UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WISCONSIN

CORY GROSHEK,
and all others similarly situated,

Plaintiff, Case No. 15-cv-157-RTR

v.

TIME WARNER CABLE INC.,

Defendant.

DEFENDANT'S BRIEF IN SUPPORT OF ITS MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION

I. INTRODUCTION

This case should be dismissed for lack of subject matter jurisdiction because Plaintiff Cory Groshek ("Groshek") lacks Article III standing to pursue his claims. In *Spokeo, Inc. v. Robins*, the Supreme Court held that "Article III standing requires a concrete injury even in the context of a statutory violation." *Spokeo, Inc. v. Robins*, --- S. Ct. ----, No. 13-1339, 2016 WL 2842447, at *7 (U.S. May 16, 2016). Accordingly, a plaintiff "cannot satisfy the demands of Article III by alleging a bare procedural violation" of the Fair Credit Reporting Act ("FCRA"). *Id.* at *8. Yet, that is exactly what Groshek has attempted to do here. Indeed, Groshek expressly admits that his claims against Defendant Time Warner Cable Inc. ("TWCI") are premised on bare procedural violations of the FCRA and that he has not suffered any actual or concrete harm. These are the ***exact*** circumstances discussed in *Spokeo* where a plaintiff lacks standing, and this action should therefore be dismissed forthwith.

In fact, Groshek presents the strongest possible case for dismissal under the standards set forth in *Spokeo*, as he *knowingly and intentionally* caused the bare procedural violation of which

he now complains. Indeed, Groshek is a professional plaintiff who admits to running a FCRA claims "business." His scheme is to apply for scores of jobs simply to cause the prospective employers to run a background check on him. If Groshek believes a prospective employer's FCRA disclosures are imperfect, he then issues a demand letter seeking to be paid tens, and sometimes hundreds, of thousands of dollars in order to avoid litigation. If the target fails to comply with his demand, Groshek then files a lawsuit based on that alleged bare procedural violation of the FCRA. At least until last week's ruling in *Spokeo*, this has been a very successful business for Groshek, as he applied for 562 jobs over an 18-month period and secured more than $230,000 in individual FCRA settlements between November 2014 and the fall of 2015 alone.

In short, Groshek not only predicates his standing on a "bare procedural violation" of the FCRA, it is a procedural violation he intentionally manufactured. To permit Groshek to continue to pursue this action in light of *Spokeo* would render the Supreme Court's pronouncements in that case virtually meaningless. Accordingly, for the reasons more fully set forth below, TWCI respectfully moves this Court for an order dismissing this case pursuant to Federal Rule of Civil Procedure 12(b)(1) based on a lack of subject matter jurisdiction.

II. FACTUAL AND PROCEDURAL BACKGROUND

A. Groshek's FCRA Claims "Business."

At his deposition, Groshek admitted that he has made a "business" out of applying for countless jobs and then threatening prospective employers with class action FCRA lawsuits unless they agreed to pay him an individual settlement that far exceeds his maximum possible recovery under the FCRA. (Deposition of C. Groshek ("Dep.") at 152:14–19, 308:7–309:13.)[1] To that end,

[1] True and correct copies of the exhibit and transcript excerpts from Groshek's deposition that are cited herein are attached as Exhibit 1 to the Declaration of Anthony E. Giardino ("Giardino Decl."), which is attached hereto as Exhibit A.

during the 18-month period from January 16, 2014 to July 29, 2015, Groshek applied for *562 jobs* (an average of one per day, including weekends and holidays). (*Id.* at 208:1–21.) As for running his FCRA claims business, Groshek admitted that:

- He discovered the potential to bring FCRA claims after talking to an attorney in February 2014, and educated himself on the requirements of the FCRA after consulting with counsel at that time. (*Id.* at 90:1–10, 92:20–22.)
- Since February 2014, he has studied FCRA news and legal updates to stay abreast of the FCRA and legal developments related to it, and regularly researches and accesses information regarding FCRA cases, settlements, and class notices for FCRA class action settlements. (*Id.* at 92:13–19, 93:5–19.)
- After meeting with counsel and educating himself on the FCRA in February 2014, he began applying for jobs on an average of one per day. (*Id.* at 228:23–231:8.)
- He used online job websites to apply for jobs, including indeed.com and careerbuilder.com. (*Id.* at 207:9–13.)
- When applying for jobs, based on his knowledge of the FCRA, he knows when looking at a background check disclosure form whether that form is compliant with the FCRA. (*Id.* at 129:21–130:13.)
- Groshek proceeds with the application process for companies whose forms he believes violate the FCRA. (*E.g.*, *id.* at 130:2–13, 196:2–24.)
- Groshek knowingly causes the purported FCRA procedural violation to be committed by proceeding through the application process to the point where a consumer report is obtained on him—usually upon his accepting a conditional offer of employment (which generally triggers a background check to be conducted and FCRA liability to attach). (*Id.* at 196:2–24, 234:9–24.)
- He takes screenshots of disclosure forms when applying for job positions to help him prove there are FCRA violations in the forms he completed. (*Id.* at 141:2–12.)
- Because he knows that there can be no liability under the FCRA until a background check is actually performed by the consumer reporting agency, he regularly obtains reports from consumer reporting agencies to determine whether liability has been triggered by his prospective employers. (*Id.* at 128:5–129:20, 272:5–16.)
- After confirming that the prospective employer had a background check run on him, Groshek then either fails to show up for his first day of work or works for a short period of time until voluntarily resigning. (*Id.* at 232:18–233:20, 234:9–235:2.)
- After deciding not to show up for the first day of work, or resigning from his position after a short period of time, Groshek sends these companies threatening letters and emails demanding payment of a large individual settlement to avoid his obtaining counsel and initiating a FCRA class action lawsuit. (*Id.* at 196:2–24, 234:9–238:11, 254:9–257:16, Ex. 13.)

Pursuant to this *modus operandi,* in just the past two years, Groshek has threatened nearly 50 companies with lawsuits after applying for jobs, accepting job offers, and causing background checks to be run by those prospective employers, including:

- Advance America
- AIG (Travel Guard International)
- Alliance Hospitality Management
- Alta Resources
- Ardor Agency LLC
- Associated Bank
- Baxalta (BioLife Plasma Services)
- Bay Event Marketing
- Burlington Coat Factory
- Convergys
- Eastbay (Foot Locker)
- Expert Global Solutions (a.k.a. APAC)
- Family Video
- Goodwill Industries
- Great Lakes Higher Education Corp.
- Harbor Freight Tools
- hhgregg, inc.
- Humana
- ImproMed, LLC
- Lands End
- Mind Your Business Inc.
- Ministry Healthcare / Network Health
- Nielsen
- Office Depot (Office Max)
- Pawn America (PAL Management)
- Pitney Bowes
- PLS Financial
- Servicemaster (TruGreen)
- Sherwin-Williams
- Shopko
- Starbucks
- Sterling Infosystems
- Target Corp.
- Total Med Staffing
- The Store (Team Schierl Companies)
- Toys R' Us
- Tundra Lodge
- U.S. Cellular
- Verifications, Inc.
- Veterans Sourcing Group
- West Corporation
- Wisconsin Auto Title Loans
- Yanda's Distributing

(Giardino Decl. ¶ 4; Dep. at 235:17–238:11, 254:9–257:16.)

At least 20 of the above-listed companies paid Groshek individual settlements ranging from $500 to $35,000 to avoid litigation. (Giardino Decl. ¶ 5; Dep. at 263:11–18.) Indeed, during the period between November 2014 and the fall of 2015 alone, Groshek secured more than $230,000 in individual FCRA settlements based on his FCRA claims business. (Dep. at 242:11–21.)

B. Groshek's Application for Employment and Background Check Authorization Form.

On or about September 22, 2014—after working with counsel over the prior seven months regarding how to assert FCRA claims against prospective employers—Groshek applied for a job with TWCI. (Compl. ¶ 11; Dep. at 69:20–22, 88:1–21, 90:1–10, 92:13–22, 93:5–19, 94:16–95:5.) On September 24, 2014, Groshek went through TWCI's online onboarding process after receiving a conditional offer of employment. (Compl. ¶¶ 12–16, Exs. A & B to Compl.) As part of that

process, he was required to review the background check authorization form that constitutes the basis of his class action lawsuit. (*Id.*) At the time he reviewed TWCI's FCRA background check authorization form, Groshek believed that the form did not comply with the FCRA's requirements because it contained a third-party release of liability provision. (Dep. at 120:9–15.) Despite his belief that TWCI's background check authorization form did not comply with the FCRA based on the inclusion of a third-party release, Groshek signed the form and authorized TWCI to request a background check on him. (Compl. ¶¶ 14–18, Exs. A & B to Compl.) At the time he signed the form, Groshek also made copies of his onboarding documentation to use in this FCRA lawsuit. (Dep. at 141:2–12.)

Groshek's conditional offer of employment became final after his background check was completed and he was hired by TWCI. (*Id.* at 97:15–18, 234:1–5.) Groshek subsequently worked for TWCI for just three months, from October 24, 2014 to January 28, 2015, when he voluntarily resigned his position. (*Id.* at 81:19–22, 222:15–18.)

On January 30, 2015, consistent with his *modus operandi* of contacting other employers after applying for, or soon after leaving, a job, Groshek sent TWCI a demand letter entitled "URGENT: TWCI Violation of the Fair Credit Reporting Act (FCRA) / Immediate settlement negotiation requested under threat of Class Action litigation." (Dep. at 81:23–82:3, 151:1–17, Ex. 13.) In this letter, Groshek used the threat of litigation to demand a "high six figure" settlement award or face the threat of a class action lawsuit based on alleged FCRA violations.[2] (Ex. 13 to

[2] Groshek's demand letter to TWCI stated:

> TWCI can either pay me a high six figure settlement to make this issue disappear now, or it can pay seven or eight figures to settle it later (and I know, for a fact, that TWCI will settle at some point, as all companies do in cases such as this). The choice is TWCI's – either pay me, or pay a minimum of $1000.00 to everyone affected by its FCRA violations over the last five years plus punitive damages and reasonable attorney's fees.

Dep.) One week later, when TWCI refused to accede to his demands, Groshek initiated this lawsuit. (Compl. at 1.)

C. Groshek's Allegations.

On February 6, 2015, Groshek filed the instant putative class action asserting a single cause of action for a violation of 15 U.S.C. § 1681b(b)(2)(A) and seeking statutory and punitive damages, injunctive relief, and attorneys' fees under 15 U.S.C. § 1681n(a). Specifically, Groshek alleges that TWCI willfully violated "15 U.S.C. § 1681b(b)(2)(A)(i) by procuring a consumer report on [him] for employment purposes without first providing [him] a clear and conspicuous written disclosure, in a document consisting solely of the disclosure, that a consumer report may be obtained for employment purposes." (Compl. ¶ 22.) Groshek further alleges that: (1) the written disclosure was not "clear and conspicuous" because it was "buried" in an employment application; and (2) the disclosure was not in a document consisting "solely of the disclosure" because it included a "waiver of liability for Time Warner." (*Id.* ¶¶ 41–43.)

Groshek has not alleged that he or any putative class members suffered any actual damages or anything other than a bare procedural violation. (Compl. *passim*.) Indeed, Groshek admitted at his deposition that his claims are premised ***exclusively*** on a technical violation of the FCRA that could only entitle him to statutory damages and that he does not intend to assert any other claims. (Dep. at 113:1–115:17.)

III. ARGUMENT

A. The Applicable Standard for a Rule 12(b)(1) Motion to Dismiss for Lack of Standing.

Standing is a prerequisite for subject matter jurisdiction and the plaintiff bears the burden of establishing standing when challenged under a Rule 12(b)(1) motion to dismiss. *See Apex Digital, Inc. v. Sears, Roebuck & Co.*, 572 F.3d 440, 443 (7th Cir. 2009) ("As a jurisdictional requirement, the plaintiff bears the burden of establishing standing") (citation omitted); *Silha v.*

ACT, Inc., 807 F.3d 169, 172–73 (7th Cir. 2015) (recognizing that defendant may mount facial and factual challenges to standing). To survive a facial challenge to standing, a plaintiff must have "'clearly . . . alleged facts demonstrating' each element [of standing]." *See Spokeo*, 2016 WL 2842447, at *5 (quoting *Warth*, 422 U.S. at 518).[3]

Further, a party may also challenge standing with facts that do not appear on the face of the complaint. In determining whether standing exists as a factual matter, a court "may look beyond the jurisdictional allegations of the complaint and view whatever evidence has been submitted on the issue." *Wiesmueller v. Nettesheim*, No. 14-C-1384, 2015 WL 3872297, at *1 (E.D. Wis. June 23, 2015) (Randa, J.) (quotation omitted).[4] "If the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action." Fed. R. Civ. Proc. 12(h)(3); *see also Am. Fed'n of Gov't Emps., Local 2119 v. Cohen*, 171 F.3d 460, 465 (7th Cir. 1999) ("if a plaintiff cannot establish standing to sue, relief from this court is not possible, and dismissal under [Rule] 12(b)(1) is the appropriate disposition").

As discussed above and as further shown below, this action must be dismissed because Groshek cannot meet his burden to show that he has Article III standing here, as: (1) he alleges nothing more than a bare procedural violation of the FCRA and suffered no cognizable harm of

[3] Because the court does not have jurisdiction to enter a "judgment" if the plaintiff does not have standing, "[a] motion attacking subject matter jurisdiction is properly brought as one to dismiss the case under Federal Rule of Civil Procedure 12(b)(1), rather than as a motion for summary judgment." *See Rittmeyer v. Advance Bancorp, Inc.*, 868 F. Supp. 1017, 1021 (N.D. Ill. 1994); *see also Disability Rights*, 2007 WL 805796, at *1 n.2 ("the issue of standing is a question of jurisdiction properly brought under Rule 12(b)(1)"); *Lockheed Martin Corp. v. United States,* 50 Fed. Cl. 550, 552 (Fed. Cl. 2001) (treating motion for summary judgment as Rule 12(b)(1) motion to dismiss for lack of subject matter jurisdiction because Rule 56 motion is inappropriate for challenging subject matter jurisdiction).

[4] Pursuant to Local Rule 7(j), the *Wiesmueller* order is attached hereto as Exhibit B.

any kind; and, alternatively (2) even absent *Spokeo,* Groshek would lack standing because he has manufactured the alleged FCRA violation of which he complains.

B. The "Irreducible Constitutional Minimum" of Standing Requires More than a Bare Procedural Violation of the FCRA.

As the Supreme Court recently stated in *Spokeo*:

> Our cases have established that the "irreducible constitutional minimum" of standing consists of three elements. *Lujan,* 504 U.S., at 560. 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 560–561; *Friends of the Earth, Inc.,* 528 U.S., at 180–181. The plaintiff, as the party invoking federal jurisdiction, bears the burden of establishing these elements. *FW/PBS, Inc. v. Dallas,* 493 U.S. 215, 231, 110 S. Ct. 596, 107 L. Ed. 2d 603 (1990).

Spokeo, 2016 WL 2842447, at *5.

"[T]he injury-in-fact requirement requires a plaintiff to allege an injury that is both 'concrete *and* particularized'" and "'actual or imminent, not conjectural or hypothetical.'" *Id.* at *3, *6 (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)); *accord Pollack v. U.S. Dep't of Justice*, 577 F.3d 736, 738–39 (7th Cir. 2009). For an injury to be "particularized," it "must affect the plaintiff in a personal and individual way." *Spokeo*, 2016 WL 2842447, at *6 (citing cases). Likewise,

> A "concrete" injury must be "*de facto*"; that is, **it must actually exist**. *See* Black's Law Dictionary 479 (9th ed. 2009). When we have used the adjective "concrete," we have meant to convey the usual meaning of the term — **"real," and not "abstract."** Webster's Third New International Dictionary 472 (1971); Random House Dictionary of the English Language 305 (1967). Concreteness, therefore, is quite different from particularization.

Id. at *7 (emphasis added).

Accordingly, a plaintiff cannot "satisfy the injury-in-fact requirement of Article III" by "alleging a bare procedural violation" of a statute. *Id.* at *7–8. Rather, "**Article III standing requires a concrete injury even in the context of a statutory violation.**" *Id.* at *7 (emphasis

added); *accord Disability Rights WI, Inc. v. Walworth Co. Bd. of Sup'rs*, No. 06-C-813, 2007 WL 805796, at *2 (E.D. Wis. Mar. 14, 2007) (Randa, J.) ("Without an allegation of a concrete injury, there can be no confidence of 'a real need to exercise the power of judicial review' or that relief can be framed 'no [broader] than required by the precise facts to which the court's ruling would be applied.'") (quoting *Warth v. Seldin,* 422 U.S. 490, 508 (1975)).[5] In *Spokeo*, the Supreme Court provided specific examples of allegations that constitute "bare procedural violations" that are insufficient to "work any concrete harm," including a failure to list accurate zip code information, or a failure to provide a required statutory notice (like an FCRA disclosure form, as Groshek claims here). *Spokeo*, 2016 WL 2842447, at *8.

C. Groshek Fails to Allege a Sufficient Injury-in-Fact in His Complaint.

Given *Spokeo,* the allegations in Groshek's Complaint are insufficient to establish standing as a matter of law. That is, as *Spokeo* has made explicitly clear, a plaintiff may "not . . . allege a bare procedural violation, divorced from any concrete harm, and satisfy the injury-in-fact requirement of Article III." *Id.* at *7.

Here, there is no allegation whatsoever of any actual harm or of a concrete injury in Groshek's Complaint. The only well-pled factual allegation is that a bare procedural violation of the FCRA occurred based on TWCI's alleged failure to comply with the technical requirements pertaining to disclosure forms. Thus, this is the classic example in *Spokeo* of a "bare procedural violation" allegation being insufficient to support standing, and this litigation should be dismissed based on Groshek's pleading deficiencies alone. *Spokeo*, 2016 WL 2842447, at *5 (quoting *Warth*, 422 U.S. at 518) ("Where, as here, a case is at the pleading stage, the plaintiff must 'clearly . . .

[5] Pursuant to Local Rule 7(j), the *Disability Rights* order is attached hereto as Exhibit C.

allege facts demonstrating' each element [of standing]."); *Silha*, 807 F.3d at 174–75 (plaintiff must allege personal loss to support finding injury in fact).

D. Groshek's Admissions Confirm the Lack of Any Concrete Injury.

Going beyond Groshek's insufficient allegations of standing in his Complaint, his admissions also make it abundantly clear that he cannot meet his burden to establish standing in this case. Specifically, Groshek admits that he has suffered no actual or concrete harm whatsoever, and instead freely admits that his case rests upon a technical violation of the FCRA's disclosure form requirements. (Dep. at 113:1–115:17.) This admission is exactly the type of "bare procedural violation" of the FCRA that the Supreme Court held insufficient to confer standing. *See Spokeo*, 2016 WL 2842447, at *6–8 (citing failure to provide disclosure form as example of statutory procedural violation that does not "work any concrete harm" and holding that plaintiff "cannot satisfy the demands of Article III by alleging a bare procedural violation" of FCRA).

Additionally, any hypothetical suggestion that Groshek suffered harm based on an allegedly defective disclosure form would be ***directly contrary*** to Groshek's admissions that he suffered no harm beyond a bare procedural violation of the FCRA. *Id.* at *6. Indeed, underscoring the complete absence of any concrete injury, Groshek admitted that: (1) he fully understood the terms of the background disclosure form at issue in his Complaint when he viewed it (including the inclusion of waiver language and its alleged violation of the technical requirements of the FCRA); (2) he suffered no actual harm or detriment besides being subject to a bare procedural violation; and, (3) any alleged violations of the FCRA did not adversely affect him or his employment with TWCI.[6] *See Silha*, 807 F.3d at 174–75, 175 n.2 (no standing where plaintiff "would have been no better off had the defendant refrained from the unlawful acts of which the

[6] Dep. at 103:14–104:5, 106:12–20, 113:1–19, 115:5–17, 129:21–130:13.

plaintiff is complaining"). Accordingly, per *Spokeo* and the law of the Seventh Circuit, this case should be dismissed because the "bare procedural violation" of the FCRA's disclosure form requirements complained of by Groshek did not result in concrete harm as a matter of law, and Groshek thus lacks Article III standing.

E. Groshek Has Not Suffered a Particularized Injury.

Groshek also never suffered a particularized injury. Specifically, the inclusion of third-party waiver language in the disclosure form did not affect Groshek "in a personal and individualized way." *Spokeo*, 2016 WL 2842447, at *6 ("For an injury to be 'particularized,' it 'must affect the plaintiff in a personal and individual way.'") (citation omitted). Indeed, Groshek admits the alleged defect in the disclosure form did not affect him at all. He was not confused, he understood the form (and the requirements of the FCRA) when he viewed it, and he knowingly proceeded with the application process despite his belief that the form violated the FCRA. (Dep. at 120:9–15, 129:21–130:13, 141:2–12.) Further, Groshek went on to receive an offer of employment and his application was not delayed or otherwise affected in any way whatsoever by the contents of the disclosure form. Accordingly, Groshek's deposition admissions completely defeat any notion that he suffered a particularized, "personal injury" as is required under *Spokeo* to establish standing.

F. Groshek Lacks Standing Because He Manufactured the Alleged Violation at Issue.

Finally, even in the absence of *Spokeo,* dismissal would be appropriate because it is black-letter law that a plaintiff cannot establish standing by manufacturing an injury through his own conduct. *Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138, 1151 (2013) (parties "cannot manufacture standing merely by inflicting harm on themselves"); *see also Pennsylvania v. New Jersey,* 426 U.S. 660, 664 (1976) ("No [party] can be heard to complain about damage inflicted by its own hand."); *Swann v. Sec'y, Georgia*, 668 F.3d 1285, 1288 (11th Cir. 2012) ("a controversy is not

justiciable when a plaintiff independently caused his own injury"); *Freedom From Religion Found., Inc. v. Obama*, 641 F.3d 803, 806 (7th Cir. 2011) ("No one is injured by a request that can be declined."); *Parvati Corp. v. City of Oak Forest, Ill.*, 630 F.3d 512, 514, 518 (7th Cir. 2010) (self-inflicted injuries caused by parties' own choices insufficient to establish standing); *Petro–Chem Processing, Inc. v. EPA,* 866 F.2d 433, 438 (D.C. Cir. 1989) (self-inflicted injuries insufficient to confer standing due to lack of causation of harm by defendant); *Ass'n of Am. Physicians & Surgeons, Inc. v. Koskinen*, No. 13-C-1214, 2014 WL 1056495, at *7 (E.D. Wis. Mar. 18, 2014) *aff'd sub nom. Ass'n of Am. Physicians & Surgeons, Inc. v. Koskinen*, 768 F.3d 640 (7th Cir. 2014) (voluntary choices contributing to one's own injury insufficient to establish standing, must show concrete injury caused by defendant's actions).[7]

As discussed above, Groshek knowingly and intentionally created the alleged procedural FCRA violation of which he complains here. Groshek knew exactly what the FCRA requirements were regarding background check authorization forms when he applied for employment with TWCI and reviewed TWCI's forms, he was not confused or misled by them in any way, but concluded that they did not comply with the FCRA. He then proceeded with TWCI's application process for the express purpose of setting himself up to assert an FCRA claim against TWCI—which he has now done. Accordingly, based on the aforementioned line of authority, Groshek lacks standing to assert any FCRA claims against TWCI and this action should be dismissed on this independent ground, even if *Spokeo* did not already require dismissal (and it does).

[7] Pursuant to Local Rule 7(j), the *Koskinen* order is attached hereto as Exhibit D.

IV. CONCLUSION

Accordingly, for the foregoing reasons, TWCI respectfully requests the Court dismiss this action pursuant to Federal Rule of Civil Procedure 12(b)(1) based on a lack of subject matter jurisdiction.

Dated this 27th day of May, 2016.

Respectfully submitted,

s/ Anthony E. Giardino
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EXHIBIT A

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WISCONSIN

CORY GROSHEK,
and all others similarly situated,

Plaintiff,

Case No. 15-cv-157-RTR

v.

TIME WARNER CABLE INC.,

Defendant.

DECLARATION OF ANTHONY E. GIARDINO IN SUPPORT OF MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION

I, Anthony E. Giardino, hereby declare and state as follows:

1. I am over the age of 18 and competent to give this Declaration.

2. I am counsel of record for Defendant Time Warner Cable Inc. ("Defendant") in the above-captioned matter and this Declaration is made based on my personal knowledge and a review of the case file in this action. I submit this Declaration in support of Defendant Time Warner Cable Inc.'s ("TWCI") Motion to Dismiss Complaint for Lack of Subject Matter Jurisdiction (the "Motion").

3. On October 7, 2015, I attended the deposition of Plaintiff Cory Groshek ("Groshek"). True and correct copies of the exhibit and transcript excerpts from Groshek's deposition that are cited in the Motion are attached hereto as Exhibit 1.[1]

4. In Plaintiff's Supplemental Answers to TWCI's First Interrogatories and at his deposition, Plaintiff identified the following companies, corporations, and/or entities that he has

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[1] Pursuant to General Local Rule 79(d)(7), and as further explained in Defendant's Notice of Filing, Exhibits 1 and 2 to this Declaration have been provisionally filed under seal.

contacted since February 2014, directly or through an agent, regarding alleged violations of the Fair Credit Reporting Act and possible litigation by him:

- Advance America
- AIG (Travel Guard International)
- Alliance Hospitality Management
- Alta Resources
- Ardor Agency LLC
- Associated Bank
- Baxalta (BioLife Plasma Services)
- Bay Event Marketing
- Burlington Coat Factory
- Convergys
- Eastbay (Foot Locker)
- Expert Global Solutions (a.k.a. APAC)
- Family Video
- Goodwill Industries
- Great Lakes Higher Education Corp.
- Harbor Freight Tools
- hhgregg, inc.
- Humana
- ImproMed, LLC
- Lands End
- Mind Your Business Inc.
- Ministry Healthcare / Network Health
- Nielsen
- Office Depot (Office Max)
- Pawn America (PAL Management)
- Pitney Bowes
- PLS Financial
- Servicemaster (TruGreen)
- Sherwin-Williams
- Shopko
- Starbucks
- Sterling Infosystems
- Target Corp.
- Total Med Staffing
- The Store (Team Schierl Companies)
- Toys R' Us
- Tundra Lodge
- U.S. Cellular
- Verifications, Inc.
- Veterans Sourcing Group
- West Corporation
- Wisconsin Auto Title Loans
- Yanda's Distributing

5. In Plaintiff's Supplemental Answers to TWCI's First Interrogatories and at his deposition, Plaintiff listed a total of twenty confidential settlement payments ranging from $500 to $35,000 that he received from the above-mentioned companies and as a result of his having made settlement demands on them.

6. True and correct copies of the relevant excerpts from Plaintiff's Supplemental Answers to TWCI's First Interrogatories are attached hereto as Exhibit 2.

Pursuant to 28 U.S.C. § 1746, I verify under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on May 27, 2016, at Atlanta, Georgia.

ANTHONY E. GIARDINO

EXHIBIT 1

[Provisionally Filed Under Seal Pursuant to General Local Rule 79(d)(7)]

EXHIBIT 2

[Provisionally Filed Under Seal Pursuant to General Local Rule 79(d)(7)]

EXHIBIT B

2015 WL 3872297
Only the Westlaw citation is currently available.
United States District Court,
E.D. Wisconsin.

Christopher L. WIESMUELLER, Plaintiff,
v.
Neal P. NETTESHEIM, in his official and unofficial capacity as State of Wisconsin Circuit Court Reserve Judge, Defendant.

No. 14–C–1384.
|
Signed June 23, 2015.

Attorneys and Law Firms

Christopher Lee Wiesmueller, Waukesha, WI, pro se.

David C. Rice, Wisconsin Department of Justice, Madison, WI, for Defendant.

DECISION AND ORDER

RUDOLPH T. RANDA, District Judge.

***1** The *pro se* plaintiff, Christopher L. Wiesmueller, is a lawyer. The defendant, the Honorable Neal P. Nettesheim, is a former Wisconsin Court of Appeals judge. Post-retirement, Judge Nettesheim was the presiding judge in John Doe investigation Case No. 10JD000007 (Milwaukee County Circuit Court), commonly known as "John Doe I." On December 4, 2011, Judge Nettesheim issued a search warrant for Wiesmueller's law office. The search warrant included a gag order that prohibited Wiesmueller from discussing the warrant with anyone but his own legal counsel. John Doe I is now closed. Wiesmueller was not charged with a crime.

In this action, Wiesmueller brings First and Fourth Amendment claims under 42 U.S.C. § 1983 against Judge Nettesheim in his individual and official capacities. Judge Nettesheim moves to dismiss for failure to state a claim. Fed.R.Civ.P. 12(b)(6). Judge Nettesheim also invokes judicial immunity, Eleventh Amendment immunity, the *Rooker–Feldman* doctrine, abstention, and lack of standing. Some of these grounds invoke Rule 12(b)(6). On such grounds, the complaint must contain "sufficient factual matter, accepted as true, to state a claim for relief that is plausible on its face." *Ashcroft v. Iqbal,* 556 U.S. 662, 678 (2009). To the extent that this motion implicates the Court's subject matter jurisdiction, Fed.R.Civ.P. 12(b)(1), the Court may "look beyond the jurisdictional allegations of the complaint and view whatever evidence has been submitted on the issue." *Ezekiel v. Michel,* 66 F.3d 894, 895 (7th Cir.1995). Under either rule, the Court must accept all well-pled allegations as true and draw reasonable inferences in the plaintiff's favor. *Id.; see also Agnew v. Nat'l Collegiate Athletic Ass'n,* 683 F.3d 328, 334 (7th Cir.2012).

Wiesmueller's first claim is that Judge Nettesheim violated the Fourth Amendment's requirement that a search warrant be issued by a detached and neutral magistrate. Wiesmueller asserts that Judge Nettesheim was not detached and neutral because he was acting as a reserve judge, not a salaried judge, and therefore had a financial interest in the perpetuation and extension of the John Doe investigation. Wiesmueller seeks compensatory damages in addition to declaratory and injunctive relief. As to the latter, Wiesmueller requests a declaratory judgment that a Wisconsin John Doe judge is attached to the investigation and therefore violates the Fourth Amendment when authorizing search warrants related to that investigation. He also requests an order enjoining Judge Nettesheim from issuing any further search warrants.

On the damages claim, Judge Nettesheim invokes judicial immunity. This immunity finds its premise in the "general principle of the highest importance to the proper administration of justice that a judicial officer, in exercising the authority vested in him, [should] be free to act upon his own convictions, without apprehension of personal consequences to himself." *Stump v. Sparkman,* 435 U.S. 349, 356 (1978). Accordingly, judges "are not liable to civil actions for their judicial acts, even when such acts are in excess of their jurisdiction, and are alleged to have been done maliciously or corruptly." *Id.* at 356. The "necessary inquiry in determining whether a defendant judge is immune from suit is whether at the time he took the challenged action he had jurisdiction over the subject matter before him." *Id.* A judge can be liable "only when he has acted in the 'clear absence of all jurisdiction.' " *Id.* at 356–57 (quoting *Bradley v. Fisher,* 13 Wall. 335, 351 (1872)).

***2** By issuing a search warrant, Judge Nettesheim did not act in the clear absence of jurisdiction because, as the Wisconsin Supreme Court has held, "a John Doe judge may issue and seal a search warrant under appropriate circumstances ..." *State v. Cummings,* 546 N.W.2d 406, 409 (Wis.1996). Where

"jurisdiction over the subject-matter is vested by law in the judge, or in the court which he holds, the manner and extent in which the jurisdiction shall be exercised are generally as much questions for his determination as any other questions involved in the case, although upon the correctness of his determination in these particulars the validity of his judgments may depend." *Stump,* 435 U.S. at 356 n. 6 (quoting *Bradley,* 13 Wall. at 351–52).

In fact, the primary thrust of Wiesmueller's argument is not that Judge Nettesheim acted without jurisdiction. Instead, Wiesmueller argues that Judge Nettesheim was acting in an investigatory capacity. However, the Wisconsin Supreme Court has rejected this characterization of the John Doe judge as "inevitably the 'chief investigator' or as an arm or tool of the prosecutor's office. We do not view the judge as orchestrating the investigation. The John Doe judge is *a judicial officer who serves an essentially judicial function* ..." *State v. Washington,* 266 N.W.2d 597, 605 (Wis.1978) (emphasis added). More to the point, the "relevant cases demonstrate that the factors determining whether an act by a judge is a 'judicial' one relate to the nature of the act itself, *i.e.,* whether it is a function normally performed by a judge, and to the expectations of the parties, *i.e.,* whether they dealt with the judge in his judicial capacity." *Stump* at 362. Issuing a search warrant at the request of a prosecutor is a function typically performed by a judicial officer. *See, e.g., Curry v. City of Dayton,* 915 F.Supp.2d 901, 903 (S.D.Ohio 2012) ("the issuance of a search warrant is unquestionably a judicial act") (quoting *Burns v. Reed,* 500 U.S. 478, 492 (1991)).

Wiesmueller's claims for injunctive and declaratory relief are not barred by judicial immunity, *Pulliam v. Allen,* 466 U.S. 522, 541–42 (1984), nor are they barred by the Eleventh Amendment. *See Kroll v. Bd. of Trustees of Univ. of Ill.,* 934 F.2d 904, 908 (7th Cir.1991) ("official-capacity actions may not be barred by the eleventh amendment insofar as they request prospective relief—i.e., an injunction or a declaratory judgment and monetary damages that are 'ancillary' to either"). However, Wiesmueller is not entitled to such relief because John Doe I is now closed. This means, of course, that Judge Nettesheim will not be issuing any more search warrants. As a result, there is no longer a live "case or controversy" on the Fourth Amendment issue. *City of Los Angeles v. Lyons,* 461 U.S. 95, 102 (1983) ("past exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive relief ... if unaccompanied by any continuing, present adverse effects"). Wiesmueller lacks standing to enjoin the issuance of further warrants, and he also lacks standing to pursue a judgment declaring that a John Doe judge violates the Fourth Amendment when issuing a search warrant. *Ashcroft v. Mattis,* 431 U.S. 171, 172 (1977) ("For a declaratory judgment to issue, there must be a dispute which calls, not for an advisory opinion upon a hypothetical basis, but for an adjudication of present right upon established facts").

***3** As to the First Amendment claim, Wiesmueller seeks declaratory relief that Judge Nettesheim cannot maintain a secrecy order on an ongoing basis, and in the alternative, an injunction against the continuing effect of the secrecy order. Unlike the Fourth Amendment claim, this claim presents a live controversy because Wiesmueller is forever barred from speaking about the matter.

On this claim, Judge Nettesheim invokes the *Rooker–Feldman* doctrine. *Rooker–Feldman* derives its name from two decisions of the Supreme Court, *Rooker v. Fidelity Trust Co.,* 263 U.S. 413 (1923) and *District of Columbia Court of Appeals v. Feldman,* 460 U.S. 462 (1983). Taken together, these rulings "preclude[ ] lower federal court jurisdiction over claims seeking review of state court judgments ... [because] no matter how erroneous or unconstitutional the state court judgment may be, the Supreme Court of the United States is the only federal court that could have jurisdiction to review a state court judgment." *Remer v. Burlington Area Sch. Dist.,* 205 F.3d 990, 996 (7th Cir.2000). *Rooker–Feldman* was given an expansive application by lower courts, but the Supreme Court put a stop to that in *Exxon Mobil Corp. v. Saudi Basic Indus. Corp.,* 544 U.S. 280, 284 (2005). Now, *Rooker–Feldman* is a "narrow doctrine, 'confined to cases brought by state-court losers complaining of injuries caused by state-court judgments rendered before district court proceedings commenced and inviting district court review and rejection of those judgments.' " *Lance v. Dennis,* 546 U.S. 459, 464 (2006) (quoting *Exxon Mobil,* 544 U.S. at 284). Put another way, "if the plaintiff has a claim that is in any way independent of the state-court judgment, the *Rooker–Feldman* doctrine will not bar a federal court from exercising jurisdiction." *Abbott v. Michigan,* 474 F.3d 324, 330 (6th Cir.2007).

The only way Wiesmueller could have challenged the secrecy order was to bring a *separate* action in the form of a supervisory writ with the Wisconsin Court of Appeals. *See State ex rel. Reimann v. Circuit Court for Daney Cnty.,* 571 N.W.2d 385 (Wis.1997). Accordingly, Wiesmueller is not a "loser" with respect to the secrecy order; the issue

was never litigated, and Wiesmueller was never a party to a proceeding in which it could have been litigated. *See, e.g., Whiteford v. Reed,* 155 F.3d 671, 674 (3d Cir.1998) ("where a state action does not reach the merits of a plaintiff's claims, then *Rooker–Feldman* does not deprive the federal court of jurisdiction"); *Simes v. Huckabee,* 354 F.3d 823, 828 (8th Cir.2004) (collecting cases); Wright & Miller, *Fed. Practice and Procedure* § 4469.1 (2002) ("A decision not on the merits also does not oust federal jurisdiction on the merits"). Therefore, *Rooker–Feldman* does not bar Wiesmueller's First Amendment claim.

Judge Nettesheim argues further that the Court should defer to the state courts (i.e., to him) regarding what documents should or should not be disclosed in connection with John Doe I. *O'Keefe v. Chisholm,* 769 F.3d 936, 943 (7th Cir.2014) ("Wisconsin, not the federal judiciary, should determine whether, and to what extent, documents gathered in a John Doe proceeding are disclosed to the public"). This argument misses the mark because Wiesmueller isn't trying to secure the release of documents gathered in the course of the John Doe investigation. Instead, Wiesmueller wants the secrecy order to be lifted so he can speak about his own experiences with the investigation. The Seventh Circuit sidestepped this issue in *O'Keefe,* 769 F.3d at 943 ("no one has challenged [the gag] order, and we do not address its propriety"), but the Court will take it up here to the extent that it will require further briefing from the parties on the issue. The briefing should consider the following. While the Seventh Circuit in *O'Keefe* was presented with an active John Doe investigation, there is no active John Doe before this Court. It is no more; the investigation has closed. Are not any orders issued in connection with that investigation now without force and effect? Given the pleaded facts of this case, is it even necessary for Wiesmueller to seek relief from a secrecy order which expired upon the conclusion of the John Doe? In other words, given the overriding constitutional protections of the First Amendment, can a secrecy order, which is only allowed to impinge upon Wiesmueller's fundamental First Amendment rights on the grounds that it promotes the effectiveness of a John Doe investigation, *see State v. O'Connor,* 252 N.W.2d 671, 678 (Wis.1977), remain in force when the purpose for the infringement no longer exists? Hasn't the limited justification for infringing Wiesmueller's First Amendment rights evaporated with the conclusion of the John Doe, and aren't Wiesmueller's First Amendment rights restored to the extent that any prior restraint is without current effect?

***4** Therefore, as indicated the Court asks the parties to brief why, given the pleaded facts of this case, the Court should not declare that Wiesmueller is entitled to relief from an order that is now without legal effect and constitutionally proscribed.

In connection, Judge Nettesheim argues that injunctive relief is precluded by the "judicial capacity" amendment to 42 U.S.C. § 1983, which provides that in "any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable." This language was added to Section 1983 in response to *Pulliam, supra,* which held that judicial immunity did not insulate judicial officers from injunctive relief. *SKS Assocs., Inc. v. Dart,* 650 F.Supp.2d 835, 837 (N.D.Ill.2009). Judge Nettesheim was not acting in derogation of a declaratory decree at the time the secrecy order was issued, so the availability of injunctive relief and whether it is necessary would appear to turn on the availability of the declaratory relief discussed above. Wiesmueller pleaded such claims in the alternative, so the judicial capacity amendment is no basis for dismissal at this time. *Brandon E. ex rel. Listenbee v. Reynolds,* 201 F.3d 194, 197–98 (3d Cir.2000) ("The foregoing amendatory language to § 1983 does not expressly authorize suits for declaratory relief against judges. Instead it implicitly recognizes that declaratory relief is available in some circumstances, and then limits the availability of injunctive relief to circumstances in which declaratory relief is unavailable or inadequate").

Wiesmueller's last claim seeks an order requiring Judge Nettesheim to disclose whether search warrants were issued upon email and internet service providers for Wiesmueller and other targets involved in the John Doe investigation. In this manner, Wiesmueller hopes to uncover potential Fourth Amendment violations because he has a reasonable expectation of privacy in his email account. Wiesmueller also seeks to vindicate the Fourth Amendment rights of others who have been similarly targeted. Finally, Wiesmueller asserts that the Sixth Amendment rights of his clients may have been violated as a result of the possible invasion of privacy.

This is a strange claim for a variety of reasons. Wiesmueller could have alleged, on information or belief, that his Fourth Amendment rights were violated as described above. Then, if the case made it past the pleading stage, Wiesmueller could have sought discovery to prove his claim. Here, the *remedy* sought by Wiesmueller is discovery in aid of a claim that may or may not exist. Thus, Wiesmueller's final claim

does not state a claim upon which relief can be granted. Moreover, even if Wiesmueller had properly alleged a Fourth Amendment violation, such a claim would be barred by judicial immunity for the reasons already stated. Therefore, the Court will not grant leave to amend on this claim.

***5 NOW, THEREFORE, BASED ON THE FOREGOING, IT IS HEREBY ORDERED THAT:**

1. Judge Nettesheim's motion to dismiss [ECF No. 7] is **GRANTED–IN–PART** and **DENIED–IN–PART;** and

2. Wiesmueller's First Amendment claim will be addressed after further briefing of the parties as directed by the Court. Wiesmueller will file the opening brief, which is due within **thirty (30)** days of the date of this Order. Briefing will proceed in accordance with Civil L.R. 7.

All Citations

Slip Copy, 2015 WL 3872297

EXHIBIT C

2007 WL 805796
United States District Court,
E.D. Wisconsin.

DISABILITY RIGHTS WISCONSIN, INC., Plaintiff,
v.
WALWORTH COUNTY BOARD
OF SUPERVISORS, Defendant.

No. 06-C-813.
|
March 14, 2007.

Attorneys and Law Firms

Jeffrey D. Spitzer-Resnick, Disability Rights Wisconsin, Madison, WI, for Plaintiff.

Andrew T. Phillips, Ronald S. Stadler, Stadler Centofanti & Phillips SC, Mequon, WI, for Defendant.

DECISION AND ORDER

RUDOLPH T. RANDA, Chief Judge.

***1** The plaintiff, Disability Rights Wisconsin, Inc. ("DRW"), is an organization that is designated by Wisconsin law to advocate for the rights of individuals with disabilities. *See* Wis. Stat. § 51.62. On August 2, 2006, DRW filed a complaint on behalf "of all school age children with disabilities who reside in Walworth County" against the Walworth County Board of Supervisors ("WCBS"). (Am.Compl.¶ 1.) DRW maintains that WCBS fails to educate students with disabilities in a sufficiently integrated setting, in violation of Title II of the Americans with Disabilities Act ("ADA") and Section 504 of the Rehabilitation Act of 1973. (*Id.* at ¶¶ 13-18.) Specifically, DRW requests that this Court order WCBS to place students with disabilities in the "most integrated environment to the maximum extent appropriate," and to also enjoin a project that is intended to increase the size of Lakeland School, which exclusively educates disabled students. (*Id.* at ¶ 5.)

WCBS filed a motion to dismiss, on the grounds that DRW lacks standing and that DRW has failed to exhaust administrative remedies. [1] Because the Court finds that DRW lacks standing, it need not address the question of whether DRW failed to exhaust administrative remedies.

When considering a motion to dismiss for lack of subject matter jurisdiction under Rule 12(b)(1) of the Federal Rules of Civil Procedure, the Court must accept as true the factual allegations in the complaint and draw all reasonable inferences in favor of the plaintiff. [2] *See Long v. Shorebank Dev. Corp.,* 182 F.3d 548, 554 (7th Cir.1999). The burden of establishing federal jurisdiction is on the party asserting jurisdiction. *See United Phosphorus, Ltd. v. Angus Chem. Co.,* 322 F.3d 942, 946 (7th Cir.2003).

Article III of the Constitution confers jurisdiction in the federal courts over "cases" and "controversies." To satisfy the case or controversy requirement, a plaintiff must demonstrate (1) that it has suffered "an injury in fact," (2) a causal connection between the injury and the conduct complained of, and (3) that a favorable court decision would likely redress or remedy the injury. *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 561 (1992).

However, an organization may have standing to sue on behalf of others without a showing of an actual injury to the organization itself. *Warth v. Seldin,* 422 U.S. 490, 497 (1975). This is referred to as "associational standing," and it requires the satisfaction of two elements. *United Food and Comm. Workers Union Local 751 v. Brown Grp., Inc.,* 517 U.S. 544, 551-53 (1996). The association may sue on behalf of its members so long as at least one of its members would have standing to sue on his own behalf and the litigation is germane to the group's purpose. *Id.* at 554-55.

DRW claims that it has "associational standing" to sue on behalf of disabled students in Wisconsin pursuant to section 51.62 of the Wisconsin Statutes. Section 51.62 assigns DRW the power to "[p]ursue legal, administrative and other appropriate remedies to ensure the protection of the rights of persons with developmental disabilities or mental illnesses." While it is without dispute that the Wisconsin statute permits DRW to file claims on behalf of disabled persons, the question is whether DRW has established that an individual constituent would otherwise have standing to bring the claims in his own right. *See United Food,* 517 U.S. at 555-56.

***2** For instance, in *Tennessee Protection and Advocacy, Inc. v. Board of Education of Putnam County,* 24 F.Supp.2d 808 (M.D.Tenn.1998) (hereinafter "*TPA* "), an advocacy agency filed suit on behalf of "all the disabled children in the Putnam County school system." *Id.* at 816. The court held that the agency did not have standing because it did not make a

concrete factual allegation of injury to at least one individual plaintiff on whose behalf it was suing. *Id.*

Similarly, in *Pennsylvania Protection and Advocacy, Inc. v. Houston,* 136 F.Supp.2d 353 (E.D.Penn.2001), an advocacy agency filed suit on behalf of "thousands of individuals with mental retardation in Pennsylvania." *Id.* at 365. The court held that where the agency "does not identify any specific individual on whose behalf it brings the action," and where the agency does not even refer to "a single constituent who would have standing to bring this action on her own behalf," the agency does not have standing to bring suit. *Id.* at 366.

Like the agency in *TPA,* DRW has filed suit on behalf of all disabled students in a particular county's school system. And, like the agencies in both *TPA* and *Houston,* DRW never makes an allegation of injury to at least one individual on whose behalf it brings the action. Accordingly, DRW likewise does not have standing here.

An association like DRW must allege an injury to at least one, specific member who has been harmed by WCBS's actions. Without an allegation of a concrete injury, there can be no confidence of "a real need to exercise the power of judicial review" or that relief can be framed "no [broader] than required by the precise facts to which the court's ruling would be applied." *Warth,* 422 U.S. at 508. Accordingly, the Court will grant WCBS's motion to dismiss because DRW lacks standing to bring this action.

NOW, THEREFORE, BASED ON THE FOREGOING, IT IS HEREBY ORDERED THAT:

The Defendant's Motion to Dismiss (Docket No. 7) is **GRANTED.**

The clerk is directed to enter judgment and close this case accordingly.

All Citations

Not Reported in F.Supp.2d, 2007 WL 805796, 34 NDLR P 147

Footnotes

1 WCBS also alleged, in its supporting brief, that DRW has failed to establish that a class action is appropriate here. However, when DRW responded that it never sought a class certification, WCBS abandoned that argument.

2 While WCBS labeled its motion to dismiss as one under Rule 12(b)(6), the issue of standing is a question of jurisdiction properly brought under Rule 12(b)(1). *See Retired Chicago Police Ass'n v. City of Chicago,* 76 F.3d 856, 862 (7th Cir.1996). WCBS's erroneous labeling of its motion to dismiss does not affect the Court's decision. *See Snyder v. Smith,* 736 F.2d 409, 419 (7th Cir.1984) (overlooking erroneous labeling of motion to dismiss), *cert. denied,* 469 U.S. 1037 (1984), *overruled on other grounds by Felzen v. Andreas,* 134 F.3d 873 (7th Cir.1998).

EXHIBIT D

2014 WL 1056495
Only the Westlaw citation is currently available.
United States District Court,
E.D. Wisconsin.

ASSOCIATION OF AMERICAN PHYSICIANS & SURGEONS, INC., and Robert T. McQueeney, Plaintiffs,
v.
John KOSKINEN, [1] Commissioner of the Internal Revenue Service, in his official capacity, Defendant.

No. 13–C–1214.
|
Signed March 18, 2014.

Attorneys and Law Firms

Andrew L. Schlafly, Andrew L. Schlafly, Attorney at Law, Far Hills, NJ, for Plaintiffs.

Jonathan Gordon Cooper, United States Department of Justice, Washington, DC, for Defendant.

DECISION AND ORDER GRANTING [8] DEFENDANT'S MOTION TO DISMISS

WILLIAM C. GRIESBACH, Chief Judge.

***1** Plaintiffs Association of American Physicians & Surgeons, Inc. ("AAPS") and Robert T. McQueeney, M.D. ("Dr.McQueeney") filed this action against the Commissioner of the Internal Revenue Service for declaratory and injunctive relief to stop the alleged unconstitutional implementation of the Patient Protection and Affordable Care Act (the "ACA"), Pub.L. No. 111–148, 124 Stat. 119. AAPS is a membership organization of thousands of practicing physicians, many of whom have "cash practices" that do not accept payment from health insurance providers. Dr. McQueeney, a practicing psychiatrist, is a member of AAPS and maintains a part-time medical practice in Marinette County, Wisconsin.

Defendant John Koskinen is the Acting Commissioner of the Internal Revenue Service ("IRS"), the executive agency entrusted to implement and administer particular sections of the ACA, including sections of the provisions commonly referred to as the Employer Mandate and Individual Mandate. Plaintiffs allege that the IRS violated the constitutional doctrine of separation of powers and the Tenth Amendment by implementing the Individual Mandate in 2014 but not the Employer Mandate, contrary to Congress's intent that the mandates be implemented simultaneously. Plaintiffs seek declaratory and injunctive relief to prohibit the IRS from implementing and enforcing the ACA in its entirety or, in the alternative, from imposing the Individual Mandate without simultaneously enforcing the Employer Mandate. The IRS has moved to dismiss the action for lack of subject matter jurisdiction on the ground that Plaintiffs lack standing to sue. (ECF No. 8.) For the reasons stated below, the IRS's motion will be granted.

I. BACKGROUND

The ACA imposes a mandate for individuals to purchase health insurance, 26 U.S.C. § 5000A ("Individual Mandate"), and a mandate for large employers to provide health insurance to their employees, *id.* § 4980H ("Employer Mandate"). The Individual Mandate provides that beginning in January 2014, a non-exempt individual must maintain a certain kind of health insurance (termed "minimum essential coverage") or else make a "shared responsibility payment," which the statute also refers to as a "penalty." *Id.* § 5000A(a)-(b). An individual can obtain minimum essential coverage in several ways, including by receiving it through an employer, purchasing it through a health insurance Exchange or insurance agent, or enrolling in various government programs like Medicare and Medicaid. *Id.* § 5000A(f). The penalty for failing to comply with the Individual Mandate is calculated as a percentage of income, subject to a floor based on a specified dollar amount (e.g. $95 for 2014, $325 for 2015, and approximately $695 for 2016) and a ceiling based on the average annual premium the individual would have to pay for ACA-compliant private health insurance. *Id.* § 5000A(c). The Individual Mandate was upheld by the U.S. Supreme Court as a valid exercise of Congress's taxing power. *Nat'l Fed'n of Indep. Bus. v. Sebelius,* —— U.S. ——, 132 S.Ct. 2566, 2601 (2012) (hereinafter "*NFIB* ").

***2** The Employer Mandate provides that beginning in January 2014, employers with at least 50 employees must offer their full-time employees "minimum essential coverage" or else pay assessable penalties. 26 U.S.C. § 4980H. An employer who does not offer minimum essential coverage risks owing $2,000 per year for each full-time employee beyond the first 30 employees. *Id.* §§ 4980H(a),

(c)(1), (c)(2)(D). The minimum essential coverage offered by employers must also be "affordable," and provide "minimum value," as defined in 26 U.S.C. § 36B(c)(2)(C). A plan is not "affordable" if the employee's required contribution exceeds 9.5% of her household income, *id.* § 36B(c)(2)(C)(i), and it does not provide "minimum value" if the employer's share of the costs of covered healthcare is less than 60%, *id.* § 36(c)(2)(C)(ii). An employer who offers a plan that fails to satisfy these two requirements risks owing $3,000 per year for each full-time employee, although the statute imposes a cap so that an employer's penalty for offering unaffordable plans does not exceed the penalty it would have incurred for failing to offer minimum essential coverage at all. *Id.* §§ 4980H(a), (c)(1), (c)(2)(D). The penalty will only be assessed if one or more employees receives a federal subsidy (a tax credit or cost-sharing reduction) for insurance bought on a health insurance Exchange. *Id.* §§ 4980H(a)(2), (b)(1)(B). Individuals are eligible for these subsidies if their income is within 400 percent of the federal poverty line and their employer does not offer adequate insurance. *Id.* §§ 36B, 4980H(c)(3).

Congress also established enforcement mechanisms to ensure compliance with the mandates. The penalties assessed under each mandate are payable to the IRS and are treated as tax obligations. *Id.* §§ 4980H(d), 5000A(g)(1). Large employers are also required to submit reports to the IRS about the insurance they offer their employees. 26 U.S.C. § 6056. In addition, the ACA authorizes the Secretary of the Treasury, and through him, the IRS, to prescribe rules to implement and enforce the Employer Mandate. *Id.* §§ 4980H(d); 6056(a), (b)(1), (b)(2)(F), (d); 7805(a). Pursuant to this authority, following the ACA's passage in 2010, the IRS initiated the process of drafting regulations to implement the Employer Mandate and its accompanying reporting provisions. Following several rounds of notice and comment, in January 2013 the IRS published proposed rules to implement the Employer Mandate. *See* 78 Fed.Reg. 218 (Jan. 2, 2013). The final rules were issued February 12, 2014, after the case was filed. *See* 79 Fed.Reg. 8544 (Feb. 12, 2014) (to be codified at 26 C.F.R. pts. 1, 54, 301). Under the final rules, the IRS will not enforce the Employer Mandate in 2014; instead, the Employer Mandate will apply to employers with 100 or more full-time employees in 2015 and to employers with 50 or more full-time employees in 2016 and beyond.

***3** Plaintiffs treat the Individual and Employer Mandates as an inextricable pair, and they contend that Congress required the Employer Mandate to begin at the same time as the Individual Mandate. According to Plaintiffs, "[the Employer Mandate protects] employees of large employers from having to pay substantial health insurance premiums in order to avoid the taxes imposed by the Individual Mandate." (Compl. ¶ 24, ECF No. 1.) In Plaintiffs' view, by delaying implementation of the Employer Mandate, the IRS changed legislation passed by Congress and thereby violated the doctrine of separation of powers and the Tenth Amendment.

Plaintiffs' complaint alleges that the IRS's actions will soon cause or have caused irreparable harm because members of AAPS, including Dr. McQueeney, have medical practices that depend on direct payment by patients for care, rather than on payments by insurance companies or other third-party payers. (*Id.* ¶ 26.) More than 50% of Dr. McQueeney's patients pay out-of-pocket for his services. (*Id.* ¶ 12.) Plaintiffs contend that the IRS's implementation of the Individual Mandate without the Employer Mandate shifts the burden of paying health insurance premiums onto individuals and thereby eliminates from the market many cash-paying patients who seek and would seek medical care by members of AAPS, including Dr. McQueeney. (*Id.* ¶ 26.) In other words, because of the burdens imposed by the Individual Mandate, individuals will be forced to use their discretionary health care dollars on insurance premiums instead of direct payments to physicians, causing Plaintiffs to lose patients and revenue. (*Id.* ¶¶ 13–14.) Plaintiffs' complaint also contains a second claim: "Defendant's delay of the Employer Mandate has [ ] caused increases in individual health insurance premiums for some members of Plaintiff AAPS." (Compl.¶ 17.)

II. LEGAL STANDARD

As a preliminary matter, the parties propose different legal standards to guide the court's standing analysis at the pleading stage. Plaintiffs contend that "a litigant does not have to prove standing at the pleading stage." (Pls' Br. in Opp. at 15, ECF No. 10.) Plaintiffs cite *Clapper v. Amnesty Int'l USA*, —— U.S. ——, 133 S.Ct. 1138, 1146 (2013), which addressed a standing challenge at the summary judgment stage. Plaintiffs contend that they should be entitled to conduct discovery and gather data on the implementation of the ACA before the court requires them to demonstrate standing. (Pls' Br. in Opp. at 18, ECF No. 10.) The IRS rejects this view and argues that its motion is ripe for decision. The IRS contends that Plaintiffs' complaint is facially inadequate and that even if Plaintiffs' factual allegations are presumed to be true,

Plaintiffs lack standing. (Def's Reply Br. at 8–10, ECF No. 11; *cf. New Jersey Physicians, Inc. v. President of U.S.,* 653 F.3d 234, 238 (3d Cir.2011)). The IRS claims Plaintiffs' complaint contains only speculative predictions and argues that such complaints are routinely dismissed without any discovery. In the alternative, if the court finds that Plaintiffs' complaint is facially adequate, the IRS argues that Plaintiff has failed to support its claim that standing exists with competent proof, as required by *Apex Digital, Inc. v. Sears, Roebuck & Co.,* 572 F.3d 440, 444–45 (7th Cir.2009).

***4** Plaintiffs must at least allege facts sufficient to show standing at the pleading stage. As the IRS observes, "[t]he Supreme Court has characterized the doctrine of standing as 'an essential and unchanging part of the case-or-controversy requirement of Article III' of the Constitution." *Perry v. Vill. of Arlington Heights,* 186 F.3d 826, 829 (7th Cir.1999) (citing *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560 (1992)). A party seeking to invoke a federal court's jurisdiction carries the burden to demonstrate three elements: (1) "an 'injury in fact,' which is an invasion of a legally protected interest that is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical"; (2) "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 not from the independent action of some third party not before the court"; and (3) "a likelihood that the injury will be redressed by a favorable decision ." *Perry,* 186 F.3d at 829 (internal citations omitted). Since these elements are "an indispensable part of the plaintiff's case, each element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, i.e., with the manner and degree of evidence required at the successive stages of litigation." *Id.* (quoting *Lujan,* 504 U.S. at 561). This includes the pleading stage.

There is, however, one significant difference between a plaintiff's burden at the pleading stage and his burden at the summary judgment stage: "in ruling on a motion to dismiss for lack of standing, the well-pleaded allegations of the complaint must be accepted as true." *Perry,* 186 F.3d at 829 (citing *Warth v. Seldin,* 422 U.S. 490, 498 (1975)). As a result, "general factual allegations of injury resulting from the defendant's conduct may suffice" to establish standing at the pleading stage. *Alliant Energy Corp.,* 277 F.3d 916, 919 (7th Cir.2002) (citing *Lujan,* 504 U.S. at 561). Nevertheless, the court must distinguish between allegations of fact, which are entitled to the presumption of truth, and unfounded speculation, which is not entitled to such a presumption. *See Allen v. Wright,* 468 U.S. 737, 758 (dismissing complaint that was "entirely speculative" at pleading stage); *Reid L. v. Illinois State Bd. of Educ.,* 358 F.3d 511, 515 (7th Cir.2004) (same); *see also United Transp. Union v. I.C.C.,* 891 F.2d 908, 912 (D.C.Cir.1989) ("[W]e may reject as overly speculative those links which are predictions of future events (especially future actions to be taken by third parties) and those which predict a future injury that will result from present or ongoing actions—those types of allegations that are not normally susceptible of labelling as 'true' or 'false.' "). With these principles in mind, the court now examines whether Plaintiffs have standing to assert their claims.

III. ANALYSIS

***5** Article III's "case or controversy" requirement ensures that the federal judicial power is confined to a role consistent with a system of separated powers and limited to cases which are traditionally thought to be capable of resolution through the judicial process. *Flast v. Cohen,* 392 U.S. 83, 97 (1968). Consistent with this principle, "[w]hen the plaintiff is not himself the object of the government action or inaction he challenges, standing is not precluded, but it is ordinarily 'substantially more difficult' to establish." *Lujan,* 504 U.S. at 562 (internal citations omitted). The plaintiff's burden is heightened further when she seeks to challenge the government's decision to tax or not tax a third party. *See Allen,* 468 at 758–66 (holding that parents of black children in school districts undergoing desegregation did not have standing to challenge IRS tax exemptions granted to racially segregated private schools); *Simon v. E. Kentucky Welfare Rights Org.,* 426 U.S. 26, (1976) (holding that low-income individuals and organizations representing such individuals did not have standing to challenge IRS policy of extending favorable tax treatment to hospitals that offered only emergency room services to indigents); *Flight Attendants Against UAL Offset ("FAAUO") v. C.I.R.,* 165 F.3d 572, 574–75 (7th Cir.1999) ("Ordinarily a person does not have standing to complain about someone else's receipt of a tax benefit.") (citation omitted). Plaintiffs typically lack standing to litigate the tax obligations of others because such suits are generalized grievances that "operate to disturb the whole revenue system of the government." *State of Louisiana v. McAdoo,* 234 U.S. 627, 632 (1914). Although exceptions exist in First Amendment challenges, the general rule that a party may not "litigate about strangers' taxes" is well-established. *See Zambrano v. Reinert,* 291 F.3d 964, 975 (7th Cir.2002) (Easterbrook, J., concurring).

Plaintiffs argue that this case is not a third-party taxation case like *Allen* or *Simon,* even though it is brought solely against the IRS. Instead, Plaintiffs argue that they are "objecting to how the IRS shifted the ACA mandate burdens from large employers onto patients of Plaintiff McQueeney and of other physicians who belong to Plaintiff AAPS." (Pls' Br. in Opp. at 16, ECF No. 10.) In Plaintiffs' view, "[t]his lawsuit is not a challenge to tax policy, but to changes in a massive health care law." (*Id.* at 20.) Plaintiffs also note that although the Supreme Court upheld the Individual Mandate as a valid exercise of Congress's taxing power, it did not hold that the ACA's penalty provisions are a tax for all purposes, including for purposes of standing. (*Id.* at 10–11 (citing *NFIB,* 132 S.Ct. at 2584 (finding that penalty for failing to comply with Individual Mandate is not a tax for purposes of Anti–Injunction Act)).) Plaintiffs' argument misses the main point of third-party standing cases. The critical issue is not whether the Employer Mandate is characterized as a tax, a penalty, or simply a mandate, but rather, whether the government action prescribed by the ACA directly affects (and injures) Plaintiffs. *See ASARCO Inc. v. Kadish,* 490 U.S. 605, 615 (1989) (explaining that in *Allen* and *Simon,* the plaintiffs lacked standing "because the probable response of private individuals to explicit tax incentives was judged to be too uncertain to satisfy the redressability prong of federal standing requirements"); *Doe v. Obama,* 631 F.3d 157, 162 (4th Cir.2011) ("*Allen* and *Simon* illustrate a fundamental tenet of standing doctrine: where a third party ... makes the independent decision that causes an injury, that injury is not fairly traceable to the government.").

***6** Plaintiffs' primary claim fails to establish standing because it relies on a series of discretionary acts by third parties. Plaintiffs allege that they will lose patients and revenue because (1) Defendant's decision to delay implementation of the Employer Mandate will cause large employers to not offer ACA-compliant health insurance for 2014 to their full-time employees, which (2) will cause these employees to pay out-of-pocket for insurance plans that Plaintiffs either will not or cannot accept payment from, which (3) will leave the employees with less discretionary income, which (4) will cause these employees to purchase fewer services from Dr. McQueeney and other AAPS members. As discussed below, each link of this lengthy causal chain is speculative and fails to support Plaintiffs' standing argument.

Employers have discretion in 2014, as in previous years, to offer health insurance to their employees. As the IRS notes, an employer's decision to offer health insurance to its employees is dependent on an array of factors, including the cost of insurance, employee preferences regarding compensation, and the actions of other employers in the same industry. (Def's Mem. in Supp. at 19, ECF No. 9.) It is of course possible that a substantial number of large employers will choose not to provide health insurance, but this is mere speculation. The ACA does not prohibit large employers from providing health insurance in 2014, and it is reasonable to conclude that many will still provide it in 2014 for the same reasons they provided it in the past.

In addition, even if some large employers choose not to offer health insurance in 2014, their full-time employees subject to the Individual Mandate will have the discretion to comply with the Mandate and purchase health insurance or pay the applicable penalty to the IRS. *NFIB,* 132 S.Ct. at 2597 (explaining that the Individual Mandate "merely imposes a tax citizens may lawfully choose to pay in lieu of buying health insurance"). Even if Plaintiffs are correct that Congress's intent in passing the Individual Mandate was to force healthy individuals who would otherwise go without insurance to purchase it, there is no guarantee that individuals will fulfill the wishes of Congress. The IRS may not enforce the Individual Mandate with criminal prosecution, *see* 26 U.S.C. § 5000A(g)(2), and as the Supreme Court observed in *NFIB,* "for most Americans, the [shared responsibility payment] will be far less than the price of insurance, and, by statute, it can never be more," 132 S.Ct. at 2595–96. The penalty amount is also subject to a phase-in period, and the penalties are lower in 2014 than in subsequent years. *See* 26 U.S.C. § 5000A(c)(2)(B), (3)(B). Indeed, for most healthy young people, they are significantly lower than the cost of complying with the mandate. As a result, it is not at all unreasonable to assume that many non-exempt individuals may simply choose to pay the penalty in 2014 instead of purchasing insurance. If that is the case, and considering the number of those previously insured whose individual policies were cancelled as a result of the more extensive coverage mandated by the ACA, it may be, as some have asserted, that Dr. McQueeney and AAPS's members will see an increase in patients at least in the first year.

***7** Moreover, even if the employees purchase health insurance plans, it is speculative that those plans will not cover the services Plaintiffs provide. Plaintiffs allege that government-approved insurance plans under the ACA do

not typically cover expenses for much of the medical care provided by AAPS members. (*Id.* ¶ 27.) But even if some plans do not cover Plaintiffs' services, individuals may still choose to pay for them out-of-pocket. Additionally, to the extent that Plaintiffs refuse to accept payment from insurance companies, they would be contributing to their own injury, which does not establish standing. *See Clapper,* 133 S.Ct. at 1152 ("[R]espondents' self-inflicted injuries are not fairly traceable to the Government's purported activities."). It is also speculative that employees who choose to forego health insurance and pay the applicable penalty will have less discretionary income than if they received health insurance from an employer and paid annual premiums. If the Employer Mandate forces employers to spend more on employee health care than in the past, employers might also reduce wages. Finally, even if employees have less discretionary income, it is speculative that they will decide not to purchase medical services from Dr. McQueeney and other members of AAPS. Plaintiffs insist that medical care is a "normal good," such that decreases in disposable income will cause individuals to spend less money on health care. (Pls' Br. in Opp. at 17, ECF No. 10.) But even if this is true, individuals may value Plaintiffs' services more highly than other services and continue to purchase them.

Under well-established standing doctrine, a threatened injury must be "certainly impending" to constitute an injury in fact. *See Clapper,* 133 S.Ct. at 1147. Each link of Plaintiffs' causal chain is tenuous, and in combination, the allegations fail to establish an injury that is "imminent" or "certainly impending." More importantly, to the extent Plaintiffs may suffer any future injury, they have not established that the injury would be fairly traceable to the IRS. The Seventh Circuit has routinely found that such speculative claims do not satisfy the requirements of Article III standing. *See Shakman v. Dunne,* 829 F.2d 1387, 1397 (7th Cir.1987) (finding the line of causation between the defendant's actions and the plaintiff's claim particularly attenuated because it depended upon "countless individual decisions" of third parties); *Credit Union Nat. Ass'n, Inc. v. Am. Inst. of Certified Pub. Accountants, Inc.,* 832 F.2d 104, 106–07 (7th Cir.1987) ("There are so many links, each problematic, that it is impossible to trace concrete injury to the [defendant's actions].").

The reality is that almost every change in the tax laws will create incentives or disincentives that will have some impact on the income earned by some industry, trade or profession. If such an impact were by itself enough to confer standing, virtually every change in the tax code would be a potential subject of litigation by such groups. Such an expansion of the concept of standing is inconsistent with the structure of our government. *See Summers v. Earth Island Institute,* 555 U.S. 488, 492 (2009) ("In limiting the judicial power to "Cases" and "Controversies," Article III of the Constitution restricts it to the traditional role of Anglo–American courts, which is to redress or prevent actual or imminently threatened injury to persons caused by private or official violation of law. Except when necessary in the execution of that function, courts have no charter to review and revise legislative and executive action.").

***8** Plaintiffs' claim that the IRS's actions have caused the insurance premiums of some AAPS members to increase suffers from similar deficiencies. First, the court notes that Plaintiffs' complaint did not identify a particular AAPS member whose premium has increased. An organization seeking to assert a claim on behalf of its members, when only some members have allegedly been harmed, must "make specific allegations establishing that at least one identified member had suffered or would suffer harm." *Summers v. Earth Island Institute,* 555 U.S. 488, 498 (2009); *New Jersey Physicians, Inc.,* 653 F.3d at 241. Plaintiffs attempt to resolve this shortcoming by stating in their brief that "Lawrence Huntoon, M.D., Ph.D., a longtime member of AAPS, is personally facing an increase in his health insurance premiums due to Defendant's implementation of ACA." (Pls' Br. in Opp. at 22, ECF No. 10.) Plaintiffs contend that some of their members will suffer this injury because (1) the IRS's decision to delay implementation of the Employer Mandate will cause large employers to not offer ACA-compliant health insurance for 2014 to their full-time employees, which (2) will reduce the ability of the insurance companies to spread the risk among a multitude of policyholders, which (3) will cause insurance companies to charge higher premiums to insured policyholders like Dr. Huntoon. (Pls' Br. in Opp. at 22, ECF No. 10.) Like Plaintiffs' primary claim, this claim rests on the prediction that a significant number of large employers who previously offered insurance will cease offering it in 2014 because they are not compelled to do so. This claim also presumes that, contrary to Plaintiffs' primary claim, employees of these employers will not elect to purchase health insurance directly from insurance companies. It further presumes that insurance companies will respond by raising premiums. Again, these claims are speculative and rely on the decisions and actions of numerous third parties.

Even if Plaintiffs had properly identified Dr. Huntoon in their complaint, the link between Plaintiffs' alleged injury and the IRS's actions is far too attenuated to confer standing on Plaintiffs. Moreover, as with Plaintiffs' principal claim, the injury alleged is not the kind that confers standing. Tax policy inevitably causes prices of many goods and services to increase. An increase in the cost of goods and services that results from a change in the tax law is not the kind of harm that confers Article III standing on those who wish to challenge the government policy the tax reflects.

IV. CONCLUSION

For the reasons stated above, Plaintiffs have failed to plead a claim which satisfies the standing requirements of Article III. Plaintiffs have presented only generalized grievances, and such grievances are not fit for judicial resolution. *See Allen,* 468 U.S. at 759–60. Since Plaintiffs' complaint is facially deficient, the court finds that discovery to further address the issue of standing is not warranted. The IRS's motion to dismiss (ECF No. 8) is hereby granted, and Plaintiff's claims are dismissed. Because the kind of harm alleged is not sufficient to confer Article III standing, even if realized, the dismissal is with prejudice.

***9 SO ORDERED.**

All Citations

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Footnotes

1 Pursuant to Fed.R.Civ.P. 25(d), the Acting Commissioner of the Internal Revenue Service, John Koskinen, has been substituted as the defendant.

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