

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF FLORIDA

CASE NO.: 16-cv-60364-WPD

ASHLEY MOODY and AUTUMN  
TERRELL, on behalf of themselves and on  
behalf of all other similarly situated,

Plaintiffs,

vs.

ASCENDA USA INC. d/b/a 24-7 INTOUCH,  
and VERIFIED CREDENTIALS, INC.,

Defendants.

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**ORDER DENYING DEFENDANT ASCENDA'S MOTION TO DISMISS  
COUNTS I AND II OF PLAINTIFFS' SECOND AMENDED COMPLAINT**

THIS CAUSE is before the Court upon Defendant Ascenda USA Inc.'s Motion to Dismiss Counts I and II of Plaintiffs' Second Amended Complaint against Defendant Ascenda USA, Inc. for Lack of Subject Matter Jurisdiction [DE 53], filed herein on August 1, 2016. The Court has carefully considered the Motion [DE 53], Plaintiffs Ashley Moody and Autumn Terrell's Response [DE 56], and Defendant Ascenda's Reply [DE 57], the notices of supplemental authority filed in the record, and is otherwise fully advised in the premises.

**I. BACKGROUND**

Plaintiffs Ashley Moody and Autumn Terrell, on behalf of themselves and on behalf of all others similarly situated ("Plaintiffs") brought this action on April 8, 2016 against Ascenda USA Inc. d/b/a 24-7 Intouch ("Defendant Ascenda") and Verified Credentials, Inc. ("Defendant Verified") (collectively "Defendants") pursuant to the Fair Credit Reporting Act of 1970 ("FCRA"), 15 U.S.C. § 1681. *See* [DE 1-1]. Defendants removed this case to federal court on

February 24, 2016 on federal question grounds. *See* [DE 1]. The First Amended Class Action Complaint was filed on April 8, 2016. *See* [DE 15]. Both Defendants filed Motions to Dismiss. *See* [DE's 21, 23].

On April 25, 2016, Defendant Verified filed a Motion to Dismiss Count III, arguing that Plaintiff Moody cannot sustain a claim for a violation under § 1681k(a) because Plaintiff failed to allege sufficient facts to establish that the information in the consumer report was not complete and up to date. *See* [DE 21]. On June 24, 2016, the Court entered an Order denying Defendant Verified's motion to dismiss in its entirety. *See* [DE 45]. The Court assumes the reader's familiarity with this Order.

On April 25, 2016, Defendant Ascenda filed a Motion to Dismiss, arguing that it complied with § 1681b(b)(2)(A) (as to Counts I and II), and that Plaintiff failed to allege sufficient facts to plead a violation of § 1681b(b)(3) (as to Count IV). On July 1, 2016, the Court entered an Order granting in part and denying in part Defendant Ascenda's motion to dismiss. *See* [DE 47]. The Court assumes the reader's familiarity with this Order.

In its July 1, 2016 Order, the Court analyzed and rejected most of the substantive arguments proffered by Defendant Ascenda in favor of dismissal. *See* [DE 47] at pp. 4-9. However, the Court agreed with Defendant Ascenda that the First Amended Complaint did not sufficiently allege that Plaintiffs suffered concrete and particularized injuries pursuant to the requirements of *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540 (2016) with regard to the alleged violations of § 1681b(b)(2)(A) (Counts I and II). *See* [DE 47] at pp. 9-11. The Court noted that it had not yet considered Plaintiffs' claims of invasion of privacy and informational injury, as they were merely set forth in their response to the motion to dismiss, rather than alleged in the complaint itself. *See* [DE 47] at pp. 10-11.

On July 14, 2016, Plaintiffs filed a Second Amended Complaint, the operative pleading in this case. *See* [DE 49]. Defendant Verified filed its Answer and Affirmative Defenses on August 1, 2016. *See* [DE 52]. Defendant Ascenda filed the instant Motion to Dismiss, seeking dismissal of the claims for alleged violations of § 1681b(b)(2)(A) (Counts I and II) for lack of subject matter jurisdiction on the grounds that Plaintiffs’ alleged injuries as to these counts are precisely the type of abstract and speculative harm that *Spokeo* prohibits.

## II. STANDARD OF REVIEW

“[F]ederal courts cannot exercise jurisdiction over cases where the parties lack standing.” *Fla. Wildlife Fed’n, Inc. v. S. Fla. Water Mgmt. Dist.*, 647 F. 3d 1296, 1302 (11th Cir. 2011). This principle exists because there is “a constitutional limitation of federal-court jurisdiction to actual cases or controversies” and “[o]ne element of the case-or-controversy requirement is that plaintiffs must establish that they have standing to sue.” *Clapper v. Amnesty Intern. USA*, 133 S. Ct. 1138, 1146 (2013) (internal citations and quotations omitted). To establish standing, “a plaintiff must show (1) it has suffered an ‘injury in fact’ that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.” *Fla. Wildlife Fed’n, Inc.*, 647 F. 3d at 1302 (citing *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 180–181 (2000)).

## III. DISCUSSION

Counts I and II allege that Defendant Ascenda violated § 1681b(b)(2)(A) by procuring consumer reports on Plaintiffs without first making proper disclosures in the format required by § 1681b(b)(2)(A)(i) and by procuring consumer reports relating to Plaintiffs without proper

authorization in violation of § 1681b(b)(2)(A)(ii). The relevant sections of the FCRA provide as follows:

(b) Conditions for furnishing and using consumer reports for employment purposes

...

(2) Disclosure to consumer  
(A) In general

Except as provided in subparagraph (B), a person may not procure a consumer report, or cause a consumer report to be procured, for employment purposes with respect to any consumer, unless—

(i) a clear and conspicuous disclosure has been made in writing to the consumer at any time before the report is procured or caused to be procured, in a document that consists *solely* of the disclosure, that a consumer report may be obtained for employment purposes; and

(ii) the consumer has authorized in writing (which authorization may be made on the document referred to in clause (i)) the procurement of the report by that person.

§ 1681b(b)(2)(A) (emphasis added).

Plaintiffs allege that Defendant Ascenda willfully violated § 1681b(b)(2)(A)(i) (Count I), which requires one to provide a clear and conspicuous disclosure in a document that consists solely of a disclosure before procuring a consumer report. In addition, Plaintiffs allege a willful violation of § 1681b(b)(2)(A)(ii) (Count II), which requires the authorization of the consumer before procuring a consumer report. Although the Plaintiffs signed the disclosure forms, the authorization requirement presupposes the existence of a valid disclosure for consent.

In the instant motion to dismiss, Defendant Ascenda argues that Plaintiffs' FCRA claims against it in Counts I and II must be dismissed because Plaintiffs do not have Article III standing in accordance with the principles set forth in the Supreme Court's recent *Spokeo* decision in. In *Spokeo*, the Supreme Court held that there must be an injury-in-fact which requires a plaintiff to

show that he or she suffered an invasion of a legally protected interest that is concrete and particularized in order to satisfy the requirements for Article III standing. *See* 136 S. Ct. at 1548-49. The Court also held that an injury must actually exist to be concrete, and that a bare procedural violation alone is insufficient to satisfy the demands of Article III, even in the context of a statutory violation. *Id.*

Defendant Ascenda argues that Plaintiffs' FCRA claims against it must be dismissed for lack of standing because the allegations of the Second Amended Complaint fail to show that Plaintiffs suffered a concrete and particularized "injury-in-fact" in connection with their claims for violations of § 1681b(b)(2)(A) and § 1681b(b)(3)(A). *See Ford v. Strange*, 580 F. App'x 701, 708 (11th Cir. 2014) (holding that the "standing inquiry is both plaintiff-specific and claim-specific").

Plaintiffs allege in their Second Amended Complaint that Defendant Ascenda caused them informational injury and invaded their right to privacy:

**Plaintiffs' First Concrete Injury under § 1681b(b)(2)(A)(i):  
Informational Injury**

77. First, in accordance with the Eleventh Circuit's recent decision in *Church v. Accretive Health, Inc.*, 2016 U.S. App. LEXIS 12414, \*1 (11th Cir. July 6, 2016), Plaintiffs suffered a concrete informational injury because Defendant failed to provide Plaintiffs with information to which they were entitled to by statute, namely a stand-alone FCRA disclosure form. Through the FCRA, Congress has created a new right—the right to receive the required disclosure as set out in the FCRA—and a new injury—not receiving a stand-alone disclosure.

78. Pursuant to § 1681b(b)(2), Plaintiffs were entitled to receive certain information at a specific time, namely a disclosure that a consumer report may be procured for employment purposes in a document consisting solely of the disclosure. Such a disclosure was required to be provided to Plaintiffs before the consumer reports were to be procured. By depriving Plaintiffs of this information, Defendant injured Plaintiff and the putative class members they seek to represent. *Public Citizen v. U.S. Department of Justice*, 491 U.S. 440, 449 (1989); *Federal Election Commission v. Akins*, 524 U.S. 11 (1998).

79. Defendant Ascenda violated the FCRA by procuring consumer reports on Plaintiffs and other Background Check Class members without first making proper disclosures in the format required by 15 U.S.C. § 1681b(b)(2)(A)(i). Namely, these disclosures had to be made: (1) before Defendant Ascenda actually procured consumer reports, and (2) in a stand-alone document, clearly informing Plaintiffs and other Background Check Class members that Defendant Ascenda might procure a consumer report on each of them for purposes of employment. The required disclosures were not made, causing Plaintiffs an informational injury. *See Church v. Accretive Health, Inc.*, 2016 U.S. App. LEXIS 12414, \*1 (11th Cir. July 6, 2016).

**Plaintiffs' Second Concrete Injury under § 1681b(b)(2)(A)(i):  
Invasion of Privacy**

80. Second, Defendant Ascenda invaded Plaintiffs' right to privacy. Under the FCRA, "a person may not procure a consumer report, or cause a consumer report to be procured, for employment purposes with respect to any consumer, unless" it complies with the statutory requirements (*i.e.*, disclosure and authorization) set forth in the following subsections: 15 U.S.C. § 1681b(b)(2). As one court put it, "[t]he FCRA makes it unlawful to 'procure' a report without first providing the proper disclosure and receiving the consumer's written authorization." *Harris v. Home Depot U.S.A., Inc.*, 114 F. Supp. 3d 868, 869 (N.D. Cal. 2015).

81. Plaintiffs' consumer report contained a wealth of private information which Defendant Ascenda had no right to access absent a specific Congressional license to do so. The report included, *inter alia*, Plaintiffs' dates of birth, address history, gender, race, partial social security numbers, and information about their respective criminal backgrounds. By procuring reports containing this private information without complying with the FCRA's disclosure requirements, Defendant Ascenda illegally invaded Plaintiffs' right to privacy.

...

**Plaintiffs' First Concrete Injury under § 1681b(b)(2)(A)(ii):  
Informational Injury**

90. First, as explained above, in accordance with the Eleventh Circuit's recent decision in *Church v. Accretive Health, Inc.*, 2016 U.S. App. LEXIS 12414, \*1 (11th Cir. July 6, 2016), Plaintiffs suffered a concrete informational injury because Defendant failed to provide Plaintiffs with information to which they were entitled to by statute, namely a stand-alone FCRA disclosure form. Thus, through the FCRA, Congress has created a new right—the right to receive the required disclosure as set out in the FCRA—and a new injury—not receiving a stand-alone disclosure.

91. Pursuant to § 1681b(b)(2), Plaintiffs were entitled to receive certain information at a specific time, namely a disclosure that a consumer report may be procured for employment purposes in a document consisting solely of the disclosure. Such a disclosure was required to be provided to Plaintiff before the consumer report was to be procured. By depriving Plaintiffs of this information, Defendant injured Plaintiff and the putative class members they seek to represent. *Public Citizen v. U.S. Department of Justice*, 491 U.S. 440, 449 (1989); *Federal Election Commission v. Akins*, 524 U.S. 11 (1998). Then, 15 U.S.C. § 1681b(b)(2)(A)(ii).

92. Defendant Ascenda violated the FCRA by procuring consumer reports on Plaintiffs and other Background Check Class members without first making proper disclosures in the format required by 15 U.S.C. § 1681b(b)(2)(A)(i). Namely, these disclosures had to be made: (1) before Defendant Ascenda actually procured consumer reports, and (2) in a stand-alone document, clearly informing Plaintiff and other Background Check Class members that Defendant Ascenda might procure a consumer report on each of them for purposes of employment.

**Plaintiffs' Second Concrete Injury under § 1681b(b)(2)(A)(ii):  
Invasion of Privacy**

93. Second, Defendant Ascenda invaded Plaintiffs' right to privacy. Under the FCRA, "a person may not procure a consumer report, or cause a consumer report to be procured, for employment purposes with respect to any consumer, unless" it complies with the statutory requirements (*i.e.*, disclosure and authorization) set forth in the following subsections: 15 U.S.C. § 1681b(b)(2). As one court put it, "[t]he FCRA makes it unlawful to 'procure' a report without first providing the proper disclosure and receiving the consumer's written authorization." *Harris v. Home Depot U.S.A., Inc.*, 114 F. Supp. 3d 868, 869 (N.D. Cal. 2015).

94. Plaintiffs' consumer report contained a wealth of private information which Defendant had no right to access absent a specific Congressional license to do so. Without a valid stand-alone FCRA disclosure there can be no valid authorization for Defendant to access Plaintiffs' consumer reports. The report included, *inter alia*, Plaintiffs' dates of birth, address history, gender, race, partial social security numbers, and information about their respective criminal backgrounds. By procuring reports containing this private information without complying with the FCRA's disclosure requirements, Defendant Ascenda illegally invaded Plaintiffs' right to privacy.

See [DE 49] at ¶¶ 77-81, 90-94.

In this case, based upon review of the allegations of the Second Amended Complaint, and the relevant case law, the Court finds that Plaintiffs have sufficiently alleged that they suffered a concrete and particularized “injury-in-fact” in connection with their claims for violations of § 1681b(b)(2)(A) in accordance with the standards set forth in *Spokeo*.

The Court recognizes the split in persuasive authority as to this issue. *Compare Meza v. Verizon Commc'ns, Inc.*, 2016 WL 4721475, at \*3 (E.D. Cal. Sept. 9, 2016) (holding that plaintiff “adequately alleges two concrete injuries (an informational injury and a privacy invasion) through violations of § 1681b(b)(2)(A)”); *and Perrill v. Equifax Info. Servs., LLC*, 2016 WL 4572212, at \*4 (W.D. Tex. Aug. 31, 2016) (“Considering this history and Congress's judgment, the Court finds an invasion of privacy within the context of the FCRA constitutes a concrete harm that meets the injury-in-fact requirements. The Court is not alone in this holding.”) (citing cases); *with Smith v. Ohio State Univ.*, 2016 WL 3182675, at \* 1 (S.D. Ohio Jun. 8, 2016) (holding that plaintiffs who alleged that their privacy rights were invaded and they were misled as to their FCRA rights as a result of the defendant’s alleged FCRA breaches did not suffer an injury-in-fact because they did not suffer a concrete consequential damage as a result of the FCRA breaches); *and Fisher v. Enter. Holdings, Inc.*, 2016 WL 4665899, at \*4 (E.D. Mo. Sept. 7, 2016) (holding that allegations that a prospective employer violated the FCRA by obtaining a consumer report without giving plaintiff proper notice is not a concrete injury because “[a]ll [p]laintiff alleges is that the ... disclosure ... did not comply with the statute at issue”).

However, upon careful consideration, the Court is persuaded by the reasoning of the cases which have found the *Spokeo* standing requirement satisfied in this context. Such a holding is consistent with the Eleventh Circuit’s recent unpublished opinion in *Church v.*



*Accretive Health, Inc.*, 2016 WL 3611543 (11th Cir. July 6, 2016) (per curiam), in which the Eleventh Circuit held that a plaintiff alleging that a defendant had violated a statutory disclosure requirement under the Fair Debt Collection Practices Act (“FDCPA”), 15 U.S.C. §§ 1692 *et seq.*, had alleged a sufficiently concrete injury and thus had standing to sue. *See also Thomas v. FTS USA, LLC*, 2016 WL 3653878, at \* 8, 11 (E.D. Va. Jun. 30, 2016) (holding that “it was Congress’ judgment, as clearly expressed in §§ 1681b(b)(2) ... to afford consumers rights to information and privacy,” and thus that “the rights created by § 1681b(b)(2) are substantive rights”). Additionally, the Court finds that the FCRA rights Plaintiffs have alleged to have been violated by Defendant Ascenda’s alleged violations of § 1681b(b)(2)(A) are not merely “bare procedural violation[s]” akin to “the dissemination of an incorrect zip code.” *See Spokeo*, 136 S. Ct. at 1550. As the district court explained in *Thomas*:

Thus, § 1681b(b)(2) establishes two rights. First, it establishes a right to specific information in the form of a clear and conspicuous disclosure. The statutory requirement that the disclosure be made in “a document that consists solely of the disclosure” helps to implement the textual command that the disclosure be clear and conspicuous. Second, § 1681b(b)(2) establishes a right to privacy in one’s consumer report that employers may invade only under stringently defined circumstances. Those protections are clearly substantive, and neither technical nor procedural.

2016 WL 3653878, at \* 7. Based on the foregoing, the Court holds that Plaintiffs have sufficiently alleged a concrete and particularized injury and thus have standing to sue pursuant to *Spokeo*.

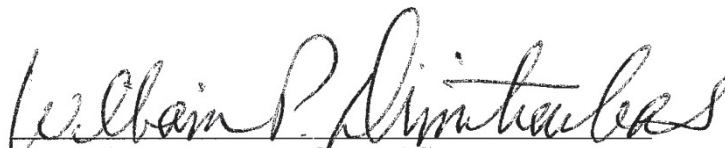
#### IV. CONCLUSION

Accordingly, it is hereby **ORDERED AND ADJUDGED** as follows:

1. Defendant Ascenda’s Motion to Dismiss Counts I and II of Plaintiffs’ Second Amended Complaint against Defendant Ascenda USA, Inc. for Lack of Subject Matter Jurisdiction [DE 53] is **DENIED**;

2. Defendant Ascenda shall file its Answer within fourteen (14) days of this Order.

**DONE AND ORDERED** in Chambers, Fort Lauderdale, Broward County, Florida, this  
5<sup>th</sup> day of October, 2016.

  
WILLIAM P. DIMITROULEAS  
United States District Judge

Copies to:  
Counsel of record