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**UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA  
WESTERN DIVISION**

THOMAS ROBINS, an individual, on	) Case No. 10-CV-5306 ODW (AGRx)
behalf of himself and all others similarly	)
situated,	) <b>PLAINTIFF'S OPPOSITION TO</b>
	) <b>DEFENDANT'S MOTION TO</b>
Plaintiff,	) <b>DISMISS</b>
	)
v.	)
	) Judge Otis D. Wright II
SPOKEO, INC., a California	)
corporation,	) Date: Monday, January 31, 2011
	) Time: 1:30 p.m.
Defendant.	) Location: Courtroom 11
	) Action Filed: July 20, 2010
	)
	)
	)
	)

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1 **I. INTRODUCTION**

2 In its Motion to Dismiss, Defendant Spokeo, Inc. accuses Plaintiff Thomas  
 3 Robins of attempting to “fit a square peg into a round hole.” Nothing could be  
 4 further from the truth. Defendant is a credit reporting agency under the Fair Credit  
 5 Reporting Act (“FCRA”) (15 U.S.C. § 1681 *et seq.*) because it furnishes consumer  
 6 reports bearing on consumers’ sensitive financial and personal information.  
 7 Defendant’s arguments ignore two salient facts: (1) it offered “Credit Estimates,”  
 8 “Wealth Level” determinations, and myriad other financial and personal information  
 9 pertaining to consumers’ mortgages, investments, home value, family life, and  
 10 personal interests; and (2) it marketed its consumer reports to HR recruiters and  
 11 employers for the purpose of evaluating potential hires. These two actions together  
 12 make Defendant a credit reporting agency.

13 Defendant’s remaining grounds for dismissal are equally unsupportable.  
 14 Plaintiff has Article III standing solely on the basis that he sufficiently stated a claim  
 15 under FCRA; moreover, Plaintiff also has standing according to recent Ninth Circuit  
 16 precedent based on his alleged concern over the dissemination of inaccurate  
 17 information and the affect it has and will continue to have on his ability to secure  
 18 employment.

19 Moreover, in an ineffective attempt to entirely shield itself from liability,  
 20 Defendant raised the affirmative defense of total immunity under the  
 21 Communications Decency Act (“CDA”) (47 U.S.C. § 230). Unfortunately, the well  
 22 developed case law surrounding CDA immunity does not fall in Defendant’s favor,  
 23 but rather, clearly demonstrates that it is a “information content provider” that creates  
 24 its own independent content, and in doing so, sheds all protections provided by the  
 25 CDA.

26 Finally, Plaintiff has sufficiently stated a claim under California’s Unfair  
 27 Competition Law (“UCL”) (Cal. Bus. & Prof. Code § 17200) by alleging a violation  
 28

1 of FCRA and alleging his inability to find gainful employment as a result of  
 2 Defendant's dissemination of inaccurate information. At the pleading stage, these  
 3 allegations are more than sufficient to support standing under a UCL claim.

4 Overall, Defendant's Motion to Dismiss is without merit, and Plaintiff requests  
 5 that the Court deny it in full.

## 6 **II. FACTUAL BACKGROUND**

### 7 **A. Spokeo.com**

8 Defendant is the operator of a website located at [www.spokeo.com](http://www.spokeo.com), which  
 9 offers a variety of information on millions of individuals. (Plaintiff's Complaint  
 10 (Dkt. No. 1), ¶ 2.) Defendant's website is supported by software that allows it to  
 11 quickly collect, process and organize consumer data from a wide range of sources,  
 12 and then display conclusions and predications based on inferences from that data.  
 13 (Compl. ¶¶ 10, 15.)

14 According to Defendant, millions of users search its website for consumer  
 15 information each day. (Compl. ¶ 14.) When a user requests information regarding a  
 16 particular consumer, Defendant immediately displays numerous pieces of  
 17 information about that consumer that bear on his or her financial well being and  
 18 personal reputation and character, including an address, phone number, employment  
 19 information, and descriptors such as "seeks opportunity," "cares about healthy  
 20 living," and "loves to read." (Compl. ¶ 14); *see also* Spokeo's "Basic Profile,"  
 21 "Lifestyle & Interests," "Household," "Neighborhood," and "Example Search"  
 22 Pages, true and accurate copies of which are attached as Exhibits C, F, G, H, and I to  
 23 Plaintiff's Request for Judicial Notice ("RJN").

24 In addition to the extensive demographic information Spokeo provides, its  
 25 reports contain colorized charts of a consumer's "Economic Health" (formerly titled  
 26 "Credit Estimate") and "Wealth Level," which range from "low" to "high," as well as  
 27  
 28

1 information on a consumer's investments and mortgage. (Compl. ¶ 15); *see also*  
 2 Spokeo's "Wealth" pages, true and accurate copies of which are attached as Exhibits  
 3 D & E to Plaintiff's RJN. Spokeo is responsible for designing, creating, and  
 4 populating the value ("high" or "low") of these charts. (Compl. ¶ 15); *see generally*  
 5 Complaint filed by the Center for Technology & Democracy ("CDT Complaint"), *In*  
 6 *the Matter of Spokeo, Inc.*, Federal Trade Commission (File No. P002501) (June 30,  
 7 2010), a true and correct copy is attached as Exhibit A to Plaintiff's RJN. Defendant  
 8 does not, however, disclose where it obtains this economic information. (Compl.  
 9 ¶ 15.) Defendant's consumer profiles also contain information on how long a person  
 10 has lived at a particular address, the value of the property, and individual property  
 11 attributes bearing on a home's value. (Compl. ¶ 16.) At Defendant's own admission,  
 12 a significant portion of the information that it reports is wholly inaccurate. (Compl.  
 13 ¶¶ 17-18.) Compounding the inaccuracies in its reports, Spokeo has failed to develop  
 14 an effective system to allow consumers to remove inaccurate information from their  
 15 individual reports, or remove the reports from Defendant's website altogether.  
 16 (Compl. ¶ 18.)

17 Regardless of known inaccuracies, Spokeo has marketed its services directly to  
 18 employers, human resource professionals, law enforcement agencies, persons and  
 19 entities performing background checks, and publishes individual consumer  
 20 "economic health" and "credit estimate" assessments. (Compl. ¶ 13); *see also*  
 21 Spokeo's "Recruiting" Page, a true and accurate copy of which is attached as Exhibit  
 22 B to Plaintiff's RJN.

### 23 **B. Plaintiff's Claims**

24 Plaintiff alleges that Spokeo.com maintains an inaccurate consumer report  
 25 about him on its website and that Defendant has violated his rights under FCRA.  
 26 (Compl. ¶¶ 20-24). While the consumer report that Spokeo has compiled about  
 27 Plaintiff correctly describes some basic information, a significant portion of the  
 28



1 information is incorrect, including his employment status, his marriage status, his  
 2 age, his educational background, whether he has children, his “economic health,” his  
 3 “wealth level,” and on top of that, the profile contained a picture of someone else.  
 4 (Compl. ¶ 21). Additionally, Plaintiff alleged that he has no way of verifying the  
 5 “economic health” rating that Defendant ascribes to him, and further denies that his  
 6 “wealth level” is accurately described on Spokeo.com. (Compl. ¶ 22.) Plaintiff  
 7 alleges that he is concerned that the inaccuracies in his report will affect his ability to  
 8 obtain credit, employment, insurance, and the like. (Compl. ¶ 23.)

### 9 **III. ARGUMENT**

10 Defendant presents four grounds for dismissal,<sup>1</sup> all of which fail for  
 11 interrelated reasons: (1) Spokeo is a credit reporting agency because it collects and  
 12 disseminates credit related information as defined by FCRA; (2) it is not immune  
 13 under the CDA because it creates and develops content appearing on its website; (3)  
 14 Plaintiff has Article III standing because he sufficiently alleged a violation of FCRA;  
 15 and (4) Plaintiff sufficiently stated a claim under the UCL by alleging a violation of  
 16 FCRA and his inability to secure employment. Because all of Spokeo’s arguments  
 17 fail, the Court should deny Defendant’s Motion to Dismiss in its entirety.

---

22 <sup>1</sup> Defendant filed its Motion to Dismiss on November 3, 2010, along with a Request for Judicial  
 23 Notice. (Dkt. No. 22-2). Defendant's Request seeks judicial notice of two website URLs and three  
 24 screen captures of Defendant’s website. Defendant fails in its request and its supporting declaration  
 25 to indicate whether the websites and screen captures relate to or represent how the website looked  
 26 during the operative time period for Plaintiff’s claims. Presumably the screen captures and  
 27 websites reflect how Defendant’s website appeared at the time Defendant filed its motion, and not  
 28 as it appeared during the time period giving rise to Plaintiff’s claims. Thus, Plaintiff and the Court  
 have no way to determine the operative time period or relevancy of the items for which Defendant  
 seeks judicial notice.

**A. Spokeo is a Credit Reporting Agency and Disseminates Credit Reports.**

***1. Spokeo meets the statutory definition of a “credit reporting agency.”***

Defendant asserts, without material support, that it is not a credit reporting agency as defined by FCRA. (Defendant’s Motion To Dismiss (“MTD”) (Dkt. No. 22), 8). Spokeo is a credit reporting agency because it collects, evaluates and analyzes consumer credit information and markets it to third parties for a fee via the Internet. (Compl. ¶¶ 13-15, 37, 40, 44). Under FCRA, a “consumer reporting agency” is defined as:

any person which, for monetary fees, dues, or on a cooperative nonprofit basis, regularly engages in whole or in part in the practice of assembling or evaluating consumer credit information or other information on consumers for the purpose of furnishing consumer reports to third parties, and which uses any means or facility of interstate commerce for the purpose of preparing or furnishing consumer reports.

15 U.S.C. § 1681a(f).

Here, Defendant collects volumes of information from unnamed public and private sources that it then transforms, converts and draws conclusions from pertaining to a consumer’s wealth, credit, lifestyle, home, education, political persuasion, and personal characteristics. (Compl. ¶¶ 10-11, 14-16, 40.) In arguing that it is not a credit reporting agency, Defendant outright ignores two core aspects of its own business. First, during the operative time period for Plaintiff’s Complaint, Defendant provided information through its “Wealth” section titled “Credit Estimate” and “Wealth Level,” including information relating to a consumer’s “Mortgage Value,” “Estimated Income,” and “Investments.” (Compl. ¶¶ 15, 40); *see also* CDT Complaint (Exhibit A), ¶¶ 18-19); Spokeo’s “Wealth” Pages (Exhibits D & E.) Second, Defendant has regularly advertised that it “is a great tool to learn more about prospective employers and employees” for HR recruiters and businesses to evaluate

1 “potential hires.” (Compl. ¶ 13); *see also* CDT Complaint (Exhibit A), ¶¶ 13-15); *see*  
 2 *also* Spokeo’s “Recruiting” Page (Exhibit B). This included presenting a large  
 3 banner on its website stating: “Want to see your candidates’ profiles on MySpace and  
 4 LinkedIn? 23% of recruiters already research social networks. Spokeo goes a step  
 5 beyond and automates candidate research across 43 social networks. Try Business  
 6 Edition.” *See* “Recruiting” Page (Exhibit B); CDT Complaint, ¶¶ 13-15;

7 **2. *Spokeo’s reports meet the statutory definition of a “credit***  
 8 ***report.*”**

9 Moreover, contrary to Defendant’s assertions, the product that Spokeo sells is a  
 10 “consumer report” as defined under FCRA. “Consumer report” is defined as:

11 any written, oral, or other communication of any information by a  
 12 consumer reporting agency bearing on a consumer's [1] credit worthiness,  
 13 [2] credit standing, [3] credit capacity, [4] character, [5] general reputation,  
 14 [6] personal characteristics, or [7] mode of living which is used or expected  
 15 to be used or collected in whole or in part for the purpose of serving as a  
 16 factor in establishing the consumer's eligibility for-- (A) credit or insurance  
 17 to be used primarily for personal, family, or household purposes; (B)  
 18 employment purposes; or (C) any other purpose authorized under section  
 19 1681b of this title.

20 15 U.S.C.A. § 1681a(d). The plain language of section 1681a(d) reveals that a report  
 21 will be construed as a “consumer report” if the business providing the information  
 22 “expects the user to use the report for a purpose permissible under the FCRA, without  
 23 regard to the ultimate purpose to which the report is actually put.” *Comeaux v.*  
 24 *Brown & Williamson Tobacco Co.*, 915 F.2d 1264, 1273-74 (9th Cir. 1990). As  
 25 affirmed by the Ninth Circuit, when an entity

26 disseminates information bearing on any of the seven characteristics of a  
 27 consumer listed in § 1681a(d) to a third party, and the agency knows or  
 28 expects that it will be used ‘in connection with a business transaction  
 involving the consumer,’ then that information is a ‘consumer report’ and  
 its originator is a ‘consumer reporting agency.’

*Greenway v. Info. Dynamics, Ltd.*, 399 F. Supp. 1092, 1095 (D. Ariz. 1974) *aff’d*, 524

F.2d 1145 (9th Cir. 1975). As demonstrated in the chart below, the information widely disseminated by Spokeo bears on all seven factors listed in § 1681a(d). *See* Plaintiff’s RJN, Exhibits A-I.

Category of Information Provided by Spokeo	Characteristics Listed in §1681a(d)
Credit Estimate, Wealth, Economic Health, Investments, Mortgage Value, Home Value, Median Income, Occupation	Credit worthiness, credit capacity, mode of living
Lifestyle, Interests, Relationship, Hobbies, Education, Neighborhood, Household Amenities,	Character, general reputation, personal characteristics, mode of living
Ethnicity, Religion, Political Party	Character, general reputation

Moreover, Defendant’s focus on its own “intention” is likewise misplaced. (MTD, 10). Not only do Spokeo’s reports contain information traditionally associated with a “consumer report” under FCRA (*e.g.*, Credit Estimate and Wealth Level), but Spokeo also marketed its reports to employers for the purpose of evaluating potential hires, which is a specifically enumerated purpose under FCRA. (Compl. ¶¶ 13-15.) *See also* Spokeo’s “Recruiting” Page (Exhibit B) and “Wealth” pages (Exhibit D & E.) The combination of those two actions undercuts any basis Defendant has to claim that it did not intend to provide its services for FCRA purposes, let alone that it did not expect it to be used for such purposes.<sup>2</sup> *Comeaux*,

<sup>2</sup> Defendant’s citation to *Mende v. Dun & Bradstreet, Inc.*, 670 F.2d 129, 133 (9th Cir. 1982) to support an intent requirement misconstrues the Ninth Circuit’s holding. The court there stated, in *dicta*, “we do not believe that the mere fact that a report could be used as a consumer report is

1 915 F.2d at 1273-74.

2 **3. *Spokeo is not a search engine or a community forum.***

3 Spokeo indentifies itself as a “search engine.” (MTD, 12). Yet, the manner in  
4 which Spokeo presents information about consumers specifically sets it apart from  
5 search engines such as Google or Yahoo. When a consumer searches for himself or  
6 herself on Google, Google does not draw conclusions from the data it returns.<sup>3</sup>  
7 Rather, it simply displays a responsive list of websites without any editorial comment  
8 or additional content. By contrast, Spokeo provides a variety of data categories,  
9 conclusions, predictions and factual assertions about a consumer’s supposed wealth  
10 and lifestyle in its data results—specifically conclusions that *do not appear* in the  
11 public or private data sources that Spokeo draws from. (Compl. ¶¶ 2, 13-15); see  
12 also Spokeo’s “Basic Profile,” “Wealth,” “Lifestyle & Interests,” and “Household”  
13 Pages (Exhibits C, D, E, F, and G.)

14 Similarly, Defendant’s attempt to compare itself to the “feedback profiles” at  
15 issue in *McCready v. eBay, Inc.* is unavailing as Spokeo’s services and website bear  
16 no resemblance to eBay’s Feedback Forum. (MTD, 13). 453 F. 3d 882, 889 (7th Cir.  
17 2006). In *McCready*, the court noted that eBay does not “exert any control over what  
18 is said in the Forum, which contains mere opinions of people not in eBay’s employ.”

19 enough to make it one. More is required; however, we reserve the question of just what additional  
20 showing is required until a case properly presents the issue.” *Mende*, 670 F.2d at 133. The court’s  
21 ruling therefore did not require a showing of intent as stated by Defendant.

22 <sup>3</sup> See *Perfect 10, Inc. v. Amazon. com, Inc.*, 487 F. 3d 701, 711 (9th Cir. 2007) (noting that

23 Google operates a search engine, a software program that automatically accesses  
24 thousands of websites (collections of webpages) and indexes them within a database  
25 stored on Google’s computers. When a Google user accesses the Google website and  
types in a search query, Google’s software searches its database for websites responsive  
to that search query. Google then sends relevant information from its index of websites  
to the user’s computer.)

26 See also *Perfect 10 v. Google, Inc.*, 416 F. Supp. 2d 828, 832 (C.D. Cal. 2006) (“Google’s basic  
27 web search . . . receives a text search string and returns a list of textual results relevant to that  
28 query.”)

1 *Id.* at 889. By contrast, Spokeo creates and publishes conclusions and factual  
 2 assertions about individuals pertaining to “consumer credit information and other  
 3 information.” (Compl. ¶¶ 2, 15); 15 U.S.C. § 1681a(f). By creating much of the  
 4 content itself, and not simply hosting a forum in which the content is posted or  
 5 discussed, Spokeo discredits any similarities between itself and eBay’s forums.  
 6 Therefore, *McCready* does little more than illuminate why Spokeo, unlike eBay, is a  
 7 credit reporting agency.

#### 8 **4. *Spokeo cannot disclaim its obligations under FCRA.***

9 Finally, Spokeo attempts to shrug off its status as a credit reporting agency that  
 10 issues consumer reports by discreetly pointing out that its data is not 100% accurate  
 11 and should not be used as a factor in establishing a consumer’s eligibility for credit,  
 12 insurance, employment purpose or for any other purpose authorized under FCRA.  
 13 (MTD, 11-12). This disclaimer is irrelevant for two reasons: (1) Spokeo has taken  
 14 multiple steps to market its consumer reports for precisely the purposes listed in its  
 15 disclaimer (*e.g.* employment) (Compl. ¶ 13); (Spokeo’s “Recruiting” Page (Exhibit  
 16 B); and (2) a credit reporting agency cannot simply place a difficult to read  
 17 disclaimer on the bottom of its website and forgo all the requirements placed on  
 18 consumer reporting agency by Congress. If this were true, TransUnion or Experian,  
 19 undoubtedly credit reporting agencies under FCRA, could simply place similar  
 20 language on their websites and magically shed their credit reporting agency status.  
 21 Spokeo’s classification as a credit reporting agency cannot be based simply on its  
 22 own self description; rather, the FCRA determines whether a company is a credit  
 23 reporting agency, and Spokeo fails to demonstrate that it is not a credit reporting  
 24 agency in the business of selling credit reports.

25 Therefore, Plaintiff has sufficiently stated a claim under FCRA and  
 26 Defendant’s motion to dismiss should be denied.



**B. Spokeo is not Immune Under the Communications Decency Act  
Because it is a Content Provider, Not a Service Provider.**

Defendant argues that the Communications Decency Act (“CDA”), 47 U.S.C. § 230 bars Plaintiff’s claims because it is immune as an interactive computer service provider. (MTD, 14). At the outset, this argument is improper to raise in a motion to dismiss. The Ninth Circuit has clarified that CDA § 230 immunity “is an affirmative defense and district courts are to treat it as such. *Barnes v. Yahoo!, Inc.*, 570 F.3d 1096, 1109 (9th Cir. 2009). As an affirmative defense, CDA § 230 cannot be used as a basis for dismissal under Rule 12(b)(6); the “assertion of an affirmative defense does not mean that the plaintiff has failed to state a claim, and therefore does not by itself justify dismissal under Rule 12(b)(6).”<sup>4</sup> *Id.* However, regardless of the timing of Defendant’s argument, Defendant is not immune because Defendant is an information content provider under the CDA, not an interactive computer service provider.

Section 230 of the CDA immunizes providers of interactive computer services<sup>5</sup> against liability arising from content created by third parties: “No provider . . . of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.” 47 U.S.C. § 230(c). This grant of immunity applies only if the interactive computer service provider is

<sup>4</sup> See also *Swift v Zynga Game Network, Inc.* 2010 WL 4569889, \*6 (N.D. Cal., Nov. 3, 2010) (“Given the limited nature of a Rule 12(b)(6) challenge, the Court cannot determine, at this stage, whether Adknowledge is entitled to CDA immunity. It would be improper to resolve this issue on the pleadings and the limited record presented.”); *Perfect 10, Inc. v. Google, Inc.*, 2008 WL 4217837, \*8 (C.D. Cal. 2008) (“preemption under the CDA is an affirmative defense that is not proper to raise in a Rule 12(b)(6) motion”) (citing *Doe v. GTE Corp.*, 347 F.3d 655, 657 (7th Cir. 2003) (immunity under 47 U.S.C. § 230 (c) is an affirmative defense that a plaintiff is not required to plead around)).

<sup>5</sup> Section 230 defines an “interactive computer service” as “any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server.” 47 U.S.C. § 230(f)(2)

1 not also an “information content provider,” which is defined as an entity that is  
 2 “responsible, in whole or in part, for the creation or development of” content. 47  
 3 U.S.C. § 230(f)(3); *see Fair Hous. Council of San Fernando Valley v.*  
 4 *Roommates.com, LLC*, 521 F.3d 1157, 1162-64 (9th Cir. 2008) (en banc)  
 5 (“*Roommates.com.*”) In *Roommates.com*, the Ninth Circuit went to great lengths to  
 6 define the terminology underlying § 230(f)(3), finding “we interpret the term  
 7 ‘development’ as referring not merely to augmenting the content generally, but to  
 8 materially contributing to its alleged unlawfulness.” *Id.*

9 In *FTC v. Accusearch*, decided by the Tenth Circuit in 2009, the court  
 10 determined that the defendant was an information content provider based on similar  
 11 facts and thus not immune from liability under the CDA. *FTC v. Accusearch Inc.*,  
 12 570 F. 3d 1187, 1200 (10th Cir. 2009). The defendant’s website there allowed a  
 13 consumer to search “information generally contained in government records, such as  
 14 ‘court dockets,’ ‘sex offender records,’ and ‘Tax . . . Liens.’ . . . [and other] intimate  
 15 personal information, such as ‘Romantic Preferences,’ ‘Personality traits,’ and  
 16 ‘Rumors.’” *Accusearch*, 570 F. 3d at 1191. The court there also examined the term  
 17 “develop,” finding that the “dictionary definitions for develop correspondingly  
 18 revolve around the act of drawing something out, making it ‘visible,’ ‘active,’ or  
 19 ‘usable.’” *Id.* at 1198. In the view of the court, it was responsible for the  
 20 development of the information appearing on its website because it “knowingly  
 21 sought to transform virtually unknown information into a publicly available  
 22 commodity.” *Id.* at 1199. *See also Roommates.com*, 521 F.3d at 1165 citing *Batzel*  
 23 *v. Smith*, 333 F.3d 1018, 1033 (9th Cir. 2003) (“the party responsible for putting  
 24 information online may be subject to liability, even if the information originated with  
 25 a user.”)

26 In the present case, Defendant developed content from a variety of sources by  
 27 posting it online and making it both “visible” and for sale. (Compl. ¶¶ 1-2, 10-13.)



1 *See Roommates.com*, 521 F.3d at 1171 (“Providing immunity every time a website  
 2 uses data initially obtained from third parties would eviscerate the exception to  
 3 section 230 for ‘develop[ing]’ unlawful content ‘in whole or in part.’”) In fact, the  
 4 specifics presented here are far from a close case. Defendant is actively developing  
 5 and creating original content that is at the center of Defendant’s FCRA violations.  
 6 (Compl. ¶¶ 13, 40); *see also* Spokeo’s “Wealth” Pages (Exhibits D & E.) Defendant  
 7 collects various types of personal information from unidentified sources, much of  
 8 which is not online anywhere else, organizes it, and draws conclusions from the  
 9 information as a whole. (Compl. ¶¶ 1-2, 13-15). Most notably, Spokeo creates and  
 10 presents charts depicting a consumer’s “Credit Estimate” and “Wealth” as graphics  
 11 specifically created by Spokeo. (Compl. ¶¶ 15, 40); *see also* Spokeo’s “Wealth”  
 12 Pages (Exhibits D & E.)

13 Defendant’s creation of the content at issue here goes far beyond the content  
 14 creation deemed sufficient in *Hy Cite Corp. v. badbusinessbureau.com, L.L.C.*, 418  
 15 F. Supp. 2d 1142, 1145 (D. Ariz. 2005). There, the defendant argued that its content  
 16 was created by third party users, but the court rejected this argument stating that it  
 17 ignored the plaintiff’s allegations that “wrongful content appears on the Rip-off  
 18 Report website in editorial comments created by Defendants and titles to Rip-off  
 19 Reports, which Defendants allegedly provide.” *Id.* at 1149. The court concluded that  
 20 because the plaintiff alleged that the defendants “produce original content contained  
 21 in the Rip-off Reports,” those allegations arguably could support a finding that the  
 22 defendants were “responsible . . . for the creation or development of information”  
 23 provided by third parties. *Id.*

24 Here, because Defendant fails to identify all the sources of its information,  
 25 Spokeo cannot even attempt to point to third party user who provided that credit or  
 26 wealth information. (Compl. ¶¶ 11, 15). Therefore, unlike *Roommates.com*, 521  
 27 F.3d at 1161 (potential renter’s provided information), *Accusearch Inc.*, 570 F. 3d at  
 28

1 1191 (third-party researchers provided the information), or *Ben Ezra, Weinstein, &*  
 2 *Co., Inc. v. Am. Online Inc.*, 206 F.3d 980, 983 (10th Cir. 2000) (third-party stock  
 3 quote company provided information), Spokeo cannot point to the origin or basis for  
 4 displaying sensitive information and conclusions about individual consumers'  
 5 financial health.<sup>6</sup> This information, as presented, *is its own design and creation*,  
 6 based on its own evaluation of consumer data. Spokeo fails to demonstrate any point  
 7 to the contrary. Accordingly, Spokeo is an information content provider and enjoys  
 8 no immunity under the CDA.<sup>7</sup>

9 **C. Plaintiff has Article III Standing.**

10 **1. Plaintiff has Article III standing by sufficiently stating a claim**  
 11 **under FCRA.**

12 Defendant's Article III standing argument is without merit and looks past well-  
 13 established law finding injury-in-fact fulfilled where a plaintiff alleges a statutory  
 14 violation. (MTD, 17). "The injury required by Article III can exist solely by virtue  
 15 of 'statutes creating legal rights, the invasion of which creates standing.'" *Fulfillment*  
 16 *Services Inc. v. United Parcel Serv., Inc.*, 528 F.3d 614, 618-19 (9th Cir. 2008)  
 17 quoting *Warth v. Seldin*, 422 U.S. 490, 500 (1975). Therefore, the essential standing  
 18 question is whether the "constitutional or statutory provision on which the claim rests  
 19 properly can be understood as granting persons in the plaintiff's position a right to

20 \_\_\_\_\_  
 21 <sup>6</sup> In fact, in a statement made by Defendant to NBC News New York on January 6, 2010, Spokeo  
 22 stated that it does not possess any of the information necessary to actually make the credit or wealth  
 23 evaluation presented on its website. Spokeo specifically clarified that it "[d]oes not possess social  
 24 security numbers, driver's license numbers, bank accounts or other private financial information  
 25 such as credit scores." See [http://www.nbcnewyork.com/station/as-seen-on/New-Way-To-Spy-On-](http://www.nbcnewyork.com/station/as-seen-on/New-Way-To-Spy-On-Your-Friends-113051299.html)  
 26 [Your-Friends-113051299.html](http://www.nbcnewyork.com/station/as-seen-on/New-Way-To-Spy-On-Your-Friends-113051299.html) (last visited on January 10, 2010.)

27 <sup>7</sup> As it did in its argument under FCRA, Defendant's CDA immunity argument heavily relies on its  
 28 claim that it is a "search engine," like Google or Yahoo, and therefore "passively displays content  
 that is created by third parties" and is an "interactive computer service" with CDA immunity.  
 (MTD, 14). As described above, Defendant does not fit into either of these categories because it  
 actively collects information, draws conclusions, and makes affirmative assertions on its website  
 based on that information. (Compl. ¶ 15). See also Section III(A)(3) *supra*.

judicial relief.” *Warth*, 422 U.S. at 500. *See also Edwards v. First American Corp.*, 610 F.3d 514, 517 (9th Cir. 2010); *In re Carter*, 553 F.3d 979, 988 (6th Cir. 2009) (“Congress no doubt has the power to create new legal rights, and it generally has the authority to create a right of action whose only injury-in-fact involves the violation of that statutory right.”)

Here, FCRA creates a set of individual rights and a private right of action by which to vindicate those rights. *Nelson v. Chase Manhattan Mortgage Corp.*, 282 F.3d 1057, 1059 (9th Cir. 2002) citing 15 U.S.C. § 1681n & 15 U.S.C. § 1681o. Therefore, Plaintiff’s allegations that Defendant violated his rights protected under FCRA are sufficient for Article III standing.

**2. Plaintiff does not need to claim actual damages to have Article III standing under FCRA.**

Defendant’s attempt to demonstrate Plaintiff’s lack of standing based on the issue of actual damages is unavailing. (MTD, 19). As its only point of support, Defendant cites to the Eighth Circuit’s ruling in *Dowell v. Wells Fargo Bank, NA*, which provides nothing more than dicta on the subject of actual damages under FCRA. 517 F.3d 1024, 1026 (8th Cir. 2008). The court there found that FCRA “clearly provides that an award of statutory damages is available as an alternative to an award of actual damages.” *Id.* Consequently, Defendant presents no case law demonstrating the necessity of pleading actual damages.

On the contrary, as pointed out by Defendant (MTD, 20), a well established line of cases from the Seventh Circuit has taken up that precise issue of statutory construction and firmly held that

the plain text of the statute states that a plaintiff may recover actual damages or statutory damages. . . FCRA suits are amenable to class treatment [] because: individual losses, if any, are likely to be small-a modest concern about privacy, a slight chance that information would leak out and lead to identity theft. That actual loss is small and hard to quantify is why statutes such as [FCRA] provide for modest damages without proof of injury.

1 *Hernandez v. Chase Bank USA, N.A.*, 429 F. Supp. 2d 983, 989 (N.D. Ill. 2006) citing  
 2 *Murray v. GMAC Mortg. Corp.*, 434 F.3d 948, 953 (7th Cir. 2006). The Ninth  
 3 Circuit and the Central District of California have positively cited this line of cases.  
 4 *See Bateman v. Am. Multi-Cinema, Inc.*, 623 F.3d 708, 718 (9th Cir. 2010) (FCRA's  
 5 statutory damages provision "allows a consumer to recover damages between \$100  
 6 and \$1,000 for each willful violation of FACTA without having to prove actual  
 7 damages"); *Pirian v. In-N-Out Burgers*, 2007 WL 1040864, \*4 (C.D. Cal. Apr. 5,  
 8 2007) ("FCRA explicitly provides for statutory damages even in the absence of actual  
 9 damages"); *Aeschbacher v. California Pizza Kitchen, Inc.*, 2007 WL 1500853, \*3  
 10 (C.D. Cal. Apr. 3, 2007). Therefore, Plaintiff need not allege actual damages to state  
 11 a claim under FCRA and thereby have standing.

12 **3. Plaintiff's allegations related to the dissemination of inaccurate**  
 13 **personal and financial information are sufficient to establish**  
 14 **Article III standing.**

15 Finally, in contrast to Defendant's position, Plaintiff's allegation that he is  
 16 "concerned that the inaccuracies [in] his report will affect his ability to obtain credit,  
 17 employment, [and] insurance" is sufficient to provide standing.<sup>8</sup> (MTD, 18) (Compl.  
 18 ¶ 22). Defendant's argument fails in light of a recent Ninth Circuit ruling in *Krottner*  
 19 *v. Starbucks Corp.*, --- F.3d ----, 2010 WL 5141255, \*4 (9th Cir. 2010). That case  
 20 dealt with Article III standing in the context of a stolen laptop containing employees'  
 21 personal information. *Id.* In ruling on whether the named plaintiffs had pleaded  
 22 injury-in-fact, the court found that a plaintiff's allegation of "generalized anxiety and  
 23 stress" stemming from concern over his stolen information was sufficient to confer  
 24

25 <sup>8</sup> The inaccuracies in Plaintiff's report included, among other things, his employment status, his  
 26 marriage status, his age, his educational background, whether he has children, his "economic  
 27 health," his "wealth level," and on top of that, the profile contained a picture of someone else.  
 28 (Compl. ¶ 21).

standing. *Krottner*, --- F.3d ----, 2010 WL 5141255, \*2. *See also Doe v. Chao*, 540 U.S. 614, 617-18 (2004) (plaintiff who allegedly “was ‘torn . . . all to pieces’ and ‘was greatly concerned and worried’ because of the disclosure of his Social Security number and its potentially ‘devastating’ consequences” . . . had standing under Article III.) Most notably, the *Krottner* court examined whether an increased risk of identity theft constituted injury-in-fact, and found that the plaintiffs had a “credible threat of real and immediate harm stemming from the theft of a laptop,” which was not hypothetical because the laptop had in fact been stolen. *Krottner*, --- F.3d ---, 2010 WL 5141255, \*4.

Here, inaccurate information and conclusions bearing on Plaintiff’s credit, wealth, and reputation have already been widely disseminated to the public and Spokeo’s paying customers over the Internet. (Compl. ¶¶ 20-24). Plaintiff is not speculating or alleging a fear based on the possible release and publication of such information; rather, he is reacting to a real and immediate threat. Therefore, at the pleading stage, Plaintiff has sufficiently pleaded injury-in-fact sufficient to fulfill the requirements of Article III standing.

Thus, Spokeo’s assertions that Plaintiff lacks standing have no basis in law and ignores the fact that Plaintiff has sufficiently stated a claim under FCRA, which does not require that he claim actual damages, and in addition has alleged sufficient claims to state an injury-in-fact.

#### **D. Plaintiff has Sufficiently Stated a Claim Under the UCL.**

Defendant argues that Plaintiff has failed to state a claim under the UCL because he has not stated a claim under FCRA and additionally lacks independent standing. Defendant’s arguments fail on both grounds.

As stated above, Plaintiff has sufficiently stated a claim under FCRA, in that Spokeo is a credit reporting agency and issues credit reports through its website. As alleged, it has violated FCRA by failing to make all the required disclosures ensuring

1 the accuracy of the financial and personal information it disseminates and sells.  
2 Therefore, Plaintiff has properly stated a claim for violation of the UCL under the  
3 unlawful prong.

4 Additionally, Plaintiff has stated an injury-in-fact and loss of money by  
5 alleging that he was unable to find employment during the time period in which  
6 Defendant disseminated and sold his financial and personal information and marketed  
7 it to HR professionals and employers. (Compl. ¶¶ 13, 24.) Accordingly, Plaintiff  
8 meets the injury-in-fact and loss of money requirement of the UCL by having pled  
9 lost income resulting from his continued unemployment. As such, Plaintiff has, at  
10 the pleading stage, sufficiently alleged injury-in-fact and the loss of money under the  
11 UCL.

12 **IV. CONCLUSION**

13 Based on the foregoing, Plaintiff Thomas Robins respectfully requests that the  
14 Court deny Defendant's Motion to Dismiss in its entirety.

15  
16  
17 Dated: January 10, 2011

EDELSON MCGUIRE, LLC

18  
19  
20 /s/ Michael J. Aschenbrener  
MICHAEL J. ASCHENBRENER

**CERTIFICATE OF SERVICE**

I, Michael J. Aschenbrener, an attorney, certify that on January 10, 2011, I served the above and foregoing ***Plaintiff's Opposition to Defendant's Motion to Dismiss***, by causing true and accurate copies of such paper to be filed and transmitted to counsel of record via the Court's CM/ECF electronic filing system.

s/ Michael J. Aschenbrener  
Michael J. Aschenbrener  
EDELSON MCGUIRE LLC