UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 1:20-cv-23771-KMM

SEGUNDO TOSTE,

Plaintiff,

v.

THE BEACH CLUB AT FONTAINEBLEAU PARK CONDOMINIUM ASSOCIATION, INC., *et al.*,

Defendants.
_____/

ORDER ON MOTION TO DISMISS

THIS CAUSE came before the Court upon Defendant Pablo A. Arriola ("Arriola"), Defendant Scott R. Shapiro ("Shapiro"), and Defendant Russell S. Jacobs, P.A.'s ("Law Firm") (collectively, "Defendants") Motion to Dismiss for Lack of Jurisdiction. ("Mot.") (ECF No. 140). Plaintiff Segundo Toste ("Plaintiff") filed a response in opposition. ("Resp.") (ECF No. 158). Defendants filed a reply. ("Reply") (ECF No. 161). The Motion is now ripe for review.

I. BACKGROUND[1]

This case arises from a dispute over Defendants' practices in collecting monies purportedly owed by Plaintiff to The Beach Club at Fontainebleau Park Condominium Association, Inc. (the "Association"), in connection with a condominium (the "Property") owned by Plaintiff in a community governed by the Association. *See generally* Am. Compl. In the Amended Complaint,

[1] The following background facts are taken from the Complaint ("Am. Compl") (ECF No. 45) and are accepted as true for purposes of ruling on this Motion to Dismiss. *Fernandez v. Tricam Indus., Inc.*, No. 09-22089-CIV-MOORE/SIMONTON, 2009 WL 10668267, at *1 (S.D. Fla. Oct. 21, 2009). Additionally, because Defendants raise a factual attack on subject matter jurisdiction, the Court "may consider extrinsic evidence such as testimony and affidavits." *See Morrison v. Amway Corp.*, 323 F.3d 920, 925 n.5 (11th Cir. 2003) (citing *Lawrence v. Dunbar*, 919 F.2d 1525, 1528–29 (11th Cir.1990)).

Plaintiff alleges that Defendants' actions violated the Federal Debt Collection Practices Act ("FDCPA"). *Id*. ¶¶ 127–168.[2]

In 2017, Plaintiff fell behind on his monthly payments to the Association. *Id*. ¶¶ 41–42. In March of 2018, Plaintiff tendered two checks for an agreed-upon amount to the Association in satisfaction of the balance owed and the Association cashed both checks. *Id*. ¶¶ 43–48. Yet, Plaintiff's balance did not return to zero. *Id*. ¶ 48. In June of 2019, he visited the Association office and the Association indicated that it would email him statements to verify the amount owed, but it never did. *Id*. ¶¶ 50–52. Plaintiff also made similar requests over email and made return trips to the Association office. *Id*. ¶¶ 52–53. In August, he was told that this matter had been sent to the Association's attorneys—Defendant Arriola, Defendant Shapiro, and Defendant Law Firm. *Id*. ¶ 53.

On September 16, 2019, Defendants sent a Notice of Intent Letter that informed Plaintiff of the Association's intent to file a claim of lien against Plaintiff's Property, unless he paid the amounts listed therein. Am. Compl. ¶¶ 54–56; *see also* Notice of Lien ("September Letter") (ECF No. 45-1). On October 30, 2019, Defendants filed a Claim of Lien in the public records of Miami-Dade County. Am. Compl. ¶ 146; *see also* ("Claim of Lien) (ECF No. 45-7). Then, on November 5, 2019, Defendants sent a Notice of Intent to Foreclose Claim of Lien to Plaintiff, which notified Plaintiff that a Claim of Lien had been recorded against his property and that the Association intended to file a foreclosure action against his Property unless the Claim of Lien was fully satisfied within a certain period of time. Am. Compl. ¶¶ 70–71; *see also* Notice of Intent to Foreclose ("November Letter") (ECF No. 45-2).

[2] The Amended Complaint also included a claim of negligent misrepresentation which Plaintiff subsequently voluntarily dismissed. (ECF No. 117).

On January 7, 2020, the Association terminated its attorney-client relationship with Defendants. *See* Declaration of Russell S. Jacobs ("Russell Decl.") (ECF No. 140-8) ¶ 6.

On September 11, 2020, Plaintiff filed the original Complaint ("Compl.") (ECF No. 1) and thereby initiated the above-captioned litigation. The Complaint detailed how Plaintiff retained an expert witness to review "all financial records available." Compl. ¶ 100. The Complaint also stated, in exhaustive detail, how Defendants' calculations of the amount owed were inaccurate. *Id*. ¶¶ 103–108.

In the Amended Complaint, Plaintiff alleges that the amounts reflected in the September Letter, the Claim of Lien, and the November Letter (collectively, "Defendants' Communications"), were incorrectly assessed and unfair, and that he was misled by those representations and incurred damages as a result. Am. Compl. ¶¶ 133, 135, 142, 144, 151, 153. Consequently, Plaintiff alleges that the September Letter, the Claim of Lien, and the November Letter, violate the FDCPA in Counts I, II, and III, respectively. *Id*. ¶¶ 127–153. Additionally, in each count of the Amended Complaint, Plaintiff alleges that Defendants' conduct caused him to suffer emotional distress, anger, fear, confusion, frustration, humiliation, and embarrassment. *Id*. ¶¶ 134, 143, 152. Plaintiff further alleges that as a result of Defendants' Communications, he suffered a "real risk of harm" based on Defendants' threat to foreclose on his Property. *Id*.

During Plaintiff's deposition, when shown the Claim of Lien, he testified: "I have never seen that before." Deposition of Segundo Toste ("Pl.'s Dep.") (ECF No. 140-7) at 51:2–13. Plaintiff also testified at his deposition that he spoke with a woman at the Firm, shortly after the Claim of Lien was filed, and she told him that they were going to put a lien on his Property. *Id*. at 46:2–48:22.

Plaintiff has submitted an Affidavit In Support of Plaintiff's Response to Defendants' Motion to Dismiss, ("Pl.'s Aff.") (ECF No. 158-1), in which he explains that while he did not recall seeing the actual Claim of Lien prior to his deposition, he was aware that a Claim of Lien had been recorded against his Property before the lawsuit. Pl.s' Aff. ¶ 14. Plaintiff states that he forwarded all of Defendants' Communications, including the Claim of Lien, to his attorneys for their review prior to filing the Complaint. *Id*. Relatedly, Plaintiff's Affidavit states that that he understood that lien foreclosure proceedings could be brought against him and his Property, based on Defendants' Communications, and that he could lose his home as a result of those proceedings. *Id*. ¶ 17. Additionally, in the affidavit, Plaintiff states that he suffered from emotional distress and mental anguish, which manifested itself in ways including but not limited to confusion, loss of sleep, extreme stress, frustration, anger and anxiety. *Id*. ¶¶ 12, 17.

Now, Defendants move the Court to dismiss Plaintiff's Amended Complaint pursuant to Federal Rule of Civil Procedure 12(b)(1)—on the grounds that Plaintiff does not have standing to sue under the FDCPA. *See generally* Mot.

II. LEGAL STANDARD

Federal Rule of Civil Procedure 12(b)(1) requires a court to dismiss an action for lack of subject matter jurisdiction. Fed. R. Civ. P. 12(b)(1). A court lacks subject matter jurisdiction over a claim when a plaintiff fails to bear the burden of establishing the "irreducible constitutional minimum" of standing. *See Spokeo Inc. v. Robins*, 578 U.S. 330, 338–39 (2016), as revised (May 24, 2016) (clarifying the contours of constitutional standing); *Duty Free Ams., Inc. v. Estee Lauder Cos.*, 797 F.3d 1248, 1271 (11th Cir. 2015) (The constitutional standing doctrine "implicates [a court's] subject matter jurisdiction, and accordingly must be addressed as a threshold matter");

Parker v. Scrap Metal Processors, Inc., 386 F.3d 993, 1002–03 (11th Cir. 2004) ("[S]tanding must exist with respect to each claim.").

"Attacks on subject matter jurisdiction under Rule 12(b)(1) come in two forms, 'facial' and 'factual' attacks." *Morrison*, 323 F.3d at 925 n.5 (citing *Dunbar*, 919 F.2d at 1528–29). "Facial attacks challenge subject matter jurisdiction based on the allegations in the complaint, and the district court takes the allegations as true in deciding whether to grant the motion." *Id*. (citing *Dunbar*, 919 F.2d at 1529). "Factual attacks challenge subject matter jurisdiction in fact, irrespective of the pleadings. In resolving a factual attack, the district court may consider extrinsic evidence such as testimony and affidavits." *Id*. (citing *Dunbar*, 919 F.2d at 1529).

III. DISCUSSION

Defendants argue that Plaintiff is without standing because (1) litigation fees and costs cannot serve as the basis for Article III injury, (2) the risk of harm to Plaintiff dissipated before this case was filed, (3) Plaintiff's emotional distress is not a concrete injury, and (4) statutory violations, or informational harm, do not confer standing without a concrete and particularized injury. *See generally* Mot.; *see also* Reply at 7. The Court considers these arguments below.

A. Applicable Law.

"Article III of the Constitution limits federal courts to adjudicating actual 'cases' and 'controversies.'" *A&M Gerber Chiropractic LLC v. GEICO Gen. Ins. Co.*, 925 F.3d 1205, 1210 (11th Cir. 2019) (citation omitted). "Perhaps the most important of the Article III doctrines grounded in the case-or-controversy requirement is that of standing." *Id*. (quoting *Wooden v. Bd. of Regents of the Univ. Sys. of Ga.*, 247 F.3d 1262, 1273 (11th Cir. 2001)). "Standing cannot be waived or conceded by the parties, and it may be raised (even by the court sua sponte) at any stage of the case." *Id.* (quoting *Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 541 (1986)). "In essence the

question of standing is whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues." *Id*. (citing *Warth v. Seldin*, 422 U.S. 490, 498 (1975)).

"The party who invokes a federal court's authority must show, at an 'irreducible minimum,' that at the time the complaint was filed, he has suffered some actual or threatened injury resulting from the defendant's conduct, that the injury fairly can be traced to the challenged action, and that the injury is likely to be redressed by favorable court disposition." *Id*. (quoting *Atlanta Gas Light Co. v. Aetna Cas. & Sur. Co.*, 68 F.3d 409, 414 (11th Cir. 1995)); *see also Spokeo*, 578 U.S. at 338 ("The plaintiff must have (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision."). A plaintiff has suffered an injury in fact where he or she has "'suffered an invasion of a legally protected interest that is concrete and particularized and actual or imminent, not conjectural or hypothetical.'" *Preisler v. Eastpoint Recovery Grp., Inc*., No. 20-cv-62268-RAR, 2021 WL 2110794, at *3 (S.D. Fla. May 25, 2021) (quoting *Spokeo*, 578 U.S. at 339 (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)) (internal quotation marks reformatted).

B. Litigation Fees and Costs Do Not Confer Article III Standing.

Defendants point out that Plaintiff claims of attorneys' fees, court costs, and expert witness fees incurred in prosecuting this case are "damages" in his Rule 26 disclosures. Mot. at 11. Defendants argue that the Supreme Court has rejected the notion that a plaintiff can create standing by claiming that the costs associated with suing a defendant confer jurisdiction under Article III. *Id*. at 11–12 (citing *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 107 (1998)). Plaintiff concedes, and the Court agrees, that fees and costs incurred in litigation do not create standing. Resp. at 2. Indeed, the Supreme Court has expressly held that an "interest in attorney's fees is . . . insufficient to create an Article III case or controversy where none exists on the merits of the

underlying claim." *Steel Co.*, 523 U.S. at 107 (quoting *Lewis v. Cont'l Bank Corp.*, 494 U.S. 472, 480 (1990) (citation omitted)). Accordingly, the Court finds that litigation fees and costs incurred by Plaintiff in connection with the above-captioned case do not confer Plaintiff standing under Article III.

C. The Risk of Future Harm Has Dissipated and, Therefore, Does Not Confer Article III Standing on Plaintiff.

Defendants contend that any risks posed to Plaintiff, such as the risk of overpayment, never materialized and therefore cannot create standing. Mot. at 12 (citing *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2213 (2021)). First, Defendants argue that Plaintiff was not at risk of overpaying when the Complaint was filed because it explains "perfectly well" why the collection letters were arguably misleading. *Id*. at 15 (citing *Preisler*, 2021 WL 2110794, *1). On this point, Defendants note that the Eleventh Circuit recently applied the concept of "dissipated risk" to an FDCPA case in *Trichell v. Midland Credit* and found standing lacking where any risk of overpayment due to misleading collection letters dissipated before the filing of the Complaint. *Id*. at 13–14 (citing *Trichell v. Midland Credit*, 964 F.3d 990, 1002–03 (11th Cir. 2020)). Second, Defendants argue that Plaintiff lacks standing because any risk of harm caused by Defendants' letters dissipated by the time the Complaint was filed because the Law Firm was terminated by the Association in January of 2020. *Id*. at 14 (citing *Tsao v. Captiva MVP Rest. Partners, LLC*, 986 F.3d 1332, 1344 (11th Cir. 2021)).

In response, Plaintiff argues that a real risk of harm existed at the time of the Complaint—the risk that lien foreclosure proceedings could commence against him and his Property at any time, based on Defendants' Communications. Resp. at 11. Plaintiff also points out that he called the Law Firm after receiving the November 5, 2019 Notice of Intent to Foreclose Claim of Lien, and was told that if he did not pay or enter an agreement, they would file a lien against his Property. *Id*. at

12. Plaintiff argues that he could not have been sure when he filed the suit that the amounts were erroneous or that Defendants would not be able to collect them because his experts were only able to provide a preliminary analysis. *Id*. at 13. Thus, Plaintiff contends that this case is distinguishable from the cases relied upon by Defendants. *Id*. at 15. Plaintiff also argues that Defendants termination by the Association did not cause any harm to dissipate because the risk that new counsel could pick up where Defendants left off and commence foreclosure proceedings remained. *Id*. at 17. Relatedly, Plaintiff contends that injuries arising from emotional distress have not dissipated. *Id.*

In reply, Defendants argue that the risk of foreclosure is insufficient under the Supreme Court's decision in *TransUnion*. Reply at 6 (citing *TransUnion*, 141 S. Ct. at 2210–11 ("[I]n a suit for damages, the mere risk of future harm, standing alone, cannot qualify as a concrete harm—at least unless the exposure to the risk of future harm itself causes a separate concrete harm.").[3]

The Supreme Court has held that in a suit for damages, "the mere risk of future harm, standing alone, cannot qualify as a concrete harm—at least unless the exposure to the risk of future harm itself causes a separate concrete harm." *TransUnion*, 141 S. Ct. at 2211. In *Trichell*, the Eleventh Circuit held that risk had dissipated for the plaintiffs before the filing of their complaints because "the complaints explain[ed] perfectly well why the collection letters were arguably

[3] Defendants argue that it is not credible for Plaintiff to claim that he was injured by information contained in the Claim of Lien because he testified that he had never seen the Claim of Lien and was not aware of its existence until defense counsel placed the document before him at the deposition. Reply at 7. In response, Plaintiff points out that although he testified at his deposition that he had never seen the Claim of Lien, he forwarded it to his attorneys and was aware that a Claim of Lien had been recorded against his Property. *Id*. at 12 (citing Pl.'s Aff. ¶ 14). Plaintiff also understood at the time his lawsuit was filed that a lien foreclosure proceeding could be brought at any time. *Id*. (citing Pl.'s Aff. ¶ 17). The Court need not reach whether Plaintiff was injured by information in the Claim of Lien because, for the reasons stated herein, Plaintiff suffered no Article III injury.

misleading. The complaints thus did not, and could not, make any allegation that [the plaintiffs were] at risk of being misled in the future." 964 F.3d at 1002–03. The *Trichell* court found that standing did not exist based on the risk of being misled because "any past risk had dissipated before they filed the complaints, and courts must assess Article III standing as of when a complaint is filed." *Id*. at 1003; *see also Preisler*, 2021 WL 2110794, at *5 ("In other words, if the Letter was misleading, Preisler knew that before he filed the Complaint—at which point any risk of harm associated with the language in the Letter had already dissipated."). The *Trichell* Court found standing lacking because the complaint "explain[ed] perfectly well why the [Defendants' calculations] were arguably misleading." *Id*. at 1002–03.

Here, too, the Complaint ("Compl.") (ECF No. 1) details how prior to filing the case, Plaintiff retained an expert witness who reviewed "all financial records available." Compl. ¶ 100. The Complaint also states, in exhaustive detail, how Defendants' calculations of the amount owed are inaccurate. *Id*. ¶¶ 103–108. Thus, as in *Trichell*, the Complaint "explain[ed] perfectly well why [Defendants' calculations] were arguably misleading." 964 F.3d at 1002–03. Therefore, any harm arising from the risk of being misled had dissipated before the filing of the Complaint and Plaintiff, therefore, cannot show Article III standing based on the risk of being misled. To the extent that Plaintiff argues that the Court should distinguish *Trichell* because Defendants have not stipulated that their calculations were incorrect, the Court finds this unconvincing in light of the standard established in *Trichell*, which probes whether a plaintiff was aware that collection materials were "***arguably*** misleading." 964 F.3d at 1002–03 (emphasis added). *Trichell* is binding precedent on this Court and renders Plaintiff's claim of standing based on the risk of being misled meritless.

Additionally, the Court agrees with Defendants that their termination by the Association—before this case commenced—has a significant bearing on Plaintiff's standing to

pursue claims against Defendants. In *Trichell*, the Eleventh Circuit made clear that the plaintiffs were without standing where "any past risk had dissipated before they filed the complaints, and courts must assess Article III standing as of when a complaint is filed." *Id.* at 1003; *see also Nicklaw v. CitiMortgage, Inc*., 855 F.3d 1265, 1267 (11th Cir. 2017) ("[N]o decision of the Supreme Court that holds—or even hints—that a plaintiff has standing to sue because he faced a risk of harm that never materialized and has since disappeared.").

In this case, insofar as Plaintiff contends that he is still at risk of having his Property foreclosed on, Defendants will necessarily have no role in that process because they were terminated by the Association before the filing of the Complaint. Therefore, the Court finds that the risk of Defendants facilitating a foreclosure on Plaintiff's Property dissipated upon their termination by the Association and, therefore, the risk of foreclosure does not confer standing on Plaintiff. [4]

However, setting aside the risk of foreclosure *in the future*, the Court still must analyze whether Defendants' assembly of misleading information, *in the past*, is sufficient to create standing in this case, such as by generating emotional distress, confusion, or informational harm. The Court considers these other potential bases for Article III injury below.

D. Emotional Distress, Alone, Is Not a Concrete Injury That Confers Standing on Plaintiff to Pursue Claims under the FDCPA.

Defendants argue that the emotional injuries included in each claim do not bear a close relationship with a harm that has "traditionally been regarded as providing a basis for a lawsuit in English or American courts." Mot. at 18 (quoting *Trichell*, 964 F.3d at 997 (citing *Spokeo, Inc. v. Robins*, 578 U.S. at 341)). Defendants contend that Plaintiff's testimony establishes that he never

[4] The Association and Plaintiff reached a settlement, and this case has been dismissed with prejudice as to the Association. (ECF Nos. 82, 86). Thus, to the extent any risk that the Association might foreclose on Plaintiff's Property remains, it is of no import to the Court's instant inquiry under Article III.

took detrimental action based on his purported emotional injuries. *Id*. at 18. Defendants argue that this case is similar to *Cooper v. Atlantic Credit & Finance Inc.*, where the Eleventh Circuit found that a plaintiff did not have standing based on confusion caused by a collection letter. *Id*. (citing *Cooper v. Atlantic Credit & Finance Inc.*, 822 Fed. Appx. 951, 955 (11th Cir. 2020)).

In response, Plaintiff argues that Defendants' reliance on *Trichell* is misplaced because here, unlike in *Trichell*, Plaintiff alleges that he was harmed by his reliance on Defendants' Communications and suffered damages in the form of emotional distress—particularly in the form of confusion. Resp. at 5–6. Plaintiff notes that a court in this district has held that emotional distress can be sufficiently concrete to establish Article III standing under the FDCPA, even post *Trichell*. *Id*. at 6–7 (citing *Rivera v. Dove Inv. Corp*., Case No. 19-cv-20934, 2020 WL 6266054 at *3 (S.D. Fla. Oct. 23, 2020)). Relatedly, Plaintiff contends that Article III injury exists when damages are available under the FDCPA, such as for emotional distress. *Id*. at 6, 8 (quoting *Minnifield v. Johnson & Freedman, LLC*, 448 F. App'x 914, 916 (11th Cir. 2011)). In Plaintiff's Affidavit, which is attached to his Response, he attests that he suffered emotional distress including: confusion, loss of sleep, extreme stress, frustration, anger, agitation, and anxiety. Pl's. Aff. at ¶¶ 12, 17.

In *Cooper v. Atl. Credit & Fin. Inc*, which arose from claims asserted under the FDCPA, the Eleventh Circuit stated that confusion would only satisfy Article III if it resulted in a plaintiff failing to dispute a debt, or some other negative consequence. 822 F. App'x 951, 955 (11th Cir. 2020) ("Cooper does not allege that her confusion about her statutory rights resulted in her not disputing the debt, that her confusion would have resulted in her utilizing one of the payment options in the second letter despite the debt being invalid, that her confusion would have resurrected any previously invalid debt, or that the confusion would have resulted in any other negative

consequences."). In other words, a violation of the FDCPA that causes only confusion, but no other concrete injury, does not confer Article III standing. *Id*.

Courts in the Southern District of Florida have been split on the application of *Trichell* and *Cooper* to emotional harms arising from alleged violations of the FDCPA. In *Preisler*, the Honorable Rodolfo A. Ruiz applied *Trichell* and *Cooper* to a plaintiff's claim that Article III injury existed based on confusion arising from communications that allegedly violated the FDCPA. 2021 WL 2110794, at *5 (citing *Trichell*, 964 F.3d at 1004). Judge Ruiz found that the plaintiff's "receipt of the allegedly misleading Letter without a claim of concrete 'downstream consequences' from said receipt is simply insufficient to confer standing[.]" *Id.* at *5 (citing *Trichell*, 964 F.3d at 1004). Relatedly, Judge Ruiz found held that the plaintiff could not "rely solely on his feelings of distress, confusion, or anxiety to fabricate concrete injury [because] [s]uch conjectural harms 'cannot satisfy Article III.'" *Id*. (citing *Trichell*, 964 F.3d at 1004; *Cooper*, 822 F. App'x at 954 (holding that confusion over a collection letter, without more, is "insufficient to confer standing")).

However, in *Rivera v. Dove Inv. Corp*., the Honorable Jose E. Martinez held that emotional distress damages are sufficiently concrete to establish Article III standing under the FDCPA. No. 19-20934-CIV, 2020 WL 6266054, at *3 (S.D. Fla. Oct. 23, 2020). In doing so, Judge Martinez based his decision on "the Eleventh Circuit's determination that '[a]ctual damages under the FDCPA include damages for emotional distress.'" *Id*. (citing *Minnifield*, 448 F. App'x at 916; *see also* 15 U.S.C. § 1692k(a)(1) (stating that plaintiffs may recover "any actual damage sustained" as a result of an FDCPA violation)).

The Court finds *Preisler* to be the more persuasive application of *Trichell* and *Cooper* as to standing in FDCPA cases involving emotional harm. There is an important distinction to be made

between statutory damages and Article III injury, which was illuminated by the Eleventh Circuit in *Trichell*:

> [T]he Supreme Court has insisted time and again, "Congress' role in identifying and elevating intangible harms does not mean that a plaintiff automatically satisfies the injury-in-fact requirement whenever a statute grants a person a statutory right and purports to authorize that person to sue to vindicate that right." *Spokeo*, 136 S. Ct. at 1549 (additional citations omitted). On the contrary, the existence of a "cause of action does not affect the Article III standing analysis." *Thole v. U.S. Bank N.A.*, 140 S. Ct. 1615, 1620 (2020). "Article III standing requires a concrete injury even in the context of a statutory violation," *Spokeo*, 136 S. Ct. at 1549, and Article III courts—while exercising jurisdiction to determine their own jurisdiction—must ultimately decide what injuries qualify as concrete. Congress's judgment may inform that assessment but cannot control it.
> . . .
>
> [W]hile a recipient may take offense that a private party has violated the FDCPA, that is akin to taking offense that the government has violated other statutes—an injury that is canonically abstract as opposed to concrete. *See, e.g.*, *Lujan*, 504 U.S. at 575–76; *Allen v. Wrigh*t, 468 U.S. 737 (1984).
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> The FDCPA's private cause of action reinforces this analysis. It provides that a person may recover "any actual damage sustained by such person as a result of" an FDCPA violation and "such additional damages as the court may allow." 15 U.S.C. § 1692k(a). ***This formulation suggests that Congress viewed statutory damages not as an independent font of standing for plaintiffs without traditional injuries, but as an "additional" remedy for plaintiffs suffering "actual damage" caused by a statutory violation.***

964 F.3d at 1000 (internal citations reformatted) (emphasis added). Accordingly, the existence of standing under Article III does not emerge simply because damages are available under the FDCPA. *Id*. Rather, the Court's inquiry should be directed to whether Plaintiff suffered a concrete and particularized injury that satisfies the requirements of Article III. *Id*. For this reason, the Court respectfully disagrees with the reasoning in *Rivera*—which looked to categories of damages under the FDCPA to assess Article III standing. 2020 WL 6266054, at *3.

Here, Plaintiff has not identified a negative consequence that resulted from confusion caused by Defendants' Communications. *See generally* Resp. The closest he comes to doing so is his

assertion that he wasted time as a result of his confusion. Resp. at 10 (citing Aff. ¶ 17). The Eleventh Circuit's decision in *Cooper* is clear that confusion alone, without negative downstream consequences, is insufficient to establish Article III injury in cases arising under the FDCPA. 822 F. App'x at 955. Wasted time is not the sort of concrete down-stream consequence that the *Cooper* Court proposed could create standing. *Id.* Thus, as in *Preisler*, the Court finds that Plaintiff's receipt of misleading communications "without a claim of concrete 'downstream consequences' from said receipt is simply insufficient to confer standing." 2021 WL 2110794, at *5 (S.D. Fla. May 25, 2021) (citing *Trichell*, 964 F.3d at 1004).[5]

E. Informational Harm, without Related Adverse Effects, Does Not Satisfy Article III.

Plaintiff points out that this Court has held, in the past, that a plaintiff suffered a concrete injury under the FDCPA where "[a] mischaracterization of [the plaintiff's] debt constitutes an injurious withholding of information that the FDCPA requires the debt collector to disclose to Plaintiff, and an invasion of Plaintiff's right to such information." Resp. at 18 (citing *Hill v. Resurgent Capital Serv., L.P.*, 461 F. Supp. 3d 1232, 1237–38 (S.D. Fla. 2020)). Plaintiff contends that *Hill* was not overruled by *Trichell* and remains good law. *Id.* Defendants contend that the Eleventh Circuit explicitly rejected a similar informational injury theory in *Trichell*, and the Court should do so here. Reply at 7 (citing *Trichell*, 964 F.3d at 1004).

In *Trichell*, the Eleventh Circuit stated:

[5] Defendants argue that Plaintiff should not be able to assert emotional injuries now because his Rule 26 disclosures do not contain any indication that he would be seeking "emotional distress damages." Reply at 2–4. This argument, too, confuses the concepts of damages under the FDCPA and Article III injury, and is without merit. Defendants have not cited to any authority for the proposition that Plaintiff must disclose all bases for jurisdiction under Rule 26. Plaintiff's failure to raise any argument as to emotional distress injury until now is, naturally, due to Defendants' inexplicably late objection to subject matter jurisdiction in this case—which occurred long after the discovery deadline closed.

> Trichell and Cooper have identified no comparable downstream consequences from their receipt of allegedly misleading communications that failed to mislead. Absent any such concrete impact, they can complain only about *receiving* information that had no impact on them. As several other courts have recognized, ***an asserted informational injury that causes no adverse effects cannot satisfy Article III.***

964 F.3d at 1004 (citing *Frank v. Autovest, LLC*, 961 F.3d 1185, 1188 (D.C. Cir. 2020); *Casillas v. Madison Ave. Assocs.*, Inc., 926 F.3d 329, 338 (7th Cir. 2019); *Huff v. TeleCheck Servs., Inc.*, 923 F.3d 458, 467 (6th Cir. 2019); *Dreher v. Experian Info. Sols., Inc.*, 856 F.3d 337, 346–47 (4th Cir. 2017)) (emphasis added).

At the time *Hill* was decided, this Court did not have the benefit of the Eleventh Circuit's opinion in *Trichell*. 461 F. Supp. 3d at 1237–38. However, it is now clear that "informational injury that causes no adverse effects cannot satisfy Article III." *Trichell*, 964 F.3d at 1004. In fact, in a different case involving the same plaintiff and defendant as *Hill* that was decided after *Trichell*, the Honorable Federico A. Moreno dismissed the plaintiff's complaint for lack of subject matter jurisdiction because "the Eleventh Circuit does not recognize an 'anything-hurts-so-long-as-Congress-says-it-hurts theory of Article III injury[.]" *Hill v. Resurgent Cap. Servs., L.P.*, No. 20-20563-CIV, 2020 WL 4429254, at *4 (S.D. Fla. July 31, 2020). In doing so, Judge Moreno remarked that "the FDCPA is a shield to protect debtors from unethical and illegal debt collectors; it is not a sword to be wielded to force defendants to pay plaintiffs who have not suffered." *Id.* (quoting *Daniels v. Aldridge Pite Haan, LLP*, No. 5:20-cv-00089-TES, 2020 WL 3866649, at *4 (M.D. Ga. July 8, 2020); *see also Preisler*, 2021 WL 2110794, at *3 ("[A] plaintiff cannot establish standing merely by alleging 'a bare procedural violation, divorced from any concrete harm,' and allegations of FDCPA violations, without more, are insufficient to establish standing." (citing *Hill*, 2020 WL 4429254, at *4) (internal citation omitted)). Accordingly, the Court finds Plaintiff's

assertion that standing exists based on informational harm, comprised of a mere procedural violation of the FDCPA, is without merit. *Trichell*, 964 F.3d at 1004.[6]

IV. CONCLUSION

UPON CONSIDERATION of the Motion, the pertinent portions of the record, and being otherwise fully advised in the premises, it is hereby ORDERED AND ADJUDGED that Defendants' Motion to Dismiss for Lack of Jurisdiction (ECF No. 140) is GRANTED. Accordingly, Plaintiff's Amended Complaint (ECF No. 45) is DISMISSED WITH PREJUDICE.[7] The Clerk of Court is INSTRUCTED to CLOSE this case. All pending motions, with the exception of Plaintiff's Motion for Attorney's Fees (ECF No. 133), are DENIED AS MOOT.

DONE AND ORDERED in Chambers at Miami, Florida, this 16th day of November, 2021.

K. MICHAEL MOORE
UNITED STATES DISTRICT JUDGE

c: All counsel of record

[6] Defendant argues that Plaintiff has not tied any of his emotional distress to information being disclosed in public records and has not claimed any injury due solely by the fact that debt information was revealed in the public records of Miami-Dade County. Mot. at 16–17. Plaintiff did not respond to this argument and has made no arguments premised upon reputational harm as the basis for his injury. *See generally* Resp. Accordingly, the Court need not—and does not—reach whether any reputational harm caused by the disclosure of misleading information to the public could confer Article III standing on a plaintiff pursuing claims under the FDCPA.

[7] Defendants' Motion presented a factual, not facial, attack on jurisdiction. Plaintiff has had an opportunity to present evidence as to jurisdiction and failed to satisfy his burden. Therefore, the Court finds that dismissal with prejudice is warranted.