The Bullet Point: Ohio Commercial Law Bulletin

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Jim Sandy and Richik Sarkar

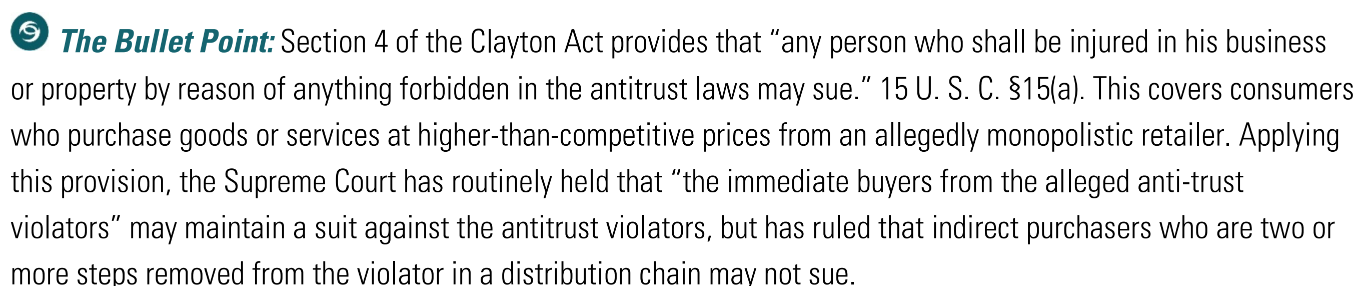
Do my online complaints constitute defamation?

Standing to Sue Under Clayton Act (Antitrust)

Apple Inc. v. Pepper et. al., Slip Op. No. 17-204 (May 13, 2019).

In this appeal, the United States Supreme Court held that iPhone users could sue Apple for alleged monopolization. The case began regarding Apple's sale of apps through its App Store, the only place where iPhone users may lawfully purchase apps. Apple charges app creators an annual fee, as well as a 30% commission on every app sale. A number of iPhone users sued Apples alleging the company unlawfully monopolized the aftermarket for iPhone apps.

Apple moved to dismiss the lawsuit and the District Court agreed finding iPhone users were not a "direct purchaser" under Supreme Court precedent. The Ninth Circuit Court of Appeals reversed and on appeal, the Supreme Court affirmed.



The Bullet Point: Section 4 of the Clayton Act provides that "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue." 15 U. S. C. §15(a). This covers consumers who purchase goods or services at higher-than-competitive prices from an allegedly monopolistic retailer. Applying this provision, the Supreme Court has routinely held that "the immediate buyers from the alleged anti-trust violators" may maintain a suit against the antitrust violators, but has ruled that indirect purchasers who are two or more steps removed from the violator in a distribution chain may not sue.

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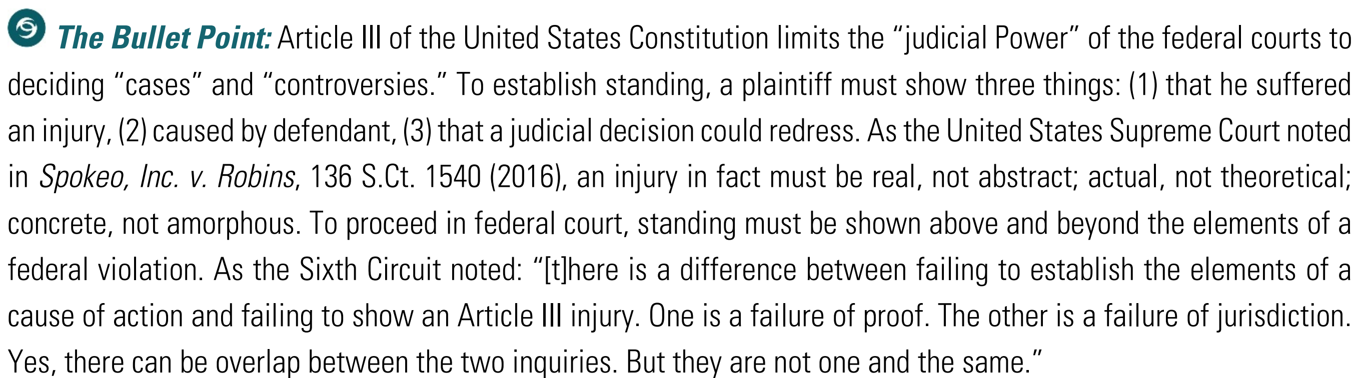
FCRA Article III Standing

Huff v. TeleCheck Servs., 6th Cir. No. 19a0085 (May 3, 2019).

This case involved a Fair Credit Reporting Act (FCRA) dispute with a check verification company. The plaintiff requested a copy of his file under FCRA from a check verification company. The report he received omitted that his license was linked to six different bank accounts and omitted two transactions from those accounts. Plaintiff filed suit but the district court granted the defendant's motion to dismiss for lack of standing. Plaintiff appealed and on appeal the Sixth Circuit Court of Appeals affirmed, finding he lacked the requisite standing to sue because the incomplete report did not injure him in any way.

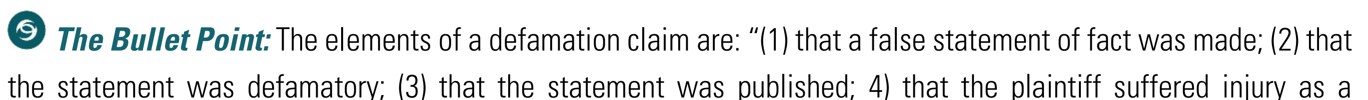


The Bullet Point: Article III of the United States Constitution limits the "judicial Power" of the federal courts to deciding "cases" and "controversies." To establish standing, a plaintiff must show three things: (1) that he suffered an injury, (2) caused by defendant, (3) that a judicial decision could redress. As the United States Supreme Court noted in *Spokeo, Inc. v. Robins*, 136 S.Ct. 1540 (2016), an injury in fact must be real, not abstract; actual, not theoretical; concrete, not amorphous. To proceed in federal court, standing must be shown above and beyond the elements of a federal violation. As the Sixth Circuit noted: "[t]here is a difference between failing to establish the elements of a cause of action and failing to show an Article III injury. One is a failure of proof. The other is a failure of jurisdiction. Yes, there can be overlap between the two inquiries. But they are not one and the same."

Online Defamation

Maddox Defense, Inc. v. Geodata Systems Management, Inc., 8th Dist. Cuyahoga No. 107559, 2019-Ohio-1778.

This was an appeal of the trial court's decision to grant summary judgment to the plaintiff in a breach of contract dispute. Both companies in the lawsuit specialized in manufacturing products to the military. The plaintiff entered into an agreement with the defendant to purchase a number of gunnery targets that would then be sold to the military. Defendant required the sale price up front. After plaintiff paid, defendant failed to deliver the gunnery targets in a timely manner, leading plaintiff to cancel its order and demand its money back. When it was not paid back, plaintiff sued for breach of contract. Defendant filed various counterclaims, including for tortious interference with a contract and business relationship and a defamation claim related to online postings made about the defendant. Ultimately plaintiff was awarded summary judgment and defendant appealed. On appeal, the Eighth District affirmed finding that the plaintiff's online postings about its business dealings with the defendant were opinion and not fact, and thus not actionable defamation.



The Bullet Point: The elements of a defamation claim are: "(1) that a false statement of fact was made; (2) that the statement was defamatory; (3) that the statement was published; 4) that the plaintiff suffered injury as a

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proximate result of the publication; and (5) that the defendant acted with the requisite degree of fault in publishing the statement. If a statement is defamatory per se, in that it tends to injure a person in his or her trade or occupation, damages are generally presumed. Truth is a defense to defamation. Moreover, when confronted with a statement published online, an opinion (as opposed to a fact statement) is typically protected from such a claim. In making this determination, courts consider the totality of the circumstances, including (1) the specific language used; (2) whether the statement is verifiable; (3) the general context of the statement; and (4) the broader context in which the statement appeared.

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Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Timber & Lumber Co.,* 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

APPLE INC. *v.* PEPPER ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 17–204. Argued November 26, 2018—Decided May 13, 2019

Apple Inc. sells iPhone applications, or apps, directly to iPhone owners through its App Store—the only place where iPhone owners may lawfully buy apps. Most of those apps are created by independent developers under contracts with Apple. Apple charges the developers a $99 annual membership fee, allows them to set the retail price of the apps, and charges a 30% commission on every app sale. Respondents, four iPhone owners, sued Apple, alleging that the company has unlawfully monopolized the aftermarket for iPhone apps. Apple moved to dismiss, arguing that the iPhone owners could not sue because they were not direct purchasers from Apple under *Illinois Brick Co.* v. *Illinois*, 431 U. S. 720. The District Court agreed, but the Ninth Circuit reversed, concluding that the iPhone owners were direct purchasers because they purchased apps directly from Apple.

Held: Under *Illinois Brick*, the iPhone owners were direct purchasers who may sue Apple for alleged monopolization. Pp. 4–14.

(a) This straightforward conclusion follows from the text of the antitrust laws and from this Court's precedent. Section 4 of the Clayton Act provides that "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue." 15 U. S. C. §15(a). That broad text readily covers consumers who purchase goods or services at higher-than-competitive prices from an allegedly monopolistic retailer. Applying §4, this Court has consistently stated that "the immediate buyers from the alleged antitrust violators" may maintain a suit against the antitrust violators, *Kansas* v. *UtiliCorp United Inc.*, 497 U. S. 199, 207, but has ruled that *indirect* purchasers who are two or more steps removed from the violator in a distribution chain may not sue. Unlike the consumer in *Illinois Brick*, the iPhone owners here are not consumers at the bot-

tom of a vertical distribution chain who are attempting to sue manufacturers at the top of the chain. The absence of an intermediary in the distribution chain between Apple and the consumer is dispositive. Pp. 4–7.

(b) Apple argues that *Illinois Brick* allows consumers to sue only the party who sets the retail price, whether or not the party sells the good or service directly to the complaining party. But that theory suffers from three main problems. First, it contradicts statutory text and precedent by requiring the Court to rewrite the rationale of *Illinois Brick* and to gut its longstanding bright-line rule. Any ambiguity in *Illinois Brick* should be resolved in the direction of the statutory text, which states that "any person" injured by an antitrust violation may sue to recover damages. Second, Apple's theory is not persuasive economically or legally. It would draw an arbitrary and unprincipled line among retailers based on their financial arrangements with their manufacturers or suppliers. And it would permit a consumer to sue a monopolistic retailer when the retailer set the retail price by marking up the price it had paid the manufacturer or supplier for the good or service but not when the manufacturer or supplier set the retail price and the retailer took a commission on each sale. Third, Apple's theory would provide a roadmap for monopolistic retailers to structure transactions with manufacturers or suppliers so as to evade antitrust claims by consumers and thereby thwart effective antitrust enforcement. Pp. 7–11.

(c) Contrary to Apple's argument, the three *Illinois Brick* rationales for adopting the direct-purchaser rule cut strongly in respondents' favor. First, Apple posits that allowing only the upstream app developers—and not the downstream consumers—to sue Apple would mean more effective antitrust enforcement. But that makes little sense, and it would directly contradict the longstanding goal of effective private enforcement and consumer protection in antitrust cases. Second, Apple warns that calculating the damages in successful consumer antitrust suits against monopolistic retailers might be complicated. But *Illinois Brick* is not a get-out-of-court-free card for monopolistic retailers to play any time that a damages calculation might be complicated. Third, Apple claims that allowing consumers to sue will result in "conflicting claims to a common fund—the amount of the alleged overcharge." *Illinois Brick*, 431 U. S., at 737. But this is not a case where multiple parties at different levels of a distribution chain are trying to recover the same passed-through overcharge initially levied by the manufacturer at the top of the chain, cf. *id.,* at 726–727. Pp. 11–14.

846 F. 3d 313, affirmed.

KAVANAUGH, J., delivered the opinion of the Court, in which GINSBURG, BREYER, SOTOMAYOR, and KAGAN, JJ., joined. GORSUCH, J., filed a dissenting opinion, in which ROBERTS, C. J., and THOMAS and ALITO, JJ., joined.

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D. C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 17–204

APPLE INC., PETITIONER *v.* ROBERT PEPPER, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

[May 13, 2019]

JUSTICE KAVANAUGH delivered the opinion of the Court.

In 2007, Apple started selling iPhones. The next year, Apple launched the retail App Store, an electronic store where iPhone owners can purchase iPhone applications from Apple. Those "apps" enable iPhone owners to send messages, take photos, watch videos, buy clothes, order food, arrange transportation, purchase concert tickets, donate to charities, and the list goes on. "There's an app for that" has become part of the 21st-century American lexicon.

In this case, however, several consumers contend that Apple charges too much for apps. The consumers argue, in particular, that Apple has monopolized the retail market for the sale of apps and has unlawfully used its monopolistic power to charge consumers higher-than-competitive prices.

A claim that a monopolistic retailer (here, Apple) has used its monopoly to overcharge consumers is a classic antitrust claim. But Apple asserts that the consumer-plaintiffs in this case may not sue Apple because they supposedly were not "direct purchasers" from Apple under our decision in *Illinois Brick Co.* v. *Illinois*, 431 U. S. 720,

745–746 (1977). We disagree. The plaintiffs purchased apps directly from Apple and therefore are direct purchasers under *Illinois Brick*. At this early pleadings stage of the litigation, we do not assess the merits of the plaintiffs' antitrust claims against Apple, nor do we consider any other defenses Apple might have. We merely hold that the *Illinois Brick* direct-purchaser rule does not bar these plaintiffs from suing Apple under the antitrust laws. We affirm the judgment of the U. S. Court of Appeals for the Ninth Circuit.

I

In 2007, Apple began selling iPhones. In July 2008, Apple started the App Store. The App Store now contains about 2 million apps that iPhone owners can download. By contract and through technological limitations, the App Store is the only place where iPhone owners may lawfully buy apps.

For the most part, Apple does not itself create apps. Rather, independent app developers create apps. Those independent app developers then contract with Apple to make the apps available to iPhone owners in the App Store.

Through the App Store, Apple sells the apps directly to iPhone owners. To sell an app in the App Store, app developers must pay Apple a $99 annual membership fee. Apple requires that the retail sales price end in $0.99, but otherwise allows the app developers to set the retail price. Apple keeps 30 percent of the sales price, no matter what the sales price might be. In other words, Apple pockets a 30 percent commission on every app sale.

In 2011, four iPhone owners sued Apple. They allege that Apple has unlawfully monopolized "the iPhone apps aftermarket." App. to Pet. for Cert. 53a. The plaintiffs allege that, via the App Store, Apple locks iPhone owners "into buying apps only from Apple and paying Apple's 30%

fee, even if" the iPhone owners wish "to buy apps elsewhere or pay less." *Id.,* at 45a. According to the complaint, that 30 percent commission is "pure profit" for Apple and, in a competitive environment with other retailers, "Apple would be under considerable pressure to substantially lower its 30% profit margin." *Id.,* at 54a–55a. The plaintiffs allege that in a competitive market, they would be able to "choose between Apple's high-priced App Store and less costly alternatives." *Id.,* at 55a. And they allege that they have "paid more for their iPhone apps than they would have paid in a competitive market." *Id.,* at 53a.

Apple moved to dismiss the complaint, arguing that the iPhone owners were not direct purchasers from Apple and therefore may not sue. In *Illinois Brick*, this Court held that direct purchasers may sue antitrust violators, but also ruled that indirect purchasers may not sue. The District Court agreed with Apple and dismissed the complaint. According to the District Court, the iPhone owners were not direct purchasers from Apple because the app developers, not Apple, set the consumers' purchase price.

The Ninth Circuit reversed. The Ninth Circuit concluded that the iPhone owners were direct purchasers under *Illinois Brick* because the iPhone owners purchased apps directly from Apple. According to the Ninth Circuit, *Illinois Brick* means that a consumer may not sue an alleged monopolist who is two or more steps removed from the consumer in a vertical distribution chain. See *In re Apple iPhone Antitrust Litig.*, 846 F. 3d 313, 323 (2017). Here, however, the consumers purchased directly from Apple, the alleged monopolist. Therefore, the Ninth Circuit held that the iPhone owners could sue Apple for allegedly monopolizing the sale of iPhone apps and charging higher-than-competitive prices. *Id.,* at 324. We granted certiorari. 585 U. S. ___ (2018).

II

A

The plaintiffs' allegations boil down to one straightforward claim: that Apple exercises monopoly power in the retail market for the sale of apps and has unlawfully used its monopoly power to force iPhone owners to pay Apple higher-than-competitive prices for apps. According to the plaintiffs, when iPhone owners want to purchase an app, they have only two options: (1) buy the app from Apple's App Store at a higher-than-competitive price or (2) do not buy the app at all. Any iPhone owners who are dissatisfied with the selection of apps available in the App Store or with the price of the apps available in the App Store are out of luck, or so the plaintiffs allege.

The sole question presented at this early stage of the case is whether these consumers are proper plaintiffs for this kind of antitrust suit—in particular, our precedents ask, whether the consumers were "direct purchasers" from Apple. *Illinois Brick*, 431 U. S., at 745–746. It is undisputed that the iPhone owners bought the apps directly from Apple. Therefore, under *Illinois Brick*, the iPhone owners were direct purchasers who may sue Apple for alleged monopolization.

That straightforward conclusion follows from the text of the antitrust laws and from our precedents.

First is text: Section 2 of the Sherman Act makes it unlawful for any person to "monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations." 26 Stat. 209, 15 U. S. C. §2. Section 4 of the Clayton Act in turn provides that "*any person* who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue . . . the defendant . . . and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee." 38

Stat. 731, 15 U. S. C. §15(a) (emphasis added). The broad text of §4—"any person" who has been "injured" by an antitrust violator may sue—readily covers consumers who purchase goods or services at higher-than-competitive prices from an allegedly monopolistic retailer.

Second is precedent: Applying §4, we have consistently stated that "the immediate buyers from the alleged antitrust violators" may maintain a suit against the antitrust violators. *Kansas* v. *UtiliCorp United Inc.*, 497 U. S. 199, 207 (1990); see also *Illinois Brick*, 431 U. S., at 745–746. At the same time, incorporating principles of proximate cause into §4, we have ruled that *indirect* purchasers who are two or more steps removed from the violator in a distribution chain may not sue. Our decision in *Illinois Brick* established a bright-line rule that authorizes suits by *direct* purchasers but bars suits by *indirect* purchasers. *Id.,* at 746.[1]

The facts of *Illinois Brick* illustrate the rule. Illinois Brick Company manufactured and distributed concrete blocks. Illinois Brick sold the blocks primarily to masonry contractors, and those contractors in turn sold masonry structures to general contractors. Those general contractors in turn sold their services for larger construction projects to the State of Illinois, the ultimate consumer of the blocks.

The consumer State of Illinois sued the manufacturer Illinois Brick. The State alleged that Illinois Brick had engaged in a conspiracy to fix the price of concrete blocks. According to the complaint, the State paid more for the concrete blocks than it would have paid absent the price-fixing conspiracy. The monopoly overcharge allegedly flowed all the way down the distribution chain to the

[1] *Illinois Brick* held that the direct-purchaser requirement applies to claims for damages. *Illinois Brick* did not address injunctive relief, and we likewise do not address injunctive relief in this case.

ultimate consumer, who was the State of Illinois.

This Court ruled that the State could not bring an antitrust action against Illinois Brick, the alleged violator, because the State had not purchased concrete blocks directly from Illinois Brick. The proper plaintiff to bring that claim against Illinois Brick, the Court stated, would be an entity that had purchased directly from Illinois Brick. *Ibid.*

The bright-line rule of *Illinois Brick*, as articulated in that case and as we reiterated in *UtiliCorp*, means that indirect purchasers who are two or more steps removed from the antitrust violator in a distribution chain may not sue. By contrast, direct purchasers—that is, those who are "the immediate buyers from the alleged antitrust violators"—may sue. *UtiliCorp*, 497 U. S., at 207.

For example, if manufacturer A sells to retailer B, and retailer B sells to consumer C, then C may not sue A. But B may sue A if A is an antitrust violator. And C may sue B if B is an antitrust violator. That is the straightforward rule of *Illinois Brick*. See *Loeb Industries, Inc.* v. *Sumitomo Corp.*, 306 F. 3d 469, 481–482 (CA7 2002) (Wood, J.).[2]

In this case, unlike in *Illinois Brick*, the iPhone owners are not consumers at the bottom of a vertical distribution chain who are attempting to sue manufacturers at the top of the chain. There is no intermediary in the distribution chain between Apple and the consumer. The iPhone owners purchase apps directly from the retailer Apple, who is the alleged antitrust violator. The iPhone owners pay the alleged overcharge directly to Apple. The absence of an intermediary is dispositive. Under *Illinois Brick*, the

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[2] Thirty States and the District of Columbia filed an *amicus* brief supporting the plaintiffs, and they argue that C should be able to sue A in that hypothetical. They ask us to overrule *Illinois Brick* to allow such suits. In light of our ruling in favor of the plaintiffs in this case, we have no occasion to consider that argument for overruling *Illinois Brick*.

iPhone owners are direct purchasers from Apple and are proper plaintiffs to maintain this antitrust suit.

B

All of that seems simple enough. But Apple argues strenuously against that seemingly simple conclusion, and we address its arguments carefully. For this kind of retailer case, Apple's theory is that *Illinois Brick* allows consumers to sue only the party who sets the retail price, whether or not that party sells the good or service directly to the complaining party. Apple says that its theory accords with the economics of the transaction. Here, Apple argues that the app developers, not Apple, set the retail price charged to consumers, which according to Apple means that the consumers may not sue Apple.

We see three main problems with Apple's "who sets the price" theory.

First, Apple's theory contradicts statutory text and precedent. As we explained above, the text of §4 broadly affords injured parties a right to sue under the antitrust laws. And our precedent in *Illinois Brick* established a bright-line rule where direct purchasers such as the consumers here may sue antitrust violators from whom they purchased a good or service. *Illinois Brick*, as we read the opinion, was not based on an economic theory about who set the price. Rather, *Illinois Brick* sought to ensure an effective and efficient litigation scheme in antitrust cases. To do so, the Court drew a bright line that allowed direct purchasers to sue but barred indirect purchasers from suing. When there is no intermediary between the purchaser and the antitrust violator, the purchaser may sue. The *Illinois Brick* bright-line rule is grounded on the "belief that simplified administration improves antitrust enforcement." 2A P. Areeda, H. Hovenkamp, R. Blair, & C. Durrance, Antitrust Law ¶346e, p. 194 (4th ed. 2014) (Areeda & Hovenkamp). Apple's theory would require us

to rewrite the rationale of *Illinois Brick* and to gut the longstanding bright-line rule.

To the extent that *Illinois Brick* leaves any ambiguity about whether a direct purchaser may sue an antitrust violator, we should resolve that ambiguity in the direction of the statutory text. And under the text, direct purchasers from monopolistic retailers are proper plaintiffs to sue those retailers.

Second, in addition to deviating from statutory text and precedent, Apple's proposed rule is not persuasive economically or legally. Apple's effort to transform *Illinois Brick* from a direct-purchaser rule to a "who sets the price" rule would draw an arbitrary and unprincipled line among retailers based on retailers' financial arrangements with their manufacturers or suppliers.

In the retail context, the price charged by a retailer to a consumer is often a result (at least in part) of the price charged by the manufacturer or supplier to the retailer, or of negotiations between the manufacturer or supplier and the retailer. Those agreements between manufacturer or supplier and retailer may take myriad forms, including for example a markup pricing model or a commission pricing model. In a traditional markup pricing model, a hypothetical monopolistic retailer might pay $6 to the manufacturer and then sell the product for $10, keeping $4 for itself. In a commission pricing model, the retailer might pay nothing to the manufacturer; agree with the manufacturer that the retailer will sell the product for $10 and keep 40 percent of the sales price; and then sell the product for $10, send $6 back to the manufacturer, and keep $4. In those two different pricing scenarios, everything turns out to be economically the same for the manufacturer, retailer, and consumer.

Yet Apple's proposed rule would allow a consumer to sue the monopolistic retailer in the former situation but not the latter. In other words, under Apple's rule a consumer

could sue a monopolistic retailer when the retailer set the retail price by marking up the price it had paid the manufacturer or supplier for the good or service. But a consumer could not sue a monopolistic retailer when the manufacturer or supplier set the retail price and the retailer took a commission on each sale.

Apple's line-drawing does not make a lot of sense, other than as a way to gerrymander Apple out of this and similar lawsuits. In particular, we fail to see why the form of the upstream arrangement between the manufacturer or supplier and the retailer should determine whether a monopolistic retailer can be sued by a downstream consumer who has purchased a good or service directly from the retailer and has paid a higher-than-competitive price because of the retailer's unlawful monopolistic conduct. As the Court of Appeals aptly stated, "the distinction between a markup and a commission is immaterial." 846 F. 3d, at 324. A leading antitrust treatise likewise states: "Denying standing because 'title' never passes to a broker is an overly lawyered approach that ignores the reality that a distribution system that relies on brokerage is economically indistinguishable from one that relies on purchaser-resellers." 2A Areeda & Hovenkamp ¶345, at 183. If a retailer has engaged in unlawful monopolistic conduct that has caused consumers to pay higher-than-competitive prices, it does not matter how the retailer structured its relationship with an upstream manufacturer or supplier—whether, for example, the retailer employed a markup or kept a commission.

To be sure, if the monopolistic retailer's conduct has not caused the consumer to pay a higher-than-competitive price, then the plaintiff's damages will be zero. Here, for example, if the competitive commission rate were 10 percent rather than 30 percent but Apple could prove that app developers in a 10 percent commission system would always set a higher price such that consumers would pay

the same retail price regardless of whether Apple's commission was 10 percent or 30 percent, then the consumers' damages would presumably be zero. But we cannot assume in all cases—as Apple would necessarily have us do—that a monopolistic retailer who keeps a commission does not ever cause the consumer to pay a higher-than-competitive price. We find no persuasive legal or economic basis for such a blanket assertion.

In short, we do not understand the relevance of the upstream market structure in deciding whether a downstream consumer may sue a monopolistic retailer. Apple's rule would elevate form (what is the precise arrangement between manufacturers or suppliers and retailers?) over substance (is the consumer paying a higher price because of the monopolistic retailer's actions?). If the retailer's unlawful monopolistic conduct caused a consumer to pay the retailer a higher-than-competitive price, the consumer is entitled to sue the retailer under the antitrust laws.

Third, if accepted, Apple's theory would provide a roadmap for monopolistic retailers to structure transactions with manufacturers or suppliers so as to evade antitrust claims by consumers and thereby thwart effective antitrust enforcement.

Consider a traditional supplier-retailer relationship, in which the retailer purchases a product from the supplier and sells the product with a markup to consumers. Under Apple's proposed rule, a retailer, instead of buying the product from the supplier, could arrange to sell the product for the supplier without purchasing it from the supplier. In other words, rather than paying the supplier a certain price for the product and then marking up the price to sell the product to consumers, the retailer could collect the price of the product from consumers and remit only a fraction of that price to the supplier.

That restructuring would allow a monopolistic retailer to insulate itself from antitrust suits by consumers, even

in situations where a monopolistic retailer is using its monopoly to charge higher-than-competitive prices to consumers. We decline to green-light monopolistic retailers to exploit their market position in that way. We refuse to rubber-stamp such a blatant evasion of statutory text and judicial precedent.

In sum, Apple's theory would disregard statutory text and precedent, create an unprincipled and economically senseless distinction among monopolistic retailers, and furnish monopolistic retailers with a how-to guide for evasion of the antitrust laws.

C

In arguing that the Court should transform the direct-purchaser rule into a "who sets the price" rule, Apple insists that the three reasons that the Court identified in *Illinois Brick* for adopting the direct-purchaser rule apply to this case—even though the consumers here (unlike in *Illinois Brick*) were direct purchasers from the alleged monopolist. The *Illinois Brick* Court listed three reasons for barring indirect-purchaser suits: (1) facilitating more effective enforcement of antitrust laws; (2) avoiding complicated damages calculations; and (3) eliminating duplicative damages against antitrust defendants.

As we said in *UtiliCorp*, however, the bright-line rule of *Illinois Brick* means that there is no reason to ask whether the rationales of *Illinois Brick* "apply with equal force" in every individual case. 497 U. S., at 216. We should not engage in "an unwarranted and counterproductive exercise to litigate a series of exceptions." *Id.,* at 217.

But even if we engage with this argument, we conclude that the three *Illinois Brick* rationales—whether considered individually or together—cut strongly in the plaintiffs' favor here, not Apple's.

First, Apple argues that barring the iPhone owners from suing Apple will better promote effective enforcement of

the antitrust laws. Apple posits that allowing only the upstream app developers—and not the downstream consumers—to sue Apple would mean more effective enforcement of the antitrust laws. We do not agree. Leaving consumers at the mercy of monopolistic retailers simply because upstream suppliers could *also* sue the retailers makes little sense and would directly contradict the longstanding goal of effective private enforcement and consumer protection in antitrust cases.

Second, Apple warns that calculating the damages in successful consumer antitrust suits against monopolistic retailers might be complicated. It is true that it may be hard to determine what the retailer would have charged in a competitive market. Expert testimony will often be necessary. But that is hardly unusual in antitrust cases. *Illinois Brick* is not a get-out-of-court-free card for monopolistic retailers to play any time that a damages calculation might be complicated. *Illinois Brick* surely did not wipe out consumer antitrust suits against monopolistic retailers from whom the consumers purchased goods or services at higher-than-competitive prices. Moreover, the damages calculation may be just as complicated in a retailer markup case as it is in a retailer commission case. Yet Apple apparently accepts consumers suing monopolistic retailers in a retailer markup case. If Apple accepts that kind of suit, then Apple should also accept consumers suing monopolistic retailers in a retailer commission case.

Third, Apple claims that allowing consumers to sue will result in "conflicting claims to a common fund—the amount of the alleged overcharge." *Illinois Brick*, 431 U. S., at 737. Apple is incorrect. This is not a case where multiple parties at different levels of a distribution chain are trying to all recover the same passed-through overcharge initially levied by the manufacturer at the top of the chain. Cf. *id.*, at 726–727; *Hanover Shoe, Inc.* v. *United Shoe Machinery Corp.*, 392 U. S. 481, 483–484

(1968). If the iPhone owners prevail, they will be entitled to the *full amount* of the unlawful overcharge that they paid to Apple. The overcharge has not been passed on by anyone to anyone. Unlike in *Illinois Brick*, there will be no need to "trace the effect of the overcharge through each step in the distribution chain." 431 U. S., at 741.

It is true that Apple's alleged anticompetitive conduct may leave Apple subject to multiple suits by different plaintiffs. But *Illinois Brick* did not purport to bar multiple liability that is unrelated to passing an overcharge down a chain of distribution. Basic antitrust law tells us that the "mere fact that an antitrust violation produces two different classes of victims hardly entails that their injuries are duplicative of one another." 2A Areeda & Hovenkamp ¶339d, at 136. Multiple suits are not atypical when the intermediary in a distribution chain is a bottleneck monopolist or monopsonist (or both) between the manufacturer on the one end and the consumer on the other end. A retailer who is both a monopolist and a monopsonist may be liable to different classes of plaintiffs—both to downstream consumers and to upstream suppliers—when the retailer's unlawful conduct affects both the downstream and upstream markets.

Here, some downstream iPhone consumers have sued Apple on a monopoly theory. And it could be that some upstream app developers will also sue Apple on a monopsony theory. In this instance, the two suits would rely on fundamentally different theories of harm and would not assert dueling claims to a "common fund," as that term was used in *Illinois Brick*. The consumers seek damages based on the difference between the price they paid and the competitive price. The app developers would seek lost profits that they could have earned in a competitive retail market. *Illinois Brick* does not bar either category of suit.

In short, the three *Illinois Brick* rationales do not per-

suade us to remake *Illinois Brick* and to bar direct-purchaser suits against monopolistic retailers who employ commissions rather than markups. The plaintiffs seek to hold retailers to account if the retailers engage in unlawful anticompetitive conduct that harms consumers who purchase from those retailers. That is why we have antitrust law.

* * *

Ever since Congress overwhelmingly passed and President Benjamin Harrison signed the Sherman Act in 1890, "protecting consumers from monopoly prices" has been "the central concern of antitrust." 2A Areeda & Hovenkamp ¶345, at 179. The consumers here purchased apps directly from Apple, and they allege that Apple used its monopoly power over the retail apps market to charge higher-than-competitive prices. Our decision in *Illinois Brick* does not bar the consumers from suing Apple for Apple's allegedly monopolistic conduct. We affirm the judgment of the U. S. Court of Appeals for the Ninth Circuit.

It is so ordered.

SUPREME COURT OF THE UNITED STATES

No. 17–204

APPLE INC., PETITIONER *v.* ROBERT PEPPER, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

[May 13, 2019]

JUSTICE GORSUCH, with whom THE CHIEF JUSTICE, JUSTICE THOMAS, and JUSTICE ALITO join, dissenting.

More than 40 years ago, in *Illinois Brick Co.* v. *Illinois*, 431 U. S. 720 (1977), this Court held that an antitrust plaintiff can't sue a defendant for overcharging *someone else* who might (or might not) have passed on all (or some) of the overcharge to him. *Illinois Brick* held that these convoluted "pass on" theories of damages violate traditional principles of proximate causation and that the right plaintiff to bring suit is the one on whom the overcharge immediately and surely fell. Yet today the Court lets a pass-on case proceed. It does so by recasting *Illinois Brick* as a rule forbidding only suits where the plaintiff does not contract directly with the defendant. This replaces a rule of proximate cause and economic reality with an easily manipulated and formalistic rule of contractual privity. That's not how antitrust law is supposed to work, and it's an uncharitable way of treating a precedent which—whatever its flaws—is far more sensible than the rule the Court installs in its place.

I

To understand *Illinois Brick*, it helps to start with the case that paved the way for that decision: *Hanover Shoe, Inc.* v. *United Shoe Machinery Corp.*, 392 U. S. 481 (1968). Hanover sued United, a company that supplied machinery

Hanover used to make shoes. Hanover alleged that United's illegal monopoly in the shoe-making-machinery market had allowed it to charge supracompetitive prices. As damages, Hanover sought to recover the amount it had overpaid United for machinery. United replied that Hanover hadn't been damaged at all because, United asserted, Hanover had not absorbed the supposedly "illegal overcharge" but had "passed the cost on to its customers" by raising the prices it charged for shoes. *Id.*, at 487–488, and n. 6. This Court called United's argument a "'passing-on' defense" because it suggested that a court should consider whether an antitrust plaintiff had "passed on" the defendant's overcharge to its own customers when assessing if and to what degree the plaintiff was injured by the defendant's anticompetitive conduct. *Id.*, at 488.

This Court rejected that defense. While §4 of the Clayton Act allows private suits for those injured by antitrust violations, we have long interpreted this language against the backdrop of the common law. See, *e.g.*, *Associated Gen. Contractors of Cal., Inc.* v. *Carpenters*, 459 U. S. 519, 529–531 (1983). And under ancient rules of proximate causation, the "'general tendency of the law, in regard to damages at least, is not to go beyond the first step.'" *Hanover Shoe*, 392 U. S., at 490, n. 8 (quoting *Southern Pacific Co.* v. *Darnell-Taenzer Lumber Co.*, 245 U. S. 531, 533 (1918)). In *Hanover Shoe*, the first step was United's overcharging of Hanover. To proceed beyond that and inquire whether Hanover had passed on the overcharge to its customers, the Court held, would risk the sort of problems traditional principles of proximate cause were designed to avoid. "[N]early insuperable" questions would follow about whether Hanover had the capacity and incentive to pass on to its customers in the shoe-making market United's alleged monopoly rent from the separate shoe-making-machinery market. 392 U. S., at 493. Resolving those questions would, in turn, necessitate a trial within a

trial about Hanover's power and conduct in its own market, with the attendant risk that proceedings would become "long and complicated" and would "involv[e] massive evidence and complicated theories." *Ibid.*

Illinois Brick was just the other side of the coin. With *Hanover Shoe* having held that an antitrust *defendant* could not rely on a pass-on theory to avoid damages, *Illinois Brick* addressed whether an antitrust *plaintiff* could rely on a pass-on theory to recover damages. The State of Illinois had sued several manufacturers of concrete blocks, alleging that the defendants' price-fixing conspiracy had enabled them to overcharge building contractors, who in turn had passed on those charges to their customers, including the State. Recognizing that *Hanover Shoe* had already prohibited antitrust violators from using a "pass-on theory" defensively, the Court declined to "permit offensive use of a pass-on theory against an alleged violator that could not use the same theory as a defense." 431 U. S., at 735. "Permitting the use of pass-on theories under §4," the Court reasoned, would require determining how much of the manufacturer's monopoly rent was absorbed by intermediary building contractors and how much they were able and chose to pass on to their customers like the State. *Id.*, at 737. Allowing pass-on theories would, as well, allow "plaintiffs at each level in the distribution chain" to "assert conflicting claims to a common fund," which would require "massive efforts to apportion the recovery among all potential plaintiffs that could have absorbed part of the overcharge—from direct purchasers to middlemen to ultimate consumers." *Ibid.* Better again, the Court decided, to adhere to traditional rules of proximate causation and allow only the first affected customers—the building contractors—to sue for the monopoly rents they had directly paid.

There is nothing surprising in any of this. Unless Congress provides otherwise, this Court generally reads statu-

tory causes of action as "limited to plaintiffs whose injuries are proximately caused by violations of the statute." *Lexmark Int'l, Inc.* v. *Static Control Components, Inc.*, 572 U. S. 118, 132 (2014). That proximate cause requirement typically bars suits for injuries that are "derivative of misfortunes visited upon a third person by the defendant's acts." *Id.*, at 133 (internal quotation marks omitted). So, for example, if a defendant's false advertising causes harm to one of its competitors, the competitor can sue the false advertiser under the Lanham Act. But if the competitor is unable to pay its rent as a result, the competitor's landlord can't sue the false advertiser, because the landlord's harm derives from the harm to the competitor. *Id.*, at 134; see also, *e.g.*, *Bank of America Corp.* v. *Miami*, 581 U. S. ___, ___–___ (2017) (slip op., at 10–11); *Dura Pharmaceuticals, Inc.* v. *Broudo*, 544 U. S. 336, 346 (2005); *Holmes* v. *Securities Investor Protection Corporation*, 503 U. S. 258, 268–270 (1992). This Court has long understood *Illinois Brick* as simply applying these traditional proximate cause principles in the antitrust context. See *Associated Gen. Contractors*, 459 U. S., at 532–535, 544–545.[1]

II

The lawsuit before us depends on just the sort of pass-on theory that *Illinois Brick* forbids. The plaintiffs bought apps from third-party app developers (or manufacturers) in Apple's retail Internet App Store, at prices set by the developers. The lawsuit alleges that Apple is a monopolist

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[1] For this reason, it's hard to make sense of the suggestion that *Illinois Brick* may not apply to claims for injunctive relief, *ante*, at 5, n. 1. Under our normal rule of construction, a plaintiff who's not proximately harmed by a defendant's unlawful conduct has no cause of action to sue the defendant for any type of relief. *Lexmark Int'l, Inc.* v. *Static Control Components, Inc.*, 572 U. S. 118, 135 (2014) (although a plaintiff that "cannot quantify its losses with sufficient certainty to recover damages . . . may still be entitled to injunctive relief," the requirement of proximate causation "must be met in every case").

retailer and that the 30% commission it charges developers for the right to sell through its platform represents an anticompetitive price. The problem is that the 30% commission falls initially on the developers. So if the commission is in fact a monopolistic overcharge, the *developers* are the parties who are directly injured by it. Plaintiffs can be injured *only* if the developers are able and choose to pass on the overcharge to them in the form of higher app prices that the developers alone control. Plaintiffs admitted as much in the district court, where they described their theory of injury this way: "[I]f Apple tells the developer . . . we're going to take this 30 percent commission . . . what's the developer going to do? The developer is going to increase its price to cover Apple's . . . demanded profit." App. 143.

Because this is *exactly* the kind of "pass-on theory" *Illinois Brick* rejected, it should come as no surprise that the concerns animating that decision are also implicated. Like other pass-on theories, plaintiffs' theory will necessitate a complex inquiry into how Apple's conduct affected third-party pricing decisions. And it will raise difficult questions about apportionment of damages between app developers and their customers, along with the risk of duplicative damages awards. If anything, plaintiffs' claims present these difficulties even more starkly than did the claims at issue in *Illinois Brick*.

Consider first the question of causation. To determine if Apple's conduct damaged plaintiffs at all (and if so, the magnitude of their damages), a court will first have to explore whether and to what extent each individual app developer was able—and then opted—to pass on the 30% commission to its consumers in the form of higher app prices. Sorting this out, if it can be done at all, will entail wrestling with "'complicated theories'" about "how the relevant market variables would have behaved had there been no overcharge." *Illinois Brick*, 431 U. S., at 741–743.

Will the court hear testimony to determine the market power of each app developer, how each set its prices, and what it might have charged consumers for apps if Apple's commission had been lower? Will the court also consider expert testimony analyzing how market factors might have influenced developers' capacity and willingness to pass on Apple's alleged monopoly overcharge? And will the court then somehow extrapolate its findings to all of the tens of thousands of developers who sold apps through the App Store at different prices and times over the course of years?

This causation inquiry will be complicated further by Apple's requirement that all app prices end in $0.99. As plaintiffs acknowledge, this rule has caused prices for the "vast majority" of apps to "cluster" at exactly $0.99. Brief for Respondents 44. And a developer charging $0.99 for its app can't raise its price by just enough to recover the 30-cent commission. Instead, if the developer wants to pass on the commission to consumers, it has to more than double its price to $1.99 (doubling the commission in the process), which could significantly affect its sales. In short, because Apple's 99-cent rule creates a strong disincentive for developers to raise their prices, it makes plaintiffs' pass-on theory of injury even harder to prove. Yet the court will have to consider all of this when determining what damages, if any, plaintiffs suffered as a result of Apple's allegedly excessive 30% commission.[2]

Plaintiffs' claims will also necessitate "massive efforts to apportion the recovery among all potential plaintiffs that

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[2] Plaintiffs haven't argued (and so have forfeited in this Court any argument) that Apple's imposition of the 99-cent rule was *itself* an antitrust violation that injured consumers by raising the price of apps above competitive levels. They didn't mention the 99-cent rule in their complaint in district court or in their briefs to the court of appeals. And, as I've noted, they concede that they are seeking damages "based solely on" the 30% commission. Brief in Opposition 5.

could have absorbed part of the overcharge," including both consumers and app developers. *Illinois Brick*, 431 U. S., at 737. If, as plaintiffs contend, Apple's 30% commission is a monopolistic overcharge, then the app developers have a claim against Apple to recover whatever portion of the commission they did not pass on to consumers. Before today, *Hanover Shoe* would have prevented Apple from reducing its liability to the developers by arguing that they had passed on the overcharge to consumers. But the Court's holding that *Illinois Brick* doesn't govern this situation surely must mean *Hanover Shoe* doesn't either. So courts will have to divvy up the commissions Apple collected between the developers and the consumers. To do that, they'll have to figure out which party bore what portion of the overcharge in every purchase. And if the developers bring suit separately from the consumers, Apple might be at risk of duplicative damages awards totaling more than the full amount it collected in commissions. To avoid that possibility, it may turn out that the developers are necessary parties who will have to be joined in the plaintiffs' lawsuit. See Fed. Rule Civ. Proc. 19(a)(1)(B); *Illinois Brick*, 431 U. S., at 739 (explaining that "[t]hese absent potential claimants would seem to fit the classic definition of 'necessary parties,' for purposes of compulsory joinder").[3]

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[3] The Court denies that allowing both consumers and developers to sue over the same allegedly unlawful commission will "result in 'conflicting claims to a common fund'" as *Illinois Brick* feared. *Ante*, at 12. But Apple charged only one commission on each sale. So even assuming for argument's sake that the 30% commission was entirely illegal, Apple can only be required to pay out in damages, at most, the full amount it received in commissions. To their credit, even plaintiffs have conceded as much, acknowledging that because "there is only *one 30% markup*," any claim by the developers against Apple would necessarily be seeking "a piece of the same 30% pie." Brief in Opposition 12. It's a mystery why the Court refuses to accept that sensible concession.

III

The United States and its antitrust regulators agree with all of this, so how does the Court reach such a different conclusion? Seizing on *Illinois Brick*'s use of the shorthand phrase "direct purchasers" to describe the parties immediately injured by the monopoly overcharge in that case, the Court (re)characterizes *Illinois Brick* as a rule that anyone who purchases goods directly from an alleged antitrust violator can sue, while anyone who doesn't, can't. Under this revisionist version of *Illinois Brick*, the dispositive question becomes whether an "intermediary in the distribution chain" stands between the plaintiff and the defendant. *Ante*, at 6. And because the plaintiff app purchasers in this case happen to have purchased apps directly from Apple, the Court reasons, they may sue.

This exalts form over substance. Instead of focusing on the traditional proximate cause question where the alleged overcharge is first (and thus surely) felt, the Court's test turns on who happens to be in privity of contract with whom. But we've long recognized that antitrust law should look at "the economic reality of the relevant transactions" rather than "formal conceptions of contract law." *United States* v. *Concentrated Phosphate Export Assn., Inc.*, 393 U. S. 199, 208 (1968). And this case illustrates why. To evade the Court's test, all Apple must do is amend its contracts. Instead of collecting payments for apps sold in the App Store and remitting the balance (less its commission) to developers, Apple can simply specify that consumers' payments will flow the other way: directly to the developers, who will then remit commissions to Apple. No antitrust reason exists to treat these contractual arrangements differently, and doing so will only induce firms to abandon their preferred—and presumably more efficient—distribution arrangements in favor of less efficient ones, all so they might avoid an arbitrary legal

rule. See *Copperweld Corp.* v. *Independence Tube Corp.*, 467 U. S. 752, 763, 772–774 (1984) (rejecting an "'artificial distinction'" that "serves no valid antitrust goals but merely deprives consumers and producers of the benefits" of a particular business model).

Nor does *Illinois Brick* come close to endorsing such a blind formalism. Yes, as the Court notes, the plaintiff in *Illinois Brick* did contract directly with an intermediary rather than with the putative antitrust violator. But *Illinois Brick*'s rejection of pass-on claims, and its explanation of the difficulties those claims present, had nothing to do with privity of contract. Instead and as we have seen, its rule and reasoning grew from the "general tendency of the law . . . not to go beyond" the party that first felt the sting of the alleged overcharge, and from the complications that can arise when courts attempt to discern whether and to what degree damages were passed on to others. *Supra*, at 2–3. The Court today risks replacing a cogent rule about proximate cause with a pointless and easily evaded imposter. We do not usually read our own precedents so uncharitably.

Maybe the Court proceeds as it does today because it just disagrees with *Illinois Brick*. After all, the Court not only displaces a sensible rule in favor of a senseless one; it also proceeds to question each of *Illinois Brick*'s rationales—doubting that those directly injured are always the best plaintiffs to bring suit, that calculating damages for pass-on plaintiffs will often be unduly complicated, and that conflicting claims to a common fund justify limiting who may sue. *Ante*, at 11–13. The Court even tells us that any "ambiguity" about the permissibility of pass-on damages should be resolved "in the direction of the statutory text," *ante*, at 8—ignoring that *Illinois Brick* followed the well-trodden path of construing the statutory text in light of background common law principles of proximate cause. Last but not least, the Court suggests that the

traditional understanding of *Illinois Brick* leads to "arbitrary and unprincipled" results. *Ante*, at 8. It asks us to consider two hypothetical scenarios that, it says, prove the point. The first is a "markup" scenario in which a monopolistic retailer buys a product from a manufacturer for $6 and then decides to sell the product to a consumer for $10, applying a supracompetitive $4 markup. The second is a "commission" scenario in which a manufacturer directs a monopolistic retailer to sell the manufacturer's product to a consumer for $10 and the retailer keeps a supracompetitive 40% commission, sending $6 back to the manufacturer. The two scenarios are economically the same, the Court asserts, and forbidding recovery in the second for lack of proximate cause makes no sense.

But there is nothing arbitrary or unprincipled about *Illinois Brick*'s rule or results. The notion that the causal chain must stop somewhere is an ancient and venerable one. As with most any rule of proximate cause, reasonable people can debate whether *Illinois Brick* drew exactly the right line in cutting off claims where it did. But the line it drew is intelligible, principled, administrable, and far more reasonable than the Court's artificial rule of contractual privity. Nor do the Court's hypotheticals come close to proving otherwise. In the first scenario, the markup falls initially on the consumer, so there's no doubt that the retailer's anticompetitive conduct proximately caused the consumer's injury. Meanwhile, in the second scenario the commission falls initially on the manufacturer, and the consumer won't feel the pain unless the manufacturer can and does recoup some or all of the elevated commission by raising its own prices. In *that* situation, the manufacturer is the directly injured party, and the difficulty of disaggregating damages between those directly and indirectly harmed means that the consumer can't establish proximate cause under traditional principles.

Some *amici* share the Court's skepticism of *Illinois*

Brick. They even urge us to overrule *Illinois Brick*, assuring us that "modern economic techniques" can now mitigate any problems that arise in allocating damages between those who suffer them directly and those who suffer them indirectly. Brief for State of Texas et al. as *Amici Curiae* 25. Maybe there is something to these arguments; maybe not. But there's plenty of reason to decline any invitation to take even a small step away from *Illinois Brick* today. The plaintiffs have not asked us to overrule our precedent—in fact, they've disavowed any such request. Tr. of Oral Arg. 40. So we lack the benefit of the adversarial process in a complex area involving a 40-year-old precedent and many hard questions. For example, if we are really inclined to overrule *Illinois Brick*, doesn't that mean we must do the same to *Hanover Shoe*? If the proximate cause line is no longer to be drawn at the first injured party, how far down the causal chain can a plaintiff be and still recoup damages? Must all potential claimants to the single monopoly rent be gathered in a single lawsuit as necessary parties (and if not, why not)? Without any invitation or reason to revisit our precedent, and with so many grounds for caution, I would have thought the proper course today would have been to afford *Illinois Brick* full effect, not to begin whittling it away to a bare formalism. I respectfully dissent.

RECOMMENDED FOR FULL-TEXT PUBLICATION
Pursuant to Sixth Circuit I.O.P. 32.1(b)

File Name: 19a0085p.06

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

JAMES HUFF, individually and on behalf of all others similarly situated,

Plaintiff-Appellant,

v.

TELECHECK SERVICES, INC.; TELECHECK INTERNATIONAL, INC.; FIRST DATA CORPORATION,

Defendants-Appellees.

No. 18-5438

Appeal from the United States District Court
for the Middle District of Tennessee at Nashville.
No. 3:14-cv-01832—Samuel H. Mays, Jr., District Judge.

Argued: December 6, 2018

Decided and Filed: May 3, 2019

Before: BATCHELDER, SUTTON, and WHITE, Circuit Judges.

COUNSEL

ARGUED: Martin D. Holmes, DICKINSON WRIGHT PLLC, Nashville, Tennessee, for Appellant. David R. Esquivel, BASS, BERRY & SIMS PLC, Nashville, Tennessee, for Appellees. **ON BRIEF:** Martin D. Holmes, DICKINSON WRIGHT PLLC, Nashville, Tennessee, Scott A. Petz, Alma Sobo, DICKINSON WRIGHT PLLC, Troy, Michigan, for Appellant. David R. Esquivel, Jeffrey P. Yarbro, Margaret V. Dodson, BASS, BERRY & SIMS PLC, Nashville, Tennessee, for Appellees.

SUTTON, J., delivered the opinion of the court in which BATCHELDER, J., joined. WHITE, J. (pp. 15–18), delivered a separate dissenting opinion.

OPINION

SUTTON, Circuit Judge. This case deals with a fading technology (checks) and an evergreen imperative (Article III standing). When a customer buys something with a check, merchants often consult a check verification company to determine whether to accept the check. Invoking his rights under the Fair Credit Reporting Act, James Huff requested a copy of his file from a check verification company called TeleCheck. The report omitted that his driver's license was linked to six different bank accounts and omitted two transactions that occurred on those accounts. Huff filed this lawsuit under the Act. Because Huff has not shown that the incomplete report injured him in any way, we affirm the district court's dismissal of his case for lack of standing.

I.

When a retail consumer offers a check to a merchant, the customer usually provides a form of identification such as a driver's license. The merchant often takes the bank account number on the check and the driver's license number, called identifiers, and sends them to companies like TeleCheck. TeleCheck runs each identifier through its system. If one of the identifiers has a debt on file, TeleCheck sends the merchant a "Code 4"—what the industry calls a negative decline. If there is not a debt on file, TeleCheck examines the customer's check-writing history to determine whether to send a "Code 3"—what the industry calls a risk-based decline. If TeleCheck recommends a decline, the merchant refuses the customer's check. If there are no debts on file and the customer presents a low risk, TeleCheck approves the transaction, and the merchant accepts the check.

When a customer presents two identifiers in a transaction, TeleCheck records a link between the identifiers in its system. If in a later transaction a customer uses only one of those identifiers, TeleCheck recommends a Code 4 decline if there is a debt associated with the presented identifier *or* the linked identifier. Say a customer presents his driver's license along with a check to buy milk. That links his license number and the account number on the check in

TeleCheck's system. Then the customer bounces a check on the same account. Now, when the customer tries to buy eggs with a check from a different account and presents his license, TeleCheck will see that an identifier linked to the license—the bad bank account—shows a debt, and it will issue a Code 4 decline. By contrast, linked identifiers play no role in TeleCheck's Code 3 decline recommendations.

James Huff often pays by check. Inspired by a legal services advertisement, Huff requested a copy of his file from TeleCheck under the Fair Credit Reporting Act. 15 U.S.C. § 1681g(a)(1). Huff provided TeleCheck with only a copy of his driver's license. As a result, the report contained only the 23 transactions in which he presented his license during the past year. But the report also told Huff that TeleCheck had more information. A bolded disclaimer at the bottom of the report read: "Linked Data: Your record is linked to information not included in this report, subject to identity verification prior to disclosure. Please contact TeleCheck at 1-800-366-1435 to verify Monday-Friday 830am-430pm CST." R. 78-6 at 3.

Huff did not call. He sued.

Huff's driver's license as it happens contains links to six different bank accounts: his own account, his wife's account, and four accounts that haven't been used for years. The accounts were linked because Huff had presented his license in transactions alongside checks from each of the accounts. In addition to leaving off the linked accounts, the report did not reveal two checks from those accounts over the past year that were not presented with Huff's license. One of the checks was from Huff's own account, and one was from his wife's.

TeleCheck has never told a merchant to decline one of Huff's checks due to his linked information.

After discovery, Huff moved for class certification, and TeleCheck moved for summary judgment based on lack of standing. The district court dismissed the case because Huff lacked standing to bring it.

II.

Article III of the United States Constitution limits the "judicial Power" of the federal courts to deciding "Cases" and "Controversies." U.S. Const. art. III, § 2. That limitation checks the power of the judicial branch by confining it to resolving concrete disputes, *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016), and checks the power of the legislative branch by prohibiting it from using the Judiciary as an adjunct to its own powers, *see Hagy v. Demers & Adams*, 882 F.3d 616, 623 (6th Cir. 2018). To protect the vital, but limited all the same, role of the Judiciary in our system of government, the Constitution makes standing an indispensable ingredient of a judicial dispute.

To establish standing, Huff had to show three things: (1) that he suffered an injury, (2) caused by TeleCheck, (3) that a judicial decision could redress. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992). The burden of establishing standing rests with Huff, and he must provide the allegations or evidence required at each stage of the litigation. *Id.* at 561. At summary judgment, the current stage of this litigation, Huff cannot rely on allegations alone but must set forth evidence demonstrating his standing.

This case turns on the "[f]irst and foremost" prong of that inquiry, injury in fact. *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 103 (1998). An injury in fact must be real, not abstract, actual, not theoretical, concrete, not amorphous. *Spokeo*, 136 S. Ct. at 1548.

Before turning to Huff's efforts to satisfy this requirement, it is well to keep in mind a distinction that's easy to miss in this area. There is a difference between failing to establish the elements of a cause of action and failing to show an Article III injury. One is a failure of proof. The other is a failure of jurisdiction. Yes, there can be overlap between the two inquiries. But they are not one and the same.

Consider the distinction from this vantage point. The Fair Credit Reporting Act creates a cause of action that has three elements: (1) duty—a consumer agency must disclose "[a]ll information in the consumer's file" upon request; (2) breach of duty—any consumer agency that fails to meet this requirement is liable to the affected individual; and (3) damages—the affected

individual may recover $100 to $1000 for each willful violation. 15 U.S.C. § 1681g(a)(1); *see id.* § 1681n(a)(1)(A).

In one way, Huff does not have a problem in establishing injury. In answering TeleCheck's motion for summary judgment, Huff went beyond mere allegations and tried to provide proof of each required element—including proof of a breach of duty that creates a statutory injury—of the cause of action. If he provided evidence checking each of these boxes, that indeed satisfies the requirements under the statute and indeed satisfies his burden of proof at this stage of the case when it comes to the elements of the cause of action.

But that leaves a different question: Does Congress have authority to label this violation of the statutory duty an Article III injury when it comes to Huff? After *Spokeo*, we know there is no such thing as an "anything-hurts-so-long-as-Congress-says-it-hurts theory of Article III injury." *Hagy*, 882 F.3d at 622. That requires us to assess whether enforcement of this cause of action, as invoked by Huff and as applied to Huff, exceeds Congress's power.

We see three ways in which Huff potentially could satisfy Article III with this cause of action. One, the statutory violation created an injury in fact as applied to him because it actually injured him when the violation led, say, to a check decline. Two, the statutory violation did not injure him in any traditional way, but the risk of injury was so imminent that it satisfies Article III. Three, the statutory violation did not create an injury in any traditional sense, but Congress had authority to establish the injury in view of its identification of meaningful risks of harm in this area. Each possibility deserves its turn.

1. *Actual injury as applied to Huff?* Huff's lawsuit does not satisfy the first option. He does not allege, much less prove, harm in the flesh-and-blood or dollars-and-cents sense of the term. By way of examples: He does not claim that TeleCheck's conduct caused a declined check or a denied rental application. He does not suggest that he wasted time or suffered emotional distress while looking for his linked information. He does not contend that he would have done anything with the missing information had he received it—say, by adjusting his spending habits. All in all, Huff acknowledges that TeleCheck's incomplete report did not "have any effect on [him] whatsoever." R. 78-2 at 25.

2. *Risk of imminent injury as applied to Huff?* The second option does not work either. The record evidence does not show that TeleCheck created a risk that Huff would suffer a check decline—or any other harm covered by the statute—based on the checking activities of the linked accounts. Quite the opposite on this record.

A material risk of harm, it is true, may establish standing. *Spokeo*, 136 S. Ct. at 1549. But the "threatened injury must be *certainly impending* to constitute injury in fact." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 409 (2013) (quotation omitted); *see Soehlen v. Fleet Owners Ins. Fund*, 844 F.3d 576, 585 (6th Cir. 2017).

The risk that TeleCheck's incomplete disclosure would cause Huff to suffer a check decline was highly speculative. Four of the linked accounts (whose precise connection to Huff the record does not reveal) were last used between 2008 and 2010, making it a virtual certainty that no one would write a bad check on them today. One of the other linked accounts was Huff's personal account, meaning he could not blame TeleCheck's nondisclosure if he bounced a check on it. The remaining account belonged to Huff's wife. For Huff to suffer a check decline based on her account, his wife would have to bounce a check with a TeleCheck merchant, the merchant would have to report the debt to TeleCheck, Huff's wife would have to leave the debt unresolved, and Huff would have to try to use a check at a TeleCheck merchant while presenting his driver's license. The odds of that happening are remote. The inescapable truth is that Huff has not suffered a check decline in the five years since he requested his file from TeleCheck.

The question, bear in mind, is not whether Huff faces some risk of a check decline in general but what additional risk of harm stems from TeleCheck's nondisclosure of Huff's information. *See Macy v. GC Servs. Ltd.*, 897 F.3d 747, 758 (6th Cir. 2018) (risk of harm must stem from the procedural violation). That means we have to ask about the difference between what Huff would have done with a report containing the linked information and what he did with the report he received. Huff offers no evidence that, had he received what he wanted, he would have tried to delink any accounts from his driver's license. Nor has he done so since acquiring that information. Full disclosure by TeleCheck, in short, would not have reduced the risk a merchant would decline Huff's check.

Now that Huff has all the information he wants, any remaining risk of a check decline flows from his failure to delink the accounts, not TeleCheck's failure to disclose them in the first instance. Because Huff has the power to eliminate any lingering risk of a check decline based on a wrongly linked account, his risk of harm does not amount to a concrete injury caused by TeleCheck. *See Bassett v. ABM Parking Servs., Inc.*, 883 F.3d 776, 783 (9th Cir. 2018).

Don't forget one last point. TeleCheck alleviated any risk of harm by including the linked data disclaimer. The disclaimer warned Huff that his "record is linked to information not included in this report" and instructed him to call to get his information. R. 78-6 at 3. Had he done so, Huff could have learned which accounts TeleCheck linked him to, determined if TeleCheck linked him to any accounts mistakenly, and asked TeleCheck to delete any inappropriate links. Courts assess injuries caused by the deprivation of information based not only on the information the consumer agency fails to provide but also on the information it does provide. *Dreher v. Experian Info. Sols., Inc.*, 856 F.3d 337, 346 (4th Cir. 2017). Because TeleCheck enabled, indeed encouraged, Huff to access all the information he sought, its failure to disclose the information created only a negligible risk that Huff would suffer a check decline.

3. *Statutory violation as intangible injury in fact?* In the absence of a tangible injury or material risk of harm, Huff offers a different theory of injury: a statutory violation that created a procedural or intangible injury. TeleCheck's failure to provide him with his linked accounts and the two missing transactions, he says, violated the Fair Credit Reporting Act. The Act creates a duty—that a consumer agency must disclose "[a]ll information in the consumer's file" upon request—and consequences for breaching that duty. 15 U.S.C. § 1681g(a)(1). And Huff has provided evidence of a breach of that duty. That's all it takes, as Huff sees it, to create a cognizable Article III injury.

Huff is right and wrong.

Huff is right that intangible injuries premised on statutory violations in some instances may satisfy Article III's injury-in-fact requirement. *Spokeo*, 136 S. Ct. at 1549. Historical practice and the judgment of Congress help to determine whether an intangible injury provides Article III standing. *Id.* Congress's judgment is "instructive and important," *id.*, and it has some

authority "to define injuries and articulate chains of causation," *Lujan*, 504 U.S. at 580 (Kennedy, J., concurring in part and concurring in the judgment). When Congress confers a procedural right to protect a plaintiff's concrete interests, a violation of that right may establish the requisite injury in fact. *See Macy*, 897 F.3d at 756.

Huff is wrong that Congress's authority to create Article III injuries has no boundaries, save limits to congressional imagination or congressional self-restraint. Separation-of-powers considerations preserve an outer limit on Congress's authority. "Article III standing requires a concrete injury even in the context of a statutory violation." *Spokeo*, 136 S. Ct. at 1549; *see Lyshe v. Levy*, 854 F.3d 855, 858 (6th Cir. 2017); *Wall v. Mich. Rental*, 852 F.3d 492, 495 (6th Cir. 2017). If a claimant has not suffered a genuine harm or risk of harm, a federal court has no business entertaining his lawsuit. Congress cannot conjure standing by declaring something harmful that is not, by saying anything causes injury because the legislature says it causes injury. *Hagy*, 882 F.3d at 622. A difference remains between injury in law and injury in fact. Otherwise Congress (or a state legislature) could create injuries in law that require the federal courts to issue advisory opinions.

As is sometimes the case with tricky legal problems, the border between what Congress may do in creating cognizable intangible injuries and what it may not do remains elusive. The Maginot Line comes to mind as a metaphor for our efforts. But that's only because the federal courts have frequently allowed Congress to create intangible injuries in the first place, often for legitimate reasons. Still, the federal courts must preserve a line, some line. Else Congress becomes the author of the limitations on its own power, a problem of greater magnitude. *Cf. Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

Huff's claim falls on the wrong side of this line. A few cases help to explain why, each involving a statutory violation—and statutory injury—that did not necessarily result in standing. Start with *Spokeo v. Robins*. 136 S. Ct. 1540 (2016). In that case, the Supreme Court noted that Congress enacted the Fair Credit Reporting Act to curb the dissemination of false information. *Id.* at 1550. But it recognized that a violation of the law that results in the dissemination of an objectively false report does not necessarily cause a concrete harm if the disclosure has no

consequences for the consumer. *Id.* "[A] bare procedural violation," such as the dissemination of an incorrect zip code, would not work a concrete harm for purposes of Article III. *Id.*

Hagy v. Demers & Adams respected that principle and elaborated on how it works. 882 F.3d 616 (6th Cir. 2018). A creditor sent a letter to the lawyer of two debtors and allegedly violated the Fair Debt Collection Practices Act by failing to disclose that it came from a debt collector. *Id.* at 619. Even if that action violated the Act, we held, the debtors lacked standing because they could not point to any negative consequences, whether immediately or imminently, caused by the violation. *Id.* at 622.

The Fourth Circuit looked at the problem the same way in a case arising under the Fair Credit Reporting Act, the same law at issue here. *Dreher*, 856 F.3d at 340. A consumer requested and received his file from a credit agency under § 1681g. *Id.* The report did not name the correct source of information about one of his debts, as required by the Act, listing the name of the debt's original (but not current) owner. *Id.* at 341. But the contact information in the report connected the consumer to the right creditor all the same. *Id.* Because the procedurally inadequate report did not "adversely affect[] [the consumer's] conduct in any way," the court found that the statutory violation did not harm the consumer's interests under the Act. *Id.* at 347.

All three cases lead to the same destination. TeleCheck's alleged statutory violation did not harm Huff's interests under the Fair Credit Reporting Act because it had no adverse consequences. In TeleCheck's system, linked accounts play a role only when one of the accounts lists an active debt. None of the six accounts linked to Huff's driver's license has ever been associated with an outstanding debt. That means the "linked data never affected, altered, or influenced a single consumer report on [Huff]." R. 81 at 4. By omitting the linked accounts and the missing transactions, TeleCheck at most prevented Huff from delinking those accounts from his driver's license. But because the undisclosed information was irrelevant to any credit assessment about Huff, delinking the accounts would not have had any effect.

Behind all of this stands an important principle. Although Congress wields broad authority to define injuries, it does not have a blank check. *Hagy*, 882 F.3d at 623. Any other conclusion would give Congress the final say over the injury-in-fact limitations in Article III, an

outcome inconsistent with the architecture of the Constitution. The Framers feared an overweening Congress, "every where extending the sphere of its activity, and drawing all power into its impetuous vortex." *The Federalist* No. 48, at 241 (James Madison) (Terence Ball ed., 2003). To fend off that possibility, they erected structural safeguards throughout the National Charter. The horizontal separation of powers prevents Congress from flattening Article III's limitations by defining harmless procedural violations—or for that matter anything at all—as injuries in fact. *See Hagy*, 882 F.3d at 623.

All of this still leaves Congress with plenty of power to define and create intangible injuries. It just has to explain itself in a way it never did here. In the absence of an explanation of how a seemingly harmless procedural violation constitutes a real injury, we are left with a canyon-sized gap between Congress's authority and the problem it seeks to resolve.

Two analogies come to mind.

One comes from *United States v. Lopez*. 514 U.S. 549 (1995). The Supreme Court invalidated a federal law banning firearms within a certain distance of any school on the ground that it exceeded Congress's power "[t]o regulate Commerce . . . among the several States." U.S. Const. art. I, § 8, cl. 3; *Lopez*, 514 U.S. at 567. Among other explanations for its decision, the Court noted the lack of congressional findings explaining how the law regulated interstate commerce. *Lopez*, 514 U.S. at 562–63. Congress amended the statute to include such findings, *see* Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 320904, 108 Stat. 1796, 2125–26 (codified as amended at 18 U.S.C. § 922(q)(1)); *Lopez*, 514 U.S. at 563 n.4, and to include an interstate-jurisdictional prerequisite for a prosecution, *see* Omnibus Consolidated Appropriations Act, 1997, Pub. L. No. 104-208, § 657, 110 Stat. 3009, 3009-369–71 (codified as amended at 18 U.S.C. § 922(q)(2)). Since then, courts have upheld the amended statute. *See, e.g.*, *United States v. Dorsey*, 418 F.3d 1038, 1046 (9th Cir. 2005); *United States v. Danks*, 221 F.3d 1037, 1039 (8th Cir. 1999) (per curiam).

The other comes from *City of Boerne v. Flores*. 521 U.S. 507 (1997). The Court invalidated the Religious Freedom Restoration Act as applied to the States because it exceeded Congress's enforcement power under Section Five of the Fourteenth Amendment. *Id.* at 536.

Among other explanations for its decision, the Court noted that Congress failed to provide a legislative record documenting any pattern of religious liberty violations that would justify extending the Act's protections beyond the Court's decisions interpreting the Free Exercise Clause. *Id.* at 530–33. After the decision, Congress enacted the Religious Land Use and Institutionalized Persons Act, which cut back on the scope of the law and supplied the necessary record to support the new law. *See* 146 Cong. Rec. 16,698–700 (2000); H.R. Rep. No. 106-219, at 18–24 (1999). Subsequent challenges to the new law have been rejected. *See, e.g.*, *Guru Nanak Sikh Soc. of Yuba City v. County of Sutter*, 456 F.3d 978, 993 (9th Cir. 2006); *cf. Cutter v. Wilkinson*, 544 U.S. 709, 714 (2005).

Congressional findings are neither necessary nor sufficient in every case. Congress is not an administrative agency, bound to record the reasoning behind the statutes it enacts. *See Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 666 (1994) (opinion of Kennedy, J.). Nor will findings invariably salvage laws at the edge of congressional power. *See United States v. Morrison*, 529 U.S. 598, 614 (2000). But in the borderlands of congressional power to define intangible injuries that satisfy Article III, a vexing area under any circumstance, guidance about the ills a statute is meant to remedy can instruct and guide.

Congress has not provided any such guidance here. Had it explained why the type of incomplete disclosure Huff received constitutes an injury in fact, our analysis might well have been different. But because Congress has not attempted to show how technical violations of the Fair Credit Reporting Act that carry no actual consequences or real risk of harm are concrete injuries, we must find that Huff has not been injured in this case.

Huff tries to counter this conclusion on two grounds. Neither one is convincing.

Huff insists that TeleCheck's failure to disclose this information injured his concrete interests under the Fair Credit Reporting Act by "robb[ing] [him] of his right to monitor his file," which prevented him from disputing the accuracy of the links. Appellant's Br. 33. Regardless of whether he presented his driver's license alongside checks from the six missing accounts, he explains, his license should not be linked to some of the accounts because they don't belong to him, and he had no way of delinking them without knowing about them.

Assume for now that TeleCheck wrongly linked Huff's accounts. The linked information nonetheless never made a difference in any credit determination, meaning its continued existence in TeleCheck's system did not harm Huff's concrete economic interests. *See Owner-Operator Indep. Drivers Ass'n v. U.S. Dep't of Transp.*, 879 F.3d 339, 345 (D.C. Cir. 2018). Confirming the point, Huff never took any action after receiving the undisclosed information, indicating he wouldn't have done anything even if he had received it earlier.

Public Citizen v. U.S. Department of Justice, 491 U.S. 440 (1989), and *FEC v. Akins*, 524 U.S. 11 (1998), do not alter this conclusion. In those cases, the Court held that a deprivation of information sufficed to provide standing because the plaintiffs would have used the information to participate in the political process. *See Akins*, 524 U.S. at 21; *Pub. Citizen*, 491 U.S. at 449. Here, in contrast, TeleCheck's incomplete report had no effect on Huff or his future conduct. *See Dreher*, 856 F.3d at 346–47. The Act never attempts to show how a technical impairment of a consumer's ability to monitor a credit report—that carries no actual consequences for the consumer—rises to the level of an Article III injury, even an Article III intangible injury. *See id.* at 347. That leaves us with a "bare procedural violation," attenuated from any real harm or imminent risk of harm, that Congress cannot convert into Article III standing. *Spokeo*, 136 S. Ct. at 1549; *Hagy*, 882 F.3d at 622.

Huff argues that *Macy v. GC Services Ltd.* shows that the risk of a check decline created by TeleCheck's nondisclosure establishes standing. 897 F.3d 747 (6th Cir. 2018). *Macy*, to start, involved a different law: the Fair Debt Collection Practices Act. 15 U.S.C. § 1692 *et seq*. Two debtors received a letter from a debt collector notifying them that their credit card accounts had been referred to the company for collection. *Macy*, 897 F.3d at 751. The letter informed the debtors that they could dispute their debt within 30 days, but it failed to say the dispute had to be "in writing." *Id.* That violated § 1692g(a), and the debtors sued. We found the debtors had standing because the debt collector's failure to include the words "in writing" created a material risk the debtors might forfeit other protections for their concrete economic interests. *Id.* at 758.

The *Macy* statute made a risk of harm far more likely than this law does. In enacting the Fair Debt Collection Practices Act, Congress sought to curb abusive debt collection activities. *Id.* at 756; *see* 15 U.S.C. § 1692(e). In finding that the nondisclosure of the "in writing"

requirement posed a material risk of harm, we observed that a written dispute triggered other statutory protections, such as forcing the debt collector to verify the debt and blocking the collector from collecting the debt until completing the verification. *Macy*, 897 F.3d at 758; *see* 15 U.S.C. § 1692g(b). An oral dispute would forfeit those protections. *Macy*, 897 F.3d at 758. Because Congress tied the writing requirement to statutory protections of concrete economic interests, the failure to include the words "in writing" created a material risk of harm.

The Fair Credit Reporting Act does not contain such interlocking statutory protections. While it allows consumers to look into and correct information in their files, it does not provide a shield from imminent economic harm in the way the Fair Debt Collection Practices Act does. The Fair Credit Reporting Act's main target is the dissemination of inaccurate and harmful information, just as in *Spokeo*. *See* 136 S. Ct. at 1550. Because TeleCheck's nondisclosure never harmed Huff, and because it did not create a material risk that Huff would suffer a check decline, Huff has not suffered an injury in fact.

The difference between *Macy* and this case comes down to a difference in how Congress exercised its power. In *Macy*, Congress did not trespass on Article III because the statutory violation was closely connected to real economic harm and thus amounted to an injury in fact. In this instance, Congress crossed the line. It has not shown how a deprivation of information that neither holds consequences for the consumer nor imposes a real risk of harm creates an injury. In the absence of that showing, we have only Congress's say-so, and that does not suffice—at least so long as the federal courts preserve the Constitution's structural boundaries.

The dissent claims that we have "declare[d] the Fair Credit Reporting Act unconstitutional as exceeding Congress's power to provide a judicial remedy for statutory violations." *Infra*, at 15. That overstates. Just as no one can obtain an advisory opinion about the meaning of this law or any other, no one can enforce this law or any other without a concrete Article III injury in fact. And even in this case, our decision does not mean that TeleCheck's alleged violations must escape scrutiny. Regardless of Huff's standing, the Federal Trade Commission and other agencies have both the authority to enforce compliance with the Act and a sovereign interest in doing so. *See* 15 U.S.C. § 1681s.

That leaves a perspective that has not been raised in today's case but may deserve consideration in a future case. As Justice Thomas has pointed out, Article III standing may draw a line between private and public rights. With respect to statutes creating private rights—that create duties owed to the plaintiffs as individuals—a bare statutory violation may suffice to establish standing. But with respect to statutes creating public rights—that create duties owed to the community as a whole—a bare statutory violation may not suffice, and the plaintiff must show some individual harm beyond the violation. *See Spokeo*, 136 S. Ct. at 1551–53 (Thomas, J., concurring); *see also Frank v. Gaos*, 139 S. Ct. 1041, 1046–47 (2019) (Thomas, J., dissenting). The theory deserves further consideration at some point. It seems to respect history and cuts a path in otherwise forbidding terrain. *See* William Baude, *Standing in the Shadow of Congress*, 2016 Sup. Ct. Rev. 197, 227–31; Ann Woolhandler & Caleb Nelson, *Does History Defeat Standing Doctrine?*, 102 Mich. L. Rev. 689, 693–712 (2004). But the theory also raises questions of its own in an age of statutes. Whatever is true of Congress's power to create standing by statute would seem to hold for state legislatures as well, posing another threat to Article III's limits. And even if the dichotomy between public and private rights honors original meaning, what of laws that use nominally private rights as a way of commissioning private attorneys general to enforce public regulatory schemes—a modern reality without obvious eighteenth-century heirs? What amounts to a public right and what amounts to a private right may not be easy to transpose today. Either way, clarification from Congress about whether a right was meant to protect personal or public interests would ease the judicial task. For now, under *Spokeo* and our own decisions, Huff has failed to establish injury in fact.

We affirm.

DISSENT

HELENE N. WHITE, Circuit Judge, dissenting. The majority declares the Fair Credit Reporting Act ("FCRA") unconstitutional as exceeding Congress's power to provide a judicial remedy for statutory violations.[1] Contrary to the majority's conclusion, Huff's injury in fact was sufficiently concrete to satisfy Article III standing requirements because (1) Congress conferred on consumers like Huff the right to request their entire file to protect their interest in having only accurate information reported about them, and (2) TeleCheck's failure to provide Huff's entire file created a material risk that inaccurate information would be reported about him and he would face a check decline. Accordingly, I respectfully dissent.

This court recently held that the violation of a procedural right granted by statute is sufficient to constitute a concrete injury in fact where (1) "Congress conferred the procedural right to protect a plaintiff's concrete interests" and (2) "the procedural violation presents a material risk of real harm to that concrete interest." *Macy v. GC Services Limited Partnership*, 897 F.3d 747, 756 (6th Cir. 2018). Both requirements are met here.

First, Congress conferred on consumers like Huff the right to obtain their full file to protect their interest in not having false credit information reported about them. In enacting the FCRA, "Congress plainly sought to curb the dissemination of false information by adopting procedures designed to decrease that risk." *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1550 (2016). One such procedure is that "[u]pon request and identification, the reporting agency is required to divulge the information in its files concerning the interested consumer." *Hovater v. Equifax, Inc.*, 823 F.2d 413, 417 (11th Cir. 1987) (citing 15 U.S.C. § 1681g). "The purpose of the [FCRA's] disclosure requirement [in 15 U.S.C. § 1681g] is to provide the consumer with an opportunity to dispute the accuracy of information in his file." *Hauser v. Equifax, Inc.*, 602 F.2d 811, 817 (8th Cir. 1979). Once the consumer identifies the allegedly inaccurate information, the FCRA sets forth a detailed grievance procedure governing how to correct that inaccuracy.

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[1] Although not stated, I presume this is an as-applied declaration of unconstitutionality.

15 U.S.C. § 1681i. In short, "[a] primary purpose[] of the statutory scheme provided by the disclosure in § 1681g(a)(1) is to allow consumers to identify inaccurate information in their credit files and correct this information via the grievance procedure established under § 1681i." *Gillespie v. Equifax Info. Servs., L.L.C.*, 484 F.3d 938, 941 (7th Cir. 2007). Thus, Congress conferred on consumers the procedural right to receive their file upon request to reduce the concrete risk that inaccurate information about them would be disclosed.

Second, TeleCheck's failure to provide Huff with the identifiers linked to him created a material risk of real harm. Unbeknownst to Huff, TeleCheck linked his driver's license number with bank accounts that were not his. When Huff exercised his right to receive his file, TeleCheck failed to disclose those bank accounts, and Huff therefore was unable to use the FCRA's grievance procedures to correct that information. Consequently, Huff was at risk of harm if one of those accounts developed a debt and Huff presented his driver's license while paying by check.

The majority disagrees that Huff faced a material risk of real harm, distinguishing *Macy* on the basis that unlike the protections in the Fair Debt Collection Practices Act ("FDCPA") at issue in *Macy*, the FCRA does not contain "such interlocking statutory protections." (Maj. Op. at 13.) However, the FCRA "interlocks" the consumer's right to his file with his ability to correct inaccurate information through the FCRA's provided procedure. Moreover, it makes sense that Congress would use different procedural protections given the different purposes of the FCRA and FDCPA. In other words, the method by which Congress chose to protect Huff's interests under the FCRA is a function of the harm he faced. Just as notifying a debtor of the actions required to preserve his rights minimizes the risk of abusive debt practices, enabling a consumer, well-situated to detect his own inaccurate information, to review his file minimizes the risk of the disclosure of an inaccurate credit report. By providing the incomplete file, TeleCheck deprived Huff of the information necessary to dispute the errantly linked accounts and thus created a material risk that if one of those accounts developed a debt, inaccurate information would be reported about Huff, and Huff's check would be declined. It appears that the majority's real quarrel is with *Macy* itself; the majority would prefer a rule that requires the plaintiff to show actual harm.

The cases relied on by the majority do not support the conclusion that there was no material risk of harm. *Spokeo*'s example of an incorrect zip code suggests a lower bar for risk of harm than the bar set by the majority here. 136 S. Ct. at 1550. Erroneously linked identifying information presents a far greater risk of harm than an incorrect zip code. Although it is hard to imagine the risk of harm from an incorrect zip code, the risk of linking an individual to accounts not owned by him is apparent: TeleCheck effectively tied Huff's creditworthiness to another consumer's, and Huff faced the risk of TeleCheck erroneously reporting a negative credit assessment solely because of that.

Similarly, *Hagy v. Demers & Adams*, 882 F.3d 616 (6th Cir. 2018) is materially different from this case because in *Hagy*, a creditor failed to provide the required disclosure on a letter in which the creditor *discharged* a debt. 882 F.3d at 622. Thus, unlike in this case, the violation presented no risk of harm because the creditor's letter to the debtors was "good news." *Id.*

Finally, the majority's reliance on *Dreher v. Experian Information Solutions, Inc.*, 856 F.3d 337 (4th Cir. 2017) is misplaced for at least two reasons. *Dreher* applied the standard for informational injuries formulated by *Friends of Animals v. Jewell*, 828 F.3d 989 (D.C. Cir. 2016), relying on the Supreme Court's decision in *Federal Election Commission v. Akins*, 524 U.S. 11 (1998). Under that standard, a plaintiff lacks standing unless he is "'denied access to information required to be disclosed by statute, and he 'suffers, by being denied access to that information, the type of harm Congress sought to prevent by requiring disclosure.'" 856 F.3d at 345-46 (quoting *Jewell*, 828 F.3d at 992) (emphasis omitted). That standard is different from the one based on *Spokeo* articulated by *Macy* because it requires that the consumer suffer a "harm" rather than simply face the "risk" of harm. *Macy*, 897 F.3d at 756. Second, before the *Dreher* court even considered whether the violation "adversely affected" the consumer's conduct, it concluded that the harm the consumer claimed—what the court called a "customer-service" harm—"is not the type of harm Congress sought to prevent when it enacted the FCRA." 856 F.3d at 346. The court explained: "Failing to identify either a common law analogue *or a harm Congress sought to prevent*, [the consumer] is left with a statutory violation divorced from any real world effect." *Id.* (emphasis added). Here, however, Huff claims a risk of harm to a

concrete interest that Congress sought to prevent—an inaccurate credit report based on bank accounts that are not his.

The majority also errs in suggesting that Congress should have "explain[ed] itself" and did not when it allowed a customer to sue after receiving an incomplete file. (Maj. Op. at 10.) As an initial matter, even if an explanation were necessary here, Congress did provide such an explanation. Rather than the "canyon-sized gap between Congress's authority and the problem it seeks to resolve" perceived by the majority (*id.*), Congress closely tied the right to disclosure of one's entire file to the legitimate purpose of preventing the report of inaccurate information to others. Congress established the disclosure requirement to enable a consumer to correct inaccurate information in his or her file, thereby reducing the risk of an inaccurate credit report. Moreover, the majority supplies little basis for faulting Congress for failing to connect the procedural violation with the risk of harm. *Spokeo* does not impose such an obligation, and the majority's only authority is its analogy to *United States v. Lopez*, 514 U.S. 549 (1995) and *City of Boerne v. Flores*, 521 U.S. 507 (1997). However, neither *Lopez* nor *City of Boerne* involved limits on Congress's power to provide a judicial remedy for statutory harms under Article III standing requirements.

For the above reasons, I respectfully dissent.

[Cite as *Maddox Defense, Inc. v. GeoData Sys. Mgt., Inc.*, 2019-Ohio-1778.]

COURT OF APPEALS OF OHIO

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

MADDOX DEFENSE, INC.,	:	
Plaintiff-Appellee,	:	No. 107559
v.	:	
GEODATA SYSTEMS MANGAGEMENT, INC.,	:	
Defendant-Appellant.	:	

JOURNAL ENTRY AND OPINION

JUDGMENT: AFFIRMED
RELEASED AND JOURNALIZED: May 9, 2019

Civil Appeal from the Cuyahoga County Court of Common Pleas
Case No. CV-18-892096

Appearances:

Michael P. Harvey, Co. L.P.A., Michael P. Harvey, *for appellant.*

Keith M. Herbers, *for appellee.*

PATRICIA ANN BLACKMON, J.:

{¶ 1} GeoData Systems Management, Inc., ("GeoData") appeals from the trial court's granting summary judgment in favor of Maddox Defense, Inc.,

("Maddox") regarding Maddox's breach of contract claim and GeoData's various counterclaims. GeoData has assigned ten errors for our review.[1]

{¶ 2} Having reviewed the record and pertinent law, we affirm the trial court's judgment. The apposite facts follow.

I. Facts and Procedural History

{¶ 3} Maddox is a company that "specializes in designing, manufacturing and selling * * * products [to] the military * * *." GeoData is a company that "specializes in manufacturing products for the military." On January 16, 2015, Maddox submitted a purchase order to GeoData for 21 "Killer Tomato" naval gunnery targets ("the Targets"). The Targets were to be resold to and used by the 15th Marine Expeditionary Unit ("MEU"). GeoData accepted the order and required Maddox to pay the entire purchase price of $15,650 in advance. In turn, GeoData promised to deliver the Targets by April 15, 2015. GeoData failed to meet this deadline, MEU cancelled its order with Maddox, and Maddox cancelled its order with GeoData and requested its money back. GeoData never delivered the Targets and failed to refund Maddox's money.[2]

{¶ 4} In September 2017, Maddox filed a breach of contract claim in the Berea Municipal Court. GeoData filed counterclaims against Maddox, and on January 25, 2018, this case was transferred to the Cuyahoga County Court of

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[1] *See* appendix.

[2] This statement of facts is taken from Maddox's appellate brief and is undisputed on appeal.

Common Pleas. On July 16, 2018, the court granted summary judgment in favor of Maddox and against GeoData on the following GeoData counterclaims: tortious interference with contract; tortious interference with business relationship; civil conspiracy; and deceptive trade practices. On August 13, 2018, the court granted summary judgment in favor of Maddox and against GeoData on GeoData's remaining counterclaims for breach of contract and defamation, as well as on Maddox's breach of contract claim. It is from these orders, as well as various interlocutory orders, that GeoData appeals.

II. Complaint and Counterclaim

{¶ 5} Maddox's complaint for breach of contract states, in part, as follows: "On January 16, 2015, [Maddox] sent [GeoData] its Purchase Order for 21 practice targets. * * * On January 21, 2015, [GeoData] accepted [Maddox's] Purchase Order and acknowledged in writing receipt of the purchase price of [$15,650] for the practice targets * * *. [GeoData] agreed in its receipt to ship the practice targets to [Maddox] within 8 to 12 weeks * * *. [Maddox] never received the practice targets. * * * [GeoData] failed and/or refused to return the purchase price to [Maddox]."

{¶ 6} Maddox attached the referenced purchase order and payment receipt to its complaint.

{¶ 7} GeoData alleges the following pertinent facts in its counterclaims: "The [Targets] were completed March 31, 2015 and were ready to ship." However, GeoData alleges that on the same day, March 31, 2015, Geodata was contacted by Neva Lundy ("Lundy"), the director of operations at Maddox, who "requested that

GeoData hold shipment and not ship" the Targets. According to GeoData, "[n]o reason was given."

{¶ 8} Based on these allegations, GeoData filed the following counterclaims: 1) Tortious interference with contract — Maddox "knew the existence of the contract and * * * intentionally procured the contract's breach by its actions and inactions * * *." 2) Interference with business relations — Maddox "was aware of a contractual business relationship with the federal government and its branches [and] prevented the formation of at least two contracts with the federal government or procured a breach of the contract or terminat[ed] the business relationship with the contract [sic]." 3) Civil conspiracy — "this * * * was done intentionally to cause damage to [GeoData] by causing interference with its relationship in the federal government * * *." 4) Commercial defamation and commercial disparagement — "GeoData was made aware by a third party of various slanderous postings on a website called Ripoff Report made by * * * Maddox." 5) Ohio Deceptive Trade Practices Act — Maddox "has made false and misleading statements of fact concerning [GeoData's] product, product availability, product deliverance and other related matters" with the intent to deceive. 6) Breach of contract — Maddox "failed to honor [its] contractual obligations * * *."

{¶ 9} GeoData did not attach any documentary evidence to its pleadings in support of these counterclaims.

III. Summary Judgment

{¶ 10} In GeoData's first, second, fifth, sixth, eighth, and ninth assigned errors, it essentially argues that the trial court erred in granting summary judgment in favor of Maddox and against GeoData on Maddox's claim and GeoData's counterclaims.

{¶ 11} Appellate review of granting summary judgment is de novo. Pursuant to Civ.R. 56(C), the party seeking summary judgment must prove that (1) there is no genuine issue of material fact; (2) they are entitled to judgment as a matter of law; and (3) reasonable minds can come to but one conclusion and that conclusion is adverse to the nonmoving party. *Dresher v. Burt*, 75 Ohio St.3d 280, 662 N.E.2d 264 (1996).

{¶ 12} "[I]f the moving party has satisfied its initial burden, the nonmoving party then has a reciprocal burden outlined in Civ.R. 56(E) to set forth specific facts showing that there is a genuine issue for trial and, if the nonmovant does not so respond, summary judgment, if appropriate, shall be entered against the nonmoving party." *Id.* at 293.

{¶ 13} In ruling on a motion for summary judgment, courts may look to "the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact * * *" that are part of the record. Civ.R. 56(C). Additionally, courts construe the evidence most strongly in favor of the party against whom the motion is made. *Id.* Pursuant to Civ.R. 56(E), "[s]upporting and opposing affidavits shall be made on personal knowledge, shall

set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated in the affidavit." Furthermore, "[w]hen a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the party's pleadings, but the party's response, by affidavit or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial." *Id.*

A. Maddox's Breach of Contract Claim

{¶ 14} To succeed on a breach of contract claim, a plaintiff must show "the existence of a binding contract or agreement; the non-breaching party performed its contractual obligations; the other party failed to fulfill its contractual obligations without legal excuse; and the non-breaching party suffered damages as a result of the breach." *Garofalo v. Chicago Title Ins. Co.*, 104 Ohio App.3d 95, 108, 661 N.E.2d 218 (8th Dist.1995).

{¶ 15} Maddox alleged that it submitted a purchase order to GeoData for the Targets and paid the entire contract price of $15,650 in advance. GeoData sent a payment receipt showing a delivery date of 8 to 12 weeks. GeoData never delivered the Targets and refused to return Maddox's money. According to Maddox, "[t]he overriding issue in this case is whether GeoData completed the Targets in time to ship them by the delivery deadline of April 15, 2015." In support of its summary judgment motion, Maddox attached: the affidavit of company chief executive officer and owner Jason Maddox ("Jason"); the purchase order and receipt at issue; 17

emails between the parties; three emails sent to the Ripoff Report website; the affidavit of Lundy; and the affidavit of Jenny Mique, a former Maddox employee.

{¶ 16} Maddox's evidentiary support in favor of summary judgment includes an April 16, 2015 email Lundy sent to GeoData, stating "we're going to have to cancel this order. The end user has stated that the product won't be able to meet their needed delivery date. Please give me a call as soon as possible so that we can arrange to transfer prepayment back." Lundy forwarded to GeoData an email from MEU stating that the delayed delivery is "not suitable for our deployment timeline" and cancelling the order.

{¶ 17} That same day, Bruce Jackim ("Bruce"), the president of GeoData, sent an email to MEU, as well as to Lundy, stating that "[y]our [Targets] are being made, and will be delivered. * * * Cancellation is not an option." However, despite GeoData's assurance that the Targets "will be delivered," it is undisputed that GeoData never shipped the Targets and fulfilled Maddox's order.

{¶ 18} Subsequent to the cancellation, the parties attempted to satisfy their agreement by filling other military target orders. For example, on April 22, 2015, GeoData emailed Lundy about a lead for targets to be sold to "USMC, MAG12 at Iwakuni, Japan. * * * Please see what you can do to get us a completed [target] sale." Additionally, GeoData sent an email proposal dated October 30, 2015, to Maddox concerning the potential sale of 150 targets, in which GeoData agreed to only charge Maddox for 129 targets: "We owe you (21) [targets] from the deal for 15MEU / USS Essex canceled by 15MEU the day of shipment. * * * This is a one[-]time

arrangement for this solicitation only, which we offer to clear the debt from the deal with 15MEU and for us to obtain funds now for production materials." It does not appear from the record that any of these sales were completed.

{¶ 19} Maddox further includes documents attached to its summary judgment motion evidencing multiple attempts to get its money back from GeoData, including emails on June 10, 2015, June 15, 2015, February 17, 2016, March 12, 2016, June 6, 2016, and August 16, 2016.

{¶ 20} Lundy's affidavit states, in part, as follows: Lundy was employed by Maddox during the time frame at issue in this case. Lundy "kept in contact" with GeoData in the spring of 2015 regarding "when the targets ordered by [Maddox] would be ready for GeoData to ship." According to Lundy, "At no time did [GeoData] tell me that the Targets were completed and ready for shipment." Concerning GeoData's allegation that, on March 31, 2015, Lundy contacted GeoData and requested that it "hold delivery" of the targets, Lundy stated, "At no time did I make such a request to GeoData or any of its employees."

{¶ 21} The affidavit of Jenny Mique states in part as follows:

> In December of 2014 I found out from a contact at [MEU] that [MEU] had attempted to purchase naval practice targets from GeoData * * *, but the deal failed because the purchase price of GeoData's targets exceeded the limit of [MEU's] military purchase card.
>
> I then called GeoData and talked to Bruce Jackim, its president, because I thought that Maddox * * * could purchase the targets required by * * * MEU from GeoData with its own funds, and then sell them to * * * MEU and receive payment from another source of military funds after delivery of the targets to * * * MEU.

> GeoData sent me an email on December 19, 2014, thanking me for my help.
>
> I then referred this matter to Neva Lundy, the director of operations of Maddox * * * and ceased to be involved in the transaction.

{¶ 22} In challenging summary judgment, GeoData does not dispute that the delivery deadline was April 15, 2015. Rather, GeoData argues that the Targets were ready to ship on March 31, 2015, but that Lundy "contacted" GeoData and "requested that GeoData hold shipment" on the Targets. GeoData does not dispute that the Targets were never delivered or that Maddox's money was never refunded.

{¶ 23} GeoData argues that its "Counterclaims essentially state the opposite of the Complaint. So, obviously, the facts are controverted." However, it is long-standing law in Ohio that a party opposing summary judgment may not rest upon mere allegations in its pleadings. Civ.R. 56(E). This court has held that "a nonmovant's own self-serving assertions, whether made in affidavit, deposition, or interrogatory responses, cannot defeat a well-supported summary judgment motion when not corroborated by any outside evidence." *Lucas v. Perciak*, 8th Dist. Cuyahoga No. 96962, 2012-Ohio-88, ¶ 16. The party opposing summary judgment "must do more than supply evidence of a possible inference that a material issue of fact exists." *Carroll v. Alliant Techsystems, Inc.*, 10th Dist. Franklin No. 06AP-519, 2006-Ohio-5521, ¶ 17.

{¶ 24} In support of its opposition to summary judgment, GeoData submitted two affidavits, one from Bruce and one from his wife Nina Jackim ("Nina"). Of interest is that Bruce's and Nina's affidavits are identical to each other

and word-for-word taken from GeoData's pleadings. GeoData did not attach any other documents or exhibits to its brief in opposition to summary judgment.

{¶ 25} On July 14, 2018, the court found that GeoData's affidavits were deficient, specifically concluding that the affidavits were identical and "simply verified versions of [GeoData's] counterclaims." The court also concluded that the affiants failed to state that they had personal knowledge of the affidavits' contents and that "in a material part of both state the critical fact in the passive voice * * *." The court gave GeoData the opportunity to "produce competent Civ.R. 56(E) evidence concerning this issue; [GeoData] has 7 days from the entry of this order to supplement the present motion with evidence competent under Civ.R. 56(E)."

{¶ 26} On July 18, 2018, GeoData submitted supplemental affidavits from Bruce and Nina. Bruce's supplemental affidavit states in its entirety as follows:

> This Affidavit supplements the Affidavit that I gave in Opposition to the Maddox Defense Inc. summary judgment.
>
> This Affidavit is made based upon my personal knowledge, which knowledge arise[s] from my discussions with, contacts with, and interactions with Maddox Defense Inc. and its agents over time.
>
> This information is also the basis for GeoData['s] Counterclaims because it is information in my personal knowledge, information that has been gleaned in my work for GeoData * * * and both myself and Nina have had direct interactions with and connections with this matter and this company since the beginning.
>
> The Rule 56(E) does require just Affidavits produced to support or oppose summary judgments. We submitted the pleadings as well.
>
> Additionally, in looking at the Court's Order, I note that the Court mentions the passive voice as being a concern. All that has occurred happened in the past.

> This Affidavit supplements the Affidavits already made and should be considered in conjunction with the already filed Opposition to the summary judgment which we believe created many genuine issues of material fact in dispute.

{¶ 27} Nina's supplemental affidavit is identical to Bruce's with one change in paragraph three: "myself and Nina" is replaced with "myself and Bruce."

{¶ 28} Upon the court's further order, on July 23, 2018, Nina and Bruce submitted "second supplemental affidavits," which state in their entirety that

> Our contacts with Neva Lundy and Jenny Mique of [Maddox] were by phone.
>
> When she would call or we would call her, we would typically be on the phone together.
>
> The Counterclaim allegations regarding what went back and forth should have indicated that we had our contacts with Neva Lundy and others by phone.

{¶ 29} On July 31, 2018, the court issued a journal entry finding that the "supplemental affidavit[s] did not establish personal knowledge of a communication from Neva Lundy instructing [GeoData] not to ship the gunnery targets." The court ordered GeoData to supplement the affidavits again, to establish "that an affiant has personal knowledge of a phone call from Neva Lundy directing GeoData to not ship the naval gunnery targets." The court noted that the existing affidavits and supplemental affidavits "fail to aver that each affiant 1. Was on a phone call with Neva Lundy during the term of the contract; and 2. * * * heard Neva Lundy direct [GeoData] to not ship the gunnery targets."

{¶ 30} GeoData did not file additional supplemental affidavits. The court granted summary judgment to Maddox on its breach of contract claim on August 14,

2018. Specifically, the court found that there was no Civ.R. 56(E) evidence that GeoData "had personal knowledge that an employee of [Maddox] called [GeoData] and directed [GeoData] not to ship the ordered gunnery targets." The court then determined that Maddox put forth evidence establishing all the elements of a breach of contract claim.

{¶ 31} Upon review, we find that the undisputed evidence shows the following regarding Maddox's breach of contract claim: the existence of a contract; that Maddox performed it obligations by paying GeoData the contract price in full; and that GeoData breached the contract by not delivering the product and not refunding the money. Furthermore, it is undisputed that Maddox was damaged in the amount of $15,650. These facts satisfy Maddox's initial burden regarding summary judgment.

{¶ 32} The burden then shifts to the nonmoving party, and GeoData attempts to create a disputed issue of material fact regarding Maddox's breach of contract claim by arguing that GeoData had a "legal excuse" for its breach. Specifically, GeoData alleges that its failure to deliver the products on time was justified, which turns on whether Lundy requested that GeoData hold the shipment. To support this allegation, GeoData relies on Bruce's and Nina's affidavits and its pleadings. As stated, all three of these documents are virtually indistinguishable, and the pertinent parts state as follows: "The [Targets] were completed March 31, 2015 and were ready to ship. On March 31, 2015, GeoData was contacted by Neva

Lundy at Maddox * * * and she requested that GeoData hold shipment and not to ship the [targets] to * * * MEU."

{¶ 33} GeoData did not present evidence, or even allege, that it informed Maddox, or anyone else for that matter, that the Targets were ready to ship on March 31, 2015. In fact, GeoData did not take this position until October 2017, when it filed its counterclaim. GeoData also alleged for the first time in its counterclaim that Lundy told GeoData to hold the shipment. It is long-standing law that a party opposing summary judgment must not rest on mere allegations in its pleadings. Civ.R. 56(E).

{¶ 34} Indeed, there is no evidence other than Bruce's and Nina's after-the-fact affidavits that the Targets were ready for shipment on March 31, 2015, or that Maddox requested the shipment be held. Significantly, none of the emails that Maddox submitted in support of its motions reference the allegedly disputed facts raised by GeoData; namely, that the Targets were ready to ship on March 31, 2015, or that Lundy contacted GeoData that same day to "hold shipment."

{¶ 35} The trial court found that Bruce's and Nina's affidavits — the only evidence that GeoData submitted to support its position — did not comply with Civ.R. 56(E). Therefore, the court concluded that "there is no genuine issue of material fact but that [GeoData] was in breach of contract by failing to ship the naval targets before April 16, 2015, when the ultimate user cancelled the contract."

{¶ 36} Upon review, we disagree with the trial court that the affidavits at issue are noncompliant. However, they are self-serving, unsupported by the record, and insufficient to create a genuine issue of material fact for trial.

> [A] nonmoving party may not avoid summary judgment by merely submitting a self-serving affidavit that simply contradicts the evidence offered by the moving party. Permitting a nonmoving party to avoid summary judgment by asserting nothing more than "bald contradictions of the evidence offered by the moving party" would render the summary judgment exercise meaningless. * * * [A] self-serving affidavit standing alone, without corroborating materials contemplated by Civ.R. 56, is simply insufficient to overcome a properly supported motion for summary judgment.

FIA Card Servs., N.A. v. Pfundstein, 8th Dist. Cuyahoga No. 101808, 2015-Ohio-2514, ¶ 15-16.

{¶ 37} The trial court gave GeoData multiple opportunities to supplement its affidavits or produce other evidence to support its argument. GeoData failed to file anything further and failed to meet its reciprocal burden. There are no genuine issues of material fact for trial regarding Maddox's breach of contract claim, Maddox is entitled to judgment as a matter of law, and reasonable minds can come to but one conclusion and that conclusion is adverse to GeoData. Accordingly, the court did not err in granting summary judgment in favor of Maddox and against GeoData on Maddox's breach of contract claim.

B. GeoData's Breach of Contract Counterclaim

{¶ 38} In this counterclaim, GeoData makes an untenable allegation that Maddox breached the contract. As stated previously, it is undisputed that a contract existed, Maddox fulfilled its obligations under this contract, and GeoData kept

Maddox's money and never delivered the Targets. GeoData fails to allege, let alone produce evidence of, how Maddox breached this contract. In fact, GeoData admitted in an email that it "owed" Maddox 21 targets. GeoData's allegation of damages states as follows in Bruce's affidavit: "The cost estimates by GeoData were approximately $22,000.00 for double shifts despite product value of $15,650.00 for a loss of $6,350.00 to GeoData." GeoData did not attach any evidence to support this allegation of damages. In short, GeoData simply offers no evidence to show that Maddox breached the contract or that GeoData suffered damages, and Maddox is entitled to judgment as a matter of law.

C. Tortious Interference with Contract

{¶ 39} In this counterclaim, GeoData alleges that Maddox "knew the existence of the contract and * * * intentionally procured the contract's breach by its actions and inactions * * *." GeoData fails to identify the contract in question, although we assume that GeoData is referring to the January 2015 contract with Maddox for the Targets, because it is the only contract referred to in the record.

{¶ 40} To succeed on a tortious interference with a contract claim, a plaintiff must show "(1) the existence of a contract, (2) the wrongdoer's knowledge of the contract, (3) the wrongdoer's intentional procurement of the contract's breach, (4) the lack of justification, and (5) resulting damages." *Fred Siegel Co., L.P.A. v. Arter & Hadden*, 85 Ohio St.3d 171, 176, 707 N.E.2d 853 (1999). "It is axiomatic that the wrongdoer must be a non-party to the contract." *Castle Hill Holdings, L.L.C., v. Al Hut, Inc.*, 8th Dist. Cuyahoga No. 86442, 2006-Ohio-1353, ¶ 47.

{¶ 41} In the instant case, it is undisputed that Maddox is a party to the contract at issue; therefore, GeoData cannot succeed on this counterclaim, and Maddox is entitled to judgment as a matter of law.

D. Tortious Interference with Business Relationship

{¶ 42} In this counterclaim, GeoData alleges that Maddox "was aware of a contractual business relationship with the federal government and its branches [and by its] intentional and improper actions, it prevented the formation of at least two contracts with the federal government or procured a breach of the contract or terminat[ed] the business relationship with the contract."

{¶ 43} Tortious interference with a business relationship occurs when "a person, without privilege, induces or otherwise purposely causes a third party not to enter into, or continue, a business relationship, or perform a contract with another." *Castle* at ¶ 47. Ohio courts have explained that "[t]he main difference between a tortious interference with a contract and tortious interference with a business relationship is that interference with a business relationship includes intentional interference with prospective contractual relations, not yet reduced to a contract." *Walter v. ADT Sec. Sys.*, 10th Dist. Franklin No. 06AP-115, 2007-Ohio-3324, ¶ 31.

{¶ 44} It is unclear from GeoData's pleadings what "business relationship" or "lost contract" it is alleging that Maddox interfered with. In its motion for summary judgment, Maddox speculates that GeoData may be referring to an "opportunity to sell Targets * * * in Japan" and "a bid * * submitted * * * for an opportunity to sell 150 Targets to the military." These are two of the leads

mentioned previously in this opinion that the parties attempted to bid to satisfy the contract dispute at issue in this case. Assuming for argument's sake that these are the "business relationships" upon which GeoData is basing this claim, GeoData failed to allege, argue, or produce evidence of "intentional interference" on the part of Maddox.

{¶ 45} Upon review, we find that GeoData failed to set forth any disputed facts regarding tortious interference with a business relationship, and Maddox is entitled to judgment as a matter of law.

E. Civil Conspiracy

{¶ 46} In this counterclaim, GeoData alleges that Maddox "interfered with [GeoData's] business and contracts causing damage." GeoData also alleges that Maddox and an unidentified entity GeoData calls "non-party APPF" intentionally interfered "with its relationship in the federal government and agencies as well as the interference with its contracts and businesses."

{¶ 47} Civil conspiracy is "a malicious combination of two or more persons to injure another in person or property, in a way not competent for one alone, resulting in actual damages." *LeFort v. Century 21-Maitland Realty Co.*, 32 Ohio St.3d 121, 126, 512 N.E.2d 640 (1987). "An underlying unlawful act is required before a civil conspiracy claim can succeed." *Williams v. Aetna Fin. Co.*, 83 Ohio St.3d 464, 475, 700 N.E.2d 859 (1998).

{¶ 48} In support of summary judgment, Maddox submitted Jason's affidavit, which states, in part, that he "never heard of APPF until [he] read

GeoData's counterclaim in November of 2017." This affidavit further states that Maddox had no contact with APPF until its counsel contacted APPF in December 2017, after this case was initially filed.

{¶ 49} Maddox also submitted an affidavit from Arthur Hochschild III, the president of American Pacific Plastic Fabricators, Inc., a company known by the name "APPF." This affidavit states that from 2014 to 2016, APPF was involved in a trademark infringement lawsuit with GeoData. Hochschild also states that in December 2o17, he was contacted by the attorney for Maddox regarding the case at hand, and "[t]here was no contact whatsoever by any officer, employee or agent of APPF with any officer, employee or agent of [Maddox] at any time prior to last month, December, 2017."

{¶ 50} GeoData submitted nothing to dispute Maddox's evidence that there was no "malicious combination" between APPF and Maddox; rather, GeoData rests on the allegations in its pleadings. Accordingly, we find that Maddox is entitled to judgment as a matter of law on GeoData's civil conspiracy claim.

F. Defamation

{¶ 51} In this counterclaim, GeoData alleges that Maddox "went out of its way to publish false and defamatory statements concerning" GeoData, and because Maddox has "done this directed towards [GeoData's] means of livelihood in existence for being in Ohio no need for special harm is needed to be proven in this matter." GeoData made blanket allegations mirroring the elements of a defamation claim; however, GeoData did not attach a copy of the allegedly defamatory

statements to its pleadings, nor did it identify the statements in question other than to refer to them as "various slanderous postings on a website called Ripoff Report made by Jason Maddox that were submitted on March 28, 2017."

{¶ 52} The elements of a defamation claim are: "(1) that a false statement of fact was made; (2) that the statement was defamatory; (3) that the statement was published; (4) that the plaintiff suffered injury as a proximate result of the publication; and (5) that the defendant acted with the requisite degree of fault in publishing the statement." *Pollock v. Rashid*, 117 Ohio App.3d 361, 368, 690 N.E.2d 903 (1st Dist. 1996). Furthermore, if a statement is defamatory per se, in that it tends to injure a person in his or her trade or occupation, damages are generally presumed. *Sullins v. Raycom Media, Inc.*, 8th Dist. Cuyahoga No. 99235, 2013-Ohio-3530, ¶ 17.

{¶ 53} However, truth is an absolute defense to defamation. *Stohlmann v. WJW TV, Inc.,* 8th Dist. Cuyahoga No. 86491, 2006-Ohio-6408. Additionally, "expressions of opinion are generally protected under Section 11, Article I of the Ohio Constitution as a valid exercise of freedom of the press." *Vail v. Plain Dealer Publishing Co.*, 72 Ohio St.3d 279, 280, 649 N.E.2d 182 (1995). This court has held that "whether a statement is fact or opinion is a question of law to be determined by the court." *Sikora v. Plain Dealer Publishing Co.*, 8th Dist. Cuyahoga No. 81465, 2003-Ohio-3218, ¶ 16. In making this determination, courts "consider the totality of the circumstances, including (1) the specific language used; (2) whether the statement is verifiable; (3) the general context of the statement; and (4) the broader

context in which the statement appeared." *Id.* at ¶ 15. "[T]he law charges the author of an allegedly defamatory statement with the meaning that the reasonable reader attaches to that statement." *McKimm v. Ohio Elections Comm.*, 89 Ohio St.3d 139, 145, 729 N.E.2d 364 (2000).

{¶ 54} In its summary judgment motion, Maddox graciously supplies the court with the statements alleged to be defamatory and argues the affirmative defense of truth. Maddox submitted an affidavit from Jason stating that, on March 28, 2017 and May 8, 2017, he sent emails to the website "Ripoff Report," which "explained the facts of [Maddox's] complaint against GeoData which constitute the acts of a thief and a scam artist." Again, GeoData produced no evidence in terms of what it alleges is defamatory within these emails. However, for the purpose of appellate review, we note the following:

{¶ 55} The March 28, 2017 email states in part that "Mr. Jackim and [GeoData] are SCAM Artists." Additionally, the May 8, 2017 email states in part that "money was stolen"; "Jackim simply ran away with our money"; and "If we do not receive * * * a return of our money * * * then we will pursue all legal * * * ramifications against * * * Jackim and make sure that he will not be able to steal anyone else's money or fraud another person or company." This second email lists the "legal ramifications" against GeoData as theft, embezzlement, [tortious] interference with government contracts, wire fraud, and slander.

{¶ 56} Our review of these emails shows that, for the most part, they tell Maddox's version of how this business deal went wrong. Given the court's findings

that GeoData breached the contract, much of Maddox's email is true, and truth as a defense applies. To the extent that truth as a defense does not apply to portions of Maddox's statements, the trial court found that "the more accusatory statements are well within the norm for negotiations" of two companies "attempting to resolve their differences albeit in a public forum." The court concluded that

> in context, these statements amount to nothing more than the opinions of Mr. Maddox. * * * [T]hese statements are pure expressions of Mr. Maddox's opinion that [GeoData's] conduct constitutes theft. * * * [G]iven the expressed willingness of [Maddox] to withdraw all accusations upon refund of the $15,650 payment, as stated in the Ripoff Report, the greater portion of these statements would appear to a reasonable reader as little more than hyperbole or puffery by a party seeking to negotiate the return of a downpayment.

{¶ 57} The United States Supreme Court has further explained that context of the publication plays a critical role in determining whether allegedly defamatory statements are actionable. *Greenbelt Cooperative Public Assn. v. Bresler,* 398 U.S. 6, 14, 90 S.Ct. 1539, 26 L.Ed.2d 6 (1970). In reviewing whether the word "blackmail" was defamatory, the court stated that

> it was [the defendant's] public and wholly legal negotiating proposals that were being criticized. No reader could have thought that [the] words were charging [the defendant] with the commission of a criminal offense. On the contrary, even the most careless reader must have perceived that the word was no more than rhetorical hyperbole, a vigorous epithet used by those who considered [the defendant's] negotiating position extremely unreasonable.

Id.

{¶ 58} Other courts have expanded on the difference between fact and opinion for the purposes of defamation:

> The distinction frequently is a difficult one, and what constitutes a statement of fact in one context may be treated as a statement of opinion in another, in light of the nature and content of the communication taken as a whole. Thus, where potentially defamatory statements are published in a public debate, a heated labor dispute, or in another setting in which the audience may anticipate efforts by the parties to persuade others to their positions by use of epithets, fiery rhetoric or hyperbole, language which generally might be considered as statements of fact may well assume the character of statements of opinion.

Gregory v. McDonnell Douglas Corp., 17 Cal.3d 596, 601, 552 P.2d 425 (1976).

{¶ 59} Ohio case law is sparse on whether complaints or reviews published on the internet may be the basis for actionable defamation claims. In *Kauffman Racing Equip., L.L.C. v. Roberts*, 126 Ohio St.3d 81, 2010-Ohio-2551, 930 N.E.2d 784, the Ohio Supreme Court addressed whether the long-arm statute conferred personal jurisdiction over a nonresident defendant who published allegedly defamatory statements on the internet. However, the case did not discuss the merits of the defamation claims.

{¶ 60} Although unrelated to statements published online, Ohio courts have spoken about statements made in a "public forum," such as letters to the editor of a newspaper. In *Wampler v. Higgins*, 93 Ohio St.3d 111, 752 N.E.2d 962 (2001), the court concluded that statements made in a letter to the editor of the Circleville Herald were nonactionable expressions of opinion. The court characterized a letter to the editor as "a common forum for citizens of the community to express viewpoints on a wide variety of subjects" and concluded that these letters "are integral to the 'robust and uninhibited commentary on public issues that is part of

our national heritage.'" *Id.* at 131 (*quoting Kotlikoff v. Community News*, 89 N.J. 62, 73, 444 A.2d 1086 (1982)).

{¶ 61} Accordingly, we turn to our sister courts in other states for guidance.

{¶ 62} In *Chaker v. Mateo*, 209 Cal.App.4th 1138, 1149, 147 Cal. Rptr.3d 496 (2012), the allegedly defamatory statements were published on an internet message board. The court concluded as follows:

> the statements about Chaker were made in the context of the paternity and child support litigation going on between Chaker and Wendy's daughter and all were made on Internet Web sites which plainly invited the sort of exaggerated and insulting criticisms of businesses and individuals which occurred here. The overall thrust of the comments attributed is that Chaker is a dishonest and scary person. This overall appraisal of Chaker is on its face, nothing more than a negative, but nonactionable opinion.

But see Stavropoulos v. Patton, 2015 U.S. Dist. LEXIS 149729, at 7, E.D. Wisc. No. 15-cv-811 (Nov. 5, 2105) (finding that statements that the defendant "disappeared with my money and will not return calls, texts or emails" and references to "filing a grand larceny complaint" published on Ripoff Report "contain all the elements of a defamatory communication").

{¶ 63} The Ripoff Report website has been described by courts as follows: "The website is a consumer reporting website where third party consumers can document complaints about companies or individuals." *Asia Econ. Inst. v. Xcentric Ventures*, L.L.C., 2010 U.S. Dist. LEXIS 133370, at 6, C.D. Cal. No. CV 10-1360 SVW (PJWx) (July 19, 2010).

{¶ 64} Upon review, we find that reasonable readers would assume the statements made on the Ripoff Report website are opinions. *Compare Seaton v. TripAdvisor,* L.L.C., 725 F.3d 592, 598, 2013 U.S. App. LEXIS 17936 (6th Cir.2013) (defendant's placement of plaintiff's hotel "on the '2011 Dirtiest Hotels' list constitutes nonactionable opinion" because readers of the online travel review website "understand the list to be communicating subjective opinions of travelers who use TripAdvisor"); *Loftus v. Nazari*, 21 F.Supp.3d 849, 852-853, 2014 U.S. Dist. LEXIS 65502 (6th Cir. 2014) (online reviews posted on opinion websites alleging that a plaintiff plastic surgeon left a defendant patient with "horrible scars and disfigurement on both breasts * * * as a result of her mistakes" not actionable as defamation — "The reader of the postings may decide for himself or herself whether the opinions should be accepted or are an example of the logical fallacy known as post hoc ergo propter hoc") .

{¶ 65} Accordingly, we find that the court did not err by granting summary judgment to Maddox on GeoData's defamation counterclaim.

G. Deceptive Trade Practices Act

{¶ 66} In this counterclaim, GeoData alleges that Maddox "has made false and misleading statements of fact concerning [GeoData's] product, product availability, product deliverance and other related matters." GeoData further alleges that these statements were material in nature and intended to deceive third parties. At no time does GeoData identify what these alleged statements are. Ohio's Deceptive Trade Practices Act is codified in R.C. Chapter 4165, and GeoData fails to

cite which of the 13 provisions of this act Maddox allegedly violated. Maddox met its burden of showing on summary judgment an absence of a factual dispute regarding this claim. Under the burden-shifting analysis, GeoData fails to set forth a disputed material fact regarding this counterclaim, and Maddox is entitled to judgment as a matter of law.

H. Disposition of Summary Judgment

{¶ 67} Upon review of Maddox's summary judgment motions, we find that Maddox set forth evidence that there is no genuine issue of material fact for trial on its claim for breach of contract and on GeoData's counterclaims. GeoData failed to meet its reciprocal burden of showing a genuine issue for trial regarding any claim or counterclaim in this case. Accordingly, Maddox is entitled to judgment as a matter of law, and GeoData's first, second, fifth, sixth, eighth, and ninth assigned errors are overruled.

IV. Motion for Enlargement of Time

{¶ 68} In GeoData's third assigned error, it argues that "the trial court erred in denying [GeoData's] motion for enlargement of time as moot based on the trial orders." Our review of the trial court's docket shows that, on July 18, 2018, the court issued the following journal entry: "The court denies [GeoData's] motion for enlargement of time as moot based on the trial order entered on 2/16/2018." The only order the court issued on February 16, 2018 was a case management order setting dates for discovery and motion practice. GeoData's only motion for an

enlargement of time was filed on January 31, 2018, and it requested additional "time to respond to discovery and dispositive motions."

{¶ 69} Based on the record and the parties' briefing on appeal, we find no error in the trial court's order, and GeoData's third assigned error is overruled.

V. Motion to Partially Strike

{¶ 70} In GeoData's fourth assigned error, it argues that the trial court erred in denying GeoData's "motion to partially strike [Maddox's] reply brief filed on June 25, 2018." GeoData offers no facts, argument, or law to support this assigned error. Our review of the record fails to show that the court erred by denying GeoData's motion to partially strike.

{¶ 71} Accordingly, GeoData's fourth assigned error is overruled.

VI. Motion for Reconsideration

{¶ 72} In GeoData's seventh assigned error, it argues that "[t]he trial court erred in denying [GeoData's] motion for reconsideration of its journal entry of July 30, 2018."

{¶ 73} According to the docket, on July 18, 2018, GeoData filed a "motion for reconsideration of the court's order on [GeoData's] counterclaims and supplemental affidavits." On July 31, 2018, the court denied this motion. GeoData's motion for reconsideration "respectfully requests [the trial court] reconsider the decision to grant summary judgment to [Maddox] on [GeoData's] tortious interference with contract, tortious interference with a business relationship, civil conspiracy and Deceptive Trade Practices Act claims because we believe there are

genuine issues of material fact in dispute to create issues for trial." However, this motion for reconsideration does not identify any of those alleged issues. Rather, GeoData attached to this motion the first set of supplemental affidavits from Bruce and Nina that are quoted earlier in this opinion. These affidavits do nothing more than state that the initial affidavits were "made based upon * * * personal knowledge," a clause that was missing from the original affidavits.

{¶ 74} Pursuant to Civ.R. 54(B), a trial court's order or decision is "subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties." Accordingly, an interlocutory order, such as granting partial summary judgment, is subject to a motion for reconsideration. *Pitts v. Ohio Dept. of Transp.*, 67 Ohio St.2d 378, 423 N.E.2d 1105 (1981). We review a trial court's ruling on a motion for reconsideration under an abuse of discretion standard. *Vanest v. Pillsbury Co.*, 124 Ohio App.3d 525, 535, 706 N.E.2d 825 (1997). "The term 'abuse of discretion' connotes more than an error of law or of judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable." *State v. Adams*, 62 Ohio St.2d 151, 157, 404 N.E.2d 144 (1980).

{¶ 75} The trial court was presented with no additional evidence in GeoData's motion for reconsideration of the court's granting partial summary judgment in favor of Maddox on four of GeoData's six counterclaims. Accordingly, we find that the trial court acted within its discretion when denying reconsideration, and GeoData's seventh assigned error is overruled.

VII. Civ.R. 54(D) Court Costs

{¶ 76} In GeoData's tenth and final assigned error, it argues that the "trial court erred in finding that [Maddox] is the prevailing party pursuant to Civil Rule 54(D) and assessing Court costs to [GeoData]." On August 15, 2018, the court issued a journal entry stating that "this court's entries of 07/16/2018 and 08/14/2018 have disposed of all pending claims in this action" and the granting of summary judgment on all claims and counterclaims is "the final judgment in this action." The court further found that Maddox was the "prevailing party pursuant to Civ.R. 54(D)" and assessed "court cost" [sic] against GeoData.

{¶ 77} Civ.R. 54(D) states that "[e]xcept when express provision therefore is made either in a statute or in these rules, costs shall be allowed to the prevailing party unless the court otherwise directs." Ohio courts have held that "costs may be taxed under Civ.R. 54(D) in actions decided on summary judgment." *Boomershine v. Lifetime Capital, Inc.*, 182 Ohio App.3d 495, 2009-Ohio-2736, 913 N.E.2d 520, ¶ 13 (2d Dist.). *See also Haller v. Borror*, 107 Ohio App.3d 432, 669 N.E.2d 17 (10th Dist. 1995).

{¶ 78} Upon review, we find no error in the court's decision to assess costs against GeoData, because Maddox is the prevailing party on all claims and counterclaims in this case. Accordingly, GeoData's tenth assigned error is overruled.

{¶ 79} Judgment affirmed.

It is ordered that appellee recover from appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

____
PATRICIA ANN BLACKMON, JUDGE

MARY EILEEN KILBANE, A.J., and
SEAN C. GALLAGHER, J., CONCUR

APPENDIX

Assignments of Error

I. The trial court erred by improperly weigh[ing] affidavit evidence set forth in the Affidavits of Bruce and Nina Jackim in its Journal Entry of July 14, 2018.

II. The trial court erred in granting part of Plaintiff's Motion for Summary Judgment on Defendant's Counterclaims in its Journal Entry of July 16, 2014.

III. The trial court erred in denying Defendant's Motion for Enlargement of Time as moot based on the Trial Orders.

IV. The trial court erred in denying Defendant's Motion to Partially Strike the Plaintiff's Reply Brief filed on June 25, 2018.

V. The trial court erred in improperly assessing and weighing the affidavit testimony at the summary judgment stage of Affidavits in support of the denial of summary judgment in its Journal Entry of July 30, 2018.

VI. The trial court erred in its Journal Entry of July 30, 2018 in deciding on summary judgment whether an allegedly defamatory statement is one of fact or opinion that could be decided on a summary judgment as a matter of law.

VII. The trial court erred in denying Defendant's Motion for Reconsideration in its Journal Entry of July 30, 2018.

VIII. The trial court erred in its Journal Entry of August 14, 2018 granting the Plaintiff's Motion for Summary Judgment on Defendant's Counterclaims.

IX. The trial court erred in granting the Plaintiff's summary judgment motion on the breach of contract in its Journal Entry of August 14, 2018 and improperly applied summary judgment standards to its analysis, thereby depriving the Defendant of a trial on the merits.

X. The trial court erred in finding that the Plaintiff is the prevailing party pursuant to Civil Rule 54(D) and assessing Court costs to the Defendant.