. Not so. This fabricated standard runs counter to well-established jurisprudence on equitable relief. Indeed, even the cases Plaintiff cites in his brief undercut his argument. *See, e.g., Walgreen Co. v. Sara Creek Prop. Co., B.V.*, 966 F.2d 273, 275

(7th Cir. 1992) ("[D]amages are the norm, so the plaintiff must show why his case is abnormal . . . . [T]he burden is to show that damages are inadequate.").

Plaintiff cites to a number of cases in which courts awarded final injunctive relief, even when monetary damages were available. But the cases on which Plaintiff relies are not on point for two reasons. First, they do not address the pleading standard for seeking injunctive relief. Second, they involve claims under different federal statutes—specifically, RICO, the Lanham Act, and section 1983—that expressly grant a right to both monetary relief *and* final injunctive relief.[6] Section 551 of the Cable Act, unlike those other statutes—or even other sections of the Cable Act (*e.g.*, section 553)—makes *no express reference* to equitable or injunctive relief. Importantly, such differences in statutory drafting explain why a court may ultimately grant final injunctive relief. In any event, even in those circumstances, litigants are still required to plead the prerequisite elements to injunctive relief. *See eBay Inc. v. MercExchange, LLC*, 547 U.S. 388, 392-93 (2006) ("[T]his Court has consistently rejected invitations to replace traditional equitable considerations with a rule that an injunction automatically follows a determination that a [patent or] copyright has been infringed.").

Plaintiff also cites *Padilla* out of context for the proposition that merely alleging an ongoing violation of federal law for retaining personally identifiable information is sufficient to

[6] *See, e.g.*, Appellant's Br. at 22-2 (citing *Duct-O-Wire Co. v. U.S. Crane, Inc.*, 31 F.3d 506 (7th Cir. 1994) (seeking preliminary injunction for RICO violation under 18 U.S.C. §§ 1962, 1964, which expressly grant district courts the power to "impos[e] reasonable restrictions on the future activities . . . of any person"); *Lacy v. Dart*, No. 1:14-CV-06259, 2015 WL 1995576 (N.D. Ill. Oct. 8, 2015) (seeking injunctive relief for ADA violation under 42 U.S.C. § 12132, which expressly authorizes injunctive relief to provide adequate accommodation); *Eppley v. Mulley*, No. 1:09-CV-386-SEB-MJD, 2011 WL 1258045 (S.D. Ind. Mar. 30, 2011) (entry of final judgment for violation of the Lanham Act under 15 U.S.C. § 1125, which expressly includes injunctive relief as a remedy to prevent ongoing infringement); *Leitner v. Frank*, No. 06-C-1227, 2006 WL 3857483 (E.D. Wis. Dec. 26, 2006) (analyzing a *pro se* complaint for civil rights violation under 42 U.S.C. § 1983, which specifically grants plaintiff relief "in equity")).

state a cause of action for injunctive relief. Appellant's Br. at 23-24. Again, *Padilla* does not eliminate Plaintiff's burden to plead the elements for injunctive relief, let alone discuss this issue.[7] The defendant in *Padilla* moved to dismiss on other grounds and never challenged the sufficiency of the pleading as to injunctive relief. Although the court in *Padilla* stated that the plaintiff "alleged all that is necessary to state [a] claim" for injunctive relief, it did so merely in the context of its now-abrogated standing analysis.

In sum, Plaintiff plainly failed to meet his pleading burden, as the SAC fails to allege either of the mandatory threshold elements for injunctive relief. Because Plaintiff has not and cannot allege that he lacks an adequate remedy at law, this Court should affirm the district court's dismissal.

VI. CONCLUSION

TWC respectfully requests this Court affirm the district court's order dismissing this action for lack of standing because Plaintiff has not suffered an injury in fact. Alternatively, the Court may affirm on the ground that Plaintiff failed to state a claim for injunctive relief because he has not established that he lacks an adequate remedy at law.

Dated: November 3, 2016

Respectfully submitted,

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TIME WARNER CABLE INC.

[7] Plaintiff's counsel, who also served as counsel of record in *Padilla*, knows the issues decided in that case. In *Padilla*, the defendant filed a motion to dismiss solely based on standing (which the court analyzed under a pre-*Spokeo* framework)—the defendant did not raise the failure to plead the elements for injunctive relief as a ground for dismissal.

CERTIFICATE OF COMPLIANCE WITH RULE 32(A)

1. This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because this brief contains 7,610 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 12-point Times New Roman type.

Dated: November 3, 2016

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CERTIFICATE OF SERVICE

I hereby certify that on November 3, 2016, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

Dated: November 3, 2016

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