No. _____

In The
Supreme Court of the United States

EDWARD F. MARACICH, MARTHA L. WEEKS,
AND JOHN C. TANNER,

Petitioners,

v.

MICHAEL EUGENE SPEARS, MICHAEL SPEARS, P.A.,
GEDNEY M. HOWE, III, GEDNEY M. HOWE, III, P.A.,
RICHARD A. HARPOOTLIAN,
RICHARD A. HARPOOTIAN, P.A.,
A. CAMDEN LEWIS, AND LEWIS & BABOCK, LLP,

Respondents.

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Driver's Privacy Protection Act of 1994 ("DPPA" or "Act"), 18 U.S.C. §§ 2721-2725, prohibits the obtainment, use, or disclosure of "personal information" maintained in state motor vehicle department ("DMV") databases, unless the use of such information falls within one of several discrete enumerated exceptions. This case presents an opportunity for this Court to resolve a conflict among the circuits and even state courts as to the circumstances under which the litigation exception to the Act permits lawyers special rights of access to DPPA-protected information.

In this case, the Fourth Circuit became the first court to hold that the acquisition and use by lawyers of confidential information from a DPPA-protected database solely for the purpose of soliciting clients, as opposed to searching for evidence or witnesses, qualified as a use "in connection with" litigation, pursuant to 18 U.S.C. § 2721(b)(4). The Eleventh Circuit, the Third Circuit, and the District of Columbia Court of Appeals, on the other hand, have held that the litigation exception does not permit lawyers to obtain or use DPPA-protected information to find or solicit clients. Instead, these courts have made clear that the litigation exception permits use of private information only when the information is relevant or likely to lead to discovery of evidence or witnesses. The Fourth Circuit has crossed that line, thereby inserting into the DPPA what amounts to a "for use

QUESTION PRESENTED – Continued

by lawyers" exception, as opposed to a "for use in litigation" exception, and further muddling an already confusing and conflicted area of the law.

This petition asks the Court to consider two questions:

1. Whether the Fourth Circuit erred in holding, contrary to every other court heretofore to have considered the issue, that lawyers who obtain, disclose, or use personal information solely to find *clients* to represent in an incipient lawsuit – as opposed to *evidence* for use in existing or potential litigation – may seek solace under the litigation exception of the Act.

2. Whether the Fourth Circuit erred in reaching the conclusion (in conflict with prior precedent) that a lawyer who files an action that effectively amounts to a "place holder" lawsuit may thereafter use DPPA-protected personal information to solicit plaintiffs for that action through a direct mail advertising campaign on the grounds that such use is "inextricably intertwined" with "use in litigation."

LIST OF PARTIES

The following were parties to the proceedings in the United States Court of Appeals for the Fourth Circuit:

1. Edward F. Maracich, individually and on behalf of all others similarly situated, Martha L. Weeks, individually and on behalf of all others similarly situated, and John C. Tanner, individually and on behalf of all others similarly situated, were plaintiffs-appellants below and are petitioners on review.

2. Michael Eugene Spears; Michael Spears, PA; Gedney Main Howe, III; Gedney Main Howe III, PA; Richard A. Harpootlian; Richard A. Harpootlian, PA; A. Camden Lewis; and Lewis & Babcock, LLP, were defendants-appellees below.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners, Edward F. Maracich, Martha L. Weeks, and John C. Tanner, respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The opinion of the Fourth Circuit Court of Appeals is reported at 675 F.3d 281 (4th Cir. 2012), and reprinted in the Appendix ("App.") at 1a-44a. The District Court's opinion and order granting Respondents' motion for summary judgment and denying Petitioner's motion for summary judgment is available at 7:09-cv-01651-HMH, and is reprinted at App. 47a-84a.

JURISDICTION

The Fourth Circuit Court of Appeals issued its decision on April 4, 2012. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

The Driver's Privacy Protection Act of 1994 ("DPPA"), 18 U.S.C. §§ 2721-2725, "regulates the disclosure of personal information contained in the records of state motor vehicle departments (DMVs)."

Reno v. Condon, 528 U.S. 141, 143 (2000). The statute is reproduced in full at App. 102a-110a.

STATEMENT OF THE CASE

Statutory Framework

The DPPA "establishes a regulatory scheme that restricts the States' ability to disclose a driver's personal information[1] without the driver's consent," "generally prohibit[ing] any state DMV, or officer, employee, or contractor thereof from 'knowingly disclos[ing] or otherwise mak[ing] available to any person or entity personal information about any individual obtained by the department in connection with a motor vehicle record.'" *Reno*, 528 U.S. at 144 (quoting 18 U.S.C. § 2721(a)) (second and third alterations in original). It "also regulates the resale and redisclosure of drivers' personal information by private persons who have obtained that information from a state DMV." *Id.* at 146.

There is a private right of action under the DPPA for the benefit of individuals whose private "personal information" is obtained, used, or disclosed "for a purpose not permitted" under § 2721(b). 18 U.S.C.

[1] "Personal information" is defined as "information that identifies an individual, including an individual's photograph, social security number, driver identification number, name, address (but not the 5-digit zip code), telephone number, and medical or disability information." 18 U.S.C. § 2725(3).

§ 2724(a). Statutory liquidated damages are available to a prevailing plaintiff. 18 U.S.C. § 2724(b). Intentional or knowing violations of the Act may also give rise to criminal sanctions. 18 U.S.C. §§ 2722, 2723.

Section 2721(b) provides that personal information may only be disclosed for an expressly enumerated list of purposes. The permissible purposes most relevant to this petition are as follows:

> (4) For use in connection with any civil, criminal, administrative, or arbitral proceeding in any Federal, State, or local court or agency or before any self-regulatory body, including the service of process, investigation in anticipation of litigation, and the execution or enforcement of judgments and orders, or pursuant to an order of a Federal, State, or local court.
>
> . . .
>
> (12) For bulk distribution for surveys, marketing or solicitations if the State has obtained the express consent of the person to whom such personal information pertains.

18 U.S.C. § 2721(b). These exceptions to the general proscription on the obtainment, disclosure, or use of personal information are often referred to as the "litigation exception" and the "bulk solicitation exception."

Factual Background

The defendants in this case are South Carolina attorneys ("the Lawyers") who brought so-called "group action" lawsuits in South Carolina state court against various car dealerships in 2006 and 2007, in which they contended the dealerships charged fees which were not properly disclosed as required by the South Carolina Regulation of Manufacturers, Distributors, and Dealers Act (S.C. Code Ann. § 56-15-10 *et seq.*).

Prior to filing suit, the Lawyers instituted two requests to the South Carolina DMV[2] for the personal information of individuals who had purchased automobiles in a given county during specified dates. The Lawyers subsequently made three more requests to the state DMV for personal information of vehicle purchasers. The DPPA-protected personal information of thousands of vehicle purchasers was obtained.

The letters represented that the personal information of car owners was sought "in anticipation of litigation" and authorized under the DPPA's litigation exception, but did not disclose that the Lawyers did not seek this information for use as evidence or to identify witnesses. More specifically, the Lawyers did not disclose that they intended to use this information to solicit car buyers to hire the Lawyers for

[2] The requests were made pursuant to the South Carolina Freedom of Information Act, S.C. Code Ann. § 30-4-10 *et seq*.

lawsuits against car dealers, many for which the Lawyers did not as yet have even a single client with standing to sue. Shortly after the second request, the Lawyers sued 51 dealerships on behalf of four named plaintiffs. At least 47 of these dealerships had not transacted business with any of the Lawyers' clients. The Lawyers later amended the Complaint to increase the number of plaintiffs to 8 and the number of dealerships to 324. At least 316 of the dealerships sued had not transacted business with any of the Lawyers' clients.

Between January 2007 and May 2007, the Lawyers posted six bulk mailings of thousands of form letters soliciting business ("the Letters") to individuals whose names and addresses were obtained from DPPA-protected DMV databases. The Letters, which carried a legend on their face disclosing they were "**ADVERTISING MATERIAL**," stated that the Lawyers represented consumers who had been charged allegedly unlawful add-on fees by car dealerships, and offered to discuss the recipient's "rights and options . . . in a free consultation." App. 10a. The Lawyers filed a copy of the Letters, as well as a list of the recipients' names and addresses (which is considered "personal information" under the Act) with the South Carolina Office of Disciplinary Counsel, as required by South Carolina's rule regulating direct mail solicitation by lawyers. The Office of Disciplinary Counsel was not informed that the personal information of the car buyers was confidential, and it was filed of public record in violation of the Act.

Around May 2007, after receiving one of the Letters, John Tanner, one of the class representatives named in this action, called one of the Lawyers, Richard Harpootlian, to ascertain how his contact information had been procured. Tanner received an "aggressive sales pitch" to hire the Lawyers. App. 13a. Harpootlian assured Tanner that he stood to gain a hefty recovery if he hired the Lawyers to sue the dealer who had sold him his car. Tanner was not asked anything about the circumstances surrounding his automobile purchase.

On June 23, 2009, Petitioners filed the instant action against the Lawyers in the United States District Court for the District of South Carolina, alleging that the Lawyers' obtainment, disclosure, and use of their personal information without their consent for the statutorily prohibited use of solicitation violated the DPPA. The court had jurisdiction under 18 U.S.C. § 2724(a). On August 3, 2009, the Lawyers moved to dismiss the complaint on multiple grounds. However, the only purported basis for dismissal relevant to this petition was the Lawyers' contention that their conduct was permitted by the litigation exception to the DPPA's bar on obtainment, disclosure, or use of personal information.

The District Court denied the Lawyers' motion to dismiss on the grounds that further factual development was necessary to determine whether the Lawyers' actions were permissible under the DPPA. (The District Court's opinion and order denying the

Lawyers' motion to dismiss is reprinted at App. 86a-101a.) Nearly one year later, however, the District Court reversed itself. Despite a stay order in the interim which prevented plaintiffs from taking any discovery, the District Court granted the Lawyers' motion for summary judgment, which was premised, according to the Fourth Circuit, on "essentially the same arguments [the Lawyers] had asserted in their unsuccessful Motion to Dismiss." App. 20a.

The District Court Opinion

The District Court made three holdings relevant to this petition.

First, the court held that, "[i]n light of the unique representative function under group action," App. 21a, the Lawyers' mailing of the Letters offering to represent the recipients in litigation against the dealers did not constitute solicitation as a matter of law. App. 61a. Analogizing to the law of class actions, in which "the [class] attorney[ ] assume[s] fiduciary obligations or constructive attorney-client status with respect to the class," App. 59a-60a (quoting 3 Herbert Newberg & Alba Conte, *Newberg on Class Actions* § 15.16 (4th ed. 2002) (alterations in original)), the court observed that "[s]olicitation of parties [to help maintain the action on behalf of a class] may be entirely appropriate, if not required, as part of class counsel's fiduciary duty." App. 61a (quoting *In re Avon Sec. Litig.*, 1998 WL 834366, at *10 (S.D.N.Y. Nov. 30, 1998) (alteration in original)). The District Court

reasoned that "even if an attorney-client relationship does not exist between the [Lawyers] and the unnamed Car Buyers, at a minimum, since the inception of the [group action], the [Lawyers] have owed all unnamed Car Buyers a fiduciary duty." App. 61a. Remarkably, the court concluded that the Lawyers' conduct was not "solicitation" within the meaning of the DPPA.

Second, the District Court held that, even assuming *arguendo* that the Lawyers had used individuals' personal information for the impermissible purpose of solicitation, they would not have violated the DPPA if they "had a permissible purpose for obtaining, using, and disclosing the personal information." App. 62a. Purporting to follow the lead of the Eleventh Circuit, the court reasoned that "the statutory exceptions found in section 2721(b) are not mutually exclusive," and thus when "two statutory provisions that potentially apply" are involved, "both must be given effect unless they pose an either-or proposition." App. 63a (quoting *Rine v. Imagitas, Inc.*, 590 F.3d 1215, 1226 (11th Cir. 2009)). The court expressly split with and "decline[d] to follow the Third Circuit's holding in *Pichler v. UNITE*" that the DPPA "contains no language that would excuse an impermissible use merely because it was executed in conjunction with a permissible purpose." App. 63a (quoting *Pichler v. UNITE*, 542 F.3d 380, 395 (3d Cir. 2008)).

Finally, the court held that the Lawyers' obtainment and use of the personal information was lawful under the litigation exception to the DPPA (18 U.S.C.

§ 2721(b)(4)), reasoning that it was "in connection with" the group action suits against the car dealers. Specifically, the District Court accepted the Lawyers' arguments that the information requests and Letters were necessary to "identify[ ] the highest volume dealers" and to "identify a Car Buyer for every Car Dealer in order to respond to the [plaintiffs'] motions to dismiss [for lack of standing]." App. 71a, 75a.

The Fourth Circuit Opinion

Petitioners timely appealed the District Court's grant of summary judgment in favor of the Lawyers. The Court of Appeals for the Fourth Circuit affirmed, but on different grounds from the District Court. The Fourth Circuit held, contrary to the District Court, that the Letters did in fact amount to solicitation under the DPPA, since the Lawyers' conduct was "consistent with the common understanding of the meaning of the word as targeted lawyer advertising aimed at affording representation to potential clients." App. 28a. However, the court concluded that this use of the recipients' personal information was nonetheless permissible under the statute because it "was integral to, and was, indeed, inextricably intertwined with the Lawyers' permissible use of the Buyers' personal information pursuant to the litigation exception." App. 29a.

In reaching its holding, the court acknowledged that there is "manifest tension between the solicitation and litigation exceptions under the DPPA" and

that "the limited number of cases among our sister circuits reflect that the law in this area is in a state of continued evolution." App. 30a. However, the Fourth Circuit concluded, as had the District Court, that "the Eleventh Circuit's approach provides the better reasoned interpretation of the Act" than that of the Third Circuit. App. 37a. The court then went a step further than the Eleventh Circuit, expanding the "inextricably intertwined" reasoning to encompass, for the first time, a situation in which the information was used to locate clients to bring lawsuits. The Lawyers, explained the court, "always had only one use as their purpose, i.e. litigation, litigation that at all times of their conduct was either imminent or ongoing." App. 37a. Indeed, the court went so far as to say that the Lawyers "simply could not make appropriate, efficient and ethical use of the Buyers' personal information . . . without first engaging in solicitation." App. 38a.

According to the court, because "the Lawyers already had been contacted by potential clients" regarding cases against other defendants prior to instituting the requests for information and sending the Letters, "it cannot be said that they were merely 'trolling.'" App. 42a. Instead, the Lawyers' conduct was permissible under the litigation exception, since "[t]he solicitation of clients by trial lawyers is surely connected to litigation in that representation for a legal claim is the goal." App. 42a.

This petition follows.

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REASONS FOR GRANTING THE WRIT

This is a case about privacy. It is also a case about whether lawyers can claim special status in pursuit of the business of the practice of law. It raises the question of whether lawyers – in contrast to every other type of professional or business – are granted special dispensation under the DPPA to invade the privacy of thousands of individuals for the sole purpose of solicitation of new business. Rejecting the ruling and reasoning of every other court that has considered this issue, the Fourth Circuit concluded that if soliciting lawyers find clients to hire them to file lawsuits, the solicitation itself is "inextricably intertwined" with litigation and the use of statutorily-protected information for solicitation is therefore permissible. By this logic, the Fourth Circuit has converted the "for use in litigation" exception into a "for use by lawyers" exception to the DPPA, and has staked out new ground, creating a conflict in the law that this Petition asks the Court now to resolve.

This case presents a compelling opportunity for this Court to resolve the split that now exists among the circuit courts and even some state courts concerning the statutory right of individuals to have kept private the personal information they must disclose to state DMVs. The question presented in this case is squarely presented before the Court; it was raised and argued at both levels below and is clouded by no jurisdictional or standing issues. Accordingly, this case provides a clean vehicle by which the Court may resolve an exceedingly important federal question.

In reaching the unprecedented conclusion that pure solicitation of clients may qualify as "investigation in anticipation of litigation" within the meaning of the Act, the Fourth Circuit was not troubled by the prospect of a lawyer filing a lawsuit that effectively amounts to nothing more than a "place holder" (because the lawyer has as yet no clients to pursue the claims that have been filed) and then obtaining potential litigants' personal information from state DMVs to solicit them to pursue the lawsuit. Its ruling is directly in conflict with precedent from the Third Circuit, the Eleventh Circuit, and the District of Columbia Court of Appeals, and the resulting confusion regarding the proper interpretation of a federal statute implicating personal privacy warrants this Court's expeditious intervention. (The fact that the Fourth Circuit purported to, but did not, follow the lead of the Eleventh Circuit is a testament to the magnitude of this confusion.) Moreover, it is important the split in the circuits be resolved now, and not put off for some other day, so that lawyers seeking DPPA-protected personal information, and the state DMVs who maintain it, are not put at future risk of the serious sanctions provided for by the Act because of conflicting opinions by various courts.

The court below not only muddled an already complex area of federal law, it also reached a decision that, if allowed to stand, has profoundly troubling policy implications. The Fourth Circuit's interpretation of the Act would permit any lawyer, at any time, to obtain and use the personal information of individuals from state DMVs to solicit clients without

their prior consent – thereby, as has been stated, creating, out of whole cloth, a "for use by lawyers" exception to the DPPA. This is a perverse and troubling result that Congress could not have intended. Pure solicitation of business – that is, the mere trolling for parties to bring a potential or incipient lawsuit, as opposed to the gathering of evidence for use in litigation – with the aid of statutorily-protected personal information is something no other court has permitted as a use of DPPA-protected personal information. It has not mattered to any other court whether the advertiser soliciting business is a lawyer or any other person or enterprise looking to peddle its wares or promote its services. This case squarely presents the Court with the opportunity to resolve the uncertainty that the Fourth Circuit has created and to make clear that attorneys, as advertisers looking for customers, have no special right to invade individuals' personal privacy under the guise of the litigation exception to the DPPA.

I. THIS CASE PRESENTS A CLEAR-CUT OPPORTUNITY FOR THIS COURT TO RESOLVE THE CONFLICT AMONG THE LOWER COURTS AND MAKE IT PLAIN THAT ATTORNEYS MAY NOT OBTAIN STATUTORILY-PROTECTED PERSONAL INFORMATION FOR THE SOLE PURPOSE OF SOLICITING CLIENTS WITHOUT THEIR CONSENT.

The Fourth Circuit's holding can be divided into two parts. First, the court declined to follow the Third

Circuit, as well as the District of Columbia Court of Appeals, in concluding – contrary to every other court heretofore to have considered the issue – that pure solicitation of clients qualifies as a permissible use under the litigation exception of the Act. Second, the court purportedly followed the lead of the Eleventh Circuit, while rejecting precedent from the Third Circuit, in holding that a permissible use of personal information under the DPPA exempts a defendant from liability for an impermissible use, so long as the latter use is "inextricably intertwined with" the former.

Thus, the Fourth Circuit's first holding *created* a split among the lower courts regarding the appropriate construction of the DPPA where there was none before, and its second holding *contributed* to a split regarding the proper test to apply to claims under the DPPA. The result is an ever-widening divergence among the lower courts regarding the proper interpretation of an important federal statute concerning personal privacy.

The Fourth Circuit's holding that pure solicitation by lawyers falls within the litigation exception to the DPPA is wrong as a matter of law and policy. It is the product of a tortured interpretation of the DPPA and, if allowed to stand, will leave a gaping loophole in the statutory scheme. In this case, the Lawyers ultimately made available in the public records the personal information of thousands of car buyers. The Fourth Circuit's reasoning would give lawyers free reign to invade any individual's personal privacy in

order to solicit business, thereby creating a "lawyer exception" to the Act that is found nowhere in the statutory language, and threatens to contribute to concerns the public already has about the "professionalism" of the legal profession.

A. Pure solicitation does not qualify as a permissible use of personal information under the litigation exception.

In construing a statute, courts "look first to its language, giving the words used their ordinary meaning." *Roberts v. Sea-Land Servs., Inc.*, 132 S.Ct. 1350, 1356 (2012). "Interpretation of a word or phrase depends upon reading the whole statutory text, considering the purpose and context of the statute, and consulting any precedents or authorities that inform the analysis." *Dolan v. U.S. Postal Serv.*, 546 U.S. 481, 486 (2006). In this case, an examination of the plain terms of the litigation exception, the interpretation of the statute by other courts, and Congressional intent as well as the exception's context in the larger statutory scheme, makes pellucidly clear that the litigation exception does not encompass conduct such as that of the Lawyers.

1. Every other court to consider the issue has recognized that solicitation of clients by lawyers is not proper under the litigation exception.

As the court below recognized, the "common understanding of the meaning of the word" solicitation

is "targeted lawyer advertising aimed at affording representation to potential clients." App. 28a. The litigation exception to the DPPA, on the other hand, provides that personal information may be disclosed

> for use in connection with any civil, criminal, administrative, or arbitral proceeding in any Federal, State, or local court or agency or before any self-regulatory body, including the service of process, investigation in anticipation of litigation, and the execution or enforcement of judgments and orders, or pursuant to an order of a Federal, State, or local court.

18 U.S.C. § 2721(b)(4).

The concept of solicitation, according to its ordinary meaning, does not fit within the plain language of the litigation exception. That exception does not allow lawyers to use personal information to obtain *plaintiffs* for a lawsuit. One does not solicit plaintiffs "in connection with" ongoing litigation or in "investigation in anticipation of litigation." One solicits plaintiffs in order to *start* litigation.

In *Pichler v. UNITE*, 585 F.3d 741 (3d Cir. 2009) ("*Pichler VII*"),[3] the Third Circuit rebuffed a non-profit

[3] The *Pichler* case has a somewhat tortuous procedural history. For purposes of this petition, the three relevant decisions are *Pichler v. UNITE*, 446 F. Supp. 2d 353 (E.D. Pa. 2006) ("*Pichler III*") (ruling on cross motions for summary judgment); *Pichler v. UNITE*, 542 F.3d 380 (3d Cir. 2008) ("*Pichler V*") (affirming the district court's holding that the defendant had

(Continued on following page)

organization's attempt to obtain access to DPPA-protected information, which the organization planned to use to locate individuals to pursue claims against a labor union. The Third Circuit stated flatly that "the litigation exception of the DPPA requires something more than merely using the protected records to identify potential litigants." 585 F.3d at 751. The court determined that, since the information sought under the DPPA "would do nothing more than identify potential litigants and claimants who may wish to pursue remedies," the organization was not permitted to obtain or use it, stating that this "is not enough to compromise the privacy afforded motorists by the DPPA." *Id*. at 752. The court expressed concern that a contrary holding would present a "great[ ]" "risk of a fishing expedition or some other form of mischief." *Id.* at 752 (quoting Arthur R. Miller, *Confidentiality, Protective Orders, and Public Access to the Courts,* 105 Harv. L. Rev. 427, 499 (1991)).

The court of last resort in the District of Columbia, the D.C. Court of Appeals, has offered a similarly clear rejection of the Fourth Circuit's position: "[A]cquiring personal information from the motor vehicle records for the purpose of finding and soliciting clients for a lawsuit is not a 'permissible use' within the meaning of § 2721(b)." *Wemhoff v. D.C.*, 887 A.2d 1004, 1012 (D.C. 2005). As one of the courts

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violated the DPPA); and *Pichler v. UNITE*, 585 F.3d 741 (3d Cir. 2009) ("*Pichler VII*") (considering appeal from the district court's refusal to modify a protective order).

in the Eleventh Circuit observed, the "litigation exception has its limits," one of which is that it does not include identifying potential litigants. *Young v. W. Publ'g Corp.*, 724 F. Supp. 2d 1268, 1279 n.4 (S.D. Fla. 2010).

Even the Eleventh Circuit Court of Appeals, which the Fourth Circuit purported to follow, has applied the litigation exception only to cases in which the defendant was actually seeking *evidence* for use in litigation, but never to a case in which the defendant was merely looking for parties to a lawsuit. *See Thomas v. George, Hartz, Lundeen, Fulmer, Johnstone, King, & Stevens, P.A.*, 525 F.3d 1107 (11th Cir. 2008). The Eleventh Circuit concluded that the litigation exception applies if the defendant is using motor vehicle records "for the purpose of identifying *potential witnesses* to testify in lawsuits" that are either ongoing or imminent. *Id*. at 1110, 1115 & n.5. On the other hand, "if a plaintiff is a recipient of a mass marketing letter, it is no secret that (b)(12) is at issue, which allows for bulk distribution of solicitations only if express consent is obtained." *Id.* at 1114.

The Third Circuit reached a similar conclusion about the use contemplated by (b)(4), stating that the litigation exception was applicable to a request for disclosure only if the information sought would "advance the inquiry of a[ ] decisionmaker charged with deciding" a claim. *Pichler VII*, 585 F.3d at 752. A court in the Southern District of New York has suggested a comparable test, finding that the defendants' use of the plaintiff's personal information was

permissible because the defendants used the information "in an effort to establish a particular point" relevant to a legal proceeding. *Manso v. Santamarina & Assocs.*, 2005 WL 975854, at *5 (S.D. N.Y. Apr. 26, 2005).

The Fourth Circuit's conclusion that the Lawyers' solicitation, conducted only to find parties to a lawsuit (rather than evidence or witnesses for use in a pending or potential lawsuit), was permissible under the litigation exception, is completely novel and unprecedented. The resulting circuit split is bound to engender further confusion about the proper interpretation of the DPPA.

2. Petitioners' reading of the DPPA is confirmed by the Congressional intent behind the enactment of the statute and the statutory scheme itself.

Congress wished to protect motorists' privacy, partly by ensuring that they were free from unwanted solicitation, when it passed and then later amended the Act. In *Reno v. Condon*, 528 U.S. 141, 144-45 (2000), this Court examined the history of the DPPA, and noted that, under the DPPA, "States may not imply consent from a driver's failure to take advantage of a state-afforded opportunity to block disclosure, but must rather obtain a driver's affirmative consent to disclose the driver's personal information for use in surveys, marketing, solicitations,

and other restricted purposes." *See also Wemhoff*, 887 A.2d at 1012 (discussing the legislative history of the Act and concluding "[t]hat Congress deemed the requirement of consent in subsections (11), (12) and (13) to be vitally important is clear from the legislative history"). Attorneys are no more permitted than anyone else to flout Congress's proscription of unwanted solicitation.

The Act is not silent on the subject of using personal information to engage in commercial solicitation; indeed, there is a statutory exception for it, but it applies *only* "if the State has obtained the express consent of the person to whom such personal information pertains." 18 U.S.C. §2721(b)(12). This consent provision "suggest[s] that Congress did not intend that personal information in motor vehicle records would be used to contact persons to become plaintiffs in a lawsuit, nor that such information would be disclosed, without the consent of the affected person." *Wemhoff*, 887 A.2d at 1012.

The Fourth Circuit's failure to realize this elementary point – that solicitation, by lawyers, telemarketers, or traveling salesmen, is not permissible under the DPPA – caused it to grossly misapply even its own test. Even assuming *arguendo* that the "inextricably intertwined" test was a proper interpretation of the DPPA, the Lawyers' actions in this case were not permissible because their use of the information was not "inextricably intertwined" with the Dealers Act litigation at all.

Had the Lawyers been calling individuals in order to find witnesses, or documentary evidence, or some other information that would "establish a point" in the litigation against the car dealers, perhaps their conduct would have passed muster under the Fourth Circuit's test. But they were not. The record does not indicate that the Lawyers did anything *other* than solicit clients with the information. Indeed, the opinion below does not clearly state which of the Lawyers' uses of the personal information were permissible under the DPPA, and which were impermissible yet immunized because they were "inextricably intertwined" with permissible uses. One might plausibly argue, then, that the Fourth Circuit's "inextricably intertwined" test was mere surplusage and that its actual holding – that is, the reasoning essential to its result – reduces to the following: When lawyers solicit clients without their consent, their conduct is not proscribed by the DPPA because legal solicitation is sufficiently "connected" to litigation to fall within the section 2721(b)(4) exception.[4] Such a holding essentially creates a "lawyer exception" to the DPPA that is found nowhere in its text.

The Letters were a sales pitch, pure and simple. And the DPPA does not allow using statutorily-protected personal information in such a way, even if the salesman is an attorney.

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[4] Even so reduced, however, this holding creates a circuit split where there was none before, as discussed below.

B. The plain terms of the DPPA do not allow a defendant to escape liability for an impermissible use of personal information merely by later using it for a permissible use.

Section 2724 of the Act provides that "[a] person who knowingly obtains, discloses or uses personal information, from a motor vehicle record, for a purpose not permitted under this chapter shall be liable to the individual to whom the information pertains. . . ." 18 U.S.C. §2724(a). Section 2721(b) enumerates fourteen permissible purposes for disclosure of personal information. As the Third Circuit has recognized, "the language of the statute is clear: The Act contains no language that would excuse an impermissible use merely because it was executed in conjunction with a permissible purpose." *Pichler V*, 542 F.3d at 395.

The Eleventh Circuit has observed that, because the DPPA is written using the disjunctive "or," it establishes "alternative means of committing a violation." *Rine v. Imagitas, Inc.*, 590 F.3d 1215, 1224 (11th Cir. 2009). Following this logic, each unlawful "obtain[ment], disclos[ure], or use[ ]" by a defendant entitles the plaintiff to additional damages. *Pichler V*, 542 F.3d at 394. If a defendant uses personal information several times, and some uses are permissible and some are not, the defendant is liable for each of the impermissible uses – and the presence or absence of a permissible use is patently irrelevant. *See id.* at 395 (defendant labor union was liable for using

personal information in order to engage in union organization, notwithstanding any "other permissible purpose [it] may have had").

Other courts have embraced this common-sense reading of the statutory text. In *Manso*, the Southern District of New York noted that, even if a party properly obtains personal information pursuant to the litigation exception to the DPPA, use of the information "in a manner not reasonably related to that litigation might indeed give rise to the inference that the information was not actually obtained and used 'in connection with' that litigation." 2005 WL 975854, at *4. Similarly, in *Menghi v. Hart*, the defendant police officer had obtained personal information about the plaintiff by running her license plates during a traffic stop – an obviously permissible use. 745 F. Supp. 2d 89, 103-04 (E.D. N.Y. 2010). However, the defendant later used that personal information to make harassing phone calls to her. *Id.* at 103. These uses had no permissible purpose and thus constituted violations of the DPPA. *Id.* at 104.

Even if the record in this case showed that the Lawyers had also used the DPPA-protected information in some other way that was permissible (which it does not), that cannot excuse their separate use of the information for solicitation. There is no "safe harbor" provision in the DPPA. The Act does not authorize otherwise impermissible uses just because the information might also be used at some point for

a proper purpose. Each violation of the DPPA is just that – a violation of the DPPA.[5] It does not matter whether the unlawful conduct is joined – or even "inextricably intertwined" – with other conduct that is lawful. To interpret the Act otherwise, as did the Fourth Circuit in this case, does violence to its plain terms, and would allow protected confidential information, laundered by a permissible use, to be sold or diverted to otherwise impermissible uses, thereby defeating the purpose of the Act.

C. It is vitally important that the Court resolve the conflict and reject the Fourth Circuit's approach.

Even if the court below had properly interpreted the DPPA, the need for resolution of the conflict and uncertainty among the lower courts concerning this important federal statute would warrant the Court

[5] For example, in the instant case, the Lawyers did more than obtain the personal information of car buyers without their consent, and then use that information to solicit them as clients – again without their consent. The Lawyers also filed a copy of the information with the South Carolina Office of Disciplinary counsel – *without redacting the plaintiffs' identifying personal information* or seeking some other protection for the thousands of individuals whose private information they had obtained from the DMV. Once on file with this office, that information was freely available to the world. Even if the Lawyers' initial obtainment and use of the plaintiffs' personal information were somehow permitted under the DPPA, this subsequent (and entirely unnecessary) disclosure without redaction was certainly not.

granting certiorari in this case. However, the Fourth Circuit's construction of the Act is wrong as a matter of law and has profoundly troubling policy implications – put simply, the holding below cannot be contained within rational bounds. This Court must not let the Fourth Circuit's decision stand.

If the Lawyers are permitted to file a suit against numerous car dealers with an initial complement of plaintiffs with standing to sue a small subset of the car dealers, then solicit additional plaintiffs using statutorily-protected personal information, why could they not, in the future, solicit plaintiffs in the first instance using such information merely on the theory that, "Surely *someone* has a grievance against these car dealers?" The *Pichler III* court recognized this problem. It pointed out that "at any given time[,] large companies such as DuPont or Dow Chemical are sure to be involved in multiple legal proceedings concerning discrimination, wage claims, or pollution." 446 F. Supp. 2d at 369. The court recognized that, were it to accept the defendant labor union's argument that its union organizing was a permissible use of personal information because it was integrally related to incipient labor litigation,

> any union – or for that matter any law firm – could research DuPont or Dow Chemical, learn of past litigation and therefore claim that litigation was "likely." It could then access the personal information of thousands of employees, contact them at their homes, and surely find *some* legal cases to prosecute. We

> do not believe that Congress drafted the DPPA just so we could eviscerate it by importing such claim trolling into its permissible uses.

Id. at 370.

Furthermore, as described above, the Fourth Circuit's decision essentially creates a "lawyer exception" to the DPPA. It would allow attorneys – and no one else – to arm themselves with the personal information of nonconsenting individuals and engage in commercial solicitation. But if lawyers can do this, why not other direct mail marketers, such as banks or credit card companies? If Lawyers may obtain DPPA-protected personal information for commercial advertising purposes and then, as in this case, disclose it to the public, of what use is the Act?

As of now, groups of commercial actors other than lawyers are not allowed to engage in such conduct, *see, e.g.*, *Rios v. Direct Mail Express, Inc.*, 435 F. Supp. 2d 1199 (S.D. Fla. 2006) (holding that defendant marketer's use of plaintiff's personal information for solicitation was prohibited by the DPPA), but one might understandably wonder why lawyers should receive special treatment. Indeed, Justice O'Connor has argued that widespread solicitation by attorneys may be even *more* worrisome than solicitation by other commercial actors:

> [T]he quality of legal services is typically more difficult for most laypersons to evaluate, and the consequences of a mistaken

> evaluation of the "free sample" may be much more serious. For that reason, the practice of offering unsolicited legal advice as a means of enticing potential clients into a professional relationship is much more likely to be misleading than superficially similar practices in the sale of ordinary consumer goods.

Shapero v. Ky. Bar Ass'n, 486 U.S. 466, 481 (1988) (O'Connor, J, dissenting).

The Fourth Circuit's holding essentially makes it impossible for a lawyer to *ever* violate the DPPA by using personal information to solicit business. This is a perverse result that must be avoided. In *Welch v. Theodorides-Bustle*, the District Court flatly rejected the public official defendants' argument that they could disclose personal information with impunity because this constituted "'use' of the information by a 'government agency . . . in carrying out its functions' . . . regardless of whether the actual disclosure was otherwise for a proper purpose." 677 F. Supp. 2d 1283, 1286 (N.D. Fla. 2010) (citation omitted). The court could not have been clearer: "That is not so. If *any* disclosure by a public official was automatically proper, there could never be a claim under the Act against a public official. The statutory language does not support such a conclusion. . . ." *Id.* The plain language of the Act does not support a special exception for lawyers any more than it supports one for public officials.

When it comes to the DPPA's proscription of bulk solicitation, lawyers are *not* special; we must abide by

the statute just like everyone else. A contrary statement provides ample ammunition to those who would charge that the legal world, writ large, is losing its sense of professionalism. *See Shapero*, 486 U.S. at 481 (O'Connor, J, dissenting) (noting that "[t]he advice contained in unsolicited 'free samples' is likely to be colored by the lawyer's own interest in drumming up business, a result that is sure to undermine the professional standards that States have a substantial interest in maintaining").

"Precisely because lawyers must be provided with expertise that is both esoteric and extremely powerful,. . . . [they] are subjected to heightened ethical demands on their conduct towards those they serve." *Id.* at 489-90. One such "ethical demand" is that we maintain the high professional standards of those who have come before us, and resist becoming the assembly of ambulance chasers that the public so often portrays us as. The Fourth Circuit's decision, in essence, *allows* lawyers to access confidential information that other advertisers are prohibited from using, so that the lawyers can chase ambulances – and it does so under the auspices of a federal court's suspiciously lawyer-friendly interpretation of a statute. That decision must not stand.

II. BOTH THE CIRCUIT COURTS AND STATE COURTS ARE DIVIDED ON THE QUESTION OF WHEN OTHERWISE UNLAWFUL USE OF DPPA-PROTECTED INFORMATION MAY BE PERMITTED.

To bolster its holding that lawyers may use statutorily-protected personal information to solicit clients, the Fourth Circuit articulated a new test for determining whether a use is permitted under the DPPA. The Fourth Circuit held that, if an impermissible use of protected information is "inextricably intertwined with" a later permissible use, the initial impermissible use is allowed. This introduction of yet another test regarding the DPPA adds confusion and contributes to a split among the lower courts. Additionally, as noted above, the Fourth Circuit's application of its own test grants immunity to any lawyer – or, at least, any litigator or "trial lawyer" – to make any use of private statutorily-protected information so long as he then files a lawsuit at some point in the future.

In addition to the "inextricably intertwined" test adopted by the court below, at least three other methods of analyzing the interplay among the DPPA's exceptions have been put forward in the lower courts. These three tests will be discussed in turn.

A. In the Third Circuit, liability arises under the DPPA for any impermissible use of personal information, even if such use is executed in conjunction with a permissible use.

In *Pichler v. UNITE*, *supra*, the Third Circuit considered whether UNITE, a labor union that had engaged in a practice called "tagging" as part of a union-organizing campaign against Cintas Corporation, had thereby violated the DPPA. The "tagging" consisted of UNITE organizers "us[ing] license plate numbers on cars found in Cintas parking lots to access information contained in state motor vehicle records relating to those license plates." *Pichler V*, 542 F.3d at 384. The union then used that information to make house calls on Cintas employees.

A "major component of the campaign to organize and unionize Cintas workers was finding potential legal claims against Cintas." *Id.* at 383. In doing so, UNITE sought to "develop [a] legal and moral attack on [the] company." *Pichler III*, 446 F. Supp. 2d at 358. The home visits were made both to effectuate this litigation strategy and to find Cintas employees interested in unionization. *Id.* at 356, 361-62.

The litigation component of the campaign was indubitably successful; in a period of two years, "UNITE brought or assisted in bringing against Cintas six federal cases, three state court cases, eighteen charges with the Equal Employment Opportunity Commission . . . and four charges with the

Occupational Safety and Health Administration." *Id.* at 363. It "also filed unfair labor practice charges with various offices of the National Labor Relations Board" and helped two individuals file complaints concerning wages. *Id.*

Eight employees of Cintas whom UNITE had contacted then sued the union, arguing that UNITE's actions violated the DPPA. The District Court ruled in favor of the plaintiffs, reasoning that under the terms of the DPPA, "one who obtains information is liable each time one gets information 'for a purpose not permitted.'" *Id*. at 367. The court concluded:

> Accordingly, if UNITE had three purposes for "obtain[ing], disclos[ing] or us[ing] [plaintiffs'] personal information" and two of those were "permissible uses" but the third was not, UNITE would still be liable for the third purpose. The Act contains no language that would excuse an impermissible use merely because it was executed in conjunction with a permissible use.

Id.

The Third Circuit endorsed the District Court's reasoning and affirmed, holding that UNITE's actions violated the DPPA "[b]ecause UNITE obtained and used the confidential information for an impermissible purpose – union organizing." *Pichler V*, 542 F.3d at 395. According to the court, the existence of this impermissible purpose was sufficient to constitute a

violation "no[ ] matter what other permissible purpose UNITE might have had." *Id.*

The Third Circuit expressly rejected UNITE's "unique argument" that "its labor-organizing purpose may not be severed from" other permissible purposes that the union claimed to have for using the personal information. *Id.* Specifically, UNITE had asserted that its conduct satisfied the litigation exception to the DPPA because its "activity in investigating potential litigation was part and parcel of its unionizing campaign, not separate and distinct from it." *Id.* The court summarily dispatched this contention:

> The litigation component to UNITE's campaign should not obscure what UNITE was trying to accomplish – organizing labor. . . . [T]he organizers themselves, in conducting their home visits, unambiguously explained that they were "organizing a union campaign against Cintas." Regardless of UNITE's attempts to mask this clear labor-organizing purpose behind the veil of a litigation purpose . . . Congress has not permitted UNITE to do so.

Id. at 395-96 (citation omitted).

Notably, UNITE's argument that its use of the personal information in litigation was "part and parcel" of its use of the information in union organizing, which the Third Circuit found not only "unique" but also meritless, is essentially identical to the Fourth Circuit's holding in the instant case. The litigation component of UNITE's strategy was by no

means insubstantial; the union brought or assisted in bringing *thirty-one* separate actions against Cintas. *Pichler III*, 446 F. Supp. 2d at 363. Yet it still was not enough to immunize the defendant's impermissible uses of the plaintiffs' personal information.

The Third Circuit also refused to allow the use of DPPA-protected information by a non-profit organization (the National Right to Work Legal Defense Foundation ("NRTW")) who wanted to identify other individuals whose rights had been violated by UNITE. *Pichler VII*, 585 F.3d at 742, 745. The Third Circuit found that the NRTW's proposed use of the protected information to send letters advising potential litigants of their rights and offering free legal advice was not permitted by the DPPA. *Id*. at 745, 752-53. Like the Lawyers in this case, the NRTW attempted to claim that the use of the protected information to identify "similarly situated victims" of UNITE was connected to already existing litigation – the action that had been filed by the *Pichler* plaintiffs. *Id*. at 751. The Third Circuit rejected this attempt to create a connection to the *Pichler* action solely to immunize the improper use of DPPA-protected information to identify potential litigants and claimants. *Id*. at 752-53.

Thus, had the court below applied the *Pichler* test rather than the newly-fashioned "inextricably intertwined" test, Petitioners would have unquestionably prevailed. Under the Third Circuit's reasoning, the Lawyers' impermissible solicitation without consent would not be immunized under the DPPA

merely by being "inextricably intertwined with" (that is, "part and parcel" of) conduct permissible under the litigation exception.

B. In the Eleventh Circuit, a defendant who uses an individual's personal information for the purpose of solicitation may not be liable under the DPPA if the same use satisfies one of the other statutory exceptions.

The Eleventh Circuit's view of the proper reconciliation of the enumerated exceptions under the DPPA is discussed most extensively in *Rine v. Imagitas, Inc.*, 590 F.3d 1215 (11th Cir. 2009). The *Rine* litigation arose when a group of Florida drivers received vehicle registration notices in envelopes containing advertisements and commercial solicitations from Imagitas, a marketing company. The drivers sued Imagitas, alleging that the company had violated the DPPA by using the plaintiffs' personal information to send targeted advertisements and solicitations with the renewal notices. Imagitas had obtained the personal information by virtue of a contract it had with the state of Florida under which the company agreed to "develop, produce, and distribute registration renewal notices to Florida drivers in participating counties." 590 F.3d at 1219. The advertising revenues thereby generated "were intended to offset the costs of producing and mailing registration renewals, saving Florida counties from the expense." *Id.* at 1219-20.

The Eleventh Circuit rejected the plaintiffs' argument that Imagitas had violated the DPPA by using personal information to engage in nonconsensual bulk solicitation. The court determined that Imagitas's actions were lawful under the "state action" exception to the DPPA. *Id*. at 1225. According to the court, Imagitas did not have to comply with the consent requirement of the bulk solicitation exception (section 2721(b)(12)) because the "case involve[d] two statutory provisions that potentially apply," both of which "must be given effect unless they 'pose an either-or proposition.'" *Id.* at 1226 (quoting *Conn. Nat'l Bank v. Germain,* 503 U.S. 249, 253 (1992)). Because the state action and bulk solicitation exceptions were not "mutually exclusive," either or both of them "may be applicable to a given situation," and only one need apply for the disclosure at issue to be permissible. *Id.*

While the Fourth Circuit purported to follow the Eleventh Circuit in the instant case, the Eleventh Circuit did not hold that a defendant making *multiple separate* uses (or permitted use, but improper disclosure) of personal information, some permissible and some impermissible, would escape liability. Rather, the *Rine* court considered Imagitas's actions to be entirely lawful because it viewed the advertising and soliciting done in connection with the mailing of the registration envelopes to be "legitimate agency function[s]" in their own right because the revenues thereby generated were used to fund public programs. *Id.* at 1223. In other words, the court determined that

none of Imagitas's uses of the personal information were impermissible. The Fourth Circuit's opinion in this case is the first to hold that a defendant who might have a future permissible use for a person's personal information is free to make impermissible use of it as well. The Fourth Circuit's version of the "inextricably intertwined" test, as adopted in this case, is in fact quite different from, and in conflict with, the Eleventh Circuit's holding in *Rine*, and its implementation has further muddled an already murky area of the law.

C. The dissent in *Pichler*, along with a Pennsylvania state court, have advocated for a standard under which use of personal information is permissible under the DPPA only if the "primary purpose" for such use is permissible.

Judge Sloviter dissented from the Third Circuit's opinion in *Pichler V*, arguing that UNITE's actions were lawful because "at least of one of [its] purposes for using the restricted information was in connection with investigation in anticipation of litigation." 542 F.3d at 402 (Sloviter, J., dissenting). While apparently conceding that UNITE also had the impermissible purpose of union organizing for its use of the information, Judge Sloviter disputed the majority's "conclusion that the presence of one unlisted purpose for obtaining the motor vehicle information overrides or cancels a listed purpose." *Id.* Instead, "[w]hen such cases are presented, [she] would . . . have the

fact-finder determine which is the primary purpose and whether that purpose was permitted under § 2721(b)." *Id.* If so, Judge Sloviter would deem the use to be lawful.

In *Hartman v. Department of Conservation and Natural Resources*, 892 A.2d 897 (Pa. Commw. Ct. 2006), the Pennsylvania Commonwealth Court[6] applied a test quite similar to the "primary purpose" test for which Judge Sloviter advocated. In *Hartman*, the defendant owner of a snowmobile magazine sought to obtain the personal information of registered snowmobile owners in Pennsylvania. He argued that, because one edition of the magazine contained articles on snowmobile safety, the information could be properly disclosed under section 2721(b)(2) of the DPPA, which permits disclosure of personal information "for use in connection with matters of motor vehicle or driver safety." *Id.* at 902. The court held that his request was properly denied because it was "clear the requested information would be used *primarily* to promote snowmobiling in Pennsylvania and membership in the [Pennsylvania State Snowmobile Association]." *Id.* at 905 (emphasis added). The court offered the following justification for

[6] The Pennsylvania Commonwealth Court is an intermediate appellate court, rather than a "court of last resort," of the state of Pennsylvania. The Pennsylvania Supreme Court has not spoken on this issue; however, an examination of this case is useful to illuminate the confusion in state as well as federal courts concerning this area of the law.

denying Hartman's request based on an impermissible primary purpose:

> Hartman's proffered construction would be inconsistent with Congress' intent to limit disclosure of this personal information for "surveys, marketing, or solicitations" unless the individual has given the State "express consent" for such a disclosure. 18 U.S.C. § 2721(b)(12). Hartman intends to use this information to market snowmobiling and the PSSA, but the registrants have not consented to the release of their names for this use. Disclosure is prohibited.

Id. Thus, the court soundly rejected Hartman's attempt to conjoin his impermissible use for obtaining the information (marketing and solicitation) with a permissible use (promoting motor vehicle safety) as inconsistent with the letter and spirit of the Act.

D. Summary of the lower courts' tests.

No court except the Fourth Circuit has held that pure solicitation is permissible under the DPPA. Setting aside for the moment this new split that the Fourth Circuit has created among the lower courts, the already existing split (which the Fourth Circuit has contributed to) can be summarized as follows:

Third Circuit. The Third Circuit view, as articulated in the *Pichler* line of cases, is that the obtainment, disclosure, or use of personal information is unlawful under the DPPA if it is motivated by any

impermissible purpose, even if it is also motivated, in part, by a permissible purpose. *See Pichler V*, 542 F.3d at 395.

Eleventh Circuit. The Eleventh Circuit, on the other hand, considers a use of personal information lawful under the Act if the defendant has any permissible purpose for the use, even if he or she also has an impermissible purpose for the same use. *See Rine*, 590 F.3d at 1226.

Primary purpose test. Judge Sloviter, dissenting in *Pichler V*, and a Pennsylvania intermediate appellate court have endorsed a test whereby a defendant's use of statutorily-protected information is lawful if the "primary purpose" for the use is permissible.

Fourth Circuit. Finally, in this case, the Fourth Circuit has added a new voice to the cacophony. In the opinion below, the court advocated a test whereby an impermissible use of personal information is excused if it is "integral to, and inextricably intertwined with," a later permissible one. App. 29a. Of the four standards discussed, this is by far the least protective of personal information; none of the others go so far as to immunize *an entirely impermissible use* (that is, a use with no permissible purpose) so long as the personal information is later used for a permissible use.

CONCLUSION

This Court's guidance is necessary to resolve both splits that now exist regarding the proper construction of the DPPA. For the foregoing reasons, Petitioner respectfully requests that this Court grant the petition for certiorari.

Respectfully submitted,

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APPENDIX A

PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

EDWARD F. MARACICH, individually and on behalf of all others similarly situated; MARTHA L. WEEKS, individually and on behalf of all others similarly situated; JOHN C. TANNER, individually and on behalf of all others similarly situated,

Plaintiffs-Appellants,

v.

MICHAEL EUGENE SPEARS; MICHAEL SPEARS, PA; GEDNEY MAIN HOWE, III; GEDNEY MAIN HOWE, III, PA; RICHARD A. HARPOOTLIAN; RICHARD A. HARPOOTLIAN, PA; A. CAMDEN LEWIS; LEWIS & BABOCK, LLP,

Defendants-Appellees.

No. 10-2021

Appeal from the United States District Court for the District of South Carolina, at Spartanburg. Henry M. Herlong, Jr., Senior District Judge. (7:09-cv-01651-HMH)

Argued: December 8, 2011

Decided: April 4, 2012.

Before DUNCAN, DAVIS, and WYNN, Circuit Judges.

Affirmed by published opinion. Judge Davis wrote the opinion, in which Judge Duncan and Judge Wynn joined.

COUNSEL

ARGUED: Philip N. Elbert, NEAL & HARWELL, Nashville, Tennessee, for Appellants. Morris Dawes Cooke, Jr., BARNWELL, WHALEY, PATTERSON & HELMS, LLC, Charleston, South Carolina, for Appellees. **ON BRIEF:** James G. Thomas, W. David Bridgers, Elizabeth S. Tipping, NEAL & HARWELL, Nashville, Tennessee; Gary L. Compton, Spartanburg, South Carolina, for Appellants. E. Bart Daniel, Charleston, South Carolina, John B. White, Jr., HARRISON, WHITE, SMITH & COGGINS, P.C., Spartanburg, South Carolina, for Appellees; Curtis W. Dowling, BARNES, ALFORD, STORK & JOHNSON, LLP, Columbia, South Carolina, for Appellees Michael Eugene Spears and Michael Spears, PA; Craig E. Burgess, John W. Fletcher, BARNWELL, WHALEY, PATTERSON & HELMS, LLC, Charleston, South Carolina, for Appellees Gedney Main Howe, III, and Gedney Main Howe, III, PA; Charles E. Hill, TURNER PADGET GRAHAM & LANEY, P.A., Columbia, South Carolina, for Appellees Richard Harpootlian and Richard A. Harpootlian, PA.

Opinion

(Filed Apr. 4, 2012)

DAVIS, Circuit Judge:

This appeal arises from the dismissal of all claims alleged in a putative class action complaint filed pursuant to the Driver's Privacy Protection Act of 1994 (DPPA or the Act), 18 U.S.C. §§ 2721-2725, which "regulates the disclosure of personal information contained in the records of state motor vehicle departments." *See generally Reno v. Condon,* 528 U.S. 141, 148 (2000) (holding the DPPA constitutional as a proper exercise of Congress' power under the Commerce Clause).

Appellees Michael E. Spears, Esq., Gedney M. Howe, III, Esq., Richard A. Harpootlian, Esq., and A. Camden Lewis, Esq., ("the Lawyers" or Appellees) are South Carolina attorneys who in 2006 and 2007 instituted several "group action" lawsuits in South Carolina state court against numerous car dealerships pursuant to the South Carolina Regulation of Manufacturers, Distributors, and Dealers Act ("Dealers Act"), S.C. Code Ann. § 56-15-10 *et seq.* They alleged that certain dealerships had collected unlawful fees from car buyers. Through requests submitted to the South Carolina Department of Motor Vehicles (DMV) under the state Freedom of Information Act, S.C. Code Ann. §§ 30-4-10 to -165 (FOIA), the Lawyers obtained "personal information" protected by the DPPA, *viz.*, the names, addresses, telephone numbers, and car purchase information of thousands of

car buyers, from which they identified potential named plaintiffs in the Dealers Act group action.

Appellants Edward F. Maracich, Martha L. Weeks, and John C. Tanner ("the Buyers" or Appellants) are car buyers who received mailings from the Lawyers regarding the Dealers Act litigation. In 2009, individually and on behalf of a putative class of all others similarly situated, the Buyers sued the Lawyers in this action in the United States District Court for the District of South Carolina alleging that the Lawyers violated the DPPA when they obtained and used the Buyers' personal information without their consent in connection with the Dealers Act litigation.

On cross-motions for summary judgment in the district court, the Buyers argued that the liability of the Lawyers was established as a matter of law because the Lawyers had obtained their personal information for use in a mass solicitation which, without the Buyers' consent, is prohibited by the DPPA. The Lawyers argued, to the contrary, that they obtained and used the Buyers' personal information for purposes that are permitted notwithstanding the absence of consent, most particularly, under the "litigation exception" to the DPPA's general prohibitions on the use of personal information. In a thorough opinion, the district court granted summary judgment in favor of the Lawyers, concluding that the Lawyers did not engage in prohibited solicitation but that, even if they did, their actions nonetheless satisfied the so-called "litigation" and "state action"

exceptions to the statutory prohibitions under the DPPA, and therefore their actions comported with the requirements of the Act. The Buyers have timely appealed from the adverse judgment.

Having carefully considered the record and the parties' contentions, in light of the plain language, purpose, and overall structure of the DPPA, we affirm the judgment, albeit on reasoning differing somewhat from that of the district court. Specifically, we hold that the district court erred in ruling that the Lawyers did not engage in solicitation. Yet, the Lawyers indisputably made permissible use of the Buyers' personal information protected by the DPPA, here, for use "in connection with [litigation]," including "investigation in anticipation of litigation." 18 U.S.C. § 2721(b)(4). Ultimately, the Buyers' damages claims asserted under the DPPA fail as a matter of law, notwithstanding the fact that the Buyers can identify a distinct *prohibited use* (mass solicitation without consent) that might be supported by evidence in the record. In short, where, as a matter of settled state law and practice, as here, solicitation is an accepted and expected element of, and is inextricably intertwined with, conduct satisfying the litigation exception under the DPPA, such solicitation is not actionable by persons to whom the personal information pertains.

I.

The issues presented arise out of the process and circumstances surrounding the Lawyers' efforts to investigate, and in due course to institute, claims cognizable in the Dealers Act litigation they filed in state court. Accordingly, we first set forth in some detail the facts and procedural history relevant to the state court litigation. We then proceed to describe the facts and procedural history of this action filed in federal district court. As the parties indicated in their cross-motions for summary judgment filed in the district court, the essential cardinal facts are undisputed.

A.

In early June 2006 the Lawyers were contacted by several persons who complained that local car dealerships were engaged in unfair practices. The pursuit of these potential claims led the Lawyers to make the first of a series of FOIA requests to the South Carolina DMV. The requests indicated to the DMV that information was being sought "in anticipation of litigation," under the DPPA provision commonly referred to as the "litigation exception," which authorizes a state DMV to disclose drivers' and/or car owners' "personal information":[1]

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[1] Under the Act, "personal information" is defined as:

> information that identifies an individual, including an individual's photograph, social security number, driver

(Continued on following page)

> for use in connection with any civil, criminal, administrative, or arbitral proceeding in any Federal, State, or local court or agency or before any self-regulatory body, including the service of process, investigation in anticipation of litigation, and the execution or enforcement of judgments and orders, or pursuant to an order of a Federal, State, or local court.

18 U.S.C. § 2721(b)(4).

In the original FOIA request, Appellee Harpootlian explained to the DMV: "I have plaintiffs who have complained of certain conduct as a result of their transactions with car dealers, conduct which I believe to be a potential violation [of] state law. I am attempting to determine if this is a common practice, and am accordingly submitting this FOIA request." J.A. 206. The request was for information on "private purchases of new or used automobiles in Spartanburg County during the week of May 1-7, 2006, including the name, address, and telephone number of the buyer, dealership where purchased, type of vehicle purchased, and date of purchase." J.A. 206. Apparently satisfied that the litigation exception applied, the DMV provided the requested information.

> identification number, name, address (but not the 5-digit zip code), telephone number, and medical or disability information, but does not include information on vehicular accidents, driving violations, and driver's status.

18 U.S.C. § 2725(3).

About one month later, Harpootlian made a second FOIA request to the DMV. This request likewise invoked the litigation exception of the DPPA and extended the inquiry to purchases of new or used cars in Charleston, Richland, York, Lexington, and Greenville counties for the week of May 1-7, 2006. Again, the DMV provided the requested information.

It is undisputed that at the time of these first two FOIA requests (despite Harpootlian's reference to "plaintiffs who have complained of certain conduct") the Lawyers had not yet filed an action under the Dealers Act or otherwise. Just days after the second FOIA request, however (and presumably before it was answered), the Lawyers filed in state court a Dealers Act case referred to by the parties and the district court as the *Herron* litigation, alleging violations by 51 car dealerships.[2] The suit was filed on behalf of four named plaintiffs and "for the benefit of all others," J.A. 220; *see* S.C. Code Ann. § 56-15-110 (providing that "when such action is one of common or general interest to many persons or when the parties

[2] The Dealers Act prohibits automobile dealerships from engaging in "any action which is arbitrary, in bad faith, or unconscionable and which causes damage to any of the parties or the public." S.C. Code Ann. § 56-15-40. The specific allegation in *Herron* was that dealerships deceptively grouped "administrative fees" on invoices with taxes and other required fees to mislead purchasers into believing that the charges were mandatory and non-negotiable. The suit requested permanent injunctive relief, disgorgement of all fees to all purchasers who paid them, double actual damages, litigation costs and attorney's fees, and punitive damages.

are numerous and it is impracticable to bring them all before the court, one or more may sue for the benefit of the whole, including actions for injunctive relief.").

Immediately following the filing of the complaint in *Herron*, various defendant dealerships filed motions to dismiss on the ground that they had not sold cars to any of the four named plaintiffs, who therefore lacked standing. With these motions pending, Harpootlian submitted a third FOIA request to the DMV in October 2006, again citing the litigation exception, in which he requested the personal information and types of vehicles purchased for people who bought cars from 328 listed dealerships between May 1 and May 14, 2006. Included on the list were those dealerships that had filed motions to dismiss for lack of standing in the *Herron* litigation. Again, the DMV complied with the request.

On October 31, 2006, the Lawyers filed an amended complaint in the *Herron* litigation, which added four named plaintiffs to the suit and increased the number of defendant dealerships from 51 to 324. As with the original complaint, defendant dealerships that had not engaged in transactions with any of the now eight named plaintiffs filed motions to dismiss for lack of standing. In all, more than 183 motions to dismiss were filed.

On January 3, 2007, the Lawyers mailed the first of another series of letters to the car buyers identified through the FOIA requests. The first letter was

prefaced, just below the letterhead, with the phrase: ***ADVERTISING MATERIAL.*** J.A. 487. The letter stated, in its entirety:

> We represent a group of consumers in a pending lawsuit arising from South Carolina car dealerships charging an add-on, often referred to as an "administrative fee," a "recording and processing fee," "closing fee," or "dealer documentation and closing fee." We believe that these fees are being charged in violation of South Carolina law.
>
> We understand that you may have been charged one of these fees on your recent purchase of an automobile. ***We obtained this information in response to a Freedom of Information Act request to the South Carolina Department of Motor Vehicles.***
>
> ***The exact nature of your legal situation will depend on facts not known to us at this time. You should understand that the advice and information in this communication is general and that your own situation may vary.*** However, we would like the opportunity [to] discuss your rights and options with you in a free consultation. If you are interested in participating in the case or in a free consultation, please mail the enclosed postage paid card and we will contact you soon.
>
> ***You may wish to consult your lawyer or another lawyer instead of us. You may obtain information about other lawyers***

> ***by consulting the Yellow Pages or by calling the South Carolina Bar Lawyer Referral Service at 799-7100 in Columbia or toll free at 1-800-868-2284. If you have already engaged a lawyer in connection with the legal matter referred to in this communication, you should direct any questions you have to that lawyer.***

J.A. 487 (emphases in original). The Lawyers filed a copy of the letter and a list of recipients' names and addresses with the South Carolina Office of Disciplinary Counsel, as required by South Carolina Rule of Professional Conduct 7.3, which regulates the solicitation of prospective clients. The emphasized text of the third and fourth paragraphs, and the prominent placement of the phrase "advertising material," complied with the provisions of Rule 7.3, as well. *See* S.C.R. Prof. Con. 7.3(d)(1), (2).

Later in January 2007, Harpootlian made two more FOIA requests of the DMV, seeking personal information of people who had purchased cars between June 1 and September 2, 2006, from an additional 31 dealerships. Then, Harpootlian submitted the final FOIA request on January 23, 2007, requesting personal information and dealership information for all purchasers of new and used cars during September 1-14, 2006, and December 10-24, 2006. The three requests again cited only the litigation exception to the DPPA and all were granted by the DMV.

On the same day as the last FOIA request, the Lawyers mailed a second round of letters to car

buyers whose personal information had been disclosed by the DMV. These letters, which differed from the first mailing only by minor formatting changes, were sent to 1,283 people. Meanwhile, in state court, various defendant dealerships filed a Joint Memorandum to Dismiss, again asserting that "for every named Dealer, there had to be a corresponding named Consumer who was a customer." Appellees' Br. 8; J.A. 666.

In March 2007, the Lawyers mailed two more rounds of letters to a total of 21,116 purchasers identified through the FOIA requests. Shortly thereafter, counsel for some of the dealership defendants in *Herron* wrote to the Lawyers, asserting that the FOIA requests and subsequent mailings violated a state law generally prohibiting certain solicitations based on information obtained from state agencies, but not mentioning the DPPA. The Lawyers responded by invoking the DPPA and reiterating that the litigation exception to the DPPA applied to their FOIA requests. The Lawyers further asserted that the letters mailed to car buyers had been made to conform to the requirements of a client solicitation under the South Carolina lawyer disciplinary rules only because "we knew that your group would try to see if we had met the requirements of the Disciplinary Counsel. In an abundance of caution we followed the requirements." J.A. 337. The Lawyers asserted that no violation of state law regarding prohibited solicitation had occurred because "we are not marketing or selling a consumer product or service." *Id.*

In March 2007, Appellant Maracich received one of the letters mailed to car buyers by the Lawyers. While his personal information had been disclosed to the Lawyers because he was one of many buyers from a particular dealership, Maracich also happened to be the Director of Sales and Marketing at that dealership.

Two months later, the Lawyers sent two rounds of letters to a total of 11,547 car buyers identified from the FOIA requests. Appellants Martha Weeks and John Tanner allege that they received letters from the Lawyers around this time. According to Tanner, after receiving the letter he called Harpootlian to find out how his contact information was obtained. During the conversation, he was subjected to "an aggressive sales pitch" to "sign up as a client for a lawsuit," and was told that he could receive "two to three times" the fee amount he had paid at purchase. J.A. 1448. Tanner further avers that during this conversation, Harpootlian never asked about the circumstances of his purchase.

In June 2007, in response to continuing disputes over standing in the *Herron* litigation, the Lawyers moved to further amend their Amended Complaint to join nearly 250 additional named plaintiffs who had come forward in response to the mailings. The dealerships opposed the motion, now arguing that the proposed additional plaintiffs had been contacted in violation of the DPPA. The state court ultimately denied the motion to amend, and ruled that the

named plaintiffs had standing only as to dealerships with which they had engaged in transactions.[3]

Consequently, in September 2007, the claimants who had been denied joinder in *Herron* brought independent actions in state court, which were then consolidated with *Herron*. All claims against dealerships without a corresponding plaintiff-purchaser were dropped in the interest of foreclosing any further controversy over standing.

Addressing another Motion to Substitute a plaintiff, the state court in the *Herron* litigation in October 2009 reiterated a number of key rulings in the case up to that point: (1) the plaintiffs had "a substantive statutory right . . . to proceed 'for the benefit of the whole' . . . 'without a requirement that the plaintiff plead and prove the class certification requirements under S.C.R.P. Rule 23'"; (2) "each named Plaintiff had standing to sue for himself and in a representative capacity for other[s] against the Defendant that transacted business with that named Plaintiff"; (3) "This is not a Rule 23, SCRP class action. This is a group representative action under the Dealers Act. . . . Nothing in the Dealers Act requires the Plaintiffs to move for class certification"; and (4) "Plaintiff's counsel, as private attorneys general, from the inception

[3] The court further ruled, however, that the existing plaintiffs could acquire standing as to any defendant that was shown by discovery to have joined a conspiracy to charge improper fees.

of this litigation have represented the public interest in attempting to regulate allegedly unfair practices . . . and therefore represent all those affected by such practices." J.A. 1354, 1355, 1357.[4]

B.

Nearly three years after the *Herron* litigation commenced, the Buyers (who are represented in this case by the same counsel who represents several of the dealerships in the *Herron* litigation) filed the

[4] The long-pending *Herron* litigation has had something of a tortuous journey. When the trial court denied the dealerships' motion to compel arbitration, the dealerships took an interlocutory appeal. The Supreme Court of South Carolina granted certification, brought up the appeal from the Court of Appeals, and reversed in part and affirmed in part the trial court's ruling, concluding, ultimately, that although the arbitration clause at issue was otherwise enforceable, its prohibition on class arbitration violated the public policy of South Carolina. *See Herron v. Century BMW,* 693 S.E.2d 394 (S.C. 2011). Upon the filing by the dealerships of a petition for *certiorari,* the United States Supreme Court granted the writ, vacated the judgment, and remanded the action to the South Carolina Supreme Court for reconsideration in light of *AT&T Mobility, LLC v. Concepcion,* 131 S. Ct. 1740 (2011) (holding that California state law rule that prohibited a waiver of class arbitration in a retail sales contract was preempted by the Federal Arbitration Act). Upon the South Carolina Supreme Court's reconsideration of *Herron* after the remand, the court held that the dealerships had forfeited the argument that the class arbitration bar under the public policy of South Carolina was preempted by the Federal Arbitration Act by failing to raise it in the trial court or before the South Carolina Supreme Court in the interlocutory appeal. *Herron v. Century BMW,* 719 S.E.2d 640 (S.C. 2011).

instant putative class action against the Lawyers, alleging violations of the DPPA related to the acquisition and use of the Buyers' personal information from DMV records through the Lawyers' FOIA requests. The Complaint asserted damages claims under 18 U.S.C. § 2724(a). Specifically, the Buyers alleged that the Lawyers unlawfully obtained personal information as defined by the DPPA, 18 U.S.C. § 2725(3), *see supra* n.1, by knowingly requesting, "under false pretenses," information for the prohibited use of solicitation, "and then using the Personal Information for the statutorily prohibited purpose of mailing lawyer advertising and solicitation materials to Plaintiffs." J.A. 19. The Buyers sought liquidated damages of $2,500 for each instance of unlawful conduct, compensatory and punitive damages, a permanent injunction, attorney's fees and costs, and interest on the monetary awards.[5]

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[5] Section 2724 provides:

(a) Cause of action. – A person who knowingly obtains, discloses or uses personal information, from a motor vehicle record, for a purpose not permitted under this chapter shall be liable to the individual to whom the information pertains, who may bring a civil action in a United States district court.

(b) Remedies. – The court may award –

(1) actual damages, but not less than liquidated damages in the amount of $2,500;

(2) punitive damages upon proof of willful or reckless disregard of the law;

(Continued on following page)

The Lawyers promptly moved to dismiss all counts in the Complaint, arguing (among other issues) that the Buyers' personal information was obtained for the permissible use provided in 18 U.S.C. § 2721(b)(4), the litigation exception, and in 18 U.S.C. § 2721(b)(1), the state action exception.[6] The motion also argued that the Lawyers "already represented" the people they had contacted using the DMV information by virtue of the group action under the Dealers

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> (3) reasonable attorneys' fees and other litigation costs reasonably incurred; and
>
> (4) such other preliminary and equitable relief as the court determines to be appropriate.

18 U.S.C. § 2724. *See Condon,* 528 U.S. at 146-47 (stating that the § 2724(a) cause of action is for knowingly obtaining, disclosing, or using personal information "for a use other than those specifically permitted by the DPPA"). The Buyers alleged four separate counts in their Complaint, all arising under the DPPA, against all four of the Lawyers (and their respective law firms), and seemingly resting on the following separate theories: (1) willful violations of the DPPA; (2) negligent violations of the DPPA; (3) respondeat superior liability, generally; and (4) concert of action, generally.

[6] The so-called "state action" exception under the DPPA provides as follows:

> (1) For use by any government agency, including any court or law enforcement agency, in carrying out its functions, *or any private person or entity acting on behalf of a Federal, State, or local agency in carrying out its functions.*

18 U.S.C. § 2721(b)(1) (emphasis added). The Lawyers argued that, in their role as "private attorneys general" under the Dealers Act, the state action exception applied to their FOIA requests leading to, and facilitating, the *Herron* litigation.

Act, and the attorneys had moreover been "obligated" to find and contact buyers to ensure that the suit was not dismissed on standing grounds as to certain members of that group.

In addition, the Lawyers noted that the lead counsel for the Buyers in the instant case also represented several of the defendant dealerships in *Herron*. They argued that this relationship created a conflict of interest, and that representation of the Buyers in federal court by the dealerships' attorneys should be prohibited in any event because to the extent that the Buyers were members of the plaintiff group in *Herron,* they were already represented by the Lawyers. In sum, the Lawyers charged that the DPPA litigation was an "obstructionist legal tactic," designed to undermine the *Herron* litigation. J.A. 158.

The district court rejected each of the Lawyers' arguments for dismissal. The court ruled, in pertinent part, that the existence of an attorney-client relationship between the Lawyers and buyer group members in *Herron* was a disputed factual issue and thus the litigation exception to the DPPA did not apply at the motion-to-dismiss stage, and that the state action exception did not apply because the Lawyers, though acting as "private attorneys general" in a group action context, were not for that reason alone agents of the government. Furthermore, the court admonished that any assertion regarding the impropriety of the representation of the class should

be expressed in a motion to disqualify counsel on the ground of conflict of interest.

In their Answer and Counterclaim, the Lawyers asserted, in effect, that this action was proof of the sports aphorism that the best defense is an aggressive offense: "This is now clearly seen as a multi-million dollar-fear lawsuit designed to interfere with and discover the legal bases of an underlying lawsuit involving consumers against car dealers and their illegal charging of secret fees. It is designed to chill, if not kill, an ongoing legitimate lawsuit." J.A. 175. After alleging a host of affirmative defenses, the Lawyers requested by way of their counterclaim a declaratory judgment that the DPPA's solicitation provision does not apply to permissible litigation-related uses of personal information. Such a construction was proper, they argued, because "Congress intended for lawyers to have unfettered access and use of DMV information for use in litigation." J.A. 189.

Discovery commenced, haltingly, but on January 25, 2010, the district court addressed the Lawyers' Motion to Stay, which argued that discovery would involve documents from the *Herron* litigation that fall within the attorney-client and work product privileges, and should therefore be stayed while that case proceeded. Agreeing that there were "numerous privilege issues" at stake, the district court ordered a six-month stay in the federal DPPA action, suspending discovery. J.A. 196.

Just weeks later, the Buyers moved to lift the stay to undertake class certification discovery under Fed. R. Civ. P. 23. Following a hearing, during which the Lawyers "stated that they could file a motion for summary judgment without the need for any discovery," J.A. 203, and the Buyers stated that discovery would likewise be unnecessary to prepare their response to such a motion and their own motion, the district court denied the motion to lift the stay with the expectation that summary judgment proceedings would proceed.

The Buyers and the Lawyers promptly filed cross-motions for summary judgment only three days apart; the former sought a partial summary judgment on liability only, and the latter sought judgment in full as to all of the Buyers' claims, relying on several theories. The Lawyers made essentially the same arguments they had asserted in their unsuccessful Motion to Dismiss.[7] This time, however, the district court was receptive.

The court first addressed the Buyers' argument that the Lawyers had provided no sworn statements as to their subjective intent regarding the FOIA requests and car buyer mailings, and relied instead solely on the *Herron*-related pleadings and other

[7] The Buyers' motion urged the court to rule that acquisition and use of information under the DPPA must both (1) meet all the requirements of permissibility and (2) avoid any impermissible categorization. The district court addressed the cross-motions together, as discussed above.

documents to establish the purpose of their conduct in seeking the Buyers' personal information. The court rejected the Buyers' argument, noting that the Buyers were themselves relying on the documents related to the *Herron* litigation in support of *their* motion, and that the *Herron*-related filings were of unquestioned authenticity, legally sufficient, and ultimately, highly probative regarding the issues before the court; the documents were therefore a proper basis on which to resolve the motions for summary judgment.

Addressing the somewhat unusual nature of the Lawyers' relationship to the group of buyers in *Herron,* the court explained that under the state court ruling in the *Herron* litigation, there is a "substantive right to representation for the 'benefit of the whole'" provided by the Dealers Act, and therefore the Lawyers' status in the *Herron* litigation was "distinct yet analogous to attorney representation in a class action under [South Carolina's class action provision]." J.A. 1475. In light of the unique representative function under group action, the Lawyers had at least a fiduciary duty to all buyers affected by the Dealers Act violations alleged. As a result, the court ruled, "The [Lawyers] did not solicit unnamed buyers as a matter of law." J.A. 1477.[8]

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[8] Concluding that "the undisputed facts" indicated permissible uses of the information, J.A. 1491, and noting that compliance with the state solicitation rules in the wording of the FOIA requests was reasonable and did not make the letters solicitation per se, the court concluded that there was no plausible basis on which to find that the DPPA had been violated.

The court then ruled broadly that even where the acquisition and use of personal information does fall within the solicitation prohibition of the DPPA (for want of the express consent of the persons to whom the personal information pertained), such conduct is nonetheless lawful under the DPPA in the absence of consent if it also comes within one of the permitted use provisions. In this regard, the court rejected the Buyers' reliance on the reasoning of *Pichler v. UNITE,* 542 F.3d 380 (3d Cir. 2008), and *Wemhoff v. District of Columbia,* 887 A.2d 1004 (D.C. Ct. App. 2005), and followed instead, as urged by the Lawyers, the Eleventh Circuit's reasoning in *Rine v. Imagitas, Inc.,* 590 F.3d 1215 (11th Cir. 2009).

The court specifically ruled that the acquisition and use of the car buyers' personal information before the *Herron* action was filed met the "investigation in anticipation of litigation" permitted use of 18 U.S.C. § 2721(b)(4), and that the acquisition and use of the car buyers' personal information after the commencement of that action were "in connection with [a] civil . . . proceeding," as also permitted by the litigation exception. Despite its rejection of the argument when it was raised in the earlier motion to dismiss, the court also ruled that the Lawyers' conduct was lawful under the state action exception of the DPPA because their role in *Herron* was adequately analogous to that of a state attorney general. Summary judgment was therefore granted in favor of the Lawyers and all the Buyers' claims were dismissed with prejudice, as was the Lawyers' counterclaim, as moot.

II.

The Buyers timely appealed and now argue before us that the district court erred in its ruling on three issues, namely, in concluding that: (1) as a matter of law, the Lawyers' conduct did not constitute solicitation under the DPPA; (2) conduct in obtaining and using personal information under the DPPA is lawful and non-actionable, even where that conduct also evidences an impermissible use; and (3) the Lawyers' conduct came within either the litigation or state action permissible use exceptions of the DPPA. We agree with the Buyers that the district court erred in concluding that no solicitation within the contemplation of the DPPA was shown. Nevertheless, we affirm the district court's determination that despite the evidence of non-consensual solicitation, the summary judgment record establishes as a matter of law that the Lawyers' conduct in obtaining and using the Buyers' personal information fell within a permissible use under the DPPA, the litigation exception, and that, under the circumstances of this case, the Buyers' claims fail as a matter of law because the solicitation was integral to, and inextricably intertwined with, conduct clearly permitted by the litigation exception.[9]

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[9] In light of our holding that the litigation exception applied to the Lawyers' conduct and forecloses the Buyers' claims, we have no occasion to review the district court's alternative ruling that the state action exception also applies under the circumstances of this case.

A.

We review the grant of summary judgment *de novo. News & Observer v. Raleigh-Durham Airport,* 597 F.3d 570, 576 (4th Cir. 2010). As provided by Fed. R. Civ. P. 56(c)(2), summary judgment should be granted "if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law."

> Facts are "material" when they might affect the outcome of the case, and a "genuine issue" exists when the evidence would allow a reasonable jury to return a verdict for the nonmoving party. The moving party is "entitled to judgment as a matter of law" when the nonmoving party fails to make an adequate showing on an essential element for which it has the burden of proof at trial. "[I]n ruling on a motion for summary judgment, the nonmoving party's evidence is to be believed, and all justifiable inferences are to be drawn in that party's favor." *Hunt v. Cromartie,* 526 U.S. 541, 552 (1999) (internal quotations omitted). To overcome a motion for summary judgment, however, the nonmoving party "may not rely merely on allegations or denials in its own pleading" but must "set out specific facts showing a genuine issue for trial." Fed. R. Civ. P. 56(e).

News & Observer, 597 F.3d at 576 (some citations omitted).[10] Similarly, "[t]he district court's analysis of the statutes in the instant case presents questions of law which we review *de novo.*" *WLR Foods, Inc. v. Tyson Foods, Inc.,* 65 F.3d 1172, 1178 (4th Cir. 1995), *cert. denied,* 516 U.S. 1117 (1996).

B.

The first issue before us concerns construction of the word "solicitation," as it appears in the DPPA's list of enumerated "permissible uses" of DMV information: "Personal information . . . may be disclosed . . . for bulk distribution for surveys, marketing, or solicitations if the State has obtained the express consent of the person to whom such personal information

[10] In their statement of the Standard of Review, the Buyers briefly raise the argument that "a court cannot, as in this case, grant summary judgment while denying the nonmoving party discovery of documents or the right to take witness or party depositions regarding facts deemed material under its interpretation of the law." Appellants' Br. 21-22. The record indicates quite clearly, however, that the Buyers agreed they would not need discovery to file an adequate opposition to a motion for summary judgment, if it involved only the same arguments offered in the motion to dismiss. J.A. 201-02. The two motions did ultimately rely on the same arguments, based on references to the undisputed facts (arising from the existence of readily-available documents whose authenticity was unquestioned) from *Herron.* Because the Buyers waived their right to discovery before the district court entertained the motion for summary judgment, the district court did not abuse its discretion in adjudicating the motion on the record presented by the parties without the benefit of full discovery.

pertains." 18 U.S.C. § 2721(b)(12). The district court ruled that the mailings by the Lawyers were not solicitations for the purposes of the DPPA as a matter of law because of the Lawyers' actual, if inchoate, representative relationship to all members of the *Herron* group of consumers. The Buyers argue this ruling was erroneous for two reasons: (1) the plain, express language of the letters – which conformed to South Carolina's requirements for solicitation by attorneys, and were therefore labeled clearly "ADVERTISING MATERIAL" – indicates that they were, in fact, solicitations, and (2) the Lawyers did not have an attorney-client, or representative, relationship with the contacted buyers and thus communication with these people was solicitation insofar as the recipients were potential clients, not actual clients.

In essence, the Buyers are arguing for an objective standard for defining solicitation: the letters looked like solicitations, conformed to the requirements for solicitations, and they accomplished the aim of solicitations, i.e., finding potential named plaintiffs for the *Herron* litigation. In ruling that the letters were not solicitations, the district court instead applied a subjective standard, taking into primary account the motives of the Lawyers and the context in which their requests were made.

Without question, the South Carolina solicitation regulations for "Direct Contact with Prospective Clients," to which these letters conformed, are explicitly designed to protect recipients from overtures that might be overwhelming, confusing, misleading,

or against their best interests. *See* S.C.R. Prof. Con. 7.3, cmts. 1, 5, 8; *see also Bates v. State Bar of Arizona,* 433 U.S. 350, 383 (1977) (noting the acceptability of restrictions on legal advertising to avoid misleading prospective clients). These concerns focus on the perception of the reader or listener, not the intentions of the attorney or the particular context in which the conduct occurs. In our view, an objective standard best protects these interests because it prevents the dissemination of material that is likely to cause confusion or misguided reliance.

The Lawyers explain their compliance with the South Carolina Rules of Professional Conduct as simply "an abundance of caution," rather than an indication that the letters constituted solicitation in fact. But the Lawyers' contention proves too much; caution was needed because, viewed objectively, the mailings constituted "solicitations." Their argument that their role in *Herron* as ostensible private attorneys general, allegedly ratified by the state court rulings described above, conferred the rights and duties of counsel on them and therefore any communication with group members (named or unnamed in the suit at the time) is unpersuasive. There is no inherent inconsistency between their role, even if true, as private attorneys general, on the one hand, and their need to "solicit" potential clients, on the other hand. By denoting the letters as "advertising material," a reasonable recipient would almost certainly have understood the message to be a solicitation from a lawyer.

Even more important than the boilerplate solicitation language, the letter encouraged recipients to respond in order to learn about their rights and "to participate in the case." J.A. 487. No mention was made of an investigation into certain practices other than the implicit suggestion of investigation during a "free consultation." J.A. 487. The letters also failed to indicate to recipients that they may already be *de facto* clients of the Lawyers, that is, persons whose interests were already protected by the senders. In short, the Lawyers presented their communication as solicitation, whether they believed it (then or now) to be or not.

Thus, we apply an appropriately consumer-protective objective standard for construing the DPPA term "solicitation." Accordingly, and consistent with the common understanding of the meaning of the word as targeted lawyer advertising aimed at affording representation to potential clients, *see, e.g., Shapero v. Kentucky Bar Ass'n,* 486 U.S. 466, 476 (1988) (evaluating constitutional propriety of state's ban on "targeted, direct-mail solicitation," and noting that while such solicitation "presents lawyers with opportunities for isolated abuses or mistakes,. . . . [t]he State can regulate such abuses and minimize mistakes through far less restrictive and more precise means [than a total ban], the most obvious of which is to require the lawyer to file any solicitation letter with a state agency, . . . giving the State ample opportunity to supervise mailings and penalize actual abuses"); *see also Ficker v. Curran,* 119 F.3d 1150 (4th

Cir. 1997), we are constrained to reject the district court's conclusion that, as a matter of law, the Lawyers were not engaged in solicitation when they contacted otherwise unknown car buyers they had identified through their FOIA requests.

As the district court correctly recognized, however, this determination is not dispositive. As we explain within, although the record supports the Buyers' contention that the Lawyers engaged in solicitation, i.e., that they induced the DMV to disclose the Buyers' personal information in the absence of the Buyers' consent, because the solicitation was entirely consistent with state law, was integral to, and was, indeed, inextricably intertwined with the Lawyers' permissible use of the Buyers' personal information pursuant to the litigation exception, the Buyers' claims fail as a matter of law.

C.

The Buyers' second argument is equally as straightforward as their first but far less persuasive. They contend that the district court erred in ruling that, as a matter of law, the nonconsensual use of personal information for solicitation is nonetheless non-actionable under 18 U.S.C. § 2724, *see supra* n.5, if the solicitation is sufficiently tied to a permissible use under the litigation exception. In other words, and more generally, the Buyers urge a theory of DPPA liability in which *any* impermissible use of personal information, e.g., solicitation absent consent, would

violate the statute (and support a damages action), even if, concomitantly, the personal information is put to a permissible use, i.e., in litigation.

For the reasons explained below, without undertaking to lay down a rule applicable in all future cases, we are persuaded that the most rational resolution of the manifest tension between the solicitation and litigation exceptions under the DPPA compels us to reject the Buyers' absolute rule.

There is no Fourth Circuit precedent teaching how to reconcile, or read harmoniously, the permissible use provisions of the DPPA, and indeed, the limited number of cases among our sister circuits reflect that the law in this area is in a state of continued evolution. *See generally,* Deborah F. Buchman, *Annotation, Validity, Construction, and Application of Federal Driver's Privacy Protection Act, 18 U.S.C.A. §§ 2721 to 2725,* 183 A.L.R. Fed. 37 (2011).

That said, we note that the Eleventh Circuit has provided a rather expansive sweep to the litigation exception of the DPPA. In *Thomas v. George, Hartz, Lundeen, Fulmer, Johnstone, King, & Stevens, P.A.,* 525 F.3d 1107 (11th Cir. 2008), the court affirmed a summary judgment in favor of a law firm that had obtained the plaintiff's personal information from the Florida Department of Highway Safety and Motor Vehicles. The defendant lawyer had obtained the plaintiff's personal information (together with that of 24,000 other Florida drivers)

> because the automobile dealers he was litigating against were asserting that plaintiffs needed to plead and prove multiple acts of deceptive and unfair trade practices to state a deceptive and unfair trade practice claim under Florida law. . . . [T]he information was [then] used to send one-thousand "Custom and Practice" letters, which aimed at obtaining evidence showing a custom and practice of deceptive acts engaged in by dealerships.

Id. at 1114 (footnote omitted). The court rejected the plaintiff's argument that the lawyer's distribution of "Custom and Practice" letters to certain car buyers supported a claim based on impermissible use, i.e., prohibited solicitation. Specifically, the court reasoned:

> as the district court rightly determined, the fact that many records were retrieved, but only a comparatively small number were used for Custom and Practice letters did not, by itself, raise a genuine issue of material fact as to whether the litigation clause applied. By affixing significance solely to the number of records relating to letters sent out, [plaintiff] overlooked that [defendant's] initial review of the total amount of records is just as much tied to "investigation in anticipation of litigation" as the eventual sending out. [Plaintiff] failed, however to discredit, or even address, the initial review.

Id. at 1115. Moreover, in considered *dicta,* the court gave short shrift to the plaintiff's complaint that the

attorney's "ulterior motive" in obtaining the DPPA personal information was for use in potential *future* litigation.[11] We can discern no inconsistency between the evident Congressional purpose in the enactment of the DPPA of protecting privacy and the kind of pragmatic approach to lawyer access to protected personal information revealed by the Eleventh Circuit's understanding of the litigation exception.

Consistent with its willingness to afford the litigation exception a pragmatic scope as reflected in *Thomas,* the Eleventh Circuit has also shown its willingness to adopt a pragmatic reconciliation of the tension arising from the DPPA's prohibition (absent express consent) on solicitation when solicitation is inextricably intertwined with a permitted use

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[11] The court stated:

> Thomas also argues that a particular excerpt from Hartz's deposition indicates a "second ulterior motive" for obtaining the vehicle records; i.e., they were obtained for the purpose of creating a database of witnesses for prospective, not-yet-filed litigation – as opposed to currently pending cases. Our review of the record reveals that Thomas did not raise this particular argument below and, as such, the argument is waived. *Irving v. Mazda Motor Corp.,* 136 F.3d 764, 769 (11th Cir. 1998). Nonetheless, the argument is without merit. The litigation clause refers to investigation in anticipation of litigation. Thus, even if the accumulation of potential witnesses related, in part, to certain cases not yet filed, we do not see how pre-suit investigation can be considered per se inapplicable to the litigation clause.

525 F.3d at 1115 n.5.

under 18 U.S.C. § 2721(b). *See Rine v. Imagitas,* 590 F.3d 1215, 1226 (11th Cir. 2009) (holding that non-consensual solicitation that is inextricably intertwined as a matter of state statutes with the state action exception is not actionable).

In *Rine,* in which the Judicial Panel on Multi-district Litigation consolidated actions brought by drivers in several states, the state of Florida contracted with a marketing enterprise to mail driver's license renewal information. *Id.* at 1219. Pursuant to its agreement with the state, and consistent with prior revenue-generating schemes pursued by the state and several Florida counties, the contractor included in the driver's license renewal mailings focused commercial advertising materials to such drivers, based on information contained in and derived from DPPA-protected personal information. *Id.* at 1219-20. Some drivers sued, among others, the contractor, as the Buyers here have sued the Lawyers, alleging a violation of the DPPA insofar as the state had failed to obtain their consent for the solicitation. In opposing the plaintiffs' claims, the contractor relied on the state action exception, arguing that it was performing functions on behalf of the state (which exercised final approval over the advertising material).

In sustaining the district court's legal conclusion that the state action exception foreclosed the plaintiffs' claims, the Eleventh Circuit reasoned that "nothing in the DPPA suggests that the (b)(12) [solicitation] exception alters the scope or meaning of the separate and independent [state action] exception

found in subsection (b)(1)." That is, where two provisions overlap but "both apply to situations not governed by the other," they "both must be given effect unless they 'pose an either-or proposition.'" *Id.* at 1226 (citing *Conn. Nat'l Bank v. Germain,* 503 U.S. 249, 253 (1992)). The *Rine* court reasoned that unlike *HCSC-Laundry v. United States,* 450 U.S. 1 (1981), where as between two potentially applicable statutory provisions one was "general" and the other "specific," the DPPA provisions are equally specific. *Rine,* 590 F.3d at 1226. They are, moreover, "not mutually exclusive, meaning any one or more of them may be applicable to a given situation." *Id.* This reasoning commends itself to us.

The Buyers contend that the Eleventh Circuit's resolution of the tension between the solicitation prohibition and the permitted uses spelled out in § 2721(b) that do not require consent is misguided and urge us to adopt, instead, the holding of the Third Circuit in *Pichler v. UNITE,* 542 F.3d 380 (3d Cir. 2008) ("*Pichler V*" per the Appellants).[12] In *Pichler V,* the

[12] *Pichler v. UNITE,* a class action concerning a union's use of DMV information to contact employees for organizing drives and to pursue impact litigation, has generated at least seven opinions to date. The Third Circuit's numbering for the series of opinions related to the case does not match the numbering set out in the Appellants' Brief; the Appellants mark a 2004 decision denying a motion to dismiss as "*Pichler I,*" while the Third Circuit starts its count with a subsequent 2005 opinion certifying the class. *Compare Pichler,* 542 F.3d at 385, *with* Appellants' Br. 30 n.5. To minimize confusion between the briefs before this court and our opinion, we will follow the Appellants' numbering.

court affirmed summary judgment of liability against the union defendants in a DPPA case, agreeing with the lower court that "[t]he [DPPA] contains no language that would excuse an impermissible use merely because it was executed in conjunction with a permissible [use]." *Id.* at 395 (citing *Pichler v. UNITE,* 446 F. Supp. 2d 353, 367 (E.D. Pa. 2006) ("*Pichler III*")). The lower court had reasoned that because the DPPA imposes liability for acquisition and use of information "for a purpose not permitted," *any* impermissible use was actionable, regardless of other circumstances supporting a finding that a permissible use provision was also satisfied. *Pichler III,* 446 F. Supp. 2d at 367. But we find that *Pichler* is plainly distinguishable from the facts and circumstances in the case at bar.[13]

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[13] The Buyers also seek solace in *Wemhoff v. District of Columbia,* 887 A.2d 1004 (D.C. Ct. App. 2005), in which a lawyer attempted to compel disclosure of DMV information about drivers ticketed for red light camera infractions at a particular intersection, when he did not yet represent any affected person and had no on-going "investigation" of red-light cameras beyond his attempt to find out the identities of those who had been ticketed. The *Wemhoff* court sustained the agency's refusal to make the disclosure, finding the request was for use in solicitation rather than in anticipation of litigation, and was therefore subject to the express consent requirement of section (b)(12).

Wemhoff held that "in anticipation of litigation" meant use for "the type of background work or search for material which would determine, substantively, whether one has a viable theory of litigation, or enough of a basis to avoid a motion for sanctions that a frivolous lawsuit has been filed." 887 A.2d at 1011-12. This test for attenuation was adopted from the district court's opinion in *Pichler,* which reasoned that the exception applied only where defendants could prove "(1) they undertook an actual

(Continued on following page)

There, the union conceded that it obtained the workers' personal information for a non-permitted use: union organizing. It somewhat belatedly and unpersuasively argued that its union organizing activities could not be disaggregated from its litigation activities. The Third Circuit majority emphatically rejected this argument.[14]

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investigation; (2) at the time of the investigation, litigation appeared likely; and (3) the protected information obtained during the investigation would be of 'use' in the litigation . . . " *Wemhoff,* 887 A.2d at 1011 (citing *Pichler v. UNITE,* 339 F. Supp. 2d 665, 666 (E.D. Pa. 2004) ("*Pichler I*")). On appeal, however, the Third Circuit pointedly noted that it "need not address the District Court's interpretation of the litigation and the acting on behalf of the government exceptions." 542 F.3d at 395.

We find that *Wemhoff* is plainly distinguishable from this case because, as the court in that case indicated, the lawyer was merely trolling for clients in the hope that litigation might be in the offing.

[14] The court could not have been more clear:

> The litigation component to UNITE's campaign should not obscure what UNITE was trying to accomplish-organizing labor. The same may be said for its acting on behalf of the government purpose. UNITE candidly admits that it launched the "campaign to organize and unionize Cintas workers." App. 226. Moreover, the organizers themselves, in conducting their home visits, unambiguously explained that they were "organizing a union campaign against Cintas." App. 238. Regardless of UNITE's attempts to mask this clear labor-organizing purpose behind the veil of a litigation purpose or an acting on behalf of the government purpose, Congress has not permitted UNITE to do so.

542 F.3d at 395-96.

At bottom, we easily conclude from these somewhat conflicting approaches to the DPPA that the Eleventh Circuit's approach provides the better reasoned interpretation of the Act under the facts and circumstances of the instant case. Just as the Florida statutes in *Rine* clearly authorized solicitation in connection with the state's license renewal schemes, South Carolina law and legal ethics norms not only permitted the type of solicitation engaged in by the Lawyers here, but in the context of the particular investigation and incipient litigation they pursued under the Dealers Act, contact with potential clients was entirely consistent with a pragmatic understanding of the litigation exception under the DPPA.

The DPPA provides, "It shall be unlawful for any person knowingly to obtain or disclose information, from a motor vehicle record, for any use not permitted under Section (b) of this title." 18 U.S.C. § 2722. Thus, the DPPA makes unlawful "any use not permitted" in subsection (b). In *Pichler,* where the DPPA defendant claimed to have obtained information for two entirely distinct uses (union organizing, not a permitted use, and in anticipation of litigation, a permitted use), the court rejected the union's disingenuous attempt, admitting of only marginal coherence, to marry an unpermitted use with a permitted one. In contrast, the Lawyers here always had only one use as their purpose, i.e., litigation, litigation that at all times of their conduct was either imminent or ongoing. The Lawyers' satisfaction of the state solicitation requirements was inextricably intertwined

with their intended permitted use of the personal information they obtained. *See Ficker,* 119 F.3d at 1153 (noting that "the Supreme Court observed in *Bates* that the dissemination of advertising information to the public had the potential to contribute substantially to fair legal process. . . . Similarly, in *Peel,* 496 U.S. 91, 110, 110 S.Ct. 2281, 2293, the Court noted that such advertising 'facilitates the consumer's access to legal services and thus better serves the administration of justice' ").

In such circumstances, we agree with the *Rine* court that full effect should be given to the permissive uses protected by the litigation exception. To hold otherwise would effectively transform the DPPA's phrase, "any use not permitted," into "use not permitted for any reason" – a shift unsupported by the language, the purpose or the structure of the Act, and contrary to the public interest benefits that can inhere in impact litigation specifically aimed at protecting consumers on a broad scale. In the context of the circumstances presented in this case, it is no stretch to say that the Lawyers simply could not make appropriate, efficient and ethical use of the Buyers' personal information under our pragmatic approach to the litigation exception without first engaging in solicitation, and they did so in a manner that was entirely in keeping with applicable state ethics norms. Put simply, they did what any good lawyer would have done; Congress could not possibly have intended to impose DPPA liability under such circumstances.

We therefore hold that as to DPPA provisions (b)(4) and (b)(12), conduct that might, prima facie, amount to prohibited solicitation (i.e., that prohibited absent express consent) leading to a disclosure of personal information, does not give rise to a cognizable claim under the DPPA when such use in solicitation is coextensive with, and inextricably intertwined with, conduct expressly permitted pursuant to the litigation exception. *Rine,* 590 F.3d at 1226. We determine next whether the district court erred in concluding that the litigation exception applies to the undisputed facts reflected in the record of this case.

D.

As stated above, the district court ruled that the litigation exception applied to the Lawyers' conduct because, as a matter of law, the undisputed facts demonstrated that they obtained and used the Buyers' personal information with the singular purpose of employing it in their investigation in anticipation of, and in connection with the prosecution of, the *Herron* litigation:

> The initial complaint and the amended complaint in the *Herron* litigation are evidence that the information obtained from the first two FOIA requests was useful in determining whether to file a group action. . . . The Plaintiffs have failed to come forward with any evidence to dispute the Defendants' evidence that the personal information from the first two FOIA requests was obtained in

> order to assist in identifying the highest volume dealers.

J.A. 1483-84. This conclusion is unassailable on the present record.

The Buyers argue that this determination was erroneous because the Lawyers "did not come forward with any evidence that they could introduce at trial in support of their position [that the exception applied to their conduct]. . . . None." Appellants' Br. 39. They assert that the district court relied solely on the Lawyers' "self-serving, unsworn assertions," and a handful of documents that were irrelevant to the legal question or, in the case of the *Herron* documents, were merely contextual. Appellants' Br. 38-9. The Lawyers counter that under the DPPA the Buyers have the burden to offer evidence of an impermissible purpose, yet in the face of the documented FOIA requests and the DMV's compliance – both of which were carried out under express invocation of the litigation exception – the Buyers only conclusorily describe the Lawyers' purpose and use as "solicitation." The Lawyers clearly have the better of the argument.

Under Fed. R. Civ. P. 56(c):

> A party asserting that a fact cannot be or is genuinely disputed must support the assertion by:
>
> (A) citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits

> or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials; or
>
> (B) showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact.

We are satisfied that the district court did not err in concluding that the Buyers failed to generate a genuine dispute of material fact concerning the applicability of the litigation exception.

First, the Buyers' arguments throughout the proceedings below had been focused solely on the applicability of the litigation provision as a matter of law, i.e., that it did not protect the use here because the solicitation provision applied as well and imposed liability regardless of any other permitted use. They did not, however, produce or suggest any evidence that the provision did not apply as a factual matter.

The strongest substantive argument we might construe from the Buyers' position is that solicitation *cannot* occur "in anticipation of" or "in connection with" litigation, 18 U.S.C. § 2721(b)(4), and that if the Lawyers solicited they could not, by definition, have been acting in anticipation of, or in connection with, litigation. Plainly, we have rejected that contention above. In our view, such a position would improperly constrict the common meaning of "in anticipation of"

and "in connection with." The solicitation of clients by trial lawyers is surely connected to litigation in that representation for a legal claim is the goal. Here, where the Lawyers already had been contacted by potential clients, it cannot be said they were merely "trolling." Rather, the summary judgment record before us leaves no room to doubt that the Lawyers were looking to build and bolster a case against the dealerships if their initial information from consumers proved the existence of plausibly systemic violations of the Dealers Act.

Moreover, as to the Buyers' contention of procedural irregularity, the district court properly considered the complaints in *Herron* because the allegations made in that case corroborated the expressly stated intended and actual use of the letters in dispute. The Buyers failed to provide any evidence refuting the explicit language of the FOIA requests and letters, which solely support the claim that the Lawyers' conduct was either for use in "investigation in anticipation of litigation" or "in connection with" a civil proceeding. *Id.*

To be sure, the Buyers correctly note that the district court declined to take judicial notice of these documents for purposes of ruling on the motion to dismiss. At the time of that motion, the court explained:

> [T]he court declines to take judicial notice of the exhibits attached to the Defendants' motion in this case which largely consist of

> pleadings and transcripts in the *Herron* litigation. . . . The facts in the *Herron* litigation remain in dispute. Therefore, the court cannot take judicial notice of the contents of those documents.

J.A. 167. Thus, the district court took a cautious approach in its consideration of the Lawyers' Fed. R. Civ. P. 12(b)(6) motion to dismiss. Nevertheless, for purposes of the subsequent cross-motions for summary judgment, the *Herron* complaints and related documents were useful (and used) not to determine the factual basis of the Dealers Act claims, but as evidence only of the actual use of the Buyers' personal information obtained via the serial FOIA requests in connection with that litigation. The complaints evidenced the ends to which the information was requested and used, and therefore were relevant, material and admissible evidence of facts at issue – permissible purpose in the Lawyers' requesting that the DMV make the disclosure of, and permitted use of the personal information thereafter. We agree with the Eleventh Circuit that the Buyers bore the risk of non-persuasion on all elements of their claims, *Thomas,* 525 F.3d at 1114-15, and here the summary judgment record does not remotely show a genuine dispute of material fact.

We therefore hold that the district court properly took judicial notice of the *Herron* documents as probative evidence of the intended, and actual, use of the Buyers' DPPA-protected personal information. Furthermore, we agree that the Buyers failed to offer any

evidence generating an issue of material fact as to whether the use here was inextricably intertwined with investigation and prosecution of the *Herron* litigation. Thus, the district court did not err in its grant of summary judgment in favor of the Lawyers as to the applicability of the litigation exception.

III.

For the foregoing reasons, we hold that the district court erred in its determination that the conduct of the Appellees did not constitute solicitation within the contemplation of the applicable DPPA prohibition. Nevertheless, the court correctly ruled that the Appellees' conduct in respect to the Buyers' personal information was undertaken in anticipation of and in connection with litigation, a use clearly permitted by the DPPA. The propriety of that use having been established as a matter of law, and the antecedent solicitation being integral and necessary to, and inextricably intertwined with, the Lawyers' permitted use of the Appellants' personal information, the Appellants' claims fail as a matter of law. Accordingly, the judgment is

AFFIRMED.

APPENDIX B

FILED: April 4, 2012

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 10-2021
(7:09-cv-01651-HMH)

EDWARD F. MARACICH, individually and on behalf of all others similarly situated; MARTHA L. WEEKS, individually and on behalf of all others similarly situated; JOHN C. TANNER, individually and on behalf of all others similarly situated

Plaintiffs-Appellants

v.

MICHAEL EUGENE SPEARS; MICHAEL SPEARS, PA; GEDNEY MAIN HOWE, III; GEDNEY MAIN HOWE, III, PA; RICHARD A. HARPOOTLIAN; RICHARD A. HARPOOTLIAN, PA; A. CAMDEN LEWIS; LEWIS & BABCOCK, LLP

Defendants-Appellees

JUDGMENT

(Filed Apr. 4, 2012)

In accordance with the decision of this court, the judgment of the district court is affirmed.

This judgment shall take effect upon issuance of this court's mandate in accordance with Fed. R. App. P. 41.

/s/ PATRICIA S. CONNOR, CLERK

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
SPARTANBURG DIVISION

Edward F. Maracich, Martha L. Weeks, and John C. Tanner, individually and on behalf of all others similarly situated, Plaintiffs, vs. Michael Eugene Spears, Michael Spears, P.A., Gedney M. Howe, III, Gedney M. Howe, III, P.A., Richard A. Harpootlian, Richard A. Harpootlian, P.A., A. Camden Lewis, and Lewis & Babcock, LLP, Defendants.	C.A. No. 7:09-1651-HMH **OPINION & ORDER** (Filed Aug. 4, 2010)

This matter is before the court on the Plaintiffs', Edward F. Maracich, Martha L. Weeks, and John C. Tanner, motion for partial summary judgment and the Defendants', Michael Eugene Spears, Michael Spears, P.A., Gedney M. Howe, III, Gedney M. Howe, III, P.A., Richard A. Harpootlian, Richard A. Harpootlian, P.A., A. Camden Lewis, and Lewis & Babcock, LLP, motion for summary judgment. For the reasons set forth below, the Defendants' motion for summary judgment is granted in part and the Plaintiffs' motion for partial summary judgment is denied.

I. FACTUAL AND PROCEDURAL BACKGROUND

The relevant and material facts of this case are undisputed. The Plaintiffs in this putative class action allege that the Defendants violated the Driver's Privacy Protection Act ("DPPA"), 18 U.S.C. § 2721, by unlawfully obtaining personal information pursuant to the Freedom of Information Act ("FOIA") from the South Carolina Department of Motor Vehicles ("SCDMV") "for the impermissible purpose of soliciting clients." (Compl. ¶ 5.)

The Defendants represent plaintiffs in litigation currently pending in the South Carolina Court of Common Pleas, *Herron v. Dick Dyer & Associates, Inc., et al.*, Civil Action No. 2006-CP-02-1230, (hereinafter "*Herron* litigation").[1] The Defendants "filed *Herron* on behalf of South Carolina car buyers ("Car Buyers") charged illegal fees against all car dealerships ("Car Dealers") charging such fees, alleging violations of South Carolina law, including the Manufacturers, Distributors, and Dealers Act ("MDDA"), S.C. Code §§ 56-15-10, et seq." (Defs. Mem. Supp. Summ. J. 1.)

Defendant Richard A. Harpootlian ("Harpootlian") sent several FOIA requests to the SCDMV requesting

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[1] Two additional cases were filed on September 4 and September 20, 2007, respectively, *Adams v. Action Ford Mercury, Inc.* ("*Adams*"), Civil Action No. 2007-CP-02-1232 and *West-Cox v. Cale Yarborough Honda* ("*West-Cox*"), Civil Action No. 2007-CP-02-1154. Those cases have been stayed pending the outcome in *Herron* and consolidated with the *Herron* case.

information regarding individuals who purchased automobiles during specific periods of time requesting the names and addresses of car buyers. (Pls. Mem. Supp. Partial Summ. J. 2.) In total, Harpootlian sent six FOIA requests to the SCDMV from June 23, 2006 to January 23, 2007. (*Id.* 2-3.) The first two FOIA requests were sent prior to commencement of the *Herron* litigation. The remaining four FOIA requests were sent after the commencement of the *Herron* litigation to identify unnamed Car Buyers in order to respond to 183 motions to dismiss for lack of jurisdiction filed by the Car Dealers in *Herron* during the Fall and Winter of 2006. (Defs. Mem. Supp. Summ. J. 25.); (Pls. Mem. Supp. Partial Summ. J. 4.) Each FOIA request indicated that the request for disclosure of the personal information was permitted by the DPPA pursuant to 18 U.S.C. § 2721(b)(4). (Compl. Exs. A-F (FOIA Requests).) The SCDMV provided the requested information.

After obtaining the information from the SCDMV, beginning in January 2007, the Defendants sent letters to unnamed Car Buyers. The Defendants sent letters on January 4, 2007, January 23, 2007, March 1, 2007, March 5, 2007, and May 8, 2007, "to individuals whose Personal Information was obtained from the SCDMV pursuant to the FOIA letters sent by Defendant Harpootlian." (*Id.* ¶¶ 25-28.) The letters stated in pertinent part:

> We represent a group of consumers in a pending lawsuit arising from South Carolina car dealerships charging an add-on, often

> referred to as an "administrative fee," a "recording and processing fee," "closing fee," or "dealer documentation and closing fee." We believe that these fees are being charged in violation of South Carolina law.
>
> We understand that you may have been charged one of these fees on your recent purchase of an automobile. . . .
>
> [W]e would like the opportunity [to] discuss your rights and options with you in a free consultation. If you are interested in participating in the case or in a free consultation, please mail the enclosed postage paid card.

(*Id.* Exs. G-K (Letters to Individuals).) In addition, the words **"ADVERTISING MATERIAL"** and statements required by South Carolina Rule of Professional Conduct 7.3(d)(1)-(3) & (g) were included in the letters. (*Id.* Exs. G-K (Letters to Individuals).) In compliance with Rule 7.3(c), copies of the letters and the mailing lists were filed with the Office of Disciplinary Counsel. (Pls. Mem. Supp. Partial Summ. J. 5 & Docket Entry 74 (Barbara Hinson Aff. ¶¶ 2-3).) The Defendants allege that "[t]hough these letters complied with Rule 7.3, such compliance was unnecessary since Rule 7.3 does not apply to communications with 'persons with whom the sender has a[n] existing professional relationship.'" (Defs. Mem. Supp. Summ. J. 6-7, quoting SCRPC 7.3(c) & (d)(1).)

The Plaintiffs assert that they received a letter from the Defendants and allege that their personal

information was obtained without their consent for the purpose of solicitation in violation of the DPPA. (Compl. ¶¶ 30, 31, 33.); (Pls. Mem. Supp. Partial Summ. J. Add'l Attach. (Declarations of the Plaintiffs, generally).)

The Plaintiffs filed the instant action against the Defendants on June 23, 2009. The Defendants filed a motion to dismiss on August 3, 2009, alleging in part that the Defendants obtained the personal information for a permissible purpose contained in 18 U.S.C. § 2721(b). The court denied the motion to dismiss on September 8, 2009. This matter was subsequently stayed on January 25, 2009. However, the court lifted the stay to allow the parties to file motions for summary judgment. On May 21, 2010, the Plaintiffs filed a motion for partial summary judgment. On May 24, 2010, the Defendants filed a motion for summary judgment. The parties have fully briefed the issues raised in the motions and this matter is now ripe for consideration.

II. DISCUSSION OF THE LAW

A. Summary Judgment Standard

Summary judgment is appropriate only "if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c)(2). Rule 56(c) mandates entry of summary judgment "against a party who fails to make a

showing sufficient to establish the existence of an element essential to that party's case." *Celotex Corp. v.* Catrett, 477 U.S. 317, 322 (1986).

In deciding whether there is a genuine issue of material fact, the evidence of the non-moving party is to be believed and all justifiable inferences must be drawn in the nonmovant's favor. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). However, "[o]nly disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted." *Id.* at 248.

Moreover, "[w]hen a motion for summary judgment is properly made and supported, an opposing party may not rely merely on allegations or denials in its own pleading; rather its response must – by affidavits or as otherwise provided in this rule – set out specific facts showing a genuine issue for trial." Fed. R. Civ. P. 56(e)(2).

The Plaintiffs argue that the Defendants have not provided any competent evidence to support their motion for summary judgment. Specifically, the Plaintiffs allege that the "Defendants have not submitted any proper evidence in support of their motion, and the majority of the exhibits attached to Defendants' motion are unsworn, unauthenticated documents not properly before the Court." (Pls. Mem. Opp'n Defs. Summ. J. 5.) In assessing a summary judgment motion, a court is entitled to consider only

the evidence that would be admissible at trial. *Toll Bros., Inc. v. Dryvit Sys., Inc.*, 432 F.3d 564, 568 (4th Cir. 2005) ("Summary judgment is warranted when the admissible evidence forecasted by the parties demonstrates that no genuine issue of material fact exists and that the moving party is entitled to judgment as a matter of law.").

In general, the documents relied upon by the Defendants in their motion for summary judgment are documents attached to the Complaint, certified copies of public records including court transcripts and orders from the *Herron* litigation, and uncertified copies of public records from the *Herron* litigation. Pursuant to Rule 902(4) of the Federal Rules of Evidence, to be self-authenticated, the Defendants must provide certified copies of public records. The Plaintiffs do not challenge the authenticity of these records and have filed no motion to strike. *See Woods v. City of Chicago*, 234 F.3d 979, 989 (7th Cir. 2000) (finding that district court did not abuse discretion in considering an unauthenticated arrest report to which there was no dispute about its authenticity because "[r]equiring authenticating affidavits in this case would be an empty formality"). Moreover, the Plaintiffs rely on various court records in the *Herron* litigation in support of their motion for partial summary judgment. (Pls. Mem. Supp. Partial Summ. J. Add'l Attach. (Docket Entry 70).) Clearly, the documents attached to the complaint and the certified copies of court records are properly considered on a motion for summary judgment. Further, given that

there is no dispute regarding the authenticity of the uncertified public records and requiring certification would be "an empty formality," the court will consider the uncertified court records to the extent that the records contain competent evidence in deciding the parties' motions for summary judgment.[2] *Woods*, 234 F.3d at 989.

B. Defendants' Motion for Summary Judgment

The Defendants argue that:

> (1) Plaintiffs have failed as a matter of law to show that the Defendants obtained and used DMV information for a purpose not permitted by the DPPA; (2) the uncontroverted facts establish as a matter of law that Defendants obtained and used the DMV information for purposes permitted by the DPPA; (3) as a matter of law, Plaintiffs cannot establish a "knowing" violation of the DPPA; (4) Plaintiffs cannot prove any actual damages; and (5) application of the DPPA to Defendants' use of state DMV information in state court litigation is unconstitutional.

(Defs. Mem. Supp. Summ. J. 2-3.)

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[2] The court notes that the better practice is for litigants to provide authenticated copies of public records in support of a dispositive motion.

1. Permissible Use

Section 2721 permits a state department of motor vehicles ("DMV") to disclose protected personal information[3] for several permissible uses listed in § 2721(b). Section 2722 provides that "it is unlawful for any person knowingly to obtain or disclose personal information, from a motor vehicle record, for any use not permitted under section 2721(b)" and "to make false representation to obtain any personal information from an individual's motor vehicle record." Permissible uses are not affirmative defenses. The Plaintiffs have the burden of demonstrating that the "obtainment, disclosure, or use was not for a purpose enumerated under § 2721(b)." *Thomas v. George, Hartz, Lundeen, Fulmer, Johnstone, King, and Stevens, P.A.*, 525 F.3d 1107, 1111, 1114-15 (11th Cir. 2008) (affirming district court's grant of summary judgment to defendant law firm because it obtained the personal information for the permissible purpose of investigation in anticipation of litigation where "the automobile dealers he was litigating against were asserting that plaintiffs needed to plead and prove multiple acts of deceptive and unfair trade practices to state a deceptive and unfair trade

[3] "'[P]ersonal information' means information that identifies an individual, including an individual's photograph, social security number, driver identification number, name, address (but not the 5-digit zip code), telephone number, and medical or disability information, but does not include information on vehicular accidents, driving violations, and driver's status." 18 U.S.C. § 2725(3).

practice claim under Florida law" and "the information was used to send one-thousand 'Custom and Practice' letters, which aimed at obtaining evidence showing a custom and practice of deceptive acts engaged in by dealerships").

The court has considered all the evidence and for the reasons stated below finds that the Plaintiffs have failed to raise any genuine issue of material fact that the Defendants used, obtained, or disclosed personal information from the SCDMV without a permissible use in violation of the DPPA. For the reasons stated below, the court finds that the Defendants obtained the personal information for the permissible uses set forth in §§ 2721(b)(1) and (4).

a. Solicitation

The Plaintiffs allege that the Defendants obtained, used, and disclosed the personal information for the purpose of soliciting new clients for the *Herron* litigation. (Pls. Mem. Opp'n Mot. Summ. J. 1.) The Defendants argue that they did not obtain or disclose the information for the purpose of soliciting clients because an attorney-client relationship has existed with the named and unnamed Car Buyers since the inception of the *Herron* litigation because the MDDA is a consumer protection statute that allows the named Car Buyers to sue for the benefit of the whole in a group action. (Defs. Mem. Supp. Summ. J. 29-30.) Therefore, the Defendants submit that they could

not solicit a client with which they already had a client relationship.

Citing *Wemhoff v. District of Columbia*, 887 A.2d 1004 (D.C. Ct. App. 2005), the Plaintiffs argue that the letters mailed to individuals whose personal information was obtained from the FOIA requests contains marketing language which establishes that the Defendants obtained the personal information from the SCDMV for the purpose of solicitation. (Pls. Mem. Supp. Partial Summ. J. 14.); *Wemhoff*, 887 A.2d at 1012 (holding that "acquiring personal information from motor vehicle records for the purpose of finding and soliciting clients for a lawsuit is not a 'permissible use' within the meaning of § 2721(b)"). The letters included the language required by Rule 7.3 and were labeled **"ADVERTISING MATERIAL."** The first of these letters was not sent until five months after commencement of the *Herron* litigation. (Compl. Exs. G-K (Letters to unnamed Car Buyers).) The Defendants argue that the language was not required and was placed on the letters in an effort to be cautious. (Defs. Mem. Supp. Summ. J. 6-7, quoting SCRPC 7.3(c) & (d)(1).) Moreover, the Defendants informed opposing counsel in the *Herron* case that the language required by Rule 7.3 of the South Carolina Rules of Professional Conduct had been added as a cautionary measure and was not required. (*Id.*) Rule 7.3 does not apply to communications with "persons with whom the sender has a[n] . . . existing

professional relationship." S.C. Prof'l Conduct R. 7.3(c) & (d)(1). In a February 16, 2007 letter,[4] Defendant A. Camden Lewis in a letter to counsel for the Car Dealers in *Herron* stated:

> I am in receipt of your writing. . . . As you well recognized, the Freedom of Information Act requests were made under the exception of 18 U.S.C. § 2721(b)(4). They were for the purpose of gaining information in litigation and making sure the car buyers had been illegally charged as we set forth in our Complaint. It is a lawyer's duty to make sure injured citizens understand their rights, and when they have been secretly cheated to bring that to their attention if at all possible.
>
> You have mentioned that the material we sent out was designated "ADVERTISING MATERIAL." As you know that is a requirement of the Disciplinary Counsel, and, as we predicted, we knew that your group would try to see if we had met the requirements of the Disciplinary Counsel. In an abundance of caution we followed the requirements.

(Compl. Ex. M (Feb. 16, 2007 Letter).)

The trial court held in the *Herron* litigation, that the MDDA established a substantive right to proceed in a representative capacity for the "benefit of the

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[4] The letter is incorrectly dated. The Plaintiffs allege that the letter was sent in March 2007. (Pls. Mem. Supp. Partial Summ. J. 7.)

whole." The South Carolina Supreme Court stated in its order affirming the trial court's denial of the Car Dealers' motion to compel arbitration that

> [t]he purpose of the Dealers Act is consumer protection. Damages are typically small in individual consumer cases, thereby discouraging plaintiffs from bringing individual actions. Our Legislature recognized this and expressly provided plaintiffs with the right to bring class action lawsuits for violations of the Dealers Act:
>
> > When such action is one of common or general interest to many persons or when the parties are numerous and it is impracticable to bring them all before the court, one or more may sue for the benefit of the whole, including actions for injunctive relief.
> >
> > . . . .
> >
> > Stated succinctly, the Legislature has made clear that the public policy of this State is to provide consumers with a non-waivable right to bring class action suits for violations of the Dealers Act. . . .

Herron v. Century BMW, 693 S.E.2d 394, 399 (S.C. 2010). The Defendants' representation of the Car Buyers in the *Herron* litigation is distinct, yet analogous to attorney representation in a class action under Rule 23 of the South Carolina Rules of Civil Procedure. "In a [Rule 23] class action, the [class]

attorney[ ] assume[s] fiduciary obligations or constructive attorney-client status with respect to the class." 3 Herbert Newberg & Alba Conte, Newberg on Class Actions § 15.16 (4th ed. 2002) (citing *Greenfield v. Villager Indus., Inc.*, 483 F.2d 824 (3d Cir. 1973)). However, an attorney-client relationship in a Rule 23 class action generally "does not arise until the class is properly certified and notified." *Gillespie v. Scherr*, 987 S.W.2d 129, 131 (Tex. Ct. App. 1998) (holding that no attorney-client relationship exists pre-certification and notice); *Atari v. Sup. Ct.*, 166 Cal. App. 3d 867, 873 (Cal. Dist. Ct. App. 1985). The *Herron* litigation is a group action arising from a substantive right to proceed as a class without the procedural constraints of Rule 23. In the *Herron* litigation, class certification and opt in/out procedures do not apply. The trial court held in the *Herron* litigation as follows:

> Concerning the relationship between S.C.R.C.P. 23 and S.C. Code Ann. § 56-15-110(2), I find that Section 56-15-110(2) creates a substantive right. Because 1985 Act 100 (the Act enacting the Rules of Civil Procedure) is inapplicable to substantive rights, I find that the 1985 Act neither repealed S.C. Code Ann. § 56-15-110(2) nor required that a complaint asserting rights under § 56-15-110(2) include a requirement that the plaintiff plead and prove the class certification requirements of S.C.R.C.P. Rule 23.

(July 31, 2007 Order *Herron* litigation). The trial court further found in a subsequent order on a motion to dismiss a named plaintiff and substitute another

plaintiff that the Defendants, as counsel for the Car Buyers "from the inception of this litigation have represented the public interest in attempting to regulate allegedly unfair practices by motor vehicle dealers and therefore represent all those affected by such practices." (Defs. Mem. Supp. Mot. Summ. J. Ex. S (March 10, 2008 Order Denying Mot. to Dismiss and Substitute at 6).) From its inception, the Defendants' represented the named Car Buyers in the *Herron* litigation "for the benefit of the whole." Likewise, the Defendants have represented all unnamed Car Buyers.

In addition, even if an attorney-client relationship does not exist between the Defendants and the unnamed Car Buyers, at a minimum, since the inception of the *Herron* litigation, the Defendants have owed all unnamed Car Buyers a fiduciary duty. *In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 801 (3d Cir. 1995) ("[C]lass attorneys . . . owe the entire class a fiduciary duty once the class complaint is filed."); *Greenfield*, 483 F.2d at 832 ("[C]lass action counsel possess, in a very real sense, fiduciary obligations to those not before the court"). "Solicitation of parties [to help maintain the action on behalf of a class] may be entirely appropriate, if not required, as part of class counsel's fiduciary duty." *In re Avon Sec. Litig.*, No. 91 CIV. 2287(LMM), 1998 WL 834366, at *10 (S.D.N.Y. Nov. 30, 1998) (unpublished). Based on the foregoing, the Defendants did not solicit the unnamed Car Buyers as a matter of law. Thus, the Plaintiffs have failed to

raise a genuine issue of material fact that the Defendants obtained or used the personal information for the impermissible purpose of solicitation.

b. Application of DPPA Permissible Use Exceptions

Further, even if the Defendants also obtained, used, or disclosed the personal information for the purpose of solicitation, the Defendants did not violate the DPPA as long as the Defendants had a permissible purpose for obtaining, using, and disclosing the personal information. In *Thomas*, the plaintiff argued that the defendant law firm had a "second ulterior motive for obtaining the vehicle records; i.e., they were obtained for the purpose of creating a database of witnesses for prospective, not-yet-filed litigation – as opposed to currently pending cases." 525 F.3d at 1115 n.5. The Eleventh Circuit found that the argument was without merit noting that "[t]he litigation clause refers to investigation *in* anticipation of litigation. Thus, even if the accumulation of potential witnesses related, in part, to certain cases not yet filed, we do not see how pre-suit investigation can be considered per se inapplicable to the litigation clause." *Id.*

In addition, in *Rine v. Imagitas, Inc.*, 590 F.3d 1215, 1219 (11th Cir. 2009), the plaintiffs received their state of Florida registration renewal information in the mail with enclosed advertisements and solicitations, which were prepared and developed by

the defendant marketing company. The plaintiffs argued that the defendant had violated the DPPA for failing to comply with the bulk solicitation exception set forth in § 2721(b)(12). *Id.* at 1221. The defendant argued that its actions did not violate the DPPA, because the disclosure of personal information was permitted under § 2721(1) "[f]or use by . . . any private person or entity acting on behalf of a Federal, State, or local agency in carrying out its functions." *Id.* at 1223. The Eleventh Circuit found that "nothing in the DPPA suggests that the (b)(12) exception alters the scope or meaning of the separate and independent exception found in subsection (b)(1). As such, the statutory exceptions found in section 2721(b) are not mutually exclusive, meaning that any one or more of them may be applicable to a given situation." *Id.* at 1226. Further, the court noted that *Rine* "involve[d] two statutory provisions that potentially apply. While these provisions may overlap, they both apply to situations not governed by the other and both must be given effect unless they pose an either-or proposition." *Id.* (internal quotation marks omitted). Thus, the Eleventh Circuit concluded that the defendant was not required to comply with § 2721(b)(12).

The court declines to follow the Third Circuit's holding in *Pichler v. UNITE*, 542 F.3d 380, 395 (3d Cir. 2008). The Third Circuit held that "[t]he [DPPA] contains no language that would excuse an impermissible use merely because it was executed in conjunction with a permissible purpose." *Id.* Therefore, the Third Circuit found that "[b]ecause UNITE obtained

and used the confidential information for an impermissible purpose – union organizing – it does not matter what other permissible purpose UNITE may have had." *Id.* In contrast, the dissent in *Pichler* concluded, and this court agrees that "the Eleventh Circuit's interpretation of § 2721(b)(4)" in *Thomas* is correct. *Id.* at 402 (Sloviter, J., dissenting).

> The provision is written broadly. It allows the use of personal information from motor vehicle records "in connection with" a wide range of litigation activities, including "the service of process, investigation in anticipation of litigation, and the execution or enforcement of judgments and orders. . . ." 18 U.S.C. § 2721(b)(4). UNITE produced evidence that because it was aware of litigation against Cintas, it sought and obtained evidence of related legal violations during its home visits, and that it used that information to bring a considerable number of allegations before state, federal, and administrative adjudicatory bodies. . . . In light of this evidence, there can be little doubt that at least one of UNITE's purposes for using the restricted information was in connection with investigation in anticipation of litigation.

Id. (internal citation omitted).

The Plaintiffs argue that because the Defendants obtained the personal information for the purpose of solicitation, they were required to comply with § 2721(b)(12), which requires that drivers consent to

bulk solicitation. (Pls. Mem. Supp. Partial Summ. J. 16.) However, as set forth above, if any § 2721(b) exception applies, the Defendants had a permissible purpose for the information and were not required to comply with § 2721(b)(12). The *Wemhoff* case is not inconsistent with this finding. In *Wemhoff*, the plaintiff sought

> [a]ll records – with redactions as necessary . . . to protect personal identity – of all motorists who were "caught" by your photo/red light camera stationed on the H Street Bridge [in the Northeast quadrant of the District of Columbia] approaching the corner of North Capitol Street. This would include addresses of those issued automatic citations.

887 A.2d at 1006. The plaintiff sought the records "so that he c[ould] solicit these individuals to bring a class action lawsuit against the District of Columbia for negligence and 'selective enforcement' of the law." *Id.* at 1006 n.2. Specifically, the plaintiff sought the personal information "to solicit persons for his lawsuit who may have received and paid photo/red light camera citations relating to the North Capitol and H Streets location." *Id.* at 1009. The defendant refused to produce the requested information pursuant to the plaintiff's FOIA request. *Id.* at 1006. The plaintiff argued that the DPPA allowed for disclosure of the information under § 2721(b)(4) for "investigation in anticipation of litigation." *Id.* at 1010. The court held that the plaintiff was not investigating in

anticipation but solely seeking to solicit clients for a yet to be filed class action lawsuit. 887 A.2d at 1011-12. Most importantly, the court noted that no § 2721(b) exception applied. *Id.* (considering other exceptions under § 2721(b) and finding them inapplicable because "Mr. Wemhoff is not an agent of the government; nor does he desire the personal information in the motor vehicle records for any of the purposes listed above"). Therefore, the *Wemhoff* court concluded that the plaintiff was not entitled to the information under the DPPA. *Id.* at 1012. Consistent with the foregoing, the court finds that as long as the Defendants had a permissible purpose for obtaining, using, and disclosing the information, there is no DPPA violation. As such, irrespective of whether the Defendants' actions constitute solicitation, the real issue is whether the Defendants had a permissible purpose for obtaining, using, and disclosing the personal information.

c. Litigation Exception

The Defendants allege that there is no violation of the DPPA as a matter of law because they obtained and used the personal information for the permissible use identified in § 2721(b)(4), which provides that a state DMV may disclose personal information

> [f]or use in connection with any civil, criminal, administrative, or arbitral proceeding in any Federal, State, or local court or agency or before any self-regulatory body, including the service of process, investigation in

> anticipation of litigation, and the execution or enforcement of judgments and orders, or pursuant to an order of a Federal, State, or local court.

18 U.S.C. § 2721(b)(4). The Defendants allege that "the uncontrovertable facts clearly establish that the DMV information was obtained and used to determine whether *Herron* could be filed 'for the benefit of the whole' as a group representative action and to establish in *Herron* the standing of the unnamed Car Buyers whom Defendants represented." (Def. Mem. Supp. Summ. J. 16.)

i. Investigation in Anticipation of Litigation

The Defendants argue that they obtained personal information pursuant to the first two FOIA requests submitted prior to the filing of the *Herron* litigation for the permissible purpose of investigation in anticipation of litigation. The Defendants submit that the first two FOIA requests were sent with the purpose of investigating whether the charging of the allegedly unauthorized fees to car buyers was a common practice in order to determine whether the *Herron* case could be filed as a group action for the benefit of the whole. (*Id.* at 23-24.)

One court has found that in order to determine whether the information was obtained for the permissible purpose of anticipation of litigation

> there must be an actual investigation, litigation must appear likely at the time of the investigation, and the protected information acquired during the investigation must be of "use" in the litigation, meaning that there was "a reasonable likelihood that the decision maker would find the information useful in the course of the proceeding."

Pichler v. Unite, 446 F. Supp. 2d 353, 368 (E.D. Pa. 2006). In the case at bar, there was an actual investigation. The Defendants had been approached in June 2006 by individuals regarding the charging of these fees, which the Defendants believed were illegal fees. (Defs. Mem. Supp. Summ. J. 11.) The Plaintiffs do not dispute that the eight named individuals in the *Herron* case independently approached the Defendants with their claims. The Defendants believed that these fees were commonly charged and as evidenced by the language of the first two FOIA requests sought to determine the extent to which the practice was widespread. The first FOIA request stated:

> This is a Freedom of Information request in anticipation of litigation . . . pursuant to the exception in 18 U.S.C. § 2721(b)(4) of the Driver's Privacy Protection Act of 1994 (copy enclosed). I have plaintiffs who have complained of certain conduct as a result of their transactions with car dealers, conduct which I believe to be a potential violation of state law. I am attempting to determine if this is a common practice, and am accordingly submitting this FOIA request.

(Compl. Ex. A (First FOIA request).) The second request dated August 24, 2006, states that it is being submitted in "anticipation of litigation" and requests the same information as the first FOIA request, but for a broader geographic region. (*Id.* Ex. B (Second FOIA request).) In *Bailey v. Daniels*, 679 F. Supp. 2d 713, 714 (W.D. La. 2009), the defendant used the plaintiff's license plate to acquire DMV information to identify him because the defendant believed the plaintiff had committed a crime against him. In granting summary judgment to the defendant, the court held that the § 2721(b)(4) anticipation of litigation exception applied. The court found as follows:

> Mr. Daniels genuinely believed that a crime had been committed against him; as it turns out, he was correct. . . . Under these circumstances, we cannot say that the information *was not* acquired for the purpose of prospective litigation, be it criminal or civil, as contemplated by the litigation exception to the DPPA. Thus, the defendant's reliance upon the exception is highly plausible. More importantly, the plaintiff has not raised a genuine issue of material fact regarding Mr. Daniels' permissible purpose for obtaining the information. . . . [*A*]*t the time Mr. Daniels . . . acquired the information*, he did so for the permissible purpose of investigating a possible crime against himself in anticipation of future litigation. In sum, with the extremely odd facts of this case, Mr. Bailey has failed to present a genuine issue of material fact regarding whether Mr. Daniels obtained

> the personal information for a use not permitted by the statute. Such proof is a required element in order to maintain an improper obtainment claim under the DPPA.

Id. at 721-22 (internal citation omitted).

The Plaintiffs argue that the first two FOIA requests were not submitted for the purpose of investigation in anticipation of litigation because the requests "did not seek information about whether car buyers were charged administrative fees or how much those fees were." (Pls. Mem. Opp'n Summ. J. 16.) Further, the Plaintiffs allege that the Defendants did not use the information to contact any Car Buyers until the letters to unnamed Car Buyers were sent after the commencement of the *Herron* litigation. (*Id.*) Finally, the Plaintiffs allege that the second FOIA request was sent only three business days before the *Herron* litigation was filed. (*Id.*)

The Defendants submit that their "initial investigation revealed that the Automobile Dealers Association may have ratified the charging of illegal fees. In an attempt to verify whether the wrongful conduct was part of a common practice such that suit could be brought 'for the benefit of the whole,' Defendants undertook to identify the highest volume dealers." (Defs. Mem. Supp. Summ. J. 11.) The Defendants state that "[t]his investigation revealed the dealerships with the highest volume of transactions charging deceptive fees." (*Id.*) In the case at bar, the *Herron* litigation was commenced and the information

obtained from the first two FOIA requests was useful in determining whether to file a group action. The Plaintiffs are essentially arguing that the Defendants were required to undertake additional investigation in order to constitute investigation in anticipation of litigation. This argument is without merit.

The initial complaint and the amended complaint in the *Herron* litigation are evidence that the information obtained from the first two FOIA requests was useful in determining whether to file a group action. The Defendants filed the *Herron* litigation on August 29, 2006, "on behalf of four named Car Buyers and, because investigation disclosed that deceptive practices were widespread, for the benefit of all car buyers who paid administrative fees against 51 Car Dealers." (*Id.* Ex. A (*Herron* First Compl.) (internal quotations omitted).) Further, on October 31, 2006, Defendants filed an amended complaint in the *Herron* litigation to add four Car Buyers and over 250 Car Dealers and to add claims for civil conspiracy and declaratory judgment. (*Id.* Ex. C (*Herron* Am. Compl).)

The Plaintiffs have failed to come forward with any evidence to dispute the Defendants' evidence that the personal information from the first two FOIA requests was obtained in order to assist in identifying the highest volume dealers. Based on the foregoing, the Plaintiffs have failed to raise a genuine issue of material fact regarding the Defendants' permissible purpose for obtaining the personal information in the first two FOIA requests. With respect to the personal

information obtained from the first two FOIA requests, the court finds the Defendants did not violate the DPPA as they acquired the information for the permissible purpose of investigation in anticipation of litigation.

ii. Use in Connection with Pending Litigation

With respect to the four FOIA requests submitted after the commencement of the *Herron* litigation, the Defendants allege that they sent the four FOIA requests for the permissible use set forth in § 2721(b)(4), "[f]or use in connection with any civil, criminal, administrative, or arbitral proceeding in any Federal, State, or local court." (Defs. Mem. Supp. Summ. J. 20.) The court agrees.

It is undisputed that the Defendants sent the four FOIA requests after the initiation of the *Herron* case to identify a car buyer for each named car dealer because the Car Dealers had moved to dismiss for lack of standing all Car Dealers for which there was no named car buyer that had transacted business with a named Car Buyer. (Defs. Mem. Supp. Summ. J. 25 & Ex. B (Car Dealers' Mot. Dismiss).) The litigation exception is extremely broad and contains a few examples, but does not expressly restrict the types of permissible uses that are uses in connection with ongoing litigation. As discussed above, identifying a representative car buyer for each car dealer for purposes of responding to the Car Dealers' motions to

dismiss also meant the Defendants generated new clients. That is insufficient under the facts of this case to find a violation under the DPPA.[5]

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[5] In addition, to find otherwise would be contrary to the intent of Congress in enacting the DPPA. The DPPA was enacted as "part of crime fighting legislation enacted in response to the murder of a young woman in Los Angeles, California in 1989" by a stalker who obtained her address from DMV records. *Margan v. Niles*, 250 F. Supp. 2d 63, 68-69 (N.D.N.Y. 2003) (citing 139 Cong. Rec. S15745-01, S15761-66 (1993); 145 Cong. Rec. S14533-02, S14538 (1999)). After her murder, "several members of Congress sought to prevent state motor vehicle departments from freely providing personal information obtained from motor vehicle records." *Id.* at 68 (citing 145 Cong. Rec. S14533-02, S14538). With the DPPA, "Congress intended to prevent stalkers, harassers, would-be criminals, and other unauthorized individuals from obtaining and using personal information from motor vehicle records." *Id.* at 68-69 (citing 145 Cong. Rec. S14533-02, S14538 ("[T]he murder of Rebecca Schaeffer led to the [DPPA]."); 141 Cong. Rec. H416-06, H447 (1995) (Rep. Dingell stated that "[l]ast year, as part of the crime bill, Congress heard the concerns of women who were being stalked because of easy access to motor vehicle records that reveal . . . addresses. To address this problem, Congress enacted the [DPPA]."); 140 Cong. Rec. H2518-01, H2527 (1994) (Rep. Goss stated: "[T]he intent of this bill is simple and straightforward: We want to stop stalkers from obtaining the name and address of their prey before another tragedy occurs. . . . [T]he [DPPA] . . . is a reasonable and practical crime fighting measure."); 139 Cong. Rec. S15745-01, S15764-66 (1993) (Sens. Robb, Biden and Harkin stating that "[t]his amendment closes a loophole in the law that permits stalkers to obtain – on demand – private, personal information about their potential victims" and further discussing other incidents where an anti-abortion activist obtained the name and address of a patient from DMV records and sent her threatening letters; an obsessed fan assaulted a model at her home after obtaining the address from

(Continued on following page)

When the Defendants submitted the four FOIA requests, the Defendants represented eight named Car Buyers who had approached the Defendants independently in June 2006 with their claims. (Defs. Mem. Supp. Summ. J. 11 & Ex. C (*Herron* Am. Compl, generally).) Thus, when the Defendants sent the post-litigation FOIA requests, the Defendants had a pending group action against the Car Dealers, which distinguishes this case from *Wemhoff*, 887 A.2d at 1011-12, and *Pichler v. UNITE*, 585 F.3d 741, 751 (3d Cir. 2009), in which the attorneys were seeking the information in order to find clients to enable them to file a class action lawsuit. The Defendants were not "trolling" for clients in the *Herron* litigation in an effort to bring a lawsuit. *Pichler*, 585 F.3d at 753. Instead, the Defendants' actions were necessary to respond to the Car Dealers' motions to dismiss for lack of standing to prevent the unnamed Car Buyers from potentially losing their claims against the Car Dealers. The letters sent to unnamed Car Buyers clearly stated that the Defendants "represent a group of consumers in a pending lawsuit" against Car Dealers charging a fee "in violation of South Carolina law." (Compl. Exs. G-K (Letters to unnamed Car Buyers).) The FOIA requests cite § 2721(b)(4), the litigation exception, and the letters to unnamed Car

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the DMV; and teens identified cars with expensive stereos and utilized the license plate numbers to find the owners' home addresses)).

Buyers indicated that the information was being used in connection with the *Herron* litigation.

The Plaintiffs cite the affidavit of Plaintiff John Tanner ("Tanner") as raising a genuine issue of material fact that the Defendants obtained and used the personal information for the purpose of solicitation. Tanner's affidavit fails to raise a genuine issue of material fact that the Defendants acted without a permissible purpose. Tanner opines that he spoke with Defendant Dick Harpootlian via telephone after receiving a letter. Tanner states that "Mr. Harpootlian did not express any interest in finding out any facts about my interaction with the dealership who sold me my car. Instead he made an aggressive sales pitch to me in which he tried to get me to sign up as a client for a lawsuit against the dealership from which I had purchased my car." (Pls. Mem. Opp'n Defs. Summ. J. Supplemental Decl. ¶ 6).) Tanner's affidavit is consistent with the Defendants' stated reasons for permissibly using the personal information obtained from the FOIA requests: to identify a Car Buyer for every Car Dealer in order to respond to the pending motions to dismiss. Based on Tanner's affidavit, Defendant Harpootlian informed Tanner that he had a claim against the dealership where he had purchased the car, informed him of the existence of the lawsuit, and asked whether he would be interested in participating in the lawsuit. (*Id.* Supplemental Decl., generally.) As previously discussed, even if the Defendants' actions constituted solicitation, as long as the Defendants had a

permissible use for the information, there is no DPPA violation.

It is undisputed that the Defendants sent the letters to individuals who they believed were charged allegedly illegal fees by the Car Dealers in an effort to identify a car buyer for each car dealer to respond to the Car Dealers' motions to dismiss.[6] (Pls. Mem. Supp. Partial Summ. J. 9 (stating that after the mailing of the letters to unnamed Car Buyers, "hundreds" came forward wanting to participate in the *Herron* litigation and "[t]he Defendants filed a Motion to Amend the Herron complaint to add 246 new named plaintiffs to defeat the defendant car dealers' standing arguments").) On June 5, 2007, the Car Buyers filed a motion to amend to add 246 new plaintiffs to moot the Car Dealers' motions to dismiss. (Defs. Mem. Supp . Summ. J. Ex. H (Motion to Amend Complaint).) However, the trial court denied the motion to amend on August 21, 2007. (Pls. Mem. Supp. Partial Summ. J. Ex. N (Order August 21, 2007).) In response, the Defendants filed the *West Cox* and *Adams* actions. (Ans. ¶ 68.) The Defendants state in their answer to the complaint that

[6] Notably, the Car Dealers, not the Car Buyers, argued that there had to be an injured Car Buyer for each named Car Dealer in order to avoid dismissal. (Defs. Mem. Supp. Summ. J. 25 & Ex. B (Car Dealers' Mot. Dismiss).) The Defendants argued in the *Herron* litigation that a Car Buyer for each Car Dealer was not required. (*Id.* Ex. F (Car Buyers Mem. Opp'n Mot. Dismiss).)

> [t]he Car Dealers [in *Herron*] resolutely continued to challenge standing, filing a joint motion for reconsideration under Rule 59(e), SCRCP of the Courts July 31, 2007 Order. If Judge Early were to change his mind about standing – or if his decision were reversed on appeal – the unnamed Car Buyers would lose their claims. In light of this predicament and in accordance with their judicially confirmed obligations to the entire group of Car Buyers, Defendant Attorneys filed the *Adams* and *West-Cox* cases based on the same Dealers Act violations asserted in Herron in order to maintain the viability of the claims of hundreds of previously unnamed Car Buyers. Those cases were filed on September 4 and September 20, 2007, respectively, and consolidated before Judge Early. Defendant Attorneys then dismissed all Car Dealers in *Herron* that did not have a corresponding named Car Buyer. Thus, without conceding the issue of standing, Defendant Attorneys mooted the issue by insuring that in all three pending suits each defendant Car Dealer had a corresponding named Car Buyer.

(*Id.*) Subsequently, on January 31, 2008, the trial court granted the Car Dealers' motion for reconsideration on the standing issue in part finding as follows:

> I conclude that a named Plaintiff has standing to pursue all three causes of action, on behalf of himself or others, against the Defendant from which that particular Plaintiff purchased a vehicle. However, a named Plaintiff does not have standing to sue, on

> behalf of himself or others, any Defendant with which he did not transact any business. A named Plaintiff may later gain standing to sue Defendants with which a named Plaintiff did not transact any business by presenting evidence sufficient to create a genuine issue of material fact that particular Defendant conspired on the charging of the closing fee with the Defendant from which the named Plaintiff purchased a vehicle.

(Pls. Mem. Supp. Partial Summ. J. Ex. O (Jan. 31, 2008 Order).) Under the facts of this case, obtaining and using the personal information in order to respond to potentially dispositive motions in a pending case falls squarely within the litigation exception in § 2721(b)(4) even if the Defendants had the secondary motive of soliciting clients. There is no question that the Defendants utilized the information they obtained for use in the *Herron* litigation in order to respond to the Car Dealers' motions to dismiss and to protect the viability of the unnamed Car Buyers' claims against Car Dealers that had moved to dismiss for lack of standing.

Based on the foregoing, the court finds that there are no genuine issues of material fact that the Defendants obtained and used the personal information obtained from the four FOIA requests for a permissible purpose, the litigation exception in § 2721(b)(4). Further, to the extent the Defendants used the personal information obtained from the first two FOIA requests for the purpose of responding to the Car Dealers' motions to dismiss, this conduct also falls

within the litigation exception for the same reasons discussed above. Based on the foregoing, the Defendants are entitled to summary judgment.

iii. State Action Exception

In addition, the Defendants allege that the personal information obtained from the SCDMV did not violate the DPPA because it allows the disclosure of protected information "[f]or use by any government agency, including any court or law enforcement agency, in carrying out its functions, or any private person or entity acting on behalf of a Federal, State, or local agency in carrying out its functions." § 2721(b)(1); (Defs. Mem. Supp. Summ. J. 26.) Therefore, in deciding whether the § 2721(b)(1) exception applies, the court must determine whether the Defendants were carrying out a function of the state and were acting on behalf of the state. *Rine*, 590 F.3d at 1223.

The MDDA authorizes the Attorney General's office in S.C. Code § 56-15-40(5) to "investigate, issue cease and desist orders and injunctive relief on any valid abuse connected with the sale, rental or leasing of a new or used motor vehicle." Further, in § 56-15-110(2), the MDDA authorizes a private person or entity "[w]hen such action is one of common or general interest to many persons or when the parties are numerous and it is impracticable to bring them all before the court, one or more may sue for the benefit of the whole, including **actions for injunctive**

relief." (Emphasis added.) Therefore, the MDDA authorizes a private person to act on behalf of a state in carrying out its function of obtaining injunctive relief for violations of the MDDA. The trial court in *Herron* concluded that the Defendants were acting as "private attorneys general" finding as follows:

> [T]his case is being prosecuted pursuant to a "private attorneys general" provision under the Dealers Act. A "private attorneys general suit" is a term used by courts when statutes authorize both the Attorney General's office and private citizens, through civil actions, to enforce regulations. In this case, the Dealers Act empowers both the state Attorney General and private citizens to seek injunctive relief on behalf of the public. Plaintiffs have sought injunctive relief on behalf of the whole and thus are acting as private attorneys general. Plaintiffs' counsel, as private attorneys general, from the inception of this litigation have represented the public interest in attempting to regulate allegedly unfair practices by motor vehicle dealers and therefore represent all those affected by such practices.

(Defs. Mem. Supp. Summ. J. Ex. A (Order at 6 (citations omitted)).) The court agrees. The *Herron* litigation is a group action for the "benefit of the whole" and the Car Buyers are seeking, in part, injunctive relief for the Car Buyers. (*Id.* Ex. C (*Herron* Am. Compl., generally).) Further, although the FOIA requests sent to the SCDMV requesting the personal

information identifies the litigation exception in § 2721(b)(4), not the state action exception, the Defendants also had the permissible use set forth in § 2721(b)(1). As discussed earlier, "the statutory exceptions found in section 2721(b) are not mutually exclusive, meaning that any one or more of them may be applicable to a given situation." *Rine*, 590 F.3d at 1216. Based on the foregoing, the Defendants' motion for summary judgment on this ground is granted.[7]

C. The Plaintiffs' Motion for Partial Summary Judgment

The Plaintiffs move for partial summary judgment requesting that the court enter judgment as a matter of law finding

> (1) that the Defendants violated the DPPA when they obtained Plaintiffs' Personal Information for the purpose of solicitation; (2) that the Defendants violated the DPPA when

[7] The Defendants raise additional grounds for summary judgment. However, having found that the Defendants had a permissible use for obtaining, using, and disclosing the personal information, the court declines to address those grounds further and denies the remaining grounds for relief ("as a matter of law, Plaintiffs cannot establish a 'knowing' violation of the DPPA; . . . Plaintiffs cannot prove any actual damages; and application of the DPPA to Defendants' use of state DMV information in state court litigation is unconstitutional") for the reasons stated in this court's September 8, 2009 Order on the Defendants' motion to dismiss. However, the court notes that even assuming that the Defendants' actions violate the DPPA, there is no evidence that the Defendants knowingly violated the DPPA.

> they used Plaintiffs' Personal Information to solicit clients; and (3) that the Defendants violated the DPPA when they disclosed Plaintiffs' Personal Information in furtherance of their efforts to solicit clients.

As set forth above, no genuine issues of material fact exist concerning whether the Defendants obtained and used the personal information for the purpose of solicitation in violation of the DPPA. The undisputed facts reveal that the Defendants obtained and used the personal information for the permitted purposes set forth in §§ 2721(b)(1) and (4).

With respect to the Plaintiffs' argument that the Defendants disclosed the personal information in violation of the DPPA "in furtherance of their efforts to solicit clients" when they provided the Office of Disciplinary Counsel "copies of the letters they sent to the Plaintiffs and putative class members, along with lists of the names and addresses of the individuals to whom the letters were sent," this claim also fails. (Pls. Mem. Supp. Partial Summ. J. 34 & Add'l Attach. (Hinson Aff. ¶¶ 2-3).)

As discussed fully above, even if the Defendants' conduct also constitutes solicitation, the Defendants disclosed the information to the Office of Disciplinary Counsel for the permissible purpose of use in connection with pending litigation. If the Defendants were soliciting clients, they were required to comply with Rule 7.3 and therefore, file the required information with the Office of Disciplinary Counsel. This conduct does not violate the DPPA because the Defendants

disclosed the information to permit them to send the letters in an effort to respond to the Car Dealers' motions to dismiss, which the court has found was a permissible use under the litigation exception in § 2721(b)(4). It would be unreasonable for the Plaintiffs to argue that the Defendants should have subjected themselves to a potential violation of the South Carolina Rules of Professional Conduct by not filing the information with the Office of Disciplinary Counsel.

Further, the disclosure of personal information to the Office of Disciplinary Counsel was permitted under § 2721(b)(1), the state action exception, as the Defendants were disclosing the information to a state agency. Based on the foregoing, having found that the Defendants had a permitted use for the personal information obtained, used, and disclosed as a matter of law, the Plaintiffs' motion for partial summary judgment is denied.

Therefore, it is

ORDERED that the Defendants' motion for summary judgment, docket number 77, is granted in part. It is further

ORDERED that the Plaintiffs' motion for partial summary judgment, docket number 68, is denied.

IT IS SO ORDERED.

s/Henry M. Herlong, Jr.
Senior United States
District Judge

Greenville, South Carolina
August 4, 2010

APPENDIX D

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA
SPARTANBURG DIVISION

Edward F. Maracich, Martha L. Weeks, and John C. Tanner, individually and on behalf of all others similarly situated,

vs.

Michael Eugene Spears, Michael Spears, P.A., Gedney M. Howe, III, Gedney M. Howe, III, P.A., Richard A. Harpootlian, Richard A. Harpootlian, P.A., A. Camden Lewis, and Lewis & Babcock, LLP,

SUMMARY JUDGMENT IN A CIVIL CASE

Case Number: 7:09cv1651-HMH

[X] Decision by Court. This action came before the Court for consideration. The issues have been considered and a decision has been rendered.

IT IS ORDERED, ADJUDGED AND DECREED that Defendants' motion for summary judgment is granted as set out.

LARRY W. PROPES, Clerk
By: /s/ [Illegible]
Deputy Clerk

August 4, 2010

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
SPARTANBURG DIVISION

Edward F. Maracich, Martha L. Weeks, and John C. Tanner, individually and on behalf of all others similarly situated, Plaintiffs, vs. Michael Eugene Spears, Michael Spears, P.A., Gedney M. Howe, III, Gedney M. Howe, III, P.A., Richard A. Harpootlian, Richard A. Harpootlian, P.A., A. Camden Lewis, and Lewis & Babcock, LLP, Defendants.	C.A. No. 7:09-1651-HMH **OPINION & ORDER** (Filed Aug. 8, 2009)

This matter is before the court on Defendants' motion to dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. For the reasons set forth below, the Defendants' motion is denied.

I. FACTUAL AND PROCEDURAL BACKGROUND

The Plaintiffs in this putative class action allege that the Defendants violated the Driver's Privacy Protection Act ("DPPA"), 18 U.S.C. § 2721, by unlawfully obtaining personal information pursuant to the Freedom of Information Act ("FOIA") from the South Carolina Department of Motor Vehicles ("SCDMV")

"for the impermissible purpose of soliciting clients." (Compl. ¶ 5.)

According to the complaint, Defendant Richard A. Harpootlian ("Harpootlian") sent several FOIA requests to the SCDMV requesting information regarding individuals who purchased automobiles during specific periods of time "including the name, address, and telephone number of the buyer, dealership where the vehicle was purchased, type of vehicle purchased, and the date of purchase." (*Id.* ¶ 19.) In total, Harpootlian sent six FOIA requests to the SCDMV from June 23, 2006 to January 23, 2007. Each FOIA request indicated that the request for personal information was permitted by the DPPA set forth in 18 U.S.C. § 2721(b)(4). The SCDMV provided the requested information.

In a January 4, 2007 letter, mailed to "individuals whose Personal Information was obtained from the SCDMV pursuant to the FOIA letters sent by Defendant Harpootlian," the Defendants "solicited clients for a lawsuit against certain dealerships, and offered a free consultation to all recipients." (*Id.* ¶ 24.) In addition, the Defendants sent additional letters on January 23, 2007, March 1, 2007, March 5, 2007, and May 8, 2007 "to individuals whose Personal Information was obtained from the SCDMV pursuant to the FOIA letters sent by Defendant Harpootlian." (*Id.* ¶¶ 25-28.) The Plaintiffs submit that in these letters the Defendants "solicited clients for a lawsuit against certain dealerships, and offered a free consultation to

all recipients." (*Id.*) The letters stated in pertinent part:

> We represent a group of consumers in a pending lawsuit arising from South Carolina car dealerships charging an add-on, often referred to as an "administrative fee," a "recording and processing fee," "closing fee," or "dealer documentation and closing fee." We believe that these fees are being charged in violation of South Carolina law.
>
> We understand that you may have been charged one of these fees on your recent purchase of an automobile. . . .
>
> [W]e would like the opportunity [to] discuss your rights and options with you in a free consultation. If you are interested in participating in the case or in a free consultation, please mail the enclosed postage paid card.

(Compl., Exs. G-K.) In addition, the words **"ADVERTISING MATERIAL"** and statements required by South Carolina Rule of Professional Conduct 7.3(d)(1)-(3) & (g) were included in the letters. (*Id.*) In compliance with Rule 7.3.23, copies of the letters and the mailing lists were filed with the Office of Disciplinary Counsel. (*Id.*) The Defendants allege that "[t]hough the Defendant Attorneys complied with Rule 7.3, no such compliance was necessary. Rule 7.3 does not apply to communications with 'persons with whom the sender has a[n] existing professional relationship.'" (Defs. Mem. Supp. Mot. Dismiss 19,

quoting SCRPC 7.3(c) & (d)(1).) The Plaintiffs assert that they received a letter from the Defendants and allege that their personal information and the personal information of "other motor vehicle owners within the Class" was obtained without their consent for the purpose of solicitation in violation of the DPPA. (Compl. ¶¶ 30, 31, 33.) The Defendants allege that the information was obtained in connection with pending litigation in state court, *Herron v. Dick Dyer & Associates, Inc., et al.,* Civil Action No. 2006-CP-02-1230, ("*Herron* litigation"), in which the Defendants "represent a group of aggrieved car buyers . . . who have claims against car dealers . . . for charging unfair and deceptive closing fees in violation of South Carolina laws." (Defs. Mem. Supp. Mot. Dismiss 10.)

The Plaintiffs filed the instant action against the Defendants on June 23, 2009. The Defendants filed the instant motion to dismiss on August 3, 2009, alleging that the Defendants obtained the personal information for a permissible purpose contained in 18 U.S.C. § 2721(b). The Plaintiffs filed a response in opposition on August 21, 2009, and the Defendants replied on August 31, 2009.

II. DISCUSSION OF THE LAW

A. Federal Rule of Civil Procedure Rule 12(b)(6)

In federal court, a claimant must make only "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2).

"To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal,* 129 S. Ct. 1937, 1949 (U.S. 2009) (internal quotation marks omitted). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.*

> The plausibility standard is not akin to a "probability requirement," but it asks for more than a sheer possibility that a defendant has acted unlawfully. Where a complaint pleads facts that are "merely consistent with" a defendant's liability, it "stops short of the line between possibility and plausibility of 'entitlement to relief.' "

Id. (citation omitted). In addition, the court must accept as true factual allegations in the complaint. However, this tenet is "inapplicable to legal conclusions." *Id.* When deciding a Rule 12(b)(6) motion to dismiss, "courts must consider the complaint in its entirety, as well as other sources courts ordinarily examine . . . , in particular, documents incorporated into the complaint by reference, and matters of which a court may take judicial notice." *Tellabs, Inc. v. Makor Issues & Rights, Ltd.,* 551 U.S. 308, 322 (2007). "Only indisputable facts are susceptible to judicial notice." *Nolte v. Capital One Financial Corp.,* 390 F.3d 311, 317 n.1 (4th Cir. 2004) (finding that "[a]lthough the filing of an SEC complaint against Willey is indisputable, the facts alleged therein are not").

The court takes judicial notice of the pendency of the *Herron* litigation in state court and the Defendants' representation of the plaintiffs in the *Herron* litigation. However, the court declines to take judicial notice of the exhibits attached to the Defendants' motion in this case, which largely consist of pleadings and transcripts in the *Herron* litigation. The Defendants do not allege that they are entitled to dismissal of this action based on res judicata in a prior judicial proceeding. *See Q Intern. Courier Inc. v. Smoak,* 441 F.3d 214, 216 (4th Cir. 2006) (finding that a "court may take judicial notice of facts from a prior judicial proceeding when the res judicata defense raises no disputed issue of fact"). The facts in the *Herron* litigation remain in dispute. Therefore, the court cannot take judicial notice of the contents of those documents.

B. Analysis

The Defendants argue that the case should be dismissed under Rule 12(b)(6) for the following reasons: (1) the personal information was obtained for the permissible purpose provided in 18 U.S.C. § 2721(b)(4) (hereinafter "litigation exception"); (2) the personal information was obtained for the permissible purpose provided in § 2721(b)(1) (hereinafter "state actor exception"); (3) Plaintiffs Tanner and Weeks have failed to plead that they received a letter from the Defendants; (4) the Plaintiffs have failed to allege that the Defendants "knowingly violated the DPPA"; (5) the

Plaintiffs have failed to plead any actual damages; and (6) "if the DPPA were interpreted to support the Plaintiffs' allegations, the DPPA would be unconstitutional as applied to this situation." (Defs. Mem. Supp. Mot. Dismiss, generally.) The court will address each argument below.

1. Permissible Use – Litigation Exception

Section 2721 permits a state department of motor vehicles ("DMV") to disclose protected personal information[1] for several "permissible uses" listed in § 2721(b). The Defendants allege that there is no violation of the DPPA because they obtained the personal information for the permissible use identified in § 2721(b)(4), which provides that a state DMV may disclose personal information:

> For use in connection with any civil, criminal, administrative, or arbitral proceeding in any Federal, State, or local court or agency or before any self-regulatory body, including the service of process, investigation in anticipation of litigation, and the execution or enforcement of judgments and orders, or

[1] "'[P]ersonal information' means information that identifies an individual, including an individual's photograph, social security number, driver identification number, name, address (but not the 5-digit zip code), telephone number, and medical or disability information, but does not include information on vehicular accidents, driving violations, and driver's status." 18 U.S.C. § 2725(3).

> pursuant to an order of a Federal, State, or local court.

18 U.S.C. § 2721(b)(4). Section 2722 provides that it is "unlawful for any person knowingly to obtain or disclose personal information, from a motor vehicle record, for any use not permitted under section 2721(b)" and "unlawful for any person to make false representation to obtain any personal information from an individual's motor vehicle record."

The Defendants submit that they "[o]btained, [d]isclosed and [u]sed the DMV Data for the [p]ermissible [p]urpose of [u]se in [c]onnection with [l]itigation [p]ursuant to Section 2721(b)(4)." (Defs. Mem. Supp. Mot. Dismiss 10.) Specifically, the Defendants submit that the information was obtained in connection with the *Herron* litigation in state court. (*Id.* 10.) The Defendants allege that

> [t]he Complaint does not contain any well-pleaded, nonconclusory factual allegations that plausibly give rise to liability under the DPPA. In addition, the allegations in the Complaint are directly contradicted by public records and the documents Plaintiffs attached to their Complaint. Put simply, the Defendant Attorneys obtained information from the South Carolina DMV for use in connection with the pending *Herron* litigation. That is perfectly legal – and certainly not actionable – under the DPPA, which allows personal information to be obtained

> "[f]or use in connection with any civil . . . proceeding in any . . . court."

(*Id.* 12.)

The court has considered all the evidence properly before this court on a Rule 12(b)(6) motion to dismiss and finds that the Plaintiffs have satisfied their burden to plead a facially plausible claim for relief that the Defendants obtained personal information from the SCDMV without a permissible use in violation of the DPPA. The Defendants sent several FOIA requests seeking the information for the permissible use set forth in § 2721(b)(4). "[A]cquiring personal information from motor vehicle records for the purpose of finding and soliciting clients for a lawsuit is not a 'permissible use' within the meaning of § 2721(b)." *Wemhoff v. District of Columbia,* 887 A.2d 1004, 1012 (D.C. Ct. App. 2005); *see also Thomas v. George, Hartz, Lundeen, Fulmer, Johnstone, King, and Stevens, P.A.,* 525 F.3d 1107, 1114-15 (11th Cir. 2008) (affirming district court's grant of summary judgment to defendant law firm because it obtained the personal information for the permissible purpose of investigation in anticipation of litigation where "the automobile dealers he was litigating against were asserting that plaintiffs needed to plead and prove multiple acts of deceptive and unfair trade practices to state a deceptive and unfair trade practice claim under Florida law" and "the information was used to send one-thousand 'Custom and Practice' letters, which aimed at obtaining evidence showing a

custom and practice of deceptive acts engaged in by dealerships").[2]

The Plaintiffs allege that the Defendants used the personal information obtained to send solicitation letters to the Plaintiffs and others to obtain clients for participation in the *Herron* litigation. Further, the Plaintiffs allege that the Defendants did not have written consent to send the solicitation letters as required by 8 U.S.C. § 2721(b)(12), which allows disclosure of personal information "for bulk distribution for surveys, marketing or solicitations if the State has obtained the express consent of the person to whom such personal information pertains." (Compl. ¶ 17.) The Plaintiffs attached to the complaint a copy of one such letter which is labeled **"ADVERTISING MATERIAL"** and informed the recipient that they were likely charged an illegal administrative fee in connection with a recent car purchase and the Defendants "represent a group of consumers in a pending lawsuit arising from South Carolina car dealerships charging" an improper fee. (*Id.* Exs. G-K.) The Defendants offered a free consultation and notified the recipients of their right to obtain counsel of their choice.

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[2] The Defendants submit additional exhibits related to the proceedings in the *Thomas* case at the district court and appellate level including copies of the Appellant's initial brief and a marking [sic] letter sent to individuals. The court cannot take judicial notice of these documents. Further, the court notes that the district court decided *Thomas* on a motion for summary judgment, not a motion to dismiss as in the instant matter.

The allegations in the complaint sufficiently allege that the Defendants obtained personal information for an improper purpose. Further, the Defendants' argument that they were not soliciting clients because they had an attorney-client relationship with all of the individuals that were sent letters is a disputed factual issue. (Defs. Mem. Supp. Mot. Dismiss 29.) In fact, the Defendants concede that "Defendant Attorneys did not have an express attorney-client relationship with the unnamed Car Buyers." (*Id.* 30.) After consideration of the evidence that is properly before this court in deciding a Rule 12(b)(6) motion, the factual allegations in the complaint are sufficient to satisfy the low bar for pleading a claim for relief.

2. Permissible Use – State Action Exception

The Defendants allege that the personal information obtained from the SCDMV did not violate the DPPA because it allows the disclosure of protected information "[f]or use by any government agency, including any court or law enforcement agency, in carrying out its functions, or any private person or entity acting on behalf of a Federal, State, or local agency in carrying out its functions." § 2721(b)(1). The Defendants allege that they are acting "as private attorneys general in lieu of the Attorney General of the State of South Carolina" because they are litigating the case "for the benefit of the whole." (Defs. Mem. Supp. Mot. Dismiss 40.) The FOIA requests sent to the SCDMV

requesting the personal information indicate that the permissible use is the litigation exception in § 2721(b)(4), not the state action exception. The Defendants are not agents of the government. Notably, the Defendants have not alleged that they have provided any information to any government agency. Further, as set forth above, the Plaintiffs have plausibly pled a claim that the Defendants obtained the personal information in violation of the DPPA. Based on the foregoing, the Defendants' motion to dismiss on this ground is denied.

3. Plaintiffs Tanner and Weeks Have Failed to Plead That They Received a Letter From the Defendants

The Defendants contend that Plaintiffs Tanner and Weeks fail to identify which of the five letters they received. This argument is without merit. The complaint states that the Plaintiffs "received the Defendants' advertising and solicitation materials, which were sent in violation of the DPPA." (Compl. ¶¶ 4-6.) This is sufficient to survive a Rule 12(b)(6) motion to dismiss.

4. Knowing Violation of the DPPA

The Defendants maintain that the Plaintiffs have failed to allege that the Defendants "knowingly violated the DPPA." (Defs. Mem. Supp. Mot. Dismiss 51.)

This argument is without merit. 18 U.S.C. § 2724(a) provides that

> [a] person who *knowingly* obtains, discloses or uses personal information, from a motor vehicle record, for a purpose not permitted under this chapter shall be liable to the individual to whom the information pertains, who may bring a civil action in a United States district court.

(Emphasis added.)

> [T]o be eligible to recover under the DPPA, a plaintiff must prove that (1) the defendant knowingly obtained, disclosed, or used personal information from her motor vehicle records; and (2) the purpose of such obtaining, disclosure, or use was not permissible. The plaintiff need not show that the defendant knew that the obtaining, disclosure, or use was impermissible.

Pichler v. UNITE, 228 F.R.D. 230, 242 (E.D. Pa. 2005). On appeal, in *Pichler,* the Third Circuit considered whether liability under the DPPA requires that a defendant "*knowingly* obtain or disclose personal information for a use the defendant *knows* is impermissible." 542 F.3d at 396. The Third Circuit held that this argument was "patently without merit" because § 2724(a) creates civil liability for violating those acts or omissions, but does not premise civil liability on knowing violations. *Id.* at 396-97. The court further held that "Congress differentiated between a knowing acquisition, disclosure, or use to establish civil

liability, and any knowing violation to establish liability for a criminal fine." *Id.* at 397. The court agrees that § 2724(a) does not require that the Defendants knowingly violated the DPPA. Therefore, the Defendants' argument that the Plaintiffs' complaint must be dismissed for failure to plead that the Defendants knowingly violated the DPPA fails.

5. Actual Damages

The Defendants allege that the complaint must be dismissed because the Plaintiffs have failed to plead any actual damages. 18 U.S.C. § 2724(b) provides that "[t]he court may award – [for a DPPA violation] (1) actual damages, but not less than liquidated damages in the amount of $2,500." The Third Circuit interpreted § 2724(b) in *Pichler* and held that "'a plaintiff need not prove actual damages to recover liquidated damages'" under the DPPA. *Pichler,* 542 F.3d at 398 (quoting *Kehoe v. Fidelity Fed. Bank & Trust,* 421 F.3d 1209 (11th Cir. 2005)). The Defendants submit that these decisions are contrary to the plain statutory language. The court disagrees and finds that a plaintiff is not required to prove actual damages in order to recover liquidated damages under § 2724(b) of the DPPA. Therefore, this argument fails.

6. Constitutionality of the DPPA

The Defendants argue that "if the DPPA were interpreted to support the Plaintiffs' allegations, the

DPPA would be unconstitutional as applied to this situation. This case – and the underlying *Herron* litigation – involves South Carolina attorneys using South Carolina DMV information to investigate and prosecute cases in South Carolina state court." (Defs. Mem. Supp. Mot. Dismiss 58.) In sum, the Defendants allege that "the Commerce Clause does not allow for regulation of information in this exclusively state matter." (*Id.* 59.) In *Reno v. Condon,* 528 U.S. 141, 148 (2000), the United States Supreme Court held that the DPPA was a constitutional statutory scheme because the personal information "the DPPA regulates is a thin[g] in interstate commerce, and that the sale or release of that information in interstate commerce is therefore a proper subject of congressional regulation." (Internal quotation marks omitted.) The Court found that

> [t]he motor vehicle information which the States have historically sold is used by insurers, manufacturers, direct marketers, and others engaged in interstate commerce to contact drivers with customized solicitations. The information is also used in the stream of interstate commerce by various public and private entities for matters related to interstate motoring. Because drivers' information is, in this context, an article of commerce, its sale or release into the interstate stream of business is sufficient to support congressional regulation.

Id. The Supreme Court has held that the DPPA is a constitutional statute that does not violate the

Commerce Clause. The fact that under the evidence of this case, it may only concern South Carolina residents does not alter this conclusion. Based on the foregoing, this argument fails.

In sum, the Plaintiffs have adequately pled a claim for relief under the DPPA sufficient to survive a Rule 12(b)(6) motion to dismiss.[3]

Therefore, it is

ORDERED that the Defendants' motion to dismiss, docket number 36, is denied.

IT IS SO ORDERED.

s/Henry M. Herlong, Jr.
Senior United States
District Judge

Greenville, South Carolina
September 8, 2009

[3] The Defendants also argue that the "Plaintiffs' claims are indicative of an improper purpose to manipulate the judicial system to serve his car dealer clients in Herron – not the persons whom he purports to represent" in the instant action. (Defs. Mem. Supp. Mot. Dismiss 60.) This argument is not proper for consideration in a Rule 12(b)(6) motion. If the Defendants are attempting to allege that the Plaintiffs' counsel is operating under a conflict of interest, they should file a motion to disqualify counsel.

APPENDIX F

UNITED STATES CODE TITLE 18 – CRIMES AND CRIMINAL PROCEDURE, CHAPTER 123 – PROHIBITION ON RELEASE AND USE OF CERTAIN PERSONAL INFORMATION FROM STATE MOTOR VEHICLE RECORDS

Sec.

§ 2721. Prohibition on release and use of certain personal information from State motor vehicle records

(a) In General. – A State department of motor vehicles, and any officer, employee, or contractor thereof, shall not knowingly disclose or otherwise make available to any person or entity:

(1) personal information, as defined in 18 U.S.C. 2725(3), about any individual obtained by the department in connection with a motor vehicle record, except as provided in subsection (b) of this section; or

(2) highly restricted personal information, as defined in 18 U.S.C. 2725(4), about any individual obtained by the department in connection

with a motor vehicle record, without the express consent of the person to whom such information applies, except uses permitted in subsections (b)(1), (b)(4), (b)(6), and (b)(9): *Provided*, That subsection (a)(2) shall not in any way affect the use of organ donation information on an individual's driver's license or affect the administration of organ donation initiatives in the States.

(b) Permissible Uses. – Personal information referred to in subsection (a) shall be disclosed for use in connection with matters of motor vehicle or driver safety and theft, motor vehicle emissions, motor vehicle product alterations, recalls, or advisories, performance monitoring of motor vehicles and dealers by motor vehicle manufacturers, and removal of non-owner records from the original owner records of motor vehicle manufacturers to carry out the purposes of titles I and IV of the Anti Car Theft Act of 1992, the Automobile Information Disclosure Act (15 U.S.C. 1231 et seq.), the Clean Air Act (42 U.S.C. 7401 et seq.), and chapters 301, 305, and 321-331 of title 49, and, subject to subsection (a)(2), may be disclosed as follows:

(1) For use by any government agency, including any court or law enforcement agency, in carrying out its functions, or any private person or entity acting on behalf of a Federal, State, or local agency in carrying out its functions.

(2) For use in connection with matters of motor vehicle or driver safety and theft; motor vehicle emissions; motor vehicle product alterations, recalls, or advisories; performance

monitoring of motor vehicles, motor vehicle parts and dealers; motor vehicle market research activities, including survey research; and removal of non-owner records from the original owner records of motor vehicle manufacturers.

(3) For use in the normal course of business by a legitimate business or its agents, employees, or contractors, but only –

(A) to verify the accuracy of personal information submitted by the individual to the business or its agents, employees, or contractors; and

(B) if such information as so submitted is not correct or is no longer correct, to obtain the correct information, but only for the purposes of preventing fraud by, pursuing legal remedies against, or recovering on a debt or security interest against, the individual.

(4) For use in connection with any civil, criminal, administrative, or arbitral proceeding in any Federal, State, or local court or agency or before any self-regulatory body, including the service of process, investigation in anticipation of litigation, and the execution or enforcement of judgments and orders, or pursuant to an order of a Federal, State, or local court.

(5) For use in research activities, and for use in producing statistical reports, so long as the personal information is not published, redisclosed, or used to contact individuals.

(6) For use by any insurer or insurance support organization, or by a self-insured entity,

or its agents, employees, or contractors, in connection with claims investigation activities, antifraud activities, rating or underwriting.

(7) For use in providing notice to the owners of towed or impounded vehicles.

(8) For use by any licensed private investigative agency or licensed security service for any purpose permitted under this subsection.

(9) For use by an employer or its agent or insurer to obtain or verify information relating to a holder of a commercial driver's license that is required under chapter 313 of title 49.

(10) For use in connection with the operation of private toll transportation facilities.

(11) For any other use in response to requests for individual motor vehicle records if the State has obtained the express consent of the person to whom such personal information pertains.

(12) For bulk distribution for surveys, marketing or solicitations if the State has obtained the express consent of the person to whom such personal information pertains.

(13) For use by any requester, if the requester demonstrates it has obtained the written consent of the individual to whom the information pertains.

(14) For any other use specifically authorized under the law of the State that holds the record, if such use is related to the operation of a motor vehicle or public safety.

(c) Resale or Redisclosure. – An authorized recipient of personal information (except a recipient under subsection (b)(11) or (12)) may resell or redisclose the information only for a use permitted under subsection (b) (but not for uses under subsection (b)(11) or (12)). An authorized recipient under subsection (b)(11) may resell or redisclose personal information for any purpose. An authorized recipient under subsection (b)(12) may resell or redisclose personal information pursuant to subsection (b)(12). Any authorized recipient (except a recipient under subsection (b)(11)) that resells or rediscloses personal information covered by this chapter must keep for a period of 5 years records identifying each person or entity that receives information and the permitted purpose for which the information will be used and must make such records available to the motor vehicle department upon request.

(d) Waiver Procedures. – A State motor vehicle department may establish and carry out procedures under which the department or its agents, upon receiving a request for personal information that does not fall within one of the exceptions in subsection (b), may mail a copy of the request to the individual about whom the information was requested, informing such individual of the request, together with a statement to the effect that the information will not be released unless the individual waives such individual's right to privacy under this section.

(e) Prohibition on Conditions. – No State may condition or burden in any way the issuance of an individual's motor vehicle record as defined in 18

U.S.C. 2725(1) to obtain express consent. Nothing in this paragraph shall be construed to prohibit a State from charging an administrative fee for issuance of a motor vehicle record.

(Added Pub.L. 103-322, Title XXX, Sec. 300002(a), Sept. 13, 1994, 108 Stat. 2099; amended Pub.L. 104-287, Sec. 1, Oct. 11, 1996, 110 Stat. 3388; Pub.L. 104-294, Title VI, Sec. 604(b)(46), Oct. 11, 1996, 110 Stat. 3509; Pub.L. 106-69, Title III, Sec. 350(c), (d), Oct. 9, 1999, 113 Stat. 1025; Pub.L. 106-346, Sec. 101(a) [Title III, Sec. 309(c)-(e)], Oct. 23, 2000, 114 Stat. 1356, 1356A-24.)

§ 2722. Additional unlawful acts

(a) Procurement for Unlawful Purpose. – It shall be unlawful for any person knowingly to obtain or disclose personal information, from a motor vehicle record, for any use not permitted under section 2721(b) of this title.

(b) False Representation. – It shall be unlawful for any person to make false representation to obtain any personal information from an individual's motor vehicle record.

(Added Pub.L. 103-322, Title XXX, Sec. 300002(a), Sept. 13, 1994, 108 Stat. 2101.)

§ 2723. Penalties

(a) Criminal Fine. – A person who knowingly violates this chapter shall be fined under this title.

(b) Violations by State Department of Motor Vehicles. – Any State department of motor vehicles that has a policy or practice of substantial noncompliance with this chapter shall be subject to a civil penalty imposed by the Attorney General of not more than $5,000 a day for each day of substantial noncompliance.

(Added Pub.L. 103-322, Title XXX, Sec. 300002(a), Sept. 13, 1994, 108 Stat. 2101.)

§ 2724. Civil action

(a) Cause of Action. – A person who knowingly obtains, discloses or uses personal information, from a motor vehicle record, for a purpose not permitted under this chapter shall be liable to the individual to whom the information pertains, who may bring a civil action in a United States district court.

(b) Remedies. – The court may award –

(1) actual damages, but not less than liquidated damages in the amount of $2,500;

(2) punitive damages upon proof of willful or reckless disregard of the law;

(3) reasonable attorneys' fees and other litigation costs reasonably incurred; and

(4) such other preliminary and equitable relief as the court determines to be appropriate.

(Added Pub.L. 103-322, Title XXX, Sec. 300002(a), Sept. 13, 1994, 108 Stat. 2101.)

§ 2725. Definitions

In this chapter –

(1) "motor vehicle record" means any record that pertains to a motor vehicle operator's permit, motor vehicle title, motor vehicle registration, or identification card issued by a department of motor vehicles;

(2) "person" means an individual, organization or entity, but does not include a State or agency thereof;

(3) "personal information" means information that identifies an individual, including an individual's photograph, social security number, driver identification number, name, address (but not the 5-digit zip code), telephone number, and medical or disability information, but does not include information on vehicular accidents, driving violations, and driver's status.[1]

(4) "highly restricted personal information" means an individual's photograph or image, social security number, medical or disability information; and

(5) "express consent" means consent in writing, including consent conveyed electronically that bears an electronic signature as defined in section 106(5) of Public Law 106-229.

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[1] So in original. The period probably should be replaced with a semicolon.

(Added Pub.L. 103-322, Title XXX, Sec. 300002(a), Sept. 13, 1994, 108 Stat. 2102; amended Pub.L. 106-346, Sec. 101(a) [Title III, Sec. 309(b)], Oct. 23, 2000, 114 Stat. 1356, 1356A-24.)