IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
MARSHALL DIVISION

SHARON TAYLOR, ET AL. *v.* ACXIOM CORPORATION, ET AL.	CIVIL ACTION NO. 2:07cv001 JUDGE DONALD E. WALTER
SHARON TAYLOR, ET AL. *v.* ACS STATE & LOCAL SOLUTIONS, INC., ET AL.	CIVIL ACTION NO. 2:07cv0013 JUDGE DONALD E. WALTER
SHARON TAYLOR, ET AL. *v.* TEXAS FARM BUREAU MUTUAL INSURANCE COMPANY, ET AL.	CIVIL ACTION NO. 2:07cv0014 JUDGE DONALD E. WALTER
SHARON TAYLOR, ET AL. *v.* SAFEWAY, INC., ET AL.	CIVIL ACTION NO. 2:07cv0017 JUDGE DONALD E. WALTER
SHARON TAYLOR, ET AL. *v.* BIOMETRIC ACCESS COMPANY, ET AL.	CIVIL ACTION NO. 2:07cv0018 JUDGE DONALD E. WALTER
SHARON TAYLOR, ET AL. *v.* FREEMAN PUBLISHING COMPANY, ET AL.	CIVIL ACTION NO. 2:07cv0410 JUDGE DONALD E. WALTER

CONSOLIDATED REPLY TO PLAINTIFFS' RESPONSE TO DEFENDANTS' MOTION TO DISMISS ON COMMON ISSUES AND RESPONSE TO PLAINTIFFS' STATEMENT OF VIOLATIONS FILED ON BEHALF OF AMERICAN DRIVING RECORDS D/B/A FIRST ADVANTAGE ADR A/K/A AGENCY RECORDS INC., SOUTHWESTERN BELL TELEPHONE, L.P. D/B/A SOUTHWESTERN BELL TELEPHONE COMPANY, A TEXAS LIMITED PARTNERSHIP, SAFEWAY INC., ACADEMY, LTD., BACKGROUND INFORMATION SYSTEMS, INC., HEB GROCERY COMPANY, LP, REALPAGE, INC., FEDCHEX, LLC., LML PAYMENT SYSTEMS, CORP., D.B. STRINGFELLOW, URAPI, THE HEARST CORPORATION D/B/A HOUSTON CHRONICLE, TEXAS MOTOR TRANSPORTATION ASSOCIATION, EMAGINENET TECHNOLOGIES, INC., TEXAS FARM BUREAU MUTUAL INSURANCE COMPANY, HOUSEHOLD DRIVERS REPORT, INC. D/B/A HDR, INC., SPARTAN INSURANCE COMPANY, ACS STATE & LOCAL SOLUTIONS, INC., INSURANCE TECHNOLOGIES CORPORATION, AMERICAN STUDENT LIST, LLC, GILA CORPORATION D/B/A MUNICIPAL SERVICES BUREAU, HAWKEYE INSURANCE SERVICES, RELIANT ENERGY, INC., SOURCE DATA, INC., DRIVER TRAINING ASSOCIATES, INC. D/B/A TICKETSCHOOL.COM, JON LATORELLA, D/B/A LOCATEPLUS HOLDINGS CORPORATION, AMERICAN ELECTRIC POWER SERVICE CORPORATION, TENANT TRACKER, INC., JI SPECIALTY SERVICES, INC., LEE FARISH COMPUTER SERVICES, INC., NATIONAL STATISTICAL SERVICES CORPORATION, AMERICAN MUNICIPAL SERVICES, LTD., GLOBE LIFE AND ACCIDENT INSURANCE COMPANY, ADP SCREENING AND SELECTION SERVICES, INC., TALBOT GROUP, INC., PARADISE DEVELOPMENT, INC. D/B/A DRIVESAFE DEFENSIVE DRIVING, SAFETY-USA INSTITUTE, LLC, ARISTOTLE INTERNATIONAL, INC., DEFENSIVE DRIVER ONLINE, LTD., GLOBAL 360 BGS, INC., ABC DATA, Inc. d/b/a UNICARD SYSTEMS, INC., BIOMETRIC ACCESS COMPANY, CONTINUEDED.COM LLC, D/B/A IDRIVESAFELY.COM, ZEBEC DATA SYSTEMS, INC., INFONATION, INC., ALLIED RESIDENT/EMPLOYEE SCREENING SERVICE, INC., UNITED TEACHER ASSOCIATES INSURANCE COMPANY, FEDERATED RETAIL HOLDINGS, INC. F/K/A THE MAY DEPARTMENT STORES COMPANY D/B/A FOLEY'S, CROSS-SELL, INC., PROPERTYINFO CORPORATION, MARSHALL SYSTEMS TECHNOLOGY, INC., U.S. INTERACTIVE, INC., DALLAS COMPUTER INFORMATION SYSTEMS, REALTY COMPUTER SOLUTIONS, INC. d/b/a REAL-COMP, ACXIOM RISK MITIGATION, INC., ACXIOM CORPORATION, TELECHECK SERVICES, INC., ISO CLAIMS SERVICE, INC. D/B/A INSURANCE INFORMATION EXCHANGE, AND CARFAX, INC.

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DEFENDANTS' CONSOLIDATED REPLY TO PLAINTIFFS' RESPONSE TO MOTION TO DISMISS ON COMMON ISSUES AND RESPONSE TO PLAINTIFFS' STATEMENT OF VIOLATIONS

These Defendants[1] file this Consolidated Reply to Plaintiffs' Response (Dkt. No. 83) to Defendants' Motion to Dismiss on Common Issues under Federal Rules of Civil Procedure 12(b)(6) and 12(b)(1) and Response to Plaintiffs' Statement of Violations (Dkt. No. 62).

I. INTRODUCTION

The Drivers Privacy Protection Act ("DPPA") was enacted to prevent people from misusing data in motor-vehicle databases, particularly misuse of data for stalking or other criminal activity. Plaintiffs do not plead that any Defendant used their data to stalk them or for any other criminal activity. Indeed, they do not plead any misuse of their data or any resulting harm whatsoever. Instead, Plaintiffs base their $2 trillion claim on the assertions that (a) even though certain Defendants (the "Non-Reseller Defendants") obtained data for use for a purpose permitted under the DPPA, they violated the DPPA by not immediately using all of the data,[2] and (b) other Defendants (the "Reseller Defendants") violated the DPPA by obtaining their data in order to resell to third parties for use for a purpose permitted under the DPPA.[3]

The DPPA's plain language defeats Plaintiffs' position. The statute does not contain the words or requirements upon which Plaintiffs base their claims. Plaintiffs describe the DPPA as

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[1] For purposes of this Reply, "these Defendants" shall refer to the Defendants listed on the cover page.

[2] (*See* Plaintiffs' Statement of Violations of the Drivers' Privacy Protection Act ("the Statement") at 2 ("Based on the lack of any relationship, business or otherwise, between the above-referenced Plaintiffs and this Defendant, the above-referenced Plaintiffs assert that this Defendant had no permissible purpose for obtaining their personal information. . . . *Any purpose this Defendant had for obtaining the above-referenced Plaintiffs' 'personal information' other than an immediately contemplated use of the information for one of the DPPA's authorized uses constitutes a violation of the DPPA*." (emphasis supplied)); *see also* Plaintiffs' Response to Defendants' Consolidated Motion to Dismiss ("Plaintiffs' Response") at 2, 3, and 10 ("Defendants appear to assert a proper purpose for obtaining *some* individuals' 'motor vehicle records'"; the DPPA "does not allow entities to purchase information for which they do not have a corresponding use;" non-resellers "obtained more individual 'motor vehicle records' than they needed for their asserted purpose.").

[3] (*See* Plaintiffs' Statement at 11 ("Resale of data is not a proper purpose for obtaining plaintiffs' personal information and obtainment of this data merely to resell violates the express terms of the DPPA"); *see also* Pls.' Resp. at 1 ("[I]ntended resale is not a proper purpose under the DPPA to obtain 'motor vehicle records.'").)

they would like it to be. Defendants' motions to dismiss are based on the DPPA as it actually is written.

Defendants' Consolidated Motion to Dismiss and Plaintiffs' Response therefore present three issues for this Court to determine:

1. Did the Non-Reseller Defendants violate the DPPA by allegedly obtaining the DPS database from the State of Texas for permissible purposes without immediately using every record received?
2. Did the Reseller Defendants violate the DPPA by allegedly obtaining the DPS database solely to resell data to third parties who used it for permissible purposes?
3. Do Plaintiffs have standing to bring their DPPA claims when they do not plead that they were actually injured in some way by Defendants' alleged DPPA violations?

The DPPA's plain language, as well as the relevant case law (including a new Eleventh Circuit opinion, the *Russell* opinions from this circuit, and a Department of Justice opinion letter) all indicate that the answer to these three questions is a resounding "No."[4]

II. ARGUMENT

1. Plaintiffs fail to state a claim under the DPPA.

A. Plaintiffs fail to state a claim under the DPPA against the Non-Resellers.

(i) The DPPA's plain language shows that Plaintiffs fail to state a claim.

The DPPA expressly permits entities to obtain data for use for enumerated permissible purposes. *See* 18 U.S.C. § 2721(b); *see also* Defs.' Consol. Mot. to Dismiss at 8-10 (listing permissible uses). Plaintiffs argue that Defendants' obtainment of the data in bulk for use for enumerated permissible purposes is impermissible because Defendants did not use the data immediately. Nothing in the DPPA's plain language requires immediate use, and nothing in its

[4] To deflect attention from their defective complaint, Plaintiffs reference the settlement of claims under the DPPA in Florida. But, Plaintiffs' counsel in this case filed briefing in the Florida case that said "[t]he Texas Litigation involves significantly different claims than the Florida litigation." *See* Sharon Taylor's Motion for Limited Intervention at 3, attached as Ex. A.

legislative history suggests that Congress intended to include such a requirement. *See United States v. Yermia*, 468 U.S. 63, 63-64 (1984) (refusing to read requirement into the statute where statute's plain language and legislative history did not include that requirement); *United States v. Aucoin*, 964 F.2d 1492, 1496 (5th Cir. 1992) (refusing to add requirement to statute where legislative history did not support party's request to do so); *United States v. Harvard*, 103 F.3d 412, 419 (5th Cir. 1997) (rejecting party's request to add language to statute because "[h]ad Congress intended to [add a materiality requirement to the statute] it could easily have done so"). This Court, therefore, should not rewrite the DPPA to include an immediate-use requirement.

Nor should the Court interpret the DPPA in a manner that would produce absurd results. *Atchison v. Collins,* 288 F.3d 177, 181 & n.13 (5th Cir. 2002) ("[T]he common mandate of statutory construction [is] to avoid absurd results."). As shown by the towing example in the Consolidated Motion, absurd results would flow from Plaintiffs' position that the DPPA allows the State to disclose personal information only on a person-by-person basis as immediately needed. (*See* Defs.' Consol. Mot. at 12.) These results would be contrary to Congressional intent as evidenced by the "permissible uses" that permit ongoing business concerns – like these Defendants – to obtain personal information for future permissible uses. Allowing Plaintiffs to recover two trillion dollars simply because Defendants did not immediately use every piece of information that they obtained for permissible purposes, likewise would be absurd.

(ii) The DPPA and case law require Plaintiffs to plead (and eventually prove) an impermissible purpose for obtaining data.

Plaintiffs assert that Defendants' Consolidated Motion to Dismiss stated that Plaintiffs must allege an impermissible use to prevail on an improper-obtainment claim. Plaintiffs tip their hand that they are concerned about the strict standard of the *Russell* opinions and show that they misunderstand Defendants' Consolidated Motion to Dismiss and the DPPA. These Defendants

reiterate that, although the DPPA allows causes of action for obtainment, disclosure, and use, the DPPA requires that the plaintiff show that the obtainment, disclosure, or use was ***for a purpose not permitted under the statute***. (*See* Defs.' Consol. Mot. at 10-15.) Under the plain language of the DPPA's requirements, Plaintiffs do not plead a proper cause of action.

In its April 24, 2008 opinion, the Eleventh Circuit became the first circuit court to address the issue of claims for improper obtainment. *Thomas v. George, Hartz, Lundeen, Folmer, Johnstone, King, and Stevens, P.A.*, -- F.3d. ---, 2008 WL 1821238 (11th Cir. Apr. 24, 2008). The Court concluded that a DPPA plaintiff must plead (and eventually prove) that a defendant obtained data for a purpose not permitted under the DPPA.

In *Thomas*, the plaintiff made DPPA claims based on the defendants' purchase of information in bulk and subsequent litigation mailings — a permissible purpose — to some of those individuals, possibly including the named plaintiff. *Id.* at *1. Upholding the take-nothing summary judgment, the Eleventh Circuit examined the DPPA's language. The Court explained that "[i]n a straightforward fashion, section 2724(a) [of the DPPA] sets forth three elements giving rise to liability, *i.e.*, that a defendant (1) knowingly obtained, disclosed or used personal information, (2) from a motor vehicle record, (3) ***for a purpose not permitted***." *Id.* at *3 (emphasis supplied). Further, the court stated that "[t]he plain meaning of the third factor is that it is only satisfied if shown that obtainment, disclosure, or use was ***not for a purpose enumerated under § 2721(b)***." *Id.* (emphasis supplied). Because Plaintiffs did not plead facts sufficient to allege the three essential elements found in the DPPA, they fail to state a claim.

The Eleventh Circuit also rejected the plaintiff's argument that the defendant bears the burden to prove a permissible purpose. *Id.* at *4. The court explained that the DPPA "is silent on which party carries the burden of proof and, as such, the burden is properly upon the

plaintiff," in part because the elements of liability include "whether the subject act was '*for a purpose not permitted.*'" *Id.*

The *Russell* decisions also support the plain-language reading urged by these Defendants. Plaintiffs argue to the contrary, stating that "[t]he only *serious allegation* involved in *Russell* [*II*] was the claim that the defendants had obtained drivers license records for the *impermissible purpose of resale.*" (Pls.' Resp. at 7 (citing *Russell II*, 302 F. Supp. 2d at 657.) (emphasis supplied). Despite Plaintiffs' claim that the "only serious allegation" in the *Russell* cases was resale, the plaintiffs in both *Russell I* and *Russell II* brought claims for improper obtainment, which were dismissed. *See Russell v. ChoicePoint Servs., Inc.*, 300 F. Supp. 2d 450, 455 (E.D. La. 2004) ("*Russell I*") (dismissing improper obtainment claim because plaintiff did not allege impermissible use); *Russell v. Choicepoint Servs., Inc.*, 302 F. Supp. 2d 654, 664 (E.D. La. 2004) ("*Russell II*") (dismissing improper obtainment claim).

Without a persuasive argument against *Russell I* and *II*, Plaintiffs fall back on *Parus v. Cator*, a factually distinguishable case in which the plaintiff alleged that the defendant obtained plaintiff's data to determine whether the plaintiff was a "local guy," an arguably impermissible purpose. *Parus v. Cator*, No. 05-C-0063-C, 2005 WL 2240955, at *5 (W.D. Wis. Sept. 14, 2005) (denying summary judgment for defendant where fact issue existed as to whether confirming that plaintiff was a "local guy" was a law enforcement purpose). *Parus* clearly is distinguishable from the case at hand because Plaintiffs here did not allege any impermissible purpose for which Defendants obtained the data. *Parus*, however, does confirm that the DPPA

states that "[s]ection 2724(a) makes a person liable when he knowingly obtains personal information from a motor vehicle record for *a purpose not permitted under the Act*." *Id.* at *4.[5]

Finally, Plaintiffs concede, as they must, that the Non-Reseller Defendants "appear to assert a proper purpose for obtaining *some* individuals' 'motor vehicle records.'" (Pls.' Resp. at 2.) Plaintiffs claim that, despite this concession, the DPPA's use of the singular form of nouns and verbs supports liability. (Pls.' Resp. at 3-6.) This contention is defeated by the very first section of the first chapter of the United States Code. Chapter 1 sets forth rules of statutory construction, the first of which is that, unless the context indicates otherwise, the singular includes the plural and vice versa. 1 U.S.C. § 1. And even under Plaintiffs' faulty construction, Plaintiffs do not allege that any Defendant obtained or used any individual motor vehicle record for an impermissible purpose. Nor do Plaintiffs ever plead that any Defendant ever used an individual record of any of the named Plaintiffs for a purpose other than one enumerated in the DPPA. Even under Plaintiffs' proposed interpretation, they fail to state a claim.

(iii) Authority interpreting the DPPA confirms that there is no immediate-use element.

Plaintiffs again assert that the DPPA requires that an entity immediately use the data it obtains. (*See* Pls.' Resp. at 11.)[6] But the DPPA contains no such requirement. Without an immediate-use requirement, Plaintiffs' claims fail as a matter of law.

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[5] *Parus* also confirms that a Plaintiff must allege an impermissible purpose for which Defendants obtained the data. In all of the cases that Plaintiffs cite, the plaintiffs allege a specific impermissible purpose for which the defendant obtained the data. *Id.* at *4 (alleging that defendant obtained data to determine if plaintiff was a "local guy"); *Pichler v. Unite*, 339 F. Supp. 2d 665, 667-668 (E.D. Pa. 2004) (alleging that union obtained information to contact employees at home to encourage union membership). Plaintiffs cannot meet their pleading burden by speculating that Defendants could not have had a permissible purpose for obtaining their records.

[6] Plaintiffs cite *Pichler v. Unite* to try to support this argument. *Pichler*, however, never says that the DPPA requires that an entity use data immediately. *Id.* Although the court held that a fact issue existed, it also noted that the "the Unions may be able to prove that the litigation exception permitted them to access the plaintiffs' personal information." *Id.* at 668. Among other reasons why the *Pichler* decision is not authoritative, it incorrectly places the burden of proof on the defendant. *Cf. Thomas*, 2008 WL 1821238, at *5-6 (placing burden of proof for impermissible purpose on plaintiff).

In making their "immediate-use" argument, Plaintiffs attempt to minimize the rationale for permitting bulk obtainment by arguing it is solely to save "time and/or money." Putting aside for a moment that the underlying rationale is irrelevant where, as here, the statute's language clearly does not prohibit bulk obtainment,[7] Plaintiffs' argument simply is not true. Rather, as the National Center for Missing and Exploited Children ("the Center") stated in its Motion for Leave to File Amicus Curie Brief in litigation in Florida, if entities are not allowed to obtain data in bulk, the Center "could be precluded from obtaining products and services from certain defendants that [it] utilizes in [its] efforts to recover missing children, apprehend their abductors, and otherwise to prevent exploitation of children in the State of Florida and elsewhere." (Mot. for Leave at 2, attached as Ex. B.) Additionally, bulk obtainment allows commerce to run smoothly and provides a convenience to many *members of the putative class*. For example, putative class members are able to use checks at retail points of sale because retailers immediately can verify their identities without a cumbersome and lengthy delay.

"Convenience" is not the use to which Defendants put the data, as Plaintiffs mistakenly argue. Rather, Defendants' actual uses are for the enumerated permissible purposes. Any convenience inures as much to the benefit of the putative-class-member consumers as to the Defendants. Further, "convenience" is not the reason why Defendants obtained data. True,

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[7] A court's interpretation of a statute must begin with the plain meaning of the statutory words. *See Custom Rail Employer Welfare Trust Fund v. Geeslin*, 491 F.3d 233, 236 (5th Cir. 2007) (holding that "in all cases involving statutory construction, our starting point must be the language employed by Congress, ... and we assume that the legislative purpose is expressed by the ordinary meaning of the words used"). Where the Congressional language is clear and unambiguous, the Court's inquiry ends. *See United States v. Meeks*, 69 F.3d 742, 744 (5th Cir. 1995) ("[W]hen the language of a statute is clear and unambiguous, judicial inquiry into its meaning is unnecessary."); *Carpenters Dist. Council v. Dillard Dep't Stores*, 15 F.3d 1275, 1282-83 (5th Cir. 1994) ("If the [statutory] language is clear and unambiguous, then the court may end its inquiry."). The Court is required to give Congress' chosen words their plain meaning. *See United States v. Valencia*, 394 F.3d 352, 355 (5th Cir. 2004) ("In construing the United States Code our task must begin with the words provided by Congress and the plain meaning of those words. . . . In so doing, we give effect to the intent of Congress . . . .") (internal citations omitted).

purchasing records in bulk may be easier than purchasing multiple records individually, but the convenience of purchasing records in bulk does not explain why a purchaser wanted the information in the first place. Again, the DPPA's language requires Plaintiffs to allege the alleged impermissible purpose for which Defendants obtained the data. By merely identifying the method by which Defendants obtained the data, Plaintiffs fail to allege an impermissible purpose.

(iv) Congress intended to allow entities to purchase data for permissible business purposes.

Finally, Plaintiffs' position that Congress intended for the DPPA to prevent use of data for permissible business purposes is belied by the lengthy laundry list of permissible uses, many of which concern activities that occur in regularly conducted business. (*See* Defs.' Consol. Mot. at 17-19.) Indeed, the primary goal of Congress in regulating disclosure of information from motor vehicle records was to allay "mounting public safety concerns over stalkers' and other criminals' access to the personal information maintained in state DMV records." *See Russell I*, 300 F. Supp. 2d at 452; (*see also* Pls.' Compl. in 2:07-cv-00013 at 15). In crafting the DPPA, "[c]areful consideration was given to the common uses now made of this information and great efforts were made to ensure that those uses were allowed under this bill." *See* Transcript of House Subcommittee Hearing on H.R. 3365 held February 3, 1994; *see also* 140 Cong. Rec. H2518-01, H2526 (1994) (statement of Rep. Goss (Congress intended the statute to prohibit the release of personal information to a "narrow group of people that *lack legitimate business* [purposes]" (emphasis supplied)). Nothing in the Congressional record suggests that Congress was concerned about or sought to prevent the sort of legitimate business activities about which Plaintiffs complain.

(v) The DPPA does not prohibit bulk sale.

Plaintiffs cite section 2721(b)(12) to support their position that the State generally may not disclose personal information in bulk. Plaintiffs are wrong. Section 2721(b)(12) allows the State to disclose personal information "[f]or bulk distribution for surveys, marketing or solicitations . . . ." By the statute's plain language, the term "bulk" does not describe the manner in which the State is disclosing the personal information, but rather the ultimate purpose for which the information is being obtained (*i.e.*, distribution for surveys, marketing or solicitations). Thus, section 2721(b)(12) does not speak to whether the State is entitled to disclose more than one individual's personal information at a time.

Finally, Plaintiffs make a very serious and baseless allegation against the State of Texas. (Pls.' Resp. at 13 ("Just because the State of Texas is apparently willing to look the other way as long as it is indemnified should not carry much weight in interpreting the DPPA. Of course the State of Texas wants to keep selling this information in bulk.").) But Plaintiffs put forth no evidence that the State of Texas is willfully violating Federal law. This careless allegation is the best Plaintiffs can do to limit the powerful fact that the State of Texas allows the very conduct these Plaintiffs claim violates Federal and State law.

B. Plaintiffs fail to state a claim under the DPPA against the Resellers.

(i) The DPPA expressly permits resale of data.

Plaintiffs ignore that the clear and unambiguous language of the DPPA permits the resale of the information:

> **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).**

18 U.S.C. § 2721(c).

It is clear from the statute's plain language that Congress intended to allow entities to obtain data solely to resell it. The language of 18 U.S.C. § 2721(c) permits resale and redisclosure by "authorized recipients." *Id.* Because Congress chose to use "authorized recipients," rather than "authorized users," it is clear that Congress intended to allow entities to obtain drivers' personal information from DMVs strictly to redistribute it to persons with permissible uses.[8] *See Russell II*, 302 F. Supp. 2d at 665 ("Congress could have limited resale and redisclosure to 'permissible users' . . . but instead Congress employed the term 'authorized recipient' in § 2721(c). This deliberate word choice reveals congressional intent to allow states and their DMVs to authorize persons and entities to receive drivers' information for resale."). Plaintiffs are unable to dispute this unambiguous construction of the DPPA.

(ii) The *Russell* Court addressed this issue and ruled against the Plaintiffs' position.

Plaintiffs' only chance to prevail on their claim against the resellers is to convince this Court that its sister court, which thoroughly analyzed the DPPA and the DPPA's legislative history, incorrectly held that the DPPA allows obtainment of data for the sole purpose of reselling it for a permissible purpose. (*See* Pls.' Resp. at 14 ("The *Russell* court incorrectly interpreted the DPPA as to resellers.").) In the *Russell* cases, the court held that under the plain language of the DPPA, a company could obtain data "strictly to redistribute it to persons with permissible uses." *Russell I*, 300 F. Supp. 2d at 456; *Russell II*, 302 F. Supp. 2d at 664 (same); *see also* Defs.' Consol. Mot. at 16-17.

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[8] "In the normal case Congress is assumed to be conscious of what it has done, especially when it chooses between two available terms that might have been included in the provision in question." *Am. Pet. Inst. v. United States EPA*, 198 F.3d 275, 279 (D.C. Cir. 2000).

Furthermore, the *Russell* Court expressly considered and rejected the flawed reasoning of the Iowa court's *Locate.Plus* opinion. *See Russell I*, 300 F. Supp. 2d at 459 ("Plaintiffs' reliance on [*Locate.Plus.Com*] is misplaced. . . . That decision is both factually and procedurally distinguishable from the case at hand.[9] **Furthermore, *Locate.Plus.Com* neglects to provide a meaningful analysis of the DPPA's statutory language and corresponding congressional intent, especially as they relate to the common definitions of key DPPA terms and to other federal privacy acts.**") (emphasis supplied); *Russell II*, 302 F. Supp. 2d at 667 (same).

Rather than citing a case on point, Plaintiffs admittedly reach for dicta from the Supreme Court in a case where the Court dealt only with the DPPA's constitutionality, which is not at issue here. (Pls.' Resp. at 16-17.) It is clear that Justice Rehnquist was not attempting to consider or decide the issue before this Court, but instead was making a broad statement about the DPPA.

Finally, Plaintiffs choose to ignore authority contrary to their position regarding resale of the data. (*See* Pls.' Resp. at 19 (stating that the United States Department of Justice letter "should be given little, if any, weight.").) The best Plaintiffs can do is acknowledge that the Department of Justice, the federal agency charged with enforcing the DPPA, issued an opinion squarely against them, and then — like the *Russell* opinions — urge this Court to ignore that compelling authority. (*See* Defs.' Consol. Mot. at 19 (discussing content of Department of Justice opinion).)

(iii) The State of Texas authorizes resale of data.

Plaintiffs assert that "[t]he State of Texas has no process to 'authorize' entities to obtain drivers license data solely for resale." (Pls.' Resp. at 22.) The State of Texas does include in its

[9] (*See* Defs.' Consol. Mot. at 16-17 for further discussion of the factual and procedural distinctions between the cases.)

contract the following language: 'It is expressly understood that the Purchaser may sell or furnish personal information obtained under this agreement to third parties, subject to the limitations herein, but may not sell or furnish personal information for any purpose or use that is not permitted by federal or state law." (*See* Pls.' Resp. Ex. 2 at 3.) The State also requires any entity that purchases data in bulk to comply with "all current provisions of the federal Driver Privacy Protection Act of 1994, as amended by PL 106-69 (18 U.S.C. § 2721 et seq.)." Furthermore, the Texas Administrative Code includes a provision regulating the redisclosure of data to third parties. *See* 37 TEX. ADMIN. CODE § 15.143.

2. Plaintiffs lack standing to bring a claim under the DPPA.

A. Plaintiffs do not plead any actual harm from the alleged obtainment or resale.

Plaintiffs attempt to prosecute an alleged violation of the DPPA that did not actually injure them. By arguing that they need not prove actual injury to have standing, Plaintiffs implicitly concede they do not plead such an injury. In failing to do so, Plaintiffs ignore caselaw, including *Russell I* and *II*, requiring Plaintiffs to plead facts detailing an actual injury caused by these Defendants' alleged DPPA violations. Instead, they assert, contrary to the caselaw, that a statutory violation is sufficient to confer standing.

It is well settled, however, that to satisfy standing, a plaintiff must allege facts showing an injury. *See Lewis v. Knutson*, 699 F.2d 230, 237 (5th Cir. 1983) (dismissing plaintiff's claims and holding that the constitutional limitations of Article III arise when plaintiff fails to allege a personal injury); *see also Russell II*, 302 F. Supp. 2d at 670 (holding that plaintiffs failed to satisfy their standing burden to show 'injury in fact'); *Howard v. Hooters*, Cause No. 4:07-CV-03399, slip op. at 1 (S.D. Tex. Apr. 5, 2008) (dismissing case where plaintiff alleged violation of privacy act without allegation of injury or claim that anyone used their data); *Bell v. Acxiom*

Corp., No. 4:06CV00485-WVW, 2006 WL 2850042, at *2 (E.D. Ark. Oct. 3, 2006) (dismissing case where plaintiff's data was disclosed in security breach, but plaintiff did not allege injury, *e.g.*, receipt of unsolicited mailings or identity theft); Defs.' Consol. Mot. at 19-22 (discussing relevant caselaw).

B. *Kehoe* does not permit a DPPA plaintiff to prevail without showing injury.

Plaintiffs quote *Kehoe*, which simply states that "plaintiff need not establish actual monetary damages to be entitled to liquidated damages under the DPPA." (*See* Pls.' Resp. at 25 (quoting *Kehoe v. Fidelity Fed. Bank & Trust*, 421 F.3d 1209 (11th Cir. 2005)).) *Kehoe* addresses pleading and proving a specific amount of damages and a computation method. But, even under *Kehoe*, Plaintiffs must plead and prove actual injury as required under the Constitution and the caselaw.[10] *See Lewis*, 699 F.2d at 236-7; *see also Russell II*, 302 F. Supp. 2d at 670; *Howard*, Cause No. 4:07-CV-03399, slip op. at *1; *Bell*, 2006 WL 2850042, at *1-2.

III. CONCLUSION

Plaintiffs fail to state a claim against the Non-resellers or the Resellers. Further, Plaintiffs do not plead facts showing any injury and, therefore, lack standing. For the foregoing reasons, these Defendants respectfully request that this Court enter an order dismissing this action.

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[10] In *Kehoe*, unlike this case, the plaintiffs made allegations that they were harmed because the defendants sent plaintiffs unwanted solicitations. 421 F.3d at 1211.

Respectfully submitted,

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