Case No. 17-169

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

TRANS UNION, LLC,
Defendant-Petitioner,

v.

CAROLYN CLARK, et al.
Plaintiff-Respondent

Appeal from the United States District Court
Eastern District of Virginia
Honorable M. Hannah Lauck, District Court Case No. 3:15-cv-391-MHL

PLAINTIFF'S OPPOSITION TO DEFENDANT'S PETITION FOR LEAVE TO APPEAL CLASS CERTIFICATION ORDER PURSUANT TO FEDERAL RULE OF CIVIL PROCEDURE 23(f)

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March 27, 2017

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
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Counsel for: Carolyn Clark

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I. INTRODUCTION.

The Fair Credit Reporting Act, 15 U.S.C. § 1681g(a)(2), requires that consumer reporting agencies such as TransUnion "clearly and accurately" disclose to consumers "[t]he sources of information" in their credit files. The Plaintiff, Carolyn Clark, alleged TransUnion did not do that when it listed as the source for two judgments against her the name of the courthouse from which the public-record information originated, rather than TransUnion's true source of the information, LexisNexis.

Clark alleged that TransUnion employed this uniform, deliberate, and classwide policy of withholding important, statutorily mandated information from consumers in violation of the FCRA. Though TransUnion obtains public records like tax liens and judgments from a vendor, LexisNexis, all it reveals to consumers like Plaintiff and Class Members is the name of the courthouse or jurisdiction from which the public-record information originated. Clark sought class certification, and the District Court, in a lengthy and well-reasoned opinion, agreed that class certification was appropriate.

Invoking Federal Rule of Civil Procedure 23(f), TransUnion now seeks the unusual step of interlocutory review of this class certification decision, by resurrecting and recasting its standing arguments as relating to class certification. Essentially, Trans Union claims neither Plaintiff nor Class Members have standing

because Plaintiff cannot show how she and Class Members would have benefitted from the disclosure of LexisNexis as a source. Of course, a "consumer's inability to monitor his or her file for falsity when not provided the relevant information," is a real impediment and a real injury. *Clark v. TransUnion, LLC*, No. 3:15cv391, 2016 WL 7197391, *10 n.20 (E.D. Va. Dec. 9, 2016). Clark and the proposed class have standing, and TransUnion's arguments to the contrary misconstrue *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540 (2016).

This Court emphasizes "careful and sparing use of Rule 23(f)," recognizing the Court's "limited capacity" for "interlocutory appeals" as well as the district court's "institutional advantage" in "managing the course of litigation." *Lienhart v. Dryvit Sys.*, 255 F.3d 138 (4th Cir. 2001). "Routine interlocutory review of class certifications is simply not feasible." *Id.*

Here, the District Court properly concluded that "Clark, and anyone not notified that LexisNexis was a source of public records information, has suffered the violation of a right created by Congress" and also faces "a material risk that LexisNexis could . . . report inaccurate information in the future." *Clark*, 2016 WL 7197391, at *11. Having properly found standing, and concluding that Clark alleges that TransUnion has a systemic procedure of willfully omitting its source of public records information, the court properly certified the class. Given the deferential

standard, and the District Court's thorough analysis, this Court should deny TransUnion's petition for permission to appeal.

II. STATEMENT OF FACTS.

In the Summer of 2014, Plaintiff requested from TransUnion her full file disclosure, which TransUnion provided on August 7, 2014. *Clark*, 2016 WL 7917391, at *2. The disclosure included incorrect entries of two Virginia judgments against her, for which TransUnion listed "Henrico District Court" and "Virginia Federal Court" as the sources of that information. *Id.* It is undisputed that TransUnion obtained this judgment information not from either of these courts, but from a third-party vendor called LexisNexis. *Id.*; (*see* Pet. at 1 ("TransUnion often uses LexisNexis to assist it in retrieving information about public records from courthouses and other public records sources.").) It is likewise undisputed that TransUnion never, during the Class period, revealed to any consumer who requested his or her file disclosure that LexisNexis was the source of public-record information in that consumer's file. (Pet. at 4 ("TransUnion has always understood § 1681g(a)(2) to refer to the originator of the record (*i.e.*, the courthouse where the judgment is entered), not an intermediary who may retrieve data from its originator." (emphasis in original)).)

On September 14, 2015, Clark filed a six-count Amended Complaint against TransUnion, alleging the class claim at issue here and five individual claims. (First

Am. Compl., ECF 10.) On July 18, 2016, following the Supreme Court of the United States' opinion in *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540 (2016), TransUnion moved to dismiss the Complaint, arguing that Clark and the proposed class lacked standing. (Mot. to Dismiss, ECF 52.) The District Court, in a lengthy opinion, denied TransUnion's argument (made again before this Court) that "each class member would need to prove individualized injury in fact based on harm suffered beyond the violation of § 1681(a)(2) itself." *See Clark v. Trans Union, LLC*, No. 3:15cv391, 2017 WL 814252, at *1 (E.D. Va. Mar. 1, 2017) (citing *Clark*, 2016 WL 7197391, at *11). In so holding, the court reviewed the remedial purposes of the FCRA, including the conclusion that by informing consumers of the source of information, the broader purposes of "fair and accurate credit reporting" are advanced. *Clark*, 2016 WL 7197391, at *8-9. Thus, the court concluded, given the purposes of the FCRA, the "failure to reveal source information reflects the type of harm, or injury in fact, that *Spokeo* recognizes as 'concrete' and 'particularized.'" *Id*. at *9.

Subsequently, Clark filed her Motion for Class Certification, which TransUnion opposed. In an extensive, well-reasoned opinion discussed further below, the District Court observed that TransUnion's standing argument continued. Either by "disput[ing] this Court's ruling on standing" or by "erroneously add[ing] an element of accuracy to § 181g(a)(2)'s plain language," the argument inappropriately focused on the accuracy of the public records, rather than

"TransUnion's failure to disclose the sources of public records information on the class members' consumer reports." *Clark*, 2017 WL 814252, at *10. After considering the appropriate requirements under Rule 23, including numerosity, commonality, typicality, and adequacy, the court granted Clark's motion and certified the following Class:

> All natural persons residing in the Fourth Circuit[:] (a) who requested their consumer file from Trans Union or any of its affiliated companies, subsidiaries, or any other Trans Union entity, (b) within five years preceding this filing of this action and during its pendency, and[,] (c) to whom Trans Union provided a response that did not include any reference to its public records vendor as the source of public records information within the consumer's file disclosure. Excluded from the class definition are any employees, officers, or directors of Trans Union, any attorney appearing in this case, and any judge assigned to hear this action.

Clark, 2017 WL 814252, at *4–5 (alterations in original). TransUnion asks that the Court review that decision immediately. It should not.

III. LEGAL FRAMEWORK.

A. Article III Standing In The Class Action Context.

Though the defense bar elevates *Spokeo* to landmark level as supposedly greatly altering the law of Article III standing, that is a myth. Courts have routinely, and correctly, concluded that *Spokeo* did nothing to change the standing landscape. *See, e.g.*, *In re Horizon Healthcare Servs. Inc. Data Breach Litig.*, 846 F.3d 625, 638 (3d Cir. 2016) ("*Spokeo* itself does not state that it is redefining the injury-in-fact requirement. Instead, it reemphasizes that Congress 'has the power to define

injuries,' 'that were previously inadequate in law.'") (citation omitted); *Thomas v. FTS USA, LLC*, 193 F. Supp. 3d 623, 629 (E.D. Va. 2016) ("*Spokeo* did not change the basic requirements of standing."). *Spokeo* reminds that Article III standing requires first an injury in fact, which must then be "'concrete and particularized' and 'actual or imminent, not conjectural or hypothetical.'" *Spokeo*, 136 S. Ct. at 1547–48.[1]

Contrary to TransUnion's argument that every class member must establish standing (Pet. at 18), it is well-settled—before *Spokeo* and since—that the standing analysis applies to the *named plaintiff only* in a class action. *Spokeo* itself confirms this basic tenet of Rule 23 practice:

> "That a suit may be a class action . . . adds nothing to the question of standing, for even named plaintiffs who represent a class 'must allege and show that they personally have been injured, ***not*** *that injury has been suffered by other, unidentified members of the class to which they belong*.'"

Spokeo, 136 S. Ct. at 1547, n.6 (quoting *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 40, n.20 (1976), emphasis added). Because it has been on the books since at least 1976, this notion is foundational in class-action jurisprudence. *See Lewert v. P.F. Chang's China Bistro, Inc.*, 819 F.3d 963, 966-69 (7th Cir. 2016) (assessing standing in a putative class action with respect only to the named

[1] TransUnion challenges only the concreteness aspect of Plaintiffs' and Class Members' Article III standing.

plaintiffs); *Neale v. Volvo Cars of N. Am., LLC*, 794 F.3d 353, 367 (3d Cir. 2015) ("Quite simply, requiring Article III standing of absent class members is inconsistent with the nature of an action under Rule 23.").[2]

B. The Requirements Of 15 U.S.C. § 1681g(a)(2).

Courts that have considered the matter agree: Section 1681g(a)(2) requires consumer reporting agencies to "clearly and accurately" disclose to the consumer the "sources of [] information" in the consumer's credit report, including ""the person, place, or thing from which information obtained." *Dennis v. Trans Union, LLC*, No. 14-2865, 2014 WL 5325231, at *7 (E.D. Pa. Oct. 20, 2014) (agreeing that plaintiff's more liberal reading more consistent with the remedial scheme intended by Congress and plain language of the FCRA); *Clark*, 2017 WL 814252, at *5; *Dreher v. Experian Info. Sols., Inc.*, 71 F. Supp. 3d 572, 579–80 (E.D. Va. 2014) (finding definition includes "at the very least, the entity that gives that information

[2] *See also Melendres v. Arpaio*, 784 F.3d 1254, 1261 (9th Cir. 2015) ("[O]nce the named plaintiff demonstrates her individual standing to bring a claim, the standing inquiry is concluded, and the court proceeds to consider whether the Rule 23(a) prerequisites for class certification have been met."); *Gooch v. Life Investors Ins. Co. of Am.*, 672 F.3d 402, 422 (6th Cir. 2012) ("Once his standing has been established, whether a plaintiff will be able to represent the putative class, including absent class members, depends solely on whether he is able to meet the additional criteria encompassed in Rule 23."); *Shahriar v. Smith & Wollensky Rest. Group, Inc.*, 659 F.3d 234, 253 (2d Cir. 2011) ("'only one of the named Plaintiffs is required to establish standing in order to seek relief on behalf of the entire class'" (citation omitted)); *Larson v. Trans Union, LLC*, No. 12-CV-05726-WHO, 2016 WL 4367253, at *4 (N.D. Cal. Aug. 11, 2016) ("In a class action, however, 'standing is satisfied if at least one named plaintiff meets the requirements.'").

directly to the consumer reporting agency").[3] As the *Dennis* Pennsylvania court concluded, contrary to TransUnion's view, "[a]s the plain language of Section 1681 g(a)(2) does not limit 'sources' in any way, the Court will not impose a limitation on the number of sources a CRA could have, and therefore be required to disclose, for a particular piece of information." *Dennis*, 2014 WL 5325231, at *7. This "straightforward" command thus requires TransUnion to disclose LexisNexis as a source, because it is the entity giving the information to TransUnion.[4]

C. The Standards For Granting A Rule 23(f) Petition.

This Court applies a five-factor test for determining whether to grant a Rule 23(f) petition, considering (1) whether the certification ruling is likely dispositive of the litigation; (2) whether the certification decision contains a substantial weakness;

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[3] As pertinent here, 15 U.S.C. § 1681g(a)(2) requires:

> **(a) Information on file; sources; report recipients**
> Every consumer reporting agency shall, upon request, and subject to section 1681h(a)(1) of this title, clearly and accurately disclose to the consumer: . . .
>
> > **(2)** The ***sources*** of the information; except [in situations not applicable here].

15 U.S.C. § 1681g(a)(2) (second emphasis added).

[4] Separately from the other infirmities in TransUnion's Petition, it raises the issue of whether LexisNexis is truly a "source" that must be disclosed under Section 1681g(a)(2), which is a merits question that should not be decided on class certification. *CGC Holding Co., LLC v. Broad & Cassel*, 773 F.3d 1076, 1098 (10th Cir. 2014) (instructing that merit's questions should be resolved at final disposition).

(3) whether the appeal raises important and unsettled questions; (4) the nature and status of the litigation; and (5) the likelihood that future events will make appellate review unlikely or unnecessary, such as "settlement negotiations" that would sound the "'death knell' for the litigation." *Lienhart*, 255 F.3d at 144–46 (citing *Prada-Steiman v. Bush*, 221 F.3d 1266, 1274–76 (11th Cir. 2000)). The substantial-weakness factor, "viewed in terms of the likelihood of reversal under an abuse of discretion standard, operates on a 'sliding scale' in conjunction with the other factors." *Id.* at 145. Only "[i]n extreme cases, where decertification is a functional certainty," may this factor "alone suffice" for immediate review. *Id*. Otherwise, "a commensurately stronger showing on the other factors is necessary." *Id*.

Meeting this test and justifying review is no easy task. Rule 23(f) appeals are "generally disfavored" under the five-factor test because they are "inherently disruptive, time-consuming, and expensive." *Prada-Steiman*, 221 F.3d at 1276. The test is designed to encourage "restraint in accepting Rule 23(f) petitions," insisting that the petitioner show a truly "compelling need for resolution of the legal issue sooner rather than later." *Id.* at 1274. Short of that, the Court "should err, if at all, on the side of allowing the district court an opportunity to fine-tune its class certification order rather than opening the door too widely to interlocutory appellate review." *Id*.

IV. ARGUMENT.

A. TransUnion Bases Its Petition On An Incorrect Interpretation Of Section 1681g(a)(2), Injecting A Non-Existent Requirement Of Inaccuracy It Incorrectly Claims Deprives Plaintiff Of Article III Standing.

As it did in the District Court, TransUnion hopes to convince this Court to interpose into a clearly worded statute a requirement that is simply not there, to rob Plaintiff and Class Members of their standing to sue. TransUnion claims the District Court erred by certifying the Class because it "misapplied *Spokeo*, permitting creation of a massive class of persons who lack Article III standing to recover under the FCRA." (Pet. at 11.) By TransUnion's reckoning, the Class lacks standing because "no real-world harm actually resulted from" its failure to disclose LexisNexis as a source. (*Id.* at 13.) Attempting to bootstrap its inaccuracy requirement to this need of real-world harm, TransUnion claims that standing is absent because Plaintiff has not shown "that the information has any inherent value outside its potential use to correct an inaccurate item." (*Id.* at 14.) In other words, only consumers with inaccuracies in their credit files would need to know of LexisNexis as a source of information and, conversely, those with accurate credit files are not harmed for Article III standing purposes by the hiding of LexisNexis as a source of information.

TransUnion's arguments conflate the concept of actual *harm*, to which Article III standing then attaches, with actual *damages*, which result from or are brought

about by the actual harm.[5] The District Court concluded that TransUnion's failure to disclose LexisNexis as a source of information worked a concrete harm on Plaintiff under *Spokeo*, because Congress created in the FCRA substantive rights to specific information, meaning Plaintiff need not allege any harm (like actual damages) beyond a deprivation of that information. *Clark*, 2016 WL 7197391, at *9. This conclusion is perfectly in line with *Spokeo*, as the District Court noted, because "the proposition that '[t]he . . . injury required by Article III may exist solely by virtue of statutes creating legal rights, the invasion of which creates standing[,]' survives *Spokeo* subject to qualification, depending on the facts of each case and [other] considerations . . ., but nevertheless intact." *Id.* at *8 (quoting *Thomas v. FTS USA, LLC*, No. 3:13cv825, 2016 WL 3653878, at *6 (E.D. Va. June 30, 2016) (alterations in original). And the District Court here is not the only court to conclude that the failure to disclose a source under Section 1681g(a)(2) results in Article III harm. *Dreher*, 71 F. Supp. 3d at 577 (finding, 18 months before *Spokeo* was handed-down, that plaintiff possessed Article III standing where the defendant CRA failed to reveal the source of information in file disclosures); *see Stokes v. Realpage, Inc*., No. CV 15–1520, 2016 WL 6095810, at *7 (E.D. Pa. Oct. 19, 2016) ("[T]he inaccurate or incomplete disclosure to a consumer of the source of a [CRA's] reported information

[5] Plaintiff seeks only statutory and punitive damages under the FCRA for herself and the Class, so there will be no actual-damages analysis in the case at all.

has been elevated by Congress to the status of a legally cognizable injury."). TransUnion attempts to unwind this logical conclusion with references to inapplicable caselaw in claiming that the District Court applied *Spokeo* incorrectly. (Pet. at 14–16.)

TransUnion's standing arguments falter on a fundamental level—they rely on the supposed need of inaccuracy for consumers to have standing to pursue claims a CRA failed to make known a source under 1681g(a)(2). But that requirement simply does not exist. At best, a consumer with an inaccuracy in his or her file from whom LexisNexis is hidden as a source (thus making it arguably more difficult for that consumer to correct the inaccuracy) suffers greater actual *damages* than does someone whose file contains no inaccuracies, but they both suffer Article III harm when they are deprived of information Congress, by enacting the FCRA, says they must have. *Clark*, 2016 WL 7197391, at *8–9. The Court should reject TransUnion's position just as did the District Court because it has no basis in the statute, caselaw, or any other source.

The flaw in TransUnion's position is confirmed by examining it in practice. It simply cannot work. TransUnion supposedly need only disclose LexisNexis to consumers who have inaccuracies in their files, but it cannot know who has an inaccuracy in their file at the time the disclosure is requested. TransUnion has no

way of knowing whether it should disclose LexisNexis at the outset because it cannot know whether an inaccuracy is present. The position is patently untenable.

Moreover, TransUnion repeatedly touts its evidence of lack of "real-world" injury, presented through its expert Victor Stango, as "undisputed," and "unrebutted" (Pet. at 1, 2, 7, 8), as if Plaintiff has somehow fallen short in her burden on class certification. Wrong. Plaintiff absolutely has disputed and rebutted Dr. Stango's evidence, challenging multiple facets of his opinions in a fully briefed motion to exclude under Federal Rule of Evidence 702 and *Daubert*. (*Mot. to Strike*, ECF 115.) Included in those challenges is substantial briefing about his lack of qualifications, the irrelevance of his discussion of inaccuracy, and that his opinions are contrary to the law of the case because they espouse—contrary to the District Court's holding on TransUnion's Motion to Dismiss—a lack of concrete injury. (*See generally Memo. in Support of Mot. to Strike*, ECF 116.) In short, TransUnion's reliance on Dr. Stango's opinions for purposes of its Petition should carry no weight because the District Court is likely to exclude them.

B. The District Court's Certification Ruling Is Not Necessarily Dispositive Of The Litigation.

TransUnion further argues that the class certification Order is the death knell of the litigation, essentially forcing TransUnion to settle. (Pet. at 10–11.) It provides nothing in support besides than the quote from *Lienhart* that certification is dispositive when it "turns on a novel or unsettled question of law." (*Id.* at 11 (quoting

Lienhart, 255 F.3d at 143).) More to the point, though, the *Lienhart* court emphasized that class certification may create an "irresistible pressure to settle" particularly "where the plaintiff's probability of success on the merits is slight." *Lienhart*, 255 F.3d at 143. Here, because the District Court's decisions on the merits of the Motion to Dismiss and Motion for Class Certification rejected TransUnion's centerpiece lack-of-standing arguments, coupled with the clear wording of the statute and multiple courts finding TransUnion's arguments meritless on the identical claim, there is far more than a "slight" chance that Plaintiff will be successful on the merits. This factor in no way favors immediate review.

A recent example from the same District Court, involving the same Defendant, confirms this point. In *Henderson v. Trans Union*, the court certified a FCRA class of consumers plaintiff claimed were deprived of at-the-time notice when TransUnion reported adverse public-record information about them to employers. 3:14-cv-00679-JAG, 2016 WL 2344786, at *1 (E.D. Va. May 3, 2016). After nearly a year of subsequent litigation and scant settlement negotiations, TransUnion moved for summary judgment, which the district court granted. (*Henderson Order Granting Summary Judgment*, ECF 118.) Given that the *Henderson* victory favors TransUnion (albeit represented there by different lawyers) even after a class was certified, it directly contrasts TransUnion's claim here that class certification will likely end this

case. It certainly offers nothing other than supposition that this is true, which cannot push this factor to favor immediate review.

But there are more examples demonstrating that TransUnion's "death knell" argument is merely a hollow litigation tactic. In *Ramirez v. Trans Union, LLC*, 301 F.R.D. 408 (N.D. Cal. 2014), the Northern District of California certified a class of 8,000 consumers whom TransUnion misreported as being terrorists and drug traffickers. TransUnion filed the same petition for interlocutory review to the Ninth Circuit Court of Appeals, raising many of the same arguments that it raises here, and the Ninth Circuit denied review. *Trans Union, LLC v. Ramirez*, No. 14-80109 (9th Cir. Dec. 2, 2014) (ECF 4). Despite TransUnion's death-knell contentions in that case, the *Ramirez* litigation has moved forward since and is scheduled for trial in June of this year. *Ramirez*, No. 12-cv-00632-JSC (N.D. Cal.) (ECF 224).

Similarly, in *Larson v. Trans Union, LLC*, 201 F. Supp. 3d 1103 (N.D. Cal. 2016), the Northern District of California certified a class of over 18,000 consumers asserting the same claim here (15 U.S.C. § 1681g) over TransUnion's virtually identical *Spokeo* arguments. TransUnion again filed a petition for interlocutory review pursuant to Rule 23(f), and the Ninth Circuit again denied review. *Larson v. Trans Union, LLC*, No. 16-80111 (9th Cir.) (ECF 4). Notwithstanding the Larson's court's certification decision, and the Ninth Circuit's subsequent ruling, the *Larson* litigation has not resulted in any settlement and continues to be litigated.

As a result, TransUnion cannot credibly assert that class certification in this case will force it to settle.

C. There Is No Weakness, Let Alone A Substantial One, In The District Court's Decision.

Undeterred by the District Court's reasoned decision on standing, TransUnion pins nearly its entire Petition on the hope that this Court will divert from that logical holding by claiming that Plaintiff has not shown a concrete injury-in-fact for herself or Class Members. (Pet. at 11.) This position grossly misreads *Spokeo* and the FCRA, leading to the unremarkable conclusion that the Court should deny TransUnion's Petition.

1. The District Court's conclusion regarding standing is correct.

TransUnion's familiar refrain throughout this case is that for standing to attach to a violation of Section 1681g(a)(2), the consumer seeking to sue must have had inaccurate information in her consumer file because, if not, there is no harm in failing to disclose LexisNexis. As to the substantial weakness factor, TransUnion claims the District Court erred in finding a common, concrete harm for Class Members because the informational injury the District Court concluded befell Plaintiff and Class Members cannot be an Article III injury-in-fact. (Pet. at 13.) TransUnion is wrong, as multiple court decisions, including a recent one involving TransUnion, confirm.

While accuracy is certainly one of Congress' concerns in enacting the FCRA, in mandating consumer access to their complete credit file (including the sources of a consumer reporting agency's information under Section 1681g(a)(2)), the legislature's defined "harm" was not merely the tangible or monetary losses proven as actual damages from credit inaccuracy. Instead, Congress was concerned that all consumers have access to information about them so that they could monitor and protect their credit, not merely so that they could correct inaccuracies after credit damage resulted from them. As another recent decision explained in rejecting the same *Spokeo* arguments (from the same defendant and counsel) against a § 1681g(a) case:

> There is good reason to view the non-disclosure alleged here as within that family of claims in which *Spokeo* discerns "concrete" Article III harm. A main purpose of FCRA, after all, is "to ensure 'fair and accurate credit reporting.'" *Spokeo*, 136 S. Ct. at 1545 (quoting 15 U.S.C. § 1681(a)(1)). Toward that end, with FCRA, "Congress plainly sought to curb the dissemination of false information by adopting procedures designed to decrease that risk." *Spokeo*, 136 S. Ct. at 1550. Requiring consumer-reporting agencies to disclose, "upon request, . . . [a]ll information in [a] consumer's file," § 1681g(a)(1), empowers a consumer to monitor her file for incorrect data. Section 1681g's disclosure requirement thus seems exactly a device "designed to decrease [the] risk" that a credit-reporting agency will "disseminat[e] . . . false information." But a consumer cannot monitor her file for falsity if she is not given the relevant information. That impediment, that non-disclosure, is thus a real injury. At the very least, preventing a consumer from monitoring her file presents a "risk of real harm" of exactly the type that FCRA seeks to prevent (i.e., the dissemination of incorrect information); and this risk can itself "satisfy the requirement of concreteness." *See Spokeo*, 136 S. Ct. at 1549–50. So it is not simply the "bare . . . violation" that predicates Article III injury in this context;

> it is the hindering of a consumer's ability to monitor and correct information about herself.
>
> ***
>
> Taking all this into view, the court holds that the § 1681g "disclosure" claim alleges a sufficiently "concrete injury" under Article III.

Patel v. Trans Union, LLC, No. 14-CV-00522-LB, 2016 WL 6143191, at *4 (N.D. Cal. Oct. 21, 2016) (rejecting Trans Union's motion to decertify a class based on *Spokeo* lack-of-standing arguments) (alterations in original). Just as recently, the District Court for the Eastern District of Pennsylvania found *Spokeo*-standing specifically as to the exact claim alleged here—the violation of §1681g(a)(2) by failing to disclose the vendor-source of a public record. In adopting the Eastern District of Virginia Court's well-reasoned conclusions in *Thomas*, the Pennsylvania court held:

> RealPage argues that the standing issue raised by the class claims is identical to the standing issue presented in *Spokeo*: the Complaints allege statutory violations of the FCRA, with no actual harm, which are thus insufficient to confer Article III standing. The class claims, RealPage asserts, allege only technical violations, devoid of any particularized or plausible allegations of concrete harm that do not establish that Plaintiffs sustained any injuries-in-fact because there was no real impact on the putative class members. Plaintiffs respond that Congress's reasons for enacting the FCRA show that it intended that the law be construed to promote the credit industry's responsible dissemination of accurate and relevant information, and afford consumers the substantive right to receive certain specified information. Thus, they maintain that they have alleged an injury-in-fact based on Congress's having created a substantive legal right, the invasion of which creates standing.

> We find that, like in *Nickelodeon*, **where the unlawful disclosure of legally protected information was determined to constitute a concrete harm because Congress has long provided plaintiffs with the right to seek redress for unauthorized disclosures of such information, the inaccurate or incomplete disclosure to a consumer of the source of a CRA's reported information has been elevated by Congress to the status of a legally cognizable injury**. We further find that the injury alleged here is sufficiently concrete to provide standing since Plaintiffs allege both the dissemination of inaccurate information about a consumer, and a failure to disclose the source of that information to the consumer. **The Classes' allegations that they did not receive the information to which they were entitled under the statute is, we conclude, sufficient to plead and establish a concrete harm since it goes to the core of the interests Congress sought to protect**. In contrast to the examples cited in *Spokeo*—where the Court surmised that accurate but undisclosed information, or incorrect but minor information like a zip code were the type of technical violations incapable of creating a concrete harm—here Plaintiffs allege a substantive *de facto* violation involving undisclosed and inaccurate information of the kind Congress required be disclosed to protect consumers, namely the source of the consumer information that the CRA reported. Without accurate source information, a consumer would be left confused as to where to go to correct erroneous data contained in a report and be unable to know whether any erroneous data would find its way into future consumer reports. Because the class claims involve more than technical violations of the statute, we find that Plaintiffs have standing to pursue their claims.

Stokes, 2016 WL 6095810, at *7 (bold emphasis added) (citing *In re Nickelodeon Consumer Privacy Litig.*, 827 F.3d 262 (3d Cir. 2016)); *see also Ramirez v. Trans Union, LLC*, No. 12-CV-00632-JSC, 2016 WL 6070490, at *4 (N.D. Cal. Oct. 17, 2016) ("These alleged [§ 1681g(a)] violations created a risk that Plaintiff would be harmed in precisely the way Congress was attempting to prevent when it mandated what disclosures consumer credit reporting agencies must make to consumers: a risk

that the consumer is not made aware of material inaccurate information in the consumer's file, nor aware of how to dispute the inclusion of the harmful information. Thus, these omissions entailed a degree of risk sufficient to satisfy Article III's concrete injury requirement."). Rather than even attempting to deal with this raft of negative, and well-reasoned, decisions finding informational injury a valid harm for Article III purposes head-on, TransUnion instead directs the Court to inapplicable decisions, none of which dispel the holdings that informational-injury alone is enough.

Every court that has considered TransUnion's exact position has rejected it. *Larson*, 2016 WL 4367253, at *3 (collecting cases). All TransUnion points-to against the clearly established notion that the deprivation of statutorily guaranteed information works Article III harm is its view that the information must "have inherent value outside its potential use to correct an inaccurate item" for harm to occur. (Pet. at 14.) That position has no basis in the caselaw, statute, or Article III—TransUnion has crafted it out of thin air. The deprivation of the information is itself the harm, and what a consumer may have done with the information does not enter the analysis. *Stokes*, 2016 WL 6095810, at *7; *Ramirez*, 2016 WL 6070490, at *4; *Larson*, 2016 WL 4367253, at *3. Given the more-than ample authority on which the District Court based its decision, no weakness in that decision exists.

TransUnion's cited authority does not alter this reality. *Beck v. McDonald*, 848 F.3d 262 (4th Cir. 2017), was not an FCRA case but, rather, one in which the plaintiffs sued because their personal information was compromised by two data breaches. The district court there found standing lacking, and this Court affirmed, because the allegation of potential identity theft resulting from the data breaches was too speculative to constitute an injury-in-fact. *Id.* at 274. In other words, the plaintiff alleged threatened future injury—not, as here, informational injury that actually occurred at the time that a consumer was denied information.

These are completely different facts than those present here, as there is confirmed concrete harm from TransUnion's uniform failure to reveal LexisNexis as the source of its public-record information. TransUnion identifies other cases that, in its view and unlike the District Court here, required "strong[er] showings of concrete injury under *Spokeo*" (Pet. at 15–16), but those cases do not evince any shortcomings in the District Court's certification decision. Rather, they stand for the unremarkable proposition that Article III standing requires a concrete injury, which Plaintiff has shown, and the District Court (along with multiple others on the precise argument) agreed, exists here. The inquiry should therefore end with the rejection of TransUnion's Petition.

2. There are no uninjured Class Members.

As noted above, it is black-letter law that the Article III standing analysis applies to the named plaintiff *only*. *Spokeo*, 136 S. Ct. at 1547, n.6; *Lewert*, 819 F.3d at 966–69; *Neale*, 794 F.3d at 367. Any questions about whether absent class members suffered the same or similar injury such that representative litigation is appropriate go to the elements of Rule 23. They do not implicate Article III in any way. Nothing to which TransUnion directs the Court turns this well-settled conclusion aside.

But even if it were true that Plaintiff need establish injury-in-fact for each Class Member, she has done so. Though it may often be hyperbole for plaintiffs to argue that they and all class members suffered the identical injury, here such a statement is uncontrovertibly true. TransUnion has not denied that it withheld LexisNexis as the source of public-record information in Plaintiff's and Class Members' disclosures, and multiple courts have concluded that this very failure to disclose results in injury that confers Article III standing. So even assuming TransUnion's point—that Plaintiff must establish that each and every Class Member has Article III standing to sue on his or her own—is a valid one, Plaintiff has met this invented standard. TransUnion's failure to show otherwise confirms there is no basis to review the District Court's decision now.

D. Immediate Review Will Answer Questions That Are Important Only To TransUnion.

While TransUnion claims that review is necessary because district courts "are applying *Spokeo*'s injury-in-fact requirement inconsistently," that is misleading. (Pet. at 20–21.) All courts to have considered the claim at issue in this case, a violation of section 1681g(a)(2) for the failure to disclose records vendors as sources of information, as described in detail above, have agreed that Article III standing exists as to that injury. And the three district court decisions TransUnion identifies as supporting its view—the courts caught in this supposed inconsistency—involved different statutory harms and different facts. *See, e.g.*, *In re Michaels Stores, Inc.*, No. 2:15cv2547, 2017 WL 354023, at *1 (D.N.J. Jan. 24, 2016) (finding no standing where plaintiffs "concede that they do not plead any concrete harm" in a complaint filed pre-*Spokeo*). Additionally, they are all outside this Circuit. (*See* Pet. at 21 (pointing to cases from New Jersey, New York, and Ohio).) Any decision by this Court on the class certification issue TransUnion presents would do nothing to resolve this supposed problem because it would not be binding authority to any of these courts.

The conclusion that no inconsistency regarding standing and Section 1681g(a)(2) is highlighted by the fact that *Spokeo* plowed no new legal ground, but relied on decades-old decisions in reaffirming the Article III concepts it examined. *Spokeo*, 136 S. Ct. at 1547, n.6 (quoting *Simon v. Eastern Ky. Welfare Rights Org.*,

426 U.S. 26, 40, n.20 (1976)). All immediate review would accomplish is give TransUnion what every defendant on the losing end of class certification would like—a second chance to argue its class-certification opposition to a fresh court with the authority to decide the issue TransUnion's way. Such is not a purpose for Rule 23(f)'s rare relief.

E. The Remaining Factors Do Not Favor Granting TransUnion's Petition.

The remaining *Lienhart* factors—status of the litigation and future events—do not favor immediate review. As the District Court noted, the case has been plagued by "myriad discovery disputes," resulting in the court continuing the trial date generally. *Clark*, 2017 WL 814252, at *6, n.5. Numerous motions are pending, including a Motion to Strike the very expert TransUnion relies on in its Petition, and discovery is not yet complete given TransUnion's failure to comply with its discovery obligations. (*See Motion to Strike*, ECF 115; *Memorandum Order*, Mar. 1, 2017, ECF 132 (finding "TransUnion has improperly constrained its discovery responses").) Thus, these factors, driven by TransUnion's delay tactics, weigh in favor of denying TransUnion's petition.

V. CONCLUSION.

TransUnion presents no reasoned ground for the extraordinary remedy of Rule 23(f) review. The District Court's decision is eminently correct, and nothing to

which TransUnion points demands a different result. The Court should decline Rule 23(f) relief.

Respectfully Submitted,
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CERTIFICATE OF SERVICE

I certify that on March 27, 2017 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the addresses listed below:

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